

DECLARATION OF VICE-PRESIDENT YUSUF

Agree with the Court's decision and reasons — Somalia and Kenya neither negotiated nor drafted the Memorandum of Understanding in dispute — Such direct negotiation would have facilitated interpretation — States must actively participate in the creation of the obligations they take on.

1. I agree with the Judgment of the Court on the preliminary objections raised by Kenya and the reasoning that led to the final decisions. Nevertheless, the circumstances in which the present dispute on the jurisdiction of the Court have arisen require me to make some observations regarding the signature by Kenya and Somalia of the Memorandum of Understanding (“MOU”), which is mainly at the origin of the preliminary objections by Kenya and which has been the focus of submissions from both Parties.

2. The MOU at issue in this case was, as a matter of fact, drafted by Ambassador Hans Wilhelm Longva of Norway in the context of technical assistance provided by Norway to African coastal States, which enabled them to make submissions or submit preliminary information to the Commission on the Limits of the Continental Shelf (“CLCS”) within the time-limits prescribed by the States parties to the United Nations Convention on the Law of the Sea (“UNCLOS”). As Norway noted, such assistance was provided in response to calls made by the United Nations General Assembly at its Sixty-Third and Sixty-Fourth Sessions (A/RES/63/111 and A/RES/64/71), and by States parties to UNCLOS at their eighteenth meeting (SPLOS/183). Norway’s assistance not only extended to Somalia and Kenya, but also to a number of other States in West Africa.

3. Such technical assistance was both timely and beneficial to African coastal States in view of the impending deadline for States to make submissions or at least to submit preliminary information to the CLCS regarding the outer limits of their continental shelf. Full submissions or even the provision of preliminary information to the CLCS are technically complex undertakings which require the involvement of individuals with the appropriate expertise in geology, geophysics, or hydrography. Many African States lack the requisite technical expertise and thus Norway’s assistance was of the utmost importance given the time-limit for the submission of preliminary information to the CLCS.

4. A distinction must, however, be made between the technical work required in connection with the submission or the provision of preliminary information to the CLCS regarding the outer limits of the continental shelf, for which Norway offered its assistance following the United Nations General Assembly resolution, and the negotiation and drafting of a bilateral MOU between Kenya and Somalia to signify their no-objection to each other's submissions in view of the unresolved issues of maritime delimitation between the two neighbouring States.

5. The latter was a purely legal and policy matter which should have been handled directly between the two neighbouring African States, negotiated between them to their mutual satisfaction, and drafted by their legal experts in accordance with clear understandings on the granting of no-objection to each other with regard to their respective submissions as well as the manner in which the separate issues of delimitation would be dealt with by their respective Governments. This does not seem, however, to have been the case.

6. As noted in the Judgment of the Court:

“On 10 March 2009, the Transitional Federal Government [of Somalia] was informed of the initiative of the Special Representative and the assistance of Norway, and was given a draft of the preliminary information that had been prepared for it. On that occasion, it was also presented with a draft of the MOU that had been prepared by Ambassador Longva. Somalia made a change to the title by adding the words ‘to each other’. It appears that Kenya suggested some changes to the text, but these changes do not appear to have affected the substance of the MOU, in particular its sixth paragraph.” (Para. 101.)

7. In light of the above described circumstances regarding the conclusion and signature by Kenya and Somalia of a bilateral agreement, which they had neither drafted nor negotiated between themselves, but which was proposed to them by a third party, it is surprising that they are in a dispute relating to the interpretation of the specific provisions of that agreement based on their alleged objectives and intentions at the time of signing. Each of them attributes now certain legal implications to the provisions of that agreement when there are hardly any *travaux préparatoires* showing their actual contribution to its conception (Judgment, para. 99).

8. Following their independence in the 1960s, African States objected to succession to bilateral agreements to which they had not contributed, and in the negotiation of which they had not participated, and called for the application of the clean-slate doctrine, particularly as reformulated in what is commonly known as the Nyerere doctrine of State succession. Of

course, the MOU between Kenya and Somalia cannot be assimilated to the bilateral treaties concluded between the colonial powers and third States, the succession to which African States objected upon their independence; nor should the noble intentions of Norway, which came forward to assist them, be the subject of misunderstanding by virtue of a dispute which is neither of its own making nor could it have been predicted.

9. Yet, it is perplexing, to say the least, that more than 50 years after independence, Kenya and Somalia are in dispute regarding the interpretation of a bilateral agreement, which they signed, but which was neither negotiated between them nor drafted by them. Indeed, the present dispute revolves around the legal implications of a bilateral agreement drafted by a third party and concluded by the two neighbouring States with hardly any input from their respective Governments.

10. International law today is not the same as that of the early twentieth century nor even that which prevailed at the time of independence of African States in the 1960s. Its effects pervade the daily lives of peoples throughout the world: their economic transactions, their development, their social interactions, and their cultural exchanges are all impacted by international law. As the scope of international law has increased, so too has the importance of ensuring that each State actively participates in the creation of international legal instruments and rules which affect its peoples and resources, and understands the obligations that it takes on.

11. No Government can afford today to put its signature to a bilateral legal instrument which it has neither carefully negotiated nor to which it has hardly contributed. This applies especially to African Governments, which, due to their painful historical experience with international legal agreements concluded with foreign powers (e.g., protectorate, unequal and capitulation treaties), should pay particular attention to the contents of such agreements. To this end, they need to develop and use their own expertise to negotiate, draft, and advise on the rules and obligations of international law to which they wish to subscribe.

(Signed) Abdulqawi A. YUSUF.
