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Transparency and Predictability in the Maritime Delimitation Process: Reverse-engineering the Somalia-Kenya Adjudicated Boundary

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Abstract

This article analyses the adjudicated boundary between Somalia and Kenya in the Indian Ocean through an integrated law-and-science approach. Using recent high-resolution satellite imagery and specialised boundary software, it seeks to 'reverse-engineer' the 12 October 2021 ruling of the International Court of Justice with a particular focus on issues of transparency and predictability. The article highlights how ambiguities in the identification of basepoints underlying the adjudicated boundary and the reliance on a relatively small-scale nautical chart based on dated surveys that does not reflect the physical reality of the relevant coast could undermine the authority of an adjudicated boundary obtained after years of legal proceedings. Addressing the issue of technical support in decision-making on adjudicated boundaries, the article proposes various means to reduce controversies regarding maritime boundary delimitation and to make the delimitation process more transparent and predictable.

Keywords

Indian Ocean – maritime boundaries – basepoints – equidistance – three-stage methodology – United Nations Convention on the Law of the Sea (LOSC) – International Court of Justice (ICJ)

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> [t]ransparency and predictability of the delimitation process as a whole are also objectives to be taken into account in this process.[1]

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Introduction

On 12 October 2021, the International Court of Justice (ICJ) delivered its judgment in the case concerning *Maritime Delimitation in the Indian Ocean* (*Somalia* v. *Kenya*), delimiting an all-purpose maritime boundary between all maritime jurisdictional zones appertaining to Kenya and Somalia.[2] While the ICJ's judgment refers to the importance of predictability in the maritime delimitation process,[3] in line with recent statements contained in findings of other tribunals,[4] the ICJ's ruling, especially concerning key technical aspects underlying the boundary determined by the Court and the reasoning

1 *Case Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), Judgment, *ITLOS Reports 2017*, p. 4, at para 281 [*Ghana-Côte d'Ivoire* judgment].

2 That is, a territorial sea boundary, a coincident exclusive economic zone (EEZ) and continental shelf boundary and a continental shelf boundary where the continental shelf rights of the parties exceed 200 nautical miles (M) from the coast. *Maritime Delimitation in the Indian Ocean* (*Somalia* v. *Kenya*), Judgment, 12 October 2021, available at https://www.icj-cij.org/public/files/case-related/161/161-20211012-JUD-01-00-EN.pdf; accessed 29 December 2021 [*Somalia-Kenya* judgment]. Such all-purpose maritime delimitation lines are often referred to as 'single maritime boundaries'. See, e.g., L Bernard and C Schofield, 'Separate lines: Challenges and opportunities of differentiated seabed and water column boundaries' in M Nordquist and J Moore (eds), *International Marine Economy: Law and Policy* (Martinus Nijhoff Publishers, Leiden, 2017) 282–321, at p. 282.

3 *Somalia-Kenya* judgment (n 2), para 128.

4 See, e.g., *Ghana-Côte d'Ivoire* judgment (n 1), paras 281, 289; *Arbitration between Barbados and the Republic of Trinidad and Tobago* (*Barbados* v. *Trinidad and Tobago*), Award, (2006) 45 *ILM* 798, para 230 (referring to '[t]he search for predictable, objectively-determined criteria

underlying its ruling in this case, raises questions regarding the critical elements of transparency and predictability within the delimitation process. As explored in this article, aspects of the Court's decisions in this case are questionable and have spatial, practical and legal consequences, as well as potential geopolitical repercussions.

The ICJ's reliance on a relatively small-scale nautical chart based on dated surveys that does not reflect the physical reality of the coast, as readily detectable using recent high-resolution satellite imagery, informs the issues identified in this article. This is especially perplexing as the Court did correctly locate the starting-point of the maritime boundary on the present-day low-water line. Moreover, the ICJ's delimitation of the territorial sea in this case yields a boundary whose terminus is almost 13 nautical miles (M) measured from the basepoints on the coast selected by the Court. This apparent inconsistency with the terms of the United Nations Convention on the Law of the Sea (LOSC)[5] is the consequence of the Court discounting offshore features, in particular the Diua Damasciaca islets off Somalia's coast, for boundary delimitation purposes but not for the delineation of territorial sea limits.[6] As a result, the terminus of the territorial sea boundary delimited by the Court is shown on recent high-resolution satellite imagery to be approximately 12 M from certain small offshore features.[7] For exclusive economic zone (EEZ) and continental shelf delimitation, Somalia's Diua Damasciaca islets were also likewise ignored by the ICJ for providing basepoints. However, analysis of

for delimitation, as opposed to subjective findings lacking precise legal or methodological bases').

5 United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396.

6 The difference between determining the maritime boundary and setting the maritime limit was mentioned by the arbitral tribunal in the *Eritrea/Yemen* case. See *Sovereignty and Maritime Delimitation in the Red Sea* (*Eritrea/Yemen*), Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Maritime Delimitation), Award of 17 December 1999, para 161, available at https://pcacases.com/web/sendAttach/518; accessed 18 February 2022 [*Eritrea/Yemen* award].

7 For our analysis, we relied on combinations of 2D and 3D advanced image interpretation and we used combinations of high resolution (10-meter) and extreme high resolution (sub-meter) present-day satellite imagery. See QGIS PI 13.14.16 (64-bit) open-source software (version 20 September 2020); Extreme High-resolution Imagery (sub-meter) Border/Marine Regional analysis Dar es Salam Kenya & Somalia, 1°55′50.32″S, 42°5′34.05″E, Scale 1:1250, © 2021 MAXAR Technologies (accessed 15 November 2021); CARIS-LOTS (V4.1) Law of the Sea GIS Software (Active Version 5 March 2022); High-resolution Imagery (5-meter (gridded) & 10-meter) Extensive Regional Assessment, Border/Marine Regional analysis Kenya & Somalia, 1°39′43.20″S, 41°33′33.19″E, Scale 1:125,000; Copernicus © Sentinel-2 Satellite Image (imagery scenes collected on 16 June 2021, 23 December 2021, 2 January 2022 and 26 February 2022).

recent satellite imagery reveals that the Court selected basepoints for Kenya for delimitation of the EEZ and the continental shelf on similarly insignificant insular features, without explanation for these choices. Consequently, the ICJ's treatment of small insular features in this case was perplexingly inconsistent and arguably at odds with past jurisprudence in maritime boundary delimitation, as detailed in this article.

The apparent deficiencies and ambiguities in the ICJ's ruling in this case raise concerns over the technical dimensions of the Court's deliberations in maritime delimitation cases, thereby affecting the transparency of the process. While it is apparent from the technical content of the ruling that the Court has some access to technical input, it is unclear precisely who provides this service.[8] This suggests that enhanced technical support to aid the Court's decision-making process in maritime delimitation cases is warranted, together with greater transparency as to the source of this technical backup.

In light of the interface between law and science that is part and parcel of the maritime delimitation process, where science sets the stage for (international) law with binding effect for coastal States, this article will review the ICJ's decision in the *Somalia-Kenya* maritime boundary case from a transparency perspective by applying the technique of reverse-engineering the ruling.

Transparency and Predictability of the Delimitation Process

The need for the promotion of transparency in international dispute settlement has gained substantial momentum internationally. Transparency has become a major theme in recent times, especially in the context of investor-State arbitration involving high-stakes, bet-the-country claims brought by investors against their host States, as evidenced by recent review and reform initiatives undertaken by the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank's International Centre for Settlement of Investment Disputes (ICSID) as well as new-generation and model

8 The *Somalia-Kenya* judgment lists the judges and counsel involved in the case, but it is silent concerning the identity of any technical support that the ICJ may have received in plotting the maritime boundary. On the issue of the use of invisible or 'phantom' experts by the ICJ, see, e.g., LC Lima, 'The debate on the use of experts by the International Court of Justice: An inquiry through sociological lenses' (2020) 34 *Temple International & Comparative Law Journal* 253–282; CE Foster, 'New clothes for the emperor? Consultation of experts by the International Court of Justice' (2014) 5 *Journal of International Dispute Settlement* 139–173. See also F Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press, Cambridge, 2019).

investment protection treaties.[9] Notable international instruments on transparency having emerged in recent years include the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration[10] and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention).[11]

In light of these initiatives affecting cases involving sovereign States, it is surprising that there is such a lack of transparency in the context of the maritime delimitation process, where the stakes are high for the coastal States involved, as well as for their concessionaires and licensees. In this context, the promotion of transparency is driven by the need for the creation of certainty and stability. Transparency serves to build stakeholders' trust in maritime boundaries adjudicated through a third-party judicial or arbitral process. Determining boundaries with pinpoint accuracy is a key component of transparency, and the use of recent high-resolution satellite imagery and specialised boundary software enhances the predictability and stability of boundaries.

In the *Ghana-Côte d'Ivoire* judgment, the ITLOS Special Chamber observed, with regard to the delimitation of the EEZ and the continental shelf, that '[t]he appropriate delimitation methodology – if the States concerned cannot agree – is left to be determined through the dispute-settlement mechanism

9 See, e.g., UNCITRAL, Settlement of commercial disputes: Preparation of a Legal Standard on Transparency in Treaty-Based Investor-State Arbitration, Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-third session (Vienna, 4–8 October 2010), UN Doc A/CN.9/712, 20 October 2010; UNCITRAL, Possible reform of investor-State dispute settlement: Submission from the European Union, UN Doc A/CN.9/WG.III/WP.145 (12 December 2017); UNCTAD, *Transparency: UNCTAD Series on Issues in International Investment Agreements II* (*A Sequel*) (United Nations, 2012) available at http://unctad.org/en/PublicationsLibrary/unctaddiaeia20IJd6_en.pdf; accessed 12 December 2021; UNCTAD, *UNCTAD's Reform Package for the International Investment Regime* (2018) available at https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf; accessed 21 December 2021; International Institute for Sustainable Development, *Transparency and the UNCITRAL Arbitration Rules*, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-3&chapter=22&lang=en; accessed 20 December 2021; International Centre for Settlement of Investment Disputes (ICSID), 'About the ICSID Rule Amendments' available at https://icsid.worldbank.org/resources/rules-and-regulations/amendments/about; accessed 28 December 2021.

10 Text available at the UNCITRAL website, www.uncitral.org; accessed 26 February 2022. See also K Loken, 'Introductory note to UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration' (2013) 52 *ILM* 1300.

11 United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 10 December 2014, in force 18 October 2017); see also E Shirlow, 'Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration' (2016) 31(3) *ICSID Review* 622.

and should achieve an equitable solution, in the light of the circumstances of each case'.[12] In that context, the Special Chamber emphasised 'additionally that transparency and predictability of the delimitation process as a whole are also objectives to be taken into account in this process'.[13] In other words, what appears to be emerging from the maritime delimitation jurisprudence developed by international courts and tribunals is that 'the ultimate goal'[14] of achieving an 'equitable solution,' as it is enshrined in Articles 74(1) and 83(1) of the LOSC, encapsulates the objectives of transparency and predictability, even though the LOSC does not explicitly mention those objectives in its delimitation provisions.

In line with these objectives, the ITLOS Special Chamber went as far as concluding that it would 'be in contradiction of the principle of transparency and predictability' if the equidistance/relevant circumstances methodology would not be adopted absent 'any compelling reasons that make it impossible or inappropriate to draw a provisional equidistance line'.[15] Thus, the Special Chamber elevated transparency and predictability to the level of a *principle* dictating the use of the equidistance/relevant circumstances methodology absent compelling reasons, because that methodology 'has been practised overwhelmingly by international courts and tribunals in recent decades'.[16] This suggests that the objectives of transparency and predictability are subsumed in the ultimate goal of achieving an equitable solution.

In the *Somalia-Kenya* judgment, the ICJ employed the three-stage methodology, which has been applied in every international maritime boundary delimitation case since it was articulated in the Court's ruling in the *Black Sea* case in 2009, as described in more detail below.[17] The Court noted that the three-stage methodology 'has brought predictability to the process of maritime delimitation and has been applied by the Court in a number of past cases'[18] and 'has

12 *Ghana-Côte d'Ivoire* judgment (n 1), para 281.

13 *Ibid.* (citing *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India* (*Bangladesh* v. *India*), Award of 7 July 2014, para 339).

14 *Delimitation of the Maritime Boundary in the Bay of Bengal* (*Bangladesh/Myanmar*), Judgment, *ITLOS Reports 2012*, p. 4, at p. 86, para 317 [*Bangladesh-Myanmar* judgment].

15 *Ibid.*

16 *Ibid.*, para 289.

17 *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), Judgment [2009] ICJ Rep 61 [*Romania-Ukraine* judgment].

18 *Somalia-Kenya* judgment (n 2), para 128 (citing *Maritime Delimitation in the Black Sea* (*Romania* v. *Ukraine*), Judgment [2009] ICJ Rep 61, at p. 101, paras 115 et seq.; *Territorial and Maritime Boundary Dispute* (*Nicaragua* v. *Colombia*), Judgment [2012] ICJ Rep 624, at p. 695, para 190; *Maritime Dispute* (*Peru* v. *Chile*), Judgment [2014] ICJ Rep 3, at p. 65, para 180; *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica*

also been used by international tribunals'.[19] However, the ICJ pointed out that 'the three-stage methodology is not prescribed by the Convention and therefore is not mandatory'[20] as a legal principle or otherwise. The Court affirmed that it 'will not use the three-stage methodology if there are "factors which make the application of the equidistance method inappropriate," for instance if the construction of an equidistance line from the coasts is not feasible'.[21] In the case between Somalia and Kenya, the ICJ saw no reason to depart from 'its usual practice' of using the three-stage methodology to determine the maritime boundary between Somalia and Kenya in the EEZ and for the continental shelf.[22]

From a legal perspective, there is a subtle, yet significant, difference between applying a concept as a (legal) principle or following it merely as a matter of *usual practice*. Interestingly, the ICJ did not refer to transparency and predictability as 'objectives' of the delimitation process – it merely observed that the three-stage methodology 'has brought predictability to the process of maritime delimitation'.[23]

The ICJ's maritime boundary ruling in the *Somalia-Kenya* case nowhere refers to transparency, which is remarkable in the light of the technical deficiencies and inconsistencies identified in this article. It is also notable that the section on maritime delimitation in the *Somalia-Kenya* judgment covers only 39 pages, which includes 13 pages of sketch-maps and tables.[24] A more detailed discussion and reasoning, based on solid scientific evidence and modern technology, would have enhanced the transparency of the ruling and, indeed, the accuracy of the adjudicated boundary line in this case.

