# INDIVIDUAL OPINION, PARTLY CONCURRING AND PARTLY DISSENTING, OF JUDGE ROBINSON

1. In this opinion, I explain the reasons for my disagreement with paragraph 214 (5) of the Judgment and make observations on other parts.

2. Paragraph 214 (5) of the Judgment reads as follows:

> "[The Court] . . . [*d*]*ecides* 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[.]"

3. Since Point B is the outer limit of the exclusive economic zone and continental shelf within 200 nautical miles, the formulation of this paragraph makes clear that the Court has delimited the continental shelf beyond 200 nautical miles. However, for the following reasons, the Court was not in a position to carry out such a delimitation.

4. First, the régime for a coastal State's entitlement to a continental shelf within 200 nautical miles is different from the régime for its entitlement to a continental shelf beyond 200 nautical miles, and it is this difference that makes the Court's finding in paragraph 214 (5) questionable. Article 76 (1) of the United Nations Convention on the Law of the Sea (hereinafter "UNCLOS" or the "Convention") provides as follows:

> "The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance."

5. Although the Convention defines the continental shelf in geological and geomorphological terms as the sea-bed and subsoil of the submarine areas throughout the natural prolongation of its land territory to the outer edge of the continental margin, it also provides that, in cases where the outer edge of the continental margin does not extend to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, the continental shelf will extend to that distance. In effect, therefore, the distance criterion supersedes the geological and geomor-

phological criteria in defining a coastal State's entitlement to a continental shelf up to 200 nautical miles. However, where, as here, the question relates to a State's entitlement to a continental shelf beyond 200 nautical miles, different considerations apply.

6. In order to determine a State's entitlement to a continental shelf beyond 200 nautical miles there must be in existence a continental margin that extends beyond 200 nautical miles because, by virtue of Article 76 (1) of the Convention, the continental shelf extends to the outer edge of the continental margin. Paragraph 3 of Article 76 of the Convention defines the margin as "compris[ing] the submerged prolongation of the land mass of the coastal State, and consist[ing] of the seabed and subsoil of the shelf, the slope and the rise". Therefore, in order to delimit, the Court must have before it reliable evidence that there is in existence, in the area beyond 200 nautical miles, a "submerged prolongation of the land mass of the coastal State". According to paragraph 6 of Article 76 of the Convention, the outer limit of the continental shelf "shall not exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured".

7. Thus, in relation to the delimitation of the continental shelf beyond 200 nautical miles, geological and geomorphological criteria supersede the distance criterion, because there can be no entitlement to a continental shelf in the area beyond 200 nautical miles and up to a distance of 350 nautical miles, unless there is certainty that there is in existence a continental margin in that area. Since under the Convention a coastal State's entitlement to a continental shelf beyond 200 nautical miles is determined by geological and geomorphological factors, the Court must ensure that those factors exist before delimiting the continental shelf beyond 200 nautical miles.

8. The distinction between delineation of the outer limit of the continental shelf by the Commission on the Limits of the Continental Shelf (hereinafter the "CLCS" or "Commission") and maritime delimitation by the Court is clear. It is equally clear that recommendations by the CLCS on the outer limit of the continental shelf do not constitute a necessary precondition for maritime delimitation by the Court. But in order to carry out such a delimitation, the Court must have reliable evidence confirming the existence of a continental shelf in the area beyond 200 nautical miles.

9. The Judgment reflects an awareness of the requirement that the Court must have at hand reliable information confirming the existence of a continental margin in the area beyond 200 nautical miles if it is to be in a position to carry out a delimitation in that area. However, as will be seen, the Court ignores this requirement.

10. After citing Article 76 (4) of the Convention, the Judgment concludes that

> "[t]he entitlement of a State to the continental shelf beyond 200 nautical miles thus depends on geological and geomorphological criteria.

> An essential step in any delimitation is to determine whether there are entitlements, and whether they overlap." (Judgment, para. 193.)

The Court noted that the Tribunal in *Bangladesh/Myanmar* was only able to carry out delimitation of the shelf beyond 200 nautical miles because of what the Tribunal described as the "unique situation in the Bay of the Bengal", a feature which the Judgment states explicitly "is not the same as [present case]". The Special Chamber of the International Tribunal for the Law of the Sea ("ITLOS") in *Ghana/Côte d'Ivoire* held that it "can delimit the continental shelf beyond 200 [nautical miles] only if such a continental shelf exists"[1], and that it had the benefit of the Commission's affirmative recommendations in relation to Ghana; it also observed that the "geological situation [of Côte d'Ivoire was] identical to that of Ghana"[2]. The Special Chamber emphasized that there is "no doubt that a continental shelf beyond 200 [nautical miles] exists in respect of the two Parties"[3]. The need for a court or tribunal to be certain about the existence of a continental shelf beyond 200 nautical miles if it is to carry out a delimitation in that area was also emphasized by the Tribunal in *Bangladesh/Myanmar*. The Tribunal stated that it would have been hesitant to proceed to delimit the area beyond 200 nautical miles if there was uncertainty about the existence of a shelf in that area[4].

11. As if to contradict the cautionary note it had sounded in relation to any reliance on the decisions in *Bangladesh/Myanmar* and *Ghana/Côte d'Ivoire*, the Court in paragraph 194 rather unexpectedly announced its decision to delimit the continental shelf boundaries up to the outer limit of the continental shelf.

12. It is ironical that, having taken the pains to isolate and identify the critically relevant information that ITLOS and its Special Chamber had in the *Bangladesh/Myanmar* and *Ghana/Côte d'Ivoire* cases, the Court proceeded to delimit the Parties' continental shelf in the area beyond 200 nautical miles without any convincing evidence as to the existence of a shelf beyond 200 nautical miles. This contrasts with the decision of the Court in *Nicaragua* v. *Colombia* not to delimit the continental shelf beyond 200 nautical miles, because Nicaragua relied on information it had submitted to the CLCS that did not substantiate its claim to a continental shelf beyond 200 nautical miles[5].

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[1] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 136, para. 491.

[2] *Ibid.*

[3] *Ibid.*, p. 137, para. 496.

[4] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 115, para. 443.

[5] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 669, para. 129.

13. The Judgment is bereft of even a scintilla of reliable evidence that the geological and geomorphological criteria, which the Judgment itself refers to in paragraph 193 as being essential in the determination of State entitlements, have been met.

