

C. Delimitation of the territorial sea

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

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

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

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

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

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

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

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

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

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

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

107. During the oral proceedings, a Member of the Court, referring to the Counter-Memorial of Kenya, asked the following question: “In Somalia’s view, does th[e] 1927 Agreement establish the delimitation line of the territorial sea between the two Parties, and if so, what would be the outer limit of this line?” Somalia responded that “[n]either [it] nor Kenya, since their independence and at all times thereafter, has ever claimed that the maritime boundary in the territorial sea follows a line perpendicular to the coast at *Dar es Salam*, for any distance”. It further added that neither Party accepted nor argued for the 1927 Agreement as binding on them in regard to a maritime boundary, for any distance.

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

109. The Court notes that neither Party asks it to confirm the existence of any segment of a maritime boundary or to delimit the boundary in the territorial sea on the basis of the 1927/1933 treaty arrangement. It recalls that in their legislation concerning the territorial sea neither Party has referred to the terms of the 1927/1933 treaty arrangement to indicate the extent of the territorial sea in relation to its adjacent neighbour. Kenya’s legislation has referred to a median or equidistance line (see paragraphs 57 and 58 above) and Somalia’s Maritime Law of 1988 refers to “a straight line toward the sea from the land as indicated on the enclosed charts” (see paragraphs 75-77 above). The Court further notes that the agenda of the meeting between Somalia and Kenya, held on 26 and 27 March 2014, to discuss the maritime boundary between the two countries, covered all maritime

zones, including the territorial sea. The delegations discussed “several options and methods” for determining the maritime boundary, although they could not reach an agreement. In a presentation examining an “Equity-based Maritime boundary scenario”, which is attached to the joint report on that meeting, Kenya referred to Articles 15, 74 and 83 of the Convention as relevant to maritime delimitation. It emphasized that Article 15 provides for delimitation through a “[m]edian line for [the] territorial sea unless there is an agreement to the contrary based on [a] claim by historical title and or *special circumstances*” (emphasis in the original). In light of the above, the Court therefore considers it unnecessary to decide whether the 1927/1933 treaty arrangement had as an objective the delimitation of the boundary in the territorial sea.

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

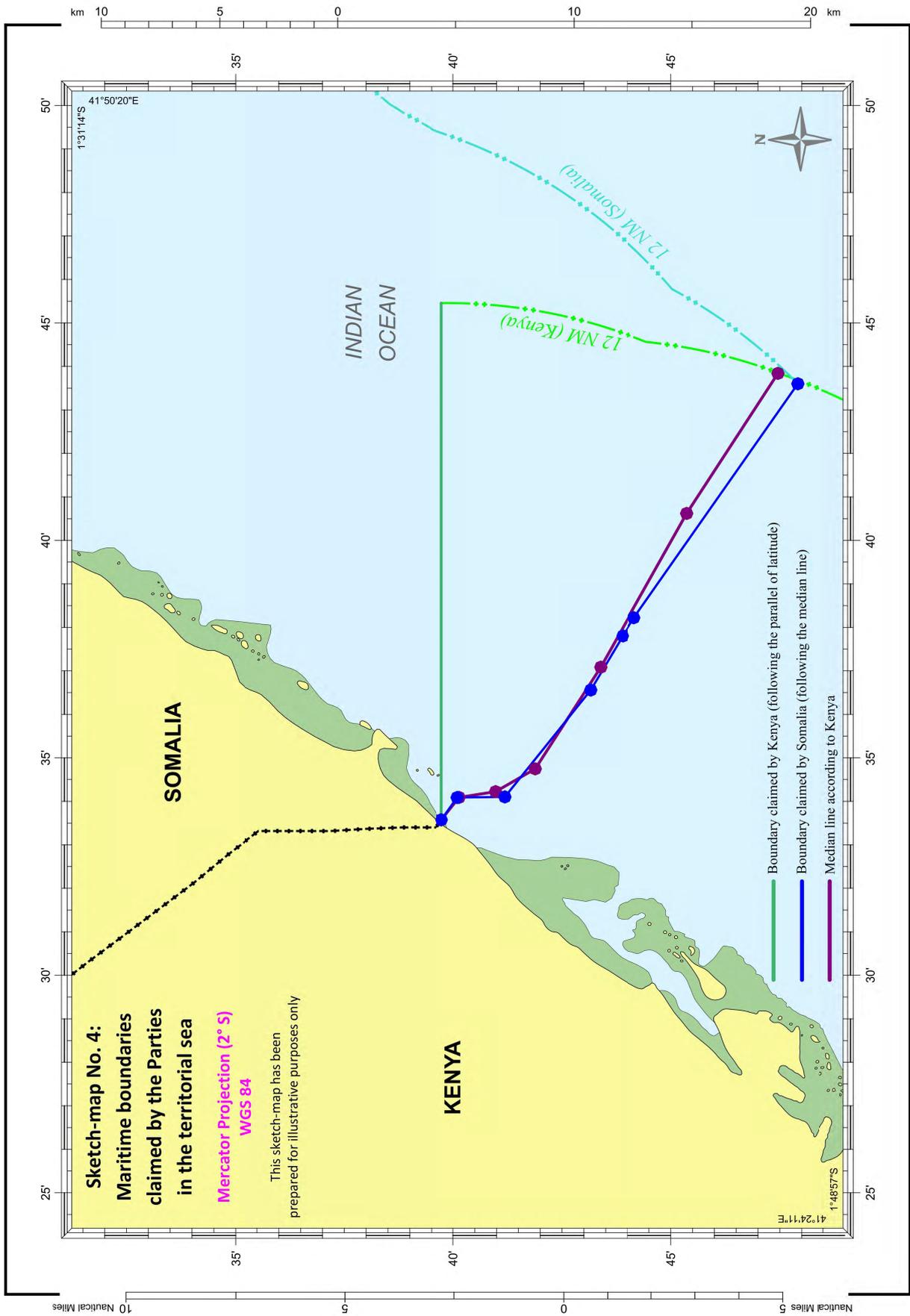
Base points on Kenya’s coast:

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

Base points on Somalia’s coast:

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

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



111. The Court recalls that the delimitation methodology is based on the geography of the coasts of the two States concerned, and that a median or equidistance line is constructed using base points appropriate to that geography. Although in the identification of base points the Court will have regard to the proposals of the parties, it need not select a particular base point, even if the parties are in agreement thereon, if it does not consider that base point to be appropriate. The Court may select a base point that neither party has proposed (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, *I.C.J. Reports 2009*, p. 101, paras. 116-117, p. 103, para. 123, p. 104, para. 125, and p. 108, para. 138). The Court further recalls that it “has sometimes been led to eliminate the disproportionate effect of small islands”, by not selecting a base point on such small maritime features (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment, *I.C.J. Reports 2001*, pp. 104-109, para. 219, referring to *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, *I.C.J. Reports 1969*, p. 36, para. 57; see also *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012*, p. 47, para. 151). As the Court has stated in the past, there may be situations in which “the equitableness of an equidistance line depends on whether the precaution is taken of eliminating the disproportionate effect of certain ‘islets, rocks and minor coastal projections’” (*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 48, para. 64).

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

113. The Court notes that the Parties have not selected the same base points for the delimitation of the territorial sea. Kenya has expressed doubts about the use of base points located on unknown low-tide features that have not been confirmed by a field visit. The first two base points that Somalia proposes on its side of the land boundary terminus are located on the Diua Damasciaca islets. They have a significant effect on the course of the median line in the territorial sea, pushing it to the south. Somalia’s third base point, off the southern tip of Ras Kaambooni, also has the effect of significantly pushing the course of the median line to the south. Kenya maintains that this base point “appears nowhere” when base points are calculated using British Admiralty Chart 3362. On the Somali side of the starting-point, the base points that Kenya would use to construct the median line (which differ from those used by Somalia) also push the initial course of the median line to the south. The placement of base points on the tiny maritime features described above has an effect on the course of the median line that is disproportionate to their size and significance to the overall coastal geography.

114. In the circumstances of the present case, the Court considers it appropriate to place base points for the construction of the median line solely on solid land on the mainland coasts of the Parties. It does not consider it appropriate to place base points on the tiny arid Diua Damasciaca islets, which would have a disproportionate impact on the course of the median line in comparison to the size of these features. For similar reasons, the Court does not consider it appropriate to select a base point on a low-tide elevation off the southern tip of Ras Kaambooni, which is a minor protuberance in Somalia’s otherwise relatively straight coastline in the vicinity of the land boundary terminus, which constitutes the starting-point for the maritime delimitation.

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

Base point	Co-ordinates
S1	1° 39' 40.4" S - 41° 33' 31.1" E
S2	1° 39' 34.4" S - 41° 33' 36.6" E
S3	1° 39' 21.6" S - 41° 33' 48.6" E
S4	1° 39' 09.2" S - 41° 34' 00.7" E

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

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

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

Turning point	Co-ordinates
1	1° 40' 18.4" S - 41° 34' 17.5" E
2	1° 40' 32.1" S - 41° 34' 32.8" E
3	1° 41' 12.8" S - 41° 35' 22.8" E
4	1° 41' 39.0" S - 41° 36' 00.9" E
5	1° 42' 39.9" S - 41° 37' 21.6" E
6	1° 44' 01.2" S - 41° 39' 02.8" E

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