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v. *Nicaragua*) and *Land Boundary in the Northern Part of Isla Portillos* (*Costa Rica* v. *Nicaragua*), Judgment [2018] ICJ Rep 139, at p. 190, para 135).

19 *Ibid.* (citing *Bangladesh/Myanmar* judgment (n 14), at p. 67, para 239; *Bay of Bengal Maritime Boundary Arbitration* (*Bangladesh* v. *India*), Award of 7 July 2014, RIAA, Vol. XXXII, p. 106, para 346; *Delimitation of the Maritime Boundary in the Atlantic Ocean* (*Ghana/Côte d'Ivoire*), Judgment, [2017] ITLOS Rep 2017, p. 96, para 324).

20 *Ibid.*

21 *Somalia-Kenya* judgment (n 2), para 129 (citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), Judgment [2007] ICJ Rep 659, at p. 741, para 272, and p. 745, para 283).

22 *Ibid.*, para 131.

23 *Ibid.*, para 128.

24 In her declaration attached to the ICJ's judgment, Judge Xue (People's Republic of China) notes that the Court does not provide much explanation to the adjustment of the provisional equidistance line effected by it. *Ibid.*, declaration of Judge Xue, para 18.

Case History

The maritime boundary dispute between Somalia and Kenya, adjacent States bordering the Indian Ocean on the eastern coastal frontage of the African continent, essentially arose from their fundamentally differing approaches to maritime delimitation and their inability to reach an agreement regarding their shared boundary. Somalia instituted proceedings against Kenya through an application submitted to the ICJ on 28 August 2014, requesting that the Court establish a single maritime boundary delimiting the territorial sea, EEZ and continental shelf, including seawards of 200 M from the coast.[25] Somalia invoked the declarations made by Somalia and Kenya under the optional clause of Article 36(2) of the ICJ Statute as the basis of the Court's jurisdiction.[26]

Following Somalia's submission of its memorial in July 2015,[27] Kenya raised preliminary objections to the Court's jurisdiction and the admissibility of Somalia's application on 7 October 2015.[28] Kenya's objections were rejected by the ICJ through its judgment of 2 February 2017, finding that the Court had jurisdiction to hear the case.[29]

Kenya duly submitted its counter-memorial in December 2017, followed by Somalia's reply in June 2018 and a rejoinder on the part of Kenya in December 2018.[30] Thus, the case was ready for hearing at the end of 2018. Additionally, Kenya requested the opportunity to submit new documents in March 2021 – a request that was granted by the ICJ subject to Somalia being afforded the chance to respond to these fresh submissions.[31]

Hearings on the merits, originally scheduled for September 2019, were delayed at Kenya's request and despite Somalia's objections.[32] These hearings were then further delayed as a consequence of the COVID-19 pandemic but

25 *Somalia-Kenya* judgment (n 2), para 1.
26 Somalia on 11 April 1963 and Kenya on 19 April 1965.
27 Memorial of Somalia, 13 July 2015, available at https://www.icj-cij.org/en/case/161; accessed 2 December 2021.
28 *Maritime Delimitation in the Indian Ocean* (*Somalia* v. *Kenya*), Preliminary Objections of the Republic of Kenya, 7 October 2015, available at https://www.icj-cij.org/public/files/case-related/161/19074.pdf; accessed 1 December 2021. *Somalia-Kenya* judgement (n 2), para 7.
29 *Maritime Delimitation in the Indian Ocean* (*Somalia* v. *Kenya*), Preliminary Objections, Judgment, *ICJ Reports 2017*, p. 3.
30 All these documents are available on the ICJ website, https://www.icj-cij.org/en/case/161; accessed 13 February 2022.
31 *Somalia-Kenya* judgment (n 2), para 17.
32 *Ibid*., para 13.

were finally held, in hybrid format, 15–18 March 2021.[33] Three days prior to the start of these hearings, Kenya informed the ICJ that it would not be participating in the hearings.[34] Kenya did, however, submit four further documents to the Court which, despite Somalia's assertions that they were neither new nor critical, the ICJ decided would be considered, though together with Somalia's observations on them.[35] Ultimately, Kenya did not participate in the oral proceedings on the merits, to the Court's regret.[36]

The Positions of Somalia and Kenya

The reason for the existence of a broad area of overlapping maritime claims between Kenya and Somalia prior to the ICJ settling the dispute arose because of their opposing views on whether a maritime boundary already existed between them. Somalia premised its request for a maritime boundary delimitation on its claim that there was no pre-existing boundary with Kenya. It argued that an equidistance line – that is, a line every point of which is at an equal distance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured – was the appropriate method to delimit the boundary between the two States absent their agreement.[37] As a consequence of the northeast-southwest configuration of the parties' coastline, Somalia's claimed equidistance line results in a claim line proceeding in broadly south-easterly direction, as depicted in the figures below.

In contrast, Kenya asserted that a maritime boundary already existed between the parties consistent with Kenya's claim line along the 1°39′43.2″ S parallel of latitude proceeding due east from the terminus of the land border on the coast.[38] The primary basis for this claim rested on Kenya's assertion that Somalia had failed to respond, and thereby had tacitly agreed, to Kenya's claim to the parallel of latitude line made in 1979,[39] as well as its submission to the Commission on the Limits of the Continental Shelf (CLCS) in 2009.[40] According to Kenya, its claims were only formally objected to by Somalia on

33 *Ibid.*, paras 14–16.
34 *Ibid.*, para 19.
35 *Ibid.*, para 21.
36 *Ibid.*, paras 28–29.
37 *Ibid.*, para 35.
38 *Ibid.*, paras 4, 35.
39 Proclamation by the President of the Republic of Kenya, 28 February 1979. See *Somalia-Kenya* judgment (n 2), para 38.
40 *Somalia-Kenya* judgment (n 2), para 38.

4 February 2014, in a situation where, according to Kenya, Somalia should have protested promptly.[41] Kenya also pointed out that Somalia's Maritime Law of 1988 referred to 'a straight line towards the sea from the land' with respect to delimitation of the Somalia-Kenya territorial sea boundary.[42] Kenya further provided evidence of the conduct of the parties between 1979 and 2014 'on the water', relating to naval enforcement activities, fisheries, marine scientific research and offshore oil exploration that in its view confirmed Somalia's acceptance of the parallel of latitude as the maritime boundary.[43]

Somalia countered all of these assertions on the part of Kenya, indicating that it had articulated its claim to an equidistance line maritime boundary in 1974, during the Third United Nations Conference on the Law of the Sea, that the reference to a 'straight line' in its 1988 Maritime Law was intended to mean an equidistance line while noting that there is no equivalent word for this in the Somali language.[44] Somalia also argued that it was 'unreasonable and unrealistic' for Kenya to expect Somalia to respond diplomatically to its claims when Somalia was embroiled in a civil war that deprived it of a functioning government in the period 1979–2014.[45] Somalia also pointed out that it had, in fact, promptly protested Kenya's claims 'once it resumed having a functioning government after the long civil war'.[46] Finally, Somalia argued that what it characterised as Kenya's 'maritime *effectivités*', or Kenya's purported displays of authority in the disputed area, did not demonstrate the existence of a maritime boundary along the parallel of latitude line as claimed by Kenya.[47]

In response to the parties' arguments, the ICJ, after reiterating that the essential question for determining the existence of an agreed boundary is whether there is a shared understanding between the countries concerned regarding their maritime boundaries,[48] noted that in the past it had set a 'high threshold' for proof regarding the establishment of a maritime boundary by acquiescence or tacit agreement.[49] The required standard of proof is 'compelling evidence' and acquiescence in this context is 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as

41 *Ibid.*, para 42.
42 Somalia, Maritime Law of 1988, Article 4(6).
43 *Somalia-Kenya* judgment (n 2), para 43.
44 *Ibid.*, para 46.
45 *Ibid.*
46 *Ibid.*
47 *Ibid.*, para 47.
48 *Ibid.*, para 50.
49 *Ibid.*, para 52. See also M Lando and JJ Hébert, 'How to complicate a simple case: The judgment on the merits in *Maritime Delimitation in the Indian Ocean* (*Somalia* v *Kenya*)' (2022) 37 *International Journal of Marine and Coastal Law* (IJMCL) 3–5.

consent'.[50] The ICJ further noted that Kenya's assertions were at odds with its own maritime legislation, particularly Kenya's 1989 Maritime Zones Act[51] and its 2009 submission to the CLCS,[52] as well as practice in relation to offshore oil and gas exploration activities.[53] The ICJ therefore concluded that there is 'no compelling evidence that Kenya's claim and related conduct were consistently maintained'.[54]

Regarding the term 'a straight line' used in Somalia's maritime legislation of 1988, the ICJ found that the meaning of this phrase was unclear.[55] The Court also referred to several instances where Somalia's view that the maritime boundary was unsettled was expressed.[56] Moreover, the ICJ indicated that it 'cannot ignore' the historical context whereby civil war effectively deprived Somalia of a functioning government between 1991 and 2005.[57] Consequently, the ICJ observed that the alleged absence of protest and other conduct on the part of Somalia to Kenya's parallel of latitude claim 'does not establish Somalia's clear and consistent acceptance of a maritime boundary at the parallel of latitude'.[58]

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50 *Ibid*., para 51 (citing *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*), Judgment [1984] ICJ Rep 246, at p. 305, para 130 [*Canada-USA* judgment]).

51 *Ibid*., para 60. The Court observed that Kenya's 1989 Maritime Zones Act makes no reference to its 1979 Proclamation or to a boundary line consistent with the line of latitude.

52 Republic of Kenya, Submission on the Continental Shelf beyond 200 nautical miles to the Commission on the Limits of the Continental Shelf, Executive Summary, April 2009, available at https://www.un.org/Depts/los/clcs_new/submissions_files/ken35_09/ken2009_executivesummary.pdf; accessed 13 February 2022.

53 *Somalia-Kenya* judgment (n 2) paras 60, 65–68. Kenya argued that the conduct of the parties, including with respect to oil concessions, reflected the existence of a *de facto* maritime boundary. However, the ICJ observed that the use by the parties of a *de facto* line along the parallel of latitude for the location of oil concession blocks may have been 'simply the manifestation of the caution exercised by the Parties in granting their concessions' (citing *Sovereignty over Pulau Ligitan and Pulau Sipadan* (*Indonesia/Malaysia*), Judgment [2002] ICJ Rep 625, at p. 664, para 79). The Court also recalled that a *de facto* line 'might in certain circumstances correspond to the existence of an agreed legal boundary or might be more in the nature of a provisional line or of a line for a specific, limited purpose, such as sharing a scarce resource' (citing *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea* (*Nicaragua* v. *Honduras*), Judgment [2007] ICJ Rep 659, at p. 735, para 253). In this context, the ICJ considered that 'proof of the existence of a maritime boundary requires more than the demonstration of longstanding oil practice or adjoining oil concession limits' (citing *Ghana-Côte d'Ivoire* judgment (n 1), para 215).

54 *Ibid*., para 70.

55 *Ibid*., para 77.

56 *Ibid*., para 78.

57 *Ibid*., para 79.

58 *Ibid*., para 80.

The ICJ also concluded that the other conduct of the parties between 1979 and 2014, including in the form of naval patrols and marine scientific research and oil concession activities,[59] likewise 'does not confirm that Somalia has clearly and consistently accepted a maritime boundary at the parallel of latitude'.[60] Accordingly, the Court rejected Kenya's contention that a maritime boundary consistent with the parallel of latitude already existed between the parties.[61] Hence, it was for the ICJ to fix the complete course of the single maritime boundary between Somalia and Kenya, as requested by Somalia.

The ICJ's Decision and the Boundary Starting-Point

Before proceeding with the delimitation of the maritime boundary offshore, the ICJ needed to locate the terminus of the land border on the coast and thus the starting-point for maritime delimitation. Prior to the independence of Somalia in 1960 and Kenya in 1963, the former colonial powers – Italy and Great Britain, respectively – had settled the land border issues between their respective territories through a 1927 agreement that was formally confirmed through an exchange of notes in 1933, referred to collectively by the Court as the '1927/1933 treaty arrangement'.[62] Although Somalia and Kenya indicated different coordinates for the location of the final permanent boundary beacon, Primary Beacon No. 29, or PB 29, these differences were slight (approximately 9.8 meters, using CARIS-LOTS software),[63] and Somalia indicated that it was willing to accept the coordinates proposed by Kenya.[64]

Noting that the parties agreed on the method for identifying the starting-point of the maritime boundary, the ICJ then endeavoured to connect PB 29 to a point on the coastal low-water line as the land terminus point (LTP) that

59 *Ibid*., paras 84–87.

60 *Ibid*., para 88.

61 *Ibid*., para 89.

62 *Ibid*., para 32.

63 CARIS-LOTS is a specialised boundary software package developed by CARIS (Universal Systems Ltd.), a Canadian geomatics software company currently operating as Teledyne CARIS Inc., in the 1990s with the approval of the United Nations. It allows for the computer-assisted drawing of maritime boundaries with pinpoint accuracy based on integrated mathematical applications. See the Teledyne CARIS website, available at https://teledynecaris.com; accessed 3 March 2022. Robert van de Poll, one of the authors of this article, served as chief designer (Product Manager) of CARIS-LOTS, which has been used by parties in maritime boundary delimitation cases before international courts and tribunals, including by Somalia and Kenya in the case discussed in this article. *Somalia-Kenya* judgment (n 2), paras 102, 143–144.

