

COUR INTERNATIONALE DE JUSTICE
RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE
DU DIFFÉREND FRONTALIER
(BÉNIN/NIGER)

ARRÊT DU 12 JUILLET 2005

2005

INTERNATIONAL COURT OF JUSTICE
REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING
THE FRONTIER DISPUTE
(BENIN/NIGER)

JUDGMENT OF 12 JULY 2005

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12 JUILLET 2005

ARRÊT

DIFFÉREND FRONTALIER
(BÉNIN/NIGER)

FRONTIER DISPUTE
(BENIN/NIGER)

12 JULY 2005

JUDGMENT

INTERNATIONAL COURT OF JUSTICE

YEAR 2005

12 July 2005

2005
12 July
General List
No. 125CASE CONCERNING
THE FRONTIER DISPUTE

(BENIN/NIGER)

*Geographical context — Historical background.**Applicable law — Principle of uti possidetis juris — Course of the boundary to be determined by reference to the physical situation to which French colonial law was applied, as that situation existed at the dates of independence — Consequences of that course on the ground to be assessed in relation to present-day physical realities — Relevance of documents and maps posterior to dates of independence for purposes of applying the uti possidetis juris principle — Legal value of post-colonial effectivities.**Place of colonial law (French droit d'outre-mer) — Powers of colonial authorities to create and abolish colonies and territorial subdivisions.**Evolution of legal status of territories concerned.**Principal documents relevant to the settlement of the dispute.**Cartographic materials — Value of maps as evidence.*

* *

*Course of boundary in River Niger sector and the question of to which Party the islands in the river belong.**Examination of regulative and administrative acts invoked by the Parties.**Arrêté of 23 July 1900 of the Governor-General of French West Africa (AOF) and decree of 20 December 1900 of the President of the French Republic did not fix the boundaries of the third military territory — Arrêté of 1900 did not locate the intercolonial boundary on the left bank of the River Niger — Letter of 27 August 1954 from Mr. Raynier, Governor ad interim of Niger — Context of that letter — Letter cannot be seen as authoritative confirmation of a previously established boundary — Benin's contention that the said letter, in conjunction with the decree of 23 July 1900, constitutes a legal title substantiating its claims cannot be upheld.*

Arrêtés of 8 December 1934 and 27 October 1938 of the Governor-General of the AOF — Did not locate the intercolonial boundary in the river — Niger's contention that said arrêtés constitute a legal title substantiating its claims cannot be upheld.

No evidence of existence of a title determining the boundary in the colonial period — Legal relationship between title and effectivités.

*Consideration of effectivités relied on by the Parties — Effectivités prior to 1954 — Letter from administrateur adjoint Sadoux of 3 July 1914 and *modus vivendi* — Terms of *modus vivendi* generally respected until 1954 — Island of Lété administered by Niger — Islands opposite Gaya administered by Dahomey — Situation less clear between 1954 and critical date — Administration of island of Lété not transferred to or taken over by Dahomey during this period.*

Boundary between the Parties follows the main navigable channel of the River Niger as it existed at the dates of independence and passes to the left of the three islands opposite Gaya — Attribution of islands in the river according to this boundary.

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Precise location of boundary line in the main navigable channel — Line of deepest soundings as it existed at the dates of independence.

Hydrographic and topographic surveys of the river over the course of time — Riverbed relatively stable — NEDECO report of 1970 the most useful source of information on the situation at the critical date — Boundary between the Parties follows the line of deepest soundings of the main navigable channel of the River Niger as it appears in that report and to be constituted opposite Gaya by the line of deepest soundings of the left navigable channel, except in the vicinity of the island of Kata Goungou, where it passes to the left of that island — Co-ordinates of the points through which the boundary passes.

Determination of which of the islands in the river belong to Benin and which to Niger — Determination without prejudice to private law rights in respect of the islands.

*

Course of the boundary on the bridges between Gaya and Malanville — Chamber's jurisdiction to determine that boundary — Boundary on the bridges to follow the course of the boundary in the river.

* *

Course of the boundary in the River Mekrou sector.

Consideration of the documents relied on by the Parties — Decree of 2 March 1907 effected a delimitation in this sector — Decree of 1 March 1919 creating the colony of Haute-Volta did not implicitly abrogate or amend the decree of 1907 — Arrêté of 31 August 1927 and erratum of 15 October 1927 defining the boundary between the colonies of Haute-Volta and Niger — Instruments concerning the creation of game reserves and national parks in the "Niger W" area.

Cartographic materials.

Line of 1907 no longer corresponded to the intercolonial boundary at the critical date — Decree of 1907 was never expressly abrogated or amended or superseded by another text — Power of the Governor-General of AOF to fix the boundaries of cercles and, hence, to determine those of colonies where the boundaries of a cercle are also those of a colony — Uti possidetis juris principle requires that account be taken of the manner in which titles were interpreted and applied by the competent public authorities of the colonial Power — River Mekrou regarded as intercolonial boundary at the critical date.

Boundary between the Parties constituted by the median line of the River Mekrou.

JUDGMENT

Present: Judge RANJEVA, Vice-President of the Court, President of the Chamber; Judges KOOLJIMANS, ABRAHAM; Judges ad hoc BEDJAOU, BENNOUNA; Registrar COUVREUR.

In the case concerning the frontier dispute,

between

the Republic of Benin,

represented by

H.E. Mr. Rogatien Biaou, Minister for Foreign Affairs and African Integration,

as Agent;

H.E. Mr. Dorothé C. Sossa, Keeper of the Seals, Minister of Justice, Legislation and Human Rights,

as Co-Agent;

H.E. Mr. Euloge Hinvi, Ambassador of the Republic of Benin to the Benelux countries,

as Deputy Agent;

Maître Robert Dossou, Avocat at the Benin bar, former Bâtonnier, Honorary Dean of the Law Faculty, University of Abomey-Calavi,

Mr. Alain Pellet, Professor of Law, University of Paris X-Nanterre, member and former Chairman of the International Law Commission,

Mr. Jean-Marc Thouvenin, Professor of Law, University of Paris X-Nanterre, Avocat at the Paris Bar, partner in the Lysias law firm,

Mr. Mathias Forteau, Professor of Law at the University of Lille 2 and at the Lille Institute of Political Studies,

as Counsel and Advocates;

Mr. Francis Lokossa, Director of Legal Affairs and Human Rights, Ministry of Foreign Affairs and African Integration,

as Special Adviser;

Mr. François Noudegbessi, Permanent Secretary, National Commission for the Delimitation of Boundaries,
 Mr. Jean-Baptiste Monkotan, Legal Adviser to the President of the Republic of Benin,
 Mr. Honoré D. Koukoui, Secretary General, Ministry of Justice, Legislation and Human Rights,
 Mr. Jacques Migan, Avocat at the Cotonou Bar, Legal Adviser to the President of the Republic of Benin,
 Ms Héloïse Bajer-Pellet, Avocat at the Paris Bar, Lysias law firm,
 Mr. Luke Vidal, lawyer, Lysias law firm,
 Mr. Daniel Müller, lawyer, Researcher at the Centre de droit international de Nanterre (CEDIN),
 Ms Christine Terriat, lawyer, Maître Robert M. Dossou law firm,
 Mr. Maxime Jean-Claude Hounyovi, Economist, Maître Robert M. Dossou law firm,
 Mr. Edouard Roko, First Secretary, Embassy of the Republic of Benin to the Benelux countries,

as Advisers;

Mr. Pascal Lokovi, Cartographer,

Mr. Clément C. Vodouhe, Historian,

as Counsel and Experts;

Ms Collette Tossouko, Secretarial Assistant, Embassy of the Republic of Benin to the Benelux countries,

as Secretary,

and

the Republic of Niger,

represented by

H.E. Ms Aïchatou Mindaoudou, Minister for Foreign Affairs, Co-operation and African Integration,

as Agent;

H.E. Mr. Maty El Hadji Moussa, Minister of Justice, Keeper of the Seals, as Co-Agent;

H.E. Mr. Souley Hassane, Minister of National Defence;

H.E. Mr. Mounkaïla Mody, Minister of the Interior and Decentralization;

Mr. Boukar Ary Mai Tanimoune, Director of Legal Affairs and Litigation, Ministry of Foreign Affairs, Co-operation and African Integration,

as Deputy Agent, Legal Adviser and Co-ordinator;

Mr. Jean Salmon, Professor Emeritus, Université libre de Bruxelles,

as Lead Counsel;

Mr. Maurice Kamto, Professor, University of Yaoundé II,

Mr. Gérard Niyungeko, Professor and former *Vice-Recteur*, University of Burundi, former President of the Constitutional Court of Burundi,

Mr. Amadou Tankoano, Professor, Abdou Moumouni University, Niamey,

Mr. Pierre Klein, Professor, Université libre de Bruxelles,

as Counsel;

Mr. Sadé Elhadji Mahamane, Chief Curator of Libraries and Archives, member of the National Boundaries Commission,

Mr. Amadou Maouli Laminou, Magistrat, Head of Section at the Ministry of Justice,

H.E. Mr. Abdou Abarry, Ambassador of the Republic of Niger to the Kingdom of the Netherlands,

Mr. Abdelkader Dodo, Hydro-geologist, Lecturer at the Faculty of Sciences, Abdou Moumouni University, Niamey,

Mr. Belko Garba, Chief Surveyor, member of the National Boundaries Commission,

Mr. M. Hamadou Mounkaïla, Chief Surveyor, Head of Department, Permanent Secretariat of the National Boundaries Commission,

Mr. Idrissa Y Maïga, Chief Curator of Libraries and Archives, Director of National Archives, member of the National Boundaries Commission,

Mr. Mahaman Laminou, Director-General of the National Geographical Institute of Niger, member of the National Boundaries Commission,

Mr. Mahamane Koraou, Permanent Secretary to the National Boundaries Commission,

Mr. Soumaye Poutia, Magistrat, Technical Adviser to the Office of the Prime Minister,

Colonel Yayé Garba, Secretary General of the Ministry for National Defence, Mr. Moutari Laouali, Governor of the Region of Dosso,

as Experts;

Mr. Emmanuel Klimis, Research Assistant at the Centre for International Law, Université libre de Bruxelles,

Mr. Boureima Diambeïdou, Chief Surveyor,

Mr. Bachir Hamissou, Administrative Assistant,

Mr. Ouba Adamou, Chief Surveyor, National Geographic Institute of Niger,

as Research Assistants;

Mr. Salissou Mahamane, Accountant,

Mr. Adboulsalam Nouri, Principal Secretary,

Ms Haoua Ibrahim, Secretary,

Mr. Amadou Gagéré, Administrative Officer,

Mr. Amadou Tahirou, Administrative Officer,

Mr. Mamane Chamsou Maïgari, journalist, Director of *Voix du Sahel*,

Mr. Goussama Saley Madougou, cameraman for national television,

Mr. Ali Moussa, journalist with the Niger Press Agency,

Mr. Issoufou Guéro, journalist,

as Administrative and Technical Staff,

THE CHAMBER OF THE INTERNATIONAL COURT OF JUSTICE formed to deal with the above-mentioned case,

composed as above,

after deliberation,

delivers the following Judgment:

1. By a joint letter of notification dated 11 April 2002, filed in the Registry of the Court on 3 May 2002, the Republic of Benin (hereinafter “Benin”) and the

Republic of Niger (hereinafter “Niger”) transmitted to the Registrar a certified copy of a Special Agreement, which was signed on 15 June 2001 in Cotonou and entered into force on 11 April 2002, whereby the Governments of the two States agreed to submit to a Chamber of the Court a dispute concerning “the definitive delimitation of the whole boundary between them”.

2. The Special Agreement of 15 June 2001 provides as follows:

“The Government of the Republic of Benin and the Government of the Republic of Niger, hereinafter the ‘Parties’;

Whereas, pursuant to the Agreement signed on 8 April 1994, having provisionally entered into force on the date of its signing, having been ratified by Benin on 17 July 1997 and by Niger on 1 February 2001, and having definitively entered into force on 15 June 2001, the date on which the instruments of ratification were exchanged, the two Governments created the Joint Delimitation Commission for their boundary;

Whereas, notwithstanding six negotiating sessions held by that Commission, the two States’ experts have been unable to agree on the course of the joint boundary;

Whereas, under Article 15 of that Agreement of 8 April 1994,

‘the contracting Parties agree to submit all disputes or disagreements arising out of the application or interpretation of this Agreement to settlement through diplomatic channels or by the other means of peaceful settlement provided for by the Charters of the Organization of African Unity and the United Nations’;

Desiring to achieve as rapidly as possible the settlement of the boundary dispute between them on the basis of the provisions of the Charter and the resolutions of the Organization of African Unity and to submit the question of the definitive delimitation of the whole boundary between them to the International Court of Justice, hereinafter the ‘Court’;

Have agreed as follows:

Article 1

Formation of a Chamber of the International Court of Justice

1. The Parties submit the dispute defined in Article 2 below to a chamber of the Court, hereinafter the ‘Chamber’, formed in accordance with the provisions of the Statute of the Court and the present Special Agreement.

2. Each of the Parties shall exercise the right granted it by Article 31, paragraph 3, of the Statute of the Court to proceed to choose a judge *ad hoc*.

Article 2

Subject of the Dispute

The Court is requested to:

- (a) determine the course of the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector;
- (b) specify which State owns each of the islands in the said river, and in particular Lété Island;
- (c) determine the course of the boundary between the two States in the River Mekrou sector.

*Article 3**Written Proceedings*

1. Without prejudice to any question as to the burden of proof, the Parties request the Chamber to authorize the following procedure for the written pleadings:

- (a) a Memorial filed by each Party not later than nine (9) months after the adoption by the Court of the Order constituting the Chamber;
- (b) a Counter-Memorial filed by each Party not later than nine (9) months after exchange of the Memorials;
- (c) any other pleading whose filing, at the request of either of the Parties, shall have been authorized or directed by the Court.

2. Pleadings submitted to the Registrar shall not be transmitted to the other Party until the Registrar has received the corresponding pleading from that Party.

*Article 4**Oral Proceedings*

The Parties shall agree, with approval from the Chamber, on the order in which they are to be heard during the oral proceedings; if the Parties fail to agree, the order shall be prescribed by the Chamber.

*Article 5**Language of the Proceedings*

The Parties agree that their written pleadings and their oral argument shall be presented in the French language.

*Article 6**Applicable Law*

The rules and principles of international law applicable to the dispute are those set out in Article 38, paragraph 1, of the Statute of the International Court of Justice, including the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of those boundaries.

*Article 7**Judgment of the Chamber*

1. The Parties accept the judgment of the Chamber given pursuant to the present Special Agreement as final and binding upon them.

2. From the day on which the judgment is rendered, the Parties shall have eighteen (18) months in which to commence the works of demarcation of the boundary.

3. In case of difficulty in the implementation of the judgment, either Party may seise the Court pursuant to Article 60 of its Statute.

*Article 8**Entry into Force*

The present Agreement is subject to ratification. It shall enter into force on the date on which the instruments of ratification are exchanged, which shall take place as rapidly as possible.

*Article 9**Registration and Notification*

The present Agreement shall be registered with the Secretariat of the United Nations pursuant to Article 102 of the United Nations Charter by the more diligent Party.

1. In accordance with Article 40 of the Statute of the Court, the present Special Agreement shall be notified to the Registrar of the Court by a joint letter from the Parties.

2. If such notification is not effected in accordance with the preceding paragraph within one month from the entry into force of the present Special Agreement, it shall be notified to the Registrar of the Court by the more diligent Party.

*Article 10**Special Undertaking*

Pending the judgment of the Chamber, the Parties undertake to preserve peace, security and quiet among the peoples of the two States.

In witness whereof, the present Special Agreement, drawn up in two original copies, has been signed by the plenipotentiaries.

Done at Cotonou, 15 June 2001.”

3. Pursuant to Article 40, paragraph 3, of the Statute of the Court and Article 42 of the Rules of Court, the Registrar transmitted copies of the joint letter of notification, of the Special Agreement and of the protocol of exchange of the instruments of ratification to the Secretary-General of the United Nations, the Members of the United Nations and other States entitled to appear before the Court.

4. Article 1 of the Special Agreement provides for the submission of the dispute to a Chamber to be formed in accordance with Article 26, paragraph 2, of the Statute, with a judge *ad hoc* to be chosen by each Party pursuant to Article 31 of the Statute. The Parties, having been duly consulted by the President of the Court regarding the composition of the Chamber, expressed their wish, pursuant to Article 26, paragraph 2, of the Statute, and to Article 17, paragraph 2, of the Rules of Court, for the formation of a Chamber of five members, of whom two would be the judges *ad hoc* to be chosen by them.

5. By a letter of 21 August 2002 the Deputy Agent of Benin informed the Court that his Government had chosen Mr. Mohamed Bennouna to sit as judge *ad hoc*. By a letter of 11 September 2002 the Agent of Niger informed the Court that his Government had chosen Mr. Mohammed Bedjaoui to sit as judge *ad hoc*.

6. By an Order of 27 November 2002 the Court, acting pursuant to Article 26, paragraph 2, of the Statute and Article 17 of the Rules of Court, decided to accede to the request of the Parties that a special Chamber be formed to deal with the case; it declared that, at an election held on 27 November 2002, President Guillaume and Judges Ranjeva and Kooijmans had been elected to form, together with the above-named judges *ad hoc*, a Chamber to deal with the case and that accordingly the said Chamber as so composed had been duly constituted pursuant to that Order. In accordance with Article 18, paragraph 2, of the Rules of Court, Judge Guillaume, who held the office of President of the Court when the Chamber was formed, was to preside over the Chamber.

7. By the same Order, the Court, acting pursuant to Article 92, paragraph 1, of the Rules of Court, fixed 27 August 2003 as the time-limit for the filing of a Memorial by each Party and reserved the subsequent procedure for further decision. The Memorials were duly filed within the time-limit thus fixed.

