APPENDIX

Section I: Somalia's Response to Kenya's New Documents and Arguments on Its Purported "Acquiescence" to a Maritime Boundary Following a Parallel of Latitude

1. Kenya's new legal memorandum seeks to bolster its argument that Somalia acquiesced in a maritime boundary following a parallel of latitude.

2. All of the arguments Kenya makes are irrelevant.

A. The Positions of the Parties during the Law of the Sea Conference

3. Kenya's argument based on the Parties' statements during the *travaux préparatoires* of the UNCLOS is set out in paragraphs 85 to 113 of the 22 February document. It mainly consists in recalling that Kenya and Somalia were among the States advocating equitable principles for the delimitation of maritime areas.[1] Three points can be made in this respect.

4. *First*, it is revealing that a report, cited by Kenya,[2] states that Tanzania and Somalia "had the malicious intention of distorting the marine borders" during the negotiations of UNCLOS.[3] This statement is completely inconsistent with the proposition that there were agreements, tacit or otherwise, on the maritime boundaries between Kenya, on the one hand, and Somalia and Tanzania, on the other.

5. S*econd*, at no point during the public debates of the Law of the Sea Conference did either Kenya or Somalia mention their own maritime boundaries. This too renders irrelevant Kenya's reliance on statements made during the Law of the Sea Conference in respect of acquiescence and other matters relevant to these proceedings, including tacit agreement, irrelevant.

6. *Third*, and more generally, Kenya's reference to the fact that Kenya and Somalia advocated equitable principles for the delimitation of maritime areas during the Law of the Sea Conference is entirely misconceived. There is clearly no incompatibility between equitable principles and delimitation according to the three-step method, beginning with a provisional equidistance line, which is the standard method to reach an equitable delimitation.

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[1] Appendix 2 to Kenya's 22 February 2021 Application, paras. 88-89, 95.

[2] *Ibid.*, para. 91, fn. 94; Report from the Kenya Permanent Mission to the United Nations on the Work of the Second Session of the Third United Nations Conference on the Law of the Sea, held in Caracas, Venezuela, from 20th June to 29th August 1974 (273/430/001A/15), received by the Kenyan Ministry of Foreign Affairs on 28 October 1974, Extract. Counter-Memorial of the Republic of Kenya (hereinafter "KCM"), Annex 11.

[3] *See ibid.*, para. 91, fn. 94 (referring to KCM, para. 70; Reply of Somalia (hereinafter "SR"), paragraph 2.97). *See also* Report from the Kenya Permanent Mission to the United Nations on the Work of the Second Session of the Third United Nations Conference on the Law of the Sea, held in Caracas, Venezuela from 20th June to 29th August 1974 (273/430/001A/15) received by the Kenyan Ministry of Foreign Affairs on 28 October 1974, Extract, p. 64. KCM, Annex 11.

B. Kenya's "Significant Assistance during Somalia's Civil War"

7. Kenya praises itself[4] for having "greatly assisted the Somali people and Government in the twenty-year period of the Somali civil war, from 1991 to 2012".[5]

8. Both the Somali people and Government are indeed appreciative of Kenya's support. But these considerations are not relevant for the present purpose: neither Party ever agreed that ceding Somalia's sovereign rights on an important part of its maritime domain would be a *quid pro quo* for Kenya's assistance. Such a bargain was not even alluded to, nor does Kenya formally invoke one. Moreover, if such agreement been given, which it was not, it could not have any legal validity, given the circumstances.

9. Further, in its legal memorandum, Kenya rightly acknowledges that "[o]f course, acquiescence does not require benefit, reliance or other estoppel-like considerations".[6] But it immediately contradicts this statement by invoking the *Temple of Preah Vihear* case where the Court noted that Thailand had enjoyed benefits from its acceptance of the map it had accepted.[7] That stands in direct contrast with this case, where Somalia has not accepted any map or document describing the maritime boundary. Moreover, whereas in the *Temple* case there was the direct link between the benefits enjoyed by Thailand and its acquiescence, no such link exists in the present case. The same can be said about the very artificial connection Kenya makes with the *Chagos* case.[8]

10. Forcing the hand of a weak neighbouring State would not, in any case, be a very dignified or legally admissible way of extorting part of its territory or sovereign rights.

C. Additional Naval Logs

11. Somalia has addressed Kenya's reliance on its alleged naval activities in the disputed maritime area in its written[9] and oral pleadings,[10] and sees no need to repeat the points there made. Somalia wishes, however, to draw the Court's attention to three points arising from Kenya's newly submitted evidence and its arguments based upon that evidence.

