

International Court of Justice — Delimitation of maritime boundary between Kenya and Somalia — United Nations Convention on the Law of the Sea, 1982 — Commission on the Limits of the Continental Shelf — Territorial sea — Exclusive economic zone — Continental shelf — Relationship between delimitation of maritime boundaries and delineation of outer limits of continental shelf beyond 200 nautical miles

Sea — Existence of tacitly agreed maritime boundary along parallel of latitude — Acquiescence — Whether Somalia had not protested Kenya's actions when protests were called for — Evidence of naval patrols, fishing conduct and oil concessions — Delimitation of territorial sea — Identification of base points — Construction of median line — Delimitation of exclusive economic zone — Methodology — Three-stage approach — Establishment of provisional equidistance line — Relevant circumstances — Cut-off effect — Whether Kenya's coastal projections inequitably cut off by equidistance line — Consideration of concavity in broader geographical context — Position of third States — Relevance of agreed maritime boundary between Kenya and Tanzania to existence of cut-off effect — Disproportionality test — Delimitation of continental shelf beyond 200 nautical miles — Methodology — Whether Court could delimit continental shelf beyond 200 nautical miles — Proof of continental shelf entitlement beyond 200 nautical miles — Use of directional arrow

State responsibility — Obligations of States in undelimited maritime areas — Whether Kenya's conduct breached Somalia's sovereign rights and jurisdiction in disputed maritime area — Whether Kenya breached its obligation not to jeopardize or hamper reaching of agreement on maritime delimitation — Articles 74(3) and 83(3) of United Nations Convention on the Law of the Sea, 1982 — Reparation

MARITIME DELIMITATION IN THE INDIAN OCEAN

(SOMALIA *v.* KENYA)¹

¹ The Federal Republic of Somalia was represented by H.E. Mr Mahdi Mohammed Gulaid, as Agent; H.E. Mr Ali Said Faqi, as Co-Agent; Mr Mohamed Omar Ibrahim, as Assistant Deputy Agent; Mr Paul S. Reichler, Mr Alain Pellet and Mr Philippe Sands QC, Ms Alina Miron, Mr Edward Craven, as Counsel and Advocates; Mr Lawrence H. Martin, Mr Yuri Parkhomenko, Mr Nicholas M. Renzler, Mr Benjamin Salas Kantor, Mr Ysam Soualhi, as Counsel; H.E. Mr Abukar Dahir Osman,

International Court of Justice

Merits. 12 October 2021

(Donoghue, *President*; Gevorgian, *Vice-President*; Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, *Judges*; Guillaume, *Judge ad hoc*)²

SUMMARY:³ *The facts*:—Somalia filed with the International Court of Justice an application instituting proceedings against Kenya in a case concerning the delimitation of the maritime boundary in the Indian Ocean within and beyond 200 nautical miles (“nm”) from the baselines of the two States. In 2017 the Court dismissed Kenya’s preliminary objections and held that it possessed jurisdiction and that the application was admissible (197 ILR 1).

Somalia maintained that there was no existing maritime boundary and that the Court had to therefore determine the course of the boundary by applying the established principles of international law as reflected in the United Nations Convention on the Law of the Sea, 1982 (“UNCLOS”). Kenya responded that Somalia had acquiesced in the existence of a maritime boundary running along a parallel of latitude. Kenya’s argument was based on the fact that Somalia had not protested certain acts by Kenya which had called for a reaction, noticeably Kenya’s Presidential Proclamations of 28 February 1979 and 9 June 2005. According to Kenya, Somalia had continued to play an active role in international relations in spite of civil war, and had thus been in a position to protest Kenya’s claim for a maritime boundary along a parallel of latitude. Further evidence provided by Kenya concerned naval patrols, interceptions and conduct relating to fisheries. Somalia argued that it had protested Kenya’s claim for an agreed maritime boundary and that, in any event, Kenya’s evidence was insufficient to establish Somalia’s acquiescence.