8. By Order of 11 September 2003, the President of the Chamber, having regard to Article 3, paragraph 1 (*b*), of the Special Agreement, fixed 28 May 2004 as the time-limit for the filing of a Counter-Memorial by each Party and reserved the subsequent procedure for further decision.

9. The Chamber held a public sitting on 20 November 2003 to enable the judges *ad hoc* to make the solemn declaration required by Article 31, paragraph 6, of the Statute and by Article 8 of the Rules of Court.

10. On 28 May 2004, within the time-limit fixed by the Order of 11 September 2003, the Parties filed their respective Counter-Memorials in the Registry. During a meeting held by the President of the Chamber with the representatives of the Parties on 2 July 2004, in order to ascertain their views on the subsequent procedure, the two Parties expressed the wish to be authorized to submit a third pleading. By Order of 9 July 2004, the President of the Chamber, having regard to Article 3, paragraph 1 (*c*), of the Special Agreement, authorized the filing of a Reply by each Party and fixed 17 December 2004 as the time-limit therefor, reserving the subsequent procedure for further decision. The Parties filed their Replies in the Registry within the time-limit thus fixed.

11. By a letter of 11 October 2004, Judge Guillaume, President of the Chamber, informed the President of the Court, pursuant to Article 13, paragraph 4, of the Statute, that he had decided to resign from the Court with effect from 11 February 2005. Since his resignation would leave a vacancy in the Chamber, the President of the Court consulted the Parties again on 11 January 2005 regarding the composition of the Chamber. At an election held on 16 February 2005, Judge Abraham was elected a member of the Chamber to fill the seat left vacant by Judge Guillaume's resignation. By an Order of 16 February 2005, the Court declared that, as a result of this election, the Chamber was now composed as follows: Judge Ranjeva, who, in his capacity as Vice-President of the Court, had become President of the Chamber, pursuant to Article 18, paragraph 2, of the Rules of Court; Judges Kooijmans and Abraham; and Judges *ad hoc* Bedjaoui and Bennouna.

12. By a letter of 11 February 2005, the Agent of Niger expressed his Government's wish to produce two new documents pursuant to Article 56 of the Rules of Court. By a letter of 25 February 2005, the Agent of Benin informed the Chamber that his Government did not object to that production. Following the decision of the Chamber to authorize the production of those documents by Niger, the Registrar advised the Parties of that decision by letters dated 2 March 2005.

13. Pursuant to Article 53, paragraph 2, of the Rules of Court, the Chamber, having ascertained the views of the Parties, decided to make accessible to the public, with effect from the opening of the oral proceedings, copies of the written pleadings and of the documents annexed thereto.

14. Public sittings were held on 7, 8, 10 and 11 March 2005, at which the Chamber heard the oral arguments and replies of:

For Benin: H.E. Mr. Rogatien Biaou,
Mr. Alain Pellet,
Maitre Robert Dossou,

Mr. Mathias Forteau,
Mr. Jean-Marc Thouvenin.

For Niger: H.E. Ms Aïchatou Mindaoudou,
Mr. Jean Salmon,
Mr. Amadou Tankoano,
Mr. Gérard Niyungeko,
Mr. Pierre Klein.

At the hearings questions were put by the Chamber, to which replies were given in writing pursuant to Article 61, paragraph 4, of the Rules of Court. Each Party submitted its written comments on the other's written replies in accordance with Article 72 of the Rules of Court.

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15. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Benin,
in the Memorial:

“Having regard to all of the foregoing considerations, the Republic of Benin requests the Chamber of the International Court of Justice to decide:

- (1) that the boundary between the Republic of Benin and the Republic of Niger takes the following course:
 - from the point having co-ordinates 11° 54' 15" latitude North and 2° 25' 10" longitude East, it follows the median line of the River Mekrou as far as its point of confluence with the River Niger,
 - from that point, the boundary continues as far as the left bank of the River [Niger], which it follows until it reaches the boundary of Nigeria, as defined by the Franco-British Agreements of 29 May and 19 October 1906;
- (2) that sovereignty over all of the islands in the River [Niger], and in particular the island of Lété, lies with the Republic of Benin.”

in the Counter-Memorial:

“For the reasons set out in its Memorial and in the present Counter-Memorial, the Republic of Benin maintains its submissions and requests the Chamber of the International Court of Justice to decide:

- (1) that the boundary between the Republic of Benin and the Republic of Niger takes the following course:
 - from the point having co-ordinates 11° 54' 15" latitude North and 2° 25' 10" longitude East, it follows the median line of the River Mekrou as far as the point having co-ordinates 12° 24' 29" latitude North and 2° 49' 38" longitude East,
 - from that point, the boundary follows the left bank of the River [Niger] as far as the point having co-ordinates 11° 41' 44" North and 3° 36' 44" East;
- (2) that sovereignty over all of the islands in the River [Niger], and in particular the island of Lété, lies with the Republic of Benin.”

in the Reply:

“For the reasons set out in its Memorial and in its Counter-Memorial, as well as in the present Reply, the Republic of Benin maintains its submissions and requests the Chamber of the International Court of Justice to decide:

- (1) that the boundary between the Republic of Benin and the Republic of Niger takes the following course:
 - from the point having co-ordinates 11° 54' 15" latitude North and 2° 25' 10" longitude East, it follows the median line of the River Mekrou as far as the point having co-ordinates 12° 24' 29" latitude North and 2° 49' 38" longitude East,
 - from that point, the boundary follows the left bank of the River [Niger] as far as the point having co-ordinates 11° 41' 44" North and 3° 36' 44" East;
- (2) that sovereignty over all of the islands in the River [Niger], and in particular the island of Lété, lies with the Republic of Benin.”

On behalf of the Government of Niger,
in the Memorial:

“The Republic of Niger requests the Court to adjudge and declare that:

- the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector, from the confluence of the River Mekrou with the River Niger as far as the boundary of Nigeria, follows the line of deepest soundings, on the understanding that, in the event of a future change in the course of that line, the boundary between the Republic of Benin and the Republic of Niger will follow that new course;
- the current line of deepest soundings in this part of the river determines which islands belong to each Party;
- the islands located between the line of deepest soundings and the right bank of the river, namely Tondi Kwaria Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaïna, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou, Elhadji Chaïbou Barou Kaïna and Dolé Barou, belong to the Republic of Benin;
- the islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaïna, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboye Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaïbou Barou Béri, Goussou Barou and Beyo Barou, belong to the Republic of Niger;
- the attribution of islands to the Republic of Benin and the Republic of Niger shall be regarded as final, even in the event of a future change in the course of the line of deepest soundings;
- the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts:
 - the first part is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atacora mountain range, indicative co-ordi-

nates of which are as follows: latitude: 11° 41' 50" North; longitude: 2° 20' 14" East;

- the second part of the line joins this latter point to the point where the former boundary between the *cercles* of Say and Fada meets the former boundary between the *cercles* of Fada and Atacora, indicative co-ordinates of which are as follows: latitude: 11° 44' 37" North; longitude: 2° 18' 55" East."

in the Counter-Memorial:

"The Republic of Niger requests the Court to adjudge and declare that:

- the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector, from the confluence of the River Mekrou with the River Niger as far as the boundary of Nigeria, follows the line of deepest soundings, on the understanding that, in the event of a future change in the course of that line, the boundary between the Republic of Benin and the Republic of Niger will follow that new course;
- the current course of the line of deepest soundings in this part of the river determines which islands belong to each Party;
- the islands located between the line of deepest soundings and the right bank of the river, namely Tondi Kwaria Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaïna, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou, Elhadji Chaïbou Barou Kaïna and Dolé Barou, belong to the Republic of Benin;
- the islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaïna, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboye Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaïbou Barou Béri, Goussou Barou and Beyo Barou, belong to the Republic of Niger;
- the attribution of islands to the Republic of Benin and the Republic of Niger shall be regarded as final, even in the event of a future change in the course of the line of deepest soundings;
- the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts:
 - the first part is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atacora mountain range, indicative co-ordinates of which are as follows: latitude: 11° 41' 50" North; longitude: 2° 20' 14" East;
 - the second part of the line joins this latter point to the point where the former boundary between the *cercles* of Say and Fada meets the former boundary between the *cercles* of Fada and Atacora, indicative co-ordinates of which are as follows: latitude: 11° 44' 37" North; longitude: 2° 18' 55" East."

in the Reply:

"The Republic of Niger requests the Court to adjudge and declare that:

- the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector, from the confluence of the River

Mekrou with the River Niger as far as the boundary of Nigeria, follows the line of deepest soundings, in so far as that line can be established as it was at the date of independence;

- that line determines which islands belong to each Party;
- the islands between the line of deepest soundings and the right bank of the river, namely Pekinga, Tondi Kwaria Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaïna, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou and Elhadji Chaïbou Barou Kaïna, belong to the Republic of Benin;
- the islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaïna, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboye Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaïbou Barou Béri, Goussou Barou, Beyo Barou and Dolé Barou, belong to the Republic of Niger;
- the attribution of islands to the Republic of Benin and the Republic of Niger according to the line of deepest soundings as determined at the date of independence shall be regarded as final. It shall be for the Parties to ensure that this channel remains the principal navigable channel by carrying out dredging works as necessary;
- the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts:
 - the first part is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atacora mountain range, indicative co-ordinates of which are as follows: latitude: 11° 41' 50" North; longitude: 2° 20' 14" East;
 - the second part of the line joins this latter point to the point where the former boundary between the *cercles* of Say and Fada meets the former boundary between the *cercles* of Fada and Atacora, indicative co-ordinates of which are as follows: latitude: 11° 44' 37" North; longitude: 2° 18' 55" East."

16. At the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Benin,

"For the reasons set out in its written and oral pleadings, the Republic of Benin requests the Chamber of the International Court of Justice to decide:

- (1) that the boundary between the Republic of Benin and the Republic of Niger takes the following course:
 - from the point having co-ordinates 11° 54' 15" latitude North and 2° 25' 10" longitude East, it follows the median line of the River Mekrou as far as the point having co-ordinates 12° 24' 29" latitude North and 2° 49' 38" longitude East,
 - from that point, the boundary follows the left bank of the River [Niger] as far as the point having co-ordinates 11° 41' 44" North and 3° 36' 44" East;

- (2) that sovereignty over all of the islands in the River [Niger], and in particular the island of Lété, lies with the Republic of Benin.”

On behalf of the Government of Niger,

“The Republic of Niger requests the Court to adjudge and declare that:

- (1) The boundary between the Republic of Benin and the Republic of Niger follows the line of deepest soundings in the River Niger, in so far as that line could be established at the date of independence, from the point having co-ordinates latitude 12° 24' 27" North, longitude 2° 49' 36" East, as far as the point having co-ordinates latitude 11° 41' 40.7" North, longitude 3° 36' 44" East.
- (2) That line determines which islands belong to each Party.
 - The islands between the line of deepest soundings and the right bank of the river, namely Pekinga, Tondi Kwaria Barou, Koki Barou, Sandi Tounga Barou, Gandégabi Barou Kaïna, Dan Koré Guirawa, Barou Elhadji Dan Djoda, Koundou Barou and Elhadji Chaïbou Barou Kaïna, belong to the Republic of Benin.
 - The islands located between the line of deepest soundings and the left bank of the river, namely Boumba Barou Béri, Boumba Barou Kaïna, Kouassi Barou, Sansan Goungou, Lété Goungou, Monboye Tounga Barou, Sini Goungou, Lama Barou, Kotcha Barou, Gagno Goungou, Kata Goungou, Gandégabi Barou Béri, Guirawa Barou, Elhadji Chaïbou Barou Béri, Goussou Barou, Beyo Barou and Dolé Barou, belong to the Republic of Niger.
- (3) The attribution of islands to the Republic of Benin and the Republic of Niger according to the line of deepest soundings as determined at the date of independence shall be regarded as final.
- (4) With regard to the Gaya-Malanville bridges, the boundary passes through the middle of each of those structures.
- (5) The boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows a line comprising two parts:
 - the first part is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atacora mountain range, indicative co-ordinates of which are as follows: latitude: 11° 41' 50" North; longitude: 2° 20' 14" East;
 - the second part of the line joins this latter point to the point where the former boundary between the *cercles* of Say and Fada meets the former boundary between the *cercles* of Fada and Atacora, indicative co-ordinates of which are as follows: latitude: 11° 44' 37" North; longitude: 2° 18' 55" East.”

* * *

17. The task assigned to the Chamber in the present case by the Special Agreement of 15 June 2001 is to determine the course of the whole boundary between Benin and Niger and to specify to which State each of the islands in the River Niger sector belongs, and in particular the island of Lété.

Benin and Niger are States in western Africa. The Republic of Benin, formerly known as the Republic of Dahomey (from 1960 to 1975) then as the People's Republic of Benin (from 1975 to 1990), covers an area of 112,622 sq km; it is bounded to the south by the Atlantic Ocean, to the west by Togo, to the north-west by Burkina Faso, to the north by Niger and to the east by Nigeria. The Republic of Niger, with an area of 1,267,000 sq km, is bounded to the south by Nigeria, to the south-west by Benin, to the west by Burkina Faso, to the north-west by Mali, to the north by Libya and Algeria, and to the east by Chad. Sketch-map No. 1, on page 105 below, illustrates the general situation of the territories of the Parties.

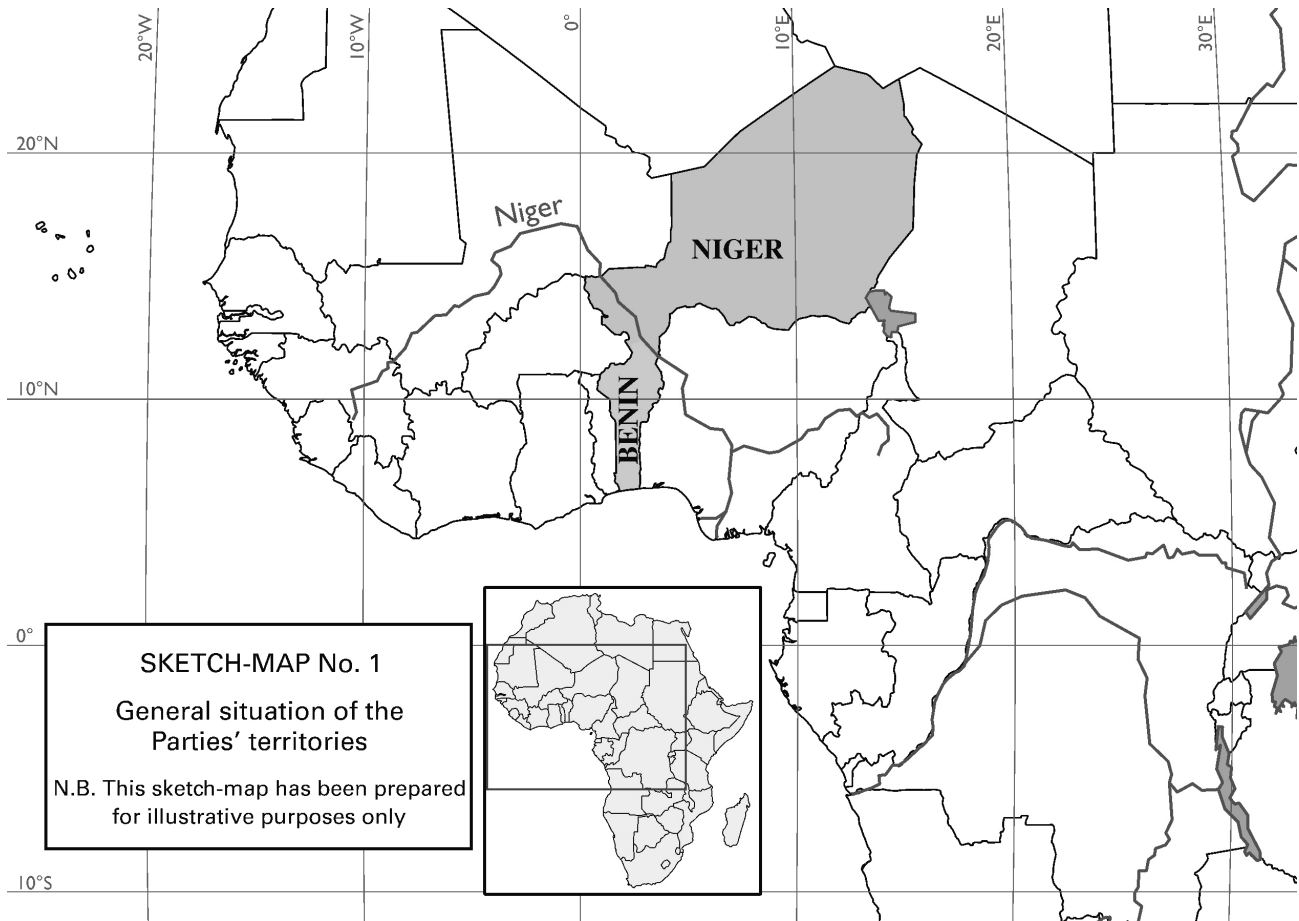
18. Article 2 of the Special Agreement divides the disputed boundary into two sectors: the River Mekrou sector in the west and the River Niger sector in the east. Sketch-map No. 2, on page 106 below, gives a general view of this boundary.

The western part of this boundary follows a course running approximately south-west to north-east, passing through woodland composed of transitional Sudano-Sahelian vegetation, from a point marking the boundary between the two States and Burkina Faso as far as the confluence of the River Mekrou and the River Niger.

