



INTERNATIONAL COURT OF JUSTICE

Peace Palace, Carnegieplein 2, 2517 KJ The Hague, Netherlands

Tel.: +31 (0)70 302 2323 Fax: +31 (0)70 364 9928

[Website](#) [Twitter Account](#) [YouTube](#) [LinkedIn](#)

Summary

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Maritime Delimitation in the Indian Ocean **(Somalia v. Kenya)**

History of the proceedings (paras. 1-28)

The Court begins by recalling that, on 28 August 2014, the Federal Republic of Somalia (hereinafter “Somalia”) filed in the Registry of the Court an Application instituting proceedings against the Republic of Kenya (hereinafter “Kenya”) concerning a dispute in relation to “the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone . . . and continental shelf, including the continental shelf beyond 200 nautical miles”. In its Application, Somalia sought to found the jurisdiction of the Court on the declarations made, pursuant to Article 36, paragraph 2, of the Statute of the Court, by Somalia on 11 April 1963 and by Kenya on 19 April 1965. On 7 October 2015, Kenya raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. By its Judgment of 2 February 2017 (hereinafter the “2017 Judgment”), the Court rejected the preliminary objections raised by Kenya, and found that it had jurisdiction to entertain the Application filed by Somalia and that the Application was admissible. Following the filing of the Parties’ written pleadings, public hearings on the merits were held from 15 to 18 March 2021. Kenya did not participate in those hearings.

I. GEOGRAPHICAL AND HISTORICAL BACKGROUND (PARAS. 31-34)

The Court first recalls the Parties’ geographical situation, before noting the following facts. On 15 July 1924, Italy and the United Kingdom concluded a treaty regulating certain questions concerning the boundaries of their respective territories in East Africa, including what Somalia describes as “the Italian colony of Jubaland”, located in present-day Somalia, and the British colony of Kenya. By an Exchange of Notes dated 16 and 26 June 1925, the boundary between the Italian and British colonial territories was redefined in its southernmost section. Between 1925 and 1927, a joint British-Italian commission surveyed and demarcated the boundary. Following the completion of this exercise, the commission recorded its decisions in an Agreement signed on 17 December 1927 (hereinafter the “1927 Agreement”), which was subsequently formally confirmed by an Exchange of Notes of 22 November 1933 between the British and Italian Governments (the 1927 Agreement and this Exchange of Notes hereinafter collectively being referred to as the “1927/1933 treaty arrangement”). Somalia and Kenya gained their independence in 1960 and 1963, respectively. Both Parties signed the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or the “Convention”) on 10 December 1982. They ratified it on 2 March 1989 and 24 July 1989, respectively, and the Convention entered into force for them on 16 November 1994. Both Somalia

and Kenya have filed submissions with the Commission on the Limits of the Continental Shelf (hereinafter the “CLCS” or the “Commission”) in order to obtain its recommendations on the establishment of the outer limits of their continental shelves beyond 200 nautical miles, in accordance with Article 76, paragraph 8, of UNCLOS. While they previously objected to the consideration by the Commission of each other’s submissions, these objections were subsequently withdrawn. As of the date of the Judgment, the Commission has yet to issue its recommendations in respect of the Parties’ submissions.

II. OVERVIEW OF THE POSITIONS OF THE PARTIES (PARA. 35)

The Court notes that the Parties have adopted fundamentally different approaches to the delimitation of the maritime areas. Somalia argues that no maritime boundary exists between the two States and asks the Court to plot a boundary line using the equidistance/special circumstances method (for the delimitation of the territorial sea) and the equidistance/relevant circumstances method (for the maritime areas beyond the territorial sea). In its view, an unadjusted equidistance line throughout all maritime areas achieves the equitable result required by international law. Kenya, for its part, contends that there is already an agreed maritime boundary between the Parties, because Somalia has acquiesced to a boundary that follows the parallel of latitude at 1° 39' 43.2" S (hereinafter “the parallel of latitude”). Kenya further contends that the Parties have considered this to be an equitable delimitation, in light of both the geographical context and regional practice. Kenya submits that, even if the Court were to conclude that there is no maritime boundary in place, it should delimit the maritime areas following the parallel of latitude, and that, even if the Court were to employ the delimitation methodology suggested by Somalia, the outcome, following adjustment to reach an equitable result, would be a delimitation that follows the parallel of latitude.

III. WHETHER SOMALIA HAS ACQUIESCED TO A MARITIME BOUNDARY FOLLOWING THE PARALLEL OF LATITUDE (PARAS. 36-89)

The Court first ascertains whether there is an agreed maritime boundary between the Parties on the basis of acquiescence by Somalia.

It recalls that both Kenya and Somalia are parties to UNCLOS. For the delimitation of the territorial sea, Article 15 of the Convention provides for the use of a median line “failing agreement between [the two States] to the contrary”, unless “it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a [different] way”. The delimitation of the exclusive economic zone and the continental shelf is governed by Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention, respectively. They establish that delimitation “shall be effected by agreement on the basis of international law”.

The Court reiterates that maritime delimitation between States with opposite or adjacent coasts must be effected by means of an agreement between them, and that, where such an agreement has not been achieved, delimitation should be effected by recourse to a third party possessing the necessary competence. Maritime delimitation cannot be effected unilaterally by either of the States concerned.

An agreement establishing a maritime boundary is usually expressed in written form. The Court considers, however, that the “agreement” referred to in Article 15, Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention may take other forms as well. The essential question is whether there is a shared understanding between the States concerned regarding their maritime boundaries.

The jurisprudence relating to acquiescence and tacit agreement may be of assistance when examining whether there exists an agreement that is not in written form regarding the maritime

boundary between two States. In this regard, the Court recalls that acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent. If the circumstances are such that the conduct of the other State calls for a response, within a reasonable period, the absence of a reaction may amount to acquiescence. This is based on the principle *qui tacet consentire videtur si loqui debuisset ac potuisset*. In determining whether a State's conduct calls for a response from another State, it is important to consider whether the State has consistently maintained that conduct. In evaluating the absence of a reaction, duration may be a significant factor.

The Court observes that it has set a high threshold for proof that a maritime boundary has been established by acquiescence or tacit agreement. It has thus emphasized that since the establishment of a permanent maritime boundary is a matter of grave importance, evidence of a tacit legal agreement must be compelling. Acquiescence presupposes clear and consistent acceptance of another State's position. To date, the Court has recognized the existence of a tacit agreement delimiting a maritime boundary in only one case, in which the parties had acknowledged in a binding international agreement that a maritime boundary already existed. In the present case, the Court uses the criteria it has identified in earlier cases and examines whether there is compelling evidence that Kenya's claim to a maritime boundary at the parallel of latitude was maintained consistently and, consequently, called for a response from Somalia. It then considers whether there is compelling evidence that Somalia clearly and consistently accepted the boundary claimed by Kenya.

In this respect, the Court notes that Somalia and Kenya present arguments regarding the Proclamations by the President of the Republic of Kenya dated 28 February 1979 and 9 June 2005 (hereinafter the "1979 Proclamation" and the "2005 Proclamation"), Kenya's 2009 Submission to the CLCS and their respective domestic laws. They also refer to other conduct of the Parties in the period between 1979 and 2014. The Court examines these arguments in turn.

The Court observes that the 1979 and 2005 Proclamations both claim a boundary at the parallel of latitude, but Kenya's legislation refers to a boundary along a median or equidistance line. Moreover, in Notes Verbales of 26 September 2007 and 4 July 2008, Kenya requested Somalia to confirm its agreement to a boundary along the parallel of latitude, but it has not been shown that Somalia provided such confirmation. Furthermore, Kenya's 2009 Submission to the CLCS and a Memorandum of Understanding (hereinafter the "MOU") signed by the two States that same year recognize the existence of a maritime boundary dispute between the Parties. Finally, the negotiations held between the Parties in 2014 and Notes Verbales of Kenya in 2014 and 2015 also indicate a lack of agreement between the Parties on their maritime boundaries. In light of the foregoing, the Court considers that Kenya has not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia. It thus concludes that there is no compelling evidence that Kenya's claim and related conduct were consistently maintained and, consequently, called for a response from Somalia.