14. The Court comes closest to identifying evidence of the existence of a continental shelf beyond 200 nautical miles when it noted "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" (paragraph 194 of the Judgment). However, this observation does not provide a sufficient basis for the delimitation because nowhere in the Judgment is there any reference to the content of this scientific evidence and, more importantly, nowhere in the Judgment is there any analysis of that content to show that the Court is satisfied that the necessary geological and geomorphological criteria have been met for the existence of a continental shelf beyond 200 nautical miles. It must be made clear that in this case the Court was not asked to examine any scientific data that would establish the existence of a continental shelf beyond 200 nautical miles. It is, of course, perfectly proper to refer to the Parties' submissions to the Commission. However, if it relies on these submissions, the Court must explain why it finds them persuasive. Such an explanation is the more necessary where, as in this case, the Commission has not yet made any recommendations on the submissions of the Parties. Thus, it appears that the principal factors that explain the Court's decision to delimit the continental shelf beyond 200 nautical miles are the criterion of the 350-nautical-mile distance as the outer limit of the continental shelf and the volition of the Parties to have the Court effect a delimitation. But, in delimiting the continental shelf beyond 200 nautical miles, geological and geomorphological factors supersede distance as the criteria for determining a State's entitlement to that shelf, thereby rendering less consequential the request of the Parties to have the Court effect a delimitation in that area.

15. The lack of any evidence of geological and geomorphological data to substantiate the existence of a continental shelf, and thus, of the entitlement of the Parties to a continental shelf beyond 200 nautical miles, undermines the validity of the finding in paragraph 214 (5), which is the principal conclusion of the Court in the part of its Judgment devoted to the delimitation of the continental shelf beyond 200 nautical miles. Nonetheless, the present opinion will comment on other aspects of the Judgment relating to this finding.

16. Second, in the delimitation of the continental shelf in the area beyond 200 nautical miles the Court has overvalued the volition of the Parties and the fact 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" (paragraph 194 of the Judgment). In the delimitation of the continental shelf up to 200 nautical miles, it is

appropriate for the Court to act entirely on requests of the Parties for it to carry out such a delimitation, because in that area the distance criterion of 200 nautical miles prevails. However, where, as here, the Court is delimiting the continental shelf in the area beyond 200 nautical miles, the requests of the Parties, and the congruence of their views as to their respective entitlement to a shelf beyond 200 nautical miles and the extent of that entitlement, do not constitute a sufficient basis for delimitation in that area. By effecting a delimitation of a party's continental shelf beyond 200 nautical miles without any reliable evidence of the existence of a shelf in that area, the Court has effectively eliminated the important difference drawn by the Convention between a coastal State's entitlement to a shelf within and beyond 200 nautical miles. In the result, by delimiting on the presumption that the Parties are entitled to a shelf of up to 350 nautical miles, the Court has replaced the geological and geomorphological criteria required by the Convention for such an entitlement with a simple distance criterion of a maximum of 350 nautical miles. There is nothing in the Judgment that comes close to the categoric findings in the *Bangladesh/Myanmar* and *Bangladesh* v. *India* cases as to the existence of a continental shelf beyond 200 nautical miles.

17. Third, the Court has carried out a delimitation of the continental shelf beyond 200 nautical miles in an environment riddled with uncertainty. Although the use of a directional arrow, such as the one contained in sketch-map No. 13 (p. 279), is not uncommon in delimitation of the continental shelf beyond 200 nautical miles, there must be some doubt as to whether this approach provides the level of certainty that one would expect in an exercise as consequential as the delimitation of a boundary between two States, which will have sovereign rights in the area attributed to them.

18. This uncertainty is even more evident in paragraph 197 of the Judgment, which reads:

> "*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')." (Emphasis mine.)

This reasoning is a conjecture built on a surmise founded on a hypothesis — scarcely a basis for the construction of a legal régime. Regrettably, the grey area that it identifies is not of "limited size", but in the circumstances of this case, may be seen as applying to the entire area beyond 200 nautical miles. It is noted, however, that the Court decided not to address the question of the legal régime that would be applicable to this grey area.

19. Notwithstanding that delineation of the outer limits of the continental shelf is carried out by coastal States on the basis of the recommendations of the CLCS, and not by the Court, there must be a concern that delimitation and delineation exercises may impact adversely on the area, defined in Article 1 (1) of the Convention as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction". The area therefore begins where national jurisdiction ends. Article 136 provides that "[t]he Area and its resources are the common heritage of mankind"; Article 140 (1) provides that "activities in the Area" are to be carried out "for the benefit of mankind as a whole . . . and taking into particular consideration the interests and needs of developing States". During the UNCLOS negotiations, generally, developing countries attached the greatest importance to the establishment of a meaningful régime for the area in the expectation that its exploration and exploitation would contribute to their growth and development in the interest of the common heritage of mankind.

20. Concerns about the possible impact of delimitation on the régime for the area were expressed by the Arbitral Tribunal in the *France-Canada Maritime Delimitation* case (Saint Pierre and Miquelon), in which France had requested delimitation of the continental shelf beyond 200 nautical miles. The Commission stated:

> "Any decision by this Court recognizing or rejecting any rights of the Parties over the continental shelf beyond 200 nautical miles, would constitute a pronouncement involving a delimitation, not 'between the Parties' but between each one of them and the international community, represented by organs entrusted with the administration and protection of the international sea-bed Area (the sea-bed beyond national jurisdiction) that has been declared to be the common heritage of mankind."[6]

While this Award, made not very long after the adoption of the Convention, may be seen as going too far, its underlying concern should not be disregarded: where it is appropriate, the interests of the international community in exploring and exploiting the area is a factor that must be taken into account in maritime delimitation in the area beyond 200 nautical miles. Moreover, in the *Bangladesh/Myanmar* case the Tribunal expressly considered the possible impact of the delimitation of the shelf beyond 200 nautical miles on the interests of the international community in the area, and determined in the following finding that those interests were not affected:

> "In addition, as far as the Area is concerned, the Tribunal wishes to observe that, as is evident from the Parties' submissions to the

[6] *Delimitation of Maritime Areas between Canada and France, Award of 10 June 1992*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XXI; *International Legal Materials (ILM)*, Vol. 31, p. 1172, para. 78.

> Commission, the continental shelf beyond 200 nm that is the subject of delimitation in the present case is situated far from the Area. Accordingly, the Tribunal, by drawing a line of delimitation, will not prejudice the rights of the international community."[7]

A fair inference from this finding is that the Tribunal would not have carried out the delimitation requested or, at any rate, would have given serious thought to declining that delimitation, had it found that this delimitation was to be carried out in an area that was near to the area in which the international community has an interest. It would seem that, in the instant case, a statement similar to that of the Tribunal in *Bangladesh/Myanmar* could not be made by the Court, because the continental shelf that is the subject of delimitation could possibly extend to the area. Nonetheless the Tribunal's dictum is instructive in that it signifies an appropriate sensitivity to the interests of the international community in the area.