The eastern part of the boundary follows the River Niger in a southeasterly direction over a distance of some 150 km from that confluence and ends at a point marking the boundary of the two States with Nigeria. The Parties have submitted differing descriptions of the characteristics of the River Niger in the region. According to Benin, the river is subject to siltation, which has led to a change in its course over time particularly affecting the right bank, which is much less stable than the left bank. Although it acknowledges the existence of this phenomenon, Niger maintains that, because of the nature of the rocks in the stretch of river concerned, there has been no significant change in the course of the main channel for more than a century, and that there is no substantial difference in the configuration of each bank. In this sector, three tributaries (the Mekrou, the Alibori and the Sota) enter the River Niger from the right bank, as a result of which it floods twice a year, in January-March and in September-October. The Parties have conflicting views as to whether, in the area subject to delimitation, the river is navigable during the low-water season: Benin claims that it is not but Niger maintains that navigation is possible throughout the year for certain types of craft.

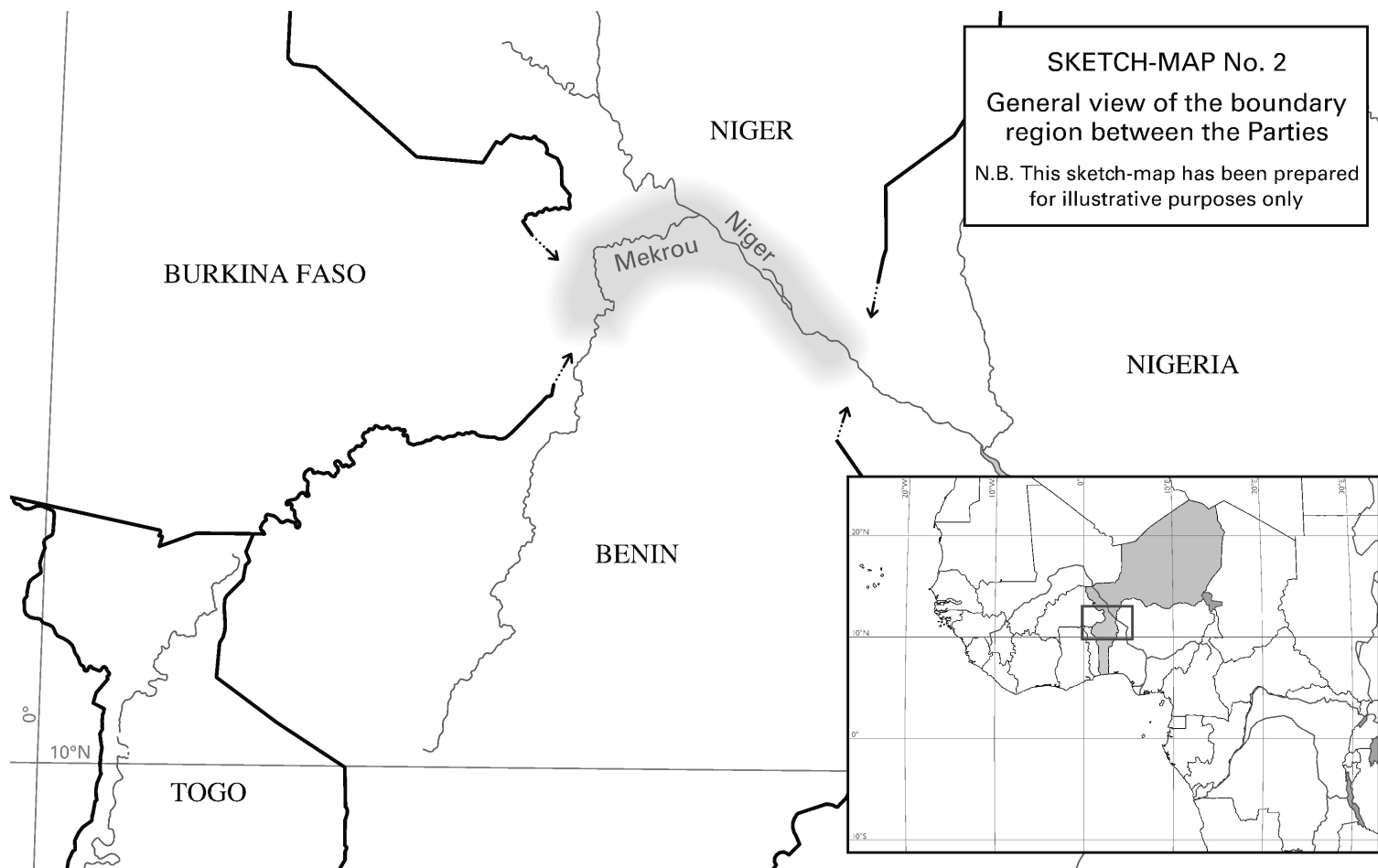
19. There are several islands within the stretch concerned; their exact number and their attribution to either Party are matters of dispute in the present case.

The island of Lété, referred to expressly in Article 2 (*b*) of the Special Agreement, is the largest, covering approximately 40 sq km. It extends 16,300 m from a point opposite the villages of Kwara Tegui (Benin) and Ouna (Niger) to a point opposite the villages of Karimama (Benin) and Albarkaizé (Niger). The approximate co-ordinates of the extremities of



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the island are: upstream, 12° 9' 55" latitude North and 3° 6' 47" longitude East; downstream, 12° 3' 43" latitude North and 3° 13' 39" longitude East. The island is fertile, with rich pastures, and is permanently inhabited; according to information supplied by Niger, its population numbered some 2,000 in the year 2000.

* *

20. The frontier dispute between the Parties is set within a historical context marked by the accession to independence of the territories that were formerly part of French West Africa ("Afrique occidentale française", hereinafter "AOF"). Benin, which has been independent since 1 August 1960, corresponds to the former colony of Dahomey, and Niger, which has been independent since 3 August 1960, corresponds to a territory which underwent various administrative transformations during the colonial period.

21. In their written pleadings, both Parties referred to incidents that occurred on the island of Lété on the eve of their independence, in 1959 and 1960. Following those events, the two States set up a process for the friendly settlement of their frontier dispute: in 1961 and 1963 two Dahomey-Niger joint commissions met to discuss the matter.

In October 1963 the crisis between Dahomey and Niger deepened, in particular regarding the island of Lété. Each State subsequently published a White Paper setting out, *inter alia*, their respective positions regarding the frontier dispute.

There were fresh attempts to reach a peaceful settlement in the years that followed, culminating in a conference held in Yamoussoukro on 18 January 1965, in the course of which the Parties agreed "until the dispute over the island is finally settled, to allow nationals of both countries to live in perfect harmony on that island". However, the issue of sovereignty over the island of Lété was not resolved and there were further incidents in subsequent years, notably in 1993 and 1998.

22. On 8 April 1994 Benin and Niger entered into an agreement creating a joint commission for the delimitation of their common border, whose terms of reference included the enumeration, collection and analysis of documents relating to the frontier and the precise establishment thereof. The commission held six meetings between September 1995 and June 2000.

Since efforts to arrive at a negotiated solution to the dispute were unsuccessful, the commission proposed that the Governments of the two States bring the dispute before the International Court of Justice by Special Agreement. The Special Agreement was signed in Cotonou on 15 June 2001 and entered into force on 11 April 2002.

* *

23. Under Article 6 of the Special Agreement (“Applicable Law”), the rules and principles of international law applicable to the present dispute include “the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of those boundaries”. It follows from the wording of this provision and from the arguments of the Parties that they are in agreement on the relevance of the principle of *uti possidetis juris* for the purposes of determining their common border. As the Chamber formed in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* had occasion to state, the existence of this principle has been recognized on several occasions in the African context (*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, *I.C.J. Reports 1986*, p. 565, para. 20); it was recognized again recently, in Article 4 (b) of the Constitutive Act of the African Union, of which Benin and Niger are members, signed in Lomé on 11 July 2000. That Chamber stated that, according to the principle in question, “pre-eminence [is] accorded to legal title over effective possession as a basis of sovereignty” and that its essence lies “in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved”, including former administrative delimitations established during the colonial period that became international frontiers (*I.C.J. Reports 1986*, pp. 586-587, para. 63, and p. 566, para. 23).

24. On the basis of the principle of *uti possidetis juris*, the present Chamber must thus seek to determine, in the case before it, the boundary that was inherited from the French administration. The Parties agree that the dates to be taken into account for this purpose are those of their respective independence, namely 1 and 3 August 1960; the Chamber would observe that there was no change in the frontier between these two very close dates.

25. The Parties have nonetheless sometimes expressed differing opinions regarding certain aspects of the application of the *uti possidetis juris* principle in the present case.

Firstly, Niger maintains that this principle does not preclude the Chamber from taking account, where appropriate, of the physical realities subsequent to independence, in order to ensure that the Judgment will have meaningful and practical significance between the Parties. Consequently, in requesting the Chamber to indicate to which State each of the islands in the River Niger belongs, by reference to the line of deepest soundings at the date of independence, Niger asks it to consider for this purpose only those islands that exist at the present time.

Benin, for its part, argues that, if the *uti possidetis juris* principle is to be applied strictly, it would be unacceptable to refer to the present situation in order to determine to which Party the islands belonged at the date of independence.

The Chamber observes that, in any event, the Parties agree that the course of their common boundary should be determined, in accordance with the *uti possidetis juris* principle, by reference to the physical situa-

tion to which French colonial law was applied, as that situation existed at the dates of independence. However, the consequences of such a course on the ground, particularly with regard to the question of to which Party the islands in the River Niger belong, must be assessed in relation to present-day physical realities and, in carrying out the task assigned to it under Article 2 of the Special Agreement, the Chamber cannot disregard the possible appearance or disappearance of certain islands in the stretch concerned.

26. Secondly, Benin and Niger have put forward differing views with respect to the documents or maps on which the Chamber should base its determination of their common boundary.

In support of its delimitation claims, Niger relies on certain documents and maps that are posterior to the dates of independence, not only to demonstrate current physical realities but also to establish the situation existing in the colonial era. According to Niger, that situation must be determined on the basis of the studies conducted closest in time to the Parties' accession to independence, without being confined to those conducted prior to the dates of independence.

Benin considers, to the contrary, that the Chamber should base its decision on research and documents prior to the critical date.

The Chamber cannot exclude *a priori* the possibility that maps, research or other documents subsequent to that date may be relevant in order to establish, in application of the *uti possidetis juris* principle, the situation that existed at the time. In any event, since the effect of the *uti possidetis* principle is to freeze the territorial title (*Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, I.C.J. Reports 1986, p. 568, para. 29), the examination of documents posterior to independence cannot lead to any modification of the "photograph of the territory" at the critical date unless, of course, such documents clearly express the Parties' agreement to such a change.

27. Thirdly, the Parties have discussed the legal value, in the light of the *uti possidetis juris* principle, of post-colonial *effectivités*.

The Chamber notes that both Parties have on occasion sought to confirm the legal title which they claim by relying on acts whereby their authorities allegedly exercised sovereignty over the disputed territories after 1960; such *effectivités* have been invoked by Niger *inter alia* in respect of activities relating to the River Niger and its islands, and by Benin in respect of activities relating to the right bank of the River Mekrou.

Such an approach should not necessarily be excluded. As stated by the Chamber formed in the case concerning the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, it is possible to

"have regard . . . in certain instances, to documentary evidence of post-independence *effectivités* when . . . they afford indications in

respect of the . . . *uti possidetis juris* boundary, providing a relationship exists between the *effectivités* concerned and the determination of that boundary” (*Judgment, I.C.J. Reports 1992*, p. 399, para. 62).

*

28. The Parties both acknowledge that, in accordance with the principle of *uti possidetis juris*, the course of the frontier and the attribution of islands in the River Niger to either one of them must be determined in the light of French colonial law, known as “*droit d’outre-mer*”. They also agree on the identification of the relevant rules of that law, but do not share the same interpretation thereof.

Before turning to those rules, the Chamber would recall that, when reference is made to domestic law in such a context, that law is applicable

“not in itself (as if there were a sort of *continuum juris*, a legal relay between such law and international law), but only as one factual element among others, or as evidence indicative of . . . the ‘colonial heritage’” (*Frontier Dispute (Burkina Faso/Republic of Mali)*, *Judgment, I.C.J. Reports 1986*, p. 568, para. 30).

29. As the Chamber in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)* (*I.C.J. Reports 1986*, pp. 568-569, para. 31) already observed, the territorial administration of the French possessions in West Africa was centralized by a decree of the President of the French Republic of 16 June 1895 and placed under the authority of a Governor-General. The entity of the AOF thus created was divided into colonies, headed by Lieutenant-Governors and themselves made up of basic units called “*cercles*” which were administered by *commandants de cercle*; each *cercle* was in turn composed of *subdivisions*, each administered by a *chef de subdivision*. The *subdivisions* consisted of *cantons*, which grouped together a number of villages.

30. The Parties acknowledge that the creation and abolition of colonies fell within the jurisdiction of the authorities of metropolitan France: the President of the French Republic, acting by decree, under the Constitution of the Third Republic, and subsequently the French Parliament, following the adoption of the Constitution of 27 October 1946.

The power to create territorial subdivisions within a single colony, on the other hand, was vested in the AOF until being transferred to the local representative institutions in 1957.

Article 5 of the decree of the President of the French Republic, dated 18 October 1904, providing for the reorganization of the AOF, vested the Governor-General with authority to “determine in government council (*conseil de gouvernement*), and on the proposal of the Lieutenant-Governors concerned, the administrative districts in each of the colonies”.

In his circular No. 114c of 3 November 1912, concerning the form of

instruments for the organization of administrative districts and subdivisions, the Governor-General interpreted this text as conferring upon him “the right to establish . . . the number and extent of the *cercles* which, within the colonies, constitute[d] the actual administrative unit”, but pointed out that it was “acknowledged that the Lieutenant-Governors would retain the power to determine the territorial subdivisions created within these *cercles* by measures adopted under their own authority”. According to that circular, “any measure concerning the administrative district, the territorial unit proper, i.e. affecting the *cercle*, in terms of its existence (creation or abolition), its extent, its name, or the location of its administrative centre”, was to be confirmed by an *arrêté général* adopted in government council; it lay with the Lieutenant-Governors “to define, by means of *arrêtés*, the approval of which [was] reserved to [the Governor-General], the exact and detailed topographical boundaries of each of these districts”, as well as “within the *cercles*, [to] fix . . . the number and extent of the territorial subdivisions . . . and the location of their centre” by means of local decisions.

31. Benin submits that, in the light of these texts, the rules applicable to the creation of colonies and their subdivisions should be distinguished from those relating to the establishment of territorial boundaries. At the hearings, Benin nevertheless acknowledged that the principle whereby authorities empowered to create colonies or administrative districts were also competent to define or modify the boundaries thereof was certainly applicable to colonies. However, Benin contended that such competence was not exclusive and that in all likelihood the said principle did not apply in respect of the internal boundaries within colonies. In any event, the local authorities, headed by the Lieutenant-Governors, had authority, by virtue of the rules governing the fixing of territorial boundaries, to clarify central authorities’ decisions.

Niger, on the other hand, contends that the power to create colonies, as conferred by the above-mentioned texts, entailed the implicit power to establish their overall extent, from which boundaries of varying precision could be determined on a case-by-case basis. According to Niger, it followed from this that the rules concerning the creation and organization of colonial administrative districts gave implicit prerogatives to the French metropolitan authorities for the determination of inter-territorial boundaries, and to the authorities of the AOF for the delimitation of administrative districts and their subdivisions. The Lieutenant-Governors’ competence in this matter was confined to certain specific circumstances, according to a procedure and formalities laid down by the above-mentioned texts.

* *

32. For a better understanding of the historical context in which the Parties’ claims stand in relation to the determination of the frontier and

to the question of to whom the islands in the River Niger belong, the evolution of the legal status of the territories concerned during the colonial period should be briefly recapitulated.

33. In the second half of the nineteenth century, France initially established settlements along the coast of Dahomey, at Cotonou and Porto Novo. Following an armed conflict with the local chieftain in the 1880s and 1890s, it consolidated its presence in the region first by placing Dahomey under protectorate (1892), and then by creating the “colony of Dahomey and dependencies” (decree of 22 June 1894). France subsequently launched expeditions northwards from its possessions in Dahomey, as well as southwards and eastwards from Sudan, which enabled it, in the autumn of 1897, to occupy the valley of the River Niger (in particular the sector between Say and Boussa).

The French occupation was expressly formalized, as regards the region of north-western Dahomey, by a convention concluded with Germany on 23 July 1897, and as regards north-eastern Dahomey, by a convention concluded with Great Britain on 14 June 1898. By means of a convention of 8 April 1904, certain adjustments were made to the line established in 1898 in order to separate the French and British areas of influence. The parties to that convention fixed the boundaries of their respective possessions in accordance with those adjustments by means of a convention of 29 May 1906 in respect of the region to the east of the River Niger, and by means of an agreement of 19 October 1906 in respect of the territories between the Gulf of Guinea and that river; demarcation operations, documented in an official record dated 19 February 1910, were subsequently carried out by the Anglo-French Commission for the delimitation of the territories situated between the Niger and Lake Chad.

34. At the end of the nineteenth century, when the colony of Dahomey was incorporated into the AOF by decree of 17 October 1899, it encompassed, in the region concerned by the present dispute, territories situated on both banks of the River Niger. By virtue of the same decree, which had provided for the dissolution of French Sudan and the apportionment of the territories it had comprised among different colonies and two specially created military territories, the territory of Say was also attributed to Dahomey. This territorial incorporation was put into effect by an *arrêté* of the Governor of Dahomey dated 20 March 1901.

By *arrêté* of 23 July 1900, the Governor-General of the AOF decided to establish a third military territory encompassing the regions on the left bank of the River Niger from Say to Lake Chad. That 1900 *arrêté* was followed by a decree of the President of the French Republic dated 20 December 1900 with the same object. The boundary between the Third Military Territory and the First Military Territory created in 1899 was subsequently determined by an *arrêté* of the Governor-General of the AOF, dated 20 March 1902.