64 *Somalia-Kenya* judgment (n 2), para 96.

would be used as the starting-point for the maritime boundary.[65] The Court did so by defining a straight line perpendicular to the general direction of the coast in the vicinity of the land border terminus as it appeared on British Admiralty Chart 3362 – a chart that was proposed by Kenya and to the use of which Somalia did not object – and 'in accordance with the terms of the 1927/1933 treaty agreement'.[66] The point so located by the Court – 1°39′44.0″ S and 41°33′34.4″ E – is 44.8 metres southeast of PB 29, as shown in Fig. 1.[67]

It is, however, unclear how the ICJ arrived at the coordinates for this point. It appears that the starting point of the maritime boundary was identified on the basis of the location of the low-water line as depicted on British Admiralty Chart 3362. This approach would be analogous to the process applied in the *Ghana-Côte d'Ivoire* judgment.[68] However, the ICJ was not explicit on this

65 This approach was consistent with the practice in other international cases such as that taken in the Ghana-Côte d'Ivoire Case. See *Ghana-Côte d'Ivoire* judgment (n 1), para 356. Somalia indicated that PB29 should be connected to the low-water line by constructing a straight line perpendicular to the direction of the coast and it placed this point, representing the starting-point for the maritime boundary, some 41 metres southeast of PB29. *Ibid.*, para 94. While Kenya had indicated in its counter-memorial and rejoinder that PB29 itself was the appropriate starting-point for the maritime boundary, the Court noted that Kenya, when discussing the construction of a provisional delimitation line, had stated that such a line should begin 'on the low-water line extending south-east from PB29'. *Ibid.*, para 95.

66 Specifically, British Admiralty Chart 3362. In his partly concurring and partly dissenting opinion, Judge Robinson (Jamaica) criticised the majority for having failed to explain how the colonial treaties between Italy and the United Kingdom were relevant to the dispute between Somalia and Kenya. In his view, the ICJ can be said to have interpreted the 1927/1933 treat arrangement without having applied it, because the starting-point identified by the Court for the territorial sea boundary is not the starting-point set out in the 1927/1933 treaty arrangement. See *Somalia-Kenya* judgment (n 2), individual opinion, partly concurring and partly dissenting, of Judge Robinson, at paras 34–36. In his separate opinion, Judge *ad hoc* Guillaume (France) stated that it was incumbent on the Court to apply the 1927/1933 treaty arrangement in accordance with Article 15 of the LOSC. In his view, the Court should have first determined whether the agreements concluded by the colonial powers delimited the territorial sea between Somalia and Kenya up to 12 M from the coastline. Thus, he disagreed with the Court's reasoning, in paragraph 109 of its ruling, 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'. However, he noted that the delimitation line adopted by the ICJ is virtually the same as the line fixed under the 1927/1933 treaty arrangement. *Ibid.*, separate opinion of Judge *ad hoc* Guillaume, paras 16–17, 19–20.

67 *Somalia-Kenya* judgment (n 2), para 98. In a footnote to this paragraph the ICJ explained that '[a]ll the co-ordinates given by the Court are by reference to WGS 84 as geodetic datum'.

68 See *Ghana-Côte d'Ivoire* judgment (n 1), para 399 ('The Special Chamber identified base points from chart BA 1383 by re-digitizing the coastline in the relevant location and then

FIGURE 1 Location of the land terminus point and starting-point for the maritime boundary
ALL FIGURES WERE CREATED BY THE THIRD AUTHOR OF THE ARTICLE, AND ARE PUBLISHED WITH HIS PERMISSION

point. In other words, in contrast to the *Ghana-Côte d'Ivoire* judgment, the *Somalia-Kenya* judgment is not transparent on this critical element of the maritime delimitation process. Hence, the ICJ's ruling on this point arguably fails to provide clear reasoning.[69] Article 56(1) of the ICJ Statute dictates that the Court's judgment states the reasons on which it is based, which 'should allow the reader to understand how the Court reached its conclusions'.[70] It is doubtful that the reader of the *Somalia-Kenya* judgment will be able to understand how the ICJ arrived at the coordinates for the LTP and the basepoints that it selected for the delimitation of the boundary line in this case.

Importantly, the LTP identified by the ICJ is consistent with the location of the low-water line that can be discerned from recent high-resolution satellite imagery[71] and is, therefore, an appropriate location to serve as the starting-point for the maritime boundary. However, the Court's use of a relatively small-scale (1:350,000) nautical chart incorporating dated surveys as a basis for choosing basepoints for territorial sea delimitation is problematic. Concerning the scale of the chart, it can be observed that the United Nations Group of Experts report on baselines cautions against the use of charts that are too old and recommends the use of charts of 1:50,000–200,000 scale for the depiction of baselines.[72] Use of a chart at a scale of 1:350,000 is therefore inappropriate. As the principal judicial organ of the United Nations, it would have been logical for the ICJ to adhere strictly to the UN guidelines regarding the use of charts in

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using the digitized coastline from both States to compute the equidistance line, identifying the relevant base points along each coastline').

69 See, e.g., *Maritime International Nominees Establishment* (*MINE*) v. *Government of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment (14 December 1989), para 5.09, https://www.italaw.com/sites/default/files/case-documents/italaw8608.pdf; accessed 20 January 2020 (observing that 'the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A. to Point B. and eventually to its conclusion').

70 *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), Reparations, Judgment of 9 February 2022, available at https://icj-cij.org/public/files/case-related/116/116-20220209-JUD-01-00-EN.pdf; accessed 16 February 2022, Declaration of Judge Tomka, para 9.

71 For our analysis, we relied on detailed sub-meter image analysis using engineering grade precision satellite imagery, QGIS PI 13.14.16 (64-bit) Open-source Software (version 20 September 2020), Border/Marine Regional analysis Dar es Salaam Kenya & Somalia, 1°55′50.32″S, 42° 5′34.05″E, Scale 1:1250, © 2021 MAXAR Technologies (imagery accessed 15 November 2021). In this instance, and crude as it is, the charted low-water line on British Admiralty Chart 3362 appears to be consistent with its location shown on the satellite imagery.

72 See *The Law of the Sea– Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (United Nations Office for Ocean Affairs and the Law of the Sea, UN Sales No. E.88.V.5, 1989) 1–2 [LOS Baselines Guide].

maritime delimitation, irrespective of the parties' chart preferences. Further, for the area immediately offshore the terminus of the land border on the coast, British Admiralty Chart 3362 relies on British Admiralty surveys dating from 1961–1964 for the Kenyan coastline, coupled with surveys underpinning former Italian Government charts dating from 1942 for the Somalian coastline.[73]

Given that the survey data used to create the selected chart is 60–80 years old, British Admiralty Chart 3362 arguably does not provide a reliable depiction of the present physical reality of the coast, as well as being of an inappropriate scale for the selection of basepoints along it. To its credit, the Court appears to have been aware of the need to walk 'down the beach' in order to properly locate the starting-point of the maritime boundary on the low-water line of the coast as it exists today. What is, however, perplexing is that the Court then promptly opted to, as it were, walk back 'up the beach' to pick basepoints 'solely on solid land on the mainland coast'.[74] Analysis of British Admiralty Chart 3362 coupled with recent high-resolution satellite imagery suggests that the ICJ achieved this aim by selecting points on or above the high-tide line, meaning that these points are well inland of the location of the normal baselines coincident with the low-water line along the coast.

The ICJ's Approach to Maritime Delimitation

Both Kenya and Somalia are parties to the LOSC.[75] Consequently, the relevant provisions of that treaty were deemed to be applicable to maritime boundary delimitation in this case. Accordingly, for the territorial sea the ICJ opted to define a median line, in keeping with Article 15 of the LOSC, though curiously without direct mention of this article (see further below). The Court also adopted the three-stage approach, first articulated by the ICJ in the *Black Sea* case between Romania and Ukraine in 2009,[76] as the basis for delimitation of the EEZ and the continental shelf, while noting that it 'is not prescribed by the Convention and therefore is not mandatory'.[77] This approach, which has been developed by the ICJ in its jurisprudence as well as by other tribunals, comprises, first,

73 This information is derived from the 'Source Data' diagram included on British Admiralty Chart 3362. See Hydrographer of the Navy, 'Lamu to Kismaayo', International Chart Series 3362 (Taunton: United Kingdom Hydrographic Office, 28 August 1997).

74 *Somalia-Kenya* judgment (n 2), para 114.

75 Both Kenya and Somalia signed the LOSC on 10 December 1982, ratifying it on 2 March 1989 and 24 July 1989, respectively. See *Somalia-Kenya* judgment (n 2), paras 33, 92.

76 *Romania-Ukraine* judgment (n 17).

77 *Somalia-Kenya* judgment (n 2), paras 122–125, 128, 131.

that a provisional delimitation line should be established using geometrically objective methods, typically through the equidistance method 'unless there are compelling reasons that make this unfeasible in the particular case';[78] at the second stage, an assessment is to be made as to 'whether there are factors calling for the adjustment or shifting of the provisional equidistance line in order to achieve an equitable result';[79] and, at the third stage, verification of the resulting potential delimitation line is undertaken through what the ICJ has termed the 'disproportionality test'.[80] This test involves a comparison of the ratio of the lengths of the parties' respective relevant coasts and the ratio of the size of the relevant areas apportioned by the provisional boundary line.

Delimitation of the Territorial Sea

Concerning the delimitation of the territorial sea, the ICJ sought to draw a median line, confirming that the construction of such a line is based on the geography of the coasts of the two States concerned and, in particular, basepoints located on their coasts.[81] The Court then observed that while it 'will have regard' to basepoints proposed by the parties, it reserves the right to select basepoints even if the parties are in agreement on particular basepoints or the Court's basepoints differ from those proposed by the parties.

Curiously, the ICJ nowhere expressly invokes Article 15 of the LOSC in its considerations, other than observing that 'Somalia submits that the delimitation of the territorial sea is to be effected pursuant to Article 15 of the Convention'.[82] The Court's confirmation of the applicable law,[83] in combination with the repeated reference to 'the median line' in the section of the ruling discussing the delimitation of the territorial sea,[84] implies that the Court's delimitation of the territorial sea was in fact based on Article 15 of the LOSC, which incorporates the 'equidistance/special circumstances' method. However, the relevant section of the Court's ruling does not mention that method, thus seemingly

78 *Romania-Ukraine* judgment (n 17), para 116.

79 *Somalia-Kenya* judgment (n 2), para 120. At this point the Court cited its earlier judgment in the *Cameroon-Nigeria* case in support of its ruling. See *Land and Maritime Boundary between Cameroon and Nigeria* (*Cameron* v. *Nigeria; Equatorial Guinea intervening*), [2002] ICJ Rep 303, at p. 441, para 288 [*Cameroon-Nigeria* judgment].

80 *Somalia-Kenya* judgment (n 2), paras 122, 125.

81 *Ibid*., para 111.

82 *Ibid*., para 99.

83 *Ibid*., para 92 ('The provisions of the Convention must therefore be applied by the Court in determining the course of the maritime boundary between the two States').

84 *Ibid*., paras 112, 114, 117, 118, 214(3).

conflating delimitation of the territorial sea with delimitation of the EEZ and continental shelf. It is also notable that the Court's choices regarding the basepoints to be used for constructing the territorial sea median line diverge from the basepoints proposed by Kenya and Somalia.[85] Indeed, the basepoints selected be the ICJ are not located on the low-water line, but instead are located substantially inland of the low-water line (see Figs. 1 and 2).

Further, the Court observed that in past rulings it on occasion needed to eliminate or discount basepoints located on small islands due to their disproportionate effect.[86] While the jurisprudence in international maritime boundary delimitation has featured numerous instances of islands being awarded partial effect or being entirely disregarded for the delimitation of EEZ and continental shelf boundaries, this has mostly affected EEZ and continental shelf boundaries and not territorial sea boundaries.[87]

85 *Ibid*., paras 111–114. In the *Ghana-Côte d'Ivoire* judgment, the ITLOS Special Chamber expressly invoked Article 15 of the LOSC. See *Ghana-Côte d'Ivoire* judgment (n 1), para 261 ('The Special Chamber notes that the delimitation of the territorial sea is governed by article 15 of the Convention'). After noting that the parties, in requesting the Special Chamber to delimit a single maritime boundary for their territorial seas, EEZs and continental shelves, had implicitly agreed that the same delimitation methodology be used for these maritime spaces, the Special Chamber considered 'it appropriate to use the same methodology for the delimitation of the Parties' territorial seas, exclusive economic zones and continental shelves within and beyond 200 nm'. *Ibid*., paras 262–263. The *Somalia-Kenya* judgment lacks a similar consideration by the ICJ, even though the Court's ruling suggests that the ICJ took the same approach as the ITLOS Special Chamber, namely, to use the same methodology for the delimitation of all of the maritime spaces dividing Somalia and Kenya.

86 *Ibid*. (citing *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (*Qatar* v. *Bahrain*), Merits, Judgment [2001] ICJ Rep 40, at pp. 104–109, para 219 (referring to *North Sea Continental Shelf* (*Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*), Judgment [1969] ICJ Rep 3, at p. 36, para 57) and *Bangladesh/Myanmar* judgment (n 14), at p. 47, para 151). The Arbitral Tribunal in the Dubai/Sharjah Border Arbitration first extended the rationale of the equidistance/special circumstances rule to the definition of basepoints. See Dubai/Sharjah Border Arbitration, Award of 19 October 1981 [1993] 91 *ILR* 543.

87 See, e.g., *Romania/Ukraine* judgment (n 17), at pp. 122–123, paras 185–188 (no effect accorded to Serpents' Island, which was attributed a 12-M territorial sea pursuant to agreements between the two parties); see also Dubai/Sharjah Border Arbitration (n 86), at p. 677 (no effect accorded to Abu Musa island); *Continental Shelf* (*Tunisia/Libyan Arab Jamahiriya*), Judgment [1982] ICJ Rep 18, at p. 89, para 129 (half-effect accorded to the Kerkennah Islands); *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*), Judgment [1985] ICJ Rep 13, at p. 48, para 64 (no effect accorded to the uninhabited islet of Filfla); *Eritrea/Yemen* Award (n 7), para 148 (no effect accorded to certain Yemeni islands); *Qatar* v. *Bahrain*, merits, judgment (n 86), at p. 122, para 185 and p. 123, para 188 (no effect accorded to the tiny uninhabited island of Qit'at Jaradah); *Bangladesh/Myanmar* judgment (n 14), para 319 (no effect accorded to St. Martin's Island in EEZ and continental shelf delimitation).