The Court also considers that Somalia's conduct between 1979 and 2014 in relation to its maritime boundary with Kenya, in particular its alleged absence of protest against Kenya's claim, does not establish Somalia's clear and consistent acceptance of a maritime boundary at the parallel of latitude. In this regard, the Court is of the view that, contrary to what is claimed by Kenya, it cannot be inferred from the Parties' positions during the Third United Nations Conference on the Law of the Sea that Somalia rejected equidistance as a possible method of achieving an equitable solution. Moreover, there is no indication that Somalia accepted the boundary claimed by Kenya during the bilateral negotiations held in 1980 and 1981. Furthermore, although Somalia's Maritime Law of 1988 refers to a boundary for the territorial sea which follows "a straight line toward the sea from the land as indicated on the enclosed charts", this phrase is unclear and, without the charts mentioned, its meaning cannot be determined. The Court also notes that the 2009 MOU, Somalia's 2009 submission of preliminary information to the CLCS, a letter from Somalia dated 19 August 2009 and addressed to the Secretary-General of the United Nations, and Somalia's 2014 objection to the consideration by the CLCS of Kenya's submission all mention the existence of a maritime boundary dispute between the Parties. Finally, the Court adds that the context of the civil war that

afflicted Somalia, depriving it of a fully operational government and administration between 1991 and 2005, must be taken into account in evaluating the extent to which it was in a position to react to Kenya's claim during this period.

In addition, the Court examines other conduct of the Parties between 1979 and 2014 concerning naval patrols, fisheries, marine scientific research and oil concessions, and considers that it does not confirm that Somalia has clearly and consistently accepted a boundary at the parallel of latitude.

In conclusion on this question, the Court finds that there is no compelling evidence that Somalia has acquiesced to the maritime boundary claimed by Kenya and that, consequently, there is no agreed maritime boundary between the Parties at the parallel of latitude. It therefore rejects Kenya's claim in this respect.

IV. MARITIME DELIMITATION (PARAS. 90-197)

In view of this conclusion, the Court turns to the delimitation of the maritime areas appertaining to Somalia and Kenya.

A. Applicable law (para. 92)

The Court first recalls that both Somalia and Kenya are parties to UNCLOS, and the provisions of the Convention must therefore be applied in determining the course of the maritime boundary between the two States.

B. Starting-point of the maritime boundary (paras. 93-98)

The Court notes that although the Parties initially proffered divergent views on the appropriate approach to defining the starting-point of the maritime boundary, those views evolved in the course of the proceedings and are now by and large concordant. Taking into account the views of the Parties, the Court considers that the starting-point of the maritime boundary is to be determined by connecting the final permanent boundary beacon, known as Primary Beacon No. 29, or "PB 29", to a point on the low-water line by a straight line that runs in a south-easterly direction and that is perpendicular to "the general trend of the coastline at Dar Es Salam" in accordance with the terms of the 1927/1933 treaty arrangement.

C. Delimitation of the territorial sea (paras. 99-118)

The Court then turns to the delimitation of the territorial sea. It notes that Somalia submits that this delimitation is to be effected pursuant to Article 15 of the Convention, whereas Kenya maintains that the maritime boundary in the territorial sea already exists at the parallel of latitude. The Court recalls that it has already concluded that no such boundary was agreed between the Parties. It also observes that Kenya, in its Counter-Memorial, referred to the 1927/1933 treaty arrangement and stated that it "provided for the establishment of [a] boundary of the territorial sea". The Court notes, however, that neither Party asks it to confirm the existence of any segment of a maritime boundary or to delimit the boundary in the territorial sea on the basis of the 1927/1933 treaty arrangement. It recalls that in their legislation concerning the territorial sea neither Party has referred to the terms of the 1927/1933 treaty arrangement to indicate the extent of the territorial sea in relation to its adjacent neighbour. The Court further notes that the agenda of the meeting between Somalia and Kenya, held on 26 and 27 March 2014, to discuss the maritime boundary between the two countries, covered all maritime zones, including the territorial sea, and that, in a presentation attached to the report on that meeting, Kenya referred to Articles 15, 74 and 83 of the Convention as relevant to maritime

delimitation, emphasizing that Article 15 provides for delimitation through a “[m]edian line for [the] territorial sea unless there is an agreement to the contrary based on [a] claim by historical title and or special circumstances”. In light of the above, the Court considers it unnecessary to decide whether the 1927/1933 treaty arrangement had as an objective the delimitation of the boundary in the territorial sea.

The Court recalls that the delimitation methodology is based on the geography of the coasts of the two States concerned, and that a median or equidistance line is constructed using base points appropriate to that geography. It explains that, although in the identification of base points the Court will have regard to the proposals of the parties, it need not select a particular base point, even if the parties are in agreement in that respect, if it does not consider that base point to be appropriate. It may select a base point that neither party has proposed. The Court further recalls that it has sometimes been led to eliminate the disproportionate effect of small islands by not selecting a base point on such small maritime features. As the Court has stated in the past, there may be situations in which the equitableness of an equidistance line depends on the precaution taken to eliminate the disproportionate effect of certain islets, rocks and minor coastal projections.

In the circumstances of the present case, the Court considers it appropriate to place base points for the construction of the median line solely on solid land on the mainland coasts of the Parties. It does not consider it appropriate to place base points on the tiny arid Diua Damasciaca islets, which would have a disproportionate impact on the course of the median line in comparison to the size of these features. For similar reasons, nor does the Court consider it appropriate to select a base point on a low-tide elevation off the southern tip of Ras Kaambooni, which is a minor protuberance in Somalia’s otherwise relatively straight coastline in the vicinity of the land boundary terminus, which constitutes the starting-point for the maritime delimitation.

The Court then gives the geographic co-ordinates of the base points that it places on the Parties’ coasts for the construction of the median line. The resulting line starts from the land boundary terminus and continues out to the point (Point A) at a distance of 12 nautical miles from the coast. That median line is depicted on sketch-map No. 5 (reproduced in Annex 2 to this Summary).

The Court observes that the course of the median line corresponds closely to that of a line “at right angles to the general trend of the coastline”, assuming that the 1927/1933 treaty arrangement, in using this phrase, had as an objective to draw a line that continues into the territorial sea, a question that the Court need not decide.

D. Delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles (paras. 119-177)

1. Delimitation methodology (paras. 119-131)

The Court then proceeds to the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles from the coasts of the Parties, noting that the relevant provisions of the Convention for this exercise are contained in Article 74 of UNCLOS for the delimitation of the exclusive economic zone and Article 83 for the delimitation of the continental shelf. It observes that those provisions are of a very general nature and do not provide much by way of guidance for those involved in the maritime delimitation exercise. The goal of that exercise is to achieve an equitable solution. If two States have freely agreed on a maritime boundary, they are deemed to have achieved such an equitable solution. However, if they fail to reach an agreement on their maritime boundary and the matter is submitted to the Court, it is the task of the Court to find an equitable solution in the maritime delimitation it has been requested to effect.

The Court recalls that, since the adoption of the Convention, it has gradually developed a maritime delimitation methodology to assist it in carrying out its task. In determining the maritime delimitation line, the Court proceeds in three stages, which it described in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*. In the first stage, the Court will establish the provisional equidistance line from the most appropriate base points on the parties' coasts. In the second, the Court will consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result. In the third and final stage, the Court will subject the envisaged delimitation line, either the equidistance line or the adjusted line, to the disproportionality test. The purpose of this test is to assure the Court that there is no marked disproportion between the ratio of the lengths of the parties' relevant coasts and the ratio of the parties' respective shares in the relevant area to be delimited by the envisaged line, and thus to confirm that the delimitation achieves an equitable solution as required by the Convention.