21. Fourth, Article 83 (1) of the Convention requires that the delimitation of the continental shelf be effected by agreement on the basis of international law in order to achieve an equitable solution. In the delimitation of the continental shelf within 200 nautical miles, the Court quite properly spent much time considering whether its three-stage methodology produced an equitable solution. On the other hand, in the delimitation of the continental shelf beyond 200 nautical miles, the Judgment is silent on the question whether the methodology the Court has used produces an equitable solution. This is a significant omission in the Judgment and it raises serious questions as to whether the delimitation carried out has been effected in accordance with the Convention.

## Concavity

### *The Significance of the Kenyan "Concavity"*

22. The best statement of the law on the relationship between a relevant circumstance, a concavity, the median line and a cut-off effect is the finding of the ITLOS in *Bangladesh/Myanmar* that

> "concavity *per se* is not necessarily a relevant circumstance. However, 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."[8]

23. The question is whether the cut-off effect produced by the equidistance line must result from a geographical feature that meets the minimum requirements for a concavity or whether it can result from any

[7] *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar), Judgment, ITLOS Reports 2012*, p. 97, para. 368.
[8] *Ibid.*, p. 81, para. 292.

geographical feature, such as a mere curvature or an indentation, even if that feature does not meet the minimum requirements for a concavity. Case law is generally unhelpful in identifying the minimum features for a concavity to result in the equidistance line producing a cut-off effect that requires its adjustment in order to achieve an equitable solution. The comments that one finds on this question are of a general nature; for example, in *Ghana/Côte d'Ivoire*, the Special Chamber found "that the coast of Côte d'Ivoire is concave, although such concavity is not as pronounced as in, for example, the case of the Bay of Bengal"[9].

24. In the 1969 *North Sea Continental Shelf* cases, the Court found that the German coast was "markedly concave"[10]. It is not for nothing that in considering the German concavity, the Court referred to another coastline, that of Bangladesh, that was also markedly concave. Indeed, in *Bangladesh/Myanmar*, ITLOS held that the Bangladesh coast was "manifestly concave" and that, consequently, the equidistance line produced a cut-off effect warranting the adjustment of that line. One may also consider the Court's decision in *Costa Rica* v. *Nicaragua*. However, that decision is not apposite because the Court did not examine in detail whether a concavity existed, but simply confined itself to the conclusion that the existence of a concavity did not produce a cut-off effect warranting an adjustment of the equidistance line. This is to be contrasted with the instant case in which the majority has found not only that there is a concavity, but that "[w]hen the mainland coasts of Somalia, Kenya and Tanzania are observed together, as a whole, the coastline is undoubtedly concave" and that, consequently, the equidistance line produces a cut-off effect that warrants some adjustment of that line. In *Cameroon* v. *Nigeria*, the Court found that there was no concavity in the sectors of the coastline relevant to the present delimitation[11]. In *Guinea/Guinea-Bissau*, the Tribunal found that the coastline of Guinea-Bissau, Guinea and Sierra Leone, when considered together, was generally concave[12].

25. In accordance with the Court's jurisprudence therefore, an adjustment of the equidistance line is only required when it produces a cut-off effect as a result of a coastal feature that is obviously concave or, to use the language of the Court in the *North Sea Continental Shelf* cases, "markedly concave" or that of the Tribunal in *Bangladesh/Myanmar*, "manifestly concave". That the Court did not have in mind a cut-off effect resulting from a slight curvature or an indentation in a coast is clear

[9] *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, p. 120, para. 424.

[10] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 50, para. 91.

[11] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 445, para. 297.

[12] *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau, Award of 14 February 1985, International Law Reports (ILR)*, Vol. 77, pp. 634-693.

from its finding in *Libya/Malta* 16 years later, that an equidistance line "may yield a disproportionate result where a coast is . . . markedly concave or convex"[13]. Here the Court was restating its finding in the 1969 *North Sea Continental Shelf* cases that an equidistance line may yield disproportionate results when a coastal feature has a concavity or convexity that would have the effect of pulling the line inwards or outwards. What is significant is that the Court found that this outcome must be the result of a markedly concave or convex coast.

26. The phrase, "as a consequence of a concavity" in the ITLOS dictum makes clear that the cut-off effect must result from a concavity, that is, a geographical feature that causes an equidistance line to produce a cut-off effect, warranting its adjustment in order to achieve an equitable result. The phrase has special significance in that it emphasizes the very important causal role that the concavity plays in the equidistance line producing a cut-off effect. If a geographical feature that is a mere curvature or an indentation rather than a concavity, produces a cut-off effect, then that effect is to be ignored, because to recognize it as capable of leading to an adjustment of the equidistance line would be to refashion geography and an equitable solution would not be achieved. The well-known proposition that maritime delimitation should not result in refashioning geography is reflected in paragraph 172 of the Judgment.

27. It can be inferred from the ITLOS dictum (cited above in paragraph 26) that it is not any and every geographical feature that will be sufficient to constitute a relevant circumstance; it is only a geographical feature meeting the minimum requirement for a concavity and producing a cut-off effect that will constitute a relevant circumstance requiring adjustment of the provisional equidistance line. Regrettably, the Special Chamber's decision in *Ghana/Côte d'Ivoire* is inconsistent with the Court's jurisprudence that an adjustment of the equidistance line is only required when it produces a cut-off effect as a result of a coastal feature that is markedly concave. The effect of the Special Chamber's ruling in that case is that a coastal feature that would appear to be nothing more than a mere curvature constituted a concavity. However, the Chamber only found that there was a cut-off effect when the convexity of the Ghanaian coastline was also taken into account, and in any event, it found that the cut-off did not warrant an adjustment of the equidistance line. The decision of the Arbitral Tribunal in *Guinea/Guinea-Bissau* is also inconsistent with the aforementioned jurisprudence of the Court.

[13] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 44, para. 56.

28. Although one cannot identify, with a fine degree of certainty, the minimum requirements for a concavity sufficient to produce a cut-off effect that calls for an adjustment of the provisional equidistance line, of the several coastal features considered in the previous paragraphs, it is only those of Germany and Bangladesh that would appear to meet those requirements. It is only those coastal features that can be said to be markedly concave. As will be seen in the sketch-maps below (pp. 336-342), it is those coastal features alone that, on their face, resemble a concavity in that they possess a shape that is markedly hollowed or markedly rounded inward like the inside of a bowl *(Merriam-Webster's Dictionary)*. The more relaxed view of what constitutes a concavity, evident in *Ghana/Côte d'Ivoire* and *Guinea/Guinea-Bissau*, has not displaced the clear finding of the Court that it is a markedly concave coastal feature that produces a cut-off effect, calling for an adjustment of the provisional equidistance line.

