

DECLARATION OF JUDGE XUE

1. In the present case, the Court has used the three-stage approach to establish the maritime boundary between Somalia and Kenya in the exclusive economic zone and on the continental shelf within 200 nautical miles. Although this methodology has been applied in a number of cases since the *Black Sea Judgment* (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 61), as this case demonstrates, the question whether its methodological approaches are suitable for all types of maritime delimitation cases requires review.

2. The relevant provisions of the 1982 United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or the “Convention”) on the maritime delimitation of the exclusive economic zone and the continental shelf are contained in Articles 74 and 83. As the Court points out in the Judgment, they are of “a very general nature and do not provide much by way of guidance for those involved in the maritime delimitation exercise” (Judgment, paragraph 121). In such an exercise, all that is required to do under these provisions is to achieve an equitable solution, either through negotiations or by a third-party settlement. In other words, there is no mandatory methodology provided for under the Convention. This is certainly not an omission, but a deliberate and well-considered choice on the part of the States parties.

3. Historically, there were two main schools of thought among States on the principles for the maritime delimitation of continental shelf: one is the principle of equidistance as expressed in Article 6, paragraph 2, of the 1958 Geneva Convention on the Continental Shelf, the other the equitable principles. Positions taken by States on these two schools varied greatly, given the geographical circumstances of the maritime area in which States find themselves; the equidistance method worked well in some cases, producing an equitable solution, while in others it did not. Therefore, it came as no surprise that the equidistance method was never accepted as a rule in international law that applies to maritime delimitations.

4. In the *North Sea Continental Shelf* cases, the Court, for the first time, was requested to pronounce on the applicable principles and rules of international law for the delimitation of continental shelf. The Court rejected the claims of Denmark and the Netherlands to apply the equidistance method (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969*, pp. 45-46, para. 82) and stated that delimitation was to be effected in accordance with equitable principles (*ibid.*, pp. 46-47, para. 85). Among the three parties concerned in the joint cases, their coastlines were comparable in length and equally treated by nature, but they were not straight lines. If the equidistance method were adopted to draw the boundary lines, it would not produce an equitable result. The Court considered that, in doing so, one of the States should enjoy continental shelf rights considerably different from those of its neighbours merely because in the one case the coastline was roughly convex in form and in the other it was markedly concave, although those coastlines were comparable in length (*ibid.*, p. 50, para. 91). To overcome the distorting effect caused by such irregular situations, the Court considered that a balancing was called for in the delimitation. It stated that

“the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines, — these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions” (*ibid.*, p. 52, para. 98).

5. The equitable principles enunciated by the Court in the *North Sea Continental Shelf* Judgment thus became the guiding principles for maritime delimitation. Subsequently, these principles were reflected in Articles 74 and 83 of UNCLOS, according to which the exercise of delimitation must achieve an equitable solution. A maritime boundary that is established by bilateral negotiations is deemed equitable, as the States concerned agree to accept it as such. In the third-party settlement, how to achieve an equitable solution very much depends on the methodology used. In the ensuing years, the Court through judicial practice has gradually formulated some methodological approaches in the maritime delimitation, taking into account various geographical circumstances. In the *Romania v. Ukraine* case, these approaches were synthesized into a general delimitation methodology, which is conveniently called “the three-stage approach” (*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, pp. 101-103, paras. 115-122). By going through three stages, the Court will first construct a provisional equidistance line on the base points that are selected on strictly geometrical criteria on the basis of objective data. It will then “consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result” (*ibid.*, p. 101, para. 120, referring to *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 441, para. 288). Such factors, referred to as “relevant circumstances”, are left to the Court to determine, although those accepted so far are mostly geographical circumstances. Finally, the Court will subject the depicted line, adjusted or otherwise, to a disproportionality test to check whether there is any marked disproportion between the ratio of the length of the relevant coasts of the parties and the ratio of the respective shares of the relevant area apportioned by the depicted line to the parties. This test is designed to ensure the equitableness of the outcome of the delimitation.

6. The three-stage approach, notwithstanding its methodological certainty and objectivity, is a practice-based method. At each stage, geographical circumstances of each case are determinative for the purpose of delimitation. For example, what base points should be chosen, and what factors constitute relevant circumstances, must be “case specific”, to be determined by the Court in the context of each case (*Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of 11 April 2006, RIAA, Vol. XXVII, p. 215, para. 242*). The three-stage approach is intended to develop objective criteria and standard techniques for the maritime delimitation, but in practice, such criteria and techniques should not be applied mechanically.