The Court observes that the three-stage methodology is not prescribed by UNCLOS and therefore is not mandatory. It has been developed by the Court in its jurisprudence on maritime delimitation as part of its effort to arrive at an equitable solution, as required by Articles 74 and 83 of the Convention. The methodology is based on objective, geographical criteria, while at the same time taking into account any relevant circumstances bearing on the equitableness of the maritime boundary. It has brought predictability to the process of maritime delimitation and has been applied by the Court in a number of past cases. The three-stage methodology for maritime delimitation has also been used by international tribunals. The Court will nonetheless abstain from using the three-stage methodology if there are factors which make the application of the equidistance method inappropriate, for instance if the construction of an equidistance line from the coasts is not feasible. This is not the case in the present circumstances, however, where such a line can be constructed.

Moreover, the Court does not consider that the use of the parallel of latitude is the appropriate methodology to achieve an equitable solution, as suggested by Kenya. A boundary along the parallel of latitude would produce a severe cut-off effect on the maritime projections of the southernmost coast of Somalia.

The Court therefore sees no reason in the present case to depart from its usual practice of using the three-stage methodology to establish the maritime boundary between Somalia and Kenya in the exclusive economic zone and on the continental shelf.

2. Relevant coasts and relevant area (paras. 132-141)

(a) *Relevant coasts* (paras. 132-137)

The Court begins by identifying the relevant coasts of the Parties, namely those coasts whose projections overlap. It states that, using radial projections which overlap within 200 nautical miles, it has identified that the relevant coast of Somalia extends for approximately 733 km and that of Kenya for approximately 511 km.

(b) *Relevant area* (paras. 138-141)

The Court notes that the Parties disagree as to the identification of the relevant area. It recalls that it has explained on a number of occasions that the relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap. The Court also recalls its observation that the relevant area cannot extend beyond the area in which the entitlements of both parties overlap. In the present case, the Court is of the view that, in the north, the relevant area extends as far as the overlap of the maritime projections of the coast of Kenya and the coast of Somalia. The Court considers it appropriate to use the overlap of the 200-nautical-mile radial projections from the land boundary terminus. As far as the southern limit of the relevant area is concerned, the Court notes

that the Parties agree that the maritime space south of the boundary between Kenya and Tanzania is not part of the relevant area. The relevant area, as identified by the Court for the purpose of delimiting the exclusive economic zone and the continental shelf up to 200 nautical miles from the coasts, measures approximately 212,844 sq km.

3. Provisional equidistance line (paras. 142-146)

The Court next constructs the provisional equidistance line. It identifies the appropriate base points for the construction of this line within 200 nautical miles of the coasts. The provisional equidistance line constructed on the basis of these base points begins from the endpoint of the maritime boundary in the territorial sea (Point A) and continues until it reaches 200 nautical miles from the starting-point of the maritime boundary, at a point (Point 10') the co-ordinates of which are given in the Judgment. The line thus obtained is depicted on sketch-map No. 9 (reproduced in Annex 2 to this Summary).

4. Whether there is a need to adjust the provisional equidistance line (paras. 147-174)

The Court considers whether there are factors requiring the adjustment or shifting of the provisional equidistance line in order to achieve an equitable solution. It recalls that Kenya perceives the provisional equidistance line as inequitable while Somalia sees no plausible reason for adjusting the line and believes that it would constitute an equitable boundary.

The Court notes that Kenya, by invoking various factors which it considers relevant circumstances in the context of this case, has consistently sought a maritime boundary that would follow the parallel of latitude. The Court has already concluded that no maritime boundary between Somalia and Kenya following the parallel of latitude was established in the past. Nor has the Court accepted the methodology based on the parallel of latitude for establishing the maritime boundary between the Parties as advocated by Kenya. Kenya would now like to achieve the same result by a major shifting of the provisional equidistance line, changing its south-easterly direction to an exclusively easterly direction. The Court considers that such a shifting of the provisional equidistance line, as argued for by Kenya, would represent a radical adjustment while clearly not achieving an equitable solution. It would severely curtail Somalia's entitlements to the continental shelf and the exclusive economic zone generated by its coast adjacent to that of Kenya. A line thus adjusted would not allow the Parties' coasts to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way.

The Court begins by considering those factors, relied on by Kenya, which are non-geographical in nature. First, as far as Kenya's security interests are concerned, the Court observes that boundaries between States, including maritime boundaries, are aimed at providing permanency and stability. This being so, the Court believes that the current security situation in Somalia and in the maritime spaces adjacent to its coast is not of a permanent nature. The Court is therefore of the view that the current security situation does not justify the adjustment of the provisional equidistance line. Moreover, the Court recalls its statement in a previous case that legitimate security considerations may be a relevant circumstance if a maritime delimitation was effected particularly near to the coast of a State. This is not the case here, as the provisional equidistance line does not pass near the coast of Kenya. The Court also recalls that control over the exclusive economic zone and the continental shelf is not normally associated with security considerations and does not affect rights of navigation.

Access for Kenya's fisherfolk to natural resources is another factor which Kenya brought to the attention of the Court when arguing for the adjustment of the line. The Court explains that such a factor can be taken into account as a relevant circumstance in exceptional cases, in particular if the line would likely entail catastrophic repercussions for the livelihood and economic well-being of the

population of the countries concerned. On the basis of the evidence before it, the Court is not convinced that the provisional equidistance line would entail such harsh consequences for the population of Kenya in the present case. Moreover, the Court has to consider the well-being of the populations on both sides of the delimitation line. In light of the foregoing, the Court cannot accept Kenya's argument that the provisional equidistance line would deny Kenya equitable access to fisheries resources that are vital to its population.

The Court then turns to another argument put forward by Kenya. It contends that the evidence of the Parties' long-standing and consistent conduct in relation to oil concessions, naval patrols, fishing and other activities reflects the existence of "a *de facto* maritime boundary" along the parallel of latitude which calls for the adjustment of the provisional equidistance line. However, the Court recalls that it has already concluded that no maritime boundary along the parallel of latitude has been agreed by the Parties. There is no *de facto* maritime boundary between Somalia and Kenya. The Court therefore cannot accept Kenya's argument that, on the basis of the conduct of the Parties, the provisional equidistance line has to be adjusted so that it coincides with the alleged *de facto* maritime boundary.

Finally, the Court considers the two remaining arguments which, according to Kenya, call for the adjustment of the provisional equidistance line. Kenya submits that the application of an equidistance line would produce a significant cut-off effect with respect to its maritime areas, and that the regional context and practice require the provisional equidistance line to be adjusted.

The Court recalls that both the ICJ itself and international tribunals have acknowledged that the use of an equidistance line can produce a cut-off effect, particularly where the coastline is characterized by concavity, and that an adjustment of that line might be necessary in order to reach an equitable solution. Nevertheless, it considers that any cut-off effect as a result of the Kenya-Tanzania maritime boundary is not a relevant circumstance. The agreements between Kenya and Tanzania are *res inter alios acta* and cannot per se affect the maritime boundary between Kenya and Somalia. However, the issue to be considered in the present case is whether the use of an equidistance line produces a cut-off effect for Kenya, not as a result of the agreed boundary between Kenya and Tanzania, but as a result of the configuration of the coastline.