12. *First*, Kenya's newly submitted logs and maps purportedly show that Kenyan naval vessels undertook patrols and interceptions in the territorial sea *north* of the parallel line that Kenya claims represents the Parties' maritime boundary.[11] In other words, the evidence confirms that Kenya's navy undertook activities in locations which, even on Kenya's case, are within Somalia's sovereign maritime space. This undermines Kenya's argument that the

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[4] Appendix 2 to Kenya's 22 February 2021 Application, paras. 116-132, 319, 348.

[5] *Ibid.*, para. 116.

[6] *Ibid.*, para. 316.

[7] *Ibid.*; *see also ibid.*, para. 347.

[8] *Ibid.*, para. 317.

[9] SR, paras. 2.57-2.72.

[10] CR/2021/2, pp. 47-49, paras. 41-46 (Sands).

[11] *See, e.g.*, Appendix 2 to Kenya's 22 February 2021 Application, Figure 2 (which is a "revised" version of the graphic at KCM, Figure 1-13); *ibid.*, Figure 3.

absence of any objection by Somalia to Kenya's naval activities in the area between the equidistance line and the parallel line can only be explained on the basis that Somalia did not consider those activities to encroach its maritime space.[12] Rather, Kenya's own evidence confirms that even when Kenya undertook activities in maritime space which it recognises as belonging to Somalia, Somalia was unable to detect and respond to those incursions. Thus, the absence of any objection by Somalia to Kenyan naval activities is not evidence of "acquiescence", but simply a reflection of Somalia's practical inability to detect – still less detect, repel and prevent – those activities.

13. *Second*, this point is reinforced by Kenya's repeated references in its new legal memorandum to Somalia's inability effectively to detect and prevent incursions and illegal activities within its maritime space. Kenya's legal memorandum contains extensive references to what is referred to as Somalia's "lack of territorial and maritime enforcement capacity"[13]; "inability to police its waters"[14]; "inability to police and prevent crime in its maritime territory"[15]; "incapacity to police its coasts"[16]; and "inability to safeguard its waters from piracy … and other grave forms of maritime crime"[17]. Kenya relies on the fact that Somalia is "unable to police its own waters";[18] "is incapable of controlling the relevant maritime areas and of preventing widespread illegal, unreported and unregulated fishing…in its waters";[19] and "cannot control, regulate or enforce its maritime jurisdiction over the now-disputed maritime area".[20] Kenya also relies on documents which emphasise Somalia's inability to prevent incursions into its maritime space, and which explain that Somalia had *authorised* other States to enter *Somalia's* sovereign maritime space in order to deal with such threats.[21] These statements and documents are inconsistent with Kenya's argument that Somalia's failure to

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[12] *See* Appendix 2 to Kenya's 22 February 2021 Application, para. 104 ("Somalia did not protest against any of these military deployments, even though some of them took place in areas that Somalia now claims as part of its territorial sea. It is untenable to believe that a sovereign State would not have objected to a military encroachment into its territorial sea. The appropriate conclusion is that Somalia did not consider there was any such encroachment".); *ibid.*, para. 237 ("Military activities in the territorial sea – a zone where the coastal State enjoys full and exclusive sovereignty and jurisdiction – constitute unequivocal displays of sovereignty. As such, they would be precisely the form of activities that should have triggered a response from Somalia, if it had any objection to Kenya's claimed maritime boundary".).

[13] Appendix 2 to Kenya's 22 February 2021 Application, para. 507.

[14] *Ibid.*, para. 489.

[15] *Ibid.*, para. 456.

[16] *Ibid.*, para. 427.

[17] *Ibid.*, para. 508.

[18] *Ibid.*, para. 443.

[19] *Ibid.*, para. 354.

[20] *Ibid.*, para. 454.

[21] *See Letter* from the Permanent Representative of Somalia to the UN addressed to the President of the Security Council, S/2008/323 (12 May 2008). Appendix 2 to Somalia's Application, Annex 13. ("[T]he Transitional Federal Government *does not have the capacity to interdict the pirates or patrol and secure the waters off the coast of Somalia* … The Transitional Federal Government further stresses that the sovereignty and territorial integrity of Somalia should be fully respected and calls upon States and interested organizations to provide technical assistance to Somalia. In this regard, the Transitional Federal Government *has granted a number of States authorization to enter Somali territorial seas in order to deal with these threats*." (emphasis added).

object to transient naval patrols or a handful of interceptions north of the equidistance line somehow show that Somalia regarded that maritime space as belonging to Kenya.

14. *Third*, it is notable that the map at Figure 2 of Kenya's legal memorandum shows that a significant number of the interceptions and patrols were clustered along a south-easterly line that closely resembles the equidistance line. This is consistent with the conclusion that Kenya's naval operations were undertaken on the basis that the maritime boundary lay on a south-easterly line closely approximating to an equidistance line. Accordingly, even if naval activities were capable as a matter of law of supporting Kenya's case on "acquiescence" – which they are not – they are manifestly incapable of supporting that case on the facts.