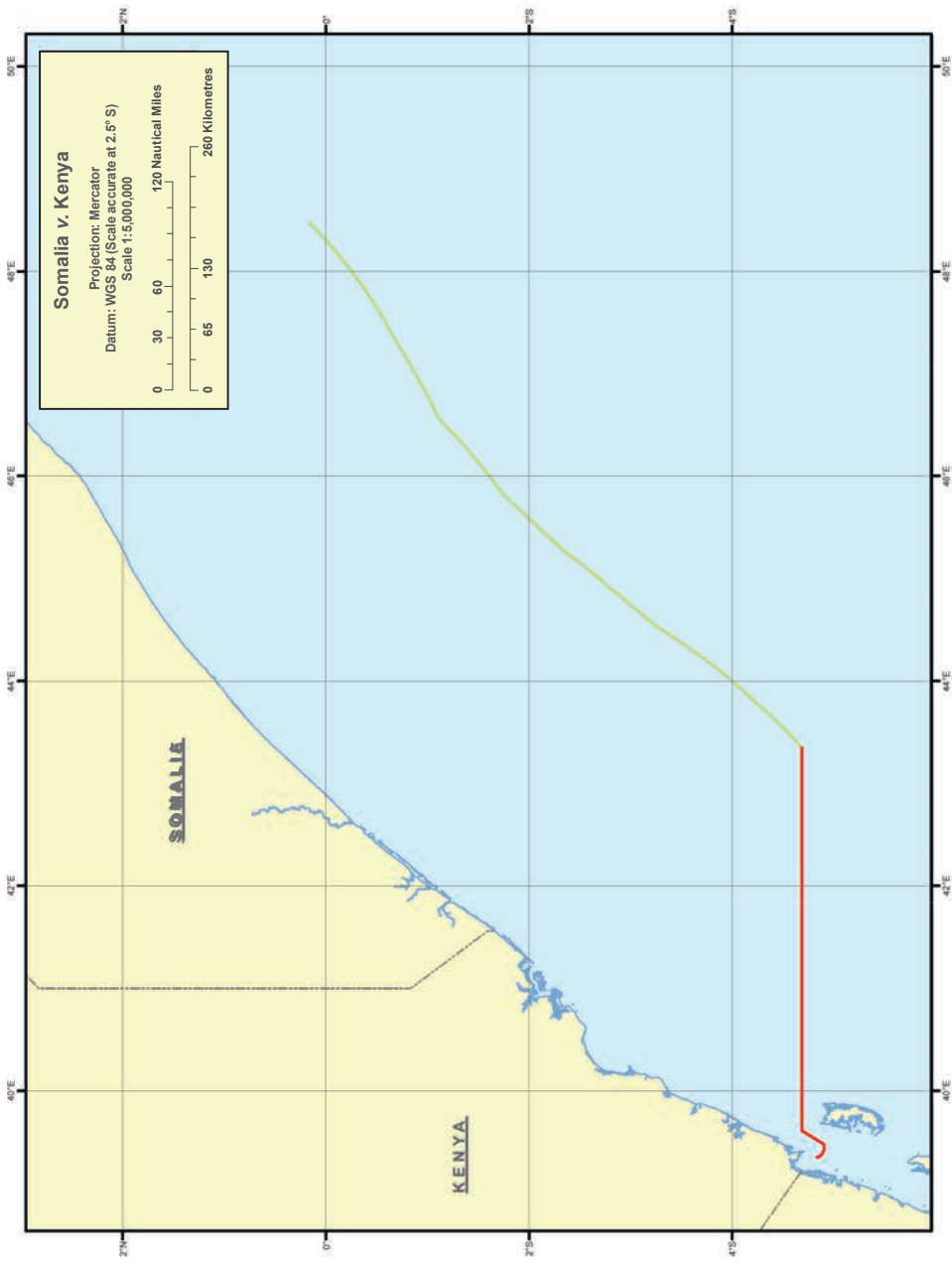
29. In the instant case, there must be a doubt as to whether the curvature in the Kenyan coast or, for that matter, the curvature in the Somali, Kenyan and Tanzanian coasts, has the degree of concavity sufficient to result in the equidistance line producing a cut-off effect, requiring an adjustment of that line. Certainly, the greater part of the Kenyan coastline may fairly be described as a slight curvature. Since, in the result, the Court has held this curvature to be a concavity, the reasonable doubt that exists as to whether the feature constitutes a concavity means that any cut-off resulting would only warrant the slightest adjustment of the equidistance line, because that line does not in any significant way prevent Kenya from achieving its maximum maritime area in accordance with international law; in fact, the better view might very well be that no adjustment is warranted since the cut-off is neither serious nor severe.

30. In considering the curvature in the Somali, Kenyan and Tanzanian coasts as part of what the Judgment describes as the "broader geographical configuration", the Court has followed the Tribunal's decision in *Guinea/Guinea-Bissau* rather than its Judgment in *Cameroon* v. *Nigeria*. In the former case, the Tribunal considered the coastline of Guinea, Guinea-Bissau and Sierra Leone together; in the latter case, the Court was explicit in its finding that the Cameroonian concavity could only be a relevant circumstance "when such concavity lies within the area to be delimited"[14]. In order to show that the Cameroonian concavity did not meet that requirement, the Court observed that it was not facing Nigeria, but rather, the island of Bioko, that belonged to a third State, and was not within the area to be delimited. The Judgment has wrongly seized on this reference by the Court to an island of a third State to conclude that "the Court's statement thus should not be understood as excluding in all circumstances the consideration of the concavity

[14] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 445, para. 297.

