DECISIONS OF INTERNATIONAL TRIBUNALS

INTERNATIONAL COURT OF JUSTICE

Edited by J Craig Barker

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I. CASE CONCERNING THE FRONTIER DISPUTE (BENIN/NIGER)

A. Introduction

The West African Republics of Benin and Niger acceded to independence in 1960, succeeding to the French colonies of Dahomey and Niger, respectively.[1] The two States share an extensive common frontier, which has been contested since decolonization. The dispute also concerned the question of sovereignty over 25 islands situated in the watercourse of the River Niger. At 40 square kilometres, Lété is the largest of these islands. It has fertile pastures and a permanent population of approximately 2,000 people. Disturbances on the island on the eve of independence brought the issue of jurisdiction into sharp focus and precipitated the present dispute. After independence, the Parties established a series of joint commissions to settle their common border. However, when these efforts failed, they referred the dispute to the International Court of Justice ('ICJ'). A Special Agreement, signed on 15 June 2001, which came into effect on 11 April 2002, requested that a Chamber of the Court delimit the whole of the common boundary.[2] Consequently, the Chamber was asked to attribute sovereignty over all the islands found in the disputed stretch of the River Niger, especially the island of Lété.[3] The Parties sought to base the case on the principle of the intangibility of frontiers received on independence, which is widely known as the principle of *uti possidetis juris*. Although the ICJ has considered the scope and application of this principle in a number of previous boundary/territorial disputes,[4] the

[1] Benin was originally known as the Republic of Dahomey.

[2] Judges Ranjeva, Vice President of the Court, President of the Chamber, Kooijmans and Abraham and Judges ad hoc Bedjaoui and Bennouna constituted the Chamber. Judgment was delivered on 12 July 2005 see ICJ <http://www.icj-cij.org/icjwww/idocket/ibn/ibnframe.htm>.

[3] See Art 2 of the Special Agreement.

[4] In particular, see the *Frontier Dispute (Burkina Faso/Republic of Mali)* ICJ Reports (1986) 554; *Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* ICJ Reports (1992) 351; and *Case Concerning the Territorial Dispute (Libyan Jamahiriya v Chad)* ICJ Reports (1994) 6.

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instant case is particularly interesting because it demonstrates the complex interrelationship between law and fact within this established principle of international law.

B. The claims of the parties and the applicable law

In connection with the case, the Parties divided the frontier into two sectors. The western sector followed a course from southwest to northeast from the point at which the two States border Burkina Faso to the confluence of Mekrou and Niger rivers. In this sector, Benin claimed that the boundary ran from the confluence of these rivers along the median line in the watercourse of the Mekrou until the point at which the two States border Burkina Faso. However, Niger contended that the boundary had two parts. First, it followed a straight line joining the confluence of the rivers to the point at which the Paris meridian meets the Atacora mountain range. The second part joined the latter point to the point at which the former colonial boundary between the *cercles* of Say and Fada met the former boundary between the *cercles* of Fada and Atacora The eastern sector followed the River Niger in a south-easterly direction for a distance of 150 kilometres from its confluence with the Mekrou to the point at which the two States border Nigeria. In this sector, Benin claimed the boundary was fixed on the eastern bank of the River Niger; as such, it claimed sovereignty over all the islands situated in the river's watercourse, including the island of Lété. In contrast, Niger claimed that the boundary followed the line of the deepest soundings in the river at the date of independence. Accordingly, Niger argued that the islands to the west of the *thalweg* belonged to Benin and the islands to the east belonged to Niger.