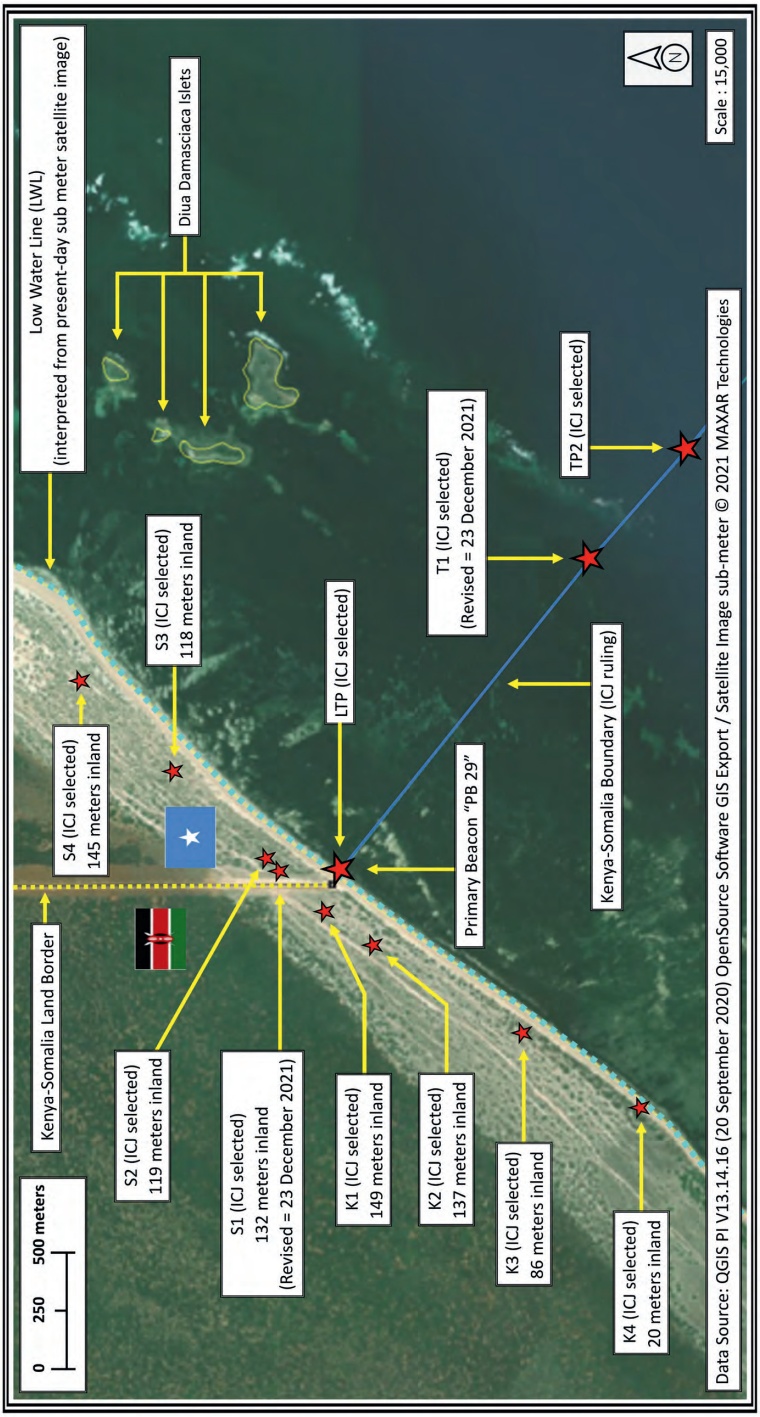

FIGURE 2 Nearshore territorial sea boundary delimitation and ICJ selected basepoints

In the *Somalia-Kenya* case, the ICJ took exception to the basepoints advanced by the parties, especially those located on 'tiny maritime features', notably the Diua Damasciaca islets. Additionally, the Court not only ignored a low-tide elevation off the southern tip of the Ras Kaambooni peninsula which Somalia had sought to use as a basepoint, but the entirety of that peninsula. This is surprising, particularly for territorial sea delimitation, given that the Ras Kaambooni peninsula is a substantial component of the mainland coastline and site of a sizable township. The ICJ ignored the Diua Damasciaca islets on the grounds that their 'effect on the course of the median line … is disproportionate to their size and significance to the overall coastal geography' and would significantly push the initial course of the median line to the south.[88] No mention was, however, made of this being a special circumstance in keeping with Article 15 of the LOSC. It can also be observed that in one of the cases that the ICJ referred to in support of its reasoning in this context, the *Bangladesh-Myanmar* judgment, the key island in contention, St. Martin's Island, was awarded full effect with respect to territorial sea delimitation, though was ignored, alongside other islands, for EEZ and continental shelf delimitation.[89]

Instead and importantly, the ICJ opted to select its own basepoints 'solely on solid land on the mainland coasts of the Parties', with the above-mentioned small insular features being ignored.[90] Problematically, as depicted in Figs. 1 and 2, the ICJ selected basepoints for the delimitation of the territorial sea on or above the high-water line rather than the low-water line, although it does not indicate this explicitly, which represents another instance of lack of transparency in the *Somalia-Kenya* judgment. This means that the ICJ's selected basepoints are substantially inland from the actual location of normal baselines consistent with the low-water line along the coast and, indeed, the location designated as the starting-point for the maritime boundary by the Court, as outlined above. Our analysis of the original text of the ruling released on 12 October 2021, based on the use of CARIS-LOTS boundary software, shows that the court-selected basepoints, four for each party (S1–S4 and K1–K4),[91] are on average over 100 metres inland of normal baselines along the mainland coast (see Fig. 2). This appears to be especially contentious with respect to delimitation of the territorial sea, given the explicit terms of Article 15 of the LOSC that the median line is 'equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two States is

88 *Somalia-Kenya* judgment (n 2), para 113.
89 *Bangladesh/Myanmar* judgment (n 14), paras 152–169, 265.
90 *Somalia-Kenya* judgment (n 2), para 114.
91 *Ibid.*, paras 115–116.

measured'.[92] In our view, a median line constructed between basepoints unilaterally chosen by the Court well inland from the normal baselines of the parties is manifestly not a median line in keeping with the terms of Articles 5 and 15 of the Convention.

Moreover, and arguably of even more concern, at the time the Court delivered its ruling on 12 October 2021, Somalia's basepoint 1 (S1) was fixed at 66.8 metres on the *Kenyan* side of the land border as a consequence of the angle at which the land border intersects the coast (see Figs. 1 and 2 and Table 1). The present authors pointed out this error in an online commentary published on 8 December 2021.[93] This error is especially perplexing given the Court's earlier efforts to locate the starting-point of the maritime boundary on the low-water line, to the southeast of PB 29.[94] When the ICJ's ruling was issued, the position of S1 was provided as 1°39′40.4″ S – 41°33′31.1″ E. The metadata associated with the *Somalia-Kenya* judgment available on the ICJ's website suggests that the original text of the ruling was changed by the Court on 23 December 2021. On that date, the coordinates for S1 were altered to 1°39′36.7″ S – 41°33′34.3″ E. This relatively minor alteration in the coordinates for S1 served to shift the location of this basepoint for Somalia to 35.2 metres on the Somali side of the land border, as illustrated on Fig. 1. Additionally, this change necessitated the alteration of the coordinates for the first turning point in the maritime boundary offshore from 1°40′18.4″ S – 41°34′17.5″ E to 1°40′18.3″ S – 41°34′17.4″ E. These changes in the text of the *Somalia-Kenya* judgment that appears on the ICJ's website were made, as far as the authors are aware, without an accompanying public communication such as a press release by the ICJ Registry announcing or explaining these changes. This unpublicised change in what might otherwise be perceived to be a final and binding ruling not subject to subsequent change is troubling and underscores the lack of transparency that is the central theme of this article (Table 1).

Utilising these eight basepoints only, and while ignoring small island features such as the Diua Damasciaca islets, the ICJ, on the basis of equidistance, designated six additional turning points to define the territorial sea boundary together with a further point,[95] designated 'Point A'. Point A is stated as being

92 LOSC (n 5), Article 15.

93 C Schofield, P Bekker and R van de Poll, 'The World Court fixes the Somalia-Kenya maritime boundary: Technical considerations and legal consequences' (8 December 2021) 25(25) *American Society of International Law Insights*, available at https://www.asil.org/insights/volume/25/issue/25; accessed 31 January 2022.

94 *Somalia-Kenya* judgment (n 2), para 98.

95 *Ibid*., para 117.

TABLE 1 Coordinates of basepoints and distance inland from low-water line

***Land Terminus Point (LTP)** **1-39-44.0S 41-33-34.4E** ***Low Water Line (LWL – ICJ Selected)**	**Inland offset from *Low Water Line (LWL) along the mainland coast** **0 meters**
Somalia Basepoints (ICJ Chosen)	Inland offset from *Low Water Line (LWL) along the mainland coast
**S1 1-39-36.7S 41-33-34.3E	132 meters
S2 1-39-34.4S 41-33-36.6E	119 meters
S3 1-39-21.6S 41-33-48.6E	118 meters
S4 1-39-09.2S 41-34-00.7E	145 meters
S5 1-38-24.0S 41-34-35.8E	262 meters
S6 1-34-50.2S 41-37-19.9E	204 meters
Kenya Basepoints (ICJ Chosen)	Inland offset from *Low Water Line (LWL) along the mainland coast
K1 1-39-42.4S 41-33-29.5E	149 meters
K2 1-39-49.0S 41-33-24.9E	137 meters
K3 1-40-09.3S 41-33-12.9E	86 meters
K4 1-40-25.5S 41-33-02.9E	20 meters
	Offshore offset from *Low Water Line along the mainland coast
K5 1-47-11.4S 41-29-10.5E	2827 meters (Offshore Shakani island)
K6 1-47-55.0S 41-28-49.4E	3345 meters (Offshore island)

Mainland Low water line (LWL) was interpreted using MAXAR 2021 sub-meter Satellite Imagery
** ICJ Revised (23 December 2021)

'at the distance of 12 nautical miles from the coast'.[96] However, the coordinates provided by the Court for the terminus of the territorial sea boundary at Point A are located almost 13 M – approximately 12.91 M – from the terminus of the land border on the coast (see Fig. 3).[97] Clearly, a territorial sea boundary in excess of 12.0 M in length would be in direct contravention of the relevant provisions of the LOSC.

This apparent inconsistency is explained by the fact that while the ICJ expressly discounted small insular features off the mainland coast, including but not limited to the Diua Damasciaca islets, for boundary delimitation

96 *Ibid.*
97 See LOSC (n 5), Articles 3–4.

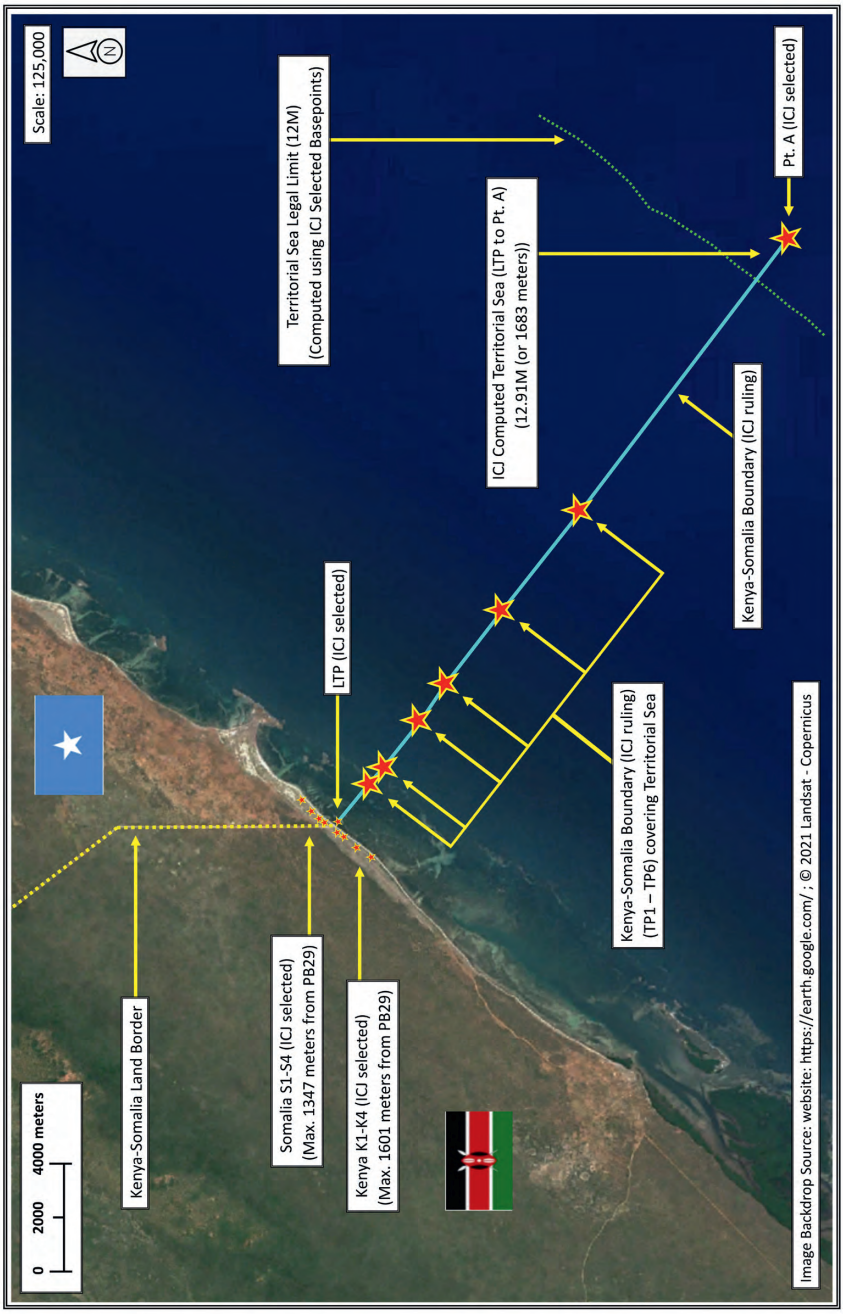

FIGURE 3 Territorial sea boundary analysis

purposes, these naturally-formed above high tide formations fulfil the requirements of Article 121(1) of the LOSC and therefore generate 12-M breadth territorial seas. These features were, therefore, still relevant to the setting of the 12-M territorial sea limits of the parties, explaining the segment of the territorial sea boundary line between Turning Point 6, controlled by the ICJ's selected basepoints, and Point A, located at the 12-M territorial sea limit. As these islands are located at some distance offshore the terminus of the land border on the coast, they generate a territorial sea limit over 12 M from the basepoints selected by the Court for delimitation of the territorial sea boundary. In short, while Point A is 12.0 M from the low-water normal baselines of the parties, this is only the case by virtue of using basepoints on small maritime features, which the ICJ had explicitly ruled were inappropriate to serve as basepoints for territorial sea delimitation purposes.[98]