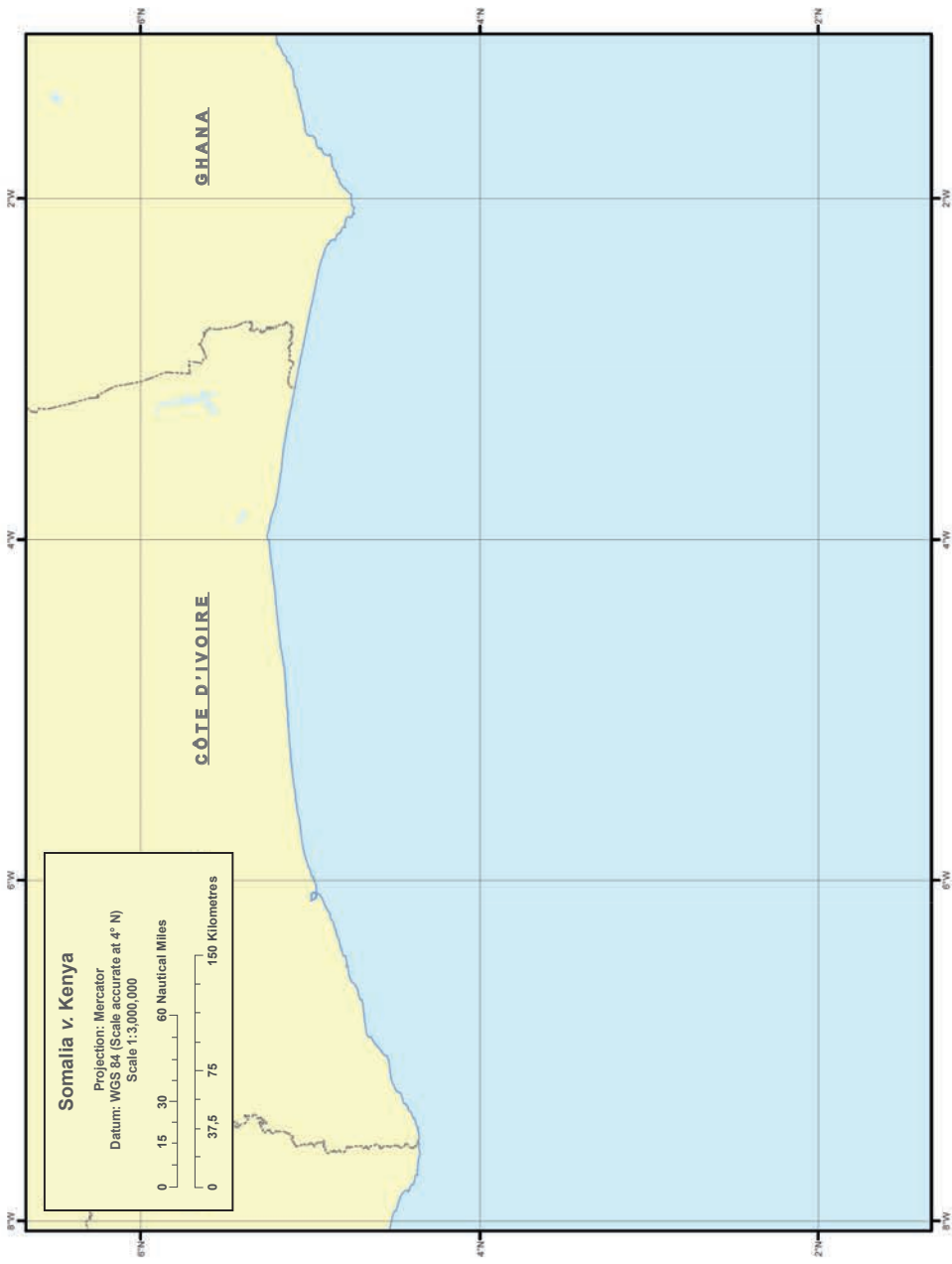

Sketch-map depicting concavity in the *North Sea Continental Shelf cases*


Sketch-map depicting concavity in *Bangladesh/Myanmar*

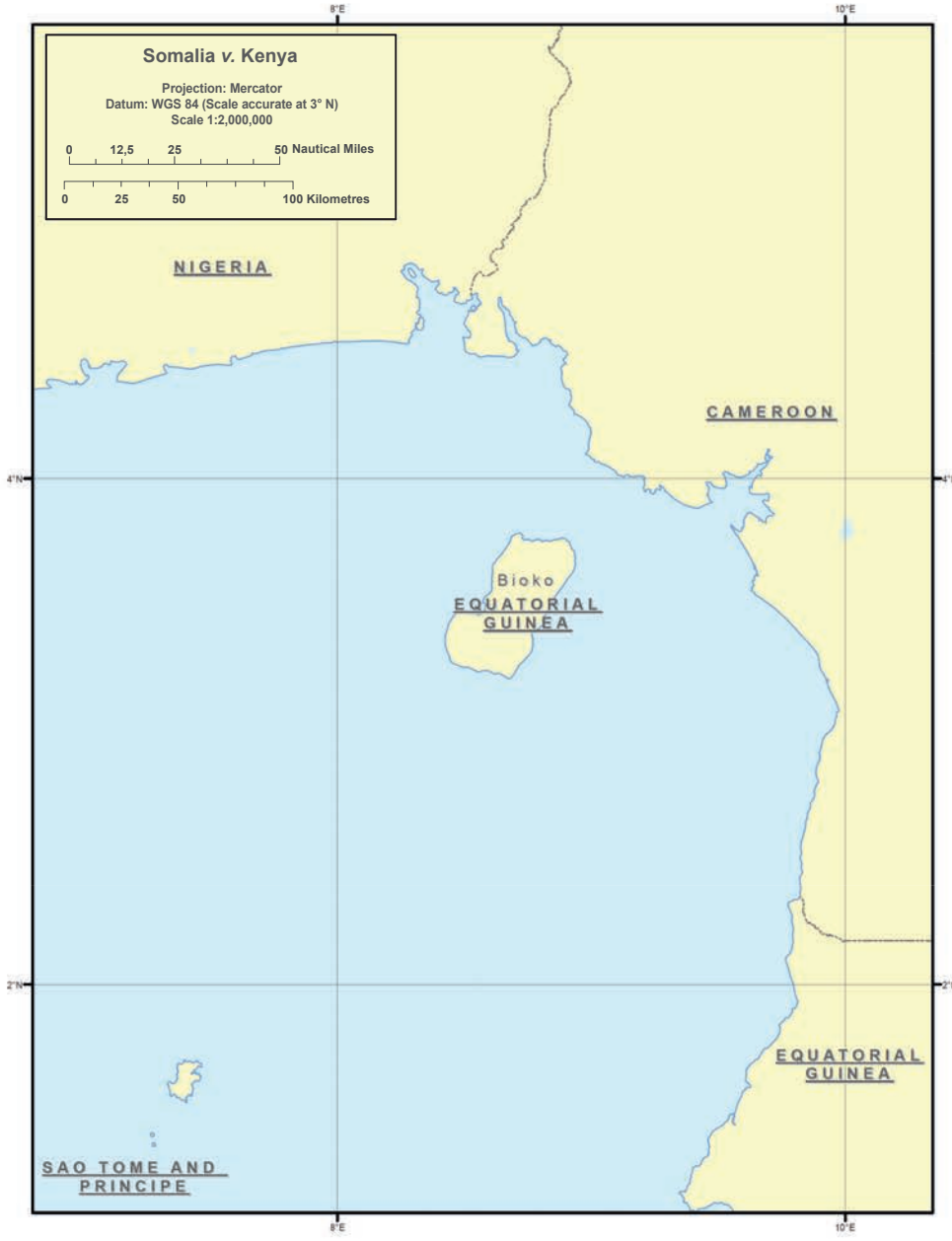



Sketch-map depicting concavity in the Kenyan coast relevant to the present case

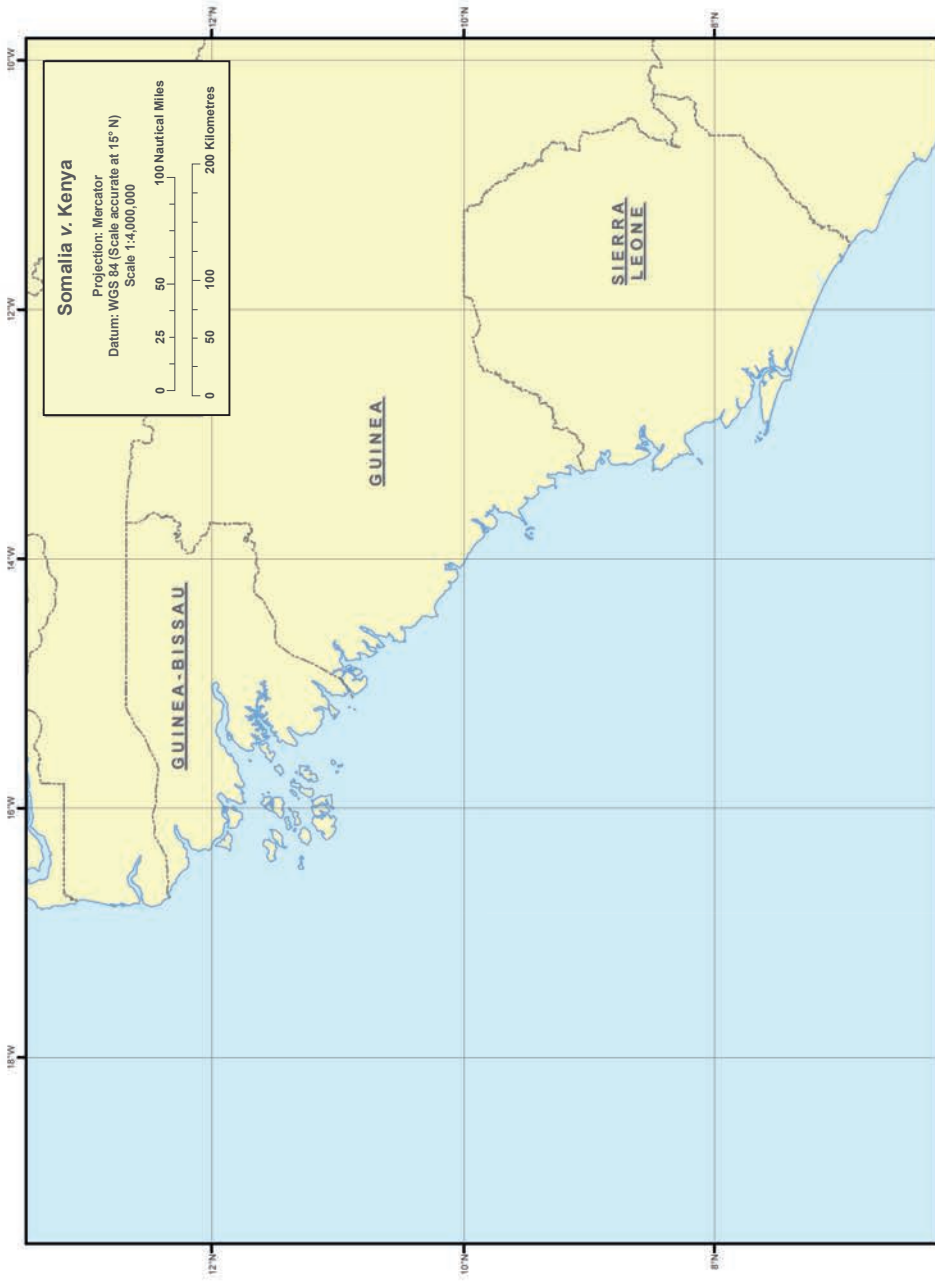

Sketch-map depicting concavity in the Tanzanian coast relevant to the present case




Sketch-map depicting concavity in *Ghana/Côte d'Ivoire*




Sketch-map depicting concavity in *Cameroon/Nigeria*




Sketch-map depicting concavity in *Guinea/Guinea-Bissau*

of a coastline in a broader geographical configuration". But there is nothing in the Court's finding to suggest that it was embracing the notion of a broader geographical configuration; rather, in order to dismiss the Cameroonian claim that its concavity was a relevant circumstance, the Court merely observed that the concavity was located in a third State, and that it was not a relevant circumstance since it was not within the area to be delimited. Significantly, the Court referred to the third State, not to take its concavity into account, but to exclude it from the maritime delimitation between Cameroon and Nigeria on the basis that it was not within the area to be delimited. In contrast, in the instant case, the Court refers to the "concavity" of a third State, Tanzania, not to exclude it from the maritime delimitation between Somalia and Kenya, but to include it in that delimitation. The proposition that, in maritime delimitation, account should be taken of a concavity that is not within the area to be delimited but is part of a so-called broader geographical configuration, is problematic. In the first place, the concept of a "broader geographical configuration" is itself broad and vague — where the configuration begins and ends is a legitimate question. But the real danger is that the cut-off effect may result more from the geographical feature of a third State — not a party to the dispute and not in the delimitation area — than from the geographical feature on the coast of the State that is a party to the dispute and is within the area to be delimited. This would appear to be so in the present case because the Tanzanian "concavity", that is not within the area to be delimited, appears more pronounced than the Kenyan "concavity", that is within the area to be delimited. The odd result is a refashioning of geography whereby an adjustment is made to the equidistance line, more on account of a "concavity" in the Tanzanian coastline than of the "concavity" in the Kenyan coastline — a result that is wholly inconsistent with the Court's finding in *Cameroon* v. *Nigeria* that, in order to qualify as a relevant circumstance for the purpose of adjusting the equidistance line, the concavity must be within the area to be delimited[15]. Somalia would appear to have been disadvantaged by reason of a "concavity" that is not within the area to be delimited — an outcome that can scarcely be described as equitable.

