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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2021

Public sitting

held on Tuesday 16 March 2021, at 3 p.m., at the Peace Palace,

President Donoghue presiding,

***in the case concerning* Maritime Delimitation in the Indian Ocean (Somalia *v.* Kenya)**

VERBATIM RECORD

ANNÉE 2021

Audience publique

tenue le mardi 16 mars 2021, à 15 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

***en l'affaire relative à la* Délimitation maritime dans l'océan Indien (Somalie c. Kenya)**

COMPTE RENDU

Present:	President	Donoghue
	Vice-President	Gevorgian
	Judges	Tomka
		Abraham
		Bennouna
		Yusuf
		Xue
		Sebutinde
		Bhandari
		Robinson
		Salam
		Iwasawa
		Nolte
	Judge *ad hoc*	Guillaume
	Registrar	Gautier

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte, juges
M. Guillaume, juge *ad hoc*

M. Gautier, greffier

The Government of Somalia is represented by:

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H.E. Mr. Ali Said Faqi, Ambassador of the Federal Republic of Somalia to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg,

as Co-Agent;

Mr. Mohamed Omar Ibrahim, Senior Adviser to the President of the Federal Republic of Somalia,

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as Counsel;

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Mr. Sulayman Mohamed Mohamoud, Attorney General of the Federal Republic of Somalia,

H.E. Mr. Yusuf Garaad Omar, Special Envoy of the President of the Federal Republic of Somalia for the Red Sea and the Gulf of Aden,

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M. Abdiqani Yasin Mohamed, assistant personnel du vice-premier ministre de la République fédérale de Somalie,

comme conseillers ;

M. Scott Edmonds, cartographe, International Mapping,

Mme Vickie Taylor, cartographe, International Mapping,

comme conseillers techniques.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to continue the oral argument of Somalia. Before I give the floor to the next speaker on behalf of Somalia, I wish to make a brief procedural comment, which is to say that shortly before the opening of the oral proceedings yesterday, the Registry received a letter from the Co-Agent of Kenya, to which Somalia responded late last night. Those letters, taken together, present the possibility that these oral proceedings will continue beyond today. As a result, while the Court had originally expected Somalia to read its final submissions today, on the basis that this would be its last session, the Court has decided instead that the reading of Somalia's final submissions will be deferred to a later date, and the Court will be in touch with the Agents in respect of the scheduling for that session.

With that behind us, I now give the floor to Mr. Paul Reichler. You have the floor, Mr. Reichler.

Mr. REICHLER:

DELIMITATION OF THE MARITIME BOUNDARY BETWEEN SOMALIA AND KENYA

1. Madam President, Members of the Court, good afternoon. It is an honour to appear before you today and a privilege to do so on behalf of Somalia.

2. My task today is an uncommonly uncomplicated one. Thanks to the elegant presentation by my esteemed colleague, Professor Miron, my path forward has been ploughed, cleared and paved. As Professor Miron has shown you, the appropriate method for delimiting the maritime boundary between Somalia and Kenya — the *only* appropriate method in the circumstances of this case — is the tried and true, three-stage process that the Court has consistently employed in its maritime delimitation cases since its 2009 Judgment in the *Black Sea* case.

3. Professor Miron has made it very clear that there is no reason for the Court to abandon this now well-established delimitation methodology. Certainly, as she has demonstrated, none of the arguments advanced by Kenya for setting this methodology aside**,** in favour of a different approach justifies doing so.

4. It thus falls to me to apply the three-stage process to the geographical circumstances of this case and to show you the maritime boundary that results from it. Because the geographical

circumstances are uncomplicated, so is my task. My presentation will therefore be very straightforward. It will consist of four parts. In Parts I, II and III, I will take you through each of the three stages of the standard delimitation process. In Part IV, I will point out the fallacies in Kenya's alternative and unprecedented approach to delimitation of the maritime boundary with Somalia, which render it untenable as a matter of law, and inequitable in its application. And I will then set out the conclusion that Somalia submits you should draw**,** namely, that the applicable law and the relevant geographical facts require that the maritime boundary between Somalia and Kenya follow an equidistance line from the land boundary terminus on the Indian Ocean coast to the outer limits of national jurisdiction.

Stage I

5. Madam President, Stage I of the three-stage process, as the Court is well aware, consists of constructing a provisional equidistance line, provided that construction of such a line is feasible and appropriate. Here, it is both. This is plain from the geographic setting. As you can see here and at tab 45 of your judges' folders, the Indian Ocean coast in the vicinity of the land boundary terminus between Somalia and Kenya is remarkably straight and smooth — almost a straight line extending all the way from just south of the Horn of Africa, in Somalia's north-east, to just north of Kenya's border with Tanzania. The relevant coast, for the purpose of constructing the provisional equidistance line, lies within this long and remarkably straight coastline.

6. The Parties are in agreement in their definition of the relevant coast for purposes of this delimitation. They agree that Somalia's relevant coast extends from just north of Mogadishu south-westward to the land border with Kenya, a distance of some 733 km, as shown on this slide, and at tab 46[1]. Kenya's relevant coast runs in the same direction, to the south-west, from the border with Somalia, for a distance of approximately 511 km, until it reaches the border with Tanzania. Somalia initially measured Kenya's relevant coast at 466 km[2]. Kenya complained in its Rejoinder that Somalia left off 45 km that should have been included[3]. In the *Black Sea* case, the Court held that only those portions of a party's coast that "generate projections which overlap with projections

[1] MS, paras. 6.27-6.30; RK, para. 165.

[2] MS, para. 6.29 and fig. 6.7.

[3] RK, para. 165.

from the coast of the other Party" are "considered as relevant for the purpose of the delimitation"[4]. This was the basis on which Somalia calculated the length of Kenya's relevant coast. However, to settle what is a minor discrepancy between the Parties, Somalia is willing to accept Kenya's measurement of its own relevant coast. There is thus no dispute as to the relevant coasts of the two Parties in this case.

7. Madam President, as these slides show, the relevant coasts in the vicinity of the land boundary terminus are devoid of any obvious geographical features that might render the construction of an equidistance line infeasible or inappropriate. There are no significant peninsulas or coastal promontories; no significant concavities or convexities; and no offshore features to complicate, or render difficult in any way, the construction of an equidistance line. In short, the unremarkableness of the relevant coasts makes this a model case for the three-stage process, and for the construction of a provisional equidistance line.

8. To be sure, a closer look at these coasts reveals the presence of some small islands on both the Somalia side and the Kenya side of the border. On Somalia's side, here and at tab 47, you will find the Diua Damasciaca Islands, a few, rocky islets less than half a nautical mile offshore, just to the south of a headland at Ras Kamboni. Kenya, too, has some small, fringing islands immediately adjacent to the continental coast. They are shown here and at tab 48: specifically, Kiungamwini and Simambaya Islands.

9. Helpfully, none of these small, close-to-shore features has a significant impact on the direction of the provisional equidistance line. Nor do any of them exert an effect on the line that causes prejudice to the other Party in any way. To the contrary, Somalia's and Kenya's fringing islands balance each other. This is for two reasons. First, all of these features are very close to the continental coast**,** and they are largely aligned along it; as a result, they do not produce a significant change in the direction of the coast. Second, there are coastal base points, from which the provisional equidistance line is drawn, on both Somalia's Diua Damasciaca Islands and Kenya's Kiungamwini Island, which offset each other. As in prior cases, the coastal base points are determined objectively, using CARIS software, as applied to official, large-scale charts. Somalia has used United States

[4] *Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009* (hereinafter "*Romania* v. *Ukraine*"), p. 97, para. 99.

National Geospatial-Intelligence Agency (US NGA) Nautical Chart 61220 to identify all of the base points[5].

10. The base points selected by the CARIS software, on the basis of US NGA Nautical Chart 61220, are shown here, and at tab 49: four are on Somalia's side, including two on the Diua Damasciaca Islands, and three on Kenya's side, including one on Kiungamwini Island. The relatively small number of base points is a reflection of the regularity of the relevant coast, which has very few turning points, all quite modest, and the absence of any significant indentations or concavities.