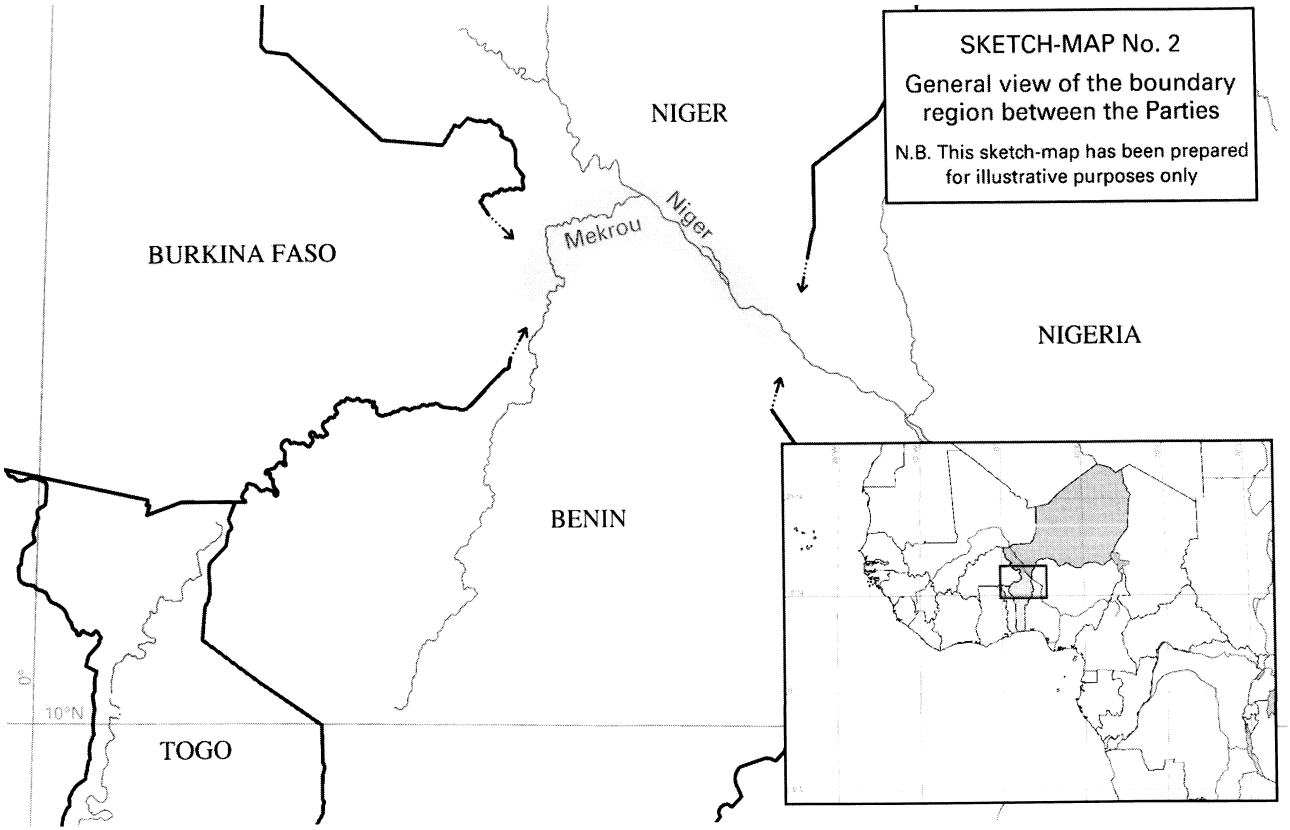
Article 6 of the Special Agreement provided that the rules and principles of international law were to constitute the applicable law for determining the dispute. In particular, it referred to 'the principle of State succession to the boundaries inherited from colonization, that is to say, the intangibility of frontiers'. The Chamber interpreted this as the principle of *uti possidetis juris*.[5] In its analysis of this principle, the Chamber relied heavily on the judgment of the Chamber in the *Burkina Faso/Mali* case. In this regard, it echoed the view that the primary purpose of *uti possidetis juris* is to secure 'respect for the territorial boundaries at the moment when independence is achieved' by transforming colonial administrative delimitations into the international boundaries of post-colonial States.[6] Clearly, *uti possidetis juris* was immensely important to the process of African decolonization. Support for the principle was initially implied in Article 3(3) of the Charter of the Organization of African Unity (1963), in which member States pledged 'respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence'. Subsequently, its value was expressly recognized through resolution 16(1) of the OAU Conference of Heads of State and Government at Cairo (1964) which declared that Member States: 'solemnly . . . pledge themselves to respect the borders existing on their achievement of national

[5] On the principle of *uti possidetis juris* see MN Shaw 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) 67 BYIL 75; S Ratner 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90 AJIL 590; and J Castellino and S Allen *Title to Territory in International Law: A Temporal Analysis* (Ashgate Aldershot 2003).

[6] *Burkina Faso/Mali* case ICJ Reports (1986) 566, para 23.

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Case Concerning the Frontier Dispute (Benin/Niger) ICJ (2005) at 20. This map is reprinted courtesy of the International Court of Justice. Available at <http://www.icj-cij.org/icjwww/idocket/ibn/ibnframe.htm>.

independence.'[7] Moreover, the OAU's successor organization, the African Union, chose to include the Cairo pledge as one of its fundamental principles.[8]

The Chamber observed a central characteristic of the principle of *uti possidetis juris* is the way that it 'freezes title to territory' at the moment of independence; this moment typically becomes the 'critical date' for determining the international boundaries of the new States concerned.[9] Accordingly, although *uti possidetis juris* is a transitional principle of State succession, it is often resurrected by post-colonial States to perform a highly significant role in determining frontier disputes that have remained unresolved since the colonial era.[10] But since *uti possidetis* 'stops the clock, it does not put back the hands' to a pre-colonial time,[11] State Parties are required to marshal the regulative/administrative instruments and *effectivitiés* of former colonial authorities in order to establish the administrative lines that inform the process of delimiting international boundaries. Nevertheless, the function of *uti possidetis juris* is not restricted to the task of delimitation. In previous decisions, the ICJ has emphasized that the principle not only fixes international boundaries, it also attributes territorial sovereignty since any boundary determination will inevitably result in at least some territory being apportioned between the Parties.[12] This role was reinforced in the present case as the Special Agreement specifically asked the Chamber to attribute all the islands situated in the eastern sector.

The principle of *uti possidetis juris* maintains a close relationship with the colonial law of the former administering power. This is demonstrated by the use of the Latin genitive, '*juris'*, which relates not to international law but to the legal status of administrative delimitations under colonial law.[13] Nevertheless, this relationship is an uneasy one. The present Chamber reaffirmed that while the *uti possidetis* line must be determined by recourse to French colonial law (*droit d'outre-mer*) there is not a 'sort of *continuum juris*, a legal relay between such law and international law', rather colonial law is only one of a number of factual elements that indicate the 'colonial heritage' which represents the 'photograph of the territory' at the critical date.[14] Therefore, while the principle of *uti possidetis juris* seeks to transpose colonial legal titles into international legal titles for the purpose of maintaining international security, the legal status of the mechanisms used to validate these territorial regimes remain distinct. This distinction is justifiable as to hold otherwise would put an international court or tribunal at risk of having to observe colonial laws which may not assist the task of

[7] ibid 564, para 19. See generally, A Mazrui *Towards A Pax Africana: A Study of Ideology and Ambition* (Weidenfeld & Nicholson London 1967).