7. In the first stage, in order to construct the provisional equidistance line, the first and essential step is to identify the parties’ coasts whose seaward projections overlap (*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, pp. 96-97, para. 99). By the Court’s jurisprudence, the coast that generates projections overlapping with projections from the coast of the other party is considered as relevant (*ibid.*; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1982*, p. 61, para. 75). In the present case, the coastline of the Parties in the area is simply straight, without any particular maritime features or indentations. Being adjacent to each other, the coasts of the Parties are both seaward, abutting the same maritime area and the same continental shelf. In identifying the relevant coasts, the Court, using radial projection, measures that the relevant coast of Somalia extends for approximately 733 km and that of Kenya extends for approximately 511 km. As sketch-map No. 8 in the Judgment illustrates, a substantial portion of the relevant coast of Somalia does not generate entitlements that actually overlap with those from the Kenyan coast. Although radial projection is normally used to identify the relevant coasts, it is questionable to use it under the present circumstances. It overstretches the length of the relevant coasts, particularly that on the Somali side. In the *Costa Rica v. Nicaragua* case, some segments of the relevant coast on the Costa Rican side in the Pacific Ocean, namely, from Punta Herradura to Punta Salsipuedes, seem also left out of the identified relevant area (*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2018 (I)*, pp. 210-214, paras. 181, 184, 185). An examination of the facts, however, tells a different story. Those segments, first of all, fall within approximately 200 nautical miles from the starting-point of the boundary between the parties. The total length of the relevant coast of Costa Rica

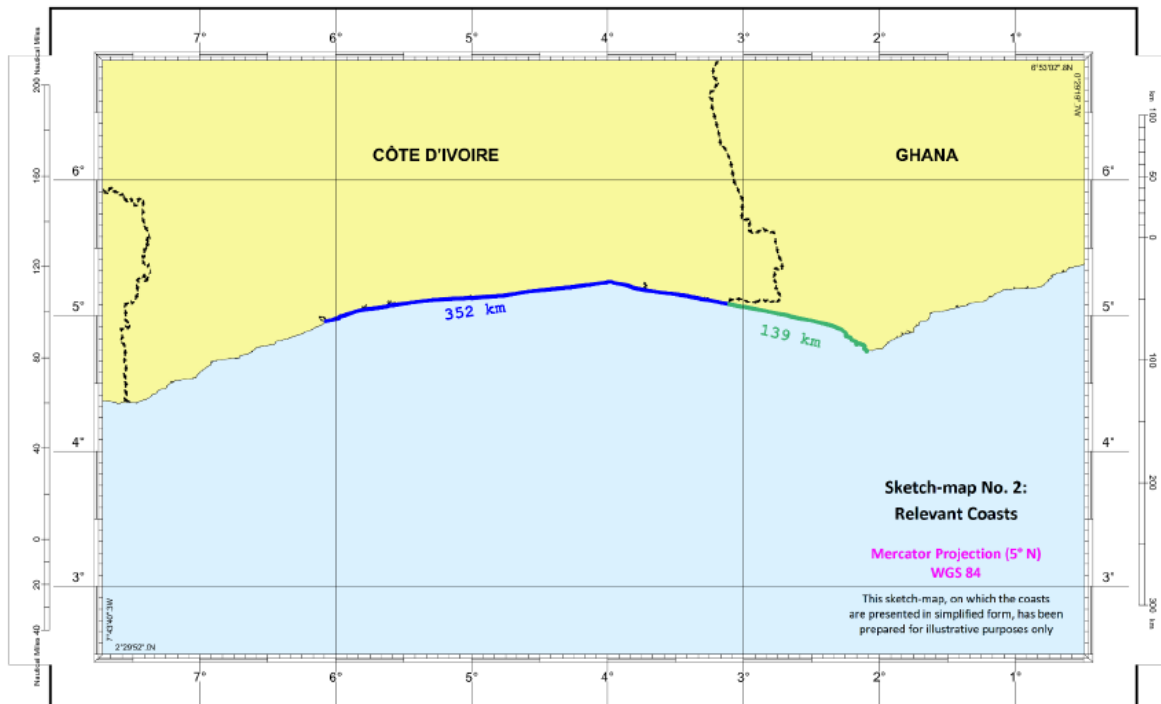
is measured as 416.4 km. That means there are genuine overlapping entitlements generated from that coast. Second, the reason why it does not about the relevant area is due to the geographical circumstance of the Nicoya Peninsula. Given the geographical circumstances of that case, the radial projection is the most appropriate methodology to be used.