31. In support of its decision to take into account the "concavity" in the Tanzanian coast as part of a broader geographical configuration, the Court cites its finding in the 1969 *North Sea Continental Shelf* cases that "although two separate delimitations were in question, they involved —

[15] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 445, para. 297.

indeed actually g[a]ve rise to — a single situation"[16]. However, there is an important difference between those cases and the instant case. In the 1969 cases, the Court joined cases brought separately by Germany against the Netherlands and against Denmark, with the result that the maritime areas produced by the coasts of the Netherlands, Denmark and Germany constituted the delimitation area. Thus, there was no question of the maritime areas of the Netherlands and Denmark, between which the German concavity lies, not being within the area to be delimited. In contrast, Tanzania is not a party to the dispute between Somalia and Kenya, and its "concavity" is not within the area to be delimited. The need for a concavity to be located within the area to be delimited, if it is to qualify as a relevant factor requiring adjustment of the equidistance line, was reiterated by the Court in *Cameroon* v. *Nigeria*.

32. There is another important distinction between the 1969 cases and the instant case. As a result of the joinder, the Court had before it submissions from the two adjacent coastal States, the Netherlands and Denmark. In contrast, in the instant case the Court has no submissions from Tanzania, which is not a party to the dispute and whose "concavity" does not lie within the area to be delimited.

33. In sum, the Court's Judgment in the 1969 cases does not authorize the proposition that in maritime delimitation account may be taken of a concavity that is not within the area to be delimited merely because it falls within a so-called "broader geographical configuration". Therefore, the "single situation" to which the Court referred in the 1969 cases does not eliminate the need for the concavity to fall within the area to be delimited if it is to qualify as a relevant factor warranting an adjustment of the provisional equidistance line.

## The Status of the 1927/1933 Treaty Arrangement

34. There is a question whether the Court has interpreted and applied the 1927/1933 treaty arrangement. In order to address this question, the following paragraphs of the Judgment must be examined. Paragraph 109 states: "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."

Paragraph 118 states:

> "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 objec-

[16] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 19, para. 11.

> tive to draw a line that continues into the territorial sea, a question that the Court need not decide (see paragraph 109 above)."

Paragraph 214 (2) reads as follows:

> "[The Court] . . . [*d*]*ecides* 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)[.]"

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

36. An interesting feature of this case is that although the part of this Judgment relating to the territorial sea is replete with references to the 1927/1933 treaty arrangement, and although the Court has quite plainly interpreted that treaty, there is nothing that explains how the Court is in a position to take cognizance of this treaty.

37. The dispute brought before the Court relates to differences between Somalia and Kenya. The 1927/1933 treaty arrangement relates to treaties between Italy and United Kingdom. By what legal theory or jurisprudential principle does the Court have the power to interpret the treaties between Italy and the United Kingdom? The Judgment does not explain

how, in the absence of the Parties conferring jurisdiction on it in respect of the colonial treaties, the Court takes cognizance of these treaties. There must be an explanation as to how the colonial treaties between Italy and the United Kingdom become relevant to the dispute between Somalia and Kenya. It cannot even be maintained that there is a link between the treaty arrangement and the dispute on the basis that both cover the same geographical area, because the treaties establish a land boundary while the dispute between the Parties relates to the sea. However, even if both the treaties and the dispute covered the same geographical area, that would not provide a sufficient link with Somalia and Kenya — States that were not parties to the 1927/1933 treaty arrangement. Indeed, in relation to Somalia and Kenya, the treaty is *res inter alios acta*. The closest that the Judgment comes to discussing the relationship between the 1927/1933 treaty arrangement and the dispute is in paragraph 32. In that paragraph, after outlining the various instruments described as the 1927/1933 treaty arrangement between Italy and the United Kingdom, there is a terse reference to Somalia and Kenya gaining their independence in 1960 and 1963 respectively. However, no link is made between the colonial treaties and the attainment of independence between Somalia and Kenya.

38. There was adopted in 1978 the United Nations Convention on Succession of States in respect of Treaties (hereinafter referred to as the "1978 Vienna Convention"). It defines a succession of States as "the replacement of one State by another in the responsibility for the international relations of territory".

39. The 1978 Vienna Convention required ratification by 15 States to enter into force. Following its adoption, the treaty took 18 years to enter into force and today, 43 years after its adoption, it only has 23 States parties or about 12 per cent of the membership of the United Nations. Obviously it has not gained any significant support. The reason is explained below.

40. By virtue of that Convention a newly independent State begins its life free from any obligation to continue or maintain the treaties of its predecessor, but with an entitlement to continue or maintain those treaties if it so wishes. This principle is reflected in Article 16 which provides that "[a] newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates". In my view, the provision is protective of the sovereignty of the newly independent States because it does not impose an obligation on them to continue the treaties of a predecessor State and at the same time it leaves those States with an entitlement to continue those treaties if they wish.

41. Notwithstanding the apparent potential of Article 16 to attract newly independent States to ratify the 1978 Convention, only few have done so. In the Caribbean, for example, only Dominica and Saint Vincent and the Grenadines are parties and from Africa only Egypt, Ethio-

pia, Liberia, Morocco, Seychelles and Tunisia are parties. Somalia and Kenya are not parties. There is obviously a strong antipathy to this Convention on the part of the vast number of developing countries that became independent after 1960. The overriding reason for this opposition is Article 11 which provides that "[a] succession of States does not as such affect: *(a)* a boundary established by a treaty; or *(b)* obligations and rights established by a treaty and relating to the regime of a boundary". Therefore, to the extent that the 1927 Agreement established a boundary, that boundary is not affected as such by the succession of States that took place on the independence of Somalia and Kenya. The significance of the phrase "as such" is that — as the International Law Commission's Commentary indicates — Article 11 "relate[s] exclusively to the effect of the succession of States on the boundary settlement", "leav[ing] untouched any other ground of claiming the revision [of the treaty] or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty"[17]. In my view, the 1927/1933 treaty arrangement did not establish a boundary in the territorial sea.

42. Article 11 of the 1978 Vienna Convention provides for an exception to the general rule in Article 16 that a newly independent State is not bound to maintain the treaties of its predecessor, but may do so if it wishes. Newly independent States did not wish to bind themselves to a treaty that obligated them to maintain boundaries established by their predecessor States. Nonetheless the Organization of African Unity adopted a resolution in 1964 that its members would "respect the borders existing on their achievement of national independence"[18], and many argue that there is a customary rule of international law requiring respect for such borders.

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

44. If the jurisprudential basis for the Court's interpretation of the treaty arrangement is not the principle of a succession of States, reflected in the 1978 Vienna Convention, then in my view, it must be that the colonial treaties between Italy and the United Kingdom become relevant to

[17] *Yearbook of the International Law Commission*, 1974, Vol. II, Part One, Commentary on Articles 11 and 12, p. 201, para. 17.