By a decree of 18 October 1904 on the reorganization of the General Government of the AOF, the President of the French Republic *inter alia* established the colony of Haut-Sénégal et Niger comprising “the former

territories of Haut-Sénégal and Moyen-Niger and those which form[ed] the Third Military Territory". The newly created colony was composed of "*cercles* under civil administration" as well as the "Military Territory of Niger", constituted by the former First and Third Military Territories.

By decree of 2 March 1907, the *cercles* of Fada-N'Gourma and Say were detached from Dahomey and incorporated into the colony of Haut-Sénégal et Niger. The intercolonial boundary fixed by that decree was revised on two occasions in its western part, first by a decree of 12 August 1909, and subsequently by a decree of 23 April 1913.

35. On 7 September 1911, a further decree separated the Military Territory of Niger from the colony of Haut-Sénégal et Niger (the *cercle* of Say remaining as a district of that colony), in order to make it an administrative subdivision under the direct control of the office of the Government-General of the AOF. On 1 January 1921, that military territory became the Civil Territory of Niger, and was then made an autonomous colony by decree of 13 October 1922.

In the meantime, the decree of 1 March 1919 had provided for the establishment of the colony of Haute-Volta, to which were attributed, *inter alia*, the *cercles* of Say and Fada-N'Gourma, which had hitherto formed part of Haut-Sénégal et Niger.

By decree of 28 December 1926, certain *cantons* in the *cercle* of Dori and the *cercle* of Say (with the exception of the *canton* of Gourmanché-de-Botou) were detached from Haute-Volta and incorporated into Niger. 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.

The colony of Haute-Volta was abolished by decree of 5 September 1932, then reconstituted with the same territorial basis by Law No. 47-1707 of 4 September 1947; in the intervening period, the *cercles* of Fada and Dori (excluding the *canton* of Aribinda) were incorporated into Niger.

36. During the colonial period, the administrative organization of Dahomey and Niger was the subject of several successive enactments.

Following its establishment in 1894, the colony of Dahomey and dependencies was organized by *arrêté* of the Governor *ad interim*, dated 11 August 1898; that *arrêté* established four *cercles* in the colony, including that of Moyen-Niger, which comprised *inter alia* "the territories of Zaberma or Dendi situated on either side of the Niger and their dependencies" and that of Gourma, which comprised "the *provinces* of Fada N'Gourma, Pama, Matiacouali, Kodjar, Botou and their dependencies". The territorial divisions of the colony were reorganized by *arrêtés* of the Governor-General of the AOF, dated 8 December 1934 and 27 October 1938; those two *arrêtés inter alia* defined the boundaries of the *cercles* of Kandi and of Natitingou, adjoining the colony of Niger.

The internal reorganization of Niger was the subject of successive *arrêtés* of the Governor-General of the AOF, dated 26 December 1904,

31 December 1907, 14 December 1908, 22 June 1910, 23 November 1912 and 22 January 1927. On the eve of independence, as a result of an *arrêté général* of 30 March 1956 adding seven new *cercles* to the colony, Niger comprised 16 *cercles*.

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37. The Chamber will now describe the main documents relevant to the settlement of the frontier dispute. In this connection, a distinction should be made between those documents that concern the determination of the course of the boundary in the River Niger sector and the question of to whom the islands in that river belong and those documents that relate to the delimitation in the River Mekrou sector.

38. As regards the sector of the River Niger and the islands therein, the essential documents, in chronological order, are as follows:

- the *arrêté général* of 23 July 1900 creating a Third Military Territory, the administrative centre of which was established at Zinder. Article 1 of this *arrêté* stated that this territory “encompass[ed] the areas on the left bank of the Niger between Say and Lake Chad that [had been] placed within the French sphere of influence by the Convention of 14 June 1898”;
- the decree of 20 December 1900 creating a Third Military Territory between the Niger and Lake Chad;
- letter No. 163 from the Minister for the Colonies, dated 7 September 1901, addressed to the Governor-General of the AOF. In this letter, the Minister referred to a previous communication, by which the Governor-General had transmitted two reports to him from the Governor of Dahomey “regarding the question of the delimitation between Dahomey and the Third Military Territory, and indicating the course of the Niger as the best demarcation line, both from a geographical and political perspective”. In response to the Governor-General’s view that this proposal seemed “highly acceptable”, the Minister indicated in his letter that “on this point, he share[d] [the] view” of the Governor-General;
- letter No. 54 of 3 July 1914, under cover of which *administrateur adjoint* Sadoux, *commandant* of the *secteur* of Gaya (Niger), sent to the *commandant* of the *cercle* of Moyen-Niger (Dahomey) “a table of the islands in the River Niger indicating the major branch of the river and the colony to which the islands therefore belong[ed]”, which he had prepared “for the sole purpose of clearly determining when grazing permits [should] be issued to the Peuhls from both banks and delimiting the territorial jurisdiction of the indigenous tribunals in the two colonies”. In his letter, the *administrateur adjoint* indicated that he “believe[d] . . . that it [was] the main channel that [should] serve as delimitation” between the territories concerned, “the *commandant* of the *secteur* of Guéné having cited to [him the previous year] a text on

this subject, which [was] in Kandi, but [which he] [did] not have in Gaya”;

- *arrêté général* No. 2812/AP of 8 December 1934 and *arrêté général* No. 3578/AP of 27 October 1938, both reorganizing the territorial divisions of the colony of Dahomey. The latter, whose text is virtually identical to that of 1934 in the part relevant to the present case, indicated in Article 1 that the *cercle* of Kandi was bounded

“[in] the east, by the frontier of Nigeria [the 1934 *arrêté* referred to ‘the frontier of Niger’] as far as the Niger;

[i]n the north-east, by the course of the Niger to its confluence with the Mekrou . . .”.

Article 2 stated that the boundaries of the *cercles* were those drawn on a 1:500,000 map of Dahomey appended to the *arrêté* (Article 2 of the 1934 *arrêté* being identical in content). However, neither of the Parties has been able, for the purposes of the present case, to locate the maps on which those boundaries had been drawn;

- letter No. 3722/APA of 27 August 1954, by which Secretary-General Raynier, Governor *ad interim* of Niger, informed the *chef* of the *sub-division* of Gaya (Niger), through the *commandant* of the *cercle* of Dosso (Niger), “that the boundary of the Territory of Niger [was] constituted by the line of highest water, on the left bank of the river, from the village of Bandofay to the frontier of Nigeria” and that “[c]onsequently, all the islands situated in this part of the river [formed] part of the Territory of Dahomey”. The Parties have drawn the attention of the Chamber to other letters relating to the inter-colonial boundary exchanged between the authorities of Niger, between the authorities of Dahomey and between the two colonies during 1954, as well as in subsequent years (in 1956 for example), which would allegedly make it possible to assess the legal value and the significance of the aforementioned letter.

39. With respect to the River Mekrou sector, the essential documents from the colonial period are, in chronological order, as follows:

- a decree of 2 March 1907, incorporating the *cercles* of Fada N’Gourma and Say into the colony of Haut-Sénégal et Niger. Article 1 of this decree provided as follows:

“[t]he boundary between the colony of Haut-Sénégal et Niger and the colony of Dahomey is formed, from the boundary of Togo, by the present boundary of the *cercle* of Gourma until it reaches the Atakora mountain range, whose summit it follows until it meets the Paris meridian, from which point it runs in a straight line in a north-easterly direction, terminating at the confluence of the River Mekrou with the Niger”;

- a decree of 12 August 1909, Article 1 of which provided that “[t]he boundary between the *cercle* of Gourma (Haut-Sénégal et Niger) and

the *cercle* of Djougou (Dahomey)” was formed, *inter alia*, by

“[t]he Altacora mountain range, whose summit it follows, or, more precisely, a line parallel to the Konkobiri-Tandangou-Sangou trail running along the foot of the mountain, at a distance of 8 km from the trail”;

- a decree of 23 April 1913, Article 1 of which provided that “[t]he boundary between the *cercles* of Fada-N’Gourma (Haut-Sénégal et Niger) and Atacora (Dahomey)” was determined, *inter alia*, by

“a line parallel, in the east, to the Compongou-Konkobiri-Batchango trail running along the foot of the Atacora mountain range at a distance of 8 km from the trail and continuing until it meets the upper course of the River Pendjari”;

- a decree of 1 March 1919 dividing the colony of Haut-Sénégal et Niger and creating the colony of Haute-Volta;
- an *arrêté général* of 16 April 1926 laying down certain conditions for the implementation of the decree of 10 March 1925 regulating hunting and creating game parks in the AOF;
- an *arrêté général* adopted by the Governor-General *ad interim* of the AOF on 31 August 1927, fixing the boundaries of the colonies of Haute-Volta and Niger. Although, as stated by its text, this *arrêté* related to the frontier between Haute-Volta and Niger, it provided, in Article 1, paragraph 2, that the boundaries between the *cercle* of Say and Haute-Volta were formed

“[i]n the South-West, [by] a line starting approximately from the [River] Sirba at the level of the Say parallel and running as far as the Mekrou;

[i]n the South-East, by the Mekrou from that point as far as its confluence with the Niger”.

This *arrêté général* was amended, on this point among others, by an *erratum* of 5 October 1927, published in the *Journal officiel* of the AOF of 15 October 1927, in which the final subparagraph of Article 1 provided simply that the boundary of the colonies of Niger and Haute-Volta “follows . . . the course of the Tapoa upstream until it meets the former boundary of the *cercles* of Fada and Say, which it follows as far as its intersection with the course of the Mekrou”;

- the aforementioned *arrêtés généraux* of 8 December 1934 and 27 October 1938, which indicated, *inter alia*, that the north-western boundary of the *cercle* of Kandi was formed by “the boundary between Dahomey and the colony of Niger, from the River Niger to the confluence of the Pendjari with the Kompongou southern ‘marigot’ ”;
- local *arrêté* No. 1464 APA of the Governor *ad interim* of Dahomey, dated 30 September 1937, laying down certain conditions for the implementation of the decree of 13 October 1936 regulating hunting

in the principal African territories under the jurisdiction of the Ministry of the Colonies;

- local *arrêté* No. 1302/AE/SZ of the Governor of Niger, dated 13 November 1937, providing that part of the territory of the *cercles* of Niamey and Fada N’Gourma would be set aside for the “Niger W National Park”;
- *arrêté général* No. 7640 SE/F of 3 December 1952, designating part of the *cercle* of Kandi (Dahomey) as the “Niger W Total Reserve”, the boundaries of which it fixed;
- *arrêté général* No. 4676 SE/F of 25 June 1953, creating the “Niger W Total Game Reserve” in an area situated in the *cercle* of Niamey (Niger), the boundaries of which it fixed.

The Parties also discussed, in connection with the frontier in the River Mekrou sector, the significance of certain documents that are posterior to the dates of independence, in particular:

- Note Verbale No. 03498, addressed on 29 August 1973 to the Ministry of Foreign Affairs of Dahomey by the Ministry of Foreign Affairs of Niger, concerning the meeting of a joint committee regarding a joint dam project on the River Mekrou;
- the minutes of a meeting of experts of the Governments of Niger and Dahomey, held on 8 February 1974, “concerning the Mekrou and the dam project on that river”;
- the Agreement of 14 January 1999 between Niger and Benin, relating to the development of a hydroelectric facility at Dyodyonga on the River Mekrou.

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40. The Parties also produced a large quantity of cartographic and photographic material in support of their respective arguments, varying in date, origin, technical quality and level of accuracy.

41. With regard to the identification of the main channel of the River Niger and the attribution of the islands in that river between the Parties, Niger has relied in particular on the following, among many other maps and sketch-maps: maps of the course of the Niger prepared in 1896 following a mission led by Lieutenant Commander Hourst to study the régime of the river and its navigability; the general 1:10,000 plan from the study on the navigability of the stretch of the Niger between Niamey and Gaya carried out by the mission led by A. Beneyton in 1929-1930; the map annexed to the report on the survey of the river between Niamey and Malanville carried out in 1949 on the instructions of the *chef des services* of the Benin-Niger region; sheet No. 4 of the study on the navigability of the river (1:10,000 survey of the shoals) prepared in 1965 by the topographic service and land registry of the Republic of Niger; maps Nos. 32 to 37 on a scale of 1:50,000 from the study on the navigability of

the River Niger between Tossaye and Yelwa conducted from 1967 onwards by NEDECO, a Dutch firm, at the request of four riparian States (Dahomey, Mali, Niger and Nigeria), the work on the ground being carried out in 1968-1969 and the final report produced in September 1970; and sheets Nos. 1 to 4 on a scale of 1:50,000 from the study of the River Niger in 1979 by the French Institut géographique national (IGN) on the basis of a photographic mission in April 1975. Niger also pointed out that the 1:200,000 maps of West Africa published by the AOF cartographic service in Dakar in 1955 and 1960 situated the inter-colonial boundary in the course of the river.

For its part, Benin has referred to cartographic material dating from the colonial period, produced by one or other of the Parties, to demonstrate that the cartographers never took it for granted that the boundary between the colonies of Dahomey and Niger followed the navigable channel of the River Niger. Moreover, according to Benin, the above-mentioned sketch-maps or studies, relied on by Niger in support of its argument, cannot be used to define the navigable channel at the dates of independence or to determine to which of the Parties the islands in the river belong. Finally, Benin relies on a study carried out for the purposes of the present case by IGN-France international in December 2003, which compared the maps of the region published by IGN in 1960 with SPOT images on the same scale recorded in 2002, in order to show the changes in the configuration of the widest channel and islands of the River Niger over the last 50 years.

42. With regard to the River Mekrou sector, each Party has relied on several maps dating from the colonial period to support its position.

According to Benin, these maps (in particular those prepared after 1919, with the exception of a map dated 1922 and republished in 1928 cited by Niger) confirm that the Mekrou was the intercolonial boundary. Benin refers, *inter alia*, to the following cartographic documentation: the “Kandi” and “Niamey” sheets of the map (1:500,000) prepared and published in October 1926 by the AOF Geographical Service (known as the “Blondel la Rougery map”); the map entitled “New Boundary of Haute-Volta and Niger (according to the *erratum* of 5 October 1927 to the *arrêté* of 31 August 1927)” (1:1,000,000); an undated map entitled “Sketch-map of the Colony of Niger prepared by Colonel Abadie of the Colonial Infantry” (1:4,500,000); a Dahomey-Togo road map (1:1,000,000) prepared by the AOF Geographical Service in 1938; and a road sketch-map entitled “Dahomey and Togo” prepared by the same service in 1948.

Niger has relied on a large amount of cartographic material to show that the colonial authorities had only a vague knowledge of the River Mekrou region and of the exact course of that river, and that the boundary established by the decree of 2 March 1907 had never been challenged; in this connection, it drew the attention of the Chamber to a combined

political and administrative map of the AOF published in 1928 (the updated version of a similar map prepared in 1922) on which the dates of 2 March 1907 and 6 September 1909 are placed along the line marking the boundary in the Mekrou sector.

43. Finally, the Parties refer to certain maps in order to determine the indicative co-ordinates of precise points on their common frontier.

Thus Benin measures the co-ordinates of the tripoints with Burkina Faso and Nigeria on the basis of the relevant sheets of what it regards as the most reliable map published on the eve of the independence of the two States, namely a 1:200,000 map of the AOF produced by the IGN in 1955.

Niger has noted that the co-ordinates of the Benin/Niger bipoint and of the tripoint with Burkina Faso that it claims in the River Mekrou sector were plotted on 1:200,000 IGN maps (the Kandi sheet of a map of West Africa published by the IGN which is annexed to its Memorial).

44. The Chamber would recall here the terms in which the probative value of maps was described in the Judgment rendered in the case concerning the *Frontier Dispute (Burkina Faso/Republic of Mali)*:

“maps merely constitute information which varies in accuracy from case to case; of themselves, and by virtue solely of their existence, they cannot constitute a territorial title, that is, a document endowed by international law with intrinsic legal force for the purpose of establishing territorial rights. Of course, in some cases maps may acquire such legal force, but where this is so the legal force does not arise solely from their intrinsic merits: it is because such maps fall into the category of physical expressions of the will of the State or States concerned. This is the case, for example, when maps are annexed to an official text of which they form an integral part. Except in this clearly defined case, maps are only extrinsic evidence of varying reliability or unreliability which may be used, along with other evidence of a circumstantial kind, to establish or reconstitute the real facts.” (*I.C.J. Reports 1986*, p. 582, para. 54.)

In other words,

“except when the maps are in the category of a physical expression of the will of the State, they cannot in themselves alone be treated as evidence of a frontier, since in that event they would form an irrebuttable presumption, tantamount in fact to legal title. The only value they possess is as evidence of an auxiliary or confirmatory kind, and this also means that they cannot be given the character of a rebuttable or *juris tantum* presumption such as to effect a reversal of the onus of proof.” (*Ibid.*, p. 583, para. 56.)

This principle will also guide the Chamber in its assessment of the maps relied on by the Parties in the present case.

* * *

45. The Chamber is firstly asked, in accordance with Article 2, paragraphs (a) and (b), of the Special Agreement, to determine the course of the boundary in the sector of the River Niger and then to specify to which Party each of the islands in the river belongs.

As the Chamber has recalled (see paragraph 23 above), the Parties have expressly asked it to carry out its task on the basis of, in particular, the principle of the succession of States to the frontiers inherited from colonialism, namely the principle of the intangibility of such frontiers, also known as the principle of *uti possidetis juris*.

46. In the present case these territorial boundaries were no more than delimitations between different administrative divisions or colonies subject to the same colonial authority. Only at the moment of independence, also called the “critical date”, did these boundaries become international frontiers. Until that time the matter of delimitation was governed by French colonial law, known as “*droit d’outre-mer*”. As noted above (see paragraph 28), in the application of the principle of *uti possidetis juris*, French law does not play a role in itself but only as one factual element among others, or as evidence indicative of what has been called the “colonial heritage” at the critical date.