8. Under the circumstances of the present case, both Parties' coasts are properly seaward, without geographical irregularities. There is no reason to leave out any segments of the coasts unless they do not produce any overlapping entitlements, in which case they should not be identified as the relevant coast in the first place. In the *Ghana/Côte d'Ivoire* case (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, p. 4), the coastal situation between the parties for the maritime delimitation possesses many similarities with that in the present case. The coastline of Ghana and Côte d'Ivoire, two adjacent States, is almost as straight as that of Somalia and Kenya, extending a substantial distance on each side from the land boundary terminus. With regard to Côte d'Ivoire's relevant coast, Côte d'Ivoire claimed that its entire coast was relevant, but Ghana contended that it should extend from the land boundary terminus until the vicinity of Sassandra, a point which is about 350 km west of the land boundary terminus. In explaining its position, Ghana stated:

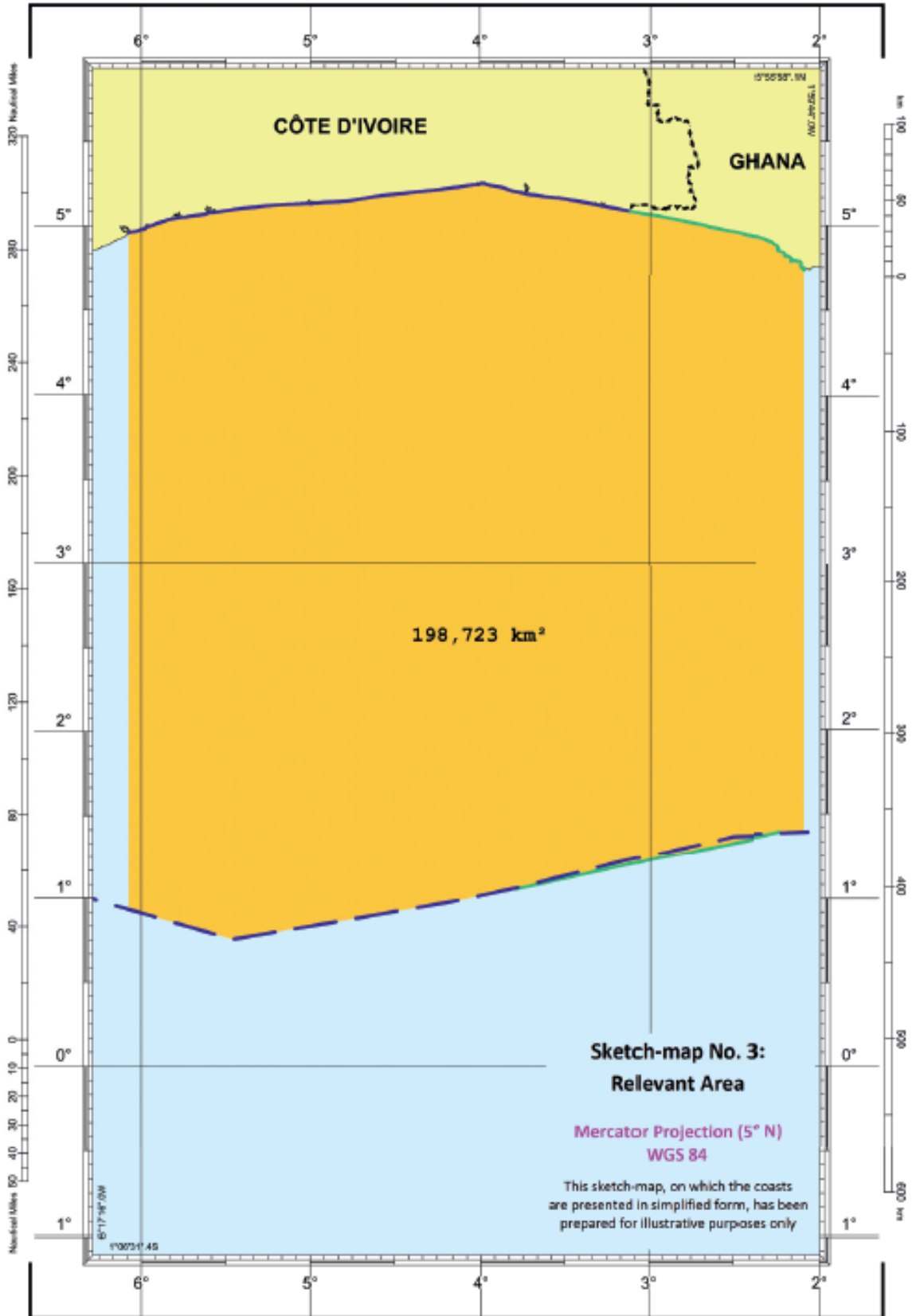
“west of [Sassandra] point, the Ivorian coastline is almost entirely beyond 200 M from the maritime entitlements claimed by Ghana . . . there is no overlap with any Ghanaian entitlement with any projections emanating from the western segment of the Ivorian coast, and therefore that western part of Côte d'Ivoire's coast cannot be relevant to the delimitation” (*ibid.*, p. 104, para. 365).