The Court observes that if the examination of the coastline is limited only to the coasts of Kenya and Somalia, any concavity is not conspicuous. However, examining only the coastlines of the two States concerned to assess the extent of any cut-off effect resulting from the geographical configuration of the coastline may be an overly narrow approach. Examining the concavity of the coastline in a broader geographical configuration is consistent with the approach taken by this Court and international tribunals. In this regard, the Court refers, in particular, to the two *North Sea Continental Shelf* cases and the *Bangladesh/Myanmar* and *Bangladesh v. India* cases, before stating that, in the present case, the potential cut-off of Kenya's maritime entitlements should be assessed in a broader geographical configuration. In the Court's view, the potential cut-off of Kenya's maritime entitlements cannot be properly observed by examining the coasts of Kenya and Somalia in isolation. When the mainland coasts of Somalia, Kenya and Tanzania are observed together, as a whole, the coastline is undoubtedly concave. Kenya faces a cut-off of its maritime entitlements as the middle State located between Somalia and Tanzania. The presence of Pemba Island, a large and populated island that appertains to Tanzania, accentuates this cut-off effect because of its influence on the course of a hypothetical equidistance line between Kenya and Tanzania. The provisional equidistance line between Somalia and Kenya progressively narrows the coastal projection of Kenya, substantially reducing its maritime entitlements within 200 nautical miles. This cut-off effect occurs as a result of the configuration of the coastline extending from Somalia to Tanzania, independently of the boundary line agreed between Kenya and Tanzania, which in fact mitigates that effect in the south, in the exclusive economic zone and on the continental shelf up to 200 nautical miles.

The Court recalls its jurisprudence and that of international tribunals according to which an adjustment of the provisional equidistance line is warranted if the cut-off effect is “serious” or “significant”. In the Court’s view, even though the cut-off effect in the present case is less pronounced than in some other cases, it is nonetheless still serious enough to warrant some adjustment to address the substantial narrowing of Kenya’s potential entitlements. In order to attenuate this cut-off effect, the Court considers it reasonable to adjust the provisional equidistance line. In view of these considerations, the Court believes that it is necessary to shift the line to the north so that, from Point A, it follows a geodetic line with an initial azimuth of 114°. This line would attenuate in a reasonable and mutually balanced way the cut-off effect produced by the unadjusted equidistance line due to the geographical configuration of the coasts of Somalia, Kenya and Tanzania. The resulting line would end at its intersection with the 200-nautical-mile limit from the coast of Kenya, at a point (Point B) the co-ordinates of which are given in the Judgment. The line thus adjusted is depicted on sketch-map No. 11 (reproduced in Annex 2 to this Summary).

5. Disproportionality test (paras. 175-177)

In the final stage, the Court checks whether the envisaged delimitation line leads to a significant disproportionality between the ratio of the lengths of the Parties’ respective relevant coasts and the ratio of the size of the relevant areas apportioned by that line. The Court recalls that the relevant coast of Somalia is 733 km long, and that of Kenya, 511 km long. The ratio of the relevant coasts is 1:1.43 in favour of Somalia. The maritime boundary determined by the Court divides the relevant area within 200 nautical miles of the coast in such a way that approximately 120,455 sq km would appertain to Kenya and the remaining part, measuring approximately 92,389 sq km, would appertain to Somalia. The ratio between the maritime zones that would appertain respectively to Kenya and Somalia is 1:1.30 in favour of Kenya. A comparison of these two ratios does not reveal any significant or marked disproportionality. The Court is thus satisfied that the adjusted line that it has established as the maritime boundary for the exclusive economic zones and the continental shelves of Somalia and Kenya within 200 nautical miles in the Indian Ocean achieves an equitable solution as required by Article 74, paragraph 1, and Article 83, paragraph 1, of the Convention.

E. Question of the delimitation of the continental shelf beyond 200 nautical miles (paras. 178-197)

The Court turns finally to the question of the delimitation of the continental shelf beyond 200 nautical miles. It first recalls that both Parties have asked the Court to determine the complete course of the maritime boundary between them, including the continental shelf beyond 200 nautical miles. The Court also recalls that any claim of continental shelf rights beyond 200 miles by a State party to UNCLOS must be in accordance with Article 76 of the Convention and reviewed by the Commission on the Limits of the Continental Shelf established thereunder.

The Court observes that both States have made submissions on the limits of the continental shelf beyond 200 nautical miles to the Commission in accordance with Article 76, paragraph 8, of UNCLOS. The Court notes that both Somalia and Kenya have fulfilled their obligations under Article 76 of the Convention. At the same time, the Commission has yet to consider these submissions and make any recommendations to Somalia and to Kenya on matters related to the establishment of the outer limits of their continental shelves. It is only after such recommendations are made that Somalia and Kenya can establish final and binding outer limits of their continental shelves, in accordance with Article 76, paragraph 8, of UNCLOS.

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, as is the case here. The exercise by international courts and tribunals of their jurisdiction regarding the

delimitation of maritime boundaries, including that of the continental shelf, is without prejudice to the exercise by the Commission of its functions on matters related to the delineation of the outer limits of the continental shelf.

The Court observes that the Parties' entitlements to the continental shelf beyond 200 nautical miles are to be determined by reference to the outer edge of the continental margin, to be ascertained in accordance with Article 76, paragraphs 4 and 5, of UNCLOS. The entitlement of a State to the continental shelf beyond 200 nautical miles thus depends on geological and geomorphological criteria, subject to the constraints set out in Article 76, paragraph 5. An essential step in any delimitation is to determine whether there are entitlements, and whether they overlap. The situation in the present case is not the same as that addressed by the International Tribunal for the Law of the Sea in the *Bangladesh/Myanmar* case. In that case, the unique situation in the Bay of Bengal and the negotiation record at the Third United Nations Conference on the Law of the Sea, which threw a particular light upon the parties' contentions on the subject, were sufficient to enable the Tribunal to proceed with the delimitation of the area beyond 200 nautical miles.

The Court notes that in their submissions to the Commission both Somalia and Kenya claim on the basis of scientific evidence a continental shelf beyond 200 nautical miles, and that their claims overlap. In most of the area of overlapping claims beyond 200 nautical miles, both Parties claim that their continental shelf extends to a maximum distance of 350 nautical miles. The Court further notes that neither Party questions the existence of the other Party's entitlement to a continental shelf beyond 200 nautical miles or the extent of that claim. Their dispute concerns the boundary delimiting that shelf between them. Both Parties in their submissions — Somalia in those presented at the close of the hearings and Kenya in its Rejoinder — request the Court to delimit the maritime boundary between them in the Indian Ocean up to the outer limit of the continental shelf. For the reasons set out above, the Court proceeds to do so.

As regards the relevant circumstances invoked by Kenya for the adjustment of the provisional equidistance line, the Court observes that it has already considered them earlier and adjusted the line accordingly in the exclusive economic zone and on the continental shelf up to 200 nautical miles. It recalls that both Somalia and Kenya have claimed a continental shelf extending up to 350 nautical miles in the greater part of the area of overlapping claims. In view of the foregoing, the Court considers it appropriate to extend the geodetic line used for the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles to delimit the continental shelf beyond 200 nautical miles.

The Court therefore concludes that the maritime boundary beyond 200 nautical miles continues along the same geodetic line as the adjusted line within 200 nautical miles until it reaches the outer limits of the Parties' continental shelves, which are to be delineated by Somalia and Kenya, respectively, on the basis of the recommendations to be made by the Commission, or until it reaches the area where the rights of third States may be affected. The direction of that line is depicted on sketch-map No. 12 (reproduced in Annex 2 to this Summary).

The Court adds that, depending on the extent of Kenya's entitlement to a continental shelf beyond 200 nautical miles as it may be established in the future on the basis of the Commission's recommendation, the delimitation line might give rise to an area of limited size located beyond 200 nautical miles from the coast of Kenya and within 200 nautical miles from the coast of Somalia, but on the Kenyan side of the delimitation line ("grey area"). This possible grey area is depicted on sketch-map No. 12. Since the existence of this "grey area" is only a possibility, the Court does not consider it necessary, in the circumstances of the present case, to pronounce itself on the legal régime that would be applicable in that area.

The complete course of the maritime boundary is depicted on sketch-map No. 13 (reproduced in Annex 2 to this Summary).