[8] See Art 4(b) of the Constitutive Act of the African Union (2000). Benin and Niger are both members of the African Union.

[9] *Burkina Faso/Mali* case ICJ Reports (1986) 568, para 30.

[10] More recently, the principle has been applied outside the colonial context. For example, see Opinion No 2 of the Badinter Arbitration Commission in relation to the dissolution of Yugoslavia, 92 ILR 168; S Terrett *The Dissolution of Yugoslavia and the Badinter Arbitration Commission* (Ashgate Aldershot 2000); and Castellino and Allen (n 5) 157–98.

[11] *Burkina Faso/Mali* case ICJ Reports (1986) 568, para 30.

[12] ibid 563, para 17; *El Salvador/Honduras case* ICJ Reports (1992) 387, para 42; and Shaw (n 5) 76–81. Moreover, the attribution of territorial sovereignty was the primary function of this principle in the decolonisation of Spanish America during the 19th century, see below.

[13] *El Salvador/Honduras* case, ibid 559, para 333; and ibid 129.

[14] *Burkina Faso/Mali* case ICJ Reports (1986) 568, para 30.

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determining international boundaries, especially given that colonial boundaries were usually created to serve very different ends.[15]

The Chamber accepted that its first task was to determine the boundary inherited from the French colonial administration. Given that Benin acceded to independence on 1 August 1960 and Niger on 3 August 1960, it decided that the period between these dates would serve as the critical date for the application of *uti possidetis juris* in this case. In accordance with Article 2 of the Special Agreement, the Chamber resolved first to delimit the international boundary in the eastern sector, thus determining title to the islands situated in the disputed stretch of the River Niger, before establishing the boundary in the western sector. Further, for the purpose of assessing the available evidence, the Chamber recalled the 'pre-eminence accorded to legal title over effective possession as a basis for sovereignty'.[16] In light of this evidential hierarchy, it decided to follow the approach adopted in the *Burkina Faso/Mali* case by first considering the regulative and administrative instruments and, if necessary, the various *effectivités* advanced by the Parties.

C. The administration of French West Africa

By way of background, the Chamber briefly reviewed the colonial administration of French West Africa and the evolution of the legal status of the territories in issue. It noted that French colonial possessions in West Africa were centralized by a decree of the President of the French Republic dated 16 June 1895. This decree created the *Afrique occidentale française* ('AOF') headed by a Governor-General and divided into a number of colonies governed by Lieutenant-Governors. A hierarchy of administrative units (*cercles*, *subdivisions*, *cantons* and villages) constituted these colonies. Until 1946, the authority to create and abolish colonies was vested in the French President; and, until 1957, the power to organize territorial divisions within colonies lay with the Governor-General. To this end, Article 5 of a decree dated 18 October 1904 vested authority in the Governor-General, acting in government council, to determine colonial administrative districts on the proposal of a Lieutenant-Governor. By a circular dated 3 November 1912, the Governor-General noted that this decree conferred upon him jurisdiction to establish the number and extent of the *cercles* within the colonies of French West Africa. However, he acknowledged that Lieutenant-Governors retained the power to determine *subdivisions* within such *cercles*. Therefore, the circular provided that any measure affecting the existence or territorial definition of *cercles* must be defined in an *arrêté* and approved by an *arrêté général* promulgated by the Governor-General acting in government council. The Chamber noted that the colony of Dahomey was created by a decree dated 22 June 1894 and incorporated into the AOF by a decree of 17 October 1899. At this time, the colony comprised territory on both sides of the River Niger. The colony of Niger was created by a decree dated 13 October 1922. Before this time, its territory was governed by a series of different military and civil authorities.

[15] *El Salvador/Honduras* case ICJ Reports (1992) 388, para 43.
[16] *Burkina Faso/Mali* case ICJ Reports (1986) 566, para 23.

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D. The Eastern Boundary Sector

1. Regulative and administrative instruments

Benin relied upon an *arrêté*, dated 23 July 1900, of the Governor-General, which created the Third Military Territory (subsequently part of the colony of Niger). Article 1 stated that the new territory: 'will encompass the areas on the [eastern] 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'. Benin argued that this *arrêté* proved that the inter-colonial boundary was fixed on the eastern bank of the River Niger. In addition, it sought to rely on the letter of the Governor *ad interim* of Niger dated 27 August 1954 to the *chef de subdivision* of Gaya (Niger), which stated that 'the boundary of the territory of Niger [was] constituted by the line of the highest water, on the left [eastern] bank of the river, from the village of Bandofay to the frontier of Nigeria' and that 'consequently, all islands situated in this part of the river [formed] part of the territory of Dahomey'. Benin claimed that this letter confirmed the position of the boundary established by the *arrêté* of 1900. Moreover, it submitted that this evidence showed the position of the boundary at the critical date.

