

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

**MARITIME DELIMITATION
IN THE INDIAN OCEAN**

(SOMALIA v. KENYA)

JUDGMENT OF 12 OCTOBER 2021

2021

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

**DÉLIMITATION MARITIME
DANS L'OCÉAN INDIEN**

(SOMALIE c. KENYA)

ARRÊT DU 12 OCTOBRE 2021

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JUDGMENT

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(SOMALIE *c.* KENYA)

12 OCTOBRE 2021

ARRÊT

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INTERNATIONAL COURT OF JUSTICE

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2021
12 October
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12 October 2021

**MARITIME DELIMITATION
IN THE INDIAN OCEAN**

(SOMALIA v. KENYA)

Geographical and historical background — Somalia and Kenya adjacent States on coast of East Africa — 1927/1933 treaty arrangement between Italy and United Kingdom concerning boundaries of their territories in East Africa — Somalia and Kenya gaining independence in 1960 and 1963, respectively — Both States parties to United Nations Convention on the Law of the Sea (UNCLOS) — Both States having filed submissions with Commission on the Limits of the Continental Shelf (CLCS) to obtain recommendations on outer limits of continental shelf beyond 200 nautical miles — CLCS yet to issue recommendations.

*

Overview of the positions of the Parties — Somalia arguing for unadjusted equidistance line through all maritime areas — Kenya contending maritime boundary already agreed as Somalia acquiesced to boundary following parallel of latitude.

*

Whether Somalia acquiesced to maritime boundary following parallel of latitude.

Maritime delimitation to be effected by agreement or recourse to third party possessing competence — Agreement on maritime boundary usually in written form but other forms possible — Essential question being existence of shared understanding between States concerning boundary — High threshold for proof that maritime boundary established by acquiescence or tacit agreement — Court to examine whether compelling evidence that Kenya's claim to maritime boundary maintained consistently, consequently calling for response from Somalia, and clearly and consistently accepted by Somalia.

Whether claim of Kenya to a boundary at the parallel of latitude maintained consistently — Kenyan proclamations of 1979 and 2005 asserting boundary along parallel of latitude — Legislation of Kenya referring to boundary on median or equidistance line — Notes Verbales of Kenya in 2007 and 2008 asking Somalia to confirm agreement to boundary at parallel of latitude — 2009 Submission of Kenya to CLCS and 2009 Memorandum of Understanding (MOU) between both States recognizing existence of disputed maritime boundaries — 2014 negotiations between Parties and diplomatic correspondence of Kenya in 2014-2015 also suggesting boundary not yet agreed — No compelling evidence that claim of Kenya to boundary at parallel of latitude maintained consistently and consequently called for response from Somalia.

Whether Somalia clearly and consistently accepted claim of Kenya to a boundary at the parallel of latitude — Position of Parties during Third United Nations Conference on the Law of the Sea not indicating rejection by Somalia of equidistance as possible method of achieving equitable solution — No indication that Somalia accepted claim of Kenya during bilateral negotiations in 1980-1981 — Somalia's Maritime Law of 1988 providing for boundary in territorial sea following "a straight line towards the sea from the land as indicated on the enclosed charts" — Phrase unclear and not possible to determine its meaning without charts mentioned — 2009 MOU and Somalia's 2009 submission of preliminary information to the CLCS, 2009 letter to UN Secretary-General and 2014 objection to the consideration by CLCS of Kenya's submission all referring to unsettled maritime boundary dispute — Context of civil war depriving Somalia of fully operational government and administration between 1991 and 2005 to be taken into account — No clear and consistent acceptance by Somalia of maritime boundary at parallel of latitude.

Practice of Parties between 1979 and 2014 concerning naval patrols, fisheries, marine scientific research and oil concessions also not showing clear and consistent acceptance by Somalia of maritime boundary at parallel of latitude.

No compelling evidence that Somalia acquiesced to maritime boundary claimed by Kenya — Consequently no agreed maritime boundary between Parties at parallel of latitude.

*

Maritime delimitation.

Applicable Law — UNCLOS.

Starting-point of maritime boundary — Concordant views of the Parties — Land boundary terminus defined in 1927/1933 treaty arrangement constituting starting-point of maritime boundary.

Delimitation of territorial sea — Article 15 UNCLOS — Identification of base points appropriate to geography of coasts — Disproportionate effect of tiny features — Court selecting base points solely on solid land on mainland coasts — Median line constructed constituting boundary in territorial sea.

Delimitation of exclusive economic zone and continental shelf within 200 nautical miles — Articles 74 and 83 UNCLOS — Three-stage methodology developed by Court — No reason to use other methodology in present case.

Identification of relevant coasts and relevant area — Relevant coasts being those whose projections overlap — Court using 200 nautical miles radial projections to identify relevant coasts of Somalia and Kenya — Relevant area being that in which potential entitlements of parties overlap — Relevant area in present case constituted by overlap of 200-nautical-mile radial projections from land boundary terminus.

First stage — Construction of a provisional equidistance line — Identification of appropriate base points — Provisional equidistance line constructed from end-point boundary in territorial sea to 200 nautical miles from starting-point of maritime boundary.

Second stage — Whether relevant circumstances calling for adjustment of provisional equidistance line — Current security situation in Somalia and in adjacent maritime spaces not justifying adjustment — No adjustment needed to ensure equitable access to fisheries resources — No de facto boundary justifying adjustment — Question whether use of equidistance line producing cut-off effect for Kenya as result of configuration of coastline — Need to consider broader geographical configuration — Cut-off of Kenya's maritime entitlements due to concavity of coastline from Somalia to Tanzania — Pemba Island accentuating cut-off effect — Need to adjust the provisional equidistance line by shifting it north — Adjusted line following geodetic line with initial azimuth 114° until intersection with 200-nautical-mile limit from coast of Kenya.

Third stage — Verification of absence of significant disproportion between ratio lengths relevant coasts and ratio respective shares of Parties in relevant area — No significant disproportionality in present case — Adjusted line achieving equitable solution.

Question of delimitation of continental shelf beyond 200 nautical miles — Both Parties having filed submissions with CLCS and fulfilled obligations under Article 76 UNCLOS — Awaiting recommendations of CLCS to delineate outer limits of continental shelf — Lack of delineation of outer limits not in and of itself impediment to delimitation of extended continental shelf between States with adjacent coasts — Essential step in delimitation being determination of existence of entitlements to extended continental shelf and overlap of such entitlements — Both Parties claiming continental shelf up to 350 nautical miles on basis of scientific evidence, claims of Parties overlapping — Neither Party questioning existence or extent of other Party entitlement to continental shelf beyond 200 nautical miles — Both Parties requesting Court to delimit maritime boundary up to outer limit of continental shelf — Court proceeding with delimitation — Court extending geodetic line used for delimitation of exclusive economic zone and continental shelf within 200 nautical miles — Maritime boundary continuing along line up to outer limits of continental shelves to be established on basis of future recommendations of CLCS or up to area where rights of third States potentially affected.

Possible grey area of limited size — Not necessary to pronounce on applicable legal régime in the present case.

*

Alleged violations by Kenya of its international obligations — Not established that Kenya's maritime activities in disputed area not made in good faith — No violation of Somalia's sovereignty or sovereign rights and jurisdiction — No evidence that Kenya's activities jeopardized or hampered reaching of final agreement on delimitation — No violation of Article 74, paragraph 3, or Article 83, paragraph 3, of UNCLOS — Responsibility of Kenya not engaged.

JUDGMENT

Present: President DONOGHUE; Vice-President GEVORGIAN; Judges TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE; Judge ad hoc GUILLAUME; Registrar GAUTIER.

In the case concerning maritime delimitation in the Indian Ocean,

between

the Federal Republic of Somalia,

represented by

H.E. Mr. Mahdi Mohammed Gulaid, Deputy Prime Minister of the Federal Republic of Somalia,

as Agent;

H.E. Mr. Ali Said Faqi, Ambassador of the Federal Republic of Somalia to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg,

as Co-Agent;

Mr. Mohamed Omar Ibrahim, Senior Adviser to the President of the Federal Republic of Somalia,

as Assistant Deputy Agent;

Mr. Paul S. Reichler, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court and the District of Columbia,

Mr. Alain Pellet, Professor Emeritus of the University Paris Nanterre, former Chairman of the International Law Commission, member of the Institut de droit international,

Mr. Philippe Sands, QC, Professor of International Law, University College London, Barrister, Matrix Chambers, London,

Ms Alina Miron, Professor of International Law, University of Angers,

Mr. Edward Craven, Barrister, Matrix Chambers, London,

as Counsel and Advocates;

Mr. Lawrence H. Martin, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,

Mr. Yuri Parkhomenko, Attorney at Law, Foley Hoag LLP, member of the Bar of the District of Columbia,

Mr. Nicholas M. Renzler, Attorney at Law, Foley Hoag LLP, member of the Bars of the United States Supreme Court, the District of Columbia and the State of New York,

Mr. Benjamin Salas Kantor, Attorney at Law, Foley Hoag LLP, member of the Bar of the Supreme Court of the Republic of Chile,

Mr. Ysam Soualhi, Researcher, Centre Jean Bodin (CJB), University of Angers,

as Counsel;

H.E. Mr. Abukar Dahir Osman, Permanent Representative of the Federal Republic of Somalia to the United Nations,

Mr. Sulayman Mohamed Mohamoud, Attorney General of the Federal Republic of Somalia,

H.E. Mr. Yusuf Garaad Omar, Special Envoy of the President of the Federal Republic of Somalia for the Red Sea and the Gulf of Aden,

Mr. Osmani Elmi Guled, Solicitor General of the Federal Republic of Somalia,

Mr. Ahmed Ali Dahir, former Attorney General of the Federal Republic of Somalia,

Mr. Kamil Abdullahi Mohammed, Legal Adviser, Office of the Attorney General of the Federal Republic of Somalia,

Mr. Abdiqani Yasin Mohamed, Personal Assistant of the Deputy Prime Minister of the Federal Republic of Somalia,

as Advisers;

Mr. Scott Edmonds, Cartographer, International Mapping,

Ms Vickie Taylor, Cartographer, International Mapping,

as Technical Advisers,

and

the Republic of Kenya,

represented by

The Honourable Paul Kihara Kariuki, Attorney General of the Republic of Kenya,

as Agent;

H.E. Mr. Lawrence Lenayapa, Ambassador of the Republic of Kenya to the Kingdom of the Netherlands,

as Co-Agent,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 28 August 2014, the Government of 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.

2. In accordance with Article 40, paragraph 2, of the Statute, the Registrar immediately communicated the Application to the Government of Kenya. He also notified the Secretary-General of the United Nations of the filing of the Application by Somalia.

3. By a letter dated 14 November 2014, the Registrar informed all Member States of the United Nations of the filing of the Application.

4. In conformity with Article 40, paragraph 3, of the Statute, the Registrar later notified the Member States of the United Nations, through the Secretary-General, of the filing of the Application, by transmission of the printed bilingual text.

5. Since the Court included upon the Bench no judge of Kenyan nationality, Kenya proceeded to exercise its right conferred by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Gilbert Guillaume.

6. By an Order of 16 October 2014, the President of the Court fixed 13 July 2015 as the time-limit for the filing of the Memorial of Somalia and 27 May 2016 for the filing of the Counter-Memorial of Kenya. Somalia filed its Memorial within the time-limit so prescribed.

7. On 7 October 2015, within the time-limit set by Article 79, paragraph 1, of the Rules of Court of 14 April 1978 (as amended on 1 February 2001), Kenya raised preliminary objections to the jurisdiction of the Court and to the admissibility of the Application. In an Order of 9 October 2015, the Court noted that, by virtue of Article 79, paragraph 5, of the Rules of Court of 14 April 1978 (as amended on 1 February 2001), the proceedings on the merits were suspended. Consequently, taking account of Practice Direction V, it fixed, by the same Order, 5 February 2016 as the time-limit for the presentation by Somalia of a written statement of its observations and submissions on the preliminary objections raised by Kenya. Somalia filed such a statement within the time-limit so prescribed, and the case became ready for hearing in respect of the preliminary objections.

8. Pursuant to the instructions of the Court under Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or the “Convention”) the notifications provided for in Article 63, paragraph 1, of the Statute. In addition, the Registrar addressed to the European Union, which is also party to that Convention, the notification provided for in Article 43, paragraph 2, of the Rules of Court, and asked that organization whether or not it intended to furnish observations under that provision. In response, the Director-General of the Legal Service of the European Commission indicated that the European Commission, acting on behalf of the European Union, did not intend to submit observations in the case.

9. By a communication dated 21 January 2016, the Government of the Republic of Colombia, referring to Article 53, paragraph 1, of the Rules of Court, asked to be furnished with copies of the pleadings and documents annexed in the case. Having ascertained the views of the Parties in accordance with that same provision, and having taken into account the objection raised by one Party, the Court decided that it would not be appropriate to grant that request. By a letter dated 17 March 2016, the Registrar duly communicated that decision to the Government of Colombia and to the Parties.

10. Public hearings on the preliminary objections raised by Kenya were held from 19 to 23 September 2016. 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 on 28 August 2014 and that the Application was admissible.

11. By an Order of 2 February 2017, the Court fixed 18 December 2017 as the time-limit for the filing of the Counter-Memorial of Kenya. That pleading was filed within the time-limit thus prescribed.

12. By an Order of 2 February 2018, the Court authorized the submission of a Reply by Somalia and a Rejoinder by Kenya, and fixed 18 June 2018 and 18 December 2018 as the respective time-limits for the filing of those pleadings. The Reply and Rejoinder were filed within the time-limits thus prescribed.

13. By letters dated 26 February 2019, the Parties were informed that the hearings on the merits would take place from 9 to 13 September 2019. By a letter dated 2 September 2019, received under cover of a Note Verbale dated 3 September 2019, Kenya requested the Court to postpone the hearings by 12 months. By a letter dated 4 September 2019, Somalia responded that it considered the request “manifestly unjustified, harmful to the judicial process and the peaceful resolution of a longstanding dispute, and highly prejudicial to [it]”. By letters dated 5 September 2019, the Parties were notified that the Court had decided to postpone the opening of the hearings to 4 November 2019.

By a letter dated 16 September 2019, Kenya requested the Court to reconsider its decision of 5 September 2019 and postpone the oral proceedings until September 2020. By a letter dated 19 September 2019, Somalia argued that there was no basis for the Court to reconsider its decision. By a letter dated 23 September 2019, Kenya reiterated its request. On 3 October 2019, the Vice-President of the Court, Acting President in the case, met the representatives of the Parties in order to ascertain their views with regard to the question of the postponement of the oral proceedings. By letters dated 16 October 2019, the Parties were informed that the Court had decided to postpone the opening of the hearings to 8 June 2020.

14. By a letter dated 23 April 2020, Kenya requested an indefinite postponement of the oral proceedings in light of the COVID-19 pandemic. By a letter dated 1 May 2020, Somalia opposed the further postponement of the oral proceedings. By letters dated 19 May 2020, the Parties were informed that the Court had decided to postpone the hearings to the week of 15 March 2021, and a detailed schedule for the hearings was provided to them.

15. By letters dated 23 December 2020, the Parties were informed that, in light of the restrictions in place across the globe as a result of the COVID-19 pandemic, the hearings due to open on 15 March 2021 would be held by video link. A modified detailed schedule was transmitted to them at the same time.

16. By a letter dated 28 January 2021, Kenya, referring to “serious difficulties in preparing for the hearing due to the ongoing global COVID-19 pandemic” and expressing concerns about proceeding with hearings by video link, requested “that the hearing be postponed until such a time as the pandemic conditions would have subsided”. By a letter dated 3 February 2021, Somalia objected to this request. Further communications on the subject were exchanged between the Parties. By letters dated 12 February 2021, the Parties were informed that the Court had decided to maintain the hearings as scheduled, starting on 15 March 2021, in a hybrid format, with some judges attending the oral proceedings in person in the Great Hall of Justice and others participating remotely by video link, and with the representatives of the Parties to the case participating either in person or by video link.

17. On 5 March 2021, Kenya presented a request to produce “new documentation and evidence”. Enclosed with Kenya’s letter were Appendix 1, accompanied by two annexes, and Appendix 2, consisting of eight volumes with annexes. Kenya’s letter stated that Volume I of Appendix 2 explained “the nature and relevance of the new and additional evidence”. By a letter dated 9 March 2021, Somalia informed the Court that it did not object to the production of the materials that Kenya wished to submit, except for Volume I of Appendix 2. With respect to Volume I of Appendix 2, Somalia indicated, however, that it would withdraw its objection if it were given the opportunity to respond to it.

18. By letters dated 11 March 2021, the Parties were informed that, in light of the absence of an objection on the part of Somalia and pursuant to Article 56, paragraph 1, of the Rules of Court, the documents contained in Appendix 1 and in Volumes II to VIII of Appendix 2 could be produced and would form part of the case file. Having considered the views of the Parties and the particular circumstances of the case, the Court decided to authorize the production of Volume I of Appendix 2 (hereinafter “Appendix 2”) by Kenya, on the understanding that Somalia would have the opportunity to comment thereon during the hearings. In addition, the Court decided that if Somalia wished to comment in writing on the materials that were produced by Kenya and to submit documents in support of its comments, it should do so no later than 22 March 2021. Somalia commented on these materials during the hearings and filed written comments on 22 March 2021.

19. By a letter dated 11 March 2021 and received in the Registry on 12 March 2021, the Agent of Kenya informed the Court that his Government would not be participating in the hearings in the case and indicated the reasons for that decision. The Agent requested the opportunity to address the Court orally before the commencement of the hearings and to submit a “position paper”, a copy of which was enclosed with his letter. By a letter dated 12 March 2021, Somalia objected to the two requests made by the Agent of Kenya. By letters dated 15 March 2021, the Parties were informed that the Court had decided not to grant either of the two requests made by Kenya.

20. By a letter dated 15 March 2021, the Co-Agent of Kenya stated that “while affirming that it [would] not participate in the hearings on the merits, Kenya wishe[d] to inform the Court that it nevertheless intend[ed] to utilize thirty minutes out of the time allocated to it on the 18th March, 2021, to orally address the Court”. Somalia responded by a letter of the same date, stating that it welcomed Kenya’s decision to participate in the hearings. By letters dated 16 March 2021, the Parties were informed that the Court was prepared to give Kenya the opportunity to address it on 18 March 2021 (during the session originally scheduled for Kenya’s oral pleadings), for the purpose of Kenya’s partici-

pation in the oral proceedings and the presentation of its contentions on the merits of the case. By a letter dated 17 March 2021, Kenya indicated that it would “not utilize the opportunity provided by the Court” to participate in the oral proceedings on 18 March 2021.

21. By a letter dated 18 March 2021, Kenya submitted four new documents “for the Court’s information and consideration”. By a letter dated 22 March 2021, Somalia argued that these documents were neither new nor critical and were of no probative value in support of Kenya’s arguments. By letters dated 23 March 2021, the Parties were informed that the Court had decided that these four new documents and Somalia’s observations thereon would be included in the case file.

22. Pursuant to Article 53, paragraph 2, of its Rules, the Court, after ascertaining the views of the Parties, decided that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings. It also decided that the additional materials submitted by Kenya prior to and during the hearings and the written comments of Somalia thereon (see paragraphs 17, 18 and 21 above) would be made public.

23. Public hearings were held from 15 to 18 March 2021, at which the Court heard the oral arguments of:

For Somalia: H.E. Mr. Mahdi Mohammed Gulaid,
Mr. Alain Pellet,
Mr. Philippe Sands,
Ms Alina Miron,
Mr. Paul S. Reichler,
Mr. Edward Craven,
Mr. Mohamed Omar Ibrahim.

24. At the hearings, a Member of the Court put a question to Somalia, to which a reply was given in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, Kenya was invited to submit any comments that it might wish to make on Somalia’s reply, but no such comments were made.

*

25. In the Application, the following claims were presented by Somalia:

“The Court is asked to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including in the continental shelf beyond 200 [nautical miles].

Somalia further requests the Court to determine the precise geographical co-ordinates of the single maritime boundary in the Indian Ocean.”

26. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Somalia,

in the Memorial:

“On the basis of the facts and law set forth in this Memorial, Somalia respectfully requests the Court:

1. 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], on the basis of international law.
2. To determine the maritime boundary between Somalia and Kenya in the Indian Ocean on the basis of the following geographical coordinates:

<i>Point No.</i>	<i>Latitude</i>	<i>Longitude</i>
1 [land boundary terminus]	1° 39' 44.07" S	41° 33' 34.57" E
2	1° 40' 05.92" S	41° 34' 05.26" E
3	1° 41' 11.45" S	41° 34' 06.12" E
4	1° 43' 09.34" S	41° 36' 33.52" E
5	1° 43' 53.72" S	41° 37' 48.21" E
6	1° 44' 09.28" S	41° 38' 13.26" E
7 (intersection with 12 M limit)	1° 47' 54.60" S	41° 43' 36.04" E
8	2° 19' 01.09" S	42° 28' 10.27" E
9	2° 30' 56.65" S	42° 46' 18.90" E
10 (intersection with 200 M limit)	3° 34' 57.05" S	44° 18' 49.83" E
11 (intersection with 350 M limit)	5° 00' 25.71" S	46° 22' 33.36" E

3. To adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations to respect the sovereignty, and sovereign rights and jurisdiction of Somalia, and is responsible under international law to make full reparation to Somalia, including *inter alia* by making available to Somalia all seismic data acquired in areas that are determined by the Court to be subject to the sovereignty and/or sovereign rights and jurisdiction of Somalia, and to repair in full all damage that has been suffered by Somalia by the payment of appropriate compensation.
(All points referenced are referred to WGS 84.)”

in the Reply:

“On the basis of the facts and law set forth in its Memorial and this Reply, Somalia respectfully requests the Court:

1. To reject Submissions 1 and 2 of Kenya’s Counter-Memorial.

2. 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], on the basis of international law.
3. To determine the maritime boundary between Somalia and Kenya in the Indian Ocean on the basis of the following geographical coordinates:

<i>Point No.</i>	<i>Latitude</i>	<i>Longitude</i>
1 [land boundary terminus]	1° 39' 44.07" S	41° 33' 34.57" E
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6	1° 44' 09.28" S	41° 38' 13.26" E
7 (intersection with 12 M limit)	1° 47' 54.60" S	41° 43' 36.04" E
8	2° 19' 01.09" S	42° 28' 10.27" E
9	2° 30' 56.65" S	42° 46' 18.90" E
10 (intersection with 200 M limit)	3° 34' 57.05" S	44° 18' 49.83" E
11 (intersection with the 350 M limit)	5° 00' 25.71" S	46° 22' 33.36" E

4. To adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations and is responsible under international law to make full reparation to Somalia, including *inter alia* by making available to Somalia all seismic, geologic, bathymetric and other technical data acquired in areas that are determined by the Court to be subject to the sovereignty and/or sovereign rights and jurisdiction of Somalia, and to repair in full all damage that has been suffered by Somalia by the payment of appropriate compensation.

(All points referenced are referred to WGS 84.)”

On behalf of the Government of Kenya,

in the Counter-Memorial:

“On the basis of the facts and law set forth in this Counter-Memorial, Kenya respectfully requests the Court to:

1. Dismiss the requests in paragraphs 2 and 3 of the Submissions at pages 147 and 148 of Somalia’s Memorial dated 13 July 2015.

2. Adjudge and declare that the maritime boundary between Somalia and Kenya in the Indian Ocean shall follow the parallel of latitude at 1° 39' 43.2" S, extending from Primary Beacon 29 (1° 39' 43.2" S) to the outer limit of the continental shelf."

in the Rejoinder:

"On the basis of the facts and law set forth in this Rejoinder, Kenya respectfully requests the Court to:

1. Dismiss the requests in paragraphs 1, 3 and 4 of [the Submissions in] the Reply of Somalia.
2. Adjudge and declare that the maritime boundary between Somalia and Kenya in the Indian Ocean shall follow the parallel of latitude at 1° 39' 43.2" S, extending from Primary Beacon 29 (1° 39' 43.2" S) to the outer limit of the continental shelf."

27. At the oral proceedings, the following submissions were presented on behalf of the Government of Somalia at the hearing of 18 March 2021:

"On the basis of its Memorial of 7 July 2015, its Reply of 18 June 2018, and its oral pleadings, Somalia respectfully requests the Court:

1. To reject Submissions 1 and 2 of Kenya's Rejoinder of 18 December 2018.
2. 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], on the basis of international law.
3. To determine the maritime boundary between Somalia and Kenya in the Indian Ocean on the basis of the following geographical coordinates (all points referenced are referred to WGS 84):

<i>Point No.</i>	<i>Latitude</i>	<i>Longitude</i>
1 [land boundary terminus]	1° 39' 44.07" S	41° 33' 34.57" E
2	1° 40' 05.92" S	41° 34' 05.26" E
3	1° 41' 11.45" S	41° 34' 06.12" E
4	1° 43' 09.34" S	41° 36' 33.52" E
5	1° 43' 53.72" S	41° 37' 48.21" E
6	1° 44' 09.28" S	41° 38' 13.26" E
7 (intersection with 12 M limit)	1° 47' 54.60" S	41° 43' 36.04" E
8	2° 19' 01.09" S	42° 28' 10.27" E
9	2° 30' 56.65" S	42° 46' 18.90" E
10 (intersection with 200 M limit)	3° 34' 57.05" S	44° 18' 49.83" E
11 (intersection with 350 M limit)	5° 00' 25.71" S	46° 22' 33.36" E

4. To adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations and is responsible under international law to make full reparation to Somalia, including *inter alia* by making available to Somalia all seismic, geologic, bathymetric and other technical data acquired in areas that are determined by the Court to be subject to the sovereignty and/or sovereign rights and jurisdiction of Somalia.”

28. Since Kenya did not participate in the oral proceedings, no formal submissions were presented on behalf of its Government at the hearings.

* * *

29. The Court regrets Kenya’s decision not to participate in the oral proceedings held in March 2021. Nevertheless, the Court had extensive information about Kenya’s views, having received its Counter-Memorial and Rejoinder, as well as numerous volumes containing additional evidence and arguments it submitted to the Court in March 2021 (see paragraphs 17, 18 and 21 above).

30. The Court recalls that the oral proceedings were conducted in a hybrid format, in accordance with Article 59, paragraph 2, of the Rules of Court and on the basis of the Court’s Guidelines for the parties on the organization of hearings by video link, adopted on 13 July 2020 and communicated to the Parties on 12 February 2021. Prior to the opening of the hybrid hearings, the Parties were invited to participate in comprehensive technical tests, and Somalia did so. During the oral proceedings, a number of judges were present in the Great Hall of Justice, while others joined the proceedings via video link, allowing them to view and hear the speaker and see any demonstrative exhibits displayed. Each Party was permitted to have up to four representatives present in the Great Hall of Justice at any one time and was offered the use of an additional room in the Peace Palace from which members of the delegation were able to participate via video link. Members of the delegations were also given the opportunity to participate via video link from other locations of their choice.

* * *

I. GEOGRAPHICAL AND HISTORICAL BACKGROUND

31. Somalia and Kenya are adjacent States on the coast of East Africa. Somalia is located in the Horn of Africa. It borders Kenya to the south-west, Ethiopia to the west and Djibouti to the north-west. Somalia’s coastline faces the Gulf of Aden to the north and the Indian Ocean to the east. Kenya, for its part, shares a land boundary with Somalia to the north-east, Ethiopia to the north, South Sudan to the north-west,

Uganda to the west and Tanzania to the south. Its coastline faces the Indian Ocean (see sketch-map No. 1 below, p. 221).

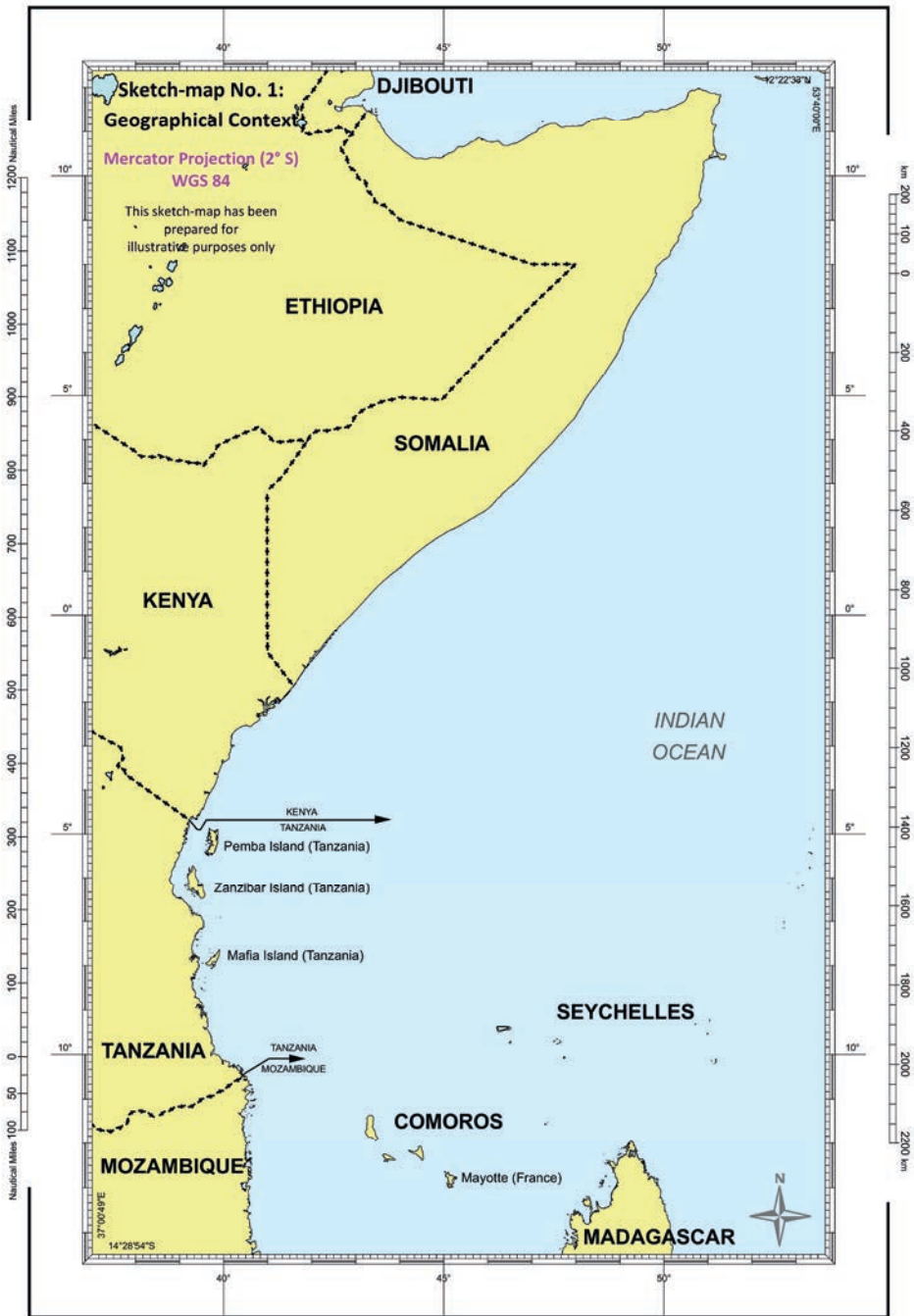
32. On 15 July 1924, Italy and the United Kingdom concluded a treaty regulating certain questions concerning the boundaries of their respective territories in East Africa, including what Somalia describes as “the Italian colony of Jubaland”, located in present-day Somalia, and the British colony of Kenya. 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 by British and Italian representatives on 17 December 1927 (hereinafter the “1927 Agreement”). That Agreement was formally confirmed by an Exchange of Notes of 22 November 1933 between the British and Italian Governments. The Court will collectively refer to the 1927 Agreement and this Exchange of Notes as the “1927/1933 treaty arrangement”. Somalia and Kenya gained their independence in 1960 and 1963, respectively.

33. Both Parties signed UNCLOS on 10 December 1982. Kenya and Somalia ratified it on 2 March 1989 and 24 July 1989, respectively, and the Convention entered into force for them on 16 November 1994.

34. 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 matters related to 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 present Judgment, the Commission has yet to issue its recommendations in respect of the Parties’ submissions.

II. OVERVIEW OF THE POSITIONS OF THE PARTIES

35. 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 (see sketch-map No. 2 below, p. 223, depicting the maritime boundaries claimed by the Parties).

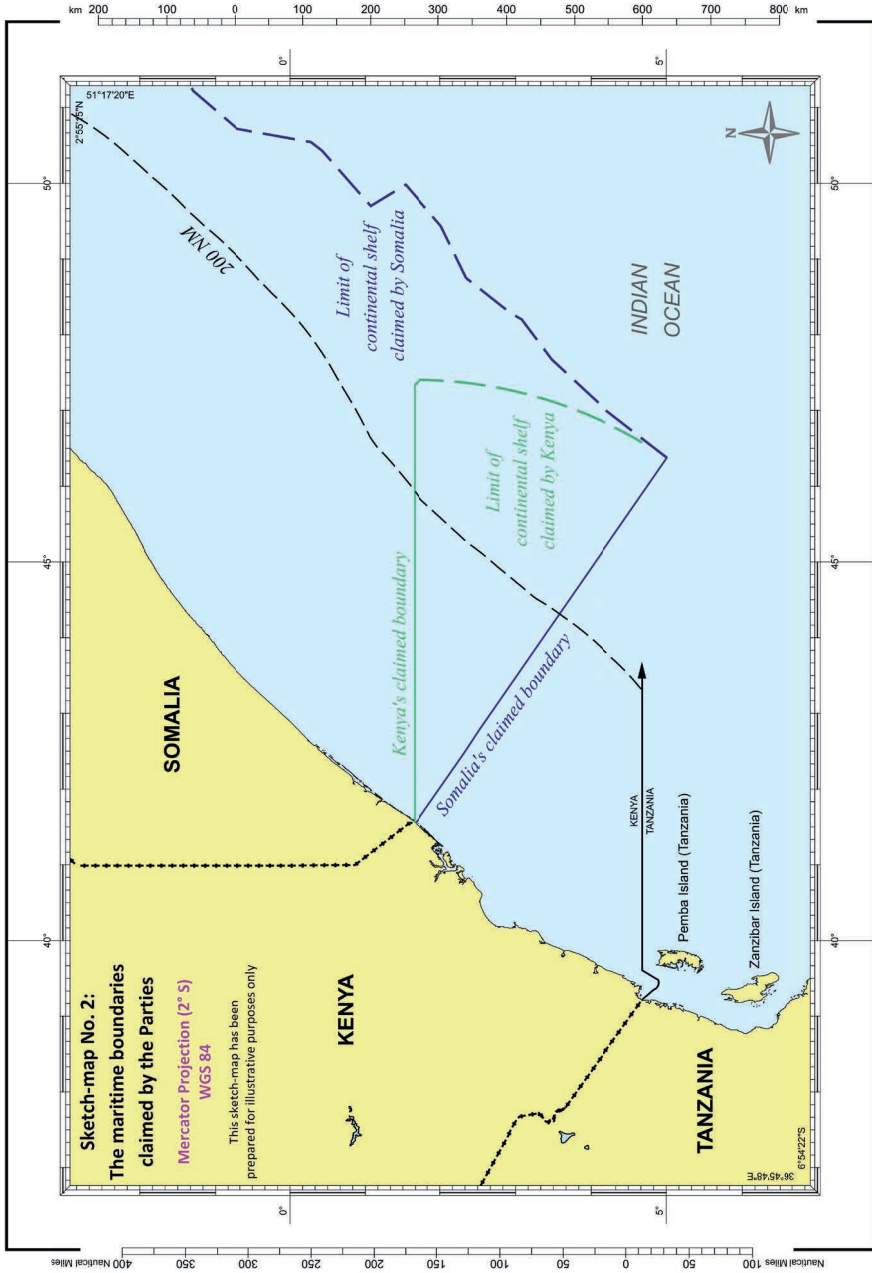
III. WHETHER SOMALIA HAS ACQUIESCED TO A MARITIME BOUNDARY FOLLOWING THE PARALLEL OF LATITUDE

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

* *

37. Kenya maintains that Somalia has acquiesced to its claim that the maritime boundary between the Parties follows the parallel of latitude and that there is thus an agreed boundary between them. According to Kenya, acquiescence requires three elements: first, a course of conduct or omission by one State indicative of its view regarding the content of the applicable legal rule; secondly, another State's knowledge (actual or constructive) of such conduct or omission; and, thirdly, a failure by the latter State, when a reaction is called for, to reject or dissociate itself within a reasonable time from the position taken by the first State. Thus, the Respondent's argument is not that a maritime boundary can result from unilateral acts, but that it can be established by consent resulting from the prolonged absence of protest against a claim. Kenya regards acquiescence as a form of consent that can be equated to tacit agreement. In support of its claim, it invokes decisions by international courts and tribunals referring to acquiescence and tacit agreement.

38. Kenya contends that by failing to respond to the Proclamation by the President of the Republic of Kenya of 28 February 1979 (hereinafter the "1979 Proclamation"; see paragraph 54 below), to the Proclamation by the President of the Republic of Kenya of 9 June 2005 (hereinafter the "2005 Proclamation"; see paragraph 61 below) and to Kenya's Submission on the Continental Shelf beyond 200 nautical miles deposited with the CLCS on 6 May 2009 (hereinafter the "2009 Submission to the CLCS"; see paragraph 65 below), Somalia has acquiesced to Kenya's claim that the maritime boundary between the Parties follows the parallel of latitude. In Kenya's view, a reaction is called for where there has been



an express, official and public notification, through formal United Nations procedures, of a State's position concerning maritime delimitation and the sovereign rights of adjacent coastal States. It argues that the absence of protest in such circumstances constitutes acquiescence under international law. The Respondent asserts that if Somalia disagreed with Kenya's claim, it should have protested promptly, since circumstances such as the proximity of the States concerned and the giving of formal notice call for a quick and, in some cases, immediate response to a maritime or territorial claim. According to Kenya, Somalia continued to play an active role in international relations during its civil war; it was represented at the United Nations throughout this period and has had an internationally recognized government since 2000. Kenya argues that Somalia was thus in a position to protest against Kenya's claim.

39. Kenya states that the Applicant's failure to react immediately to the 1979 Proclamation or the 2005 Proclamation was particularly significant given that, pursuant to the 1972 Law on the Somali Territorial Sea and Ports, Somalia claimed a territorial sea extending to 200 nautical miles and, therefore, its claim of sovereignty in that area was at stake. In Kenya's view, Somalia's acquiescence was made clear by its agreement to the principle of equitable delimitation during the negotiations held at the Third United Nations Conference on the Law of the Sea and by its insistence on deleting any reference to equidistance in Articles 74 and 83 of UNCLOS, a position that was shared by other African States. Kenya considers it significant that Somalia initiated a rapprochement with Kenya in 1978 and points out that Somalia did not raise the issue of the 1979 Proclamation during bilateral meetings held between the Parties in 1980 and 1981.

40. Kenya also argues that Somalia's Maritime Law of 1988, which mentions a "straight line" in respect of the territorial sea boundary, refers to the parallel of latitude rather than an equidistance line. In addition, Kenya highlights Somalia's lack of reaction or protest when, in 2007 and 2008, Kenya sent two Notes Verbales in which it stated that it had drawn the boundaries with Somalia "using the parallel of latitude" and requested that Somalia confirm its agreement to such boundaries.

41. Kenya considers that the terms of the "Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant to each other no-objection in respect of submissions on the outer limits of the continental shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf" (hereinafter the "MOU"), signed by the Parties in 2009, are consistent with Somalia's acquiescence. In Kenya's view, the Court has already found that the MOU does not concern the delimitation of the maritime boundary between the Parties and was

intended merely to allow them to make their CLCS submissions before the relevant deadline. It adds that the reference in the MOU to an unsettled maritime boundary “dispute” concerns only the delimitation of the outer continental shelf and simply recognizes that the Parties have not yet negotiated a formal agreement.