**V. ALLEGED VIOLATIONS BY KENYA OF ITS INTERNATIONAL
OBLIGATIONS (PARAS. 198-213)**

The Court first examines the Applicant's argument that, by its unilateral actions in the disputed area, Kenya has violated Somalia's sovereignty over the territorial sea and its sovereign rights and jurisdiction in the exclusive economic zone and on the continental shelf. The Court recalls that Somalia's submission was made in the context of proceedings regarding a maritime boundary which had never before been settled, and that the present Judgment has the effect of fixing the maritime boundary between the Parties. The Court considers that when maritime claims of States overlap, maritime activities undertaken by a State in an area which is subsequently attributed to another State by a judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States. Somalia complains of surveying and drilling activities conducted or authorized by Kenya in areas located entirely or partially north of the equidistance line claimed by Somalia as the maritime boundary. There is no evidence that Kenya's claims over the zone concerned were not made in good faith. Under the circumstances, the Court concludes that it has not been established that Kenya's maritime activities, including those that may have been conducted in parts of the disputed area that have now been attributed to Somalia, were in violation of Somalia's sovereignty or its sovereign rights and jurisdiction.

The Court then turns to the Applicant's argument that Kenya's activities were in violation of Article 74, paragraph 3, and Article 83, paragraph 3, of UNCLOS. Under these provisions, States with opposite or adjacent coasts that have not reached an agreement on the delimitation of the exclusive economic zone or continental shelf are under an obligation to "make every effort . . . during this transitional period, not to jeopardize or hamper the reaching of the final agreement". The Court considers that the "transitional period" mentioned in these provisions refers to the period from the moment the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved. The Court recalls that it is of the view that a maritime delimitation dispute between the Parties has been established since 2009. Accordingly, the Court only examines whether the activities conducted by Kenya after 2009 jeopardized or hampered the reaching of a final agreement on the delimitation of the maritime boundary.

The Court observes that Somalia complains of certain activities, including the award of oil concession blocks to private operators and the performance of seismic and other surveys in those blocks, which are of a transitory character. In the Court's view, these activities are not of the kind that could lead to permanent physical change in the marine environment, and it has not been established that they had the effect of jeopardizing or hampering the reaching of a final agreement on the delimitation of the maritime boundary. Somalia also complains of certain drilling activities which are of the kind that could lead to permanent physical change in the marine environment. Such activities may alter the status quo between the parties to a maritime dispute and could jeopardize or hamper the reaching of a final agreement. However, the Court is of the opinion that, on the basis of the evidence before it, it is not in a position to determine with sufficient certainty that drilling operations that could have led to permanent physical change in the disputed area took place after 2009. The Court further notes that, in 2014, the Parties engaged in negotiations on maritime delimitation and that, in 2016, Kenya suspended its activities in the disputed area and offered to enter into provisional arrangements with Somalia. In light of these circumstances, the Court cannot conclude that the activities carried out by Kenya in the disputed area jeopardized or hampered the reaching of a final agreement on the delimitation of the maritime boundary, in violation of Article 74, paragraph 3, or Article 83, paragraph 3, of UNCLOS.

For these reasons, the Court finds that Kenya has not violated its international obligations through its maritime activities in the disputed area. Since Kenya's international responsibility is not engaged, the Court need not examine Somalia's request for reparation. Somalia's submission must therefore be rejected.

OPERATIVE CLAUSE (PARA. 214)

For these reasons,

THE COURT,

(1) Unanimously,

Finds that there is no agreed maritime boundary between the Federal Republic of Somalia and the Republic of Kenya that follows the parallel of latitude described in paragraph 35 [of the Judgment];

(2) Unanimously,

Decides that the starting-point of the single maritime boundary delimiting the respective maritime areas between the Federal Republic of Somalia and the Republic of Kenya is the intersection of the straight line extending from the final permanent boundary beacon (PB 29) at right angles to the general direction of the coast with the low-water line, at the point with co-ordinates 1° 39' 44.0" S and 41° 33' 34.4" E (WGS 84);

(3) Unanimously,

Decides that, from the starting-point, the maritime boundary in the territorial sea follows the median line described at paragraph 117 [of the Judgment] until it reaches the 12-nautical-mile limit at the point with co-ordinates 1° 47' 39.1" S and 41° 43' 46.8" E (WGS 84) (Point A);

(4) By ten votes to four,

Decides that, from the end of the boundary in the territorial sea (Point A), the single maritime boundary delimiting the exclusive economic zone and the continental shelf up to 200 nautical miles between the Federal Republic of Somalia and the Republic of Kenya follows the geodetic line starting with azimuth 114° until it reaches the 200-nautical-mile limit measured from the baselines from which the breadth of the territorial sea of the Republic of Kenya is measured, at the point with co-ordinates 3° 4' 21.3" S and 44° 35' 30.7" E (WGS 84) (Point B);

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Bennouna, Xue, Sebutinde, Robinson, Iwasawa, Nolte; *Judge ad hoc* Guillaume;

AGAINST: *Judges* Abraham, Yusuf, Bhandari, Salam;

(5) By nine votes to five,

Decides that, from Point B, the maritime boundary delimiting the continental shelf continues along the same geodetic line until it reaches the outer limits of the continental shelf or the area where the rights of third States may be affected;

IN FAVOUR: *President* Donoghue; *Vice-President* Gevorgian; *Judges* Tomka, Bennouna, Xue, Sebutinde, Iwasawa, Nolte; *Judge ad hoc* Guillaume;

AGAINST: *Judges* Abraham, Yusuf, Bhandari, Robinson, Salam;

(6) Unanimously,

Rejects the claim made by the Federal Republic of Somalia in its final submission number 4 [concerning the allegation that the Republic of Kenya, by its conduct in the disputed area, had violated its international obligations].

President DONOGHUE appends a separate opinion to the Judgment of the Court; Judges ABRAHAM and YUSUF append separate opinions to the Judgment of the Court; Judge XUE appends a declaration to the Judgment of the Court; Judge ROBINSON appends an individual, partly concurring and partly dissenting, opinion to the Judgment of the Court; Judge *ad hoc* GUILLAUME appends a separate opinion to the Judgment of the Court.

Separate opinion of President Donoghue

In her separate opinion, President Donoghue explains why she has voted in favour of subparagraph (5) of the dispositive paragraph of the Judgment, pursuant to which the maritime boundary continues beyond 200 nautical miles until it reaches the outer limits of the continental shelf or the area where the rights of third States may be affected. She recalls that both Parties have asked the Court to delimit the continental shelf beyond 200 nautical miles and that neither Party has questioned the other Party's entitlement to outer continental shelf or the other Party's claim that, in certain parts of the area in which the Parties' claims overlap, such entitlement extends to 350 nautical miles. President Donoghue also indicates that she has cast this vote with reluctance, not out of procedural concerns but because the Court has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that might appertain to the Parties. She explains that this case is entirely different from other cases in which a tribunal has delimited the outer continental shelf of two States. President Donoghue also makes clear that her doubts about the Court's decision to delimit the outer continental shelf do not result from the particular course of the boundary that the Court has established. Finally, President Donoghue underlines that it cannot be presumed that a line that achieves an equitable delimitation of the 200-nautical-mile zones will also result in equitable delimitation of overlapping areas of two States' outer continental shelf, since the juridical basis for entitlement to outer continental shelf is entirely different from the basis for entitlement within 200 nautical miles.

Separate opinion of Judge Abraham

Judge Abraham agrees with most of the conclusions reached by the Court.

He disagrees, however, with the line chosen by the Court for the maritime boundary both within and, consequently, beyond 200 nautical miles. Judge Abraham disagrees with the manner in which the Court implements the second stage of the "three-stage" method, regarding the existence of relevant circumstances justifying an adjustment of the provisional equidistance line. Judge Abraham notes that the Court's jurisprudence states that, for the Court to be able to justify an adjustment, the concavity of the coastline must lie "within the area to be delimited". Yet, in his view, there is no conspicuous concavity in the configuration of Somalia's coast to the north of Kenya, or in the way in which the Somali and Kenyan coastlines extend in broadly the same general direction. Although he accepts that it may be reasonable, in some cases, to take account not only of the coastal configuration of the two States parties to the proceedings, but also that of a third State, Judge Abraham considers that the cut-off effect for Kenya, which results mainly from the configuration of its coast in relation to that of Tanzania to the south, is not sufficiently "serious" or "significant" to give rise to an adjustment of the equidistance line, in any event not on the scale of that made by the Court.