In contrast, Niger claimed that the content of this *arrêté* merely indicated the territorial extent of the new territory. It contended that an understanding soon arose that the boundary between Dahomey and the Third Military Territory was located in the course of the River Niger. In support, Niger produced a letter of the French Minister for the Colonies dated 7 September 1901 addressed to the Governor-General, which endorsed his suggestion that the course of the river would be the best boundary line. Moreover, Niger argued that this understanding was formally confirmed in the *arrêtés* of the Governor-General dated 8 December 1934 and 27 October 1938. Promulgated in connection with the reorganization of Dahomey, these *arrêtés* described the boundaries of its *cercles*. In particular, they stated that the north-western boundary of the *cercle* of Kandi (Dahomey) was 'the course of the Niger as far as its confluence with the Mekrou'. Niger submitted that this could only mean that the boundary was located in the watercourse. Further, in response to Benin's claims concerning the significance of the 1954 letter, it claimed that the Governor *ad interim* of Niger lacked the legal authority to determine the inter-colonial boundary.

The Chamber decided that the *arrêté* of 1900 could not be interpreted as determining the inter-colonial boundary. It observed that Article 1 simply indicated, in general terms, the areas that were being detached from Dahomey and incorporated into the new territory. Moreover, the Chamber noted that the letter of the French Minister for the Colonies of 1901 revealed that the inter-colonial boundary remained unsettled during this period. Further, in connection with the letter of 1954, the Chamber made a number of observations. First, it noted that if the *arrêté* of 1900 did not establish the boundary, this letter could not be construed as authoritative confirmation of its delimitation. Secondly, under French colonial law, a Lieutenant-Governor was not competent to determine the external boundaries of a colony on a unilateral basis. Thirdly, the letter made no reference to prior regulative or administrative acts in support of its assertions and when such particulars were requested by the Governor of Dahomey, none were produced. Consequently, the Chamber could not uphold Benin's claim that the *arrêté* of 1900 together with the letter of 1954 established an inter-colonial boundary on the eastern bank of the River Niger. In contrast, the Chamber accepted that the course of

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the River Niger represented, in broad terms, the inter-colonial boundary as established in the *arrêtés* of 1934 and 1938. However, it could not endorse Niger's submission that the boundary was located in the watercourse. The Chamber considered that the wording of the *arrêtés* lacked precision in this regard and the notion of the 'course of the river' gave rise to a range of possibilities; including a boundary on either side of the river or at some point within it.

2. Colonial effectivitiés

As neither Party succeeded in establishing the exact location of the inter-colonial boundary by regulative or administrative instruments, the Chamber turned to examine the evidence of colonial *effectivitiés*. First, it assessed the *effectivitiés* presented by the Parties for the period prior to 1954. In a letter addressed to the *commandant de cercle* of Kandi (Dahomey) dated 3 July 1914, the *commandant de secteur* of Gaya (Niger) sought to determine territorial jurisdiction for the sole purpose of regulating certain indigenous activities. The letter included a list of the islands situated in the eastern sector of the River Niger. Further, it purported to attribute the islands to the east of the main navigable channel to Niger and the islands to the west to Dahomey. However, it provided that the three islands opposite the village of Gaya were to come under the jurisdiction of Dahomey despite being situated to the east of the main navigable channel. The letter led to an agreement between the two authorities. Although it was never officially approved, this *modus vivendi* was catalogued in a 1917 report made by the head *ad interim* of the *subdivision* of Gaya. The Chamber considered that, during the period from 1914 to 1954, it served its original purpose satisfactorily. It also noted the 1917 report stated that the village of Lété was administered by Gaya and the available documentary evidence, including tax registers, census lists and acts of maintenance confirmed that Gaya exercised jurisdiction over the island. The Chamber observed that Benin offered no official documentation to rebut this evidence.

The Chamber turned to investigate the *effectivitiés* presented for the period from 1954 to 1960. It noted claims that Dahomey was authorized to exercise jurisdiction on Lété became more frequent during this time. Officials in Kandi (Dahomey) sought to invoke the 1954 letter of the Governor *ad interim* of Niger, while officials in Gaya relied on the 'rediscovered' *modus vivendi*. However, disagreements regarding jurisdiction were brought into sharp relief by a number of property-related disturbances, which occurred on Lété during 1959 and 1960, between the inhabitants of Gourouberi (Dahomey) and the Peuhls of Niger. In response, both Dahomey and Niger maintained that they exercised jurisdiction over the island. However, as tensions between the two indigenous groups mounted, culminating in a riot on 29 June 1960, both Malanville (Dahomey) and Gaya stationed small police units on the island.

In addition, Benin claimed that the *modus vivendi*, by its very nature, precluded the existence of an intention on the part of Niger's colonial authorities to act 'as of right' in relation to their administrative activities on Lété from 1914 to 1954 and particularly from 1954 to 1960. Accordingly, Benin contended that, in the absence of the requisite intention to act in a sovereign capacity, Niger was unable to rely on colonial *effectivitiés* in order to establish a boundary in the watercourse of the River Niger and thus title to the islands in issue. In response, the Chamber observed that, under international law, a claim to sovereignty must manifest 'the intention and will to act as sovereign, and

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some actual exercise or display of such authority'.[17] However, it stated that the concept of State *effectivitiés* could not be transposed into colonial law; accordingly, it ruled that this concept had no application in the present case. This ruling is undoubtedly correct. The ICJ has distinguished between 'State *effectivitiés'* and 'colonial *effectivitiés'* in a number of previous cases. The Chamber in the *Burkina Faso/Mali case* defined 'colonial *effectivitiés'* as 'the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region during the colonial period'.[18] Moreover, in the *El Salvador/Honduras* case, Judge Torres Bernárdez made an express distinction between 'colonial *effectivitiés',* which, he opined, do not constitute a norm of international law and 'State *effectivitiés',* which concern the 'effective possession and/or administration by a State other than the one possessing the title or irrespective of that title'.[19] It is suggested that this distinction must be valid as, although *uti possidetis juris* is a principle of international law, it is retrospectively determined by reference to the colonial heritage bequeathed by a single colonial power.