11. From these base points, it is a mechanical exercise to construct a provisional equidistance line, which is also produced by the CARIS software. As you can see here, and at tab 50, the equidistance line is almost perfectly straight. In fact, it *is* perfectly straight over its final 262 nautical miles out to the 350-nautical-mile limit from Kenya's coast. This, too, is a reflection of the virtually straight, unremarkable coastline from which it is drawn. Another way of showing this is by rendering the relevant coast as a perfectly straight line, and drawing a perpendicular, or bisector, intersecting it at the land boundary terminus. This is what an equidistance line would look like if the coast were *perfectly* straight. The similarity between the perpendicular and the actual equidistance line, shown here and at tab 51, is still further evidence of the regularity of the coast, and the appropriateness of using the three-stage, equidistance-based methodology to delimit the maritime boundary.

12. So what does Kenya have to say about this? In its Counter-Memorial and its Rejoinder, Kenya said practically nothing. It did not propose an alternative chart; nor did it identify any coastal base points; nor did it construct an equidistance line. Nor did it challenge the correctness of the base points identified, or the equidistance line constructed by Somalia. That was where Kenya's case stood as of 5 March 2021, 11 days ago. On that date, as part of its application under Rule 56, Kenya submitted a 315-page legal memorandum, which it labelled "Appendix 2, Volume I". In that supplementary written pleading, Kenya challenged Somalia's depiction of the equidistance line for the first time.

[5] MS, paras. 5.18-5.21.

13. First, Kenya objected to Somalia's use of the official US Government chart of the Somalia/Kenya coast. It contended that British Admiralty Chart 3362 is more accurate and appended that chart to its pleading. Second, Kenya determined the appropriate base points from which to construct an equidistance line, based on the British Admiralty chart and CARIS software, and it supplied the co-ordinates of those base points. Third, it constructed its own provisional equidistance line. This slide, which is also at tab 52, shows the resulting equidistance line, alongside Somalia's equidistance line, which we have superimposed on Kenya's chart. As you can see, there is very little difference between the two equidistance lines. This further confirms the appropriateness of the three-stage process and the construction of a provisional equidistance line in the first stage.

14. Somalia expects that the Court will determine for itself which chart, and which sets of base points, to use in constructing the equidistance line, as it and other international tribunals have done in prior maritime delimitation cases. Somalia trusts the Court to perform this technical exercise, and will be content with the outcome, whether the Court uses the United States or the British Admiralty chart, or another chart that it considers even more reliable.

15. Despite the facility with which Kenya has now identified appropriate coastal base points and produced its own provisional equidistance line, it argues, in its belated legal pleading, that equidistance itself should be rejected because of the purported unreliability of the base points on its own coast[6]. Kenya suggests that only a site visit can properly determine the location of these base points. This is a novel, as well as untimely, argument. Article 16 of UNCLOS provides:

> "The baselines for measuring the breadth of the territorial sea determined in accordance with articles 7, 9 and 10, or the limits derived therefrom, and the lines of delimitation drawn in accordance with articles 12 and 15 shall be shown on charts of a scale or scales adequate for ascertaining their position. Alternatively, a list of geographical co-ordinates of points, specifying the geodetic datum, may be substituted."[7]

Somalia, and Kenya itself, have satisfied both of these alternative criteria. They have each drawn a line of delimitation based on the official charts of a neutral State, which are of such scale as to be adequate for ascertaining its position. And both Somalia and Kenya have provided a list of geographical co-ordinates of points, specifying the geodetic datum. Nothing more is required.

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[6] Kenya's Appendix 2, paras. 327-329.

[7] UNCLOS, 10 Dec. 1982, Art. 16.

16. Even if Kenya's self-serving and unproven argument about unstable base points were tenable, which it is not, the solution would not be to resort to a parallel of latitude, which has no relation to the base points whatsoever, or, in this case, to the actual direction of the coast. Instead, it would be to substitute a bisector for the equidistance line. That was the solution chosen by the Court in *Nicaragua* v. *Honduras*, where, due to the unstable nature of the coast at the mouth of the Rio Coco, no reliable coastal base points could be determined[8]. As we saw a few moments ago, a bisector in this case, drawn from a straight line following the general direction of the relevant coast, closely approximates an equidistance line, whether drawn on the basis of United States NGA Chart 61220 or British Admiralty Chart 3362.

17. Madam President, as Professor Miron explained, and as you can see directly from each of these depictions, this is not only an appropriate case for application of the three-stage methodology; it is an emblematic case for use of that methodology. If that methodology were not appropriate here, in the particularly unremarkable geographical circumstances of this case, it would be difficult to envision a situation where it should be applied.

18. There is one technical issue, however, regarding Stage I of the three-stage process that remains to be addressed. This concerns the starting-point for the provisional equidistance line. Somalia contends that the equidistance line, and, indeed, any boundary line that could be drawn, must begin on the coast, at the low-water line[9]. Somalia's position conforms to Article 5 of UNCLOS, which states that the "normal baseline for measuring the breadth of the territorial sea" — and thus the starting-point of any delimitation — "is the low-water line"[10]. Surprisingly, Kenya disagrees. It contends that the maritime boundary should begin on land, some 40 m inland from the coast, at Boundary Pillar (BP) 29[11].

19. The Parties agree that Boundary Pillar 29 is the final *marker* on the land boundary between Somalia and Kenya, before the boundary reaches the sea[12]. Its precise geographic co-ordinates were

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[8] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007*, p. 745, para. 281, p. 748, para. 294, and p. 749, para. 297.

[9] RS, para. 3.61.

[10] UNCLOS, 10 Dec. 1982, Art. 5.

[11] RK, para. 166.

[12] Government of Somalia and Government of Kenya, *Joint Report on the Kenya-Somali Maritime Boundary Meeting, 26-27 Mar. 2014* (1 Apr. 2014), pp. 3-4; MS, Vol. III, Ann. 31; RK, para. 166.

disputed in the written pleadings, and Kenya again complains, in the legal memorandum it submitted on 5 March, that Somalia has incorrectly used astronomical co-ordinates without converting them to WGS 84. To avoid further argument over a minor technical point, Somalia is prepared to accept the co-ordinates proposed by Kenya for Boundary Pillar 29[13]. Either way, BP 29 is located approximately 40 m inland. Fortunately, this is not a unique situation. It was common practice for colonial authorities, such as those from Italy and the United Kingdom who demarcated this land boundary in the 1920s, not to erect such pillars on the coast itself. Their surveyors knew that boundary markers placed too close to the sea are especially vulnerable to being washed away during major storms, or slowly eroded over time.

20. Thus, the same circumstance has arisen previously. And courts and arbitral tribunals have had little difficulty addressing it. They have done so by drawing a straight line connecting the final boundary pillar to the coast at the low-water line, and then by constructing the maritime boundary from that point on the coast. In *Ghana*/*Côte d'Ivoire*, for example, the final pillar demarcating the land boundary between these former British and French colonies was situated some 150 m inland from the coast[14]. The ITLOS Chamber decided to connect that pillar to the coast by means of a straight line, along the same azimuth that connected the last pillar to the one immediately before it; it then constructed a provisional equidistance line starting from the low-water line[15]. Similarly, the arbitral tribunal in *Guyana* v. *Suriname* drew a straight line from the final boundary pillar to the low-water line, and then commenced the maritime boundary from that point[16]. The logical solution here, therefore, is a straight line from Boundary Pillar 29 to the low-water line on the coast, and then, from that point, construction of a provisional equidistance line.

21. Happily, in this case, the historical record tells us exactly how the straight line from BP 29 to the coast should be drawn. The boundary agreement of 17 December 1927 between Italy and the United Kingdom states that the land boundary extends from BP 29 to the sea in a south-easterly

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[13] RS, para. 3.51; RK, para. 166.

[14] *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017* (hereinafter "*Ghana/Côte d'Ivoire*"), para. 346.

[15] *Ghana/Côte d'Ivoire*, paras. 352-356.