According to Ghana, the relevant coast for Côte d'Ivoire is 308 km, and that for Ghana is 121 km.

9. The Special Chamber of the International Tribunal for the Law of the Sea (hereinafter the “ITLOS Chamber” or “Chamber”), using the equidistance/relevant circumstances methodology, found that “[t]he Côte d'Ivoire coast from [the land boundary terminus] until Sassandra generate[d] . . . projections into the maritime area to be delimited. The projections of this part of the coast of Côte d'Ivoire overlap[ped] with projections of the Ghanaian coast and accordingly this part of the Ivorian coast [was] relevant” (*ibid.*, p. 106, para. 377). With regard to Côte d'Ivoire's coast west of Sassandra, the Chamber was of the view that that part of the coast did not have a projection to the sea in a way that overlapped with the disputed area, and therefore did not constitute part of the relevant coast (see *ibid.*, p. 107, sketch-map No. 2, reproduced below). It emphasized that “what the relevant coast is — or, in other words, which seaward projection of the coast creates an overlap — is determined by the *geographic reality* of that coast” (*ibid.*, p. 106, para. 378; emphasis added). Accordingly, the Chamber decided that the length of the relevant Ghanaian coast was approximately 139 km and that of Côte d'Ivoire 352 km (*ibid.*, p. 106, para. 379). On the basis of this identification, the Chamber determined the relevant area (see *ibid.*, p. 109, sketch-map No. 3, reproduced below). This finding of the Chamber, in my view, properly reflects the technical nexus between the relevant coasts and the relevant area for the purposes of the delimitation. It should be the geographic reality and genuine overlapping entitlements that determine which part of a coast is relevant.



Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017, p. 107, sketch-map No. 2



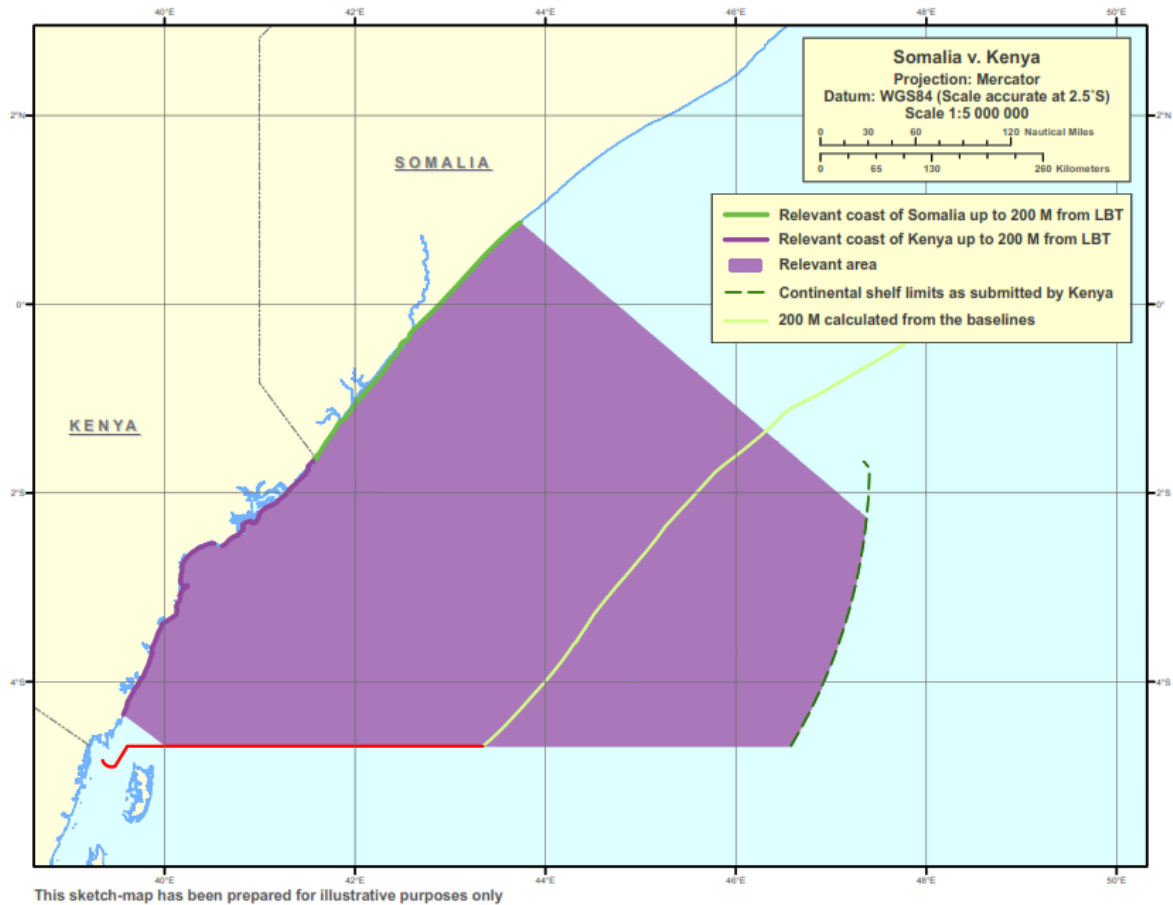
Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017, p. 109, sketch-map No. 3