Against this background, the Chamber concluded that, from 1914 to 1954, the *modus vivendi* was broadly observed. Consequently, during this period, jurisdiction was exercised by Niger on the islands to the east of the main navigable channel and by Dahomey on the islands to the west of that channel. It also considered that although Niger's administration of Lété had been occasionally called into question, it was never factually or legally contested during this time. Further, while the situation became more ambiguous from 1954 to 1960, the Chamber decided that the evidence was not sufficient to conclude that administrative authority, which had been unequivocally exercised by Niger during the earlier period, had been transferred to Dahomey. Therefore, the Chamber held that the international boundary followed the main navigable channel of the River Niger, as it existed on independence. Accordingly, it held that Benin possessed title to the islands between the boundary and the western bank and Niger had title to the islands between the boundary and the eastern bank of the river. Specifically, it ruled that the island of Lété belonged to Niger.[20]

The Chamber proceeded to delimit the boundary in the main navigable channel, which it took to be the line of the deepest soundings or *thalweg* at the moment of independence. In order to determine this line, it relied on an independent navigability study produced in 1970 at the request of the governments of Dahomey, Mali, Niger, and Nigeria. The Chamber noted that this survey was not contested at the time of production and its findings were corroborated by earlier and later studies. While the survey was conducted between 1967 and 1970, given that the report suggested that the riverbed was relatively stable, the Chamber decided that the physical situation at the time of the survey was virtually identical to that which existed at the moment of independence in 1960. By acting in accordance with its preliminary observation that sources subsequent to the critical date may be relevant to the determination of the *uti*

[17] See the *Legal Status of Eastern Greenland (Denmark v Norway)* case 1933 PCIJ Series A/B No 53, 45–6.

[18] *Burkina Faso/Mali* case ICJ Reports (1986) 586–7, para 63.

[19] See the Separate Opinion of Judge Torres Bernárdez in the *El Salvador/Honduras case* ICJ Reports (1992) 640–1, paras 22–3.

[20] In his Dissenting Opinion, Judge ad hoc Bennouna, considered that the available legal titles and *effectivitiés* established a boundary on the eastern bank of the River Niger and that all the islands located in the disputed stretch of the river belonged to Benin.

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possidetis juris at the moment of independence,[21] the Chamber adopted a pragmatic interpretation of the available evidence. It then plotted the exact coordinates of the international boundary. During this exercise, it noted that the 1970 survey indicated that, in the area opposite the village of Gaya, the river had two navigable channels. However, as the survey did not establish which of these channels was consistently deeper, the Chamber decided that the eastern navigable channel would constitute the boundary in this area. It noted that the existence of two navigable channels did not hinder the task of fixing the boundary because the *modus vivendi* confirmed that the three islands adjacent to Gaya were administered by Dahomey in any event.[22]

Finally, Niger asked the Chamber to determine the position of the boundary on two bridges situated between Gaya and Malanville. Benin argued this request was not included in the Special Agreement. Therefore, the Chamber had no jurisdiction to rule on this issue. However, the Chamber decided that, since the bridges were situated in the eastern sector, it possessed jurisdiction in this regard. As a boundary represents the terminal point of territorial sovereignty from the subsoil to the super adjacent airspace, it held that a vertical line would be extended from the boundary in the watercourse and fixed onto these structures at the appropriate points.[23]

3. The relationship between effectivitiés *and* uti possidetis juris

The Chamber recalled that the ICJ had examined the legal relationship between title and *effectivitiés* on a number of occasions.[24] In particular, it relied on the *Burkina Faso/Mali case*, which noted the complex role played by *effectivitiés* in determining legal title.[25] Specifically, it observed that this relationship produces 'several eventualities':

> Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivitiés* is to confirm the exercise of the right derived from a legal title. Where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, preference should be given to the holder of the title. In the event that the *effectivitié* does not co-exist with any legal title, it must invariably be taken into consideration. Finally, there are cases where the legal title is not capable of showing exactly the territorial expanse to which it relates. The *effectivitiés* can then play an essential role in showing how title is interpreted in practice.[26]

[21] para 26.

[22] Further, in light of this evidence, the Chamber ruled that, while the line of the deepest soundings in the eastern channel passed to the west of the island of Kata Goungou, the boundary would be fixed to the east of this line.

[23] Judge ad hoc Bennouna, stated that as the Special Agreement did not request that the boundary on the bridges be delimited, the Chamber had no jurisdiction to rule on this issue.