[16] *Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname*, Award of 17 September 2007, United Nations, *Reports of International Arbitral Awards (UNRIAA)*, Vol. XXX (hereinafter "*Guyana* v. *Suriname*"), paras. 137-138, 308.

direction, "in a straight line at right angles to the general trend of the coastline"[17]. Consistent with that agreement, Somalia has connected BP 29 to the low-water line by means of a straight line, perpendicular to the coast, as shown on this slide and at tab 53. The point at which this perpendicular line intersects the low-water line is therefore the proper starting-point for the maritime boundary. And it is from that point that Somalia has constructed its provisional equidistance line. The precise geographical co-ordinates of that point, and of the entire provisional equidistance line, are set out at tab 54 of your judges' folder.

Stage II

22. Madam President, in Stage II of the three-stage process, to which I now turn, the Court considers whether there are any special or relevant circumstances that would require an adjustment of the provisional equidistance line in order to achieve an equitable delimitation. The Court and other international tribunals have repeatedly made clear that the special or relevant circumstances that could give rise to an adjustment of the provisional equidistance line should be *geographical* circumstances. The point was emphasized recently by the ITLOS Chamber in *Ghana/Côte d'Ivoire*, which explained:

> "According to international jurisprudence, delimitation of maritime areas is to be decided objectively on the basis of the geographic configuration of the relevant coasts . . . [and only] in extreme [circumstances] may considerations other than geographical ones become relevant"[18].

23. Although Kenya chose not to engage directly with the three-stage process in its Counter-Memorial or Rejoinder, it did identify three circumstances that, in its submission, rendered the provisional equidistance line inappropriate. What all three circumstances have in common is that none is geographical: none is based on the coastal or maritime geography specific to this case.

24. The first of these circumstances is what Kenya euphemistically calls the "regional practice"[19]. As evidence of such a purported practice, they cite just two maritime boundary agreements, both products of political negotiation rather than judicial settlement, which resulted in

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[17] Agreement between Italy and the United Kingdom in which are recorded the decisions of the Commission appointed under Article 12 of the Treaty between His Britannic Majesty and His Majesty the King of Italy, signed at London on 15 July 1924, regulating certain questions concerning the boundaries of their respective territories in East Africa, 17 Dec. 1927, Appendix I, First Part; RS, para. 3.53.

[18] *Ghana/Côte d'Ivoire*, paras. 452–453.

[19] CMK, paras. 302-325, 323; RK, paras. 143-144, 161.

boundaries following a parallel of latitude[20]. Both of these agreements were negotiated by a single State, Tanzania; one of them is an agreement between Tanzania and Kenya, to which I will return; the other is with Mozambique. These agreements are, as Professor Miron explained, *res inter alios acta* in regard to Somalia and shed no light whatsoever on the delimitation of an equitable boundary between Somalia and Kenya. International jurisprudence has been clear in this regard: State practice, that is, the practice of other States, is not a special or relevant circumstance that can be invoked to adjust a provisional equidistance line[21], unless it rises to the level of *opinio juris*, which is not even alleged in this case. Nor could it be, on the basis of just two political agreements involving the same State.

25. The second circumstance raised by Kenya in opposition to the provisional equidistance line is what it calls the "practice of the Parties". The so-called "practice" that Kenya alleges is Somalia's purported acceptance of, or acquiescence to, the parallel of latitude that Kenya claims as the maritime boundary[22]. My distinguished colleagues, Professor Pellet and Professor Sands, have already shown you — as was previously made clear in the written pleadings — that there was no such practice, no such acceptance, ***or*** no such acquiescence on Somalia's part[23]. Nor is there any evidence that, in practice, Somalia ever manifested an understanding that the parallel of latitude would constitute an equitable basis for the delimitation of its maritime boundary with Kenya. All of the evidence is to the contrary.

26. Like Ghana, in its case against Côte d'Ivoire, Kenya argues that even if the conduct of the Parties did not rise to the level of a "tacit agreement," it should be regarded as a relevant circumstance sufficient to warrant an adjustment of the provisional equidistance line[24]. The ITLOS Special Chamber rejected both of Ghana's arguments, holding that there was no tacit agreement, and that the conduct in question could not be considered a relevant circumstance requiring adjustment of the

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[20] CMK, paras. 331-332; RK, paras. 144-146, 188.

[21] *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them*, Decision of 11 April 2006, *UNRIAA*, Vol. XXVII (hereinafter "*Barbados* v. *Trinidad and Tobago*"), p. 237, paras. 340, 342, 344.

[22] CMK, Chap. III; RK, Chap. I.

[23] RS, Chap. 2, paras. 2.44-2.48 and 2.86-2.112.

[24] *Ghana/Côte d'Ivoire*, paras. 457-460.

provisional equidistance line, either[25]. It ruled that, if it were to reject Ghana's tacit agreement argument, but still consider Côte d'Ivoire's alleged conduct a relevant circumstance sufficient to require an adjustment to the provisional equidistance line, that "would, in effect, undermine its earlier finding on the existence of a tacit agreement"[26].

27. This brings me to the third and final circumstance proffered by Kenya as a reason to dispense with the three-stage process and the provisional equidistance line: its maritime boundary agreements with Tanzania[27]. Professor Miron addressed them briefly yesterday. I will discuss them in greater detail and I will demonstrate why they cannot be considered relevant circumstances in this case. There were two such agreements. The first, which entered into force in 1976, delimited the Kenya/Tanzania boundary only from the coast to the 12-nautical-mile limit of the territorial sea[28]. The second agreement, dated 30 July 2009, delimited the remainder of the maritime boundary, between the 12-nautical-mile territorial sea limit and the outer limit of the parties' extended continental shelf entitlements. The second agreement established a boundary along a parallel of latitude[29]. Notably, the latter agreement, in July 2009, was made three months *after* Kenya's maritime boundary dispute with Somalia had become manifest, as reflected in their Memorandum of Understanding dated 7 April 2009[30]. Kenya was thus fully aware of Somalia's claim that the boundary should be an equidistance line at the time it agreed with Tanzania on a boundary that would follow a parallel of latitude. This slide, which is also at tab 55, shows, in blue, the notional equidistance boundaries between Somalia and Kenya in the north, and between Kenya and Tanzania in the south. It also shows, in black, the territorial sea boundary agreed by Kenya and Tanzania in 1976, and, in red, the continental shelf/EEZ boundary agreed by those two States in 2009. Kenya

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[25] *Ghana/Côte d'Ivoire*, paras. 468, 478-481.

[26] *Ghana/Côte d'Ivoire*, para. 478.

[27] CMK, paras. 110, 326-331; RK, paras. 135-143.

[28] Exchange of Notes Constituting an Agreement between the Republic of Kenya and the United Republic of Tanzania on the Territorial Sea Boundary, *UNTS*, Vol. 1039, p. 148 (17 Dec. 1975 and 9 July 1976), entered into force 9 July 1976; MS, Vol. III, Ann. 5.

[29] Agreement between the United Republic of Tanzania and the Republic of Kenya on the delimitation of the maritime boundary of the exclusive economic zone and the continental shelf, *UNTS*, Vol. 2603 (23 June 2009), p. 37, entered into force 23 June 2009; MS, Vol. III, Ann. 7.

[30] Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, *UNTS*, Vol. 2599 (7 Apr. 2009), p. 37; MS, Vol. III, Ann. 6.

claims that the combined effect of an equidistance-based boundary with Somalia and its own 2009 boundary agreement with Tanzania, would be a cut-off of its maritime entitlements, especially in the extended continental shelf beyond 200 nautical miles[31].

28. Before examining whether Kenya, as it *alleges*, is significantly cut off from its maritime entitlements, it should be emphasized that, as a matter of law, it makes no difference here. Kenya's agreement with a third State, whatever its impact, is not a relevant circumstance that could merit an adjustment of the provisional equidistance line with Somalia. The Court confirmed this point in its most recent maritime boundary decision. In *Costa Rica* v. *Nicaragua*, Costa Rica argued that it sat in the middle of a "three-State concavity", such that an equidistance line with *Nicaragua*, in conjunction with its prior delimitation ***by*** agreement with Panama, would produce "a cut-off effect for Costa Rica's seaward projections"[32]. Kenya's recent written submission of 5 March echoes Costa Rica's pleading. Word for word, it claims that Kenya lies in the *middle* of a so-called three-State concavity[33].