42. Kenya contends that a letter sent by the Prime Minister of Somalia to the Secretary-General of the United Nations on 19 August 2009 did not contain a claim to an “equidistant maritime boundary” or a protest against Kenya’s maritime boundary claim. It asserts that Somalia’s first objection to Kenya’s claim was expressed in a letter sent by the Minister for Foreign Affairs and International Cooperation of Somalia to the Secretary-General on 4 February 2014. Kenya argues that its consent to negotiate a formal delimitation agreement does not imply that Somalia has not acquiesced to its claim.

43. Furthermore, Kenya refers to “additional evidence” concerning other conduct of the Parties between 1979 and 2014, which, in its view, “confirms” Somalia’s acceptance of the parallel of latitude as the maritime boundary. Kenya asserts that its naval patrols and interceptions, as well as both Parties’ conduct concerning fisheries, marine scientific research and offshore oil exploration blocks, have all been consistent with Kenya’s claim. The Respondent maintains that its conduct would have called for a reaction from the Applicant, if Somalia had considered that Kenya had encroached on its maritime areas. In this regard, Kenya has submitted a number of maps, reports and other documents issued by various entities. It contends that the maps submitted by Somalia are irrelevant, either because they do not purport to show the official position of the Parties or because they are speculative or of unknown provenance.

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44. Somalia notes that Article 15, Article 74 and Article 83 of UNCLOS make clear that delimitation is to be effected by agreement. It recognizes that a maritime boundary may be established by an agreement that is not in written form, but contends that a maritime boundary cannot be established by unilateral acts. In this regard, Somalia maintains that Kenya has not explained how acquiescence differs from tacit agreement. According to Somalia, even if acquiescence could be invoked as a principle of delimitation, Kenya would have to prove a prolonged and consistent course of conduct indicating its own view on the location of the maritime boundary, as well as a very definite course of conduct by Somalia showing its intention clearly and consistently to accept Kenya’s claim. Somalia argues that lack of protest against a notification of a claim cannot automatically amount to an acceptance of that claim.

45. Somalia maintains that Kenya's own public statements and positions directly contradict its contention that the Parties have already delimited their maritime boundary along the parallel of latitude. In this regard, Somalia refers to Kenya's 2009 Submission to the CLCS, Kenyan domestic law, Kenya's statements to the United Nations, official Kenyan reports and presentations, the terms of the 2009 MOU, the record of the bilateral negotiations between the Parties and Kenya's pleadings before the Court in support of its preliminary objections. The Applicant adds that other States and international organizations have recognized that the maritime boundary between the Parties remains to be delimited.

46. Somalia further maintains that, in any event, it did not wait until 2014 before protesting against Kenya's claim. It contends that it articulated its claim to an equidistance line in 1974 during the Third United Nations Conference on the Law of the Sea and that this claim was embodied in its Maritime Law of 1988. Somalia asserts that "[t]he Somali language does not contain a word precisely equivalent to 'equidistance line' in English" and that the phrase "a straight line toward the sea from the land" in Article 4, paragraph 6, of the 1988 Law "was intended to be equivalent to an equidistance line". The Applicant also contends that it is unreasonable and unrealistic to expect a State that was ravaged by civil war and had no functioning government to have lodged formal diplomatic protests against a purported claim to a boundary line, stressing that it protested against Kenya's claim "once it resumed having a functioning government after the long civil war". In this regard, it draws attention to the letter sent by its Prime Minister to the Secretary-General of the United Nations on 19 August 2009, which stated, *inter alia*, that the continental shelf between Somalia and Kenya had not yet been delimited. Somalia adds that its opposition to a maritime boundary at the parallel of latitude, as well as its protests against Kenya's award of offshore concessions for maritime areas north of the equidistance line, were reflected in news reports published in 2012 and in a 2013 report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2060 (2012).

47. With respect to other conduct of the Parties referred to by Kenya, Somalia argues that "maritime *effectivités*" cannot be invoked in themselves to support the existence of a maritime boundary. In Somalia's view, Kenya's purported displays of authority in the disputed area were in any event sporadic, infrequent and recent, and were undertaken at a time when, on account of civil war, there was no functioning Somali government able to monitor such activities or exercise effective control over them. Somalia considers that the maps, reports and documents adduced by the Respondent provide no support for the existence of a maritime boundary as claimed by Kenya. It refers to other maps, asserting that they either depict an equidistant maritime boundary or show Kenya's

northernmost concession blocks following a course that closely resembles an equidistance line. The Applicant contends that, in any event, even the consistent conduct of two States over a long period of time is not sufficient evidence of an agreement.

* *

48. The Court 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. The Court has noted that “[t]he texts of these provisions are identical, the only difference being that Article 74 refers to the exclusive economic zone and Article 83 to the continental shelf” (*Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 65, para. 179). They establish that delimitation “shall be effected by agreement on the basis of international law”.

49. 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 (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 299, para. 112 (1)). Maritime delimitation cannot be effected unilaterally by either of the States concerned (*ibid.*; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p. 66, para. 87; *Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, p. 132).

50. 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 (see *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 23, para. 43, and p. 31, para. 69). The Court notes that both Parties recognize that the delimitation of maritime boundaries requires such a shared understanding.

51. 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” (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 305, para. 130; see also *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, p. 577, para. 364). 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 (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, pp. 50-51, para. 121; *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, I.C.J. Reports 1962, p. 23). This is based on the principle “[q]ui tacet consentire videtur si loqui debuisset ac potuisset” (*ibid.*). 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 (*Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, pp. 138-139). In evaluating the absence of a reaction, duration may be a significant factor (see e.g. *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, pp. 95-96, paras. 274-276; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, Judgment, I.C.J. Reports 1992, pp. 408-409, para. 80; *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, I.C.J. Reports 1962, p. 32).

52. The Court has set a high threshold for proof that a maritime boundary has been established by acquiescence or tacit agreement. It has emphasized that since “[t]he establishment of a permanent maritime boundary is a matter of grave importance”, “[e]vidence of a tacit legal agreement must be compelling” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, I.C.J. Reports 2007 (II), p. 735, para. 253; see also *Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, pp. 38-39, para. 91; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, ITLOS Reports 2017, p. 70, para. 212). Acquiescence “presupposes clear and consistent acceptance” of another State’s position (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 309, para. 145). 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 “acknowledge[d] in a binding international agreement that a maritime boundary already exist[ed]” (*Maritime Dispute (Peru v. Chile)*, Judgment, I.C.J. Reports 2014, p. 38, para. 90). In the present case, the Court will use the criteria it has identified in earlier cases and examine 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 will then consider whether there is compelling evidence that Somalia clearly and consistently accepted the boundary claimed by Kenya.

53. In this respect, the Parties present arguments regarding Kenya's 1979 Proclamation, 2005 Proclamation, 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 will examine these arguments in turn.

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54. In the 1979 Proclamation, the President of Kenya declared:

“1. That notwithstanding any rule of law or any practice which may hitherto have been observed in relation to Kenya or the waters beyond or adjacent to the territorial Sea of Kenya, the Exclusive Economic Zone of the Republic of Kenya extend[s] across the sea to a distance of two hundred nautical miles measured from the appropriate base-line from where the territorial sea is measured as indicated in the Map annexed to this Proclamation. Without prejudice to the foregoing, the Exclusive Economic Zone of Kenya shall:

- (a) in respect of its southern territorial waters boundary with the United Republic of Tanzania be an eastern latitude north of Pemba island to start at a point obtained by the northern intersection of two arcs one from the Kenya Lighthouse at Mpunguti ya Juu, and the other from Pemba island Lighthouse at Ras Kigomasha.
- (b) in respect of its northern territorial waters boundary with [the] Somali Republic be on eastern latitude South of Diua Damasciaca Island being latitude 1° 38' South.

2. That this Proclamation shall not affect or be in derogation of the vested rights of the Republic of Kenya over the Continental Shelf as defined in the Continental Shelf Act 197[5].

3. All States shall, subject to the applicable laws and regulations of Kenya, enjoy in the Exclusive Economic Zone the freedom of navigation and overflight and of the laying of sub-marine cables and pipelines and other internationally lawful recognized uses of the sea related to navigation and communication.

4. That the scope and regime of the Exclusive Economic Zone shall be as defined in the schedule attached to this Proclamation.”

55. This Proclamation was transmitted by the Secretary-General to the Permanent Missions of the Member States of the United Nations on 19 July 1979.

56. The 1979 Proclamation was concerned with Kenya's exclusive economic zone. It stated that “the Exclusive Economic Zone of Kenya shall . . . in respect of its northern territorial waters boundary with [Somalia] be on . . . latitude 1° 38' South”.

57. The Court notes that Kenya's Territorial Waters Act of 1972 had established in its Section 2, subsection 1, that "[e]xcept as provided in subsection (4) of this section the breadth of the territorial waters of the Republic of Kenya shall be twelve nautical miles". Subsection 4 had stated that "[o]n the coastline adjacent to neighbouring States the breadth of the territorial sea shall extend to a Median Line". The Territorial Waters Act was revised in 1977, but the text of Section 2, subsection 4, remained the same. The Act remained in force when the 1979 Proclamation was issued. The Court thus observes that Kenya was not consistently claiming a maritime boundary with Somalia at a parallel of latitude in all maritime areas.

58. On 25 August 1989, shortly after ratifying UNCLOS, Kenya adopted the Maritime Zones Act (hereinafter the "1989 Maritime Zones Act"), which is still in force. In respect of the delimitation of the territorial sea, that Act employs similar terms to Kenya's Territorial Waters Act of 1972. Section 3, subsection 4, of the 1989 Maritime Zones Act provides:

"On the coastline adjacent to neighbouring states, the breadth of the territorial waters shall extend to [a line] every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial waters of each of [the] respective states is measured."

As regards the delimitation of the exclusive economic zone, Section 4, subsection 4, of the Act provides that "[t]he northern boundary of the exclusive economic zone with Somalia shall be delimited by notice in the *Gazette* by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law".

59. Kenya contends that Section 3, subsection 4, of the 1989 Maritime Zones Act merely reflects the terms of Article 15 of UNCLOS, which, it explains, applies "the median line in the territorial sea as a provisional method 'failing agreement' on delimitation". It considers that the provision is without prejudice to the parallel of latitude boundary adopted in the 1979 Proclamation and maintains that Kenyan legislation neither asserts nor requires territorial sea delimitation based on a median line. Kenya further argues that Section 4, subsection 4, of the 1989 Maritime Zones Act simply recognizes that, notwithstanding the 1979 Proclamation, a formal agreement has not been concluded with Somalia in respect of the boundary of the exclusive economic zone.

60. The Court considers that Kenya's position is at odds with the text of the 1989 Maritime Zones Act, which refers neither to the 1979 Proclamation nor to a boundary at the parallel of latitude, for either the territorial sea or the exclusive economic zone. In respect of the exclusive economic zone, the text of Section 4, subsection 4, of the 1989 Maritime Zones Act provides that the northern boundary of the exclusive economic

zone with Somalia shall be delimited pursuant to “an agreement between Kenya and Somalia”. These words stand in contrast to the text of Section 4, subsection 3, which provides that the southern boundary with Tanzania shall be “on an easterly latitude”, employing similar terms to those found in the 1979 Proclamation. Section 4, subsection 4, thus implies that, unlike the situation of the boundary between Kenya and Tanzania, Kenya considered in 1989 that there was no agreement with Somalia on their maritime boundary. The Act refers instead to an agreement to be concluded and published in the future. It was therefore reasonable for Somalia to understand Kenya’s position to be that an agreement was to be negotiated and concluded at a later date.

61. Kenya’s 2005 Proclamation replaced the 1979 Proclamation, while generally reaffirming its terms. With regard to the exclusive economic zone, the 2005 Proclamation modified the parallel of latitude claimed as the boundary with Somalia. Paragraph 1 of the 2005 Proclamation, in its relevant part, reads as follows:

“Without prejudice to the foregoing, the Exclusive Economic Zone of Kenya shall:

.....

(b) In respect of its northern territorial waters boundary with [the] Somali Republic be on eastern latitude South of Dlua Damascia[ca] Island being latitude 1° 39’ 34” degrees south.”

The Proclamation included two schedules, which contained co-ordinates defining the “area of the territorial waters” and the “Exclusive Economic Zone” of Kenya. In the first schedule, the northernmost point of the outer limit of Kenya’s territorial sea is on the parallel of latitude. This implied that, for Kenya, the boundary of its territorial sea with Somalia also followed the same parallel of latitude. According to Kenya, the parallel of latitude was adjusted from the one in the 1979 Proclamation for greater accuracy, so that it coincided with the tangent to the southernmost islet of Dlua Damasciaca.

62. On 25 April 2006, the Secretary-General notified the Member States of the United Nations and the States parties to UNCLOS that, in accordance with Article 16, paragraph 2, and Article 75, paragraph 2, of the Convention, Kenya had deposited two lists of geographical co-ordinates of points, as contained in the 2005 Proclamation. The 2005 Proclamation was subsequently published in the *Law of the Sea Bulletin* No. 61.

63. Kenya has also drawn the Court’s attention to two Notes Verbales from the Ministry of Foreign Affairs of Kenya to the Ministry of Foreign Affairs of the Transitional Federal Government of Somalia, dated 26 September 2007 and 4 July 2008. In the Note Verbale of 26 September 2007, which concerned the process of delineation of the outer limits of its continental shelf, Kenya claimed that the maritime boundaries between the two countries “have been drawn using the parallel of latitude[], in accordance with Articles 74, 83 of the UNCLOS” and requested Somalia to

confirm “that the Transitional Federal Government agrees with the way the maritime boundaries between the two countries are drawn . . . as deposited with the United Nations by the Government of the Republic of Kenya”. The aide-memoire attached to the Note Verbale stated that “the boundaries between our two countries have not been defined”. In the Note Verbale of 4 July 2008, Kenya asked the Government of Somalia “to state its position to the Government of the Republic of Kenya that the Transitional Federal Government of Somalia agrees with the maritime boundaries between the two countries as drawn and deposited with the United Nations by the Government of the Republic of Kenya”.

64. The Court observes that the Notes Verbales did not characterize the maritime boundary claimed by Kenya as an agreed boundary, but rather invited Somalia to confirm its agreement. It has not been shown that Somalia provided such confirmation.

65. In its 2009 Submission to the CLCS, Kenya states that the maritime space over which it exercises sovereignty, sovereign rights and jurisdiction was determined on the basis of the provisions of UNCLOS, “as implemented by the following legislation and proclamations: the Territorial Waters Act, 1972; the Maritime Zones Act, 1989, Cap. 371; and, the Presidential Proclamation of 9 June 2005 . . . in respect of Kenya’s territorial sea and exclusive economic zone”. It also states that “the outer edge of the continental margin appurtenant to Kenya’s land territory extends beyond 200 [nautical miles] measured from the territorial sea baseline”. The lists of co-ordinates and the maps included by Kenya in its submission show a single maritime boundary with Somalia at a parallel of latitude, extending beyond 200 nautical miles to the claimed outer limit of its continental shelf.

66. The Court notes that Kenya’s 2009 Submission to the CLCS was made for the purpose of delineating the outer limits of its continental shelf, which is a process distinct from the delimitation of the continental shelf (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 668, para. 125). In this regard, Kenya’s submission indicates that “Kenya has overlapping maritime claims with the adjacent coastal States of Somalia to the north and with the United Republic of Tanzania to the south” and mentions that Kenya and Somalia had signed the 2009 MOU agreeing that they would not object to each other’s submissions to the CLCS. The MOU provides that

“[t]he submissions made before the Commission and the recommendations approved by the Commission thereon shall not prejudice the positions of the two coastal States with respect to the maritime dispute between them and shall be without prejudice to the future delimitation of maritime boundaries in the area under dispute”.

67. As previously noted by the Court in the 2017 Judgment, the terms of the MOU suggest “that the two States recognize that they have a ‘mar-

itime dispute' that is 'unresolved'" (*I.C.J. Reports 2017*, p. 32, para. 72) and identify the "area under dispute" as that "in which the claims of the two Parties to the continental shelf overlap, without differentiating between the shelf within and beyond 200 nautical miles" (*ibid.*, p. 35, para. 84). They also suggest that "the Parties intended to acknowledge the usual course that delimitation would take . . . namely engaging in negotiations with a view to reaching agreement" (*ibid.*, p. 40, para. 97). In this connection, the MOU provides that "[t]he delimitation of maritime boundaries in the areas under dispute . . . shall be agreed between the two coastal States on the basis of international law".

68. The Court observes that Kenya's 2009 Submission to the CLCS also alludes to the lack of agreement between the Parties on the maritime boundary in the exclusive economic zone. In respect of the boundary with Tanzania, the submission explains that "[a]n agreement is in place between Kenya and Tanzania concerning the delimitation of maritime boundaries". However, in respect of the boundary with Somalia, the submission states that the exclusive economic zone boundary "shall be delimited by notice in the *Gazette* by the Minister pursuant to an agreement between Kenya and Somalia on the basis of international law", thus employing the same terms as Section 4, subsection 4, of the 1989 Maritime Zones Act. The submission also notes the existence of an "unsettled boundary line between Kenya and Somalia". From these terms, it was reasonable for Somalia to maintain its understanding that an agreement had yet to be negotiated and concluded.

69. On 26 and 27 March 2014, at the request of the Kenyan Government, the Parties met in Nairobi to engage in negotiations on maritime delimitation. The mere fact that these negotiations took place suggests that the Parties recognized the need to delimit the maritime boundary between them (see *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, *ITLOS Reports 2017*, p. 73, paras. 221-222, and p. 78, para. 243). This is confirmed by the Parties' joint report on the negotiations, which states that they considered "several options and methods including bisector, perpendicular, median and parallel of latitude", but that they "could not reach a consensus on the potential maritime boundary line acceptable to both countries to be adopted". Nowhere does the report imply that there already was an agreed maritime boundary between the Parties.

70. Finally, the Court observes that Kenya's recognition that no agreement on the maritime boundary with Somalia has been reached was also reflected in its two Notes Verbales to the Secretary-General from the Permanent Mission of Kenya to the United Nations, dated 24 October 2014 and 4 May 2015, and in its statements made to the Court during the preliminary objections phase of the case.

71. In light of the foregoing, the Court concludes that Kenya has not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia. Kenya's claim was contra-

dicted by its Territorial Waters Act of 1972, which remained in force in 1979, its 1989 Maritime Zones Act and its 2009 Submission to the CLCS. Under these circumstances, 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. The Court 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.

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72. The Court recalls that Kenya's claim of acquiescence is based on Somalia's alleged acceptance of a maritime boundary at the parallel of latitude, in particular through its prolonged absence of protest. The Court will address this argument of Kenya, bearing in mind the conclusion drawn above (see paragraph 71).

73. Kenya has emphasized that it issued the 1979 Proclamation while the Parties were actively participating in the negotiations held at the Third United Nations Conference on the Law of the Sea and that Somalia's lack of reaction should be assessed in light of the positions it took in that context. Discussions during the Conference on the question of the delimitation of maritime areas resulted in the adoption of Article 15, Article 74, paragraph 1, and Article 83, paragraph 1, of UNCLOS. The Court notes that the latter two provisions reflect the view held by both Kenya and Somalia during the negotiations that the delimitation of the exclusive economic zone and the continental shelf between States with adjacent or opposite coasts should be effected by agreement "in order to achieve an equitable solution". These provisions, however, do not set forth a specific method of delimitation and it cannot be inferred from the Parties' positions during the Conference that Somalia rejected equidistance as a possible method of achieving an equitable solution.

74. In the years immediately following Kenya's 1979 Proclamation, the Parties engaged in discussions on a variety of issues regarding their bilateral relations, such as trade and exploitation of marine resources. However, there is no indication that Somalia accepted Kenya's claim to a boundary along a parallel of latitude during that period. In this regard, Kenya has submitted minutes of a meeting held between the Vice-Presidents of the two States on 6 May 1980, but these minutes make no mention of any discussion of the Parties' maritime boundaries or the 1979 Proclamation. The same is true of other evidence submitted by Kenya in relation to meetings held between the Parties in 1981.