[24] In addition to the cases cited above, see the *Case Concerning the Land and Maritime Boundary (Cameroon v Nigeria)* ICJ Reports (2002) ICJ <http://www.icjcij.org/icjwww/idocket/icn/icnframe.htm>; *Case concerning Sovereignty over Pula Ligitan and Pula Sipadan (Indonesia/Malaysia)* ICJ Reports (2002) ICJ <http://www.icj-cij.org/icjwww/idocket/iinma/iinmaframe.htm>; The Eritrea–Yemen Arbitration (First Stage) (1998) Permanent Court of Arbitration:<http://pca-cpa.org/ENGLISH/RPC/#Eritrea>; and the Decision of the Eritrea-Ethiopia Boundary Commission Regarding the Delimitation of the Eritrea-Ethiopia Border (2002) Permanent Court of Arbitration: <http://www.pca-cpa.org/ENGLISH/RPC/#Eritrea-Ethiopia%20Boundary%20Commission>.

[25] *Burkina Faso/Mali* case ICJ Reports (1986) 587, para 63.

[26] ibid.

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In light of the above observation, the Chamber considered that the present dispute concerned a situation in which the given *effectivitiés* did not co-exist with legal title and, therefore, had to be taken into consideration when applying the principle of *uti possidetis juris*. However, despite the validity of this interpretation, the Chamber did not consider its effect on the jurisprudence of *uti possidetis juris*.

It is suggested that the legal relationship between title and *effectivitiés* invites reflection upon the concept of title itself. The Chamber in *Burkina Faso/Mali case* explained that:

> In this context, the term 'legal title' appears to denote documentary evidence alone. It is hardly necessary to recall that this is not the only accepted meaning of the word 'title' . . . In fact, the concept of title may also, and more generally, comprehend both any evidence which may establish the existence of a right, and the actual source of that right.[27]

Despite this expansive interpretation of the meaning of title, it is clear that colonial *effectivitiés* cannot establish the existence of legal title under (French) colonial law. Moreover, as the genitive '*juris'* within *uti possidetis juris*, is a reference to the possession of title to territory under colonial law, colonial *effectivitiés* are theoretically incapable of informing the application of this principle of international law. However, in practice, when *uti possidetis juris* 'speaks with an uncertain voice',[28] such *effectivitiés* guide (rather than merely confirm) the principle's application. Moreover, the evidential value of colonial *effectivitiés* was strengthened in the present case by the lack of other evidence, which could substantiate their legal effect.[29] Therefore, they provided the only evidence that could determine the *uti possidetis* line. Accordingly, this case demonstrates that, in ambiguous situations, facts rather than 'law' may determine the application of *uti possidetis juris*.[30] Nevertheless, this conclusion appears to question the principle's jurisprudential logic.

The complex interrelationship of law and fact within the principle of *uti possidetis* becomes clearer when its doctrinal origins are examined. Under Roman *jus gentium,* the praetorian interdict *uti possidetis* was an interim ruling concerned with the actual possession of land prior to *vindicatio* proceedings.[31] It was transposed into early international law as a mechanism for the attribution of territory actually possessed by States on the cessation of hostilities.[32] But it was not until the Spanish withdrawal from Central and South America in the 19th century that the principle became associated with the process of decolonization.[33] In this context, the departing colonial power had not occupied many of its territories effectively. Consequently, in order to protect the new States from being acquired by other colonial powers through the doctrine of *terra nullius*, a 'kind of Monroe doctrine' was devised, which established the territorial para-

[27] ibid 564, para 18.

[28] *El Salvador/Honduras* case ICJ Reports (1992) 386, para 41.

[29] eg in the *El Salvador/Honduras case*, ibid 563–5, paras 342–4, the Court considered that colonial *effectivitiés* were fragmentary; consequently, in order to establish the *uti possidetis* line, the notion of acquiescence was invoked in support of post-colonial *effectivitiés*.

[30] Or, more accurately, *uti possidetis juris* may be determined by facts not 'facts' derived from law.

[31] In its original form '*uti possidetis ita possideatis'* translates to 'as you possess, so you may possess'. For an examination of the classical origins of *uti possidetis* see Castellino and Allen (n 5) 29–56.

[32] ibid; and Shaw (n 5) 98.

[33] See Castellino and Allen, ibid 57–89.

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meters of the new States in law rather than in fact.[34] To this end, the genitive '*juris*' indicated constructive or fictional as opposed to effective occupation.[35] In contrast, Portugal chose to invoke a more faithful reinterpretation of the classical principle by fixing the boundaries of the new Brazilian State by reference to *uti possidetis de facto*, a principle that validated territories actually occupied by the retreating Portuguese colonial authorities.[36]

Although, in many parts of Africa, the process of decolonization was conducted through *uti possidetis juris*, the difficult relationship between legal titles and colonial *effectivitiés* demonstrates that the principle maintains an abeyant connection to the notion of effective occupation, which re-emerges in cases where the evidence of legal title remains inconclusive.[37] Moreover, the task of determining the *uti possidetis* line is largely a factual exercise, a view underpinned by the notion of colonial heritage, which turns legal titles into facts for the purpose of determining title to territory in international law. Against this background, it is suggested that any express recognition of the complex interrelationship between law and fact within the principle of *uti possidetis juris* would not undermine its legal significance in international law; rather, its coherence would be enhanced by a greater appreciation of its doctrinal foundations.