Separate opinion of Judge Yusuf

In his separate opinion, Judge Yusuf explains that he agrees with the decision of the Court to reject Kenya's claim that Somalia had acquiesced to a maritime boundary that follows the parallel of latitude. He also points out that the Court was correct in denying Kenya's request to adjudge and declare that the maritime boundary shall follow the parallel of latitude. Judge Yusuf expresses his agreement with the application of the median line for the delimitation of the territorial sea, pursuant to Article 15 of UNCLOS. He disagrees, however, with certain aspects of the implementation of that delimitation. In his view, the way in which the base points have been selected for the construction of the median line departs from the provisions of UNCLOS and from the jurisprudence of the Court.

The selected base points have resulted in a contrived median line, the construction of which appears to have been aimed at producing a line which comes as close as possible to a bisector line, although there is nothing that justifies the use of a bisector for the delimitation of the territorial sea between Somalia and Kenya.

With respect to the delimitation of the exclusive economic zone and the continental shelf, Judge Yusuf elucidates his main disagreement with the Judgment's approach to that delimitation. His disagreement relates to the manner in which the three-stage methodology has been implemented in the Judgment, particularly with regard to the adjustment of the provisional equidistance line through an unprecedented search for a concavity and an elusive cut-off in a so-called "broader geographical configuration". In his opinion, taking into account extraneous geographical circumstances that lie beyond the geography and the relevant coastlines of the Parties can only be understood as a "judicial refashioning of geography", which is neither consistent with the cardinal principle that "the land dominates the sea" nor with the practice of the Court. In addition, Judge Yusuf disagrees with what he considers as the incorrect use of the concept of a "serious cut-off" in the Judgment, which does not correspond to the ordinary meaning of the word "cut-off" in English and diverges from its use in international jurisprudence regarding maritime delimitation.

Judge Yusuf further considers that the use of a geodetic line based on an incorrectly adjusted equidistance line brings into the delimitation of the area beyond 200 nautical miles the same flawed reasoning used for the area within the 200-nautical-mile zone. This reasoning does not take into account the fact that any "cut-off" effect of Kenya's coastal projections in the outer continental shelf could solely be due to its agreement with Tanzania, which should have no legal effect on the delimitation between Somalia and Kenya. Moreover, the incorrect adjustment of the equidistance line gives rise to what the Judgment refers to as a "possible grey area", which may also lead in the future to a "Court-created" new problem between the Parties.

Declaration of Judge Xue

1. In Judge Xue's view, this case demonstrates that the question whether the three-stage methodology is suitable for all types of maritime delimitation cases requires review.

2. She emphasizes that there is no mandatory delimitation methodology provided for under UNCLOS; all that is required is to achieve an equitable solution, either through negotiations or by a third-party settlement. The historical developments on the principles for the delimitation of the continental shelf suggest that the equidistance method was never accepted as a rule in international law that applies to maritime delimitations. It is the equitable principles enunciated by the Court in the *North Sea Continental Shelf* Judgment that became the guiding principles for maritime delimitation and subsequently were reflected in Articles 74 and 83 of UNCLOS. Judge Xue considers that the three-stage approach, notwithstanding its methodological certainty and objectivity, is a practice-based method and its criteria and techniques should not be applied mechanically.

3. In the present case, Judge Xue observes that 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. As sketch-map No. 8 in the Judgment illustrates, a substantial portion of the relevant coast of Somalia identified by the Court does not generate entitlements that actually overlap with those from the Kenyan coast. She points out that 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. She refers to the *Ghana/Côte d'Ivoire* case, which shared many similarities with the present case. In her view, the identification of the relevant coasts and relevant area by the ITLOS Chamber properly reflects the technical nexus

between the relevant coasts and the relevant area for the purposes of the delimitation. She stresses that it should be the geographic reality and genuine overlapping entitlements that determine which part of a coast is relevant.

4. Judge Xue also takes the view that the relevant area identified by the Court does not encompass the entire potential overlapping entitlements of the Parties in this case. In her opinion, 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 so that they include the potential overlapping entitlements in the continental shelf beyond 200 nautical miles, as its outer limits are not yet determined. Referring to the *Bangladesh/Myanmar* and *Bangladesh v. India* cases, she considers that in the present case, the coasts identified are relevant, irrespective of whether the continental shelf is within 200 nautical miles or beyond. In her view, 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 agreed boundary until the 350-nautical-mile limit as claimed by Kenya. 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. Judge Xue points out that methodological approaches should only serve as a means to achieve an equitable solution, but not be an end in itself. The paramount consideration should be given to the goal of achieving an equitable solution.

5. The second important aspect that Judge Xue would like to raise is the consideration of the relevant circumstances. She is of the view that 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.

6. Judge Xue considers that 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. In her opinion, the tendency of attaching legal relevance primarily to geographical circumstances, 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 for the equidistance method and the equitable principles would vanish from the process of delimitation. 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 her view, is unfounded, because the notion of relevant circumstances itself is judicially developed and applied.

7. In the present case, Judge Xue fully concurs 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, but she is not contented with the way in which the adjustment is done. She notes that the Court does not provide much explanation to the adjustment of the provisional equidistance

line, and moves on to the last stage to verify the result. On the face of the figures calculated by the Court, no one can seriously challenge its conclusion. However, if the identification of the relevant coasts 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 would be different.

8. Judge Xue observes that the 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, proportionality between the two ratios would be the primary consideration for the Court to rely on. Once that is done, Judge Xue wonders how much room is left for the disproportionality test to give its checking effect.

Individual opinion, partly concurring and partly dissenting, of Judge Robinson

1. Judge Robinson's opinion addresses four areas of the Court's Judgment, namely, the delimitation of the continental shelf beyond 200 nautical miles, the question of a concavity, the 1927/1933 treaty arrangement and acquiescence.

The delimitation of the continental shelf beyond 200 nautical miles

2. In relation to the delimitation of the continental shelf beyond 200 nautical miles, Judge Robinson disagrees with the finding in paragraph 214 (5) of the Judgment. He argues that the operative paragraph makes clear that the Court has delimited the continental shelf beyond 200 nautical miles. However, in his view, the Court was not in a position to carry out such a delimitation. He gives several reasons for this position.

3. First, he argues that in order to determine a State's entitlement to a continental shelf beyond 200 nautical miles there must be in existence a continental margin that extends beyond 200 nautical miles and he argues that, in order to delimit, the Court must have before it reliable evidence that there is in existence in the area beyond 200 nautical miles a "submerged prolongation of the land mass of the coastal State". According to Judge Robinson, while it is clear that recommendations by the CLCS on the outer limit of the continental shelf do not constitute a necessary precondition for maritime delimitation by the Court, he nonetheless argues that, in order to carry out such a delimitation, the Court must have reliable evidence confirming the existence of a continental shelf in the area beyond 200 nautical miles if it is to be in a position to carry out a delimitation in that area. In his view, the Court has ignored this requirement.