75. Until 1989, Somalia did not claim an exclusive economic zone or define its continental shelf. Article 1, paragraph 1, of the 1972 Law on the Somali Territorial Sea and Ports defined Somalia's territorial sea as extending to 200 nautical miles, without including any provision pertaining to its delimitation. Shortly before ratifying UNCLOS, Somalia adopted the Maritime Law of 1988, approved by Law No. 5 on 26 January 1989. Article 7 of the Maritime Law provides that Somalia's exclusive economic zone shall extend to 200 nautical miles, and Article 8 defines its continental shelf both within and beyond 200 nautical miles. The Maritime Law does not refer to the delimitation of either of these areas. Article 4 defines Somalia's territorial sea as extending to 12 nautical miles and addresses the issue of its delimitation with Kenya, providing in the relevant part of paragraph 6:

“If there is no multilateral treaty, the Somali Democratic Republic shall consider that the border between the Somali Democratic Republic and the Republic of Djibouti and the Republic of Kenya is a straight line toward the sea from the land as indicated on the enclosed charts.”

76. Somalia has not produced the charts mentioned in the provision, explaining that they may have been lost or destroyed during the civil war. It maintains that “the phrase ‘straight line toward the sea’ was intended to be equivalent to an equidistance line”. Kenya contends that, although the meaning of this phrase is unclear, taking Somalia's contemporary practice into account, it should be interpreted as a reference to the parallel of latitude.

77. The Court notes that Article 4, paragraph 6, of the Maritime Law also refers to the delimitation of maritime areas in relation to the Republic of Yemen, employing the phrase “a median line”. The phrase “a straight line toward the sea from the land” is not clear and, without the charts mentioned, its meaning cannot be determined. Kenya submits a number of documents, including the Mining Code of the Somali Democratic Republic of 1984 and several maps, which, in its view, support its interpretation of this phrase. The text of the Mining Code, adopted prior to the Maritime Law of 1988, does not serve to clarify the meaning given by the latter to the phrase “a straight line toward the sea from the land”. Article 58 of the Mining Code concerns only the establishment of concession blocks in Somali territory. The Mining Code did not itself regulate Somalia's maritime boundaries. Similarly, the maps submitted by Kenya depict only oil concession blocks. As the Court will further explain below (see paragraphs 86 and 87), such blocks, in and of themselves, cannot be taken to indicate the existence of a maritime boundary.

78. Somalia did not react immediately to the 2005 Proclamation. However, its view was made clear on several occasions in 2009. As noted above (see paragraph 67), the MOU concluded that year between the Par-

ties refers to an unsettled maritime dispute. Somalia's 2009 submission of preliminary information to the CLCS reproduces the text of the MOU and indicates that "[u]nresolved questions remain in relation to [the] bilateral delimitation of the continental shelf with neighbouring States". In addition, in a letter dated 19 August 2009 and addressed to the Secretary-General of the United Nations, the Prime Minister of Somalia maintained that "[t]he delimitation of the continental shelf . . . has not yet been settled", further stating that

"[i]t would appear that Kenya claims an area extending up to the latitude of the point where the land border reaches the coast, while, instead, in accordance with the international law of the sea, an equidistance line normally constitutes the point of departure for the delimitation of the continental shelf between two States with adjacent coasts. Somalia bases itself on the latter view".

Furthermore, as noted by the Court in the 2017 Judgment, in 2014 Somalia "objected to the consideration by the CLCS of Kenya's submission on the ground that there existed a maritime boundary dispute between itself and Kenya" (*I.C.J. Reports 2017*, p. 14, para. 19). Somalia withdrew its objection in 2015, noting that the dispute had been submitted to the Court.

79. Finally, the Court cannot ignore the context of the civil war that afflicted Somalia, depriving it of a fully operational government and administration between 1991 and 2005. These circumstances were public and notorious (see e.g. Security Council, Report of the Secretary-General on the protection of Somali natural resources and waters, UN doc. S/2011/661, 25 October 2011, para. 22), and they were also recognized by Kenya in the previous phase of the proceedings. This context needs to be taken into account in evaluating the extent to which Somalia was in a position to react to Kenya's claim during this period.

80. For the foregoing reasons, the Court considers that the conduct of Somalia between 1979 and 2014 in relation to its maritime boundary with Kenya, as examined above, 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.

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81. Kenya also argues that other conduct of the Parties between 1979 and 2014 confirms Somalia's acceptance of a maritime boundary at the parallel of latitude. Kenya refers, in particular, to the Parties' practice concerning naval patrols, fisheries, marine scientific research and oil concessions (see paragraph 43 above). The Court will now consider this argument of Kenya.

82. The Court recalls that, in the context of a maritime delimitation dispute, as for territorial disputes, the date on which the dispute crystallized is of significance. Acts occurring after such date are in principle irrelevant to the determination of a maritime boundary and cannot be taken into consideration, “having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims” (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007 (II)*, pp. 697-698, para. 117; see also *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, *I.C.J. Reports 2008*, pp. 27-28, para. 32; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, *I.C.J. Reports 2002*, p. 682, para. 135).

83. Kenya argues that there was no dispute between the Parties until 2014. However, when it submitted its preliminary objections in 2015, it stated that “[i]t was only in 2009 that Somalia first disputed Kenya’s 1979 EEZ maritime boundary”. Somalia, for its part, argues that the Parties have been engaged in a maritime boundary dispute since the 1970s. The Court recalls that the MOU concluded by the Parties in 2009 and Kenya’s 2009 Submission to the CLCS indicate that a maritime dispute existed between them as of 2009 (see paragraphs 66-68 above). Somalia has not provided the Court with sufficient evidence to conclude that the dispute emerged before 2009. Accordingly, the Court considers that the Parties’ activities after 2009 cannot be taken into consideration for the purpose of determining the maritime boundary.

84. In light of the foregoing, the Court will examine the conduct of the Parties referred to by Kenya. The Court begins by considering the evidence of naval patrols. Maps depicting and logs recording Kenya’s naval patrols and interceptions in the territorial sea show that some law enforcement activities were conducted by Kenya north of the equidistance line claimed by Somalia. Occasionally, however, they were also conducted north of the parallel of latitude that it claims as the maritime boundary. Kenya’s naval patrols and interceptions were thus not necessarily consistent with its maritime boundary claim. Moreover, one of the maps submitted by Kenya is marked “secret” and the remaining evidence does not establish that Somalia had knowledge of these activities.

85. The evidence on fisheries and marine scientific research activities also does not support Kenya’s claim. Kenya submitted a fishing licence it had granted to a French vessel on 20 June 2011 for the period between July 2011 and June 2012, which included co-ordinates for fishing areas north of the equidistance line. There is no evidence, however, that Somalia had knowledge of these activities, which, in any event, took place

after 2009. Kenya also submitted a report issued by the Ministry of Fisheries and Marine Transport of Somalia for the period 1987-1988, which referred to the positions studied in a survey conducted by the Intergovernmental Oceanographic Commission (hereinafter the “IOC”) of UNESCO. However, this report includes no indication of any maritime boundary. Similarly, a map published by the Ministry of Fisheries of Somalia and reproduced in a 1987 report of the United Nations Environment Programme does not depict the boundary of Somalia’s southernmost fishery region or its maritime boundary with Kenya. It therefore cannot be concluded from this map that Somalia considered the maritime boundary to be established at the parallel of latitude. Other documents submitted by Kenya as evidence — including a map produced by the IOC, an offshore trawling survey of Kenya conducted by the Food and Agriculture Organization of the United Nations and the United Nations Development Programme, and a technical paper reflecting the results of a survey programme conducted in co-operation with Norwegian agencies — were not produced by the Parties and thus cannot be taken to reflect their official positions.

86. As regards oil concessions, the Parties have referred to a number of maps produced by third parties, as well as by Kenyan and Somali institutions. Kenya has also referred to the terms of Somalia’s Mining Code (see paragraph 77 above) and Petroleum Law. The Court notes that the Parties have established offshore oil concession blocks employing different lines since the 1970s. However, the Parties have referred only to limited practice that took place before 2009, such as a series of contracts concluded since 2000 in relation to the oil concession block identified by Kenya as Block L-5 and the drilling of the first exploratory well slightly north of the equidistance line claimed by Somalia, between December 2006 and January 2007. For the most part, the Parties have referred to practice after 2009, which, for the reasons previously explained (see paragraphs 82 and 83 above), is irrelevant to the determination of the maritime boundary.

87. The Court notes Kenya’s argument that the conduct of the Parties, including with respect to oil concessions, reflects the existence of a *de facto* maritime boundary. Even assuming that the limited evidence of practice before 2009 could be taken to suggest that a *de facto* line along the parallel of latitude may have been used by the Parties for the location of oil concession blocks, at least for some time, the Court observes that this may have been “simply the manifestation of the caution exercised by the Parties in granting their concessions” (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 664, para. 79). The Court also recalls that a *de facto* line “might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource” (*Territo-*

rial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 735, para. 253). The Court considers that “proof of the existence of a maritime boundary requires more than the demonstration of longstanding oil practice or adjoining oil concession limits” (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, ITLOS Reports 2017, p. 71, para. 215).

88. For the reasons set out above, the Court considers that other conduct of the Parties between 1979 and 2014 does not confirm that Somalia has clearly and consistently accepted a maritime boundary at the parallel of latitude.

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89. In conclusion, 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. Kenya’s claim in this respect must therefore be rejected.

IV. MARITIME DELIMITATION

90. In view of the conclusion just reached, the Court will now turn to the delimitation of the maritime areas appertaining to Somalia and Kenya.

91. In its Application, Somalia requested the Court to determine, on the basis of international law, the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including the continental shelf beyond 200 nautical miles (see paragraph 25 above).

A. Applicable Law

92. Both Somalia and Kenya are parties to UNCLOS (see paragraph 33 above). The provisions of the Convention must therefore be applied by the Court in determining the course of the maritime boundary between the two States.

B. Starting-Point of the Maritime Boundary

93. 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.

94. According to Somalia, the construction of the maritime boundary line begins with the identification of the land boundary terminus, which it

locates at $1^{\circ} 39' 44.07''$ S and $41^{\circ} 33' 34.57''$ E. To locate the land boundary terminus, Somalia first explains that the terminal point of the Parties' land boundary was defined with a high degree of precision in the 1927/1933 treaty arrangement between the two colonial Powers, the United Kingdom and Italy. Somalia contends that, consistent with the terms of the 1927 Agreement, the final permanent boundary beacon, known as Primary Beacon No. 29, or "PB 29", at the location known as "Dar Es Salam", must be connected to the low-water line by means of a straight line, perpendicular to the coast. It submits that the point at which this perpendicular line intersects the low-water line is the proper starting-point of the maritime boundary. Somalia situates this point on the low-water line approximately 41 metres south-east of PB 29. Somalia further contends that its approach to defining the starting-point of the maritime boundary is in conformity with Article 5 of UNCLOS, which states that the normal baseline for measuring the breadth of the territorial sea is the "low-water line".

95. In its Counter-Memorial and Rejoinder, Kenya made reference to PB 29 itself as being the appropriate starting-point for the delimitation of the maritime boundary. It argued against a starting-point located on the low-water line. The Court, however, notes that subsequently, in Appendix 2, where Kenya discussed how a provisional equidistance line ought to be constructed, it stated that such a line "begins from [a land boundary terminus] on the low-water line extending south-east from PB29". Taking these views into account, the Court can conclude that the Parties agree on the method for identifying the starting-point of the maritime boundary.

96. As to the exact location of PB 29, Somalia first argued that its co-ordinates are $1^{\circ} 39' 43.3''$ S and $41^{\circ} 33' 33.49''$ E. In its Counter-Memorial, Kenya replied that the precise co-ordinates of PB 29 are slightly different, at $1^{\circ} 39' 43.2''$ S and $41^{\circ} 33' 33.19''$ E. However, in the oral proceedings, Somalia indicated that it would be prepared to accept the co-ordinates proposed by Kenya for PB 29 for the purposes of identifying the starting-point of the maritime boundary in the Indian Ocean.

97. As to the exact location of the land boundary terminus, the Parties have put forward co-ordinates that are approximately the same. The co-ordinates for the land boundary terminus identified by Kenya by employing British Admiralty Chart 3362 — namely $1^{\circ} 39' 44.0''$ S and $41^{\circ} 33' 34.4''$ E — differ only slightly from the co-ordinates identified by Somalia using the United States National Geospatial Agency (US NGA) Nautical Chart 61220 (see paragraph 94 above). During the oral proceedings, Somalia stated that it would "be content with the outcome" regardless of which chart the Court chose to employ.

98. 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 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. On the basis of British Admiralty Chart 3362, the Court determines that the co-ordinates for the starting-point of the maritime boundary are 1° 39' 44.0" S and 41° 33' 34.4" E¹ (see sketch-map No. 3 below, p. 242).

C. Delimitation of the Territorial Sea

99. The Parties have differing views on the delimitation of the territorial sea. Somalia submits that the delimitation of the territorial sea is to be effected pursuant to Article 15 of the Convention.

100. Article 15 of the Convention, which concerns the delimitation of the territorial sea, provides:

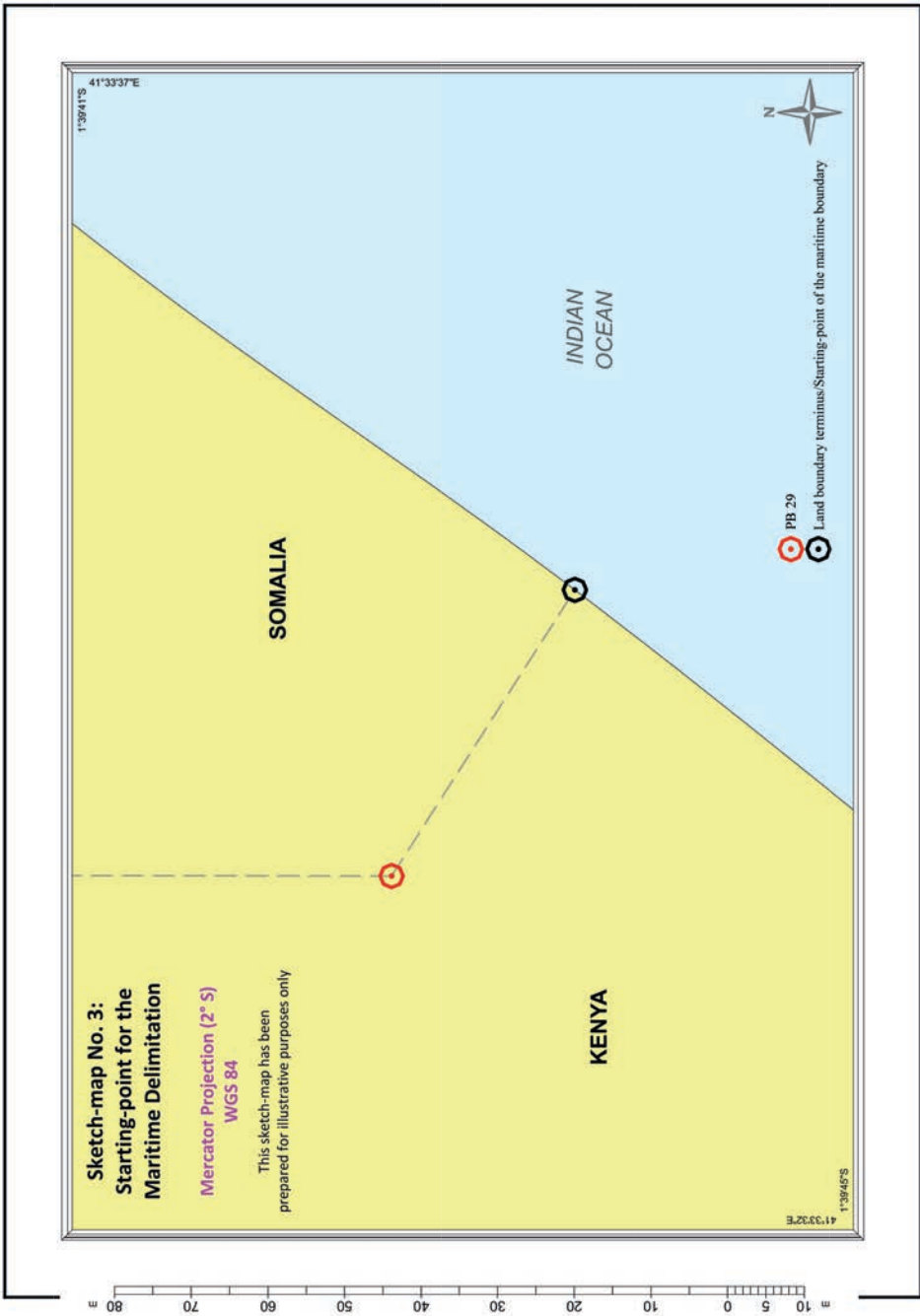
“Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.”

101. Somalia maintains that a median line should constitute the maritime boundary between the Parties in the territorial sea.

102. On the basis of US NGA Nautical Chart 61220, and using the CARIS-LOTS software, Somalia has selected various base points on its side of the land boundary terminus which, according to Somalia, influence the location of the median line within 12 nautical miles. Two of these base points are located on the Dlua Damasciaca islets. Base point S1 has the geographical co-ordinates 1° 39' 43.30" S and 41° 34' 35.40" E. For base point S2, Somalia provides the following geographical co-ordinates: 1° 39' 35.90" S and 41° 34' 45.29" E. The third point, S3, is located on a low-tide elevation off the southern tip of a small peninsula known as Ras Kaambooni, with the co-ordinates 1° 39' 14.99" S and 41° 35' 15.68" E.

103. On the Kenyan side of the land boundary, Somalia has identified two base points on the most seaward points on the charted low-tide coast. According to Somalia, these points control the median line within the territorial sea. For base point K1, Somalia provides the co-ordinates 1° 42' 00.06" S and 41° 32' 47.38" E; for base point K2, the co-ordinates are 1° 43' 04.77" S and 41° 32' 37.18" E.

¹ All the co-ordinates given by the Court are by reference to WGS 84 as geodetic datum. All delimitation lines described by the Court are geodetic lines and all azimuths provided are geodetic azimuths based on WGS 84.



104. Relying on these base points, Somalia suggests a median line in the territorial sea with five turning points as follows:

<i>Turning point</i>	<i>Co-ordinates</i>
T1	1° 40' 05.92" S – 41° 34' 05.26" E
T2	1° 41' 11.45" S – 41° 34' 06.12" E
T3	1° 43' 09.34" S – 41° 36' 33.52" E
T4	1° 43' 53.72" S – 41° 37' 48.21" E
T5	1° 44' 09.28" S – 41° 38' 13.26" E

The line proposed by Somalia is depicted on sketch-map No. 4 reproduced below (p. 246). As Somalia sees it, there are no “special circumstances” making this line “arbitrary, unreasonable or unworkable”, and it should therefore constitute the maritime boundary to be adopted by the Court for the delimitation of the territorial sea.

105. Kenya argued in its Counter-Memorial that the maritime boundary, including the part in the territorial sea, already exists and that it follows the parallel of latitude (see sketch-map No. 4 below, p. 246). The Court has already concluded (see paragraph 89 above) that no such boundary was agreed between the Parties. Kenya, in the same written pleading, referred to the 1927/1933 treaty arrangement and stated that it “provided for the establishment of [a] boundary of the territorial sea”. Kenya drew attention to Appendix I of the 1927 Agreement, which states that the line proceeds from PB 29 “in a south-easterly direction, to the limit of territorial waters in a straight line at right angles to the general trend of the coast-line at *Dar Es Salam*, leaving the islets of *Diua Damasciaca* in Italian territory”. According to Kenya, the resulting line, which it describes as running perpendicular to the general direction of the coast “must be extended further into the territorial sea (which extended up to 3 nautical miles at the time)”.

106. Kenya has however not asked the Court to delimit any segment of the maritime boundary on the basis of the 1927/1933 treaty arrangement. In the submissions contained in its Counter-Memorial and its Rejoinder, it asks the Court to adjudge and declare that the maritime boundary follows the parallel of latitude from the starting-point to the outer limit of the continental shelf (see paragraph 26 above). It took the same position in its Appendix 2, filed just a few days before the opening of the hearings.

107. During the oral proceedings, a Member of the Court, referring to the Counter-Memorial of Kenya, asked the following question: “In Somalia’s view, does th[e] 1927 Agreement establish the delimitation line of the territorial sea between the two Parties, and if so, what would be the outer limit of this line?” Somalia responded 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.