29. The Court flatly rejected Costa Rica's argument, as reflected in this sketch-map from the Judgment. It ruled that the "overall concavity of Costa Rica's coast and its relations with Panama [did not merit] adjustment of the [provisional] equidistance line . . . with Nicaragua"[34]. As the Court explained, in considering whether the alleged cut-off was a relevant circumstance, the only pertinent question was "whether the seaward projections from Nicaragua's coast create a cut-off for the projections from Costa Rica's coast as a result of the concavity of that coast"[35]. Because *that* cut-off — the one caused by Nicaragua's coastal projections — was insignificant, the Court found that no adjustment of the equidistance line was warranted[36]. As the Court ***further*** explained: "a judgment rendered by the Court between one of the Parties and a third State or between two third

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[31] CMK, paras. 343-346; RK, paras. 138-142.

[32] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica* v. *Nicaragua)* and *Land Boundary in the Northern Part of Isla Portillos (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2018 (I)* (hereinafter "*Costa Rica* v. *Nicaragua*"), p. 195, para. 150.

[33] Kenya's Appendix 2, paras. 389-390.

[34] *Costa Rica* v. *Nicaragua*, p. 196, para. 156.

[35] *Ibid.*

[36] *Ibid.*

States cannot" — *cannot* — "per se affect the maritime boundary between the Parties. *The same applies to treaties concluded between one of the Parties and a third State*"[37].

30. That is precisely the situation here, and the result can be no different. Indeed, Kenya's situation is far less sympathetic than Costa Rica's. Even if the so-called "cut-off" created by Kenya's decision to agree to a parallel boundary with Tanzania, at a time when it was fully aware of Somalia's equidistance claim and the consequences thereof were relevant to this delimitation — which it is not — it would still not make any difference. The purported cut-off is not significant enough to merit an *adjustment* ~~*to*~~ ***of*** the provisional equidistance line. As shown in this slide and at tab 56, the Parties' relevant coasts project to the south-east. The equidistance line between Somalia and Kenya follows exactly the same general direction. It does not cut off either country's coastal projection. In fact, it does exactly what delimitation lines are supposed to do, as the Court prescribed in the *Black Sea* case: "[I]t allows the adjacent coasts of the Parties to produce their effects, in terms of maritime entitlements, in a reasonable and mutually balanced way."[38]

31. Kenya complains that the combination of an equidistance line with Somalia and its agreed boundary with Tanzania "substantially narrows Kenya's coastal projection into its EEZ, from a coastal length (measured as a straight line) of 424 km to only 180 km measured at the 200 M limit"[39]. That may be true as a matter of simple arithmetic — as shown here and at tab 57 — but the case law does not support the conclusion that an adjustment to the provisional equidistance line is warranted in circumstances like these. Indeed, Bangladesh was left worse off in its adjudicated delimitations with Myanmar and India — *after* both equidistance lines were substantially adjusted — than Kenya would be in this case without an adjustment. The adjustments the two tribunals made to the two provisional equidistance lines left Bangladesh with a narrower coastal projection than Kenya would have if the Court were to adopt an equidistance line as the boundary with Somalia[40]. As you can see, Bangladesh's coastal façade, rendered as a straight line, measures 349 km, but shrinks to just 103 km

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[37] *Costa Rica* v. *Nicaragua*, p. 187, para. 123; emphasis added.

[38] *Romania* v. *Ukraine*, p. 127, para. 201.

[39] CMK, para. 343.

[40] RS, para. 3.82. See *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, Judgment, *ITLOS Reports 2012* (hereinafter "*Bangladesh/Myanmar*), paras. 323-340; *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 2014, PCA Case No. 2010-16 (hereinafter "*Bangladesh v. India*), paras. 478-480.

at the 200-nautical-mile limit *after* adjustment of the provisional equidistance line in Bangladesh's favour, to relieve it of some of the prejudice caused by its severe coastal concavity. Kenya finds itself in a superior position to Bangladesh, without an adjustment of the provisional equidistance line. It thus has no good argument for one here.

32. Kenya further complains that the provisional equidistance line "prevent[s] Kenya from having any entitlement out to the edge of [its] continental shelf"[41]. That too is irrelevant. There is no right to a boundary that enables a State to reach the maximum limit of its potential continental shelf entitlement. Looking again at the Bangladesh cases, as depicted here and at tab 58, the final delimitation lines adopted by ITLOS and the Annex VII Tribunal stopped Bangladesh's continental shelf 115 nautical miles short of the outer limit of the entitlement it claimed in its submission to the CLCS[42]. As the tribunal in the *Bangladesh* v. *India* case observed, "international jurisprudence on the delimitation of the continental shelf does not recognize a general right of coastal States to the maximum reach of their entitlements, irrespective of the geographical situation and the rights of other coastal States"[43].

33. Bangladesh had a much stronger claim for an adjustment than Kenya. Bangladesh did not cut itself off by an agreement with a third State. It was cut off by the deep, natural concavity of its coast, a circumstance over which it had no control. Kenya, in contrast, voluntarily shortened its own extended continental shelf entitlement by agreement with Tanzania. The next slide makes this perfectly clear. In 2009, if Kenya had pressed for an equidistance boundary with Tanzania, instead of a parallel of latitude, it would have secured for itself, as shown here and at tab 59, an extended continental shelf all the way to the outer limit of 350 nautical miles, comprising more than 25,000 sq km, even if the boundary with Somalia were also an equidistance line. Now you can see exactly how high a price Kenya paid for agreeing with Tanzania to depart from equidistance beyond 200 nautical miles. The effect of Tanzania's Pemba Island on the equidistance line, pushing it northward, ended well short of the 200-nautical-mile limit. It did not have any impact beyond that distance. It thus appears that Kenya deliberately chose to surrender more than 25,000 sq km of

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[41] CMK, para. 344.

[42] RS, para. 3.83.

[43] *Bangladesh* v. *India*, para. 469.

maritime space beyond 200 nautical miles for a gain of just 10,725 sq km within 200 nautical miles. It is not for Somalia to criticize Kenya's choice. But Somalia insists that Kenya has no right to make it pay for the consequences of that choice, by adjusting the Somalia/Kenya provisional equidistance line as compensation to Kenya. As the arbitral tribunal held in *Barbados* v. *Trinidad and Tobago*: "Barbados cannot be required to 'compensate' Trinidad and Tobago for the agreements it has made by shifting Barbados' maritime boundary in favour of Trinidad and Tobago."[44]

34. In its legal memorandum of 5 March, Kenya added a potpourri of other so-called "relevant circumstances" that purportedly warrant an adjustment or even an abandonment of the provisional equidistance line. In this new submission, Kenya gave particular emphasis to the alleged interests of its fisherfolk, and the purported need to protect its security. Neither of these circumstances is geographical. And neither justifies a departure from equidistance.

35. In regard to fisherfolk, Kenya has helpfully provided us with maps showing what *it* calls the "prominent fishing grounds" they "frequent"[45]. Our cartographic experts have georeferenced them and superimposed them on this sketch-map, which is at tab 60. As you can see, all of these allegedly prominent fishing grounds are to the south, that is, on the Kenyan side, of the equidistance line. There is thus no impact on Kenya's fisherfolk. But, even if — *quod non* — there were, the fishing practices of Kenyan fisherfolk are not a relevant circumstance for determining the course of the maritime boundary in this case. This is because, even if it is assumed that they might suffer some injury, no evidence has been submitted of any potentially "catastrophic" impact on the livelihood and economic well-being of the population, as this Court's jurisprudence, from the *Gulf of Maine* case through the Judgment in *Nicaragua* v. *Colombia*, requires, before such interests can be taken into account in the delimitation of a maritime boundary[46]. In any event, although it is under no legal obligation to do so, Somalia is willing to enter into a fisheries agreement with Kenya, to secure the ability of fisherfolk from both States to continue exercising their livelihoods in the areas they have traditionally frequented. But this does not affect the delimitation of the maritime boundary.

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[44] *Barbados* v. *Trinidad and Tobago,* para. 346.