4. He argues that in this case, the Court has proceeded to delimit the Parties' continental shelf in the area beyond 200 nautical miles without any convincing evidence as to the existence of a shelf beyond 200 nautical miles. Judge Robinson contends that the Court's Judgment is bereft of even a scintilla of reliable evidence that the geological and geomorphological criteria, which the Judgment itself refers to in paragraph 193 as being essential in the determination of state entitlements, have been met. According to Judge Robinson, the Court comes closest to identifying evidence of the existence of a continental shelf beyond 200 nautical miles when it noted, in paragraph 194, "that in their submissions to the Commission both Somalia and Kenya claim on the basis of scientific evidence a continental shelf beyond 200 nautical miles and that their claims overlap". However, according to Judge Robinson, this observation does not provide a sufficient basis for the delimitation because nowhere in the Judgment is there any reference to the content of this scientific evidence, and more importantly, nowhere in the Judgment is there any analysis of that content to show that the Court is satisfied that the necessary geological and geomorphological criteria have been met for the

existence of a continental shelf beyond 200 nautical miles. In the circumstances, he contends that it appears that the principal factors that explain the Court's decision to delimit the continental shelf beyond 200 nautical miles are the criterion of the 350-nautical-mile distance as the outer limit of the continental shelf and the volition of the Parties to have the Court effect a delimitation. However, he argues that, in delimiting the continental shelf beyond 200 nautical miles, geological and geomorphological factors supersede distance as the criteria for determining a State's entitlement to that shelf, thereby rendering less consequential the request of the Parties to have the Court effect a delimitation in that area. Consequently, he concludes that the lack of any evidence of geological and geomorphological data to substantiate the existence of a continental shelf, and thus, of the entitlement of the Parties to a continental shelf beyond 200 nautical miles, undermines the validity of the finding in paragraph 214 (5), which is the principal conclusion of the Court in the part of its Judgment devoted to the delimitation of the continental shelf beyond 200 nautical miles.

5. Second, he observes that the Court has carried out a delimitation of the continental shelf beyond 200 nautical miles in an environment riddled with uncertainty. He argues that notwithstanding that delineation of the outer limits of the continental shelf is carried out by coastal States on the basis of the recommendations of the CLCS, and not by the Court, there must be a concern that delimitation and delineation exercises may impact adversely on the Area, defined in Article 1 (1) of the Convention. The Area begins where national jurisdiction ends. He argues that, where it is appropriate, the interests of the international community in exploring and exploiting the Area is a factor that must be taken into account in maritime delimitation in the area beyond 200 nautical miles. Recalling the decision in the *Bangladesh/Myanmar* case where the Tribunal expressly considered the possible impact of the delimitation of the shelf beyond 200 nautical miles on the interests of the international community in the Area, and determined that those interests were not affected, he argues that it would seem that in the instant case, a statement similar to that of the Tribunal in *Bangladesh/Myanmar* could not be made by the Court, because the continental shelf that is the subject of delimitation could possibly extend to the Area.

6. Finally, he criticizes the Judgment on the basis that in the delimitation of the continental shelf beyond 200 nautical miles, the Judgment is silent on the question whether the methodology the Court has used produces an equitable solution. He considers this a significant omission because it raises serious questions as to whether the delimitation, as required by the Convention, has been carried out "in order to achieve an equitable solution".

Concavity

7. Turning to the question of a concavity, Judge Robinson argues that case law is generally unhelpful in identifying the minimum features for a concavity to result in the equidistance line producing a cut-off effect that requires its adjustment in order to achieve an equitable solution. In his view, it is not any and every geographical feature that will be sufficient to constitute a relevant circumstance; it is only a geographical feature meeting the minimum requirement for a concavity and producing a cut-off effect that will constitute a relevant circumstance requiring adjustment of the provisional equidistance line.

8. According to Judge Robinson, in the instant case, there must be a doubt as to whether the curvature in the Kenyan coast or, for that matter, the curvature in the Somali, Kenyan and Tanzanian coasts has the degree of concavity sufficient to result in the equidistance line producing a cut-off effect, requiring an adjustment of that line. In his view, the greater part of the Kenyan coastline may fairly be described as a slight curvature. However, he argues that since, in the result, the Court has held this curvature to be a concavity, the reasonable doubt that exists as to whether the feature constitutes a concavity means that any cut-off resulting would only warrant the slightest adjustment

of the equidistance line, because that line does not in any significant way prevent Kenya from achieving its maximum maritime area in accordance with international law; in fact, he argues that the better view might very well be that no adjustment is warranted since the cut-off is neither serious nor severe.

9. Judge Robinson also makes observations on what the Judgment describes as the “broader geographical configuration”. He argues that the Court has followed the Tribunal’s decision in *Guinea/Guinea-Bissau* rather than its Judgment in *Cameroon v. Nigeria*. He points out that in the instant case, the Court refers to the “concavity” of a third State, Tanzania, not to exclude it from the maritime delimitation between Somalia and Kenya, but to include it in that delimitation. In his view, the proposition that, in maritime delimitation, account should be taken of a concavity that is not within the area to be delimited but is part of a so-called broader geographical configuration, is problematic. According to Judge Robinson, in the first place, the concept of a “broader geographical configuration” is itself broad and vague because where the configuration begins and ends is a legitimate question. He contends that the real danger is that the cut-off effect may result more from the geographical feature of a third State — not a party to the dispute and not in the delimitation area — than from the geographical feature on the coast of the State that is a party to the dispute and is within the area to be delimited. He argues that this would appear to be so in the present case, because the Tanzanian “concavity”, that is not within the area to be delimited, appears more pronounced than the Kenyan “concavity”, that is within the area to be delimited. According to him, the odd result is a refashioning of geography whereby an adjustment is made to the equidistance line, more on account of a “concavity” in the Tanzanian coastline than the “concavity” in the Kenyan coastline — a result that is wholly inconsistent with the Court’s finding in *Cameroon v. Nigeria* that, in order to qualify as a relevant circumstance for the purpose of adjusting the equidistance line, the concavity must be within the area to be delimited. He concludes that Somalia would appear to have been disadvantaged by reason of a “concavity” that is not within the area to be delimited — an outcome that can scarcely be described as equitable.

The status of the 1927/1933 treaty arrangement

10. Judge Robinson argues that there is a question as to whether the Court has interpreted and applied the 1927/1933 treaty arrangement. According to Judge Robinson, an examination of paragraphs 109 and 118 of the Judgment reveals that the Court has interpreted the treaty arrangement. He observes that the Court could not have concluded that there was a close correspondence between the median line as described in paragraph 117 of the Judgment and the course of a line “at right angles to the general trend of the coastline” without examining and interpreting that phrase, which is to be found in the 1927/1933 treaty arrangement. However, he acknowledges that it might also be argued that in this paragraph the Court has not only interpreted the colonial treaty but also applied it. However, this is not a view that he shares, but he argues that it cannot be ruled out of consideration. His own position is that paragraph 214 (2) of the *dispositif* confirms that the Court has not applied the 1927/1933 treaty arrangement because the starting-point identified — “the intersection of the straight line extending from the final permanent boundary beacon (PB 29) at right angles to the general direction of the coast with the low-water line” — is not the starting-point set out in the 1927/1933 treaty arrangement. He argues that this paragraph of the *dispositif* does not use the phrase “at right angles to the general trend of the coastline”, which is to be found in paragraph 118 of the Judgment, and placed in quotation marks to indicate that it is taken from the 1927/1933 treaty arrangement. In his view, this paragraph, in its reference to the low-water line as the starting-point of the boundary, reflects Article 5 of the Convention, which is the applicable law for the Parties, since both States are parties to that Convention. He contends that although it may be said that the formulation of this paragraph is influenced by the 1927/1933 treaty arrangement, it cannot be concluded, that in determining the starting-point the Court has applied the 1927/1933 treaty arrangement.

11. Judge Robinson observes that there must be an explanation as to how the colonial treaties between Italy and the United Kingdom become relevant to the dispute between Somalia and Kenya. According to him, it cannot even be maintained that there is a link between the treaty arrangement and the dispute on the basis that both cover the same geographical area, because the treaties establish a land boundary while the dispute between the Parties relates to the sea. However, even if both the treaties and the dispute covered the same geographical area, that would not provide a sufficient link with Somalia and Kenya, States that were not parties to the 1927/1933 treaty arrangement. In his view, the closest that the Judgment comes to discussing the relationship between the 1927/1933 treaty arrangement and the dispute is in paragraph 32 of the Judgment. He states that in that paragraph, after outlining the various instruments described as the 1927/1933 treaty arrangement between Italy and the United Kingdom, there is a terse reference to Somalia and Kenya gaining their independence in 1960 and 1963 respectively. However, he states that no link is made between the colonial treaties and the attainment of independence between Somalia and Kenya.