[18] Organization of African Unity, Assembly of the Heads of State and Government, First Ordinary Session, Cairo, 17-21 July 1964, AHG/Res. 16 (I) of 21 July 1964, "Border Disputes among African States".

the Court's adjudication in the dispute between Somalia and Kenya on the basis of the right to self-determination. When Somalia became independent in 1960, it assumed sovereignty over territory in respect of which Italy formerly exercised sovereignty; in particular, it assumed responsibility for the conduct of foreign relations in respect of that territory. Similarly, when Kenya became independent in 1963, it assumed sovereignty over territory in respect of which the United Kingdom formerly exercised sovereignty; in particular it assumed responsibility for the conduct of foreign relations in respect of that territory. The right to self-determination reflected in resolution 1514 (XV) of the United Nations General Assembly, enables both Somalia and Kenya to determine the conduct of their foreign relations, including whether to maintain the treaties entered into by Italy and the United Kingdom in respect of the territory over which they now exercise sovereignty. This is confirmed by Article 2 of resolution 1514 (XV) which provides that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". The right to self-determination[19] as reflected in resolution 1514 (XV) was already a rule of customary international law at the time of the independence of Somalia and Kenya.

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

[19] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019 (I)*, separate opinion of Judge Patrick Robinson, p. 294.

## ACQUIESCENCE

46. Acquiescence, like the kindred concept of estoppel, owes its place in international law primarily to Anglo-American law. In international law, acquiescence applies to cases where, although a State's consent has not been expressly given to a course of conduct by another State, an inference may be drawn that the State's silence denotes its consent to that conduct, that is, its agreement with that conduct. Thus, the primary task in acquiescence is to determine the circumstances in which it is permissible to infer from a State's silence its consent or agreement with the conduct of another State. In that regard, an essential evidentiary requirement for acquiescence to apply is that the inference of State consent from its silence may only be drawn if the circumstances are such that a response is called for. This is the most important element in the law of acquiescence.

47. It is settled that for acquiescence to apply there must be an examination of the conduct of the State claiming acquiescence to determine whether it is clear and consistent and, as a consequence, calls for a response from the alleged acquiescing State. Thus, the initial focus is on the conduct of the State claiming acquiescence with a view to deciding whether it calls for a response from the alleged acquiescing State.

48. Kenya captures very well the meaning of acquiescence in paragraph 210 of its Counter-Memorial when it argued that "the absence of protest when a response is called for constitutes acquiescence". Kenya is correct. That is the law. Kenya's submission reflects the requirement that it is only when a response is called for to the conduct of the State claiming acquiescence and that response is not forthcoming, that an inference may be drawn that silence signifies consent with the conduct of the State claiming acquiescence. It is true that in its pleadings Kenya examines the conduct of the alleged acquiescing State, Somalia, but it carries out this examination on the basis that, in its view, its own conduct called for a response from Somalia — a response that, it maintains, was not given. Thus, in paragraph 208 of its Counter-Memorial, Kenya alludes to the Kenyan proclamations of 1979 and 2005, arguing that they clearly and unambiguously reflected Kenya's position on a maritime boundary with Somalia at a parallel of latitude. Kenya submits that Somalia was aware of these proclamations and, if it had an objection, it should have protested. But Kenya's position is not that it is necessary *ab initio* to examine Somalia's conduct to determine whether there has been acquiescence. Rather, its position, consistent with its submission that the absence of protest when a reaction is called for constitutes acquiescence, is that its own conduct, such as the issuance of the proclamations of 1979 and 2005, required a response from Somalia and, since that was not forthcoming, Somalia's silence may be taken to signify its consent or agreement with its conduct. Thus, every submission made by Kenya that an examination of Somalia's conduct shows that Somalia failed to protest when a response was called for must be considered against the background of its main proposition that its own conduct was clear and consistent, and therefore

called for a response from Somalia. In other words, Kenya's own position is that an examination of Somalia's conduct is consequential and dependent on a finding that a response was called for from Somalia — a position that is wholly consistent with the law of acquiescence. In this regard, the Court appears to have misinterpreted Kenya's position.

49. Kenya's proposition that the absence of protest when a response is called for constitutes acquiescence is consistent with the case law of the Court. In *Pedra Branca* the Court found that "silence may also speak, but only if the conduct of the other State calls for a response"[20]. Here the Court reflects the strong evidentiary requirement, implicit in the words "only if", that an inference of consent may only be drawn if the conduct of the State claiming acquiescence calls for a response. It may be observed that this strong evidentiary requirement is consistent with the substantive law that the evidence of acquiescence must be compelling.

50. There is an inherent conflict between the Court's finding in paragraph 71 and its finding in paragraph 72. After examining the conduct of Kenya, the Judgment concludes in paragraph 71 "that Kenya has not consistently maintained its claim that the parallel of latitude constitutes the single maritime boundary with Somalia". In effect the Court concluded that, by virtue of the inconsistency of Kenya's conduct, no response was called for by Somalia; consequently, the Court should have dismissed the claim. There was no need to move on to determine whether Somalia clearly and consistently accepted a maritime boundary at the parallel of latitude (para. 72); to do so undermines the earlier finding that Kenya's conduct was not consistent and, consequently, no response was called for by Somalia. The conflict between paragraphs 71 and 72 is evident because, if Kenya did not consistently maintain its claim, it would be impossible to identify with any certainty what Somalia could clearly and consistently have acquiesced to. This explains why the most important aspect of the law on acquiescence is an examination of the conduct of the State claiming acquiescence to determine whether that conduct requires a response. In particular the Court's approach flies in the face of the finding in paragraph 71 that "it was reasonable for Somalia to understand that its maritime boundary with Kenya in the territorial sea, in the exclusive economic zone and on the continental shelf would be established by an agreement to be negotiated and concluded in the future". If it is reasonable for Somalia to have this understanding, it is difficult to appreciate why the Court would go on to examine whether Somalia clearly and consistently accepted a maritime boundary at the parallel of latitude. This is so because the Court could only have made this finding on the basis that it had rejected Kenya's claim of Somalia's acquiescence to a boundary

[20] *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 51, para. 121.

along a parallel of latitude — all the more reason why an enquiry into Somalia's conduct was unnecessary.

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

52. Consequently, I am unable to agree with the Court's conclusion in paragraph 80; after its finding in paragraph 71, the Court should have dismissed Kenya's claim. In my view, it reflects a wrong reading not only of the law, but also of Kenya's own submission. Properly understood, Kenya's own submission proceeds on the basis that the evidentiary hurdle of a required response must first be cleared before undertaking any examination of Somalia's acceptance of a maritime boundary along a parallel of latitude. Since the Court has found that no such response was required the question of an examination of Somalia's conduct does not arise.

*(Signed)* Patrick L. ROBINSON.