E. The Western Boundary Sector

The Chamber turned to the task of determining the course of the boundary in the River Mekrou sector. As noted above, Niger claimed that the boundary in this sector followed a straight line joining the confluence of the Mekrou and Niger rivers to the point at which the Paris meridian meets the Atacora mountain range. It then joined the latter point to the point at which the former colonial boundary between the *cercles* of Say and Fada met the former boundary between the *cercles* of Fada and Atacora. In support, Niger relied on a decree dated 2 March 1907 that defined the boundary between Dahomey and Niger, and incorporated the *cercles* of Fada and Say into the colony of Haut-Sénégal et Niger (to which Niger succeeded). Further, Niger submitted that this delimitation remained in force at the moment of independence. In response, Benin argued that the 1907 boundary was implicitly superseded by a decree dated 1 March 1919, which created the colony of Haute-Volta. The new colony was constituted by detaching a number of *cercles* from Haut-Sénégal et Niger, including Fada and Say. According to Benin, this interpretation was endorsed by subsequent administrative instruments, which indicated that the course of the Mekrou had been expressly or implicitly adopted as the inter-colonial boundary. Moreover, it suggested that the available cartographic evidence endorsed this interpretation.

The Chamber observed that the 1919 decree established the colony of Haute-Volta solely by reference to *cercles* of which it was composed. It noted that, unlike the 1907 decree, the 1919 decree did not include a precise definition of the inter-colonial bound-

[34] See the Separate Opinion of Judge Ajibola in the *Libya/Chad* case ICJ Reports (1994) 85, para 119.

[35] ibid 86, para 121; *Burkina Faso/Mali* case ICJ Reports (1986) 566, para 23; and *El Salvador/Honduras* case ICJ Reports (1992) 559, para 333.

[36] See Judge Ajibola, ibid 86, para 122; and Shaw (n 5) 99–100.

[37] *Burkina Faso/Mali* case ICJ Reports (1986) 565–6, paras 22–4; and the Separate Opinion of Judge Torres Bernardez in the *El Salvador/Honduras* case ICJ Reports (1992) 641, para 23.

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ary. However, the Chamber considered that the process of delimitating these *cercles* could define the inter-colonial boundary. It recalled that, during this period, the authority to determine *cercles* was vested in the Governor-General acting in government council. Accordingly, while it concluded that the 1919 decree had not implicitly abrogated or amended the 1907 inter-colonial boundary, it 'left unaffected the power of the Governor-General to modify the boundary in future by fixing the boundaries of the *cercles* in question in accordance with his normal competence in that regard'.[38]

The Chamber then examined a series of administrative instruments, which indicated that the competent colonial authorities had modified the boundaries of the *cercle* of Say thereby varying the 1907 inter-colonial boundary. First, it observed that, following the incorporation of the *cercle* of Say into the colony of Niger, the Governor-General issued an *arrêté* dated 31 August 1927, which delimited the boundary of the colonies of Haute-Volta and Niger. Article 1 stated that the River Mekrou would constitute the south-eastern boundary between the *cercle* of Say and the colony of Haute-Volta until its confluence with the River Niger. Although an *erratum* dated 15 October 1927 removed this boundary reference, the Chamber concluded that the *erratum* expressly confirmed that the terminal point of the *cercle* of Say was situated on the Mekrou. The Chamber also took cognisance of a series of *arrêtés* promulgated by the Governor-General and the Governors of Dahomey and Niger between 1926 and 1953 for the purpose of defining the parameters of game reserves and national parks in the 'Niger W' region, which straddled both colonies. Without exception, these *arrêtés* used the Mekrou for the purpose of delimiting jurisdiction. The Chamber concluded that these *arrêtés* indicated that the competent colonial authorities regarded the course of the Mekrou to be the inter-colonial boundary during this period. Moreover, while acknowledging the relative probative value of maps,[39] the Chamber considered that the available cartographic evidence, notably maps produced in 1926, 1927, and 1938, confirmed and strengthened this conclusion.

The Chamber recognized that the 1907 decree, which established the original inter-colonial boundary, was never abrogated or superseded by a later regulative instrument of equal authority. Nevertheless, it decided that successive administrative instruments promulgated from 1927 onwards indicated that the inter-boundary between Dahomey and Niger followed the watercourse of the Mekrou and, therefore, it constituted the boundary between the two colonies at the critical date.[40] In reaching its decision, the Chamber observed 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 their law-making power.[41]

The Chamber noted that none of the administrative instruments promulgated from 1927 onwards were challenged before the competent courts, nor were the colonial authorities criticized for having departed from the 1907 boundary. In any event, the Chamber

[38] para 134.

[39] See the *Burkina Faso/Mali* case ICJ Reports (1986) 582–3, paras 53–6.

[40] Given the pre-eminence of legal title over effective possession, the Chamber ruled that there was no need to examine the various *effectivitiés* advanced by the Parties in connection with the western sector. In any event, the Chamber noted that the *effectivitiés* in this sector were relatively weak.

[41] para 140.

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stated that its function was not to act as a substitute French administrative court charged with the task of reviewing the legality of the instruments in question.