The Court's ruling lacks transparency, both in not making it clear that small insular features are discounted for delimitation of the territorial sea but still affect the delineation of the maritime limit and, further, not making it apparent from the text of the ruling that the actual line measures 12.91 M from the ICJ's selected basepoints, and not 12.0 M, the breadth described in Article 3 of the LOSC (see Fig. 3 above). That, in effect, the portion of the territorial sea boundary between Turning Point 6 and Point A is dependent on small maritime features specifically ruled out by the Court for delimitation purposes appears to be both curious and arguably problematic. In our view, the selection of basepoints should be dictated by the relevant provisions of the LOSC and the UN's own Baselines publication. The existence of 'special circumstances' mentioned in Article 15 would dictate a delimitation method 'at variance' with the (strict) equidistance method, as the text of that provision makes clear.[99]

Given that the ICJ did not refer to Article 15 of the LOSC in its own considerations,[100] one is left to wonder how the Court came to the conclusion that the same delimitation methodology should be used for the whole delimitation process, that is, for all the maritime zones to be delimited. In the *Ghana-Côte d'Ivoire* judgment, the ITLOS Special Chamber interpreted the

98 *Somalia-Kenya* judgment (n 2), para 114.

99 In the *Ghana-Côte d'Ivoire* case, Côte d'Ivoire's arguments regarding the location of basepoints were treated as potential circumstances favouring the application of the angle bisector methodology for delimitation in lieu of the equidistance methodology to which Article 15 of the LOSC refers in the first instance. The ITLOS Special Chamber rejected those arguments. See *Ghana-Côte d'Ivoire* judgment (n 1), paras 290–318.

100 The Court did expressly invoke Articles 74 and 83 of the LOSC in discussing the delimitation of the EEZ and continental shelf. *Somalia-Kenya* judgment (n 2), para 119.

submissions of both parties to that effect,[101] but the *Somalia-Kenya* judgment lacks a similar statement by the ICJ, presumably because the Court was unable to draw that conclusion from the parties' diverging approaches to delimitation, particularly given Kenya's express rejection of the three-stage methodology in this case.[102]

Delimitation of the EEZ and the Continental Shelf

Having identified the relevant coasts of the parties,[103] as well as the relevant area as preliminary steps underlying the three-stage methodology,[104] the ICJ then turned to the first stage of the three-stage methodology and constructed a provisional equidistance line.[105] The Court did so by identifying additional basepoints, to the north (for Somalia, S4–S6) and south (for Kenya, K4–6), as the basis for the construction of the provisional line for delimitation of the EEZ and the continental shelf, based on British Admiralty Chart 3362.[106] The

101 *Ghana-Côte d'Ivoire* judgment (n 1), paras 259 ('The Special Chamber interprets the submissions of both Parties to the effect that it should use the same delimitation methodology for the whole delimitation process, namely the methodology developed for the delimitation of exclusive economic zones and continental shelves', known as the three-stage methodology) and 360 ('The Special Chamber notes that the two Parties agree, in principle, on the three-stage approach as developed in international jurisprudence').

102 The ICJ expressly acknowledged Kenya's position that the three-stage methodology, including a provisional equidistance line, 'is not appropriate in the present case'. *Somalia-Kenya* judgment (n 2), para 127.

103 *Ibid*., paras 132–137. The ICJ identified the relevant coasts, that is, those coasts whose projections overlap, by using radial projections that overlap within 200 M. The Court agreed with the length of the coast proposed by each party, that is, approximately 733 km for Somalia and approximately 511 km for Kenya, *ibid*.

104 *Ibid*., paras 138–142. Rejecting Somalia's approach to identifying the relevant area beyond 200 M, the ICJ recalled that the relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap and that it cannot extend beyond the area in which the entitlements of both parties overlap. *Ibid*., para 140. On this basis, the Court considered it appropriate to use the overlap of the 200-M radial projections from the land boundary terminus in determining the northern limit and to disregard the maritime space south of the boundary agreed between Kenya and Tanzania. The total relevant area measures approximately 212,844 sq km. *Ibid*., para 141. In her declaration appended to the ICJ's judgment, Judge Xue took issue with the Court's identification of the relevant area, which in her view 'does not encompass the entire potential overlapping entitlements of the Parties in this case', as it omits the continental shelf beyond 200 M from the relevant area. *Ibid*., declaration of Judge Xue, para 10.

105 *Somalia-Kenya* judgment (n 2), paras 142–146.

106 *Ibid*., para 146.

Somalia-Kenya judgment does not specify how exactly the ICJ arrived at the coordinates for the basepoints selected for each party, pointing to additional reasoning deficiencies. There appears to be considerable inconsistency between the choice of basepoints for this part of the delimitation process. The three basepoints selected for Somalia are located over 200 metres inland from the actual location of normal baselines along the mainland coast as shown on recent high-resolution satellite imagery (see Fig. 4). This scenario is exacerbated by the ICJ's decision to discount the Somali peninsula of Ras Kaambooni in its entirety, and not just the low-tide elevation off this peninsula proposed as a basepoint by Somalia, as one that would disproportionately distort an equidistance line. As noted above, Ras Kaambooni is an integral, and populated, component of the mainland rather than an offshore feature more readily discounted. Consequently, one of the basepoints selected for Somalia by the ICJ (S5) is actually located well inland in the midst of the Somali town of Ras Kaambooni, as shown in Fig. 4. In contrast, the basepoints selected by the ICJ for Kenya are located either very close to the reality of the coast (K1–K4) or on or near small insular features located well offshore (K5 and K6) (see Fig. 4 and Table 1).

There hence appears to be a notable inconsistency in the ICJ's treatment of islands with small features being discounted on account of their potentially disproportionate distorting impact on equidistance lines in the vicinity of the territorial sea delimitation line, yet used as basepoints for EEZ and continental shelf delimitation. This inconsistency also appears to have impacted Somalia over Kenya with Somalia's Diua Damasciaca islets and a low-tide elevation off the southern tip of the Ras Kaambooni peninsula being discounted, yet small Kenyan islands being used as basepoints for EEZ and continental shelf delimitation.

With respect to Kenyan basepoints K5 and K6, it is plausible to suggest that the ICJ may have been misled by the depiction of the coast on British Admiralty Chart 3362, a relatively small-scale chart based on dated surveys. This chart shows the section of coast where basepoints K5 and K6 are located as featuring a large area of green shading, signifying areas submerged at high tide but emerging at low tide, protruding from the coast in the vicinity of a settlement on the mainland called 'Shakani'. Further, a relatively large island termed 'Kiungamwina' Island is marked on the chart, though attached to the mainland coast by a further large area of green shading (see Fig. 4).[107] It is also notable that the portion of chart under consideration includes numerous symbols indicating the presence of mangroves, which arguably hardly fits

107 British Admiralty Chart 3362 (n 73).

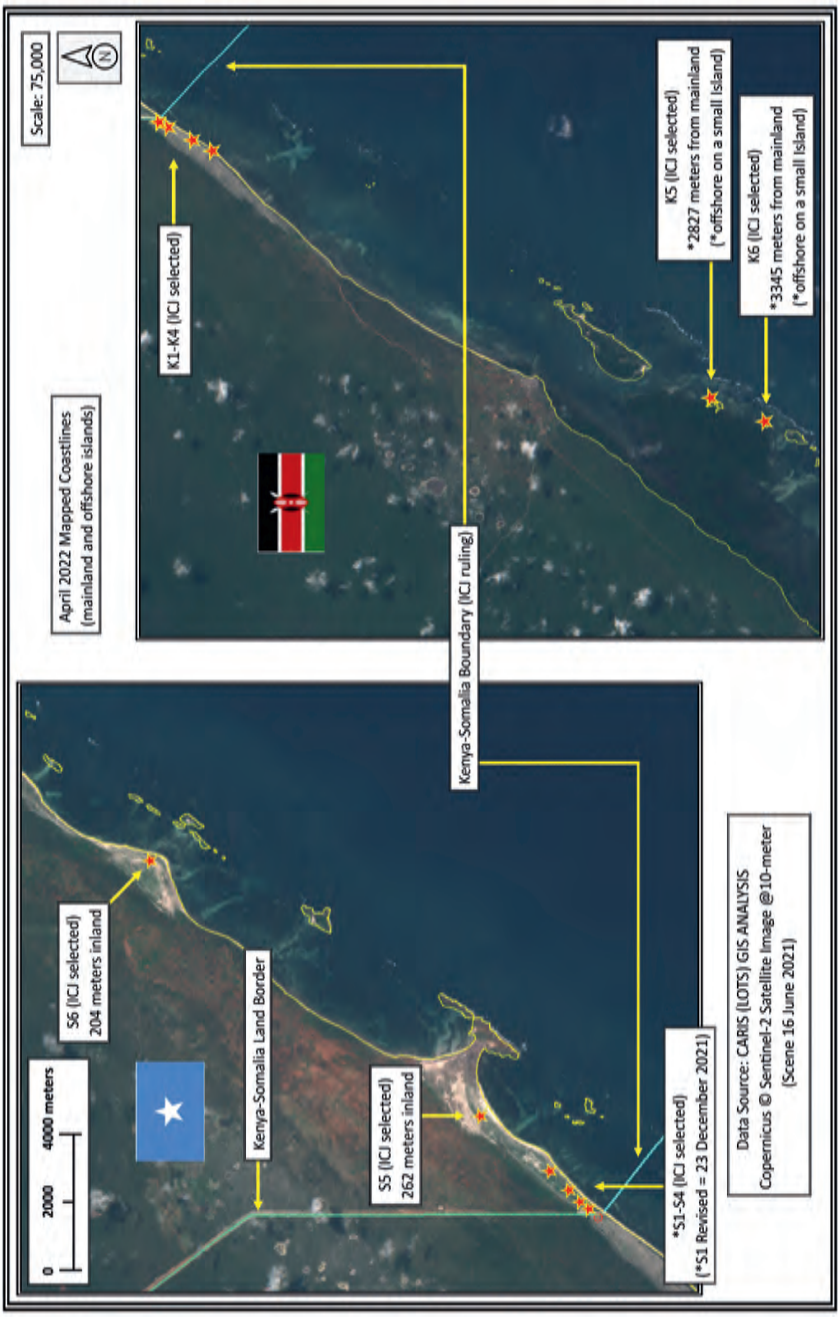

FIGURE 4 ICJ selected basepoints located on present-day satellite imagery

the Court's own requirement to place basepoints 'solely on solid land on the mainland coasts of the Parties' (plural).[108] Coastal areas covered in mangrove forest complicate traditional coastal survey approaches as the location of high and low-water lines tends to be obscured. This undoubtedly made it difficult for chart-makers to accurately locate and depict the low-water line on a chart, including channels between islands and the mainland. Consequently, in our view the chart was not appropriate to be relied on by the ICJ for the purpose of identifying basepoints for use in maritime delimitation.

In stark contrast, recent high-resolution satellite imagery shows that there are a number of small above high-tide islands surrounded by broad areas that are submerged at high tide and emergent at low tide but, crucially, separated from the mainland coast by narrow channels (see Fig. 5). As such, these features meet the legal definition of Article 121(1) of the LOSC, meaning they are not part of the continental terrestrial landmass. Indeed, basepoint K5 coincides with a feature shown on the chart and labelled 'Shakani I.', as shown in Fig. 5.

Reliance on a nautical chart based on survey data 60 years or more old and at a poor scale for the purpose of baselines work appears to have led the Court to treat the area where basepoints K5 and K6 were placed as part of the mainland coast and thus on 'solid land' on the 'mainland coasts' of one of the parties[109] which, in fact, is not the case. Given the substantial discrepancies between the chart and the physical reality of the coastline as shown on recent high-resolution satellite imagery, the ICJ's conclusion that it 'considers that it can rely on British Admiralty Chart 3362' in identifying the appropriate basepoints on the parties' relevant coasts is all the more confounding.[110]

It can also be observed that the Court's ruling does not clarify how the four turning points between Point A and the 200-M limit were calculated.[111] While the *Somalia-Kenya* judgment indicates that both parties used the CARIS-LOTS boundary software in advancing their positions on the basepoints, it is unclear whether the Court relied on CARIS-LOTS or other software in determining the basepoints and turning points selected by it. It would have served the goal of transparency if the Court had explained how it arrived at the coordinates for those points and what technical input, if any, it received in this process.