10. The problem with the radial projection in this case also exists in the relevant area identified by the Court, which, in my view, does not encompass the entire potential overlapping entitlements of the Parties in this case. In their submissions to the Court, both Parties have requested the Court to determine the complete course of the maritime boundary between Somalia and Kenya in the Indian Ocean, including in the continental shelf beyond 200 nautical miles. Based on its finding that both Parties had made submissions on the limits of the continental shelf beyond 200 nautical miles to the Commission on the Limits of Continental Shelf (hereinafter the “CLCS”) in accordance with Article 76, paragraph 8, of UNCLOS, before the present proceedings and, as the matter stands, neither of them questions the existence of the other Party’s entitlement to a continental shelf beyond 200 nautical miles or the extent of that claim, the Court decides to proceed to the delimitation of the continental shelf beyond 200 nautical miles. With regard to the absence of the recommendations of the CLCS on the establishment of the outer limits of the continental shelves, the Court emphasizes that “the lack of delineation of the outer limit of the continental shelf is not, in and of itself, an impediment to its delimitation between two States with adjacent coasts” (Judgment, paragraph 189). However, this decision of the Court is not reflected in the relevant area identified by the Court, which does not comprise the potential overlapping entitlements of the Parties beyond 200 nautical miles.

11. Once the Court decides to go ahead with the delimitation of the boundary in the outer continental shelf, even with care, it means that the relevant area should include the continental shelf beyond 200 nautical miles. With the radial projection methodology, it is difficult to proceed to identifying the relevant coasts and the relevant area that includes the potential overlapping entitlements in the continental shelf beyond 200 nautical miles, as its outer limits are not yet determined. On the identification of the relevant coasts for the outer continental shelf, there are two additional decisions for reference: one is the Judgment rendered by the ITLOS in *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* and the other is the award of the *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*. In the latter case, the parties requested the Arbitral Tribunal to delimit the full course of their maritime boundary, including the continental shelf beyond 200 nautical miles. With regard to the relationship between the relevant coasts of the continental shelf within 200 nautical miles and those of the continental shelf beyond 200 nautical miles, the Arbitral Tribunal observed that “the coast is relevant, irrespective of whether that overlap occurs within 200 nm of both coasts, beyond 200 nm of both coasts, or within 200 nm of one and beyond 200 nm of the other” (*Award of 7 July 2014, RIAA*, Vol. XXXII, p. 93, para. 299). That is to say, the relevant coasts for the delimitation within 200 nautical miles are the same as those for the delimitation beyond 200 nautical miles (*ibid.*, p. 94, paras. 300-302; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, *Judgment, ITLOS Reports 2012*, pp. 58-59, paras. 200-205). It follows that in the present case, the coasts identified are relevant irrespective of whether the continental shelf is within 200 nautical miles or beyond. Notwithstanding that identification, nevertheless it remains problematic to use radial projection to identify the relevant area.

12. In the present case, it is evident that all the overlapping entitlements of the Parties could be generated from the coasts of the Parties within 200 nautical miles. If frontal projections were used, the relevant coasts of the Parties would extend on each side of the land boundary terminus for a 200-nautical-mile distance and the relevant area would extend south-eastward perpendicular to the relevant coasts to the limit of 200 nautical miles, and further down to the limit of 350 nautical miles as claimed by Kenya. In the south, the relevant area is confined by the perpendicular line and the boundary agreed between Kenya and Tanzania, and extends along the boundary until the 350-nautical-mile limit as claimed by Kenya (see sketch-map below). In my opinion, the area thus identified would better present the potential overlapping entitlements of the Parties. Regardless of the fact that the Court does not possess the necessary information of the continental shelf beyond 200 nautical miles, its decision to extend the adjusted equidistance line beyond 200 nautical miles could be sustained only if the outer continental shelf is presumed to exist. One may argue that this approach may deviate from the conventional practice of the Court, but the approach taken by the Court itself is not “conventional”. To omit the continental shelf beyond 200 nautical miles from the relevant area would not enable the Court to conduct a meaningful assessment of the proportion

between the ratio of the length of the relevant coasts of the Parties and the ratio of the shares of the relevant area apportioned to each of them. As is mentioned before, methodological approaches should only serve as a means to achieve an equitable solution, but not an end in itself. The paramount consideration should be given to the goal of achieving an equitable solution (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, ITLOS Reports 2017, p. 86, para. 281; *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 67, para. 235). Of course, there should be no mistake that any delimitation in the outer continental shelf should only be taken as illustrative, conditional on the recommendations of the CLCS in accordance with Article 76, paragraphs 4 and 5, of UNCLOS.