The Chamber's decision to validate the understanding of the competent administrative authorities regarding the position of the inter-colonial boundary from 1927 onwards is clearly correct from the perspective of international law. This finding is supported by the notion of colonial heritage, which provides that it is the definition of colonial territories at the moment of independence that informs the application of *uti possidetis juris*. The validity of the administrative interpretation of the inter-colonial boundary from 1927 onwards may have been questionable under French administrative law since it was not expressly fixed by an *arrêté général* promulgated for that purpose. However, this issue was peripheral to the Chamber's task. It should be recalled that the notion of colonial heritage ensures that colonial legal titles constitute only factual evidence through which the application of *uti possidetis juris* may be determined. Therefore, the legal validity of the administrative instruments in question was not significant in this context (although evidence of illegality would surely affect their probative force). The Chamber was rightly persuaded by the consistency of successive administrative instruments and the absence of any judicial or executive action against the competent colonial authorities in this regard. Nevertheless, its conclusions provide useful insight into the value of colonial legal titles for the purpose of applying the principle of *uti possidetis juris* since they arguably reinforce the principle's factual base.

The Chamber then determined the precise location of the boundary within the Mekrou. In this respect, a particular issue was whether the *thalweg* or the median line should prevail as the international boundary. The Chamber recalled the *Kasikili/Sedudu Island (Botswana/Namibia)* case, which observed that typical treaty practice in such situations is to delimit the boundary by reference to the *thalweg* when the watercourse is navigable and to use the median line when it is not.[42] In the present case, it noted that, in 1998, the technical committee of the Joint Benin–Niger Boundary Delimitation Committee was prevented from carrying out its task of plotting coordinates on the Mekrou because the river was not navigable due to low water levels. Moreover, given that the Parties did not provide the Chamber with any documents for the purpose of determining the *thalweg*, it concluded that the median line would best serve as the international boundary in the western sector.

F. Conclusion

Invariably, the task of determining the administrative delimitations of former colonial authorities and, thus, the application of *uti possidetis juris* is a fraught one.[43] However, by following the interpretative approaches and evidential strategies adopted in the *Burkina Faso/Mali* case, the present Chamber reached a series of sound conclusions. In particular, in the western sector, the Chamber's decision to validate the successive administrative instruments, which sought to modify the inter-colonial boundary from 1927 onwards constituted a pragmatic interpretation of the colonial heritage. Moreover, its reliance on colonial *effectivitiés* to fix the *uti possidetis* line in the eastern sector was undoubtedly correct. Nevertheless, given that such *effectivitiés* provided the only

[42] ICJ Reports (1999) 1062, para 24.

[43] See the comment made by the Chamber in the *Burkina Faso/Mali* case ICJ Reports (1986) 587, para 64.

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evidence used to delimit the boundary and, therefore, to attribute title to the islands in question, it is suggested that the Chamber missed a valuable opportunity to reflect on the doctrinal implications of its decision for the principle of *uti possidetis juris*.

STEPHEN ALLEN*

II. CASE CONCERNING ARMED ACTIVITIES ON THE TERRITORY OF THE CONGO (*DEMOCRATIC REPUBLIC OF THE CONGO v UGANDA*)

A. Introduction

The *Case Concerning Armed Activities on the Territory of the Congo*[1] is one of four cases instituted by the Democratic Republic of Congo (DRC) before the International Court of Justice since 1999 in response to the alleged violations committed by the States parties to the Congolese conflict. This unprecedented pattern of serial litigation is in part a direct consequence of the complexity and the wide range of actors involved in the prolonged armed conflict that has been going on in the DRC since at least 1994. The case brought by the DRC against Belgium in the *Arrest Warrant Case*, although concerned with the extent of immunities of a serving foreign minister, indirectly raised the question of accountability for violations of humanitarian norms including war crimes, committed during the armed conflict.[2] Two other cases directly concerned with the use of force were instituted against Burundi[3] and Rwanda.[4] Of these, the case against Burundi, whose jurisdictional basis was rather insecure, was unilaterally discontinued by the DRC,[5] and on 25 January 2006, the Court found that it had no jurisdiction to entertain the merits of the application against Rwanda.[6] The case against Uganda is therefore significant as it is the only one of the Congolese cases concerned with the use of force, in respect of which the Court has given a judgment on the merits.[7] It is also the first time since the Court's landmark judgment in the *Nicaragua* case[8] that it has been presented with issues that potentially involved a re-appraisal of its jurispru-

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[1] Application instituting proceedings filed in the registry of the Court on 23 June 1999, General list No 116. See also order on request for indication of provisional measures: ICJ Press Communiqué 2000/24 (1 July 2000). On which see D Kristiotis Case Note (2001) 50 ICLQ 662–9.

[2] *Case Concerning Arrest Warrant* (*Democratic Republic of Congo v Belgium* of 11 Apr 2000) Judgment of 14 Feb 2002 General List No 121.

[3] *Armed Activities on the Territory of the Congo* (*DRC v Burundi*) Application of 23 June 1999, General List No 115.

[4] Armed Activities on the territory of the Congo, *DRC v Rwanda*, application of 23 June 1999; Order of 30 Jan 2001, placing on record DRC's application to discontinue proceedings and court's order that the case be removed from the General List. On 23 May 2002 the Republic of Rwanda instituted a new application based on different jurisdictional grounds.

[5] By an order of 23 Jan 2001, the court placed on record the discontinuance of the proceedings by the DRC and ordered that the case be removed from the list.

[6] Judgment of 25 Jan 2006. Available at <http://www.icj-cij.org>.

[7] Judgment of 19 Dec 2005.

[8] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v United States of America*) Judgment of 27 June 1986 (merits) ICJ Reports 1986.

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