Since the Parties achieved independence virtually simultaneously (see paragraph 20 above), the period between 1 and 3 August 1960 can be considered as the critical date.

47. In accordance with the approach of the Chamber in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, the Chamber will first consider the various regulative or administrative acts invoked by the Parties; thus, pre-eminence is to be accorded to legal title over effective possession as a basis of sovereignty (*I.C.J. Reports 1986*, pp. 586-587, para. 63).

In this respect, it is relevant to recall that the Parties agree that, during the period under consideration, the power to create colonies or territories was vested in the President of the French Republic until 1946 and thereafter in the French Parliament, while colonial subdivisions could be created by the Governor-General of the AOF under the terms of the decree of 18 October 1904. In his circular No. 114c of 3 November 1912, the Governor-General of the AOF determined that the main subdivisions (“*cercles*”) would be established by the Governor-General, but that the Lieutenant-Governors would be entitled to create further territorial subdivisions within the “*cercles*” (see paragraph 30 above).

It appears that it is not disputed between the Parties that the competence to create or establish territorial entities included the power to deter-

mine their extent and to delimit them, although during the colonial period this was never made explicit in any regulative or administrative act.

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48. As the Chamber has set out above (see paragraphs 32 to 36), the colony of Dahomey was created by decree of 22 June 1894 and incorporated into the AOF by decree of 17 October 1899. It is not contested that, during this period, the colony of Dahomey comprised territories situated on both banks of the River Niger.

49. By *arrêté* of 23 July 1900 the Governor-General of the AOF established a Third Military Territory, which “will encompass the areas on the left bank of the Niger between Say and Lake Chad that were placed within the French sphere of influence by the [Anglo-French] Convention of 14 June 1898”.

50. On 20 December 1900 a decree of the President of the French Republic was issued which established a Third Military Territory “between the Niger and Lake Chad”. The decree, which was superior to an *arrêté* in the hierarchy of legal acts, made no reference to the *arrêté* of 23 July 1900. In the Chamber’s view, the decree must nevertheless be seen as a confirmation of the *arrêté* of the Governor-General; it covers, albeit in less precise terms, the same area between (the River) Niger and (Lake) Chad.

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51. Benin contends that the *arrêté* of 23 July 1900 established the boundary between the Third Military Territory and the colony of Dahomey at the left bank of the River Niger. According to Benin, by detaching the areas beyond the left bank from Dahomey, the river itself and the islands located therein remained part of that colony. Benin further contends that the boundary thus established was confirmed in 1954 by Mr. Raynier, Secretary-General and Governor *ad interim* of Niger, in his letter of 27 August (see paragraph 38 above).

52. Niger, for its part, denies that the *arrêté* of 23 July 1900 established a boundary; in its view the relevant wording was merely intended to indicate the territorial extent of the newly created Territory. It further observes that an understanding soon developed that the boundary was constituted by “the course of the river” and that this could only mean that the boundary was situated within the watercourse of the river. As evidence of this understanding, Niger refers to a letter of the French Minister for the Colonies dated 7 September 1901 (see paragraph 38 above). It further contends that this understanding was formally confirmed in two *arrêtés* of the Governor-General of the AOF of 8 December 1934 and 27 October 1938.

Sketch-map No. 3, on page 123 below, shows the claims of the Parties in respect of the boundary in the sector of the River Niger.

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53. The Chamber is of the view that the *arrêté* of 23 July 1900 in conjunction with the decree of 20 December 1900, which created the Third Military Territory, cannot be read as determining the boundaries thereof. The geographical references used can only be seen as indicating in general terms the extent of the newly created territory; the words “the areas on the left bank of the Niger” in the *arrêté* and “the Niger” in the decree make it clear that these areas are detached from the colony of Dahomey to which they previously belonged.

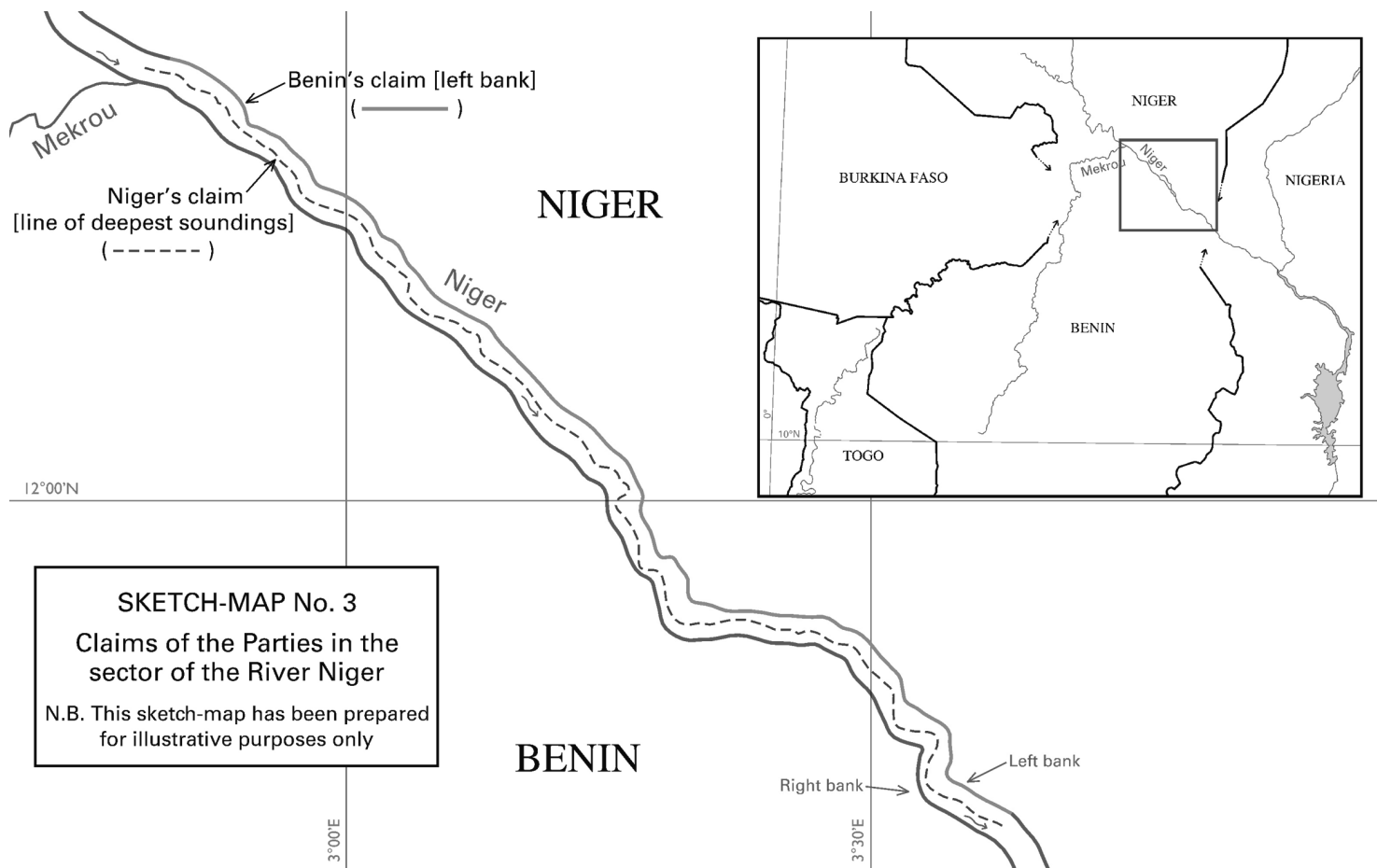
54. The conclusion that the legal instruments of 23 July and 20 December 1900 did not determine any boundary, and were not considered at the time as doing so, is confirmed by the letter of 7 September 1901 of the French Minister for the Colonies addressed to the Governor-General of the AOF. In this letter reference is made to two political reports in which the Governor of Dahomey indicated with regard to the delimitation between Dahomey and the Third Military Territory that “the course of the Niger” would constitute the best demarcation line, both from a geographical and a political point of view. The Governor-General apparently supported this suggestion and in his reply the Minister wrote that he “share[d] [the] view [of the Governor-General] on this point”.

55. Although this letter did not determine the boundary, the Chamber considers that it provides sufficient evidence that a delimitation had not taken place the year before. Nor has the Chamber found any document which shows that a delimitation was carried out in subsequent years. The Chamber notes in this respect that a preparatory draft of the *arrêté général* of 23 November 1912 on the internal administrative reorganization of the Military Territory of Niger contained a suggestion to locate the boundary at the right bank of the River Niger, thus allocating all islands in the river to this Territory, but that this proposal was not followed in the *arrêté* itself which did not contain any delimitation clause.

56. The Chamber therefore concludes that Benin’s argument that the *arrêté* of 23 July 1900 located the boundary at the left bank of the River Niger, and that this delimitation remained in force until the date of independence, cannot be upheld.

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57. As noted above (see paragraph 51), Benin contends that the boundary as established in the *arrêté* of 23 July 1900, was confirmed in a letter of Mr. Raynier, Governor *ad interim* of Niger, of 27 August 1954. In this letter, Mr. Raynier informed the *chef* of the *subdivision* of Gaya (Niger) that “the boundary of the territory of Niger [was] constituted by the



line of highest water, on the left bank of the river, from the village of Bandofay to the frontier of Nigeria”, and that “[c]onsequently, all the islands situated in this part of the river [formed] part of the territory of Dahomey”.

58. According to Benin, this letter both corroborates the existence of the boundary at the left bank and adds the further precision that it is constituted by “the line of highest water”. Benin argues that this was not beyond the competence of a Lieutenant-Governor; the letter must be deemed to be declaratory in so far as it confirmed and clarified an already existing title and constitutive in so far as it contained a specification of that title.

59. Benin further contends that Niger is bound by the letter since it subsequently became the subject of intercolonial correspondence and was relied upon by the authorities of Dahomey. The letter was never withdrawn by its author nor was it invalidated by a higher authority. In Benin’s view, “for the purposes of applying the *uti possidetis* principle, it is thus indeed the 1954 correspondence which constitutes the ‘colonial heritage’, that is to say, the ‘photograph’ of the territory at the critical date”.

60. Niger denies that Mr. Raynier was competent to determine an intercolonial boundary and consequently considers that the letter lacks any legal basis. It further contends that the letter only refers to one section of the limit (between Bandofay and the border with Nigeria) and therefore cannot determine the whole boundary. Niger finally asserts that the letter was of an intra-colonial character and never led to an inter-colonial understanding to which it could be held in good faith.

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61. The Chamber will first analyse the context in which the letter of 27 August 1954 was written.

From the case file it is clear that in the first half of 1954 difficulties had arisen between the local authorities in the two colonies about the legal status of certain islands in the river.

With regard to one of these islands, (“the island opposite Gaya”), the *commandant* of the *cercle* of Kandi (Dahomey) sent a letter dated 17 June 1954 to the Governor of Dahomey asking to whom that island belonged. On 23 July of the same year the *chef* of the *subdivision* of Gaya (Niger) addressed a more general request to the Governor of Niger, asking for “all relevant information regarding the islands in the river belonging to Niger or to Dahomey”.

62. In his response of 1 July 1954 to the first letter, the Governor of Dahomey stated that “the *arrêtés* delimiting the boundary between these two territories [were] silent” on the question of the attribution of the islands to each colony. He requested the *commandant* of the *cercle* of Kandi to draw up a list of those islands, the status of which could be the source of dispute, “in order to enable [him] to settle once and for all with

Niger, [with whom he intended to raise] the question, this problem of the boundary delimitation”.

63. In his reply, dated 27 August 1954, to the request made by the *chef* of the *subdivision* of Gaya, Mr. Raynier, the Governor *ad interim* of Niger (who had arrived in Niamey on 25 August 1954), made the statement referred to above (see paragraph 57). No reasoning was given nor were any references made to earlier regulative or administrative acts. The *commandant* of the *cercle* of Dosso (to which Gaya belonged) sent a copy of this letter to the *commandant* of the *cercle* of Kandi, who in turn transmitted it to the Governor of Dahomey.

64. On 11 December 1954 the Governor of Dahomey asked his counterpart in Niger “to kindly provide [him] with particulars of the instruments or agreements determining [the] boundaries” mentioned in the letter of 27 August. The Governor stated that he sought this clarification “in order that this question might be officially resolved” since “Dahomey’s archives and *arrêté général* No. 3578/AP of 27 October 1938 provide[d] no specific information on the matter”.

The Governor *ad interim* of Niger never responded to that request.

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65. The Chamber has already found that the *arrêté* of 23 July 1900 did not establish a boundary; consequently, the letter of 27 August 1954 cannot be seen as an authoritative confirmation of such a boundary.

The Chamber further notes that, under French colonial law, the Lieutenant-Governor of a colony had no competence to unilaterally delimit the external boundaries of the colony. The letter in itself cannot, therefore, be relied on by Benin as a legal title placing the boundary on the left bank of the river.

66. The boundary defined in the letter could have been validated by a higher authority and it was with that in mind that the Governor of Dahomey asked for further information in his letter of 11 December 1954. However, the letter of 11 December 1954 went unanswered. Moreover, no further action was taken by either of the two colonies in order to have the boundary indicated in the letter of 27 August 1954 validated by the Governor-General of the AOF. The Chamber therefore cannot uphold Benin’s claim according to which the letter of 27 August 1954 in conjunction with the *arrêté* of 23 July 1900 provides it with legal title to a boundary on the left bank.

67. With regard to Benin’s contention that the letter led to some sort of informal intercolonial understanding which bound Niger at the critical date in 1960, the Chamber observes that such a legal concept did not exist in French colonial law or “*droit d’outre-mer*” thus cannot provide Benin with title.

The Chamber is, however, aware of the fact that the letter of 27 August

1954 may have led to certain *effectivités*. Whether or not this is the case will be considered in due course.

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68. The Chamber will now turn to the acts invoked by Niger as evidence of its legal title, namely the *arrêtés* issued by the Governor-General of the AOF on 8 December 1934 and 27 October 1938 reorganizing the internal administrative structure of the colony of Dahomey and containing a description of the boundaries of the various *cercles*. In both *arrêtés* the north-west boundary of the *cercle* of Kandi is described as “the course of the Niger as far as its confluence with the Mekrou”.

69. According to Niger these *arrêtés* are the formal and authoritative confirmation that the boundary between Dahomey and the neighbouring colony of Niger was located in the watercourse itself, as had already been indicated in the letter of the Minister for the Colonies dated 7 September 1901. The *arrêtés* thus provide sufficient evidence of Niger’s title, even if the title itself is not explicitly laid down in a prior regulative or administrative act.

70. Benin contends that these *arrêtés* were merely of an intra-colonial character and were not intended to determine the boundary of Dahomey with another colony. Benin further argues that the wording used is imprecise and does not exclude a frontier on the left bank of the river.

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71. The Chamber first notes that both *arrêtés* were issued by the Governor-General, who was the authority competent to establish, delimit and reorganize the *cercles* of colonies. In so far as they describe the boundaries of these *cercles* with the neighbouring colonies which also came under his authority, the *arrêtés* do not have an exclusive internal character but may also be relied upon in intercolonial relations. Consequently it can be concluded on the basis of these *arrêtés* that the course of the River Niger constituted the intercolonial boundary.

72. The Chamber is unable, however, to deduce therefrom that that boundary was situated *in* the river, whether at the thalweg or the median line. The Chamber notes in this regard that the terminology used in the *arrêtés* is identical to that of the 1901 letter and is just as imprecise. The notion of the “course of the river” covers a range of possibilities: a boundary on either river bank or a boundary somewhere within the river.

73. Even if, as Niger contends, a certain practice had evolved on the basis of a boundary within the river (see paragraph 83 below), that practice was not endorsed by the *arrêtés*, although it may be assumed that the Governor-General would have been aware of the practice, which had

already been in existence for a considerable period of time. In the Chamber's view, it is evident that the term, "the course of the Niger", was not intended to indicate the precise location of the boundary but merely to indicate the separation line between the two colonies.

74. The Chamber thus finds that the 1934 and 1938 *arrêtés* do not establish a boundary *in* the river; it cannot therefore sustain Niger's claims as to title.

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75. In view of the foregoing, the Chamber concludes that neither of the Parties has succeeded in providing evidence of title on the basis of regulative or administrative acts during the colonial period.

76. Therefore, the Chamber will now consider whether the evidence furnished by the Parties with respect to *effectivités* can provide the basis for it to determine the course of the frontier in the sector of the River Niger and to which of the two States each of the islands in the river belongs, in particular the island of Lété.

77. The Chamber recalls in this regard that the Court has previously ruled in a number of cases on the legal relationship between *effectivités* and title.

The passage most pertinent to the present case can be found in the Judgment in the *Frontier Dispute (Burkina Faso/Republic of Mali)* case, in which the Chamber of the Court, having noted that "a distinction must be drawn among several eventualities" when evaluating the legal relationship between *effectivités* and title, stated, *inter alia*, that: "[i]n the event that the *effectivité* does not co-exist with any legal title, it must invariably be taken into consideration" (*I.C.J. Reports 1986*, p. 587, para. 63; see also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *I.C.J. Reports 1994*, p. 38, paras. 75-76; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, *I.C.J. Reports 2002*, p. 353, para. 68; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 678, para. 126).

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78. Both Parties claim that, during the colonial period, administrative acts were carried out by their local colonial authorities on a number of islands in the river. The Parties mention, in this regard, the provision of licences for grazing, fishing and tree-felling, as well as the levying of taxes, periodic sanitary control of livestock, military patrolling and police activities.

79. With regard to the management of the river, Niger claims that, for a certain period, it carried out management activities over the whole of the relevant stretch of the river. Niger further maintains that, when this

task was subsequently entrusted to Dahomey, the latter did not manage the whole of the river and that the colony of Niger continued to perform certain management activities on the part of the river contiguous to it. In Niger's view, its continued activities negate Dahomey's alleged rights on the whole of the river.