Relevant coasts and relevant area

13. The second important aspect that I would like to raise is the consideration of the relevant circumstances. As the Court states in the Judgment, the concept of relevant circumstances is not provided in the Convention but developed through judicial practice (Judgment, paragraph 124). The reason why, so far, there is no exhaustive list of relevant circumstances that have been developed by the Court in maritime delimitation is not difficult to explain. Geographical, economic, and social situations of States differ greatly. There may be historic rights or special interests to be preserved or protected by international law. Maritime delimitation is not just about the sharing of a maritime area. The underlying interests often rest at the heart of the dispute between the parties. When the equidistance method alone cannot fulfil the objective of achieving an equitable solution in all circumstances, the equitable principles should come into play. In essence, the second stage is a crucial means to ensure the equitableness of the final result of the delimitation. If anything, this should be the strength of the three-stage approach.

14. The Court, as the adjudicator, is obliged to take all the relevant circumstances into consideration, on the basis of the evidence and documents adduced by the parties. What circumstance is relevant and what is not must be appreciated by the Court in the context of a specific case. They cannot be predetermined or preset by certain criteria. As Judge Weeramantry pointed out, “one can never foretell what circumstances may surface or achieve importance in the unknown disputes of the future” (*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *Judgment, I.C.J. Reports 1993*, separate opinion of Judge Weeramantry, p. 261, para. 182). The Court might be easily criticized for “excessive subjectivity” in its judgment of such circumstances, but there are good reasons for the Court to maintain its appreciation of the subject-matter. For judicial settlement, even if it cannot be precluded that there are situations where the parties may use the open-endedness of the concept to make excessive claims, it is up to the Court to consider the circumstances and determine what factors to be taken into account in accordance with the equitable principles. So far, the Court has attached legal relevance primarily to geographical circumstances — such as cut-off effect, concavity and convexity, special insular features — which could produce distorting effects on the maritime delimitation. Non-geographical factors have seldom been accepted by the Court as relevant circumstances, although in principle they are not precluded in the jurisprudence of the Court. This tendency in practice, if continued, would likely render the second stage into a purely geometrical exercise, with a few fixed geophysical factors for the Court to consider, thus reducing the discretion of the Court in its appreciation of the situation. Eventually, the three-stage approach would in effect evolve into a substitute of the equidistance method and the equitable principles would vanish from the process of delimitation.