[45] Kenya's Appendix 2 of 22 Feb. 2021, Ann. 4, image 7.

[46] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984,* p. 342, para. 237; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)* (hereinafter "*Nicaragua* v. *Colombia*"), p. 706, para. 223; *Barbados* v. *Trinidad and Tobago,* para. 267.

36. In regard to protection of Kenya's security, it cannot be denied that, at this point in historical time, the difficulties faced by Somalia impair its ability to prevent cross-boundary piracy or illegal, unreported and unregulated (IUU) fishing. But this is not a relevant circumstance justifying adjustment of the equidistance line, either. Until now, the Court has been willing to take account of a State's security interests in delimiting a maritime boundary, only to prevent the line from crossing closely in front of the State's coast[47]. That is not even remotely the situation here; even Kenya does not argue that it is. Where, like here, the provisional delimitation line does not cross in front of a State's coast, the Court has been unwilling in its prior cases to treat the alleged security interests as a circumstance sufficient to justify adjustment of the line[48].

37. Indeed, it would be a dangerous precedent to draw a boundary based on which State is strong enough to enforce it, which is what Kenya's argument ultimately boils down to. Might cannot be allowed to substitute for legal right, in this case Somalia's right to an equitable boundary, drawn in accordance with the rules of international law and the procedures of maritime delimitation that the Court has consistently applied.

38. Accordingly, Madam President, none of the circumstances invoked by Kenya, either in its formal written pleadings or its newest supplement — or, as Professor Miron refers to it: Kenya's Rejoinder *bis* — constitute grounds for abandoning the three-stage process, or for adjusting the provisional equidistance line in Kenya's favour at Stage II of this process. The result is that, at the end of the second stage of the process, the provisional equidistance line remains intact. No adjustments are required or justified.

Stage III

39. This brings us to the third, and final, stage of the three-stage process. As the Court explained in the *Black Sea* case, at this stage its role is to "check . . . whether any disproportionality exists in the ratios of the coastal length of each State, and the maritime areas falling [on] either side of the delimitation line"[49]. In its jurisprudence since the *Black Sea* case, the Court has elaborated on

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[47] *Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985* (hereinafter "*Libya* v. *Malta*"), p. 42, para. 51.

[48] *Nicaragua* v. *Colombia*, para. 222; *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway), Judgment, I.C.J. Reports 1993*, p. 74, para. 81.

[49] *Romania* v. *Ukraine*, p. 89, para. 78.

the nature of this disproportionality test; it is *not* to determine whether the provisional equidistance line, as adjusted or not in Stage II, distributes the disputed maritime space *proportionately*, but to determine whether that distribution is *significantly disproportional*.

40. In both *Nicaragua* v. *Colombia* and *Costa Rica* v. *Nicaragua*, the Court explained that it is only when there is a "gross" disproportion that the provisional equidistance line will be considered "inequitable"[50]. Unless the distribution of maritime space is grossly disproportionate, the Court will not adjust, or further adjust, the equidistance line, and that line will be deemed to constitute an equitable boundary. By way of example, in *Nicaragua* v. *Colombia*, the Court did *not* consider a coastal length ratio of 8.2:1 — and a relevant area ratio of 3.4:1 — to be so disproportionate as to render the delimitation inequitable[51].

41. Here, the provisional equidistance line produces no disproportionality, let alone one that can even remotely be considered significant or gross. This is perfectly clear when the test established by the Court for Stage III of the three-stage process is properly performed. As I explained earlier, there is now no disagreement on the relevant coasts or their lengths. The Parties are agreed that *Somalia's* relevant coast is 733 km long; and Somalia has accepted Kenya's measurement of its own relevant coast at 511 km. The ratio of the Parties' relevant coasts is therefore 1.43:1 in favour of Somalia[52].

42. The concept of the relevant area was defined succinctly and clearly by the Court in its 2012 Judgment in *Nicaragua* v. *Colombia*: "The relevant area comprises that part of the maritime space in which the potential entitlements of the parties overlap."[53] This was reaffirmed six years later in the Judgment in *Costa Rica* v. *Nicaragua*[54]. Costa Rica had projected the relevant coasts seaward in a way that encompassed broad areas that had previously been awarded to Colombia in 2012, and where, consequently, neither Costa Rica nor Nicaragua could have potential entitlements. The Court rejected Costa Rica's approach on that basis, ratifying the principle of the *Nicaragua/Colombia* case that "[t]he relevant area comprises that part of the maritime space in which the potential entitlements

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[50] *Nicaragua* v. *Colombia*, p. 716, para. 242; *Costa Rica* v. *Nicaragua*, p. 201, paras. 161-162.

[51] *Nicaragua* v. *Colombia*, pp. 716-171, paras. 243-247.

[52] MS, paras. 6.27-6.30; RK, para. 165.

[53] *Nicaragua* v. *Colombia*, p. 683, para. 159.

[54] *Costa Rica* v. *Nicaragua*, p. 211, para. 184.

of the parties overlap"[55]. Accordingly, maritime spaces where one or both parties do not have a potential entitlement cannot constitute part of the relevant area for purposes of Stage III of the three-stage process.

43. This slide shows the maritime space where the potential entitlements of Somalia and Kenya overlap, within 200 nautical miles of their relevant coasts. All of the shaded space on this slide falls within 200 nautical miles of both Parties. It thus constitutes the relevant area for purposes of delimitation of the maritime boundary *within* 200 nautical miles[56]. This slide, which is also at tab 61, shows how the provisional equidistance line divides this relevant area between the two Parties. As you can see, its application allocates more maritime space to Kenya than to Somalia, by a difference of 110,236 sq km to Kenya versus 103,627 sq km to Somalia[57].

44. The slide also shows you a comparison between the ratio of the Parties' coastal lengths, and the ratio of relevant areas distributed to the Parties by the provisional equidistance line. The ratios are 1.43:1 in favour of Somalia for the relevant coast, as we have already seen, and 0.94:1 in favour of Kenya for the division of the relevant area. The equidistance line thus allocates more maritime space to Kenya than it would merit if the distribution were strictly proportional to the ratio of the lengths of their relevant coasts. There is thus no significant disproportionality here, let alone one that is unfavourable to Kenya.

45. This slide shows the relevant area, when the area beyond 200 nautical miles, where both Parties have submitted overlapping claims to the Commission on the Limits of the Continental Shelf, has been added. Here, we have combined the relevant area within 200 nautical miles and the relevant area beyond 200 nautical miles. The equidistance line divides these combined areas by distributing 188,749 sq km to Somalia and 130,785 sq km to Kenya, as shown here and at tab 62. This is a ratio of 1.44:1 in favour of Somalia[58]. This is almost identical to the ratio of the Parties' coastal lengths, which is 1.43:1 in favour of Somalia. The equidistance line thus passes the Court's disproportionality

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[55] *Costa Rica* v. *Nicaragua*, p. 198, para. 159.

[56] MS, para. 6.36.

[57] MS, para. 6.56; RS, para. 3.95.

[58] MS, para. 7.58; RS, para. 3.96.

test. There is no disproportionality here, let alone the kind of significant or gross disproportionality that would justify an adjustment of the equidistance line.

46. Madam President, the equidistance line therefore constitutes an equitable boundary throughout the relevant area, from the starting-point on the coast, to the outer limit of national jurisdiction in the extended continental shelf. Somalia respectfully submits that this is the boundary international law requires the Court to adopt in this case.

The fallacies in Kenya's proposed solution

47. I come now to the final part of my presentation, which is to bring to your attention the fallacies in Kenya's unprecedented approach to delimitation of the maritime boundary — its so-called "'parallel of latitude' delimitation methodology"[59], or, in its most recent phraseology on 5 March, the "latitudinal delimitation methodology"[60].

48. The first major flaw in their approach is that they have performed the delimitation exercise completely backwards. They have started at the end of the process, by opening with a conclusion: that the boundary should follow a parallel of latitude. This conclusion is assumed by the very nomenclature they give to the so-called methodology they have chosen to apply: a "parallel of latitude" or "latitudinal" delimitation methodology[61]. Kenya is undeterred by the fact that neither this Court, nor any other, nor any arbitral tribunal, has ever recognized the existence of, let alone applied, such a methodology to delimit a boundary between two States. Never.