108. Kenya was given an opportunity to comment on Somalia's reply to the question but did not do so.

109. The Court notes 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. Kenya's legislation has referred to a median or equidistance line (see paragraphs 57 and 58 above) and Somalia's Maritime Law of 1988 refers to "a straight line toward the sea from the land as indicated on the enclosed charts" (see paragraphs 75-77 above). 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. The delegations discussed "several options and methods" for determining the maritime boundary, although they could not reach an agreement. In a presentation examining an "Equity-based maritime boundary scenario", which is attached to the joint report on that meeting, Kenya referred to Articles 15, 74 and 83 of the Convention as relevant to maritime delimitation. It emphasized 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*" (emphasis in the original). In light of the above, the Court therefore considers it unnecessary to decide whether the 1927/1933 treaty arrangement had as an objective the delimitation of the boundary in the territorial sea.

110. Kenya criticizes Somalia's choice of US NGA Nautical Chart 61220 for the selection of the base points and maintains that British Admiralty Chart 3362 should be used if a provisional equidistance line is to be constructed in the territorial sea. For the provisional equidistance line in the territorial sea, Kenya has selected the base points K1, K2, K3 and K4 and the base points S1, S2 and S3, with the following co-ordinates:

Base points on Kenya's coast:

<i>Base point</i>	<i>Co-ordinates</i>
K1	1° 39' 51.6" S – 41° 33' 28.4" E
K2	1° 40' 39.6" S – 41° 32' 55.3" E
K3	1° 42' 40.1" S – 41° 32' 41.8" E
K4	1° 43' 12.2" S – 41° 32' 38.5" E

Base points on Somalia's coast:

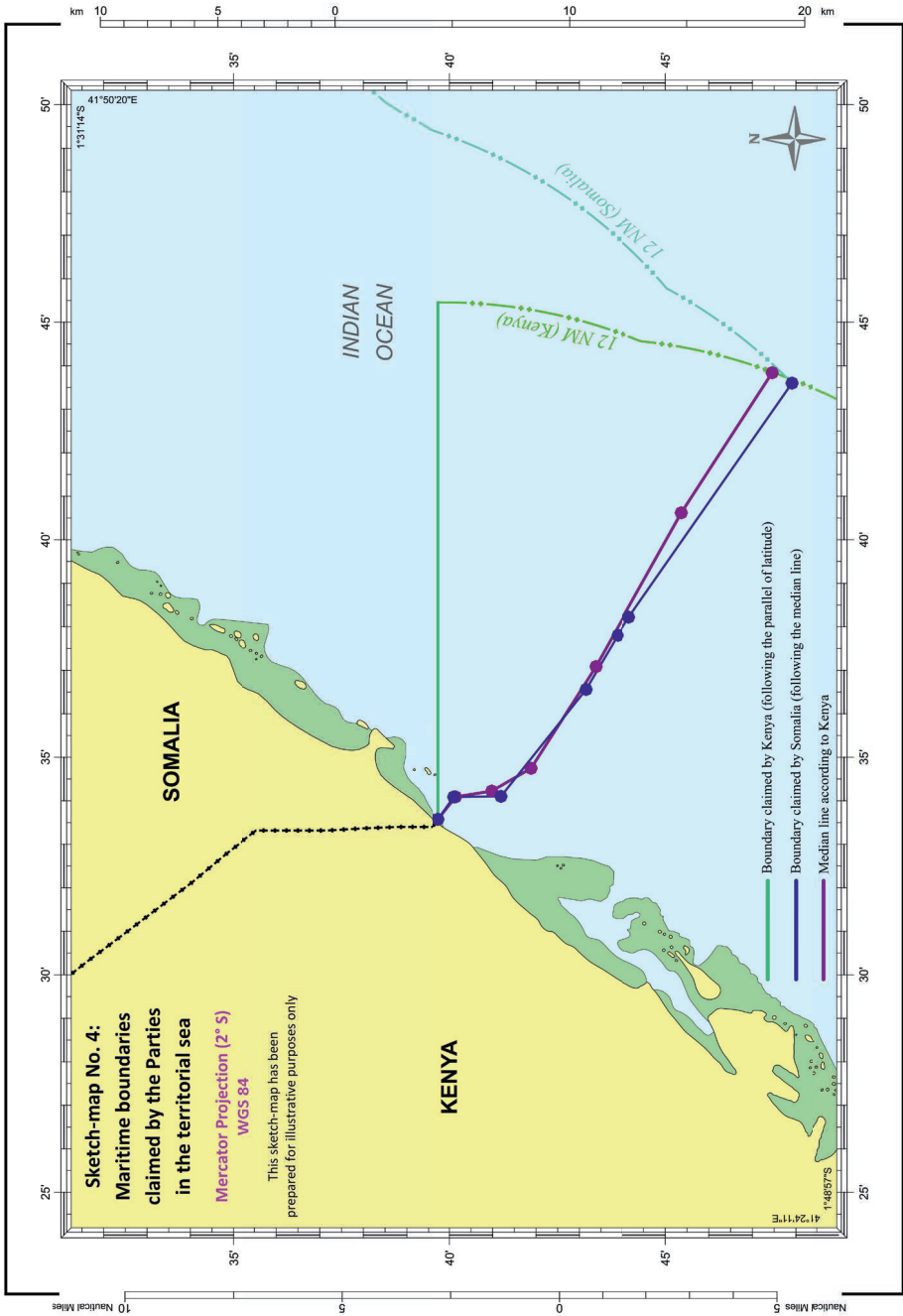
<i>Base point</i>	<i>Co-ordinates</i>
S1	1° 39' 36.3" S – 41° 33' 40.4" E
S2	1° 39' 40.9" S – 41° 34' 35.4" E
S3	1° 38' 57.0" S – 41° 35' 21.9" E

The line that it constructs on this basis lies slightly to the north of the line proposed by Somalia (see sketch-map No. 4 below, p. 246).

111. 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. 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 thereon, if it does not consider that base point to be appropriate. The Court may select a base point that neither party has proposed (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 101, paras. 116-117, p. 103, para. 123, p. 104, para. 125, and p. 108, para. 138). 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 (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, I.C.J. Reports 2001, pp. 104-109, para. 219, referring to *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p. 36, para. 57; see also *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, ITLOS Reports 2012, p. 47, para. 151). As the Court has stated in the past, there may be situations in which “the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain ‘islets, rocks and minor coastal projections’” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, I.C.J. Reports 1985, p. 48, para. 64).

112. The Court considers that there are serious reasons to question the appropriateness of the base points, as proposed by the Parties, that determine the course of the median line within the territorial sea.

113. The Court notes that the Parties have not selected the same base points for the delimitation of the territorial sea. Kenya has expressed doubts about the use of base points located on unknown low-tide features that have not been confirmed by a field visit. The first two base points that Somalia proposes on its side of the land boundary terminus are located on the Diua Damasciaca islets. They have a significant effect on the course of the median line in the territorial sea, pushing it to the south. Somalia's third base point, off the southern tip of Ras Kaambooni, also has the effect of significantly pushing the course of the median line to the



south. Kenya maintains that this base point “appears nowhere” when base points are calculated using British Admiralty Chart 3362. On the Somali side of the starting-point, the base points that Kenya would use to construct the median line (which differ from those used by Somalia) also push the initial course of the median line to the south. The placement of base points on the tiny maritime features described above has an effect on the course of the median line that is disproportionate to their size and significance to the overall coastal geography.

114. 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, the Court does not 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.

115. The appropriate base points selected by the Court on Somalia’s coast are the following:

<i>Base point</i>	<i>Co-ordinates</i>
S1	1° 39' 36.7" S – 41° 33' 34.3" E
S2	1° 39' 34.4" S – 41° 33' 36.6" E
S3	1° 39' 21.6" S – 41° 33' 48.6" E
S4	1° 39' 09.2" S – 41° 34' 00.7" E

116. The appropriate base points selected by the Court on Kenya’s coast are the following:

<i>Base point</i>	<i>Co-ordinates</i>
K1	1° 39' 42.4" S – 41° 33' 29.5" E
K2	1° 39' 49.0" S – 41° 33' 24.9" E
K3	1° 40' 09.3" S – 41° 33' 12.9" E
K4	1° 40' 25.5" S – 41° 33' 02.9" E

117. The resulting line starts from the land boundary terminus at co-ordinates 1° 39' 44.0" S and 41° 33' 34.4" E and has the following turning points:

<i>Turning point</i>	<i>Co-ordinates</i>
1	1° 40' 18.3" S – 41° 34' 17.4" E
2	1° 40' 32.1" S – 41° 34' 32.8" E
3	1° 41' 12.8" S – 41° 35' 22.8" E
4	1° 41' 39.0" S – 41° 36' 00.9" E
5	1° 42' 39.9" S – 41° 37' 21.6" E
6	1° 44' 01.2" S – 41° 39' 02.8" E

The geographical co-ordinates of the point (Point A) at the distance of 12 nautical miles from the coast are 1° 47' 39.1" S and 41° 43' 46.8" E. That median line is depicted on sketch-map No. 5 below (p. 249).

118. The Court observes that the course of the median line as described in paragraph 117 corresponds closely to the course 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 (see paragraph 109 above).

D. Delimitation of the Exclusive Economic Zone and the Continental Shelf within 200 Nautical Miles

1. Delimitation methodology

119. The Court will now proceed to the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles from the coasts of the Parties. 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.

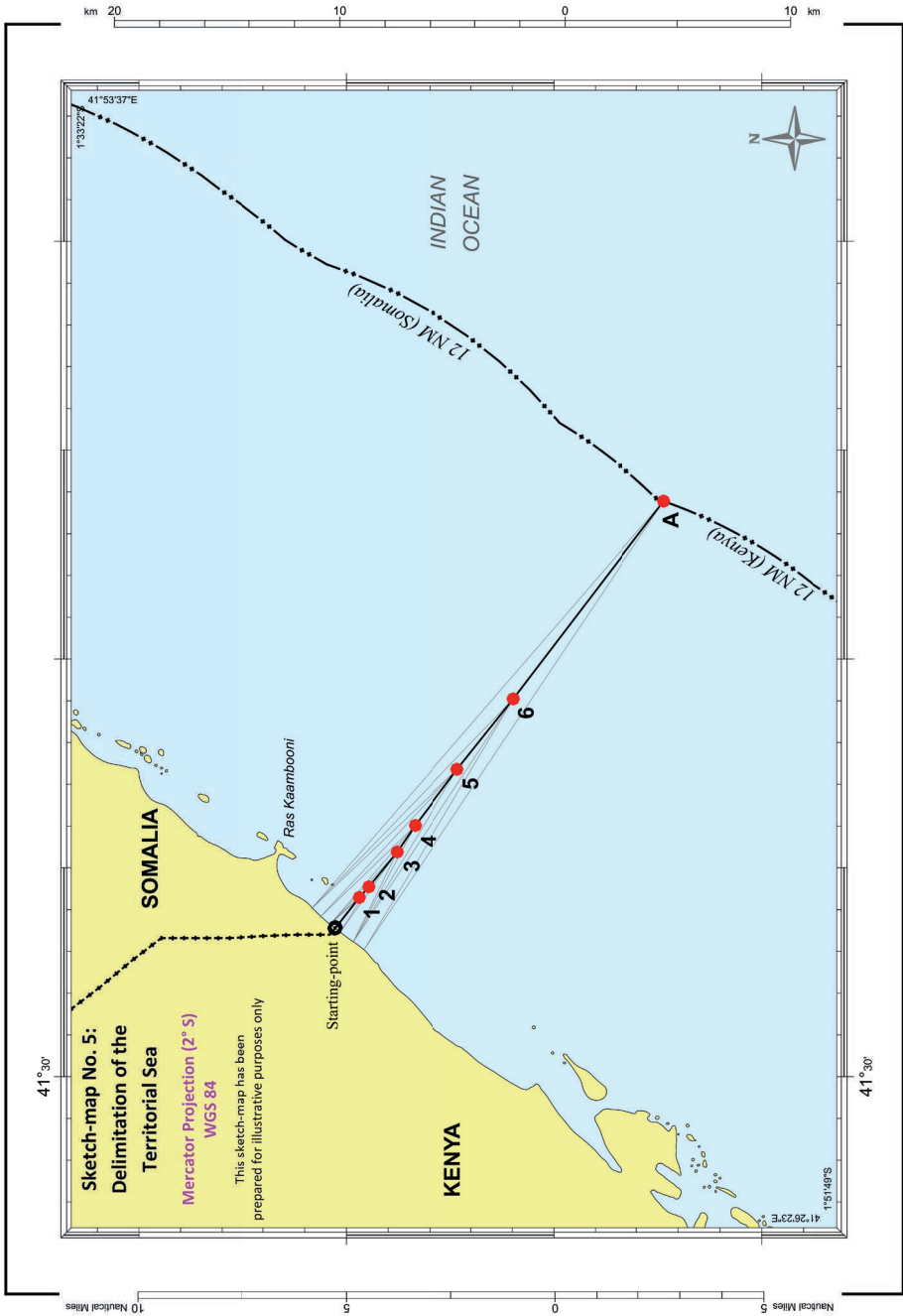
Article 74, paragraph 1, provides:

“The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”

Article 83, paragraph 1, reads as follows:

“The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”

120. In substance, these two provisions are identical, thus facilitating the establishment of a single maritime boundary delimiting two distinct



maritime zones with their own specific legal régimes (see e.g. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment*, *I.C.J. Reports* 1985, p. 33, para. 33; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, *Judgment*, *I.C.J. Reports* 1984, p. 295, para. 96).

121. The above-quoted 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 the achievement of 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.

122. Since the adoption of the Convention, the Court 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)* (*Judgment*, *I.C.J. Reports* 2009, pp. 101-103, paras. 115-122).

123. In the first stage, the Court will establish the provisional equidistance line from the most appropriate base points on the coasts of the parties. As the Court has stressed, “the line is plotted on strictly geometrical criteria on the basis of objective data” (*ibid.*, p. 101, para. 118).

124. In accordance with Articles 74 and 83 of the Convention, the delimitation shall achieve an equitable solution. The Court has explained that “the achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment*, *I.C.J. Reports* 2012 (II), p. 703, para. 215). The Court will therefore, in the second stage, “consider whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result” (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment*, *I.C.J. Reports* 2009, 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). Various factors, referred to as “relevant circumstances”, may call for the adjustment or shifting of the provisional line. These factors are mostly geographical in nature, although there is no closed list of relevant circumstances. They are not specified in the provisions of the Convention related to delimitation, which do not use the term “relevant circumstances”. These relevant circumstances have been identified and developed in the practice of the Court, the International Tribunal for the Law of the Sea and arbitral tribunals in the context of each case. As observed by the Arbitral Tribu-

nal in the case between Barbados and Trinidad and Tobago, the relevant circumstances are “case specific” (*Arbitration between Barbados and the Republic of Trinidad and Tobago, Award of 11 April 2006*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXVII, p. 215, para. 242).

125. 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 relevant coasts of the parties and the ratio of the respective shares of the parties 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. Whether there is such a marked disproportion is a matter for the Court’s appreciation in each case by reference to the overall geography of the area (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 129, para. 213).

* *

126. Somalia maintains that in the circumstances of this case the only appropriate method for delimiting the maritime boundary between Somalia and Kenya.

127. Kenya argues in its written pleadings that the three-stage methodology is not mandatory. It does not deny that this method may be appropriate to achieve an equitable solution in certain cases; however, in its view, it is not appropriate in the present case. Kenya submits that, in light of the applicable law, the regional geographical context and practice, and the conduct of the Parties, the parallel of latitude is the appropriate methodology to achieve an equitable solution. It contends that, in any event, the parallel of latitude provides for the most equitable delimitation in this case.

* *

128. The Court observes that the three-stage methodology is not prescribed by the Convention 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 (e.g. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 101, paras. 115 *et seq.*; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment, I.C.J. Reports 2012 (II)*,

p. 695, para. 190; *Maritime Dispute (Peru v. Chile)*, Judgment, *I.C.J. Reports 2014*, p. 65, para. 180; *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)*, p. 190, para. 135). The three-stage methodology for maritime delimitation has also been used by international tribunals (see *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, p. 67, para. 239; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, *RIAA*, Vol. XXXII, p. 106, para. 346; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, *ITLOS Reports 2017*, p. 96, para. 324).

129. The Court will not use the three-stage methodology if there are “factors which make the application of the equidistance method inappropriate” (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007 (II)*, p. 741, para. 272), for instance if the construction of an equidistance line from the coasts is not feasible (*ibid.*, p. 745, para. 283). This, however, is not the case in the present circumstances where such a line can be constructed.

130. 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 (see sketch-map No. 2 above, p. 223).

131. 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*

(a) *Relevant coasts*

132. The Court must first identify the relevant coasts of the Parties, namely those coasts whose projections overlap (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 97, para. 99).

133. As regards its own relevant coast, Somalia maintains that it extends for 733 km, from the land boundary terminus with Kenya in the south to the area just south of Cadale, some 92 km north of Mogadishu. Somalia notes that, north of this point its coast arcs gradually away from the area of overlapping entitlements and is therefore no longer relevant to the delimitation with Kenya.

134. Concerning Kenya’s relevant coast, Somalia, in its written pleadings, submitted that all of Kenya’s coast is relevant except for two sec-

tions facing due south and thus away from the delimitation area, namely the north-eastern extremities of Ungama Bay in the central portion of Kenya's coast and the final section of Kenya's coast as it approaches Tanzania. Excluding these two sections, Somalia concluded that the total length of Kenya's relevant coast is 466 km. At the hearings, however, Somalia agreed that all of Kenya's coast, from the border with Somalia in the north to the border with Tanzania in the south, is relevant, with a length of 511 km (see sketch-map No. 6 below, p. 254).

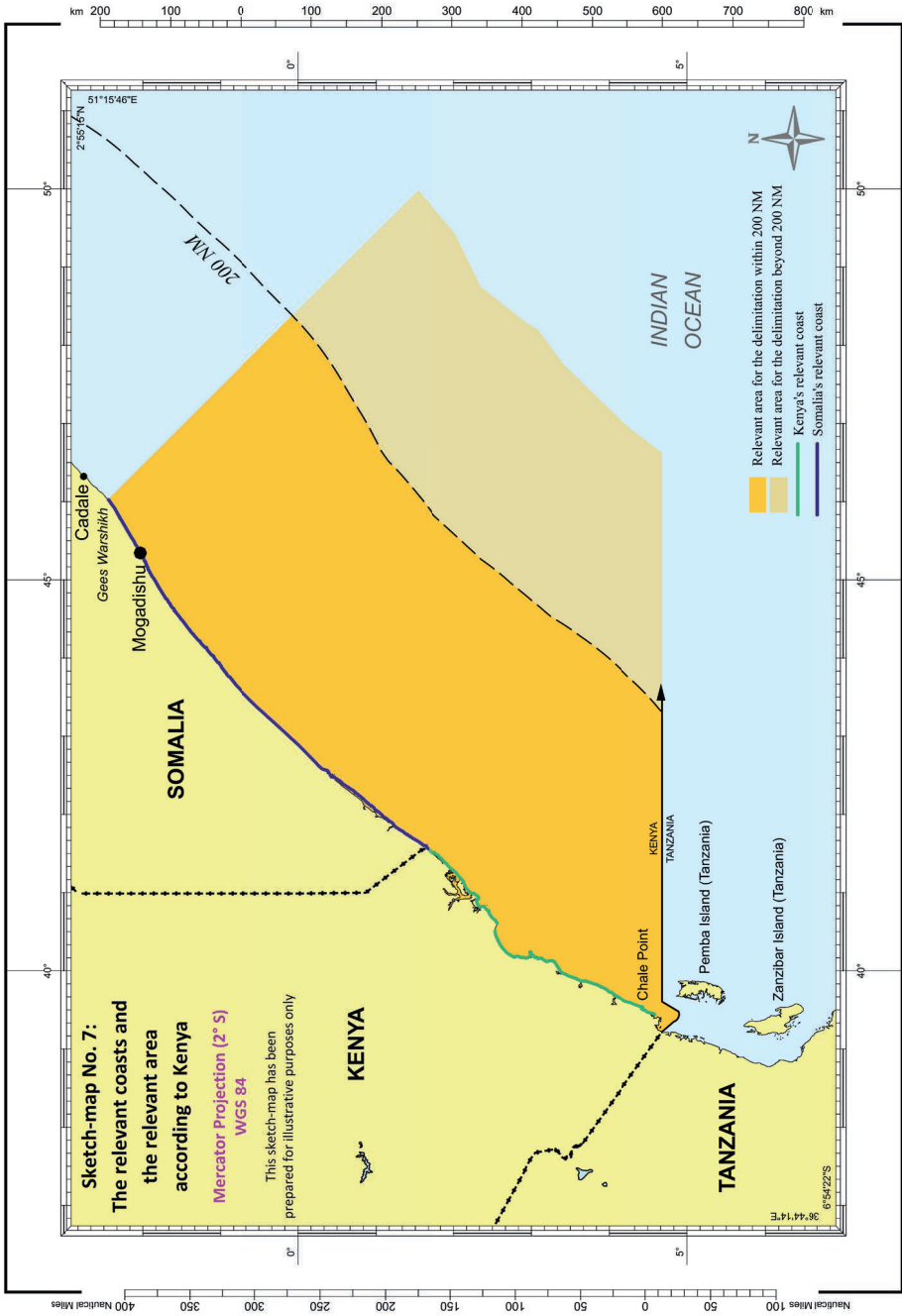
135. While Kenya accepts that Somalia's relevant coast has a length of 733 km, it nonetheless maintains that, if Somalia's approach, using a radial projection from the land boundary terminus, is applied consistently, the radial projection from the land boundary terminus should extend to 350 nautical miles with the result that Somalia's relevant coast measures only 714 km. It acknowledges, however, that the difference is not significant.