With regard to the second stage of the three-stage methodology, involving consideration of relevant circumstances that might lead to an adjustment

108 *Somalia-Kenya* judgment (n 2), para 114.
109 *Ibid.*
110 *Ibid.,* para 146.
111 *Ibid.*

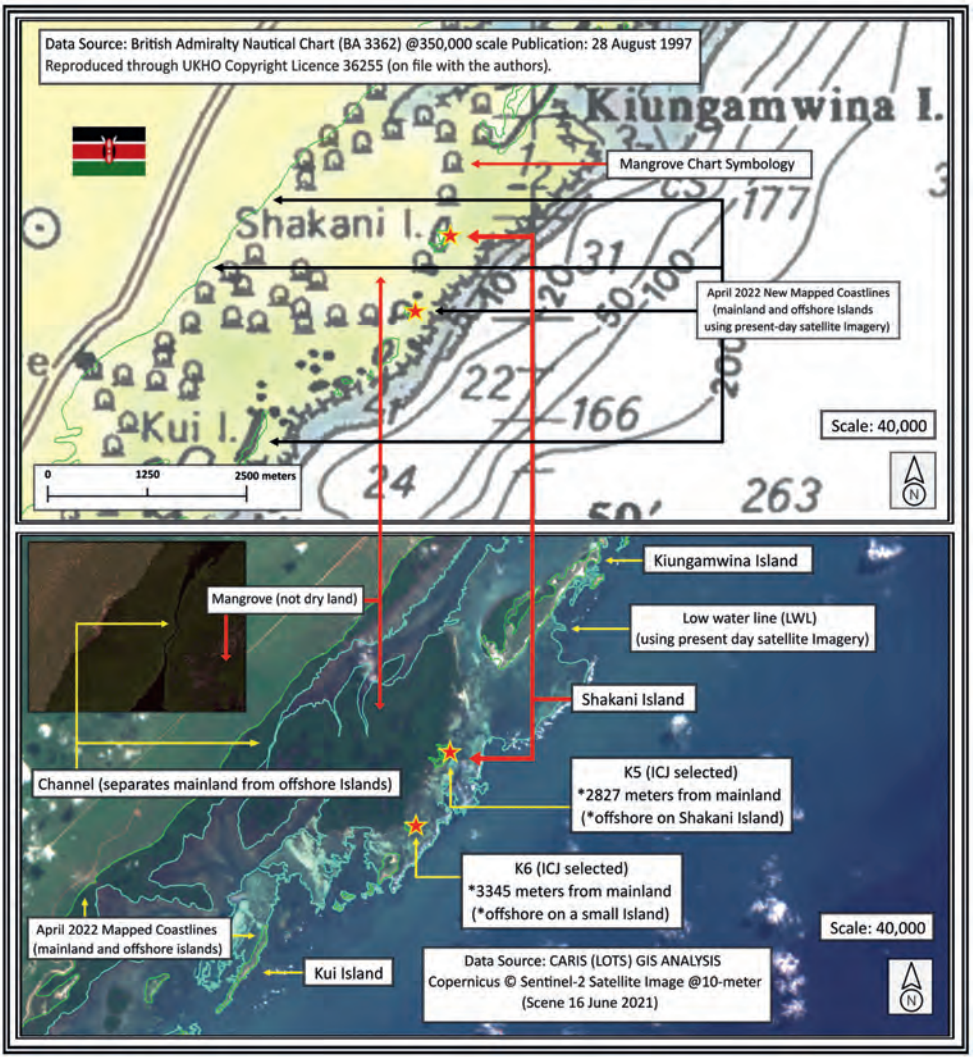

FIGURE 5 Basepoints K5 and K6 illustrated on chart BA3362 versus modern-day satellite imagery
Note: The portion of Chart BA3362 reproduced here is subject to © Crown Copyright and/or database rights. Reproduced by permission of The Keeper of Public Records and the UK Hydrographic Office (www.GOV.uk/UKHO).

or shifting of the provisional line, Kenya invoked five circumstances that in its view required the adjustment of the provisional equidistance line drawn by the ICJ. While the Court dismissed four of them, it did entertain Kenya's contention that the provisional line would result in a severe reduction in its coastal projection that constituted an unreasonable cut-off effect with respect to its entitlement to maritime areas.[112] Somalia argued, unsuccessfully, that to the extent that a cut-off effect existed to Kenya's maritime entitlements, this was solely the result of the agreed maritime boundary between Kenya and Tanzania and, therefore, did not justify an adjustment of the provisional equidistance line (see Fig. 6).[113]

While the ICJ acknowledged that when the coasts of Kenya and Somalia are examined in isolation, 'any concavity is not conspicuous', it suggested that this 'may be an overly narrow approach' in light of the geographical configuration of the coastline.[114] Instead, the Court viewed the concavity of the coastline 'in a broader geographical configuration'[115] and observed that 'Kenya faces a cut-off of its maritime entitlements as the middle State located between Somalia and Tanzania'.[116] On this basis, the Court found that the provisional equidistance line constructed at the first stage of the three-stage process 'progressively narrows the coastal projection of Kenya, substantially reducing its maritime entitlements' within 200 M of the coast.[117] While this cut-off effect was 'less pronounced' than in other cases, in the Court's view it was 'still serious enough

112 *Ibid.*, para 149. In addition to the cut-off effect argument, Kenya also invoked four circumstances that the ICJ characterised as 'non-geographical' in nature, namely, the regional practice of using parallels of latitude to define the maritime boundaries of States on the eastern African coast, vital security interests of both parties and the international community at large (notably security threats posed by terrorism and piracy), the parties' conduct in relation to oil concessions, naval patrols, fishing and other activities, and repercussions for the livelihoods and economic well-being of Kenya's fisherfolk. *Ibid.*, paras 150–153, 158–160.

113 *Ibid.*, para 163.

114 *Ibid.*, paras 164, 168.

115 *Ibid.*, para 165. In support of its position that the potential cut-off of Kenya's maritime entitlements should be assessed in a broader geographical configuration, the ICJ made reference to the *North Sea Continental Shelf* cases, the *Bangladesh/Myanmar* and *Bangladesh* v. *India* cases in the Bay of Bengal, and the *Guinea/Guinea-Bissau* case. *Ibid.*, paras 165–167.

116 *Ibid.*, para 168. In the Court's view, '[t]he presence of Pemba Island, a large and populated island that appertains to Tanzania, accentuates this cut-off effect because of its influence on the course of a hypothetical line between Kenya and Tanzania' beyond 200 M.

117 *Ibid.*, para 169.

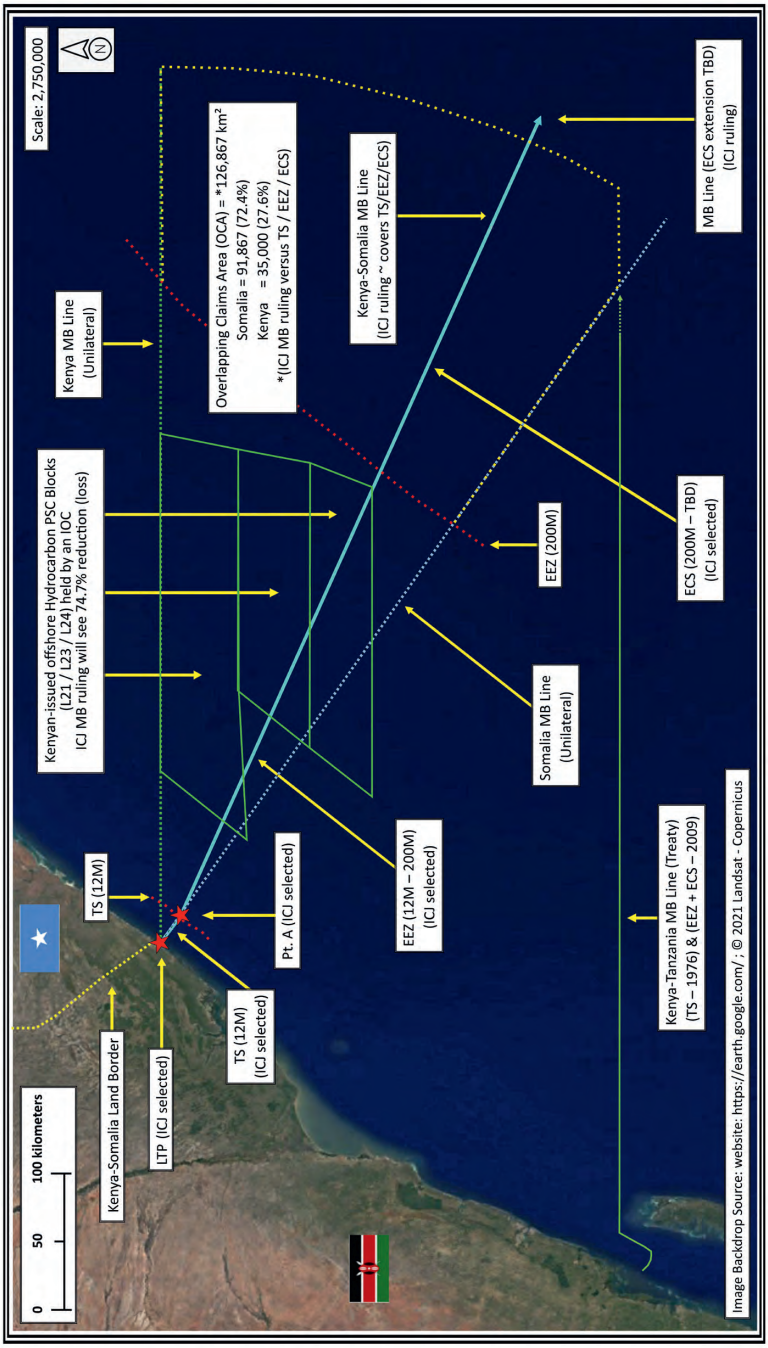

FIGURE 6 Impacts of the adjudicated maritime boundary on offshore blocks

to warrant some adjustment' in order to address 'the substantial narrowing' of Kenya's potential entitlements.[118]

The ICJ affirmed that 'the achievement of an equitable solution requires that, so far as possible, the line of delimitation should allow the coasts of the Parties to produce their effects in terms of maritime entitlements in a reasonable and mutually balanced way,' which it considered to be 'an important standard to be used in making an adjustment to the provisional equidistance line'.[119] As a result, the Court decided to adjust the EEZ delimitation line northwards such that from Point A it follows a geodetic line with an initial azimuth of 114° (see Fig. 6).[120]

According to the Court, while it was explicit that any cut-off effect as a result of the boundary agreement between Kenya and Tanzania 'is not a relevant circumstance,'[121] the adjustment to the provisional line applied by it serves to 'attenuate in a reasonable and mutually balanced way' the cut-off effect produced by the regional configuration of coastlines.[122] The Court viewed the concavity of the coastline in a broader East African regional context, including the coast of Tanzania,[123] and on this basis found that the coastal projection of Kenya was narrowed, substantially reducing its maritime entitlements within 200 M of the coast.[124] Accordingly, the ICJ adjusted the EEZ delimitation line northwards such that from Point A it follows a compass bearing of 114° (see Fig. 6). The Court found that the provisional equidistance line, as adjusted, did not reveal any significant or marked disproportionality when comparing the ratio of the lengths of the parties' respective relevant coasts and the ratio of the size of the relevant areas apportioned by that line.[125]

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118 *Ibid*., para 171. The majority's reasoning on this point apparently was controversial and drew sharp criticism, especially from Judges Abraham (France) and Robinson (Jamaica) in their separate opinions appended to the *Somalia-Kenya* judgment.

119 *Ibid*., para 172 (citing *Territorial and Maritime Dispute* (*Nicaragua* v. *Colombia*), Judgment, [2012] ICJ Rep 624, at p. 703, para 215). In this context, the ICJ also referred to 'the following principles: "there is … no question of refashioning geography, or compensating for the inequalities of nature", "equity does not necessarily imply equality" and "there can be no question of distributive justice"' (citing *Continental Shelf* (*Libyan Arab Jamahiriya/Malta*) judgment (n 87) , at pp. 39–40, para 46).

120 *Ibid*., para 174.

121 *Ibid*., para 163.

122 *Ibid*., para 174.

123 *Ibid*., paras 165–167.

124 *Ibid*., para 169.

125 *Ibid*., paras 175–177. The ratio of the relevant coasts was found to be 1:1.43 in favour of Somalia, while the ratio between the maritime zones that would appertain to Kenya and Somalia, respectively, was determined as being 1:1.30 in favour of Kenya. *Ibid*., para 176. One eminent commentator has pointed out that the ICJ was 'misleading' in its application of

The vote on this boundary segment was 10–4. The ICJ judges from France, Somalia, India and Lebanon voted against this part of the Court's ruling. It is clear from the individual declarations and opinions attached to the *Somalia-Kenya* judgment that the Court's treatment of the cut-off effect argument advanced by Kenya and its discussion of prior cases addressing that effect divided the judges and resulted in a less than unanimous vote. In his separate opinion appended to the *Somalia-Kenya* judgment, former ICJ President Yusuf (Somalia) accused the majority of an unprecedented 'search for a concavity' and 'an elusive cut-off effect that could justify the adjustment of the equidistance line'.[126] In Judge Yusuf's view, the basepoints selected by the Court have resulted in a 'contrived median line, the construction of which appears to have been aimed at producing a line which comes as close as possible to a bisector line'.[127]

As a direct consequence of the aforementioned issues arising from the Court's determination of the location of Point A, there are inevitable *knock on* consequences for the EEZ and continental shelf boundaries, as demonstrated in Fig. 6.

Delimitation of the Continental Shelf Beyond 200 M from the Coast

As concerns the delimitation of the continental shelf seawards of 200 M EEZ limits, the ICJ decided, by nine votes to five,[128] that a continuation of the adjusted equidistance line beyond 200 M was appropriate, to the outer limits of the parties' continental shelves that the Court noted 'are to be delineated by Somalia and Kenya, respectively, on the basis of the recommendations to be made by the [CLCS] or until it reaches the area where the rights of third States

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the disproportionality test, providing the comparison of relevant coasts between Kenya and Somalia but for the comparison of relevant areas reversing the order of the parties so that it was between Somalia and Kenya, resulting in the Court 'not comparing like with like'. R Churchill, 'Dispute Settlement in the Law of the Sea: Survey for 2021' (2022) 37 (4) *IJMCL*.

126 *Ibid*., separate opinion of Judge Yusuf, para 23.

127 *Ibid*., para 19.

