SEPARATE OPINION OF JUDGE *AD HOC* GUILLAUME

[Translation]

1. The Court found that, contrary to Kenya's claims, the maritime boundary between Kenya and Somalia does not follow a parallel of latitude. It fixed the starting-point of the boundary in accordance with the agreements concluded between Italy and the United Kingdom in 1927 and 1933. It then delimited the territorial sea, in effect along the line at right angles to the general direction of the coast set out in those same agreements. As regards the exclusive economic zone (hereinafter the "EEZ") and the continental shelf beyond 200 nautical miles, the Court did not adopt the equidistance line put forward by Somalia. With a view to achieving an equitable solution, it made a significant adjustment to this line in favour of Kenya. Finally, it rejected Somalia's submission seeking a finding against Kenya on account of its unlawful activities in the disputed area. I support these decisions, but I disagree with some points of the reasoning adopted by the Court, and I consider it necessary to express my differences of opinion here.

2. Somalia requested the Court to delimit the maritime areas appertaining to it and to Kenya. Both States are parties to the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS"). The delimitation must therefore be effected in accordance with Articles 15, 74 and 83 of that Convention. Failing agreement between the Parties, the rules set out in those articles, as interpreted in the jurisprudence, must be applied. Consequently, the Court had first to determine whether there were any agreements in existence between Kenya and Somalia concerning all or part of their maritime boundary.

I. Is there a Tacit Agreement between the Parties about Delimitation along a Parallel of Latitude?

3. Kenya claims there is. It asserts that it has fixed the northern limit of its maritime areas at the parallel 1° 39′ 43.2″ S. It contends that Somalia agreed to this limit by way of acquiescence. The limit is therefore the boundary. Somalia disputes this on three grounds. It claims:

(a) that a maritime boundary cannot be established by acquiescence[1];
(b) that in any event Somalia has not acquiesced to Kenya's unilateral claims[2]; and
(c) lastly, that Kenya itself has acknowledged that its boundary has never been fixed[3].

[1] Reply of Somalia, Vol. I, para. 1.11.
[2] *Ibid.*, para. 2.12.
[3] *Ibid.*, para. 2.29.

4. The Court rightly rejected the first argument. International law is not formalistic. It recognizes that territorial sovereignty may be transferred and that boundaries may be fixed by tacit agreement or by acquiescence, as recalled by the Court in the *Pedra Branca/Pulau Batu Puteh* case between Malaysia and Singapore[4]. According to that Judgment, tacit agreement arises from the convergent conduct of the parties. Acquiescence, for its part, results from the absence of reaction by one State to the positions taken by another. It is not always easy to distinguish between the two and, in the aforementioned Judgment, the Court itself avoided taking a stance on the approach to be followed. Acquiescence and tacit agreement both convey the consent of the States in question. In both cases, through different processes, the States manifest their agreement.

Somalia contends, however, that Articles 15, 74 and 83 of UNCLOS provide for the delimitation of maritime spaces by way of agreement. It acknowledges that these agreements may be express or tacit, but maintains that UNCLOS precludes delimitation by acquiescence. Yet it is difficult to see why the drafters of UNCLOS would have recommended that States fix their maritime boundaries by agreement, but excluded the possibility of the agreed solution resulting from the acquiescence of one party to the positions taken by the other. It is clear that the drafters wanted States to reach mutually acceptable solutions, regardless of how this was achieved. The term "agreement" in the Convention must be understood to include any solution arising from the parties' consent.

The solution adopted in the jurisprudence for stretches of land[5] is therefore valid for maritime areas, as the Court ruled in the *Gulf of Maine* case, moreover[6]. The limits of those areas may result from one State's silence in the face of another State's positions.

5. The facts of the case must also lead to the conclusion that, through its long silence, Somalia acquiesced to the parallel of latitude adopted by Kenya. The facts in this respect must be clear and "without any doubt"[7].

What is the situation? Kenya claims to have repeatedly asserted that its maritime boundary with Somalia was constituted by a parallel of latitude. These assertions are said to have been notified to Somalia, which should

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[4] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 50, paras. 120-121; see also the joint dissenting opinion of Judges Simma and Abraham, *ibid.*, p. 117, para. 3.

[5] In this regard, see *Island of Palmas Case (Netherlands/United States of America), Award of 4 April 1928, Reports of International Arbitral Awards (RIAA)*, Vol. II, p. 839. See also *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, pp. 24-30. Lastly, in respect of the island of Meanguera, see *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 577, para. 364.

[6] *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.