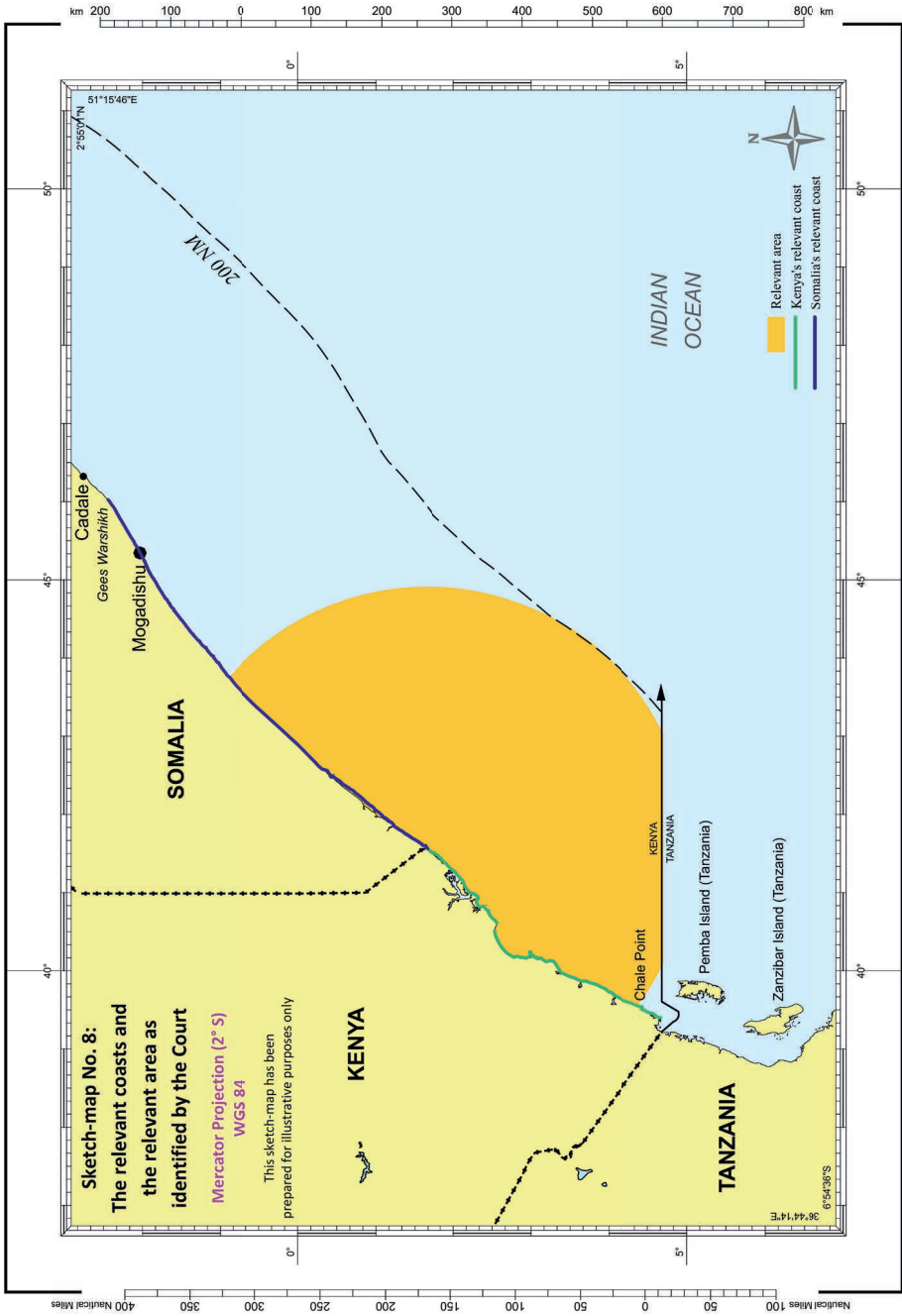
136. Concerning its own relevant coast, Kenya indicates that it generally agrees with Somalia's approach. It states, however, that it would also include a 30 km section of coastline south of Chale Point on its coast, and therefore estimates its relevant coastal length at approximately 511 km following its natural configuration (see sketch-map No. 7 below, p. 255).

137. The Court, using radial projections which overlap within 200 nautical miles (see paragraph 132 above), has identified that the relevant coast of Somalia extends for approximately 733 km and that of Kenya for approximately 511 km (see sketch-map No. 8 below, p. 256).

(b) *Relevant area*

138. The Parties disagree as to the identification of the relevant area. Somalia proceeds in two steps, first drawing 200-nautical-mile envelopes of arcs from the Parties' baselines and identifying the area where those arcs intersect as the area of overlapping potential entitlements, excluding the area south of the agreed Kenya-Tanzania boundary. This produces a total relevant area of 213,863 sq km within 200 nautical miles. Somalia then adds to this area the maritime space beyond 200 nautical miles in which the potential entitlements of the Parties overlap. Although it accepts the role of potential entitlements for the determination of the relevant area, in fact, it limits the relevant area beyond 200 nautical miles in the north by the parallel of latitude drawn from the land boundary terminus. It appears that Somalia has done so on the basis of the claim submitted by Kenya to the CLCS. Somalia considers that this combined area constitutes the totality of the relevant area in the circumstances of the case, thus measuring approximately 319,542 sq km (see sketch-map No. 6 below, p. 254).





139. Kenya rejects Somalia's approach to identifying the relevant area. According to Kenya, Somalia acts inconsistently when it applies one approach to define the relevant area within 200 nautical miles and a different approach to define the area beyond 200 nautical miles. For Kenya, the relevant area consists of the entire frontal projections of the Parties' relevant coasts out to 350 nautical miles. In the west, the relevant area is bounded by the coasts of the Parties from Ras Wasin in the south of Kenya, through the land boundary terminus to the Somali headland of Gees Warshikh in the north. The southern limit of the relevant area is bounded by the agreed boundary between Kenya and Tanzania. In the east, the relevant area is bounded by the continental shelf limits as submitted by Somalia to the CLCS dated 21 July 2014. To define the relevant area in the north, Kenya adopts a straight line perpendicular to the coast to connect the end of the relevant coast at Gees Warshikh to the continental shelf limit. The total relevant area thus defined measures 525,300 sq km (see sketch-map No. 7 above, p. 255).

140. The Court cannot accept Somalia's approach to identifying the relevant area beyond 200 nautical miles since it is not in conformity with past pronouncements of the Court on what constitutes the relevant area. The Court has explained on a number of occasions that "[t]he relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap" (see *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), p. 184, para. 115; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 683, para. 159). The Court also recalls its observation that "the relevant area cannot extend beyond the area in which the entitlements of both Parties overlap" (*ibid.*, p. 685, para. 163). The fact that Kenya has limited its claim to the extended continental shelf submitted to the CLCS by the parallel of latitude does not mean that its potential entitlements cannot extend to the north of that parallel. Rather, that claim is based on Kenya's assertion that the parallel of latitude constitutes the maritime boundary between the two States, an assertion which the Court has found unproven and cannot accept.

141. 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 (see sketch-map No. 8 above, p. 256).

3. *Provisional equidistance line*

142. The Court must next construct the provisional equidistance line. To do so, it must identify the appropriate base points on the Parties' relevant coasts which will be used for that purpose.

* *

143. Somalia suggests that the base points should be identified by using appropriate software based on the relevant nautical charts. It submits that the software automatically selects those points that generate the equidistance line, that is a line every point of which is equidistant from the nearest points on the Parties' baselines from which the breadth of the territorial sea is measured. Having used the CARIS-LOTS software, based on US NGA Nautical Chart 61220, Somalia has identified two base points on its side of the land boundary terminus and two base points on the Kenyan side. It provides the following geographical co-ordinates for the base points on the Somali side, for base point S3 1° 39' 14.99" S and 41° 35' 15.68" E and for base point S4 1° 35' 37.21" S and 41° 38' 01.00" E. The two base points that Somalia identified on the Kenyan side have the following co-ordinates: base point K2 1° 43' 04.77" S and 41° 32' 37.18" E and base point K3 1° 46' 10.97" S and 41° 30' 45.14" E. It submits that these four base points control the entire course of the equidistance line up to 200 nautical miles from the coast.

144. Kenya contends, in Appendix 2, that Somalia failed to use the most reliable charted data. Kenya criticizes the reliance by Somalia on US NGA Nautical Chart 61220, arguing that it contains no new or independent charted data. Kenya draws the Court's attention to the fact that US NGA Nautical Chart 61220 indicates that its charted data are derived from the relevant British Admiralty or Italian charts. In Kenya's view, the appropriate chart to be used for the selection of base points is British Admiralty Chart 3362, which offers the best available charted data. Based on that chart and using the same CARIS-LOTS software, Kenya identifies the following base points for the construction of the provisional equidistance line:

Base points on Kenya's coast:

<i>Base point</i>	<i>Co-ordinates</i>
K4	1° 43' 12.2" S – 41° 32' 38.5" E
K5	1° 43' 39.0" S – 41° 32' 28.4" E
K6	1° 46' 26.3" S – 41° 30' 36.2" E

Base points on Somalia's coast:

<i>Base point</i>	<i>Co-ordinates</i>
S3	1° 38' 57.0" S – 41° 35' 21.9" E
S4	1° 35' 49.9" S – 41° 38' 1.8" E

Kenya admits that its proposed provisional equidistance line shows only slight differences from that proposed by Somalia.

145. Somalia also pointed out at the hearings that there was very little difference between the two equidistance lines constructed from the base points it had selected or from those selected by Kenya. It concluded that it would be content for the Court to use either US NGA Nautical Chart 61220 or British Admiralty Chart 3362, or any other chart that the Court might consider even more reliable.

* *

146. Taking into account the views of the Parties, the Court considers that it can rely on British Admiralty Chart 3362. It identifies the following base points as appropriate for the construction of the provisional equidistance line within 200 nautical miles of the coasts:

Base points on Somalia's coast:

<i>Base point</i>	<i>Co-ordinates</i>
S4	1° 39' 09.2" S – 41° 34' 00.7" E
S5	1° 38' 24.0" S – 41° 34' 35.8" E
S6	1° 34' 50.2" S – 41° 37' 19.9" E

Base points on Kenya's coast:

<i>Base point</i>	<i>Co-ordinates</i>
K4	1° 40' 25.5" S – 41° 33' 02.9" E
K5	1° 47' 11.4" S – 41° 29' 10.5" E
K6	1° 47' 55.0" S – 41° 28' 49.4" E

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') with co-ordinates 3° 31' 41.4" S and 44° 21' 02.5" E (see sketch-map No. 9

below, p. 261). The turning points between Point A and the 200-nautical-mile limit are the following:

<i>Turning point</i>	<i>Co-ordinates</i>
7	2° 01' 57.8" S – 42° 02' 26.7" E
8	2° 05' 37.1" S – 42° 08' 26.9" E
9	2° 11' 13.0" S – 42° 17' 25.5" E
10	2° 20' 12.3" S – 42° 32' 04.8" E

4. *Whether there is a need to adjust the provisional equidistance line*

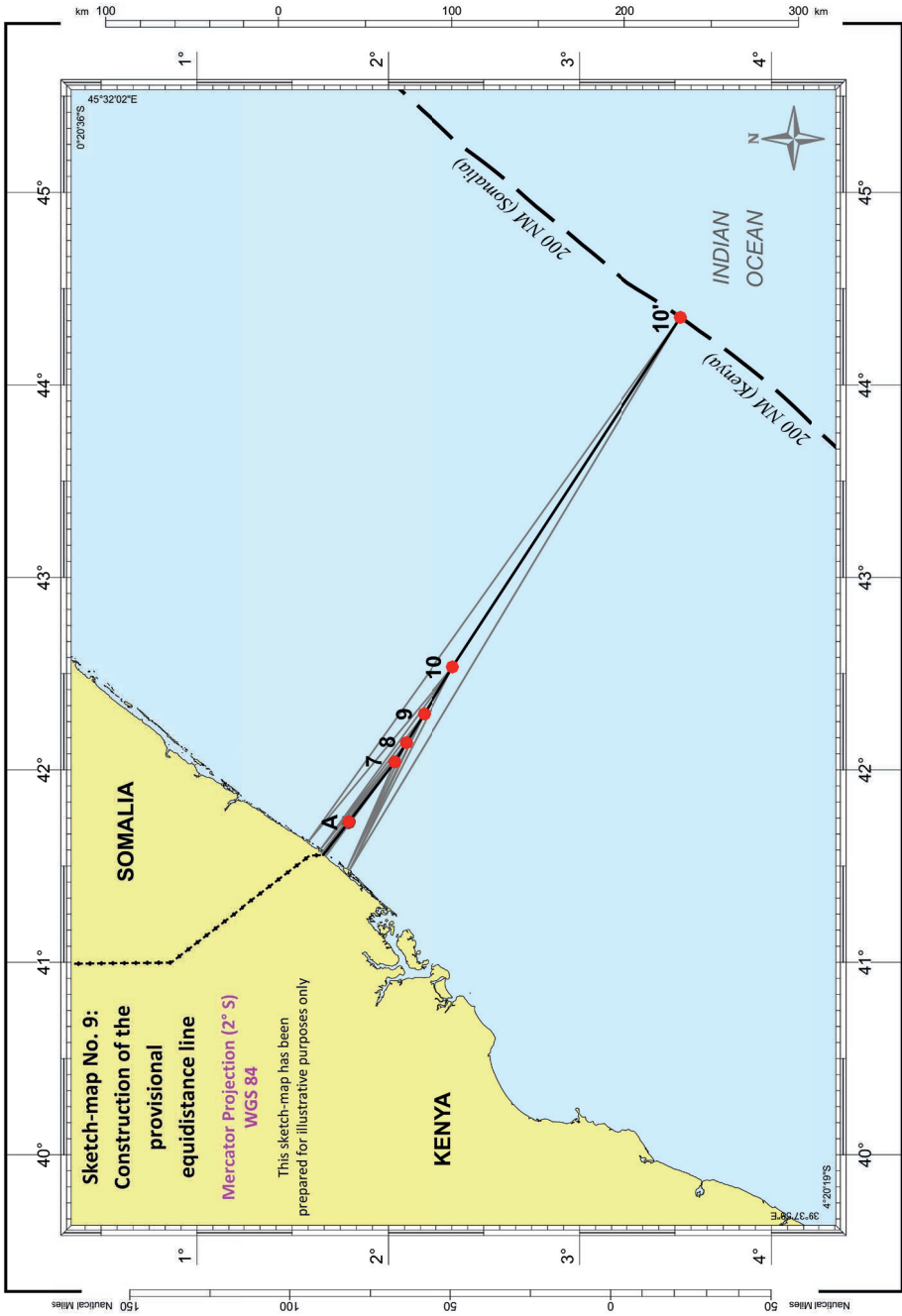
147. The Court will next consider whether there are factors requiring the adjustment or shifting of the provisional equidistance line in order to achieve an equitable solution. Since the cases concerning the *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, such factors have been referred to in the jurisprudence of the Court as relevant circumstances (*Judgment, I.C.J. Reports 1969*, p. 53, para. 101).

* *

148. Somalia sees no reason for adjusting the provisional equidistance line. It maintains that the relevant circumstances that may justify the adjustment of the equidistance line in order to reach an equitable solution are essentially of a geographical nature. Somalia mentions three such circumstances in particular, namely: the cut-off effect of the provisional equidistance line, appreciated within the general geographical context; the cut-off effect of such a line due to concavity of the coast; and the presence of islands in the relevant maritime area. In Somalia's view, there are no such circumstances in the present case. Nor are there any other unusual or anomalous geographical circumstances since the coasts of the Parties are comparatively straight and unremarkable. It contends that the Kenya-Tanzania maritime boundary agreement is *res inter alios acta* for Somalia and that it cannot have any bearing on the delimitation in the present case. It adds that the effect of that boundary agreement can only consist of depriving Kenya of some of its entitlements beyond 200 nautical miles. Somalia concludes that the provisional equidistance line should remain intact since no adjustment is required or justified.

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149. Kenya, for its part, invokes five circumstances which, it considers, require the adjustment of the provisional equidistance line. In its view, any such adjustment should result in a boundary following the parallel of latitude. First, Kenya contends that the provisional equidistance line would lead to a severe reduction in its coastal projection constituting a



significant, pronounced and unreasonable cut-off effect with respect to its maritime areas.

150. The second relevant circumstance requiring the adjustment of the provisional equidistance line is, according to Kenya, constituted by the regional practice of using parallels of latitude to define the maritime boundaries of States on the Eastern African coast.

151. Vital security interests of both the Parties and the international community at large are, in Kenya's view, another relevant circumstance that confirms the need to adjust the provisional equidistance line to the parallel of latitude. Kenya refers to the security threats of terrorism and piracy in support of its call for such an adjustment.

152. Kenya further argues that 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 and that this constitutes yet another relevant circumstance that requires the adjustment of the provisional equidistance line to the parallel of latitude.

153. Finally, Kenya contends that an unadjusted equidistance line would have devastating repercussions for the livelihoods and economic well-being of Kenya's fisherfolk who are said to depend on fisheries in coastal areas near the Kenya-Somalia boundary. As Kenya sees it, their equitable access to those natural resources therefore requires the adjustment of the provisional equidistance line to the parallel of latitude. Kenya presents this as the fifth relevant circumstance to be taken into account by the Court.

* *

154. At this stage, the Court must "verify that the provisional equidistance line, drawn by the geometrical method from the determined base points on the coasts of the Parties is not, in light of the particular circumstances of the case, perceived as inequitable" (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 112, para. 155). If it is, the Court should adjust the line in order to achieve an equitable solution as required by Articles 74 and 83 of the Convention.

155. As summarized above, Kenya perceives the provisional equidistance line as inequitable while Somalia does not see any plausible reason for adjusting the line and believes that it would constitute an equitable boundary.

156. The Court notes that Kenya, by invoking various factors which it considers as constituting 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 coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 703, para. 215; *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 127, para. 201).

157. The Court will begin by considering those factors, relied on by Kenya, which are non-geographical in nature.

158. As far as the security interests of Kenya are concerned, the Court is fully aware of and does not underestimate the serious threats to security in the region. These threats are certainly of legitimate concern to the States in the region and to the international community at large. The Court notes the efforts of the international community, in particular the United Nations and the African Union, as well as of various countries, including Kenya, to assist Somalia in re-establishing peace and security after many years of internal conflicts. 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" (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2012 (II), p. 706, para. 222). 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" (*ibid.*).