128 The ICJ judges from France, Somalia, India, Jamaica and Lebanon voted against this part of the Court's ruling. Judge *ad hoc* Guillaume (France), a former ICJ president who was appointed by Kenya to sit as a judge *ad hoc* in this case, voted in favour of all sections of the operative paragraph.

may be affected'.[129] Only six pages of the *Somalia-Kenya* judgment are devoted to this segment of the boundary, and the individual opinions appended to the ruling make astute observations regarding the question of evidence underlying the Court's reasoning with regard to the boundary line beyond 200 M.[130]

In her separate opinion, ICJ President Donoghue (United States) revealed that she had cast her vote 'with reluctance', because the Court 'has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that might appertain to the Parties'.[131] She observed that 'because the juridical basis for entitlement to outer continental shelf is entirely different from the basis for entitlement within 200 nautical miles, it cannot be presumed that a line that achieves an equitable delimitation of the 200-nautical-mile zones will also result in equitable delimitation of overlapping areas of two States' outer continental shelf'.[132] Meanwhile, Judge Robinson (Jamaica) criticised the ruling for being silent on the question of whether the methodology the Court had used produces an equitable solution for the line beyond 200 M.[133] Judge Robinson went beyond what President Donoghue stated with regard to the evidence underlying the outer continental shelf of the parties, criticising the decision for being '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'.[134]

As the outer continental shelf limits submitted by Somalia to the CLCS are, in places, considerably seawards of those submitted by Kenya for areas of continental shelf located on the Kenyan side of the adjudicated boundary line, some readjustment to Kenya's outer continental shelf limits may eventuate. Further, the ICJ acknowledged that, as a consequence of its adjustment away from strict equidistance, coupled with uncertainties over the extent of Kenya's

129 *Ibid.*, para 196. The ICJ noted that '[i]t is only after such recommendations are made that Somalia and Kenya can establish final and binding outer limits of their continental shelves, in accordance with Article 76, paragraph 8, of UNCLOS'. *Ibid.*, para 188. Moreover, the Court emphasised that 'the lack of delineation of the outer limits of the continental shelf is not, in and of itself, an impediment to its delimitation between two States with adjacent coasts, as is the case here'. Kenya and Somalia have claimed a continental shelf extending up to 350 M in the greater part of the area of overlapping claims.

130 See, especially, separate opinion of President Donoghue and individual opinion, partly concurring and partly dissenting, of Judge Robinson.

131 *Ibid.*, separate opinion of President Donoghue, para 4.

132 *Ibid.*, para 13.

133 *Ibid.*, individual opinion, partly concurring and partly dissenting, of Judge Robinson, para 21.

134 *Ibid.*, para 13.

continental shelf entitlement seawards of 200 M, its ruling has the potential to give rise to a 'grey area' located beyond 200 M from the coast of Kenya but within 200 M of Somalia's coast, but on the Kenyan side of the delimitation line. This means that in this area Kenya would have jurisdiction over the seabed and Somalia would have jurisdiction over the water column.[135] In the light of the fact that the existence of this 'grey' area 'is only a possibility',[136] the ICJ side-stepped the issue and did not consider it necessary to pronounce itself on the legal regime that would be applicable in that area. However, as Judge Yusuf points out in his individual opinion appended to the *Somalia-Kenya* judgment, the mere reference to the 'grey area' and 'its representation in a sketch-map that is an integral part of the Judgment may create a new and unnecessary controversy between these two neighbouring States in the future'.[137]

Seismic and Other Data Collection Pending Delimitation and Adjudication

In its final submissions, Somalia had also asked the ICJ to declare that Kenya make 'available to Somalia all seismic, geologic, bathymetric and other technical data acquired in areas that are determined by the Court to be subject to the sovereignty and/or sovereign rights and jurisdiction of Somalia'.[138] According to Somalia, Kenya's unilateral actions in the disputed area had violated Somalia's sovereignty over the territorial sea and its sovereign rights and jurisdiction in the EEZ and continental shelf for which Kenya owed Somalia reparation in the form of the release of technical data acquired by Kenya in the areas adjudicated by the ICJ.

In rejecting Somalia's claim, the ICJ explained that 'when maritime claims of States overlap, maritime activities undertaken by a State in an area which is subsequently attributed to another State by a judgment "cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States"'.[139] The Court found that the surveying and drilling activities conducted or authorised by Kenya, of which Somalia complained, related to concession blocks located north of the

135 *Ibid.*, para 197.
136 *Ibid.*
137 *Ibid.*, separate opinion of Judge Yusuf, para 52.
138 *Ibid.*, para 27.
139 *Ibid.*, para 203 (citing *Ghana-Cote d'Ivoire* judgment (n 1), para 592).

strict equidistance line claimed by Somalia and that there was no evidence that Kenya's claims over the area concerned were not made in good faith.[140]

With regard to Somalia's argument that those surveying and drilling activities violated the principles enshrined in the LOSC, the ICJ agreed with the ITLOS Special Chamber in the *Ghana-Cote d'Ivoire* case that the 'transitional period' mentioned in Articles 74(3) and 83(3) of the LOSC refers to 'the period after the maritime delimitation dispute has been established until a final delimitation by agreement or adjudication has been achieved'.[141] The Court noted that the award of oil concession blocks to private operators and the performance of seismic and other surveys 'are not of the kind that could lead to permanent physical change in the marine environment' and that Somalia had failed to establish that these activities had the effect of jeopardising or hampering the reaching of a final agreement on the delimitation of the maritime boundary.[142]

The ICJ also concluded that evidentiary material, including maps, did not show any wells drilled after 2009, the year in which the boundary dispute between Somalia and Kenya crystallised, in the oil concession blocks referred to by Somalia.[143] The Court further noted that Somalia and Kenya had engaged in negotiations on maritime delimitation in 2014 and that Kenya had suspended its activities in the disputed area and had offered to enter into provisional arrangements with Somalia in 2016.[144] On this basis, the ICJ found, unanimously, that Kenya had not violated its international obligations through its maritime activities in the disputed area.[145]

Given that over 40 per cent of all the world's maritime boundaries are believed to await delimitation,[146] and that Articles 74(3) and 83(3) of the LOSC apply to an un-delimited boundary situation involving any of the 155 States with oceanic coastal frontage having ratified the LOSC,[147] the recent rul-

140 *Ibid*., para 204.

141 *Ibid*., para 203 (citing *Ghana-Cote d'Ivoire* judgment (n 1), para 630).

142 *Ibid*., para 207.

143 *Ibid*., para 209.

144 *Ibid*., para 210.

145 *Ibid*., para 214 sub (6).

146 Globally, 58 per cent of potential maritime boundary segments were settled through negotiation or adjudication and were in force in 2020. See C Schofield and A Østhagen, 'An ocean apart?: Maritime boundary agreements and disputes in the Arctic Ocean' (2021) 2 *The Polar Journal* 11, at p. 17.

147 At the time of writing there were 168 parties to the LOSC, comprising 167 States and the European Union. See UN DOALOS (United Nations Division for Ocean Affairs and the Law of the Sea), 'Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements' (28 May 2021) available at http://www.un.org

ings in the *Ghana-Cote d'Ivoire* and *Somalia-Kenya* cases have enhanced the transparency and predictability of the pre-delimitation process. These recent rulings also underscore the advantages for disputing States of entering into provisional arrangements of a practical nature pending adjudication so as to avoid an adjudicated boundary and the irreversible consequences of a judicial or arbitral ruling fixing a disputed boundary. In certain situations, it is surely better to 'agree-to-disagree' on a maritime boundary through a provisional arrangement, including a cross-border unitisation or a joint development arrangement, than to risk the imposition of a boundary by a third party.

Addressing Transparency Deficiencies in Adjudicated Delimitations

The use of charts that meet the United Nations guidelines[148] and of recent high-resolution satellite imagery and the most sophisticated boundary software available by international courts and tribunals, in combination with their transparent application in individual cases, will help to reduce controversies regarding maritime boundary delimitation and will make the delimitation process more transparent and predictable. The transparency aspect could be improved by international courts and tribunals, at least those that are standing bodies such as the ICJ and the ITLOS, maintaining a roster of recognised experts in maritime delimitation who could be called upon to assist the court or tribunal in the technical aspect of plotting the maritime boundary in a particular case, including the identification of coordinates for appropriate base-points and turning points with reference to an agreed geodetic datum. The names and roles of such experts appointed following the ordering of an expert enquiry or otherwise should be clearly described in the maritime boundary ruling, similar to the use and description of experts on compensation phases of ICJ cases.[149] Moreover, following the example set by the ICJ in the *Corfu*

/Depts/los/reference_files/chronological_lists_of_ratifications.htm; accessed 25 January 2022.

148 See LOS Baselines Guide (n 72), at pp. 1–2.

149 See, e.g., *Corfu Channel Case* (*UK* v. *Albania*), Compensation Phase, Judgment, [1949] ICJ Rep 244 (Experts' Report attached as Annex 2, p. 258). On 19 November 1949, the ICJ issued an order appointing as experts Rear-Admiral JB Berck of the Royal Netherlands Navy, and Mr G de Rooy, Director of Naval Construction, Royal Netherlands Navy, with instructions to 'examine the figures and estimates stated in the last submissions filed by the Government of the United Kingdom regarding the amount of its claim for the loss of the *Saumarez* and the damage caused to the *Volage*', two vessels affected by mining activity for which Albania had been held responsible by the ICJ. *Ibid*., [1949] ICJ Rep 237.

Channel case in 1949 and subsequent cases,[150] the members of the adjudicatory body should be given an opportunity to ask for explanations in regard to the written report prepared by the expert(s) and the replies of the expert(s) should be communicated to the parties with an invitation to submit written observations within a reasonable time limit. The resulting documents should be attached to the final ruling.

Standing bodies such as the ICJ and the ITLOS could also establish an *ad hoc* 'review panel' comprising two or more geo-scientists with recognised experience in plotting maritime boundaries and tasked with reviewing the technical expertise rendered to the judges in a given maritime delimitation case by an expert on retainer. In performing a 'quality-check' function, such a review panel can be expected to detect any glaring errors of the kind described in this article and to make suggestions for correction before the final text of the ruling is adopted and the adjudicated boundary becomes permanent for the parties to the case.

In the case of the ICJ, Article 50 of its Statute and Article 67 of the Rules of Court provide a firm legal basis for the appointment of experts to assist the Court in performing its judicial functions. According to Article 50, the Court 'may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion'.[151] The ICJ has, in the past, justified the appointment of experts in situations that 'raise questions of a technical nature'.[152] With respect to maritime boundary delimitation it appears that the ICJ has only formally appointed its own technical expert on one occasion when a Chamber of the Court did so in the *Gulf of Maine* case, albeit at the behest of the parties to the case through the Special Agreement between them, rather than on its own initiative.[153] In that case, the ICJ Chamber appointed Commander Peter Beazley to prepare a technical report which was appended to its ruling.[154] Here it can be observed that arbitration tribunals have proved to have a greater appetite

150 For the most recent example, see *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo* v. *Uganda*), Order, [2020] ICJ Rep 264 [*Democratic Republic of the Congo* v. *Uganda* order] and *ibid*., Order [2020] ICJ Rep 95 (appointing four experts for the compensation phase in that case).

151 For a detailed commentary on Article 50, see A Zimmermann *et al.* (eds), *The Statute of the International Court of Justice: A Commentary* (2nd ed., Oxford University Press, Oxford, 2012). See also Article 15 of the ITLOS Rules, available at https://www.itlos.org/fileadmin/itlos/documents/basic_texts/ITLOS_8_25.03.21.pdf; accessed 31 January 2022.

152 *Democratic Republic of the Congo* v. *Uganda* order (n 150), at p. 269, para 15.

153 *Canada-USA* judgment (n 50), para 18.

154 *Ibid*., pp. 347–351.

for appointing technical experts.[155] Maritime delimitation cases undoubtedly raise questions of a technical nature that would benefit from the assistance of experts in the plotting of boundaries through use of recent high-resolution satellite imagery and the most sophisticated boundary software available.

The role of experts in maritime delimitation cases could be described in the ICJ's Practice Directions, which involve no alteration to the Rules of Court, but are additional thereto.[156] Such an addition to the Practice Directions, which would be justified given the ICJ's role as a front-runner through a dozen or so adjudicated boundary rulings issued since 1969, would introduce greater clarity and transparency regarding the technical aspects of boundary rulings and any assistance the Court may receive in plotting a boundary line in a particular case. In the case of *ad hoc* tribunals, including those constituted under Annex VII of the LOSC, a procedural order could be adopted at the outset of the proceedings in which the appointment and role of one or more neutral boundary experts are described. In cases before *ad hoc* type tribunals, the parties should also consider appointing arbitrators or members with known experience and expertise in plotting maritime boundaries.

Conclusion

The ICJ's maritime boundary ruling in the *Somalia-Kenya* case on its surface is broadly consistent with earlier international jurisprudence, invoked in the Court's ruling, in terms of locating the starting basepoint for maritime delimitation on the low-water line from a final land border marker.[157] The ruling also reflects established practice in terms of the construction of the median line for territorial sea delimitation, and in applying the three-stage methodology to the delimitation of the territorial sea, EEZ and continental shelf in cases involving a request for a single 'all-purpose' boundary.[158] What appears to be less consistent with past practice includes the lack of reference to Article 15

155 For example, the Arbitral Tribunal in the *South China Sea* case appointed an independent expert hydrographer and commissioned expert reports on key aspects of the case, including navigational safety and coral reef issues. See *South China Sea Arbitration* (*Philippines* v. *China*), Award, PCA Case No 2013–19, ICGJ 495 (PCA 2016), 12 July 2016, Permanent Court of Arbitration [PCA], paras 85, 133. Similarly, the *Eritrea/Yemen* award indicates that the Arbitral Tribunal relied on an expert in geodesy. *Eritrea/Yemen* award (n 7), para 168.