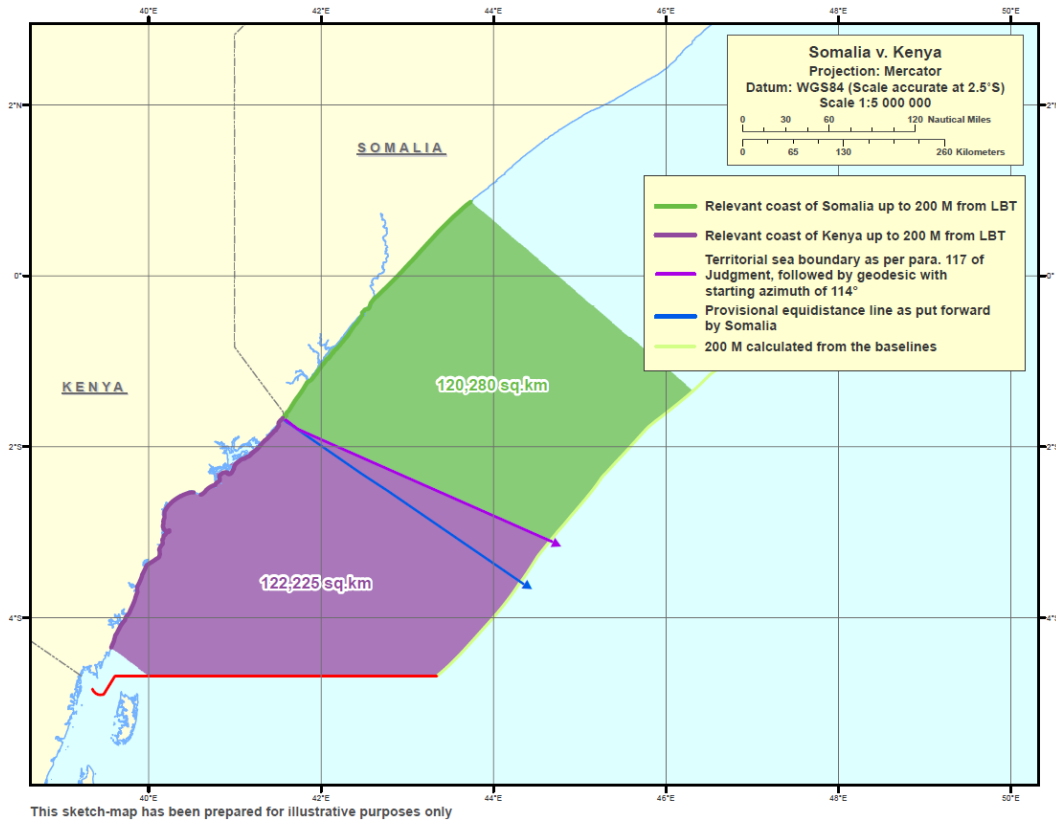
15. The fear that the boundless proliferation of relevant circumstances would open up a risk of assimilating judgments based on law to those rendered *ex aequo et bono*, in my view, is unfounded, because the notion of relevant circumstances itself is judicially developed and applied. As the Court stated in the *North Sea Continental Shelf* cases, “when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules” (*Judgment, I.C.J. Reports 1969*, p. 48, para. 88). The margin of appreciation is to be exercised by the Court, not the parties. Coupled with that discretion, of course, is the responsibility of the adjudicating organ, court or arbitral tribunal, to act reasonably and fairly in the delimitation in accordance with the equitable principles.

16. In the present case, Kenya has raised five factors as the relevant circumstances for the adjustment of the equidistance line, including significant cut-off effect, regional practice of using parallels of latitude to delimit maritime boundaries, vital security interests, long-standing conduct of the Parties in relation to oil concessions, naval patrols and fishing activities, and the impact on the local fisherfolk. The Court rejects all the factors but cut-off effect. Here I fully concur with the reasoning of the Court with regard to the geographical circumstances in the region concerned and the cut-off effect produced by the equidistance line (*Judgment*, paragraphs 162-171). Sketch-map No. 10 in the *Judgment* well illustrates the effect of the concavity of the coastline on the delimitation of the maritime boundaries among the three States — Somalia, Kenya and Tanzania. This is a textbook case where the equidistance method could not produce an equitable solution. The equidistance line between Kenya and Tanzania and the equidistance line between Kenya and Somalia both work to the disadvantage of Kenya and, as a result, the Kenyan coast could not produce its effect to a significant extent in terms of its maritime entitlements. As the narrowing effect on Kenya comes from both the northern and southern directions, it is reasonable to make an adjustment in both directions. Such adjustment of the equidistance lines does not give rise to the refashioning of geography. On the contrary, it will rectify the unreasonableness of the equidistance lines, ensuring a fair sharing of the disputed area, which serves the interests of the States concerned in the long run. The maritime boundary agreed between Kenya and Tanzania, as indicated on sketch-map No. 10 of the *Judgment*, has overcome the cut-off effect to the extent the parties deem reasonable and appropriate. With regard to the equidistance line between Somalia and Kenya, it is for the Court to determine to what extent the line should be adjusted.