Somalia contended that, to locate the starting point of the maritime boundary, the Court had to consider the 1927/1933 treaty arrangement⁴ between Italy and the United Kingdom, as the former colonial powers over Somalia and Kenya respectively. Somalia maintained that the starting point had to be identified by tracing a straight line, perpendicular to the coast, from the final permanent land boundary beacon (“PB29”) to the low-water line, which identified a point with coordinates 1° 39′ 44.07″ S and 41° 33′ 34.57″ E.

Mr Sulayman Mohamed Mohamoud, H.E. Mr Yusuf Garaad Omar, Mr Osmani Elmi Guled, Mr Ahmed Ali Dahir, Mr Kamil Abdullahi Mohammed, Mr Abdiqani Yasin Mohamed, as Advisers; Mr Scott Edmonds and Ms Vickie Taylor, as Technical Advisors.

The Republic of Kenya was represented by the Honourable Paul Kihara Kariuki, as Agent; H.E. Mr Lawrence Lenayapa, as Co-Agent. Kenya was not represented at the hearing which was conducted in hybrid format for health reasons.

² Judge ad hoc Guillaume was appointed by Kenya under Article 31 of the Statute.

³ Prepared by Dr M. Lando.

⁴ For the details of the treaty arrangement, see para. 32 of the judgment.

Kenya argued that the precise coordinates of PB29 were $1^{\circ} 39' 43.2''$ S and $41^{\circ} 33' 33.19''$ E, which Somalia agreed to accept in the oral proceedings.

According to Somalia, the territorial sea boundary had to be a median line. Kenya stated that the territorial sea boundary was delimited by extending the line connecting PB29 to the low-water line, under the 1927/1933 treaty arrangement, although it did not expressly request the Court to delimit the maritime boundary in the territorial sea based on this method. Kenya suggested potential base points to delimit a median-line boundary in the territorial sea.

For the delimitation of the exclusive economic zone (“EEZ”), Somalia argued that the three-stage approach developed by the Court was the appropriate methodology to ensure the achievement of an equitable solution. Kenya stated that the parallel of latitude ensured the achievement of that same objective and was in keeping with the approach adopted with regard to the boundary between Kenya and Tanzania further south. Somalia identified the relevant area using radial projections, while Kenya contended that frontal projections were the more appropriate method to identify the relevant area.

Somalia argued that there were no reasons to adjust the equidistance line, as, *inter alia*, there was no serious cut-off effect and the maritime treaty between Kenya and Tanzania was *res inter alios acta*. Kenya contended that the equidistance line had to be adjusted on the basis of cut-off effect, the regional practice of using parallels of latitude as maritime boundaries, security concerns relating to terrorism and piracy, the Parties’ conduct in relation to oil concessions, naval patrols, fishing and other activities, and access to fishing resources by Kenyan fishermen.

Somalia contended that, by its unilateral actions in the disputed maritime area, Kenya had breached Somalia’s sovereign rights and jurisdiction. Somalia added that, by those actions, Kenya had also breached its obligation not to jeopardize or hamper the reaching of a final agreement on the maritime boundary pursuant to UNCLOS Articles 74(3) and 83(3). Kenya stated that its activities could not be wrongful acts, as they took place before 2014, when there was no dispute between the Parties. Kenya submitted that its activities were not of a character to breach its obligations under Articles 74(3) and 83(3).

Held:—(1) (unanimously) There was no agreed boundary between Kenya and Somalia following a parallel of latitude.

(a) Absence of reaction within a reasonable period where a reaction was called for could amount to acquiescence. The threshold to show that a maritime boundary was established by acquiescence was high and presupposed clear and consistent acceptance by the States concerned. Kenya did not consistently claim a maritime boundary along a parallel, as differences between its 1979 Proclamation and other Kenyan domestic legislation showed. The 2005 Proclamation claimed a boundary along a parallel but was followed by direct communications with Somalia which did not rely upon that claim. Kenya’s submission to the Commission on the Limits of the Continental Shelf

also did not claim a boundary along a parallel. Since Kenya had not consistently maintained its position that there was a maritime boundary along a parallel, there was no compelling evidence of such a boundary (paras. 51-2, 57, 61-8 and 71).