159. Access for Kenya's fisherfolk to natural resources is another factor which Kenya brings to the attention of the Court when arguing for the adjustment of the line. Such a factor can be taken into account by the Court 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" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada)*

United States of America), *Judgment, I.C.J. Reports 1984*, p. 342, para. 237; see also *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, *Judgment, I.C.J. Reports 1993*, pp. 71-72, paras. 75-76). In the *Gulf of Maine* case, the Chamber of the Court did not find that the delimitation line it constructed would have such consequences. 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. In any event, as it appears from a map provided by Kenya, 17 out of 19 fish landing sites are located near or at the Lamu Archipelago, and would therefore be unaffected by an equidistance line. Only two landing sites are close to the land boundary terminus. Moreover, in the present case, 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.

160. The Court now 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. In the past, summarizing its jurisprudence and that of various arbitral tribunals, the Court stated that:

"although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional equidistance line. Only if they are based on express or tacit agreement between the parties may they be taken into account." (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, *Judgment, I.C.J. Reports 2002*, pp. 447-448, para. 304.)

The same is true for other types of conduct, such as naval patrols or fishing activities. The Court has already concluded that no maritime boundary along the parallel of latitude has been agreed by the Parties (see paragraphs 88 and 89 above). There is no *de facto* maritime boundary between Somalia and Kenya. The Court therefore cannot accept the argument of Kenya 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.

161. The Court will now consider the two remaining arguments that, 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. It also points out that the cut-off effect produced by the equidistance line is severely exacerbated past the 200-nautical-mile limit, essentially to the point that Kenya would be completely cut off from the outer limit of the continental shelf. Kenya further argues that the regional context and practice require the adjustment of the provisional equidistance line.

162. The Court 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 (e.g. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969*, p. 17, para. 8, and p. 49, para. 89; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, *RIAA*, Vol. XXXII, p. 123, para. 408). In 1985, the Court reaffirmed that an equidistance line “may yield a disproportionate result where a coast is . . . markedly concave or convex” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 44, para. 56). The International Tribunal for the Law of the Sea, while stating that “in the delimitation of the exclusive economic zone and the continental shelf, concavity *per se* is not necessarily a relevant circumstance”, has also confirmed that

“when an equidistance line drawn between two States produces a cut-off effect on the maritime entitlement of one of those States, as a result of the concavity of the coast, then an adjustment of that line may be necessary in order to reach an equitable result” (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, p. 81, para. 292).

163. Somalia argues that, to the extent that there is any cut-off effect suffered by Kenya, it is solely the result of the agreed maritime boundary between Kenya and Tanzania. The Court 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* (*Arbitration between Barbados and the Republic of Trinidad and Tobago*, Award of 11 April 2006, *RIAA*, Vol. XXVII, p. 238, para. 346). They “cannot *per se* affect the maritime boundary” between Kenya and Somalia (*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)*, p. 187, para. 123). 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.

164. If the examination of the coastline is limited only to the coasts of Kenya and Somalia, any concavity is not conspicuous. However, examin-

ing 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. It is true that in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, the Court stated that the concavity of the coastline may be a relevant circumstance for the purposes of delimitation “when such concavity lies within the area to be delimited” (*Judgment, I.C.J. Reports 2002*, p. 445, para. 297). However, it is worth recalling the specific context of that case, and in particular the Court’s observation that “the concavity of Cameroon’s coastline is apparent primarily in the sector where it faces Bioko” (*ibid.*), an island that is subject to the sovereignty of a third State, namely Equatorial Guinea. Prior to making this statement, the Court had concluded that “[t]he part of the Cameroon coastline . . . fac[ing] Bioko . . . cannot therefore be treated as facing Nigeria so as to be relevant to the maritime delimitation between Cameroon and Nigeria” (*ibid.*, p. 443, para. 291). The Court’s statement thus should not be understood as excluding in all circumstances the consideration of the concavity of a coastline in a broader geographical configuration.

165. Examining the concavity of the coastline in a broader geographical configuration is consistent with the approach taken by this Court and international tribunals. In the two *North Sea Continental Shelf* cases, the Court examined the coasts of three States, with Germany in the middle. The Court described the cut-off effect as follows:

“in the case of a concave or recessing coast . . . the effect of the use of the equidistance method is to pull the line of the boundary inwards, in the direction of the concavity . . . ‘cutting off’ the coastal State from the further areas of the continental shelf outside of and beyond this triangle” (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, *Judgment, I.C.J. Reports 1969*, p. 17, para. 8).

The Court expressed this view in the context of proceedings that had been joined, while the cases themselves remained separate. The Court noted that “although two separate delimitations [were] in question, they involve[d] — indeed actually g[a]ve rise to — a single situation” (*ibid.*, p. 19, para. 11). The Court emphasized that “[t]he fact that the question of either of these delimitations might have arisen and called for settlement separately in point of time, does not alter the character of the problem with which the Court is actually faced” (*ibid.*).

166. In both the *Bangladesh/Myanmar* and *Bangladesh v. India* cases, even though the issue was that of a boundary between the two respective States, the International Tribunal for the Law of the Sea, in the former case, and the Arbitral Tribunal, in the latter, each looked at the concavity of the coasts of the three States as a whole, with Bangladesh in the mid-

dle. In *Bangladesh v. India*, the Arbitral Tribunal quoted from the Judgment in the *North Sea Continental Shelf* cases, the Award in the *Guineal Guinea-Bissau* case and the Judgment in the *Bangladesh/Myanmar* case to point out that when there are three adjacent States along a concave coastline, the equidistance method has the “drawback of resulting in the middle country being enclaved by the other two” (*Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award of 7 July 2014, RIAA, Vol. XXXII, pp. 123-124, paras. 413-416).

167. In the present case, the potential cut-off of Kenya’s maritime entitlements should be assessed in a broader geographical configuration. This was also the approach adopted by the Arbitral Tribunal in the *Guineal Guinea-Bissau* case. It took into consideration “the whole of West Africa” in order to seek “a solution which would take overall account of the shape of its coastline”. It noted that “[t]his would mean no longer restricting consideration to a *short coastline* but to a *long coastline*” that included the coastline of Sierra Leone (*Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award of 14 February 1985, *International Law Reports*, Vol. 77, p. 683, para. 108, emphasis in the original). It expressed the view that “while the continuous coastline of the two Guineas — or of the three countries when Sierra Leone is included — is generally concave, that of West Africa in general is undoubtedly convex” (*ibid.*). The Tribunal observed that “[i]n order for the delimitation between the two Guineas to be suitable for equitable integration into the existing delimitations of the West African region . . . it is necessary to consider how all these delimitations fit in with the general configuration of the West African coastline” (*ibid.*, p. 684, para. 109). The Tribunal also noted that the overall concavity of the coastline of the two States was “accentuated” if it considered “the presence of Sierra Leone further south”, with Guinea situated in the middle between Guinea-Bissau and Sierra Leone (*ibid.*, pp. 681-682, paras. 103-104).

168. 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, even more so than the coastline of Guinea-Bissau, Guinea and Sierra Leone considered together, which the Arbitral Tribunal characterized as concave (see paragraph 167 above). 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 (see sketch-map No. 10 below, p. 269).

169. 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.

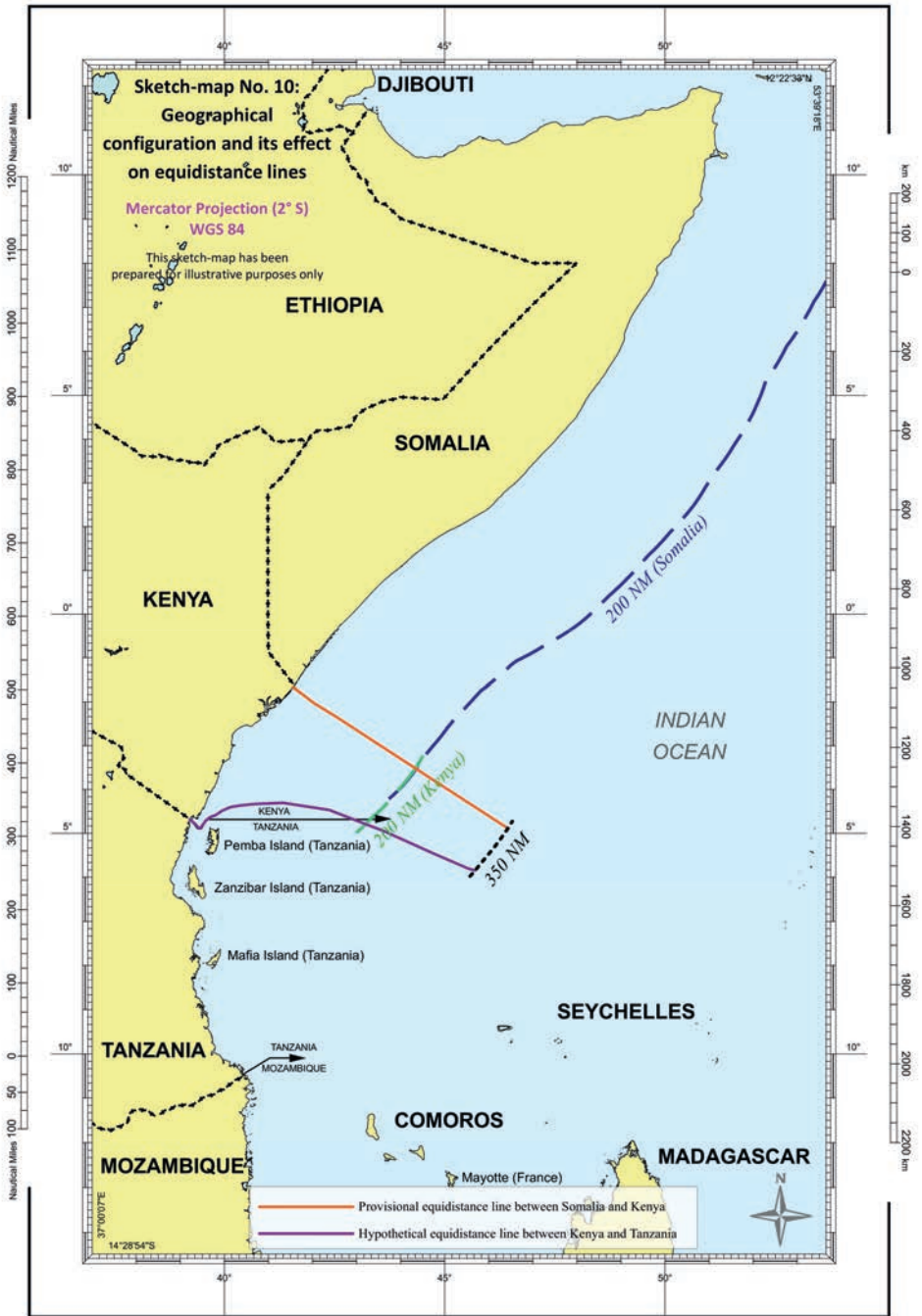
170. The Court recalls its jurisprudence and that of international tribunals according to which an adjustment of the provisional equidistance line is warranted if the cut-off effect is “serious” or “significant” (see *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, *Judgment, I.C.J. Reports 2018 (I)*, pp. 196-197, para. 156; *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, *Judgment, ITLOS Reports 2017*, p. 120, para. 425; *Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, *Award of 7 July 2014, RIAA, Vol. XXXII*, p. 124, para. 417).

171. In the view of the Court, 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.

172. The Court has affirmed that “the achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way” (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *Judgment, I.C.J. Reports 2012 (II)*, p. 703, para. 215). This is an important standard to be used in making an adjustment to the provisional equidistance line. The Court, however, bears in mind the following principles: “there is . . . no question of refashioning geography, or compensating for the inequalities of nature”, “equity does not necessarily imply equality” and “there can be no question of distributive justice” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, *Judgment, I.C.J. Reports 1985*, pp. 39-40, para. 46). In other words, an adjustment should not produce an unreasonable result for Somalia.

173. The adjustment of a provisional equidistance line must be assessed on a case-by-case basis. As the Arbitral Tribunal observed in the *Arbitration between Barbados and the Republic of Trinidad and Tobago*, “[t]here are no magic formulas” to be used for the adjustment of a provisional equidistance line (*Award of 11 April 2006, RIAA, Vol. XXVII*, p. 243, para. 373). Rather, it is a result of an overall appreciation of the relevant circumstances by the Court in seeking to achieve an equitable solution. In order to attenuate the cut-off effect described above, the Court considers it reasonable to adjust the provisional equidistance line.

174. In view of the above 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) with co-ordinates 3° 4' 21.3" S and 44° 35' 30.7" E (see sketch-map No. 11 below, p. 271).

5. *Disproportionality test*

175. In the final stage, the Court will check 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.

176. The relevant coast of Somalia is 733 km long and that of Kenya 511 km long (see paragraph 137 above). 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.

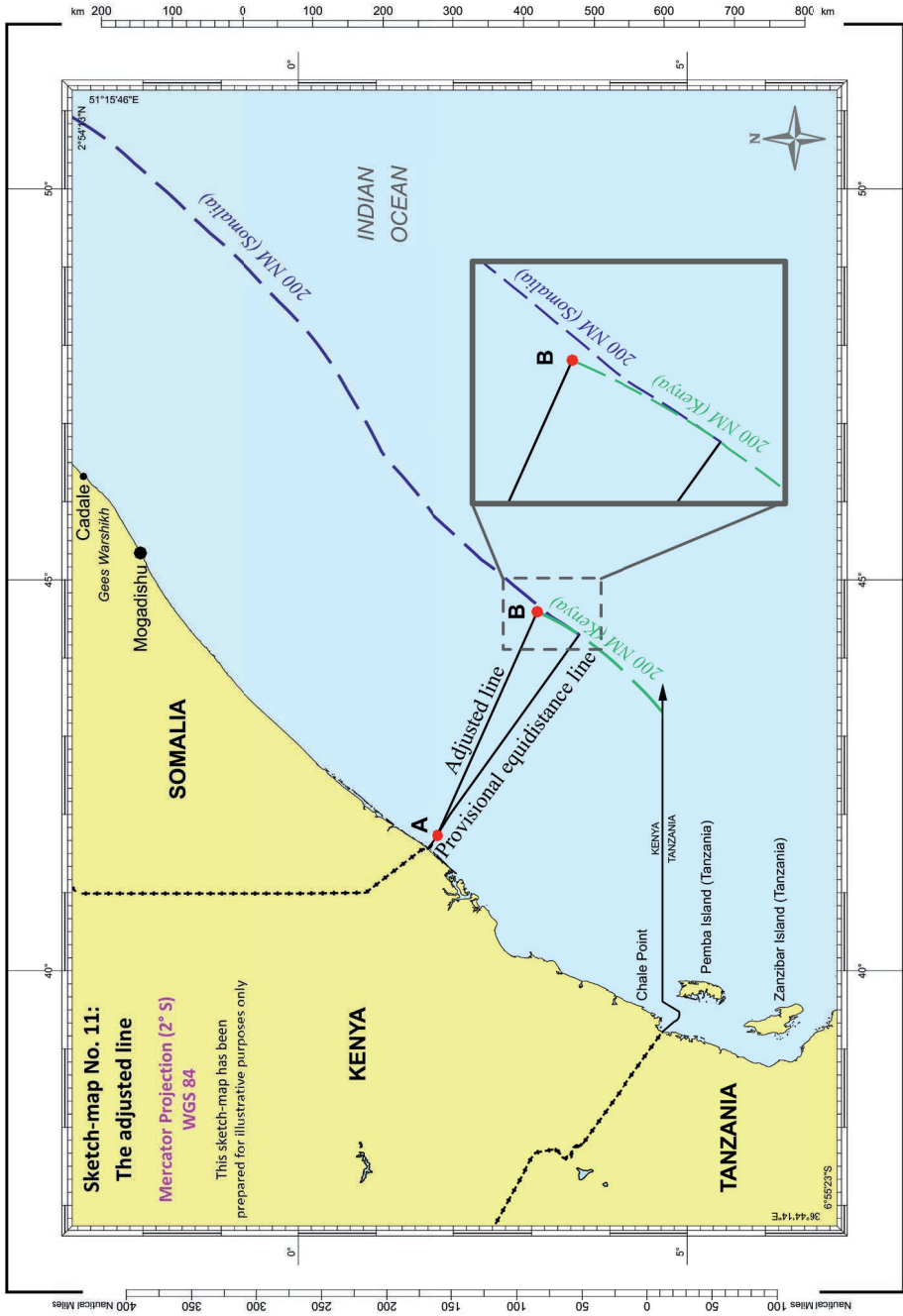
177. The Court is thus satisfied that the adjusted line that it has established as the maritime boundary for the exclusive economic zones and the continental shelves of Somalia and Kenya within 200 nautical miles in the Indian Ocean, described in paragraph 174 above, achieves an equitable solution as 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

178. The Court finally turns to the question of the delimitation of the continental shelf beyond 200 nautical miles. It is recalled 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 (see paragraphs 26 and 27 above).

* *

179. Somalia states that the Court has jurisdiction to delimit this maritime area. In this respect, Somalia argues that there is a clear distinction in the Convention between the Court's task, which consists of the delimitation of the continental shelf between the Parties under Article 83 of the Convention, and the role of the Commission on the Limits of the Continental Shelf, which is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf under Article 76 of the Convention. Somalia stresses that both



Kenya and Somalia have made full submissions to the Commission concerning the extent of their respective continental shelves beyond 200 nautical miles, and therefore that they have fulfilled their obligations under Article 76, paragraph 8, of the Convention. Somalia acknowledges that in its Judgment of 19 November 2012 (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 669, para. 129), the Court declined to exercise its jurisdiction over Nicaragua's claim for the delimitation of the extended continental shelf. However, Somalia contends that this was not because the Court considered that the making of a recommendation by the Commission had any priority over delimitation. Rather, in Somalia's view, the Court considered that, in the absence of a full submission to the Commission, Nicaragua had not established that it had an entitlement to a continental shelf beyond 200 nautical miles that overlapped with Colombia's entitlement.

180. Somalia further maintains that the Court's jurisdiction with respect to the delimitation of the continental shelf beyond 200 nautical miles is not affected by the absence of the delineation of the outer limits of the Parties' respective entitlements on the basis of the Commission's recommendations.

181. Somalia asserts that the Court has all the necessary information before it to carry out the delimitation in this maritime area, since the Parties have discharged the procedural obligation imposed upon them under Article 76, paragraph 8, of the Convention to provide the Commission with information on the limits of their continental shelves beyond 200 nautical miles. It adds that the "Parties' entitlements to a continental shelf beyond 200 [nautical miles are] not in dispute between them". It cites the Judgment of 14 March 2012 rendered by the International Tribunal for the Law of the Sea in the *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, where the Tribunal was satisfied with the information contained in the parties' submissions to the Commission (*Judgment, ITLOS Reports 2012*, p. 116, paras. 448-449). Thus, in Somalia's view, there is no legal or practical impediment to the Court's determination of the course of the Parties' maritime boundary while the Commission is engaged in the task of considering each Party's submission and making its recommendations for the purpose of delineating the outer limit of each Party's continental shelf.

182. Somalia argues that the legal principles applicable to delimitation of the continental shelf beyond 200 nautical miles are the same as those applicable to delimitation within 200 nautical miles. Somalia maintains that there is no relevant circumstance which could justify an adjustment of the provisional equidistance line beyond 200 nautical miles.

183. Any reduction in Kenya's overall maritime entitlements beyond 200 nautical miles, Somalia submits, "could only arise as a result of Kenya's bilateral agreement with Tanzania, by which Kenya voluntarily divested itself of a very large maritime area south of the negotiated parallel boundary". As Somalia sees it, Kenya "voluntarily shortened its own

extended continental shelf entitlement by agreement with Tanzania”. Somalia further relies on the Award in the *Arbitration between Barbados and the Republic of Trinidad and Tobago (Award of 11 April 2006, RIAA, Vol. XXVII, p. 238, para. 346)* for the proposition that, as a third party in relation to the agreement concluded between Kenya and Tanzania, it cannot be required to “compensate” for Kenya’s choice. Therefore, Somalia requests the Court to refrain from making any adjustment of the provisional equidistance line beyond 200 nautical miles.