[7] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 51, para. 122; see also pp. 50-51, paras. 120 *et seq*.

have reacted, but failed to do so for 35 years. Kenya claims that Somalia thus consented to this line as the boundary. That acquiescence is said to be confirmed by the Parties' conduct. Somalia denies this.

6. For Kenya, the facts are as follows:

(a) Kenya extended its territorial sea to 12 nautical miles by Presidential Proclamation of 13 June 1969[8]. Section 2, subsection 4, of the Act of 16 May 1972 states: "On the coastline adjacent to neighbouring States the breadth of the territorial sea shall extend to [the] Median Line"[9].

(b) By Presidential Proclamation of 28 February 1979, Kenya endowed itself with an EEZ of 200 nautical miles. The Proclamation states that "the Exclusive Economic Zone of Kenya shall . . . 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"[10].

(c) Section 3, subsection 4, of the Maritime Zones Act of 25 August 1989 provides: "On the coastline adjacent to neighbouring states, the breadth of the territorial waters" shall be determined by the equidistance line[11]. Section 4, subsection 4, adds 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"[12].

(d) By Presidential Proclamation of 9 June 2005, Kenya declared that "the Exclusive Economic Zone of Kenya shall . . . [i]n respect of its northern territorial waters boundary with [the] Somali Republic be on eastern latitude South of Diua Damascia[ca] Island being latitude 1° 39′ 34″ degrees south". Two appended tables specify the seaward co-ordinates of the territorial sea and the EEZ[13].

(e) On 6 May 2009, Kenya made a submission to the Commission responsible for fixing the outer limits of the continental shelf beyond 200 nautical miles (CLCS), with a view to establishing those limits. According to the co-ordinates provided and the map appended, its maritime boundary with Somalia continues beyond 200 nautical miles along the parallel of latitude used for the EEZ[14].

In sum, until 2005, Kenya used the median line to delimit its boundary with Somalia in the territorial sea. In 1979, it declared that the northern limit of its EEZ followed the parallel of latitude. However, its 1989 Act stated that this boundary would be delimited pursuant to an agreement to be reached with Somalia. Lastly, since 2009, Kenya has adopted

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[8] Counter-Memorial of Kenya (hereinafter "CMK"), Vol. II, Ann. 1.
[9] Memorial of Somalia (hereinafter "MS"), Vol. III, Ann. 16.
[10] *Ibid.*, Ann. 19, Art. 1 *(b)*.
[11] *Ibid.*, Ann. 20.
[12] *Ibid.*
[13] *Ibid.*, Ann. 21.
[14] *Ibid.*, Ann. 59.

the parallel of latitude for the continental shelf beyond 200 nautical miles.

7. It is not in dispute that the 1979 and 2005 proclamations were transmitted by Kenya to the United Nations Secretariat and communicated by the latter to all United Nations Member States. They were also published by the Secretariat and placed on the United Nations website[15].

8. Did Somalia react to Kenya's declarations? It claims that it did, relying in particular on its own legislation. This is detailed below:

(a) By Law of 10 September 1972, Somalia fixed the breadth of its territorial sea at 200 nautical miles[16].

(b) By Law of 1988-1989[17], Somalia reduced its territorial sea to 12 nautical miles, declared an EEZ of 200 nautical miles and recognized that its continental shelf might ultimately extend beyond that distance. Article 4 of this Law provides:

> "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."[18]

Those charts were not communicated to the Court by Somalia.

The Parties disagree on the interpretation to be given to this text. Somalia claims that the straight line mentioned is the equidistance line. Kenya contends that it is the parallel of latitude. It is regrettable that the charts appended to the Law were not produced by Somalia. Without these crucial documents, we are reduced to conjecture. It seems to me highly likely that the straight line shown on the chart was not the equidistance line. Indeed, if that were the case, it would be hard to understand why that line should be expressly mentioned in the Yemen delimitation but not in the delimitation with Somalia. Without the chart, however, we cannot be certain of this.

(c) By a Presidential Proclamation of 30 June 2014, Somalia reaffirmed its rights over the EEZ. Article 4 of that Proclamation states that in any case where Somalia's EEZ is adjacent or opposite to the EEZ of another coastal State, Somalia "is prepared to enter into negotiations with the coastal State concerned with a view to delimiting their respective Exclusive Economic Zones"[19].