12. In Judge Robinson's view, the 1927/1933 treaty arrangement did not establish a boundary in the territorial sea.

13. Judge Robinson observes that the Judgment does not determine whether the 1927/1933 treaty arrangement establishes a boundary in the territorial sea. In his view, it is patent that the Judgment seeks to adopt an approach that would arrive at a conclusion about the delimitation of the territorial sea without any reference to the colonial treaties. Nonetheless, as is evident in paragraphs 109 and 118, the Judgment does not seem capable of escaping references to those treaties.

14. In questioning the jurisprudential basis of the Court's interpretation, he argues that if the jurisprudential basis for the Court's interpretation of the treaty arrangement is not the principle of a succession of States, reflected in the 1978 Vienna Convention on the Succession of States in respect of Treaties, then in his view, it must be that the colonial treaties between Italy and the United Kingdom become relevant to the Court's adjudication in the dispute between Somalia and Kenya on the basis of the right to self-determination.

15. He observes that in response to a question by a Member of the Court, Somalia stated that "[n]either [it] nor Kenya, since their independence and at all times thereafter, has ever claimed that the maritime boundary in the territorial sea follows a line perpendicular to the coast at Dar es Salam, for any distance". It further added that neither party accepted nor argued for the 1927 Agreement as binding on them in regard to a maritime boundary, for any distance. In Judge Robinson's view, in exercise of their sovereignty and independence Somalia and Kenya had the right to determine their relationship with the colonial treaties, that is, whether they accepted or rejected them. These two statements by Somalia, indicating the Parties' non-reliance and non-acceptance of the colonial treaties, classically reflect the exercise of the right to self-determination by newly independent States. Consequently, those treaties are inapplicable in the determination of the maritime dispute between Somalia and Kenya. Since those treaties did not establish a boundary in the territorial sea, the question whether there is an obligation under customary international law to respect boundaries that existed at independence does not arise.

Acquiescence

16. Judge Robinson observes that it is settled that, for acquiescence to apply, there must be an examination of the conduct of the State claiming acquiescence to determine whether it is clear and consistent, and as a consequence, calls for a response from the alleged acquiescing State. Thus, the

initial focus is on the conduct of the State claiming acquiescence with a view to deciding whether it calls for a response from the alleged acquiescing State.

17. He argues that there is an inherent conflict between the Court's finding in paragraph 71 and its finding in paragraph 72 of the Judgment. After examining the conduct of Kenya, the Judgment concludes in paragraph 71 "that Kenya has not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia". According to Judge Robinson, in effect, the Court concluded that by virtue of the inconsistency of Kenya's conduct no response was called for by Somalia; consequently, the Court should have dismissed the claim. In his view, there was no need to move on to determine whether Somalia clearly and consistently accepted a maritime boundary at the parallel of latitude (paragraph 72); to do so undermines the earlier finding that Kenya's conduct was not consistent and consequently no response was called for by Somalia.

18. In Judge Robinson's view, the conflict between paragraphs 71 and 72 of the Judgment is evident because if Kenya did not consistently maintain its claim, it would be impossible to identify with any certainty what Somalia could clearly and consistently have acquiesced to. This explains why the most important aspect of the law on acquiescence is an examination of the conduct of the State claiming acquiescence to determine whether that conduct requires a response. He argues that, in particular the Court's approach flies in the face of the finding in paragraph 71 of the Judgment that "it was reasonable for Somalia to understand that its maritime boundary with Kenya in the territorial sea, in the exclusive economic zone and on the continental shelf would be established by an agreement to be negotiated and concluded in the future". Further, if it is reasonable for Somalia to have this understanding, it is difficult to appreciate why the Court would go on to examine whether Somalia clearly and consistently accepted a maritime boundary at the parallel of latitude. This is so because the Court could only have made this finding on the basis that it had rejected Kenya's claim of Somalia's acquiescence to a boundary along a parallel of latitude — all the more reason why an enquiry into Somalia's conduct was unnecessary.

19. Judge Robinson observes that, having carried out its examination of Somalia's conduct, the Court concludes that the conduct of Somalia between 1979 and 2014 did not demonstrate "Somalia's clear and consistent acceptance of a maritime boundary at the parallel of latitude" (paragraph 80). In his view, an examination of the logic of this conclusion shows why the Court's approach is questionable. He argues that, had the finding been that there was evidence demonstrating Somalia's clear and consistent acceptance of a maritime boundary along a parallel of latitude, it would be impossible to reconcile that finding with the earlier conclusion in paragraph 71 of the Judgment, not only that Kenya's conduct did not require a response from Somalia, but also that it was reasonable for Somalia to expect that on the basis of Kenya's conduct its maritime boundary with that State would be established on the basis of agreement.

Separate opinion of Judge *ad hoc* Guillaume

Judge *ad hoc* Guillaume supports the Court's decision, but disagrees with certain points of its reasoning.

First, he agrees with the Court's finding that Somalia did not acquiesce to Kenya's positions concerning the delimitation of its territorial sea and its continental shelf beyond 200 nautical miles along a parallel of latitude. In his view, however, the situation is different as regards the exclusive economic zone. Indeed, he recalls that Kenya claimed this parallel of latitude in 1979 and 2005 by presidential proclamations circulated to all United Nations Member States, and that Somalia did not object until 2009. He observes that it may nonetheless be asked whether, in matters of such importance, circulation of this kind is sufficient to give rise to a tacit agreement by acquiescence, or

whether a State is required to notify its neighbour of its claims directly. He also notes that, prior to 2018, both in its negotiations with Somalia and before the Court, Kenya never claimed that Somalia had acquiesced, and it behaved as if the boundary of the exclusive economic zone had yet to be established. It is for these reasons that Judge *ad hoc* Guillaume ultimately supported the Court's solution on this point.

In addition, like the Court, Judge *ad hoc* Guillaume considers that, as successor States, Kenya and Somalia are bound by the three agreements concluded between Italy and the United Kingdom, the former colonial Powers, in 1924, 1927 and 1933, which fixed the boundary between them. He notes that these agreements were not abrogated in whole or in part by either express or tacit agreement between the Parties. Judge *ad hoc* Guillaume is of the opinion that it was therefore incumbent on the Court to apply them in accordance with Article 15 of the United Nations Convention on the Law of the Sea. Accordingly, the Court should have first determined whether these agreements delimited the territorial sea between the Parties up to 12 nautical miles from the coastline. Judge *ad hoc* Guillaume was thus unable to support the Court's reasoning that it is "unnecessary to decide whether the 1927/1933 treaty arrangement had as an objective the delimitation of the boundary in the territorial sea" (Judgment, paragraph 109). He considers that this was the case, and that, consequently, the delimitation line is a "straight line running in a south-easterly direction at right angles to the general direction of the coast at Dar Es Salam".

Judge *ad hoc* Guillaume nonetheless observes that the delimitation line adopted by the Court is virtually the same as the line fixed under the 1927/1933 treaty arrangement. He therefore voted in favour of the co-ordinates set out in the third subparagraph of the Judgment's operative clause, while disagreeing with the reasoning adopted.

- Sketch-map No. 5: Delimitation of the territorial sea
- Sketch-map No. 9: Construction of the provisional equidistance line (within 200 nautical miles)
- Sketch-map No. 11: The adjusted line (within 200 nautical miles)
- Sketch-map No. 12: Delimitation beyond 200 nautical miles
- Sketch-map No. 13: Course of the maritime boundary