*

184. In keeping with its view that Somalia has acquiesced in a maritime boundary following the parallel of latitude, Kenya contends that that boundary extends on this same course beyond 200 nautical miles to the outer limits of the continental shelf, as indicated in its 2009 Submission to the CLCS. The Court has already held (paragraph 89 above) that there is no agreed maritime boundary between the Parties at the parallel of latitude through acquiescence.

185. Kenya states that, if the Court were to reject its claim regarding Somalia’s acquiescence to a maritime boundary along the parallel of latitude and apply the three-stage methodology, then several relevant circumstances would call for an adjustment of the provisional equidistance line in order to achieve an equitable solution (see paragraphs 149-153 above). Kenya argues that it would suffer from a very significant cut-off effect beyond 200 nautical miles if Somalia’s claimed equidistance line were adopted as the maritime boundary. Such a line, Kenya contends, would cut it off from 98 per cent of its potential entitlement to the continental shelf beyond 200 nautical miles and deprive it entirely of any entitlement to the outer limits of the continental shelf at 350 nautical miles from the Kenyan coast. It adds that the situation would be as if the outer continental shelf in this area were generated by the coastal projections of Somalia and Tanzania alone, and Kenya simply did not exist. That cut-off effect has also been invoked by Kenya as a relevant circumstance requiring the adjustment of the provisional equidistance line in the exclusive economic zone and on the continental shelf within 200 nautical miles. Kenya does not ask the Court to treat the maritime boundary agreements between Kenya and Tanzania, and between Tanzania and Mozambique, as opposable to Somalia. Rather, these agreements establish the “regional context” within which the boundary between the Parties must be appraised. According to Kenya, there is no question of being “compensated” for the agreements it has entered into, as Somalia claims. It insists that an equitable maritime delimitation cannot ignore equitable delimitations that were agreed in the past, consistent with the applicable law at the time: this is a matter both of “historical equity” and “common sense”.

* *

186. The Court held in the 2017 Judgment that it has jurisdiction over the Application filed by Somalia on 28 August 2014 and that the Application is admissible (*I.C.J. Reports 2017*, p. 53, para. 145 (3)). In that Application, Somalia requested the Court to determine the course of the maritime boundary between the Parties in the Indian Ocean, including on the continental shelf beyond 200 nautical miles (*ibid.*, p. 10, para. 11; see also paragraphs 25-27 above).

187. The Court recalls that, as expounded in the case concerning *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, “any claim of continental shelf rights beyond 200 miles [by a State party to UNCLOS] must be in accordance with Article 76 of UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder” (*Judgment, I.C.J. Reports 2007 (II)*, p. 759, para. 319).

188. 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 the Convention. Kenya made its submission to the Commission on 6 May 2009, while Somalia made its own submission on 21 July 2014 and provided an amended Executive Summary on 16 July 2015. In addition, each Party filed an objection to consideration by the Commission of the other’s submission. These objections were subsequently withdrawn. 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.

189. 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. As the International Tribunal for the Law of the Sea observed,

“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” (*Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, *Judgment, ITLOS Reports 2012*, p. 100, para. 379).

190. To support the argument that the Court may proceed to the delimitation of the continental shelf beyond 200 nautical miles on the basis of the information contained in the Parties’ submissions to the Commission, Somalia avails itself, in particular, of the Judgment in the *Bangladesh/Myanmar* case. It is true that in that Judgment, the Tribunal

proceeded to determine the maritime boundary of the continental shelf beyond 200 nautical miles on the basis of the submissions made by Bangladesh and Myanmar to the Commission. The Tribunal was convinced that, in view of the uncontested scientific evidence on the unique nature of the Bay of Bengal and information submitted to it during the proceedings, there was a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nautical miles. It noted that a "thick layer of sedimentary rocks covers practically the entire floor of the Bay of Bengal" (*Judgment, ITLOS Reports 2012*, p. 115, para. 445). It thus concluded that both parties had entitlements to a continental shelf extending beyond 200 nautical miles (*ibid.*, pp. 115-116, paras. 446 and 449). This being so, the Court notes that, in reaching that conclusion, the Tribunal in that case took particular account of the "unique situation [in the Bay of Bengal], as acknowledged in the course of negotiations at the Third United Nations Conference on the Law of the Sea" (*ibid.*, p. 115, para. 444).

191. The Court observes that the entitlements of the Parties 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 (*ibid.*, p. 114, para. 437).

192. Paragraphs 4 and 5 of Article 76 provide:

- "4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
- (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
 - (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
- (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.
5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a) (i) and (ii), either shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres."

193. 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.

194. 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 will proceed to do so.

195. As regards the relevant circumstances invoked by Kenya for the adjustment of the provisional equidistance line, the Court 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. The Court 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. Somalia has claimed a continental shelf beyond 200 nautical miles, including in the area between the point OL1, located at the end of the equidistance line it claims as the maritime boundary, at co-ordinates 5° 00' 25.69" S and 46° 22' 33.34" E, and point OL7, located further north, close to the parallel of latitude, at co-ordinates 2° 00' 47.69" S and 49° 26' 05.09" E. Kenya has claimed a continental shelf up to 350 nautical miles in the area between the point ECS1, located on the hypothetical line constructed as an extension of the existing boundary with Tanzania at co-ordinates 4° 41' 00.29" S and 46° 34' 36.02" E, and the point ECS38, located further north at a short distance from the parallel of latitude, at co-ordinates 1° 44' 21.82" S and 47° 24' 13.79" E. 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.

196. 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 below (p. 278).

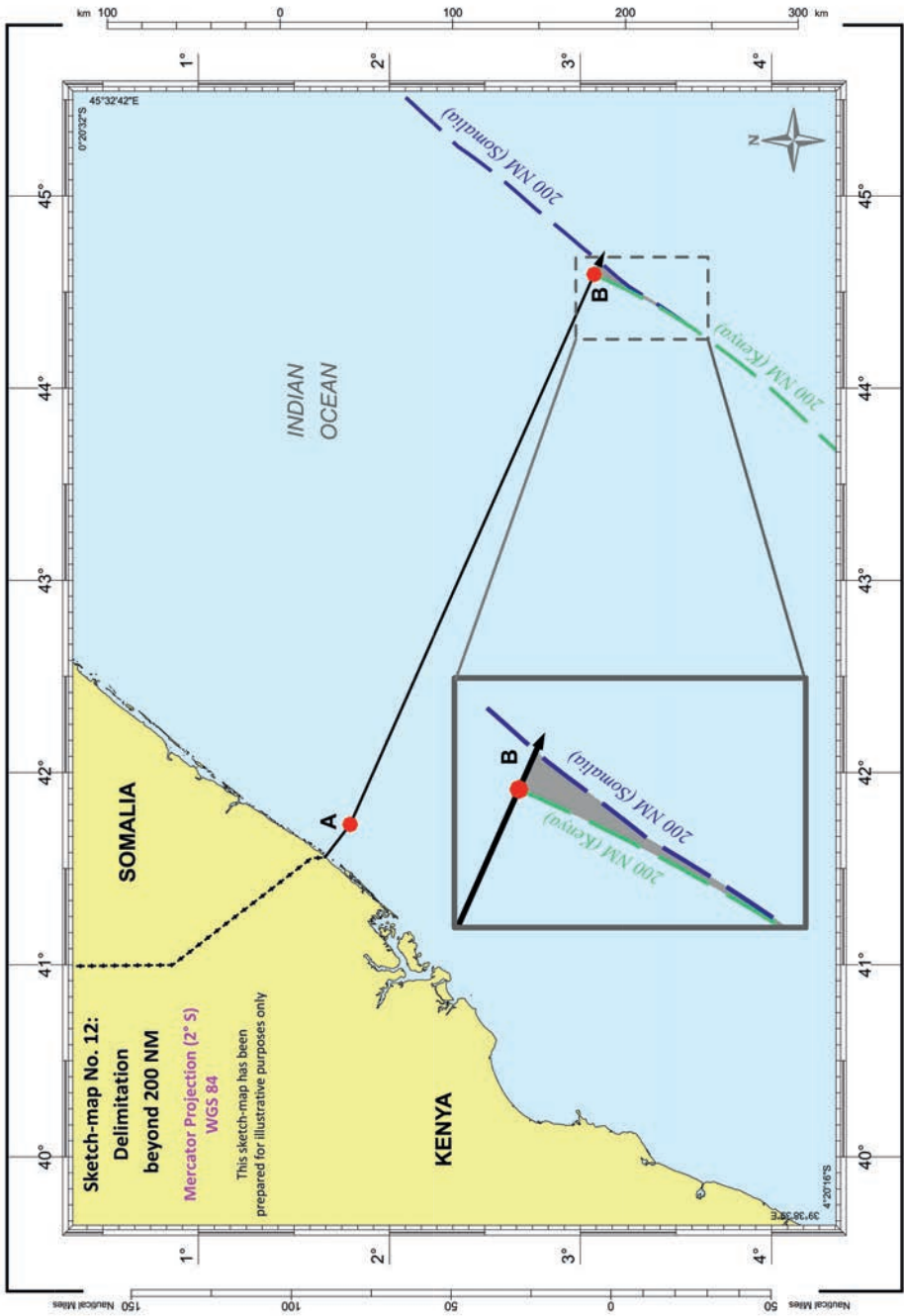
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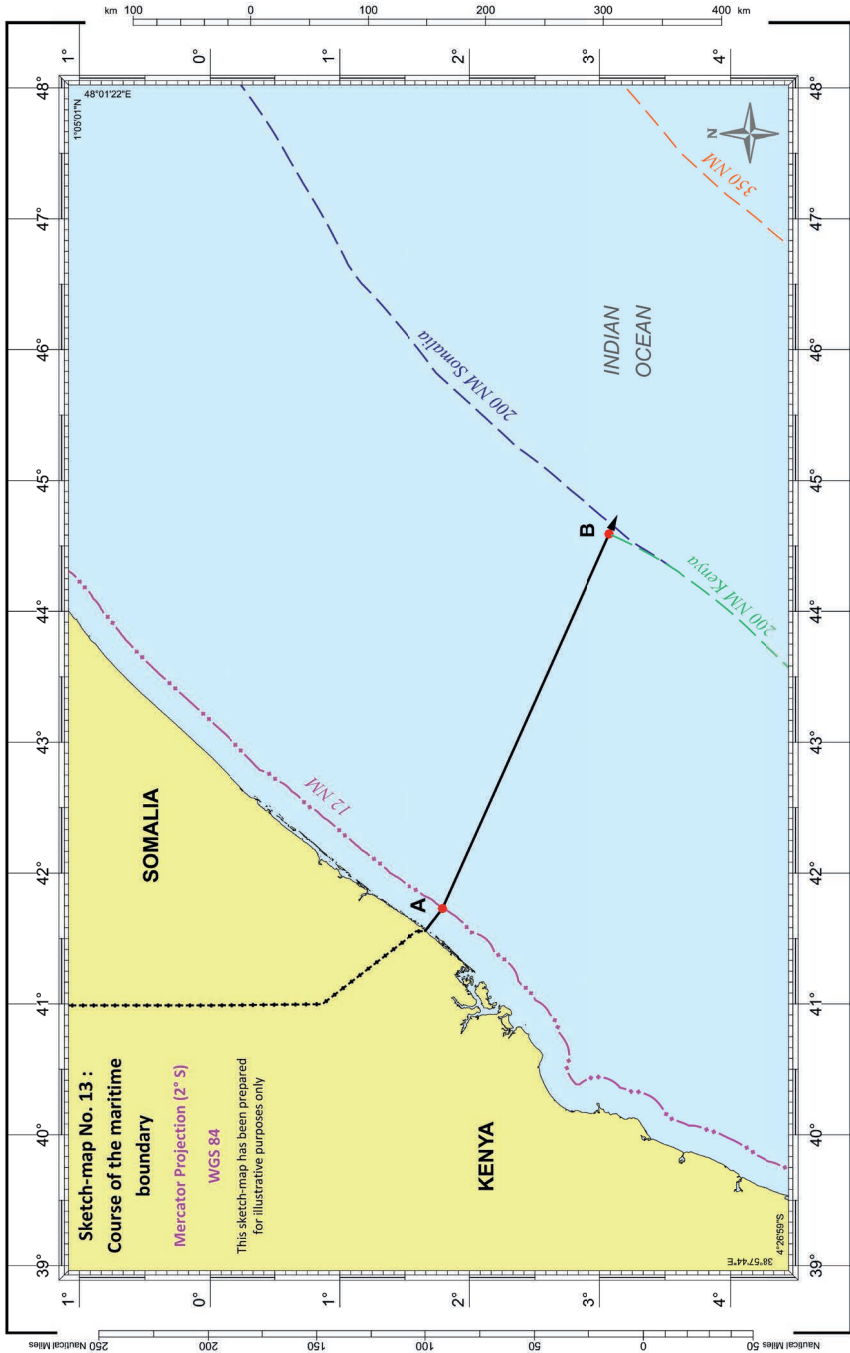
197. Depending on the extent of Kenya's entitlement to a continental shelf beyond 200 nautical miles as it may be established in the future on the basis of the Commission's recommendation, the delimitation line might give rise to an area of limited size located beyond 200 nautical miles from the coast 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 (p. 278). 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.

V. ALLEGED VIOLATIONS BY KENYA OF ITS INTERNATIONAL OBLIGATIONS

198. In its final submissions, Somalia requests the Court to "adjudge and declare that Kenya, by its conduct in the disputed area, has violated its international obligations and is responsible under international law to make full reparation to Somalia". Somalia, however, stated during the oral proceedings that it does not insist on compensation for past violations. It asks the Court to order Kenya to cease its wrongful acts and to make available to Somalia the technical data acquired in areas that are determined by the Court to be subject to the sovereignty or sovereign rights and jurisdiction of Somalia.

199. Somalia argues 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, as well as the principles enshrined in UNCLOS. Recalling Article 77 of UNCLOS, Somalia maintains that economic activities in a disputed maritime area, including exploration and exploitation, constitute a violation of the exclusive rights of the State whose jurisdiction over that area is recognized following delimitation. It adds that





when it was informed of such activities and was in a position to react, it protested against them. In the Applicant's view, Kenya's argument that there was no area in dispute before 2014 is not persuasive, because an area of overlapping claims had emerged by the end of the 1970s and has remained in dispute ever since.

200. Somalia also argues that irrespective of where in the disputed area Kenya's activities took place, they were in violation of Kenya's obligation, under Article 74, paragraph 3, and Article 83, paragraph 3, of UNCLOS, not to jeopardize or hamper the reaching of a final agreement concerning the delimitation of the exclusive economic zone and continental shelf. In Somalia's view, violations of these provisions arise not only from unilateral activities that physically affect the marine environment, but, in some cases, from non-invasive acts as well, such as seismic surveys, which States can consider as a violation of their sovereign rights. The Applicant asserts that Kenya's unilateral activities in the disputed maritime area "have generated mistrust and animosity in relations between the Parties", jeopardizing and hampering the possibility of reaching a final agreement between them.

*

201. Kenya argues that there was no dispute over the maritime boundary until 2014, when Somalia formally asserted an equidistance line. Thus, it maintains that it had the right to engage freely in activities consistent with its sovereign rights in areas where it had claimed and exercised uncontested jurisdiction. In its view, such activities cannot be said to be unlawful, even if the areas concerned had been in dispute and are now attributed by the Court to Somalia. The Respondent adds that Somalia wrongly conflates the sovereignty that coastal States enjoy in the territorial sea with the more limited sovereign rights exercised in the exclusive economic zone and on the continental shelf.

202. As regards Article 74, paragraph 3, and Article 83, paragraph 3, of UNCLOS, Kenya argues that the obligation, during the transitional period, not to jeopardize or hamper the reaching of a final agreement, does not preclude all activities in the disputed area. Kenya maintains that this obligation is concerned only with activities that lead to permanent physical change in the disputed area, and that it does not apply to activities commenced prior to a dispute. The Respondent contends that the expansive interpretation of this obligation proposed by Somalia is contrary to the jurisprudence of the Court and that of international tribunals. Kenya adds that Somalia has not provided evidence that either its Government or its population ever perceived Kenya's alleged activities as an attempt to deprive Somalia of its rights under international law. Kenya points out that most of the activities referred to by Somalia predate the

emergence of the dispute in 2014 and that they were transitory in nature. Thus, it argues that Somalia has failed to establish that Kenya authorized any unlawful activities in the disputed area.

* *

203. The Court will first examine 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 "is made in the context of proceedings regarding a maritime boundary which had not been settled prior to the decision of the Court. The consequence of the Court's Judgment is that the maritime boundary . . . has now been delimited as between the Parties" (*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 718, para. 250). 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" (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)*, Judgment, *ITLOS Reports 2017*, p. 159, para. 592).

204. Somalia complains of surveying and drilling activities conducted or authorized by Kenya in the Lamu Basin, referring in particular to the offshore oil concession blocks identified by Kenya as Blocks L-5, L-13, L-21, L-22, L-23, L-24 and L-26. The Court notes that these concession blocks are 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 area 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.

205. The Court now 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. These paragraphs, which refer to the exclusive economic zone and the continental shelf respectively, read as follows:

"Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation."

206. 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 after the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved” (*Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Judgment, ITLOS Reports 2017, p. 168, para. 630). As previously noted (see paragraph 83 above), the Court is of the view that a maritime delimitation dispute between the Parties has been established since 2009. Accordingly, the Court will only examine whether the activities conducted by Kenya after 2009 jeopardized or hampered the reaching of a final agreement on the delimitation of the maritime boundary.

207. 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” (see *Aegean Sea Continental Shelf (Greece v. Turkey)*, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976, p. 10, para. 30). 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 (see *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, Award of 17 September 2007*, RIAA, Vol. XXX, pp. 132-133, paras. 466-467 and 470).

208. 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 (see *ibid.*, p. 137, para. 480). Somalia refers, in particular, to four wells drilled in the offshore Lamu Basin as of 2011, to “sea core” and “seabed core” drilling operations carried out in Block L-22 in 2013 and 2014, and to exploratory drilling in Block L-5 which was “scheduled in 2015”. Kenya does not deny having authorized drilling operations in the Lamu Basin, but states that “there was no drilling of seabed core” in Block L-22 in 2014 and that the drilling scheduled in Block L-5 “never took place”.

209. The Court notes that a presentation made in 2011 by a commissioner from Kenya’s Ministry of Energy refers to offshore drilling operations in the Lamu Basin but only lists wells drilled until 2007. A map included in the Final Report of the Strategic Environmental and Social Assessment of the Petroleum Sector in Kenya, issued in December 2016 by the Ministry of Energy and Petroleum of Kenya, identifies four wells

drilled in the Lamu Basin after 2009, but all of them are located south of and at a great distance from the equidistance line claimed by Somalia as the maritime boundary. The map does not show any wells drilled after 2009 in the oil concession blocks referred to by Somalia. With respect to the alleged drilling in Block L-22, two documents issued by a private operator state that “sea core drilling operations [were] in progress on the L22 offshore license” in 2013 and that “[o]n the offshore L22 license, seabed core drilling operations were carried out in early 2014”. However, these documents do not specify the precise location of those operations. As for the alleged drilling in Block L-5, Somalia has not provided the Court with evidence demonstrating that any such drilling operation ever took place. Thus, on the basis of the evidence before it, the Court 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.

210. The Court further notes that, in 2014, the Parties engaged in negotiations on maritime delimitation (see paragraph 69 above) and that, in 2016, Kenya suspended its activities in the disputed area and offered to enter into provisional arrangements with Somalia.

211. 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.

212. For the reasons set out above, 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.

213. The maritime boundary between the Parties having been determined, the Court expects that each Party will fully respect the sovereignty, sovereign rights and jurisdiction of the other in accordance with international law.

* * *

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 above;

(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 above 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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twelfth day of October, two thousand and twenty-one, in three copies, one of which will be placed in the archives

of the Court and the others transmitted to the Government of the Federal Republic of Somalia and the Government of the Republic of Kenya, respectively.

(Signed) Joan E. DONOGHUE,
President.

(Signed) Philippe GAUTIER,
Registrar.

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.

(Initialed) J.E.D.

(Initialed) Ph.G.