(d) From August 2009 onwards, Somalia repeatedly stated that the equi-

[15] CMK, Vol. II, Anns. 20 and 65; MS, Vol. III, Ann. 56.
[16] MS, Vol. III, Ann. 9, Art. 1.
[17] The 1988 Law was promulgated by a presidential decision of 26 January 1989. *Ibid.*, Ann. 11.
[18] *Ibid.*, Ann. 10.
[19] *Ibid.*, Ann. 14, Art. 4.

distance line should govern the delimitation of the maritime spaces appertaining to it and to Kenya and in particular its continental shelf beyond 200 nautical miles[20].

9. All things considered, it appears that:

(a) Kenya did not claim the parallel of latitude for the territorial sea until 2005. It did so implicitly, in the table of co-ordinates annexed to the Proclamation. Somalia objected to this position in 2009. Somalia's four-year silence on a proclamation formulated in this way cannot constitute acquiescence.

(b) Kenya claimed the same parallel of latitude for the continental shelf beyond 200 nautical miles in 2009. Somalia immediately objected to this. It therefore never acquiesced.

(c) The situation is not so clear cut as regards the EEZ. Indeed, Kenya claimed the parallel of latitude in 1979 and 2005 by presidential proclamations circulated to all United Nations Member States, and Somalia raised no objection until 2009. However, it may be asked whether, in matters of such importance, circulation of this kind is sufficient to give rise to a tacit agreement by acquiescence, or whether a State is required to notify its neighbour of its claims directly. It should also be noted that, prior to 2018, both in its negotiations with Somalia and before the Court, Kenya never claimed that Somalia had acquiesced, and it behaved as if the EEZ boundary had yet to be established.

It is for these reasons that I ultimately supported the Court's solution on this point.

II. Does the 1927/1933 Treaty Arrangement between Italy and the United Kingdom Delimit the Territorial Sea?

10. In 1924, 1927 and 1933, the former colonial Powers, Italy and the United Kingdom, concluded three agreements establishing their boundary. As successor States, Kenya and Somalia are bound by these agreements. The Court deemed this to be so (Judgment, para. 98). Nor could there be any doubt in this regard, in view of Articles 11 and 12 of the 1978 Vienna Convention on Succession of States in respect of Treaties[21], the application in Africa of the rule of *uti possidetis juris* enshrined by

[20] MS, Vol. III, Ann. 37, Letter of 19 August 2009. *Ibid.*, Anns. 31 and 32, Records of the 2014 negotiations.

[21] In the case concerning the *Gabčíkovo-Nagymaros Project*, the Court acknowledged the customary nature of Article 12 of the Convention (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 72, para. 123). The same conclusion must be drawn *a fortiori* with regard to Article 11, according to which "[a] succession of States does not as such affect . . . a boundary established by a treaty".

various decisions of the Organization of African Unity[22], and the jurisprudence of the Court[23] and arbitral tribunals[24].

11. It was thus for the Court to determine whether the 1927/1933 treaty arrangement fixed the starting-point and course of the maritime boundary in all or part of the territorial sea.

12. The 1933 agreement gives binding effect to the conclusions reached by the Parties' officials in 1927. It fixes with extreme precision the course of the land boundary from beacon to beacon, and reproduces it to the same effect on a map. Moreover, it provides that from the final beacon, PB 29, to the point known as Dar Es Salam, the boundary runs "in a south-easterly direction, to the limit of territorial waters in a straight line at right angles to the general trend of the coastline at Dar Es Salam, leaving the islets of Diua Damasciaca in Italian territory"[25].

13. This provision makes it possible to fix the starting-point of the maritime boundary. Contrary to what is claimed by Kenya, this cannot be the inland beacon PB 29. The land boundary thus continues from this beacon along the short stretch of around 41 metres which separates it from the sea. It does so in a straight line at right angles to the general trend of the coastline. The starting-point of the maritime boundary is therefore at the intersection of that line and the coast, as rightly determined by the Court.

14. In the territorial sea, the boundary must follow the same direction. Indeed, the 1927/1933 treaty arrangement indicates that, from beacon PB 29, the boundary continues in that direction up to the limit of the territorial sea. The arrangement further indicates that, as a result of this delimitation, the islets of Diua Damasciaca will be in Italian territory, confirming that the boundary thus fixed does indeed extend as far as the outer limit of the territorial sea.

15. In response to a question put by one of the judges at the hearings, Somalia nonetheless claimed that neither Party "accepts, or has ever

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[22] The African Union has on several occasions expressed its support for respecting the borders existing at the time independence is achieved (resolution AHG/Res.16 (I) of 21 July 1964 and Article 4, paragraph *(b)* of the Constitutive Act of the African Union of 11 June 2000). In the case concerning the *Frontier Dispute* between Burkina Faso and Mali, the Court stated that *uti possidetis* is "a principle of a general kind which is logically connected with this form of decolonization wherever it occurs". Hence, in this respect, the African Union's statements are "declaratory rather than constitutive" (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, p. 566, paras. 23-24).