49. Kenya illustrates how it wishes this Court to be the first to do so. To begin, they draw a parallel of latitude from the land boundary terminus to the outer limit of the extended continental shelf[62]. Then they purport to demonstrate that this preordained line distributes the relevant area proportionately[63]. This step is not as mundane as it may seem, at least not as implemented by Kenya. By artificially manipulating the size of the relevant area — as I will demonstrate in a few moments — they purport to establish that the parallel of latitude *does* divide the area proportionally. And finally,

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[59] CMK, paras. 339-354, fig. 3-2; RK, paras. 177-184 and figs. 2-8 and 2-11.

[60] Kenya's Appendix 2, paras. 322-324.

[61] CMK, para. 342.

[62] CMK, fig. 3-2; RK, fig. 2-11.

[63] CMK, para. 352; RK, para. 185.

they argue that proportionality equals equity, and that, as a consequence, the parallel of latitude is an equitable line that should be adopted as the maritime boundary[64].

50. This, as I have said, is a completely backwards approach to maritime delimitation. If this were a football match, it would be like starting with the final score, then going to penalty kicks to achieve that outcome, then playing the second half of regulation time, then the first half, and concluding with the national anthems of the two sides. But this is not the World Cup! It is the World Court! And here maritime delimitation is performed in the proper order, from beginning to end, rather than the reverse: Stage I, followed by Stage II and then Stage III, before identifying the equitable line of delimitation which is the conclusion that international law requires. That is the proper Court-ordained methodology for delimiting a maritime boundary. There is no such thing as a "parallel of latitude delimitation methodology".

51. Kenya's second major error is to presume that maritime delimitation is based on proportionality, and that only a delimitation line that distributes the disputed maritime space proportionately can be regarded as equitable[65]. This approach is contrary to the long-established precedent of this Court. As far back as the *Libya/Malta* case, the Court declared that "the use of proportionality as a method in its own right is wanting of support in the practice of States, in the public expression of their views at . . . the Third United Nations Conference on the Law of the Sea, or in the jurisprudence"[66]. More recently, in the *Black Sea* case, the Court confirmed that "[t]here is no principle of proportionality as such which bears on the initial establishment of the provisional equidistance line"[67]. The Court went on to explain:

> "The purpose of delimitation is not to apportion equal shares of the area, nor indeed proportional shares. The test of disproportionality is not in itself a method of delimitation. It is rather a means of checking whether the delimitation line arrived at by other means needs adjustment because of a significant disproportionality in the ratios between the maritime areas"[68].

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[64] CMK, paras. 353-354.

[65] RK, Chap. II.C.2.

[66] *Libya* v. *Malta*, p. 45, para. 58.

[67] *Romania* v. *Ukraine*, p. 116, para. 163.

[68] *Romania* v. *Ukraine*, p. 99, para. 110.

52. Yet, Kenya bases its argument in favour of a parallel of latitude on that line's purported equal distribution of the relevant area as between itself and Somalia[69]. This is a wrong approach as a matter of law, as the Court's jurisprudence makes abundantly clear. And it is equally wrong as a matter of geographical fact, which Kenya manipulates to lead to its desired conclusion. Here is how they do it. As we have seen, the relevant area, as defined by the Court in *Nicaragua* v. *Colombia* and *Costa Rica* v. *Nicaragua*, is the maritime space where the potential entitlements of the Parties overlap[70]. That area is presented again here, and at tab 63, in the shaded solid green area. To get the result they want, Kenya inflates the relevant area — shown here as the area marked with vertical green lines — by adding maritime space where only Somalia, but not Kenya, has potential entitlement, since it is within 200 nautical miles of Somalia's coast, but beyond 200 nautical miles from Kenya's[71]. Kenya also includes in its version of the relevant area substantial maritime space beyond 200 nautical miles of both coasts which only Somalia, but not Kenya, has claimed in its submission to the CLCS[72]. Kenya has no potential entitlement to either of these areas, within and beyond 200 nautical miles, and there are thus no overlapping entitlements there. As a consequence, they cannot properly be considered part of the relevant area. Kenya's unmistakable purpose in including these areas is to artificially inflate the relevant area, and, in particular, the part of it that its parallel of latitude distributes to Somalia, in order to give the appearance of an equal, or almost equal, distribution as between the two States.

53. Kenya defends this sleight of hand by refusing to accept that the relevant area is limited to the area where the Parties have overlapping entitlements. This is what it says in the Rejoinder, in respect of the relevant area: "Kenya does not agree with Somalia's approach of identifying the areas of overlapping potential entitlements"[73]. This, of course, is not *Somalia's* approach. It is the *Court's* approach, and Somalia has done no more than give effect to it. For this, Kenya criticizes Somalia for "the relevant area being incorrectly [defined] as the area of overlapping entitlements"[74]. On this issue,

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[69] RK, para. 174.

[70] *Nicaragua* v. *Colombia*, p. 683, para. 159; *Costa Rica* v. *Nicaragua*, p. 211, para. 184.

[71] RK, fig. 2-4.

[72] *Ibid.*

[73] RK, para. 168.

[74] RK, para. 176.

Kenya's dispute, we submit, is fundamentally with the Court's jurisprudence, not with Somalia's adherence to it.

54. Kenya defends its disagreement with the Court's established definition of the relevant area by reliance on a treatise on maritime delimitation authored by Messrs. Fietta and Cleverly[75]. Madam President, Kenya did not read this treatise carefully. This is what the distinguished authors actually wrote, but which Kenya chose to ignore: "The relevant area is usually identified by reference to the overlap of the States' coastal projections, extending to the outer limit of the area to be delimited."[76] The authors go on to explain that, on this basis, maritime areas that "are located more than 200 M from one of the two States, or beyond [its] outer continental shelf limits" are "not part of the relevant area"[77]. The authors' definition of the relevant area thus tracks perfectly with that of the Court, and with Somalia's application of it. This underscores the complete lack of support for Kenya's position in either the jurisprudence or the learned commentary.

55. Compounding its error, Kenya repeatedly attempts to attribute to Somalia its own groundless argument that maritime delimitation must be based on proportionality. We were stunned when we saw this in Kenya's Rejoinder but we could not help but see it, because Kenya repeated this allegation four times within 16 paragraphs[78]. According to Kenya, its parallel of latitude "produces the 'almost equal division' of maritime areas between Kenya and Somalia *that Somalia has recognised as equitable*"[79]. Kenya even has the audacity to refer to this as "Somalia's proportionality test"[80]!

56. Madam President, Somalia has never recognized the parallel of latitude as equitable. Nor has it ever argued that maritime delimitation law requires an "equal division" of the disputed maritime area. Kenya's attempt to put its words into Somalia's mouth is a classic case of what psychoanalysts would diagnose as "projection". Freud described this phenomenon in his *Further*

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[75] RK, para. 169.

[76] S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation*, p. 48.

[77] S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation*, p. 48.

[78] RK, paras. 174-190. In particular, see paras. 174, 177, 183, 189.

[79] RK para. 183. See also paras. 174, 177 and 189; CMK, para. 352, fn. 506.

[80] RK para. 174. See also heading of RK, Chapter II.C.2.

Remarks on the Neuro-Psychoses of Defence[81]. Whatever may be Kenya's psychological motivation for attempting to shift the blame for a bad idea to Somalia, our position has been consistent: the boundary must be delimited by the Court's three-stage process; the construction of a provisional equidistance line is feasible and appropriate; there are no special or relevant circumstances warranting an adjustment to that line; and the equidistance line distributes the disputed maritime area in a way that is not significantly disproportionate. It thus constitutes the equitable solution that UNCLOS and the Court's jurisprudence require. Somalia has never advocated that the law requires an "equal division" of the disputed maritime area.

57. Madam President, in addition to all of its other infirmities, Kenya's parallel of latitude fails to deliver an equitable solution. This is what an equitable solution looks like. It is the one Somalia proposes, and you have seen it before. The coast is a nearly a straight line running from north-east to south-west. The coasts of the Parties project to the south-east. As you can see here, the equidistance line permits the coasts of both Parties to project in that direction, without being cut-off, to the full extent of their 200-nautical-mile entitlements, and beyond, into the extended continental shelf. Kenya is not cut off by an equidistance boundary with Somalia.