156 See ICJ Practice Directions, available at https://www.icj-cij.org/en/practice-directions; accessed 21 December 2021.

157 See, e.g., *Ghana-Côte d'Ivoire* judgment (n 1), para 356; see also Lando and Hébert (n 49), pp. 6–7.

158 See also *Romania-Ukraine* judgment (n 17), paras 115 et seq., 185.

of the LOSC, the selection of basepoints for territorial sea delimitation substantially inland of the location of the low-water line along the coast and the absence of any mention of the existence of 'special circumstances' when small insular features that might disproportionately distort the course of the equidistance line were discounted. Similarly, the inconsistent treatment of islands in the delimitation of the EEZ and continental shelf appears to be especially problematic in light of the Court's decision to place basepoints 'solely on solid land on the mainland coasts of the Parties' and the fact that mangrove forests do not represent solid land.[159] The Court's treatment of offshore islands, where Somali features were discounted yet basepoints were selected by the ICJ on Kenyan islands, also seems to be a departure from past jurisprudence, albeit one apparently caused by relying on charting inadequate for the purpose of identifying appropriate basepoints for maritime delimitation.

Overall, the adjustment of the provisional, equidistance-based line in favour of Kenya on the basis of macro-geographical, regional coastal geography resulted in a mainland coastal boundary line that divided the overlapping claims area and thus yielded an outcome that is arguably somewhat more palatable to Kenya and arguably disadvantaged Somalia by reason of a 'concavity' that is not within the area subject to delimitation. Indeed, the split of the overlapping claims area was roughly 77:23 in Somalia's favour according to our calculations based on the use of CARIS-LOTS software. As a result, Kenya still secured around 64 per cent of its claimed maritime jurisdiction prior to the case based on the Court's use of basepoints that predominantly correspond to basepoints used by Kenya.

The Court's decision to continue the delimitation line for the continental shelf seawards of the 200 M limit in the same direction as for the area within 200 M limits was also consistent with past decisions,[160] except that its reasoning, which is short and bereft of scientific evidence, undoubtedly is wanting on this point, as was highlighted in the above-mentioned individual opinions of Judges Donoghue and Robinson.

The ICJ's endorsement of the important statements of the ITLOS Special Chamber in the *Ghana-Côte d'Ivoire* judgment in respect of the 'provisional arrangements of a practical nature' that are called for by Articles 74(3) and 83(3) of the LOSC during the transitional period between the crystallisation of a maritime boundary dispute and the final delimitation of a disputed boundary can be said to solidify the relevant rules of international law applicable to

159 See *Somalia-Kenya* judgment (n 2), para 114.

160 See, e.g., *Ghana-Côte d'Ivoire* judgment (n 1), para 527.

this period. This undoubtedly serves the aim of predictability of the maritime delimitation process, including the pre-delimitation phase.

The Court's references to the decisions of other courts and tribunals, including arbitral tribunals, is notable in this context and continues a trend to cite decisions other than the Court's own, including decisions by *ad hoc* bodies, with increasing frequency in maritime delimitation cases.[161] It is the sign of a maturing, and in some respects 'settled',[162] jurisprudence on maritime delimitation, a sub-field of international law that reflects essentially 'judge-made law' even though decisions, including ICJ judgments, are not formal sources of international law.[163] Indeed, this latest ruling by the ICJ shows that there is a *jurisprudence constante* regarding the three-stage methodology, which is consistently applied by the ICJ as well as other tribunals sitting in maritime delimitation cases, even though this methodology is not prescribed by the LOSC and 'therefore is not mandatory'.[164]

These developments are to be welcomed, because they reduce uncertainty in the maritime delimitation process and introduce greater clarity and predictability to that process. In maritime delimitation, international law can 'only provide a few basic legal principles, which lay down guidelines to be followed with a view to an essential objective'[165] – in this case, the 'equitable solution' prescribed by Articles 74 and 83 of the LOSC. Consequently, international courts and tribunals charged with adjudicating boundary disputes have developed, and have more or less consistently applied, a certain delimitation methodology, in the course of which more detailed principles that have become

161 For a comprehensive citation analysis of the Court's maritime delimitation jurisprudence between 1969 and 2010, see P Bekker, 'Taking stock before ITLOS takes off: A citation analysis and overview of the maritime delimitation case law' in 2010 *Proceedings of the Sixth Conference of the Advisory Board on the Law of the Sea*, available at https://legacy.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf6/S6P1-P.pdf; accessed 21 March 2022.

162 *Romania-Ukraine* judgment (n 17), para 118.

163 For a critical analysis of this development, see P Bekker and T Innes, 'The underappreciated role of curial settlement in international law norm-making: Using transnational law and diffusion studies to re-assess the status of prior decisions' in C Reynaert *et al.* (eds), *What is Wrong with International Law? Liber Amicorum Alfred Soons* (Martinus Nijhoff Publishers, Leiden, 2015) 385–403.

164 *Somalia-Kenya* judgment (n 2), para 128. For a critical review of the three-stage methodology as applied in ICJ cases, see F Olorundami, 'Objectivity versus subjectivity in the context of the ICJ's three-stage methodology of maritime boundary delimitation' (2017) 32(1) *IJMCL* 36–53.

165 *Canada-USA* judgment (n 50), para 81. In the *Somalia-Kenya* judgment, the ICJ observed that the delimitation provisions of Articles 74(1) and 83(1) of the LOSC 'are of a very general nature and do not provide much by way of guidance for those involved in the maritime delimitation exercise'. *Somalia-Kenya* judgment (n 2), para 121.

'part of the relevant rules of international law'[166] are emerging. Such principles include the application of 'relevant circumstances' at the second stage of the three-stage methodology. Noting that the delimitation provisions of the LOSC do not use the term 'relevant circumstances', the ICJ observed that such circumstances 'have been identified and developed in the practice of the Court, the International Tribunal for the Law of the Sea and arbitral tribunals in the context of each case'.[167] The same applies to the disproportionality test.[168]

It can be observed that the ICJ's ruling in the case between Somalia and Kenya has significant practical impacts in terms of access to marine resources, particularly with respect to fisheries and potential seabed hydrocarbons. For example, Kenya has issued three offshore hydrocarbon concessions to a major oil and gas company of which approximately 75 per cent fall on the Somali side of the adjudicated boundary line, according to our calculations based on the use of CARIS-LOTS software (see Fig. 6). The ruling in this case confirms the cautious approach of the ICJ, in line with other international courts and tribunals, in considering factors that are non-geographical in nature at the second stage of the three-stage methodology. Thus, the ICJ rejected Kenya's claim of equitable access to fisheries resources in coastal areas near the Kenya-Somalia boundary as an applicable 'relevant circumstance' absent evidence of 'catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned'.[169] The ICJ also affirmed its earlier jurisprudence regarding conduct in relation to oil concessions as a relevant circumstance.[170] In her declaration appended to the *Somalia-Kenya* judgment, Judge Xue wondered whether the tendency of attaching legal relevance primarily to geographical circumstances, if continued, 'would likely render the second stage into a purely geometrical exercise' and that, eventually, 'the three-stage approach would in effect evolve into a substitute for the equidistance method and the equitable principles would vanish from the

166 *Romania-Ukraine* judgment (n 17), para 41.

167 *Somalia-Kenya* judgment (n 2), para 124.

168 In her declaration, Judge Xue points out that, while the disproportionality test may be sound in theory, in practice not much room may be left for the 'checking effect' of this test 'when geographical factors are the only relevant circumstances that call for adjustment of the equidistance line' such that 'proportionality between the two ratios would be the primary consideration for the Court to rely on'. *Ibid.*, declaration of Judge Xue, para 20.

169 *Somalia-Kenya* judgment (n 2), para 159 (citing *Canada-USA* judgment (n 5), at p. 342, para 237, and *Maritime Delimitation in the Area between Greenland and Jan Mayen* (*Denmark* v. *Norway*), Judgment [1993] ICJ Rep 38, at pp. 71–72, paras 75–76).

170 *Ibid.*, para 160 (citing *Cameroon-Nigeria* judgment (n 79), at pp. 447–448, para 304).

process of delimitation'.[171] She rightly stressed that '[w]hat circumstance is relevant and what is not must be appreciated by the Court in the context of a specific case'.[172]

Notwithstanding the contribution of the Court's latest boundary ruling to the overall maritime delimitation jurisprudence, the legal and technical issues arising from the ICJ's decision respecting the coordinates of the boundary determined in the Court's judgment in this case, coupled with the overall lack of transparency in the delimitation process administered by the ICJ in the present case, are troubling. Indeed, these issues may undermine the authority of the ICJ, not only as between the parties to this particular case but beyond the two African litigants. If the ICJ does indeed make use of its own technical experts in support of its rulings fixing maritime boundaries that are meant to last forever, or has such experts on retainer, we submit that transparency dictates that the names of such experts be made public by the Court.

The Court's reliance on a relatively small-scale nautical chart based on dated surveys that does not reflect the physical reality of the coast as readily detectable using recent high-resolution satellite imagery arguably led it to select basepoints on islands rather than on 'solid land on the mainland coasts of the Parties' as intended.[173] This necessarily had a distorting effect on the construction of the single all-purpose boundary and in our view affirms a questionable precedent set by the ITLOS Special Chamber's reliance on a similarly dated, pencil-and-ruler type chart in the *Ghana-Côte d'Ivoire* judgment.[174] In our view, international courts and tribunals should not readily accept dated and

171 *Ibid*., declaration of Judge Xue, para 14.

172 *Ibid*. In its judgment at paragraph 124, the ICJ observed that 'there is no closed list of relevant circumstances' and that the relevant circumstances are 'case specific' (citing *Barbados* v. *Republic of Trinidad and Tobago* award (n 4), para 242.

173 *Somalia-Kenya* judgment (n 2), para 114.

174 In that case, the ITLOS Special Chamber rejected the use of a LOS Baselines Guide-compliant chart advanced by Côte d'Ivoire in favour of a chart based on information dating from the first half of the nineteenth century, because different methods had been employed for the survey of the Ghanaian and Ivorian coasts. The Special Chamber did observe that 'a more recently prepared chart is preferable in principle', so long as the same surveying methodology has been used for the two coasts in question. See *Ghana-Côte d'Ivoire* judgment (n 1), para 341. In stark contrast to the *Ghana-Côte d'Ivoire* judgment, the *Somalia-Kenya* judgment does not address the chart scale issue in relation to the LOS Baselines Guide and it includes no observation regarding the use of more recently prepared charts. The ICJ relied on British Admiralty Chart 3362 after '[t]aking into account the views of the Parties', that is, Kenya's preference for that chart and Somalia's statement, made during the oral proceedings, that it would be content with the outcome regardless of which chart the ICJ chose to employ. See *Somalia-Kenya* judgment (n 2), paras 97–98.

imprecise nautical charts suggested by one or both parties, but should independently seek to take advantage of recent satellite imagery and sophisticated boundary software. Such an approach would likely have prevented the Court from delivering a ruling featuring such a troubling imbalance in treatment of insular features where small islets, as well as features of the mainland coast, on the Somali side were discounted while basepoints for Kenya were located on seemingly analogous islands despite the express intention of the Court to select 'appropriate' basepoints, 'solely on solid land on the mainland coast'.[175]

Further, the ICJ's delimitation of a territorial sea boundary stretching almost 13 M from the basepoints selected by the Court, is, at first glance, perplexing until it becomes clear, through reverse-engineering the adjudicated boundary, that small islands ignored for boundary delimitation purposes still contribute to the setting of 12-M territorial sea maritime limits.

The issues identified in this article could have been avoided by the proper use of recent high-resolution satellite imagery and of specialised boundary software such as CARIS-LOTS, which arguably provide greater certainty and predictability in that they allow for the fixing of boundary basepoints and coordinates with pin-point accuracy. At the same time, the Court's decision on the boundary is binding for Somalia and Kenya and is final and without appeal.[176] It is, therefore, uncertain whether Kenya would be successful if it were to raise the technical issues apparent in the ICJ's ruling and seek their correction.[177] Even were this to occur, it presently seems unlikely, based on the pronouncements of Kenyan officials in the aftermath of the ICJ's ruling,

175 *Somalia-Kenya* judgment (n 2), para 114.

176 See ICJ Statute, Articles 59–60. In this context, it is interesting to note the paragraph of the Court's judgment preceding the operative paragraph: 'The maritime boundary between the Parties having been determined, the Court expects that each Party will fully respect the sovereignty, sovereign rights and jurisdiction of the other in accordance with international law'. *Ibid*., para 213.

177 While Article 61 of the ICJ Statute provides for the possibility of applying for revision of a judgment, this provision would appear on its face to be inapplicable, because a revision application 'may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence'. Revision proceedings must be distinguished from rectification of errors and interpretation disputes. As regards the latter, Article 60 of the ICJ Statute provides: 'In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party'. For a detailed commentary on Articles 60–61, see Zimmermann *et al*. (n 151).

that Kenya will comply with the ruling.[178] However, these apparent issues and ambiguities only help to undermine the Court's decision and the overall aim of predictability of the maritime delimitation process. As is underscored by the relatively narrow vote on the segments of the Kenya-Somalia boundary beyond Point A marking the end of the territorial sea boundary and by the individual declarations and opinions attached to the ICJ's ruling, the words expressed by ICJ Judge Stephen Schwebel (United States) in the *Gulf of Maine* case in 1984 still ring true: 'In view of the flexibility of approach illustrated by these important judgments, it is not to be expected that subsequent cases will not afford considerable room for differences of opinion in the application of equitable principles to problems of maritime delimitation'.[179]

If the suggestions for the improvement of transparency in the delimitation process set out in this article were to be followed by international courts and tribunals charged with delimiting maritime boundaries, the objectives of transparency and predictability of the maritime delimitation process would be met in practice. This, we submit, would enhance the legitimacy and acceptance of the resulting boundary ruling in a particular case.[180]

178 See, e.g., BBC, 'ICJ rejects Kenya case in Somalia maritime border row' (12 October 2021) available at https://bbc.com/news/world-africa-58885535; accessed 21 December 2021; A Wasike, 'Kenya rejects ICJ ruling over maritime dispute with Somalia' (Anadolu Agency, 13 October 2021) available at https://www.aa.com.tr/en/africa/kenya-rejects-icj-ruling-over-maritime-dispute-with-somalia/2390548#; accessed 22 December 2021.

179 *Canada-USA* judgment (n 50), separate opinion of Judge Schwebel, at pp. 357–358.

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