(b) Somalia's conduct between 1979 and 2014 had not established its consistent acceptance of a maritime boundary along a parallel of latitude. Kenya had conducted naval patrols north of the claimed boundary along a parallel, had failed to show evidence of such a boundary emerging from fishing activity and marine scientific research, and had provided limited evidence of oil-related practice before 2009, all of which indicated that Somalia had not accepted a boundary along a parallel of latitude (paras. 72-88).

(2) (unanimously) The starting point of the maritime boundary was a point with coordinates $1^{\circ} 39' 44.0''$ S and $41^{\circ} 33' 34.4''$ E (WGS 84) (para. 117).

(3) (unanimously) The boundary in the territorial sea was a median line from the starting point to a point with coordinates $1^{\circ} 47' 39.1''$ S and $41^{\circ} 43' 46.8''$ E (WGS 84; Point A).

(a) The starting point of the maritime boundary was to be identified by tracing a straight line between PB29 and the low-water line, thus identifying a point having coordinates $1^{\circ} 39' 44.0''$ S and $41^{\circ} 33' 34.4''$ E (para. 98).

(b) There were serious reasons to question the Parties' choice of base points, because base points were placed on tiny maritime features that had a disproportionate effect on the boundary relative to their size and significance in the coastal geography. Base points had to be placed only on the mainland of both Parties. The territorial sea boundary was the median line beginning at the starting point and extending to Point A ($1^{\circ} 47' 39.1''$ S and $41^{\circ} 43' 46.8''$ E), located at 12 nm from the Parties' coasts (paras. 112-14).

(4) (by ten votes to four, Judges Abraham, Yusuf, Bhandari and Salam dissenting) The maritime boundary in the EEZ followed the geodetic line starting with azimuth 114° until it reached the 200 nm limit from the baselines from which the breadth of the territorial sea of Kenya was measured, at the point with co-ordinates $3^{\circ} 4' 21.3''$ S and $44^{\circ} 35' 30.7''$ E (WGS 84; Point B) (para. 174).

(5) (by nine votes to five, Judges Abraham, Yusuf, Bhandari, Robinson and Salam dissenting) From Point B, the maritime boundary delimiting the continental shelf continued along the same geodetic line until it reached the outer limits of the continental shelf or the area where the rights of third States could be affected.

(a) While the three-stage approach was not a mandatory methodology to delimit the maritime boundary between the Parties, the parallel of latitude would have caused severe cut-off of Somalia's coastal projections and was thus inappropriate to achieve an equitable solution as required under UNCLOS (paras. 126-31).

(b) Using radial projections, Somalia's relevant coast extended for 733 km and Kenya's relevant coast for 511 km. The relevant area was

identified, using radial projections, as the area where the maritime entitlements of the Parties overlapped, while the area south of the boundary agreed by Kenya and Tanzania was excluded from the relevant area. The provisional equidistance line extended from Point A to a point at 200 nm from the Parties' coast, with coordinates 3° 31' 41.4" S and 44° 21' 02.5" E (paras. 137, 140-1 and 146).

(c) The provisional equidistance line could not be adjusted to resemble a parallel of latitude, because to do so would have allowed Kenya to obtain a boundary along a parallel of latitude contrary to the decision that there was no evidence for such a boundary. Security concerns, practice relating to oil concessions and access to natural resources by Kenyan fisherfolk were not reasons to justify adjusting the provisional equidistance line. As to cut-off effect, the maritime boundary agreed by Kenya and Tanzania could not generate a relevant circumstance in the case between Kenya and Somalia, as it was *res inter alios acta*. The concavity was not conspicuous if the analysis were limited to the coast of the Parties, but to limit oneself to examining that coast would be an overly narrow approach. The cut-off of Kenya's coastal projection had to be assessed in a broader geographical context including the coast of Tanzania. Thus assessed, cut-off was serious enough to justify adjusting the equidistance line. The adjusted line started from Point A and followed a geodetic line with an initial azimuth of 114°. As the ratio of the Parties' relevant coasts was 1:1.43 and the ratio of their relevant areas was 1:1.30, the adjusted equidistance line did not cause any gross disproportionality (paras. 156, 158-60, 163-4, 167-8, 171, 174 and 176-7).