Benin denies that such river management activities can be relied upon as *effectivités* since, during the colonial period, such activities, even if carried out by the authorities of individual colonies, were performed in the exercise of a public function on behalf of the AOF as a whole.

80. Aside from documentary evidence, Benin has presented testimony taken from certain individuals in the form of "*sommations interpellatives*" (replies to official enquiries). According to Niger, such testimony, taken several decades after the period in question, is unreliable and untrustworthy.

The Chamber notes that Benin did not invoke this testimony in the later stages of the proceedings.

81. Finally, both Parties have presented a number of maps in order to support their claims. Neither of them claims, however, that these maps have any "intrinsic legal force" in the sense that they represent the "physical expressions of the will of the State . . . concerned" (see *Frontier Dispute (Burkina Faso/Republic of Mali)*, I.C.J. Reports 1986, p. 582, para. 54; see also paragraph 44 above). The Chamber notes that none of these maps were annexes to an official text.

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82. The Chamber will first analyse the various activities prior to 1954, presented as *effectivités* by the Parties.

83. On 3 July 1914 the *commandant* of the *secteur* of Gaya (Niger), *administrateur adjoint* Sadoux, wrote a letter to the *commandant* of the *cercle* of Moyen-Niger (Dahomey), in which he referred to the use of certain islands by the local inhabitants of both banks of the river. He wrote this letter "for the sole purpose of clearly determining when grazing permits [should] be issued to the Peuhls from both banks and delimiting the territorial jurisdiction of the indigenous tribunals in the two colonies". *Administrateur adjoint* Sadoux attached to his letter a list of islands in the border area, drawn up on the basis of an exploration of the whole stretch of the river between Koulou and the Nigerian border, with an indication of the colony to which each island belonged according to its position with respect to the main navigable channel. *Administrateur adjoint* Sadoux defined this channel as "the river's main channel, not the widest channel, but the *only channel navigable at low water*" (emphasis in the original).

84. In his letter, *administrateur adjoint* Sadoux invited the *commandant* of the *cercle* of Moyen-Niger to come to Gaya for further discus-

sions if the contents of the list were contested. The case file does not contain a reaction to the letter. However, it appears that such a meeting did take place and led to an agreement.

Thus, in a report entitled “Monographie de Gaya” dated May 1917, Mr. Esperet, who was heading *ad interim* the *subdivision* of Gaya, stated:

“In July 1914 the *commandant* of the *subdivision* of Gaya held consultations on site with the *commandant* of the *cercle* of Kandy, and they proposed to their respective heads of colony that the permanently navigable channel of the Niger solely be taken as the boundary. Although those proposals were never officially approved, they have since then always served as the basis for the settlement of any disputes between different groups of Peuhls.”

He also mentioned that “the village of Lété” was administered by Gaya.

85. Although difficulties arose in 1919 with regard to the administration of the island of Lété by Gaya, which was contested by Dahomey, the 1914 arrangement, which became known as the 1914 *modus vivendi*, seems to have been complied with in subsequent years.

In 1925 a proposal was made by Dahomey to exchange Lété for the three islands opposite Gaya, which the Sadoux letter had attributed to Dahomey. Asked for his reaction by the Governor of Niger, the *commandant* of the *cercle* of Niamey (Niger) stated that the situation, based on the *modus vivendi*, was not wholly satisfactory. He therefore suggested that

“a clearer boundary be adopted: . . . the boundary between the two colonies is marked by the right bank of the river at the line of highest water. That will give all the islands to the colony of Niger without any possibility of dispute.”

No action was taken upon either the proposal of Dahomey or that of the *commandant* of the *cercle* of Niamey.

86. The case file does not contain other documents from that period referring to the boundary issue; the 1914 *modus vivendi* seems to have functioned satisfactorily until the events of 1954 which led to the correspondence described in paragraphs 61 to 64 above. In a telegram of 10 June 1941 to the *commandant* of the *cercle* of Dosso (Niger), the *chef* of the *subdivision* of Gaya referred to the 1914 *modus vivendi*. He commented that:

“[t]he permanently navigable channel of the Niger was solely adopted as boundary. Those proposals have *never been officially approved* since 1914. A decision on the matter is desirable.” (Emphasis in the original.)

87. In the years prior to 1954, the island of Lété seems to have been continuously administered by the *subdivision* of Gaya. The tax registers of Gaya, in so far as they have been preserved, contain references to “Lété” in the years 1925, 1927, 1928, 1930, 1932, 1935 and 1936.

“Lété” was included in a list of villages situated in the *subdivision* of Gaya, with an indication of the number of inhabitants, in 1932, 1945, 1946 and 1954. It was also included in census lists in 1944 and 1945.

Finally, the Governor of Niger authorized the felling of palm trees on the island of Lété in 1946.

88. Benin has not submitted any official document from colonial authorities regarding an effective exercise of authority, during the period under consideration, on the island of Lété or on any other island situated to the left of the main navigable channel.

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89. The Chamber will now turn to the *effectivités* in the period from 1954 until the critical date in 1960. It recalls that, on 27 August 1954, the Governor *ad interim* of Niger wrote a letter in which he stated that the boundary was situated “at the line of highest water, on the left bank of the river, from the village of Bandofay to the frontier of Nigeria” and that “all the islands situated in this part of the river [formed] part of the territory of Dahomey”.

90. During this period, the claims of Dahomey to be entitled to administer the island of Lété became more frequent.

In a letter of 23 May 1955 to the *commandant* of the *cercle* of Kandi, the *chef de poste administratif* at Malanville (Dahomey) mentioned certain difficulties which had arisen with respect to the collection of taxes from inhabitants of Niger who held cattle on Lété. He raised the question of “whether the tax collector of Dahomey [was] entitled to operate on the island of Lété”.

In a letter of 20 June 1955 to the *commandant* of the *cercle* of Dosso (Niger), dealing with the same incidents, the *chef* of the *subdivision* of Gaya, “without in any way wishing to raise the question of the boundary” (a clear reference to the letter of 27 August 1954), emphasized that the island of Lété “[had] consistently been regarded as belonging to Niger”.

91. In 1956, difficulties arose again, this time with regard to the collection of taxes on the export of smoked fish from Lété. The *commandant* of the *cercle* of Kandi informed the Governor of Dahomey of these incidents and added that he had “rediscovered” the letter of 27 August 1954 which stated that the river and all the islands belonged to Dahomey.

92. In that same year, the Director of the Geographical Service of the AOF requested the *commandants* of the *cercles* of Dosso and Kandi to inform him of the nature and date of the official texts that defined the

boundary between Dahomey and Niger. In this regard, the *chef* of the *subdivision* of Gaya informed the *commandant* of the *cercle* of Dosso that he had “rediscovered” the 1914 Sadoux letter, which he called “the only serious document on the matter”.

The *commandant* of the *cercle* of Kandi, by letter of 28 June 1956, informed the Director of the Geographical Service that “this question of boundaries [had], to [his] knowledge, never been dealt with in any official text”. He added that there had been disputes in the past and attached in this regard the letter of 27 August 1954 of the Governor *ad interim* of Niger.

93. In 1955, 1957 and 1958, “Lété” is mentioned in the list of polling stations in Niger.

94. Serious troubles arose in 1959, the year before independence. In a letter of 16 June 1959 the *chef* of the *subdivision* of Malanville informed the Prime Minister of Dahomey (which was at the time an autonomous republic within the *Communauté française*) about a dispute between inhabitants of Gouroubéri (Dahomey) and Peuhls from Niger who, in violation of the property rights of the former, had occupied the island of Lété. He added that he had had unsuccessful consultations with his counterpart in Gaya, who seemed to support the Peuhls and “[was] . . . unaware of the régime governing the islands”. The *chef* of the *subdivision* of Malanville was of the view that the boundary was located on the left bank of the river and stated that, according to his information, the island of Lété had always belonged to the inhabitants of Gouroubéri.

95. In December 1959, the *commandant* of the *cercle* of Kandi visited Malanville. The *chef* of the *subdivision* of Gaya was invited to meet him on Lété but that meeting did not take place. Although the *commandant* of the *cercle* of Kandi visited the island, the *chef* of the *subdivision* of Gaya “did not come to the meeting”. It was said later on that he had been unaware of the visit.

96. Riots broke out on the night of 29 June 1960, during which four Peuhls from Niger were killed and a number of dwellings were set on fire. In a letter dated 3 July 1960, the *commandant* of the *cercle* of Kandi informed the Minister for the Interior of Dahomey that order had been restored and that both Gaya (Niger) and Malanville (Dahomey) had stationed a small police unit on the island.

97. In a letter dated 13 July 1960 to the Prime Minister of Dahomey, the President of the Council of Ministers of Niger (which was also at the time an autonomous republic within the *Communauté française*) proposed to settle the dispute for once and for all through a formal agreement on the question of the “island of Lété (*subdivision* of Gaya, Niger)”.

In his response dated 29 July 1960, the Prime Minister of Dahomey observed that the matter had already been settled by the letter of 27 August 1954 but that he did not object to consultations in order to reach a formal agreement.

In a letter dated 31 July 1960, the Prime Minister of Niger again

pressed for a formal settlement. He referred, however, not to the 1954 letter but, *inter alia*, to the 1914 letter and proposed to take as the boundary “the median line of the river’s permanent channel, or of its deepest channel”.

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98. On the basis of the evidence before it, the Chamber finds that, from 1914 to 1954, the terms of the *modus vivendi* established by the 1914 Sadoux letter were in general respected and that, during this period, the main navigable channel of the River Niger was considered by both sides to be the boundary. As a result, administrative authority was exercised by Niger on the islands to the left and by Dahomey on the islands to the right of that line. The entitlement of Niger to administer the island of Lété was sporadically called into question for practical reasons but was neither legally nor factually contested.

99. With respect to the islands opposite Gaya, the Chamber notes that, on the basis of the *modus vivendi* established by the 1914 Sadoux letter, these islands were considered to fall under the jurisdiction of Dahomey. It recalls in this regard that in 1925 a proposal was made to Niger by the authorities of Dahomey for the exchange of the three islands opposite Gaya for the island of Lété but that no action was taken on this proposal (see paragraph 85 above). The Chamber has not received any information to indicate that these islands were administered at that time from anywhere else other than the *cercle* of Kandi (Dahomey). The Chamber therefore concludes that, in this sector of the river, the boundary was regarded as passing to the left of these three islands.

100. The situation is less clear in the period between 1954 and 1960. It is apparent that both Parties periodically claimed rights over the islands, in particular Lété, and also occasionally performed administrative acts as a display of authority. However, on the basis of the evidence before it, the Chamber cannot conclude that the administration of Lété, which before 1954 was undoubtedly carried out by Niger, was effectively transferred to or taken over by Dahomey. In this respect, the Chamber notes that a report of the gendarmerie of Malanville of 1 July 1960 stated that Lété was “currently administered by the *subdivision* of Gaya”.

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101. Benin contends that, even if the local authorities in Niger did administer Lété and other islands during the period between 1914 and 1954, they could not have done so in the belief that they were acting “as of right”.

In Benin’s view, the *modus vivendi* was merely a temporary and prac-

tical arrangement, pending a definitive settlement of the boundary issue. By its very nature, it precluded the existence of an intention to act “as of right” and these administrative acts cannot therefore be relied on as *effectivités*.

As regards the period after 1954, Benin contends that Niger had, in the letter of 27 August 1954, relinquished any intention to act “as of right”.

102. The Chamber observes that the concept of the intention and will to act as sovereign, as mentioned in the *Legal Status of Eastern Greenland (Denmark v. Norway)* case (1933, *P.C.I.J., Series A/B, No. 53*, pp. 45-46), is a concept of international law and cannot be transplanted purely and simply to colonial law. The Chamber’s sole task in applying the principle of *uti possidetis juris* is to ascertain whether it was the colony of Dahomey or that of Niger which effectively exercised authority over the areas which the Parties now claim as sovereign States.

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103. For all these reasons and in the circumstances of the case, particularly in light of the evidence furnished by the Parties, the Chamber concludes that the boundary between Benin and Niger follows the main navigable channel of the River Niger as it existed at the dates of independence, it being understood that, in the vicinity of the three islands opposite Gaya, the boundary passes to the left of these islands. Consequently, Benin has title to the islands situated between the boundary thus defined and the right bank of the river and Niger has title to the islands between that boundary and the left bank of the river.

* *

104. The Chamber will now proceed to determine the precise location of the boundary line in the main navigable channel, namely the line of deepest soundings, as it existed at the dates of independence; it will then determine to which of the Parties each of the islands in the river belongs.

105. Benin contends that the navigable channel of the River Niger is unstable and has changed over the years as the result of the siltation of the river and the formation of sandbanks of a virtually permanent character. Benin has highlighted a number of cases in which this phenomenon has allegedly resulted in a change in the position of the main navigable channel around the islands. It referred, in particular, to the islands of Kotcha Barou, Gagno Goungou and Dolé Barou.

106. Niger does not deny the periodic occurrence of siltation which may lead to the formation of sandbanks but contends that, under normal circumstances, these accumulations of sand are washed away during the high-water season when the speed and pressure of the watermass increase

considerably. Niger admits that, with respect to the island of Dolé Barou, the main channel has moved to the left side of the island since the accession of the two States to independence, but submits that this may be due to works on dykes carried out upstream on the left bank of the river. It further submits that a number of hydrological surveys, carried out over a period of more than 60 years, have demonstrated that the riverbed is remarkably stable and that the main navigable channel has remained unchanged.

107. The Chamber initially notes that, over the course of time, a number of hydrographic and topographic surveys have taken place. In this respect, the following studies are the most pertinent:

1. the maps produced as a result of the mission of Lieutenant Hourst in 1896;
2. the report of the mission carried out by the engineer A. M. J. Beneyton between 1926 and 1932 on behalf of the AOF;
3. the final report of a study on the navigability of the Middle Niger, carried out by the Netherlands Engineering Consultants (NEDECO) between 1967 and 1970 at the request of the Governments of Dahomey, Mali, Niger and the Federation of Nigeria;
4. a series of annotated aerial photographs taken in 1975 and published in a report of IGN-Paris in 1979.

108. The Chamber observes that the position of the main navigable channel as determined by each of the missions is very similar. The Chamber considers that this indicates that the riverbed is relatively stable and that any siltation which has taken place has rarely led to a noticeable change in the location of the main navigable channel. This appears to have been the case in both the colonial and post-independence period.

109. Given that the Chamber has to determine the course of the boundary at the time of independence, the NEDECO report of 1970 provides the most useful information on the situation at the critical date. In view of the proven stability of the riverbed, it may be assumed that the situation between 1967 and 1970 was virtually identical with that in 1960.

110. In this respect, the Chamber considers it of great importance that the 1967-1970 survey was carried out by an independent firm renowned for its expertise and experience and that the results were contained in a report presented to the Governments of four riparian States, including the Parties to the present case. Furthermore, the findings of the NEDECO study were not contested at the time of their publication and they are corroborated by both earlier and later studies.

111. The report of the NEDECO study examines the navigability of the River Niger between Tossaye in Mali and Yelwa in Nigeria. It there-

fore covers the whole stretch of the river between Benin and Niger from its confluence with the Mekrou to the frontier with Nigeria.

112. The maps annexed to the report are very detailed, each of them covering a stretch of 25 km and showing the longitudinal profile of the main navigable channel based on the results of echosounding carried out, using a boat-mounted echo-sounder, on various occasions during the high and low water season. In order to check the position of the channel, cross-sections were made by NEDECO and the deepest point of each section was fixed. Subsequently, the distance was measured from this point to the two banks, or in certain cases to one of them. Finally, these distances were represented on a topographical map on a scale of 1:50,000.

The Chamber observes that the main navigable channel identified by the report of the NEDECO study generally coincides with or is very similar to the one that is represented in the maps and sketch-maps resulting from the 1896 Hourst mission and the 1926-1932 Beneyton mission.

113. The Chamber further notes that map No. 36 of the NEDECO report indicates that in the sector opposite the village of Gaya, the river has two navigable channels. On the basis of the available data, it is not possible to say which one is consistently deeper. This is however without consequence in the present case given the conclusions drawn by the Chamber, in paragraphs 99 and 103 above, from the colonial *effectivités* in that sector. The Chamber considers that, in the sector of the three islands opposite Gaya, the boundary is constituted by the line of deepest soundings of the left navigable channel. However, in the vicinity of the last of these islands, Kata Goungou, the boundary deviates from that line and passes to the left of that island.

114. With the exception indicated in the previous paragraph, the boundary between the Parties therefore follows the line of deepest soundings of the main navigable channel of the River Niger as it appears in the 1970 NEDECO report, from the intersection of this line with the median line of the River Mekrou until its intersection with the boundary of the Parties with Nigeria.

Opposite Gaya, the boundary is constituted by the line of deepest soundings of the left navigable channel from the point situated at co-ordinates 11° 52' 29" latitude North and 3° 25' 34" longitude East until the point located at co-ordinates 11° 51' 55" latitude North and 3° 27' 41" longitude East, where the boundary deviates from this channel and passes to the left of the island of Kata Goungou, subsequently rejoining the main navigable channel at the point located at co-ordinates 11° 51' 41" latitude North and 3° 28' 53" longitude East.