[23] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 145; see also *Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, P.C.I.J., Series A, No. 24*, p. 17; *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, pp. 6-38; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 72, para. 123.

[24] *Delimitation of the maritime boundary between Guinea-Bissau and Senegal, Decision of 31 July 1989*, United Nations, *Reports of International Arbitral Awards*, Vol. XX, p. 143, paras. 62 *et seq*.

[25] MS, Vol. III, Ann. 4, Exchange of Notes between His Majesty's Government in the United Kingdom and the Italian Government regarding the Boundary between Kenya and Italian Somaliland (22 November 1933), Appendix I, First Part.

accepted, that the boundary in the territorial sea" follows the line provided for under the 1927/1933 treaty arrangement. Somalia thus concluded that this line could not be adopted. Kenya, for its part, mentioned the 1927/1933 treaty arrangement in its Counter-Memorial in respect of the delimitation of the territorial sea[26]. It did not comment on Somalia's response to the question put at the hearing.

16. The Court noted 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" (Judgment, para. 109). It also recalled that neither Party referred to this arrangement in its legislation or during the 2014 negotiations. The Court therefore concluded that it was "unnecessary to decide whether the 1927/1933 treaty arrangement had as an objective the delimitation of the boundary in the territorial sea" *(ibid.)*.

17. I cannot support this line of reasoning. A treaty remains in force until such time as it is abrogated. So long as it is in force, the courts must apply and interpret it. Somalia's pleadings in effect raised the question whether the two Parties had, by tacit agreement, abrogated the contested provision in so far as it applies to the territorial sea, while retaining it for the purposes of fixing the final segment of the land boundary and the starting-point of the maritime boundary. Tacit agreements, however, are not easily proved, as the Court moreover recalled with regard to the parallel of latitude claimed by Kenya (*ibid.*, para. 52). In this case, there is no evidence that such an agreement ever existed, nor was it claimed that one did.

In these circumstances, the Court should, in my view, have applied the 1927/1933 treaty arrangement not only in fixing the starting-point of the maritime boundary, but also in plotting the course of that boundary in the territorial sea. It did not have the option of dispensing with it.

18. A delicate issue remains: at the time of the treaty arrangement, the breadth of the territorial sea was generally 3 nautical miles. Today it is 12 miles. Should the line fixed under the arrangement stop at 3 miles or continue up to 12?

That depends on the common intention of the parties when the arrangement was made[27]. In this instance, however, the *travaux préparatoires* are silent. In such an event, the Court makes a determination based on whether or not the terms used are generic.

The 1927/1933 treaty arrangement refers to the territorial sea without mentioning its breadth. While Great Britain was firmly committed to the

[26] CMK, Vol. I, para. 34.

[27] *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, pp. 242-244, paras. 63-71. In some instances, the Court has retained the original meaning of terms (see *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)* and *Kasikili/Sedudu Island (Botswana/Namibia)*). In others, the Court has adopted the evolving meaning (see *Aegean Sea Continental Shelf (Greece* v. *Turkey)* and *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*).

3-mile limit at the time, that limit was already disputed, by Italy in particular[28]. The negotiators must therefore have been aware that the breadth of the "territorial waters" might change. In my view, account must be taken of the developments that have occurred since 1933, and the 12-mile limit must be adopted.

The Parties' boundary in the territorial sea thus continues up to the 12-mile point in a straight line running in a south-easterly direction at right angles to the general direction of the coast at Dar Es Salam, in accordance with the 1927/1933 treaty arrangement.

19. The Court adopted a delimitation line which is virtually the same as that set out in the treaty arrangement. However, it reached this result by drawing a median line in accordance with Article 15 of UNCLOS. It nevertheless observed that the median line closely corresponds to that provided for under the 1927/1933 treaty arrangement (Judgment, para. 118).

20. I therefore agree with the co-ordinates adopted by the Court and, consequently, voted in favour of the third subparagraph of the operative clause. I cannot support the reasoning adopted, however. In accordance with Article 15 of UNCLOS, the Court should have first determined whether there was an agreement between the Parties; it should then have concluded that such an agreement did exist, and applied it.

(Signed) Gilbert GUILLAUME.

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[28] D. P. O'Connell, *The International Law of the Sea*, Vol. I, 1982, p. 165.