(d) The lack of delineation of the outer limits of the continental shelf beyond 200 nm was not an impediment to the delimitation of the continental shelf beyond 200 nm. Kenya and Somalia did not contest each other's entitlement to a continental shelf beyond 200 nm and, conversely, both Parties requested the Court to delimit their overlapping continental shelf entitlements beyond 200 nm. The boundary in the EEZ was extended beyond 200 nm up to the point where it would reach the outer limit of the Parties' continental shelf or the area where the rights of third States might be affected. This boundary created a "grey area", but it was unnecessary to decide on the legal regime applicable to it (paras. 189 and 194-7).

(6) (unanimously) Kenya was not responsible for breaches of its obligations under Articles 74(3) and 83(3) of UNCLOS. Unilateral activities in disputed maritime areas did not constitute wrongful acts if carried out before the boundary was established and in an area subject to the good faith claims of the Parties. There was no evidence that Kenya's claims in the disputed maritime area were not in good faith. The dispute between the Parties arose in 2009, therefore only activities conducted since 2009 were capable of breaching Kenya's international obligations under Articles 74(3) and 83(3) of UNCLOS. Somalia had failed to provide sufficient evidence that Kenya's alleged activities relating to oil drilling had occurred. There was no evidence to find that those activities, if they had occurred, could have led to permanent

physical change in the disputed area. Kenya had not breached its international obligations and there was therefore no need to examine Somalia's claim for reparation (paras. 203-4, 206-9 and 211-13).

Separate Opinion of President Donoghue: The Court had been given limited information concerning the existence, shape, extent and continuity of each Party's claimed continental shelf beyond 200 nm. The Court could not properly identify the relevant area beyond 200 nm and, thus, achieve an equitable solution in delimiting the continental shelf beyond 200 nm. This case was different from those in which there was ample evidence of entitlement beyond 200 nm. Because of the different basis of title over maritime areas within and beyond 200 nm, one could not presume that a boundary that achieved an equitable solution within 200 nm could also do so beyond 200 nm (paras. 4-8 and 11-13).

Separate Opinion of Judge Abraham: To identify a concavity justifying the adjustment of the provisional equidistance line, the Court had to consider coasts that were not part of the relevant coast of the Parties. It could be reasonable, in certain cases, to consider not only the coasts of the Parties, but also those of third States. However, the situation of Kenya shared no similarity with that of Bangladesh (in relation to India and Myanmar) or that of Germany (in relation to Denmark and the Netherlands). It was only if cut-off effect was "serious" that it would justify adjusting a provisional equidistance line. The "seriousness" criterion was not met in the circumstances and, therefore, no adjustment of the provisional equidistance line was justified (paras. 12-15).

Separate Opinion of Judge Yusuf: (1) The Court had departed from its practice concerning the identification of base points to draw the territorial sea boundary, as it had not identified such base points on the low-water line of the Parties' coast and had not accepted certain base points on which the Parties agreed. The Court had also refused to put a base point on Ras Kaambooni and the Diua Damasciaca islands, both significant features of Somalia's coast (paras. 8-19).

(2) It was legally erroneous to look for cut-off effect beyond the area to be delimited. References to the "broader geographical configuration" disconnected the analysis of relevant circumstances from the geographical setting of the delimitation. The Court had to consider the coast of a third State to justify adjusting the provisional equidistance line. The Court's approach to adjustment had departed from the previous jurisprudence of international tribunals on that matter. As to delimitation beyond 200 nm, the Court had simply asserted that the boundary within 200 nm extended beyond 200 nm, without giving reasons. The creation of a "grey area" created potential new problems for the Parties in the future (paras. 23, 25, 29, 31-48, 50 and 52).