115. It follows from the foregoing that the boundary line between Benin and Niger in the sector of the River Niger, proceeding downstream, passes through the points numbered from 1 to 154, the co-ordinates of which are indicated in the table below:

(Clarke 1880 Ellipsoid)

<i>Co-ordinates on the line</i>		
<i>Point No.</i>	<i>Latitude North</i>	<i>Longitude East</i>
001	12° 24' 31"	2° 49' 36"
002	12° 24' 25"	2° 50' 08"
003	12° 24' 24"	2° 50' 20"
004	12° 24' 06"	2° 50' 43"
005	12° 23' 54"	2° 50' 55"
006	12° 23' 46"	2° 51' 05"
007	12° 23' 34"	2° 51' 25"
008	12° 23' 32"	2° 51' 45"
009	12° 23' 25"	2° 52' 07"
010	12° 23' 16"	2° 52' 21"
011	12° 22' 56"	2° 52' 40"
012	12° 22' 41"	2° 52' 52"
013	12° 22' 38"	2° 53' 04"
014	12° 22' 00"	2° 53' 18"
015	12° 21' 38"	2° 53' 33"
016	12° 21' 11"	2° 54' 04"
017	12° 21' 07"	2° 54' 16"
018	12° 20' 58"	2° 54' 25"
019	12° 20' 36"	2° 54' 52"
020	12° 20' 12"	2° 55' 19"
021	12° 20' 09"	2° 55' 25"
022	12° 20' 06"	2° 55' 38"
023	12° 19' 41"	2° 56' 01"
024	12° 19' 29"	2° 56' 08"
025	12° 19' 06"	2° 56' 29"
026	12° 19' 00"	2° 56' 40"
027	12° 18' 14"	2° 57' 11"
028	12° 17' 55"	2° 57' 16"
029	12° 17' 15"	2° 57' 47"
030	12° 17' 03"	2° 58' 10"
031	12° 16' 52"	2° 58' 41"
032	12° 16' 38"	2° 59' 32"
033	12° 16' 10"	3° 00' 35"
034	12° 15' 59"	3° 00' 49"
035	12° 15' 26"	3° 01' 10"
036	12° 15' 01"	3° 01' 18"
037	12° 14' 27"	3° 01' 31"
038	12° 14' 01"	3° 01' 47"
039	12° 13' 43"	3° 02' 04"
040	12° 13' 41"	3° 02' 11"
041	12° 13' 34"	3° 02' 24"
042	12° 13' 12"	3° 02' 45"
043	12° 12' 31"	3° 03' 33"

Co-ordinates on the line

<i>Point No.</i>	<i>Latitude North</i>	<i>Longitude East</i>
044	12° 12' 22"	3° 03' 36"
045	12° 12' 06"	3° 03' 29"
046	12° 11' 46"	3° 03' 35"
047	12° 11' 01"	3° 04' 19"
048	12° 10' 36"	3° 04' 56"
049	12° 10' 26"	3° 05' 49"
050	12° 10' 21"	3° 06' 03"
051	12° 10' 05"	3° 06' 25"
052	12° 09' 46"	3° 06' 50"
053	12° 09' 27"	3° 07' 30"
054	12° 09' 16"	3° 07' 40"
055	12° 08' 52"	3° 07' 39"
056	12° 08' 25"	3° 07' 38"
057	12° 08' 10"	3° 07' 59"
058	12° 07' 48"	3° 08' 41"
059	12° 07' 21"	3° 09' 15"
060	12° 06' 49"	3° 10' 07"
061	12° 06' 21"	3° 10' 35"
062	12° 05' 43"	3° 10' 58"
063	12° 05' 24"	3° 11' 07"
064	12° 05' 01"	3° 11' 20"
065	12° 04' 44"	3° 11' 39"
066	12° 04' 33"	3° 11' 54"
067	12° 04' 24"	3° 12' 04"
068	12° 04' 09"	3° 12' 22"
069	12° 03' 58"	3° 12' 43"
070	12° 03' 39"	3° 13' 13"
071	12° 03' 20"	3° 13' 29"
072	12° 03' 01"	3° 13' 49"
073	12° 02' 51"	3° 13' 57"
074	12° 02' 18"	3° 14' 05"
075	12° 01' 57"	3° 14' 22"
076	12° 01' 53"	3° 14' 36"
077	12° 01' 54"	3° 15' 06"
078	12° 01' 30"	3° 15' 33"
079	12° 01' 10"	3° 15' 39"
080	12° 00' 53"	3° 16' 13"
081	12° 00' 42"	3° 16' 13"
082	12° 00' 21"	3° 15' 54"
083	12° 00' 09"	3° 15' 38"
084	11° 59' 52"	3° 15' 25"
085	11° 59' 24"	3° 15' 34"
086	11° 58' 54"	3° 16' 08"
087	11° 58' 33"	3° 16' 21"

Co-ordinates on the line

<i>Point No.</i>	<i>Latitude North</i>	<i>Longitude East</i>
088	11° 58' 14"	3° 16' 30"
089	11° 57' 56"	3° 16' 42"
090	11° 57' 19"	3° 16' 51"
091	11° 56' 40"	3° 16' 45"
092	11° 56' 07"	3° 17' 00"
093	11° 56' 01"	3° 17' 47"
094	11° 55' 55"	3° 17' 56"
095	11° 55' 48"	3° 18' 00"
096	11° 55' 01"	3° 18' 13"
097	11° 54' 51"	3° 18' 13"
098	11° 54' 42"	3° 18' 12"
099	11° 54' 12"	3° 18' 15"
100	11° 53' 20"	3° 18' 50"
101	11° 53' 08"	3° 19' 06"
102	11° 52' 54"	3° 19' 17"
103	11° 52' 53"	3° 19' 43"
104	11° 53' 11"	3° 20' 15"
105	11° 53' 09"	3° 20' 23"
106	11° 52' 57"	3° 20' 43"
107	11° 53' 08"	3° 21' 38"
108	11° 53' 13"	3° 22' 13"
109	11° 53' 13"	3° 22' 37"
110	11° 53' 11"	3° 23' 01"
111	11° 52' 59"	3° 23' 37"
112	11° 52' 39"	3° 24' 11"
113	11° 52' 37"	3° 24' 44"
114	11° 52' 43"	3° 25' 06"
115	11° 52' 29"	3° 25' 34"
116	11° 52' 30"	3° 25' 55"
117	11° 52' 37"	3° 26' 28"
118	11° 52' 30"	3° 26' 50"
119	11° 51' 55"	3° 27' 41"
120	11° 51' 53"	3° 28' 20"
121	11° 51' 41"	3° 28' 53"
122	11° 51' 25"	3° 29' 12"
123	11° 51' 03"	3° 29' 22"
124	11° 50' 36"	3° 29' 38"
125	11° 50' 03"	3° 30' 11"
126	11° 49' 39"	3° 30' 34"
127	11° 49' 22"	3° 30' 53"
128	11° 48' 53"	3° 31' 16"
129	11° 48' 29"	3° 31' 15"
130	11° 48' 01"	3° 31' 10"
131	11° 47' 34"	3° 31' 13"

<i>Co-ordinates on the line</i>		
<i>Point No.</i>	<i>Latitude North</i>	<i>Longitude East</i>
132	11° 47' 16"	3° 31' 22"
133	11° 47' 06"	3° 31' 35"
134	11° 46' 56"	3° 31' 51"
135	11° 46' 46"	3° 32' 06"
136	11° 46' 41"	3° 32' 31"
137	11° 46' 42"	3° 32' 51"
138	11° 46' 46"	3° 33' 13"
139	11° 46' 45"	3° 33' 31"
140	11° 46' 33"	3° 33' 46"
141	11° 46' 21"	3° 33' 53"
142	11° 46' 09"	3° 33' 56"
143	11° 45' 53"	3° 33' 55"
144	11° 45' 35"	3° 33' 45"
145	11° 45' 06"	3° 33' 15"
146	11° 44' 32"	3° 33' 02"
147	11° 44' 05"	3° 32' 59"
148	11° 43' 27"	3° 33' 23"
149	11° 43' 16"	3° 33' 42"
150	11° 43' 08"	3° 34' 07"
151	11° 43' 11"	3° 34' 16"
152	11° 42' 58"	3° 34' 38"
153	11° 42' 52"	3° 34' 58"
154	11° 42' 39"	3° 35' 18"

The points that constitute the boundary line are further represented, purely for illustrative purposes, on sketch-map No. 4 (in six sheets) attached to the present Judgment¹.

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116. The Chamber will now determine to which of the Parties each of the islands in the River Niger belongs, following the course of the river downstream from its confluence with the Mekrou to the frontier with Nigeria.

The Chamber has not received reliable information that new islands formed nor that islands disappeared between 1960 and 1967-1970. As regards subsequent years, it observes that one of the islands identified by Niger, namely Sandi Tounga Barou, which is not represented on any map prepared before 1973, does appear on various aerial photographs and SPOT images taken from 1973 onwards. The Chamber must consequently determine to which of the Parties this island belongs. With

¹ A copy of this map will be found in a pocket at the end of this fascicle or inside the back cover of the volume of *I.C.J. Reports 2005*. [Note by the Registry.]

respect to the “island” of Pekinga, which Niger in its final submissions attributed to Benin, the Chamber notes that it is not identifiable as a separate island on the maps annexed to the NEDECO report, but instead appears to be part of the river bank on the Benin side.

117. The Chamber finds, on the basis of paragraphs 103 *et seq.*, that

1. Boumba Barou Béri belongs to Niger;
2. Boumba Barou Kaïna belongs to Niger;
3. Kouassi Barou belongs to Niger;
4. Sansan Goungou, also known as Fodofey (or Fandofay) Barou or Koro Kouara Barou, belongs to Niger;
5. Lété Goungou belongs to Niger;
6. Tondi Kwaria Barou, also known as Faran Tounga Barou, belongs to Benin;
7. Monboye Tounga belongs to Niger;
8. Sini Goungou, also known as Tondika Goungou, belongs to Niger;
9. Lama Barou belongs to Niger;
10. Kotcha Barou, also known as Bagou Barou, Gouandi Tounga Barou or Ibrahim Ba Ama Founbou, belongs to Niger;
11. Koki Barou belongs to Benin;
12. Gagno Goungou, also known as Gaya Goungou or Karsani Goungou, belongs to Benin;
13. Kata Goungou belongs to Benin;
14. Sandi Tounga Barou belongs to Benin;
15. Gandégabi Barou Kaïna belongs to Benin;
16. Gandégabi Barou Béri belongs to Niger;
17. Guirawa Barou, also known as Issa Kaïna, belongs to Niger;
18. Dan Koré Guirawa, also known as Bédari, belongs to Benin;
19. Barou Elhadji Dan Djoda, also known as Sabonbarou or Wéra Barou, belongs to Benin;
20. Koundou Barou belongs to Benin;
21. Elhadji Chaïbou Barou Béri belongs to Niger;
22. Elhadji Chaïbou Barou Kaïna belongs to Niger;
23. Goussou Barou, also known as Gattawani Béri Barou or Dandani-koye Barou, belongs to Niger;
24. Beyo Barou, also known as Wéra Kaïna Barou, belongs to Niger;
25. Dolé Barou, also known as Barou Béri or Bani Koubaye, belongs to Niger.

These various islands are shown on the illustrative sketch-map referred to in paragraph 115 above.

118. Finally, the Chamber observes that the determination in regard

to the attribution of islands effected above is without prejudice to any private law rights which may be held in respect of those islands.

* *

119. Niger has also asked the Chamber to determine the frontier on the two bridges between Gaya (Niger) and Malanville (Benin). Benin contends that this issue is not covered by the dispute submitted to the Chamber under the terms of the Special Agreement and that the Chamber therefore has no jurisdiction to comply with Niger's request.

120. The Chamber notes in this regard that, in the Special Agreement, "[t]he Court is requested to . . . determine the course of the boundary . . . in the River Niger sector". Since the bridges between Gaya and Malanville are located in that sector, the Chamber considers that it has jurisdiction to determine where the boundary is located on these bridges.

121. Niger contends that the boundary is situated at the middle point of each of the bridges. It observes that the construction and maintenance of these structures has been financed by the Parties on an equal basis and that the bridges are their joint property. According to Niger, it logically follows that the boundary is situated at the middle point of this joint property and does not follow the boundary line in the river itself. Niger further contends that this solution has been adopted in a substantial number of previous and existing agreements.

122. Benin, for its part, submits that the arrangements for the construction and maintenance of the bridges and any provisions on joint ownership bear no relation to the issue of territorial sovereignty. It further contends that a difference between the location of the boundary on the bridges and the course of the boundary in the river beneath would be incoherent and lead to legal inconsistencies.

123. The Chamber initially observes that the two bridges crossing the River Niger between Gaya and Malanville were built in 1958 and 1988-1989 respectively. They are more than 300 m in length and they connect platforms built on each of the banks, which are used for customs and other administrative purposes.

The Chamber further observes that there are a number of arrangements in place which provide that the use and maintenance of these bridges, of which the Parties have joint ownership, is to be financed by them on an equal basis.

It finally observes that these agreements and arrangements do not contain any provisions on territorial issues.

124. The Chamber notes that neither of the Parties has contended that there is a rule of customary international law regarding territorial delimitation in the case of bridges over international watercourses. It further notes that the various precedents cited in the case file are all based on bilateral agreements.

The Chamber observes that, in the absence of an agreement between

the Parties, the solution is to extend vertically the line of the boundary on the watercourse. This solution accords with the general theory that a boundary represents the line of separation between areas of State sovereignty, not only on the earth's surface but also in the subsoil and in the superjacent column of air. Moreover, the solution consisting of the vertical extension of the boundary line on the watercourse avoids the difficulties which could be engendered by having two different boundaries on geometrical planes situated in close proximity to one another.

In light of the foregoing, the Chamber concludes that the boundary on the bridges between Gaya and Malanville follows the course of the boundary in the river. This finding is without prejudice to the arrangements in force between Benin and Niger regarding the use and maintenance of these bridges, which are financed by the two States on an equal basis (see paragraph 123 above). The Chamber observes in particular that the question of the course of the boundary on the bridges is totally independent of that of the ownership of those structures, which belong to the Parties jointly.

* * *

125. The Chamber is further charged under Article 2 (*c*) of the Special Agreement with “determin[ing] the course of the boundary between the two States in the River Mekrou sector”.

Although Benin contended that this issue was a “quite artificial dispute created by Niger at the time of negotiation of the Special Agreement” for tactical purposes and that until then there had never been any disagreement between the Parties on the matter — an assertion which Niger strongly denied —, there can be no doubt that the Chamber's task, according to the express terms of the Special Agreement, includes settlement of this aspect of the dispute, without having to speculate on the motives of either Party. Indeed Benin has not sought to argue otherwise.

* *

126. The dispute between the Parties in regard to this sector of the boundary may be summarized as follows.

According to Benin, the boundary follows the median line of the River Mekrou. That is said to result, on the one hand, from the application of the *uti possidetis juris* principle, since, at their dates of independence, the territories of Dahomey and Niger were separated by the course of that river pursuant both to the legal titles in force and to the *effectivités*; on the other hand and in any event, such a boundary is said to have been confirmed by Niger's formal recognition, at the time of the negotiations between the two Parties in 1973 and 1974 with a view to the construction of the Dyodyonga dam, that the Mekrou did indeed constitute the boundary between their respective territories. In this connection, Benin

relies on a Note Verbale from Niger dated 29 August 1973 and on the minutes of a meeting held on 8 February 1974 between the experts of the two Parties (see paragraph 39 above), the River Mekrou being indicated in both of these documents as constituting the boundary between the two States.

According to Niger, the boundary in the sector in question follows a line comprising two parts: the first is a straight line joining the point of confluence of the River Mekrou with the River Niger to the point where the Paris meridian meets the Atakora mountain range; the second part joins this latter point to the point where the former boundary between the *cercles* of Say and Fada meets the former boundary between the *cercles* of Fada and Atakora. That is claimed to result from the combined effect of the regulatory instruments which, during the colonial period, defined the boundary between Dahomey and Niger in the sector in question, namely the decree of 2 March 1907 incorporating the *cercles* of Fada-N'Gourma and Say into the colony of Haut-Sénégal et Niger (to which Niger succeeded) and the decrees of 12 August 1909 and 23 April 1913 (see paragraph 39 above) modifying the boundary of the latter colony with Dahomey. As regards the documents of 1973 and 1974 relied on by Benin, Niger contends that, even assuming that they can be regarded as creating a legal obligation, such obligation is vitiated by a manifest error which would deprive it of any validity according to the rules of customary law concerning defects in international agreements, as codified in Article 48, paragraph 1, of the Vienna Convention on the Law of Treaties.