58. Here, in contrast, is an *in*equitable solution. As you can see here, and at tab 64, the parallel of latitude causes a significant cut-off of Somalia's coastal projection, in the part of its relevant coast adjacent to the boundary with Kenya. In contrast, there is no such cut-off on the Kenyan side of the line. Kenya's coast is allowed to project itself to the south-east in an unimpeded fashion. In fact, in the northern third of the area attributed to Kenya by this division of the disputed maritime area, Kenya's coast is permitted to project itself well above 90 degrees, to more than 120 degrees, at Somalia's expense. This is a far cry from the mutually balanced way of sharing a cut-off that maritime delimitation law requires.

59. The bankruptcy of Kenya's approach is further illustrated by a new sketch-map that was included in its written submission of 5 March. This is Kenya's depiction of how the relevant coast supposedly projects seaward. What is blindingly obvious, despite all of the busyness on this sketch, is that, to draw projections due eastward, in parallel with a parallel of latitude, they invented a

[81] S. Freud, *Further Remarks on the Neuro-Psychoses of Defence* (1896).

so-called "coastal configuration" which does not even come close to representing the actual direction of the coast! As highlighted here, Kenya's imaginary coast runs due north and south, at an angle of zero degrees. This bears scant relation to the actual direction of the real coast, which runs from north-east to south-west, despite Kenya's effort to obscure it with enough arrows to fill an extraordinarily large quiver. What Kenya has done here is completely refashion the coastal geography, in violation of the most basic principles of maritime delimitation.

60. The conclusion, Madam President, is therefore inescapable: the parallel of latitude proposed by Kenya results from no known or recognized, or judicially sanctioned, method of delimitation, and it fails to produce the equitable boundary that the law requires. In contrast, the equidistance line, which results from the standard, three-stage process the Court has regularly employed in the delimitation of maritime boundaries, is an equitable boundary between Somalia and Kenya, and it should be adopted by the Court as the boundary between these two States.

61. Madam President, Members of the Court, this concludes my presentation. I thank you for your kind courtesy and patient attention. And I ask that you call upon my esteemed colleague, Mr. Edward Craven, to address you next.

The PRESIDENT: I thank Mr. Reichler and I shall now give the floor to Mr. Edward Craven. Mr. Craven, you have the floor.

Mr. CRAVEN:

KENYA'S RESPONSIBILITY FOR ITS UNLAWFUL ACTS IN THE DISPUTED MARITIME AREA

1. Thank you very much, Madam President. Madam President, Members of the Court, it is a privilege to appear before you on behalf of Somalia. In this speech, I shall address Kenya's violations of Somalia's sovereignty and sovereign rights and the related breaches of Kenya's obligations under Articles 74 (3) and 83 (3) of UNCLOS.

I. Somalia's sovereignty and sovereign rights in respect of its maritime zones

2. It, of course, is well established that a coastal State possesses sovereignty over its territorial sea and exclusive sovereign rights with respect to its continental shelf and exclusive economic zone.

The exclusivity of those sovereign rights is expressly reflected in UNCLOS. In respect of the continental shelf, for example, Article 77 provides that a coastal State's rights to explore and exploit the natural resources of the continental shelf "are *exclusive* in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, *no one* may undertake these activities without the *express consent* of the coastal State"[82].

3. Accordingly, a State that undertakes any unauthorized exploratory activities in the continental shelf of another State violates the latter's sovereign rights. This is the case regardless of whether the activities cause permanent physical change — the unauthorized exploration is itself a violation. This is clear from the Court's Order on provisional measures in the *Aegean Sea Continental Shelf* case, which held that "seismic exploration of the natural resources of the continental shelf without the consent of the coastal state might, *no doubt*, raise a question of infringement of the latter's exclusive right of exploration"[83].

4. It is equally well established that judicial determination of a disputed maritime boundary is essentially declaratory — rather than constitutive — of a State's rights over the maritime areas which are recognized as belonging to that State. As the Court emphasized in the *North Sea Continental Shelf* case, maritime delimitation "is a process which involves establishing the boundaries of an area already, in principle, appertaining to the coastal State and not the determination *de novo* of such an area"[84].

5. Accordingly, if the Court accepts Somalia's position regarding the location of the Parties' maritime boundary, the Court's judgment will have the effect of recognizing existing sovereign rights of Somalia, rather than creating new ones. It follows from this that if Kenya has undertaken *any* exploratory or exploitative activities in the maritime space that is found to belong to Somalia, then those activities will in principle have violated Somalia's existing sovereign rights and will therefore engage Kenya's international responsibility.

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[82] UNCLOS, 10 December 1982, Article 77 (2); emphasis added.

[83] *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976* (hereinafter "*Greece* v. *Turkey*"), pp. 10-11, para. 31.

[84] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 22, para. 18.

II. Kenya's unlawful unilateral activities in Somalia's maritime zones

6. Madam President, there is no doubt that Kenya has indeed undertaken exploratory activities in the areas claimed by Somalia. Kenya explicitly accepts that it has done so. After several decades of not awarding oil concession blocks north of the equidistance line, in the mid-2000s Kenya abruptly changed tack, and began to authorize both seismic and drilling activities knowing them to be in the disputed maritime area[85]. Those activities took place after the dispute between the Parties had crystallized.

7. As the graphic on the screen illustrates, in the period immediately prior to Somalia's Application to the Court, Kenya awarded no fewer than seven oil concession blocks in the disputed maritime area to at least five oil companies. Pursuant to those concessions, several commercial operators have undertaken extensive seismic testing on Somalia's side of the equidistance line. As a result of that testing, those companies have acquired extensive data regarding the nature, location and volume of the natural resources contained in tens of thousands of square kilometres of Somalia's continental shelf. That data is both valuable, and politically and commercially sensitive. Moreover, in addition to seismic testing, at least one oil company licensed by Kenya has drilled a well in Somalia's continental shelf. Kenya accepts that in 2007 the oil company Woodside drilled the Polombo-1 deep-water well in block L-5 on Somalia's side of the equidistance line[86].

8. Somalia did not consent to any of those testing or drilling activities. On the contrary, Somalia made repeated and emphatic protests against those activities as soon as it was aware of them and had the ability to object[87]. By authorizing and encouraging companies to undertake exploratory testing and drilling in Somalia's continental shelf — and by disregarding Somalia's ardent objections to those activities — Kenya violated Somalia's ***sovereign*** rights.

III. Violation of Kenya's obligations under Articles 74 (3) and 83 (3) of UNCLOS

9. In addition to unlawfully interfering with Somalia's sovereign rights, Kenya's activities in the disputed area also violated its obligations under Articles 74 (3) and 83 (3) of UNCLOS. This is

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[85] See MS, paras. 3.22-3.24, 8.19-8.27.

[86] See RK, para. 198.

[87] See MS, paras. 8.20, 8.23, 8.24 and 8.27.

so regardless of where in the disputed area those activities took place and irrespective of the Court's ultimate ruling about the location of the maritime boundary. As the Court well knows, Article 83 (3) stipulates that, pending agreement, the States concerned, "in a spirit of understanding and co-operation, *shall make every effort* to enter into provisional arrangements of a practical nature and, during this transitional period, *not to jeopardize or hamper the reaching of the final agreement*" (emphasis added).

10. Article 74 (3), of course, contains materially identical provisions in respect of the exclusive economic zone.

11. In *Ghana/Côte d'Ivoire*, the ITLOS Special Chamber stressed that the obligation not to jeopardize or hamper the reaching of a final agreement on delimitation is "an obligation of conduct", one which requires the States concerned to act "in a spirit of understanding and co-operation" and to "make every effort" to avoid impeding the reaching of a final agreement[88]. In light of this, the question for the Court is therefore a simple one: did Kenya make "every effort" to avoid jeopardizing or hampering the reaching of a final agreement with Somalia on the delimitation of the maritime boundary?