Declaration of Judge Xue: (1) The use of radial projections was doubtful in the present case because it resulted in overstretching the length of the Parties' coasts, especially Somalia's coast. The relevant area identified by the Court did not encompass the entire area in which the Parties' potential maritime entitlements overlapped, because there was no certainty as to the location of the other limits of the continental shelf beyond 200 nm. Frontal projections would better represent the potential overlapping maritime entitlements of the Parties (paras. 7 and 10-12).

(2) The Court was correct in its treatment of cut-off, as the Kenya–Tanzania and Kenya–Somalia boundaries both created inequity by cutting off Kenya's coastal projections. If a different method had been used to identify the relevant coast and relevant area, the equidistance line as adjusted by the Court could not have created some disproportion between the ratio of the relevant coasts and the ratio of the areas appertaining to either Party (paras. 16-20).

Individual Opinion, partly Concurring and partly Dissenting, of Judge Robinson: (1) The Court could not delimit the continental shelf beyond 200 nm. First, there was no evidence that the geological and geomorphological criteria necessary for the Parties to have continental shelf entitlements beyond 200 nm were satisfied. Secondly, the Court had placed too much reliance on the Parties' lack of objection to each other's entitlement to a continental shelf beyond 200 nm. Thirdly, the lack of clear outer limits of the continental shelf beyond 200 nm meant that the Court's delimitation beyond 200 nm was riddled with uncertainty, unsuitable for a task as important as boundary delimitation. Finally, the Court had not considered whether the three-stage approach achieved an equitable solution beyond 200 nm (paras. 3-21).

(2) It was not every coastal concavity which could produce cut-off effect, but it was difficult exactly to identify the minimum requirements for a concavity to produce such an effect. In the present case, the curvature in the Parties' coasts did not meet such requirements. It was problematic for the Court to have taken into account the concavity generated also by the coast of a third State, which was not possible under the existing jurisprudence (paras. 22-33).

(3) There was no explanation of how the Court was authorized to take cognizance of the 1927/1933 treaty arrangement. This arrangement was made between Italy and the United Kingdom, which were not parties to the case; there was no explanation of how the colonial agreements between Italy and the United Kingdom were relevant to delimitation between Somalia and Kenya (paras. 36-7).

(4) Acquiescence was the absence of protest when a response was called for. There was a conflict between paragraphs 71 and 72 of the judgment. Paragraph 71 stated that Kenya's conduct was so inconsistent as not to call for a response. Paragraph 72, however, analysed whether Somalia had accepted a boundary along a parallel of latitude. The Court should have dismissed Kenya's claim for a boundary along a parallel of latitude simply based on the finding in paragraph 71 (paras. 48, 50 and 52).

Separate Opinion of Judge ad hoc Guillaume: Because Italy and the United Kingdom had concluded the 1927/1933 treaty arrangement, the Court had to decide whether that arrangement fixed the starting point of the maritime boundary and all or part of the territorial sea boundary. The Court had been wrong to find that it was not necessary to consider whether the 1927/1933 treaty arrangement delimited the territorial sea between the Parties, because a treaty remains in force until it has been terminated. The Court's decision meant that the Parties had tacitly terminated the 1927/1933 treaty arrangement, at least insofar as it delimited the territorial sea. Although at the time of the 1927/1933 treaty arrangement the territorial sea had generally been seen to extend to 3 nm from the coast, it was reasonable that Italy and the United Kingdom had considered the evolutive character of the breadth of the territorial sea. The 1927/1933 treaty arrangement should therefore be considered to apply to the delimitation of a 12 nm territorial sea (paras. 11 and 17-18).

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[212] 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.

[213] 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