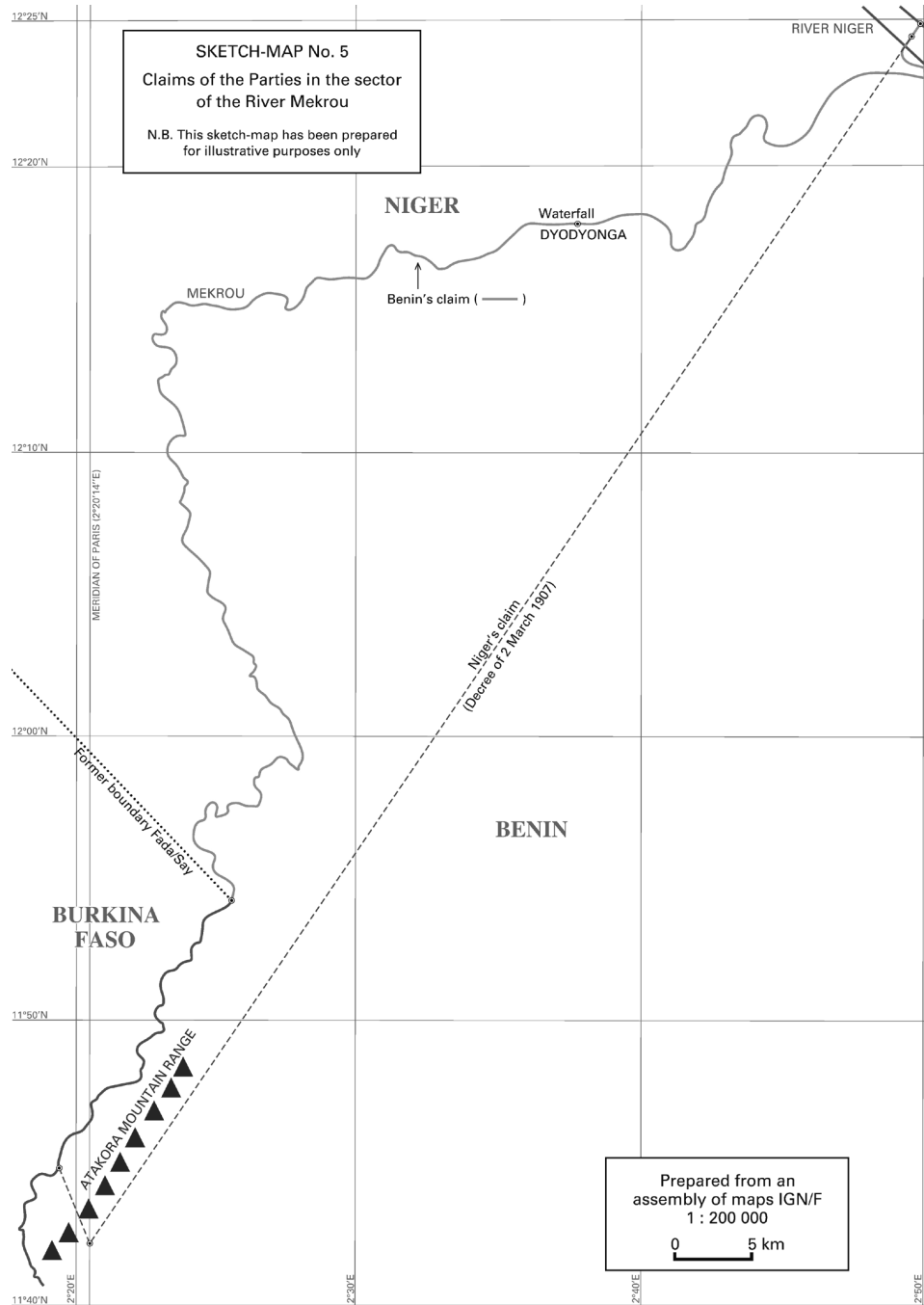
Sketch-map No. 5, on page 144 below, shows the claims of the Parties in respect of the boundary in the sector of the River Mekrou.

* *

127. The Chamber will first ascertain, by application of the principle of *uti possidetis juris*, what the course of the intercolonial boundary was at the critical dates of independence in August 1960. Only then is it required, if necessary, to consider the documents of 1973 and 1974 relied on by Benin in order to determine whether they could validly have produced legal effects capable of affecting the course of the international boundary as previously defined, that is to say the boundary resulting from the *uti possidetis* of 1960.

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128. 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, in accordance with the rules recalled above (see paragraphs 47 and 77).



129. The first text for consideration is the above-mentioned decree of 2 March 1907, the object of which was to change the course of the boundary between the colony of Haut-Sénégal et Niger and that of Dahomey by incorporating the *cercles* of Fada N’Gourma and Say, until then part of Dahomey, into the neighbouring colony. Article 1 of that decree provides that the new intercolonial boundary:

“is constituted, from the boundary of Togo, by the present boundary of the *cercle* of Gourma until it reaches the Atakora mountain range, whose summit it follows until it meets the Paris meridian, from which point it runs in a straight line in a north-easterly direction, terminating at the confluence of the River Mekrou with the Niger”.

130. That delimitation, which clearly does not coincide with the course of the River Mekrou, tends to support the position of Niger. Indeed Niger accordingly contends that the decree of 2 March 1907, as partially amended in 1909 and 1913 (see paragraph 39 above), remained in force until the critical dates of independence in 1960 and that it constitutes the legal title to be relied on for purposes of applying the *uti possidetis juris* principle.

131. Benin, however, challenges this position, arguing that the 1907 delimitation was implicitly superseded by the decree of 1 March 1919 creating the colony of Haute-Volta, and that from 1919 onwards not one of the successive administrative instruments relating to the disputed sector mentioned the line of 1907. On the contrary, every one of those instruments, and in particular the *arrêté* of 31 August 1927, whereby the Governor-General of the AOF fixed the boundaries of the colonies of Haute-Volta and Niger, expressly or impliedly adopted the course of the Mekrou as the intercolonial boundary, as is moreover confirmed by abundant cartographic evidence.

132. The Chamber cannot accept the proposition that the decree of 1 March 1919 implicitly abrogated or amended that of 2 March 1907 in relation to the intercolonial boundary in the sector in question.

The 1919 decree created the colony of Haute-Volta, which was constituted by detaching a certain number of *cercles*, including Fada N’Gourma and Say, from Haut-Sénégal et Niger. The effect of this was that, in the Mekrou sector, the colony of Dahomey, instead of bordering Haut-Sénégal et Niger, now bordered the newly created Haute-Volta, so that the boundary established in Article 1 of the 1907 decree could no longer be considered as separating Dahomey from Haut-Sénégal et Niger.

However, there is nothing in the terms of the 1919 decree to suggest that its authors intended to call into question the line defined as the intercolonial boundary in 1907. The two *cercles* detached from Dahomey in 1907 in order to be included in the neighbouring colony of Haut-Sénégal et Niger were in 1919 incorporated into the new colony of Haute-Volta.

Nonetheless, the boundary separating those *cercles* (and in particular the *cercle* of Say) from Dahomey, was not moved in 1919: nothing in the terms of the decree of 1 March 1919, nor any incompatibility between two successive texts, leads to the conclusion that the boundary clearly and precisely defined in 1907 was modified in 1919.

133. That does not suffice however to refute Benin's argument with respect to the course of the boundary in the sector concerned.

134. The Chamber is bound to note, first of all, that the 1919 decree refers neither in its citations nor in its operative articles to the 1907 decree, and that it does not include any precise definition of the inter-colonial boundary, as the earlier decree had done. In reality, the 1919 decree defines the territory of Haute-Volta solely by reference to the *cercles* which compose it, and it is thus also by this means that it indirectly defines the boundaries between Haute-Volta and the neighbouring colonies, and in particular Dahomey. It is by the precise delimitation of the *cercles* mentioned in Article 1 of the decree of 1 March 1919 — a delimitation not effected by the decree itself — that, from this date, the inter-colonial boundary could be defined. In particular, it was the delimitation of the *cercle* of Say that would then enable the boundary between Haute-Volta and Dahomey to be determined in the disputed sector. However, as recalled above (see paragraphs 30, 47 and 71), the delimitation of the *cercles*, the principal administrative subdivisions of the colonies, was at that time, pursuant to Article 5 of the decree of 18 October 1904 reorganizing the AOF, a matter falling within the competence of the Governor-General. It must therefore be concluded from the foregoing that, while the 1919 decree did not call into question the intercolonial boundary determined in 1907, it left unaffected the power of the Governor-General to modify the boundary in the future by fixing the boundaries of the *cercles* in question in accordance with his normal competence in that regard.

135. The Chamber notes that the *arrêté* of the Governor-General of 31 August 1927 defines the River Mekrou as the boundary of the *cercle* of Say in the area contiguous with the colony of Dahomey.

That *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. That instrument, in the second paragraph of Article 1, defined the boundary between the *cercle* of Say and Haute-Volta in the following terms:

“In the South-West [by] a line starting approximately from the [River] Sirba at the level of the Say parallel and terminating at the Mekrou;

In the South-East, by the Mekrou from that point as far as its confluence with the Niger.”

Thus, by this *arrêté* the Governor-General clearly fixed the boundary of the *cercle* of Say, and hence the intercolonial boundary, on the Mekrou.

136. It is true, and Niger has been at pains to point this out, that the *arrêté* of 31 August 1927 was followed on 15 October by an *erratum* amending its text retroactively by removing the reference to the course of the Mekrou as the south-eastern boundary between the *cercle* of Say and Haute-Volta. Article 1 of the *arrêté*, as amended pursuant to the *erratum* of 15 October, confines itself to stating that the boundary between the Niger and Haute-Volta “follows . . . the course of the Tapoa upstream until it meets the former boundary between the *cercles* of Fada and Say, which it follows as far as its intersection with the course of the Mekrou”.

However, the *erratum* would seem in effect to have been motivated not by the fact that the Governor-General did not mean to fix the south-eastern boundary of the *cercle* of Say along the Mekrou, but rather by a wish not to define the boundary between Dahomey and Niger in an *arrêté* whose purpose, as was clear from its title, was to fix the boundary between Niger and Haute-Volta. Not only did the *erratum* thus not contradict the fact that the boundaries of the *cercle* of Say were as indicated the previous August, but it expressly confirmed that the terminal point of the southern boundary of that *cercle* was situated on the Mekrou.

137. Furthermore, the Chamber must take account of the instruments concerning the creation of game reserves and national parks in the area known as “The Niger W”. Both the Governor-General’s *arrêté* of 16 April 1926 and the *arrêtés* of 30 September 1937 of the Governor of Dahomey and of 13 November of the same year of the Governor of Niger — defining within the territory of each of the two colonies the provisional extent of their nature reserves — as well as the Governor-General’s *arrêtés* of 3 December 1952 and 25 June 1953 definitively fixing the borders of those reserves, use the River Mekrou for purposes of delimitation of the areas in question. If, in the eyes of the administrative authorities competent to promulgate the *arrêtés* in question, the Mekrou did not represent the intercolonial boundary, it is difficult to see why it should have been chosen as the boundary of these national parks and nature reserves.

138. Finally, the Chamber is bound to note that the cartographic material in the file clearly confirms that, certainly from 1926-1927, the Mekrou was generally regarded as the intercolonial boundary by all the administrative authorities and institutions of the colonial Power.

Certainly, maps — unless they are annexed to an administrative instrument, and hence form an integral part thereof, which is not the case here — possess only the relative force conferred upon them by the jurisprudence recalled above (see paragraph 44). However, in the present case the cartographic evidence may be regarded as confirming and reinforcing the conclusions flowing from an analysis of the above-mentioned regulative texts. The same applies notably to the map prepared and published in October 1926 by the AOF Geographical Service (known as the “Blondel la Rougery map”), to the map entitled “New Boundary of Haute-

Volta and Niger (according to the *erratum* of 5 October 1927 to the *arrêté* of 31 August 1927)” and to the Dahomey-Togo roadmap prepared by the AOF Geographical Service in 1938 (see paragraph 42 above).

139. All of the foregoing considerations confirm the position that the 1907 line no longer corresponded, at the critical date, to the intercolonial boundary and that, on the contrary, at that date, it was the course of the Mekrou which, in the view of all the competent authorities of the colonial administration, constituted the boundary between the adjacent colonies — at that date the colonies of Dahomey and Niger.

140. The Chamber observes that, as argued by Niger, the decree of 2 March 1907, which clearly defined a different boundary, was never expressly abrogated or amended, or indeed superseded by some other instrument of at least equal authority — either a decree or a statute — containing provisions clearly incompatible with its own. Nor indeed was any instrument of this kind cited by Benin in reply to a question from the Chamber on this aspect of the dispute, with the exception of the 1919 decree, which, as explained above, did not have the abrogating effect claimed for it by Benin.

However, further to what has already been said (see paragraph 134) in regard to the power of the Governor-General to fix the boundaries of the *cercles* and, hence, to determine those of colonies, the Chamber would emphasize that the *uti possidetis juris* principle requires not only that reliance be placed on existing legal titles, but also that account be taken of the manner in which those titles were interpreted and applied by the competent public authorities of the colonial Power, in particular in the exercise of their law-making power. The Chamber is bound to note that the administrative instruments promulgated after 1927 were never the subject of any challenge before the competent courts, and that there is no evidence that the colonial administration was ever criticized at the time for having improperly departed from the line resulting from the 1907 decree. It is not for the Chamber to substitute itself for a domestic court (in this case, the French administrative courts) by carrying out its own review of the legality of the instruments in question in light of the 1907 decree, nor to speculate on what the French courts might have decided had they been seised of the matter. The fact is that they were not so seised and that there is nothing to suggest that, in the decisions taken by them after 1927, the administrative authorities either manifestly exceeded their powers or acted in manifest breach of the applicable rules.

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141. It follows from all of the foregoing that, at least from 1927 onwards, the competent administrative authorities regarded the course of the Mekrou as the intercolonial boundary separating Dahomey from Niger, that those authorities reflected that boundary in the successive instruments promulgated by them after 1927, some of which expressly

indicated that boundary, whilst others necessarily implied it, and that this was the state of the law at the dates of independence in August 1960. In these circumstances, it is unnecessary to look for any *effectivités* in order to apply the *uti possidetis* principle, since *effectivités* can only be of interest in a case in order to complete or make good doubtful or absent legal titles, but can never prevail over titles with which they are at variance. The Chamber notes moreover, *ex abundanti*, that the *effectivités* relied on by the Parties in the sector in question are relatively weak.

* *

142. In the light of the preceding conclusion, the dispute between the Parties regarding the legal effect of Niger's Note Verbale of 29 August 1973 and of the minutes of the meeting of experts of 8 February 1974 becomes moot. It is thus unnecessary to decide whether those documents could have constituted a legally binding obligation for Niger and, if so, whether that obligation could have been vitiated by an error fulfilling the conditions laid down by customary international law.

* *

143. Lastly, it remains for the Chamber to determine the exact location in the River Mekrou of the boundary between Benin and Niger. In this respect, in its final submissions Benin requested the Chamber to adjudge and declare that, in this sector, the boundary follows "the median line of the River Mekrou". Niger did not expressly adopt a position on this question, even on an alternative basis; it did, however, contend in its written pleadings that the eastern starting point of the boundary in that sector (corresponding to the western terminal point of the boundary in the River Niger sector) is constituted by the "confluence of the River Niger with the Mekrou", which it locates at "the intersection of the thalweg of the River Mekrou with the main channel of the River Niger" or at the "point of intersection of the axes of the River Niger and the River Mekrou".

144. The Chamber would recall that, in the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)*, the Court observed that:

"Treaties or conventions which define boundaries in watercourses nowadays usually refer to the thalweg as the boundary when the watercourse is navigable and to the median line between the two banks when it is not, although it cannot be said that practice has been fully consistent." (*I.C.J. Reports 1999 (II)*, p. 1062, para. 24.)

In the present case, the Chamber notes that, during a reconnaissance mission carried out in April 1998, the joint technical committee of the Joint Benin-Niger Boundary Delimitation Commission

“plotted the co-ordinates of the point of intersection of the axes of the River Niger and River Mekrou, but was not able to continue its work beyond that point because navigation on the River Mekrou [was] not possible due to the low water level”.

Moreover, the Parties did not provide the Chamber with any documents that would enable the exact course of the thalweg of the Mekrou to be identified. The Chamber notes that in all likelihood there is a negligible difference between the course of the thalweg and the course of the median line of the River Mekrou, but considers that, in view of the circumstances, including the fact that the river is not navigable, a boundary following the median line of the Mekrou would more satisfactorily meet the requirement of legal security inherent in the determination of an international boundary.

145. The Chamber concludes, for the foregoing reasons, that, in the sector of the River Mekrou, the boundary between Benin and Niger is constituted by the median line of that river.

* * *

146. For these reasons,

THE CHAMBER,

(1) By four votes to one,

Finds that the boundary between the Republic of Benin and the Republic of Niger in the River Niger sector takes the following course:

- the line of deepest soundings of the main navigable channel of that river, from the intersection of the said line with the median line of the River Mekrou until the point situated at co-ordinates 11° 52' 29" latitude North and 3° 25' 34" longitude East;
- from that point, the line of deepest soundings of the left navigable channel until the point located at co-ordinates 11° 51' 55" latitude North and 3° 27' 41" longitude East, where the boundary deviates from this channel and passes to the left of the island of Kata Goungou, subsequently rejoining the main navigable channel at the point located at co-ordinates 11° 51' 41" latitude North and 3° 28' 53" longitude East;
- from this latter point, the line of deepest soundings of the main navigable channel of the river as far as the boundary of the Parties with Nigeria;

and that the boundary line, proceeding downstream, passes through the points numbered from 1 to 154, the co-ordinates of which are indicated in paragraph 115 of the present Judgment;

IN FAVOUR: *Judge* Ranjeva, *Vice-President of the Court*, *President of the Chamber*; *Judges* Kooijmans, Abraham; *Judge ad hoc* Bedjaoui;

AGAINST: *Judge ad hoc* Bennouna;

(2) By four votes to one,

Finds that the islands situated in the River Niger therefore belong to the Republic of Benin or to the Republic of Niger as indicated in paragraph 117 of the present Judgment;

IN FAVOUR: *Judge* Ranjeva, *Vice-President of the Court, President of the Chamber*; *Judges* Kooijmans, Abraham; *Judge ad hoc* Bedjaoui;

AGAINST: *Judge ad hoc* Bennouna;

(3) By four votes to one,

Finds that the boundary between the Republic of Benin and the Republic of Niger on the bridges between Gaya and Malanville follows the course of the boundary in the river;

IN FAVOUR: *Judge* Ranjeva, *Vice-President of the Court, President of the Chamber*; *Judges* Kooijmans, Abraham; *Judge ad hoc* Bedjaoui;

AGAINST: *Judge ad hoc* Bennouna;

(4) Unanimously,

Finds that the boundary between the Republic of Benin and the Republic of Niger in the River Mekrou sector follows the median line of that river, from the intersection of the said line with the line of deepest soundings of the main navigable channel of the River Niger as far as the boundary of the Parties with Burkina Faso.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twelfth day of July, two thousand and five, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Benin and the Government of the Republic of Niger, respectively.

(Signed) Raymond RANJEVA,
President of the Chamber.

(Signed) Philippe COUVREUR,
Registrar.

Judge *ad hoc* BENNOUNA appends a dissenting opinion to the Judgment of the Chamber.

(Initialled) R.R.

(Initialled) Ph.C.