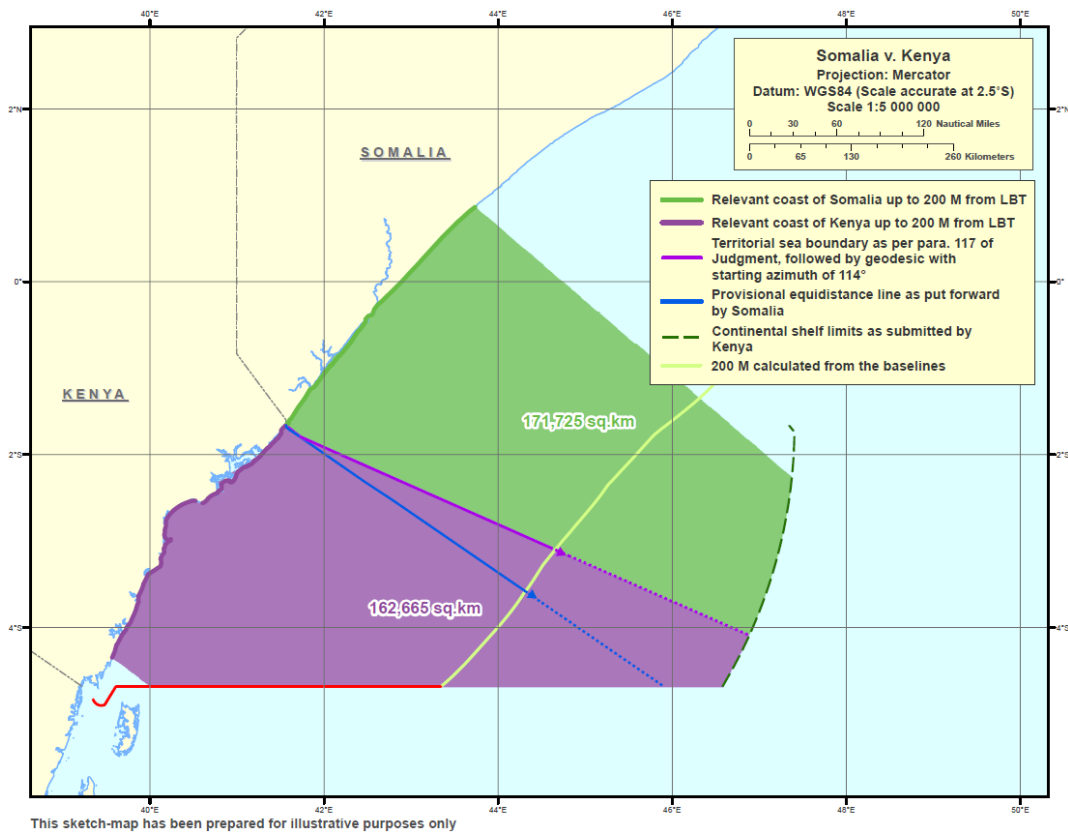
17. Between Somalia and Kenya, if all the other factors presented by Kenya are dismissed as non-relevant, one may wonder, other than the proportionality consideration, on what basis the Court could rely to adjust the provisional equidistance line. With the cut-off effect, I am quite persuaded by, and satisfied with, the reasoning of the Judgment for the necessity to adjust the equidistance line, but I am not contented with the way in which the adjustment is done, which brings me to the last point I wish to address.

18. In paragraph 174 of the Judgment, the Court decides to shift the line northwards to an initial azimuth of 114°, in the view that this line would offset the cut-off effect produced by the concavity of the coastal line. Without much explanation as to the reason for this adjustment, the Court moves on to the last stage to verify the result. According to the three-stage methodology, at the final stage, the Court will check whether the adjusted line leads to a significant disproportionality between the ratio of the lengths of the Parties' respective relevant coasts and the ratio of the sizes of the relevant area apportioned by that line. According to the Court's calculation, the ratio of the relevant coasts between Somalia and Kenya is 1:1.43 in favour of Somalia and the ratio of the apportioned spaces is 1:1:30 in favour of Kenya. The Court is of the view that [a] comparison of these two ratios does not reveal any significant or marked disproportionality" (Judgment, paragraph 176).

19. On the face of the figures, no one can seriously challenge the conclusion of the Court. However, if the identification of the relevant coasts, as has been pointed out before, follows a different method, the proportionality of the ratio of the coastal lengths of the Parties and the ratio of the maritime areas apportioned to the Parties, respectively, will be different. As the following sketch-maps illustrate, the maritime areas apportioned to the Parties in the maritime area within 200 nautical miles are approximately equal, not so favourable to Kenya as stated by the Court. The difference in size between the Parties is getting bigger in the outer continental shelf, in favour of Somalia, provided the outer limits of the continental shelves beyond 200 nautical miles as claimed by the Parties are ultimately confirmed by the CLCS.



Apportionment of the maritime area within 200 nautical miles



Apportionment of the relevant area including the continental shelf beyond 200 nautical miles

20. For years, international courts and tribunals did not reach agreement on the term “a significant disproportionality”, a criterion that assesses the equitableness of the outcome of maritime delimitation. Under the three-stage approach, the disproportionality test is designed to check, *ex post facto*, the final result. According to the Court, the disproportionality test is not in itself a method of delimitation; rather, it is a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas which would fall to one party or other by virtue of the delimitation line arrived at by other means, and the lengths of their respective coasts (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports 2009*, pp. 99-100, para. 110). This distinct status and role of the disproportionality test is sound in theory, but in practice it may not play that role. As is demonstrated in this case, when geographical factors are the only relevant circumstances that call for adjustment of the equidistance line, as in the *North Sea Continental Shelf* cases, proportionality between the two ratios would be the primary consideration for the Court to rely on. Once that is done, how much room is left for the disproportionality test to give its checking effect?

(Signed) XUE Hanqin.