12. The answer to this question is plainly: no. It is clear beyond argument that Kenya granted numerous licences that ~~***both***~~ authorized and encouraged exploratory activities in maritime areas that Kenya knew were claimed by Somalia. It is equally clear that, in so doing, Kenya behaved in a manner that would be perceived by both the Government and the population of Somalia as a deliberate attempt to deprive Somalia of its sovereign rights. This was self-evidently likely to hamper the reaching of any agreement in respect of the Parties' maritime boundary.

13. Independent reports attest to the detrimental impact of Kenya's activities. One example suffices to illustrate the point: in its 2013 report to the Security Council, the United Nations Monitoring Group on Somalia highlighted the profoundly destabilizing effect of Kenya's unilateral activities in the disputed area. The report explained that Kenya's decision to award oil concessions in the contested area had led directly to a dispute between Somalia and the holder of several of those concessions, a dispute which could "serve to create further animosity between the Government of

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[88] *Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment, ITLOS Reports 2017*, paras. 627, 629 and 630.

Somalia and Kenya" and "exacerbate tensions between Somalia and Kenya that have already been sharpened by political disagreements" in respect of other territorial issues[89]. Creating animosity and exacerbating tensions are inimical to the obligations enshrined in Articles 74 (3) and 83 (3) of UNCLOS.

IV. Kenya's response to Somalia's case concerning the interference with its sovereign rights

14. Kenya's principal response to Somalia's case has been to assert that the dispute with Somalia did not crystallize until 2014[90]. As Somalia has already explained, that position is completely wrong and is contradicted extensively by the documentary record.

15. As Professor Sands has explained, since as far back as the late 1970s Kenya was aware that Somalia claimed an equidistant maritime boundary. Somalia never disavowed that position. Kenya's claim to the contrary is directly contradicted by its own statements, including at an earlier phase in these proceedings. In its Preliminary Objections, Kenya acknowledged that the dispute already existed at least half a decade before 2014. According to Kenya: "It was only *in 2009* that Somalia first *disputed* Kenya's 1979 EEZ . . . boundary."[91]

16. Similarly, the Memorandum of Understanding, which the Parties concluded in 2009, expressly referred to the existence of a "maritime dispute" and contained no fewer than 11 references to the "dispute" or "disputed areas"[92]. Kenya's principal argument is thus fatally flawed.

17. Kenya's other line of response is to assert that no violation can occur where the activities in question are merely "transitory" in character[93]. This argument also lacks merit. Article 77 of UNCLOS prohibits all unauthorized exploratory activities in Somalia's continental shelf. It draws no distinction between unauthorized activities of a permanent or transitory character. A temporary

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[89] United Nations Monitoring Group on Somalia and Eritrea, *Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 200 (2012): Somalia*, UN doc. S/2013/413, 12 July 2013, pp. 247-250; MS, Vol. III, Ann. 64.

[90] CMK, Vol. I, Chap. I, Sec. G. See also CMK, Vol. I, Chap. 4, Sec. A.

[91] POK, para. 18; emphasis added.

[92] Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to Grant to Each Other No-Objection in Respect of Submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf, *UNTS*, Vol. 2599 (7 Apr. 2009), p. 37; MS, Vol. III, Ann. 6.

[93] RK, paras. 11, 192, 193, 199, 204 and 206.

interference is still an interference, particularly where it results, as here, in the permanent unauthorized acquisition of sensitive data concerning Somalia's maritime resources.

18. Secondly, the case law cited by Kenya does not establish that Articles 74 (3) and 83 (3) can only be violated by activities that have permanent physical effects[94]. Nor is there any mandate in the language of those Articles for such an interpretation. What matters, as the Special Chamber recognized in *Ghana/Côte d'Ivoire*, is whether Kenya has made "every effort" to avoid jeopardizing or hampering the reaching of a final agreement with Somalia. In the context of the existing dispute, Kenya's decisions to award oil concessions in maritime areas claimed by Somalia, and to permit and encourage the carrying out of extensive exploratory tests in those areas, plainly fell short of that exacting standard.

19. Thirdly, and in any event, Kenya concedes that not all of the activities in question were transitory. On at least one occasion, a well was drilled on Somalia's side of the equidistance line. Thus, even on Kenya's approach to the law, the standard enshrined in Articles 74 and 83 was indisputably breached.

V. Consequences of Kenya's responsibility

20. Madam President, the consequences of Kenya's unlawful acts are straightforward. In accordance with international law, Kenya is obliged to cease its wrongful acts so as to respect Somalia's sovereignty and sovereign rights. In particular, it must cease to award any oil concessions north of the equidistance line and it must annul such concessions as it has purported to grant.

21. Although Somalia is entitled to substantial reparation from Kenya, in the spirit of amity and neighbourliness, which Somalia hopes will characterize the Parties' future relationship, Somalia does not pursue a claim for reparation for past wrongs. Instead, Somalia asks the Court to do just three things: first, to affirm unambiguously the existence of Somalia's rights; second, to recognize the violations of those rights that have occurred; and third, to order that Kenya shall cease its wrongful acts and take all necessary steps to terminate any measures that violate the sovereignty or sovereign rights of Somalia.

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[94] RK, paras. 202-207.

22. Madam President, Somalia is one of the world's poorest countries. Following years of civil conflict and humanitarian disasters, Somalia's maritime resources are one of its few valuable assets. Unfortunately, they are also among its most vulnerable. Somalia has brought this case before the Court in order to obtain vindication of its sovereign rights over those resources, which are critical to its future development and to the future security and prosperity of its people. As the pre-eminent guardian of the international legal order, Somalia looks to this Court to ensure that its sovereign rights are effectively protected, for the benefit of all of Somalia's people, and in accordance with established principles of international law.

23. Madam President, Members of the Court, thank you all very much for your kind attention. In accordance with our understanding of the statement at the start of this session, Madam President, this concludes Somalia's presentation today.

The PRESIDENT: I thank Mr. Edward Craven whose statement does bring to an end today's presentation of Somalia's oral arguments. I wish to recall as mentioned at the opening of today's session that the Court yesterday received a letter from Kenya and a response from Somalia that present the possibility that the oral proceedings will continue beyond today. The matter is currently under consideration by the Court. Once the Court has taken a decision, the Registrar will inform the Parties as to the further conduct of the proceedings. For this reason, the reading by Somalia of its final submissions will be deferred to a later date.

I shall now give the floor to Judge Bennouna who has a question for Somalia. Judge Bennouna, you have the floor.

M. le juge BENNOUNA : Je vous remercie, Madame la présidente. Vous me permettrez de baisser mon masque, exceptionnellement, pour que je sois entendu. Je parle sous votre contrôle.

Ma question s'adresse à la Somalie. Je souhaiterais que la délégation somalienne clarifie sa position au sujet de l'affirmation du Kenya, dans son contre-mémoire, selon laquelle la borne nº 29 à Dar Es Salam, qui représente le terminus de la frontière terrestre entre les deux Parties, doit être reliée «dans une direction sud-est, jusqu'à la limite des eaux territoriales, le long d'une ligne droite à angle droit de l'orientation générale de la côte à Dar Es Salam, laissant les îlots de Diua Damasciaca en territoire italien», ceci conformément à la description générale de la frontière prévue dans l'accord

de 1927 (voir à ce sujet le contre-mémoire, aux paragraphes 33 à 35). Ma question est donc la suivante : Est-ce que, selon la Somalie, cet accord de 1927 établit la ligne de délimitation de la mer territoriale entre les deux Parties et, si tel est le cas, quelle serait la limite extérieure de cette ligne ?

Je vous remercie, Madame la présidente.

The PRESIDENT: I thank Judge Bennouna. The written text of this question will be communicated to Somalia as soon as possible. Somalia may respond to the question in writing no later than 10 a.m. on 22 March 2021. The Registrar will also convey the question and Somalia's reply to Kenya. Should Kenya wish to make any comment on Somalia's reply, in accordance with Article 72 of the Rules of Court, its comment must be submitted no later than 10 a.m. on 26 March 2021. This brings to a close today's session of these oral proceedings. The sitting is adjourned.

The Court rose at 4.35 p.m.