D. Kenya's Notes Verbales *to Somalia in 2007 and 2008*

15. Kenya's legal memorandum refers to two *notes verbales* that were sent to Somalia in 2007 and 2008,[22] which were already on the record as Annexes 9 and 12 to Kenya's Rejoinder, respectively.[23] Those documents provide no support for Kenya's case on acquiescence.

16. *First*, as Somalia has explained in its written and oral pleadings, it is well established that unilateral acts such as these are incapable as a matter of law of establishing maritime boundaries.[24]

17. *Second*, and in any event, Kenya's *notes verbales* invited Somalia to produce and send a *note verbale* expressing Somalia's agreement to the proposition that the Parties' maritime boundary followed a parallel of latitude. Somalia did not do so. In circumstances where a State has declined to take up two successive invitations to "agree" to a particular proposition regarding its maritime boundary, the reasonable conclusion is that the proposition in question is *not* agreed. The fact that Kenya considered it necessary to make the request twice – and the fact that Somalia twice declined to provide the response sought by Kenya – undermines, rather than supports, Kenya's case. This is further confirmed by the fact that a year later, in 2009, Kenya proceeded on the basis that the maritime boundary had not been delimited, by agreement or acquiescence or otherwise, as indicated below.

E. The 2009 Memorandum of Understanding

18. Kenya contends that the 2009 Memorandum of Understanding ("MOU") "contemplated and incorporated Somalia's acquiescence" because the MOU stated that the maritime boundary dispute would be resolved "on the basis of international law", and (in Kenya's words) "[a]cquiescence is a well-established form of agreement under international law."[25] Thus, Kenya argues that a treaty which contains no fewer than 11 references to the maritime "dispute" or "disputed areas", and which referred repeatedly to the "future

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[22] *Ibid.*, paras. 140-141, 258-259.

[23] *Note Verbale* from the Ministry of Foreign Affairs of Kenya to the Ministry of Foreign Affairs of the Transitional Federal Government of Somalia, MFA.273/430/001 (26 September 2007). KR, Vol. II, Annex 9; Note Verbal from the Ministry of Foreign Affairs of Kenya to the Ministry of Foreign Affairs of the Transitional Federal Government of Somalia, MFA 273/430/001 (4 July 2008). KR, Vol. II, Annex 12

[24] SR, paras. 2.3-2.12; CR 2021/2, pp. 18-36, paras. 2-51 (Pellet).

[25] Appendix 2 to Kenya's 22 February 2021 Application, para. 146.

delimitation" of the Parties' maritime boundary, nevertheless somehow recognised and enshrined a pre-existing (but unwritten) delimitation of that boundary. This argument is incoherent, inconsistent with Kenya's repeated statements before this Court at the Preliminary Objections phase,[26] and self-evidently wrong.

F. International Agreements between Kenya and Somalia

19. The fact that between 2005 and 2009 Somalia "negotiated and adopted international agreements with Kenya"[27] also undermines Kenya's case on acquiescence. The evidence that the Parties concluded various international agreements concerning a variety of subject matters, but failed to enter into an agreement on the delimitation of any aspect of their maritime boundary, is fully consistent with Somalia's case that it has never agreed to, or acquiesced in, the parallel boundary claim of Kenya. The international agreements cited by Kenya demonstrate that where Kenya and Somalia intended to establish mutually binding rights and obligations between each other, they did so by negotiating and concluding written treaties, not by means of an unwritten and asymmetric process of unilateral assertion and passive acceptance.

G. Management of Somalia's Airspace

20. Kenya's attempt to support its acquiescence argument by reference to the "management of Somalia's airspace"[28] is also entirely without merit.

21. *First*, Kenya's argument is based entirely on documents showing the extent of the Mogadishu flight information region ("FIR"). A FIR is "[a]n airspace of defined dimensions within which flight information service[s] and alerting service[s] are provided".[29] In other words, it is a tool used for the safe management of international air traffic. It has nothing whatever to do with the management – still less the delimitation – of maritime areas. This point is demonstrated and reinforced by the fact that the documents published by the International Civil Aviation Organisation ("ICAO") on which Kenya relies make it clear that the maps, charts and statements contained within those documents are not intended to reflect any view regarding the boundaries of any State.[30]

22. *Second*, while FIRs often (but not always) follow a State's land and territorial sea boundaries, the same is not true in respect of the waters beyond the territorial sea. In this regard, it is notable that of the four examples that Kenya cites of African States adopting a

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[26] See the statements summarised at SR, paras. 2.15-2.21; CR/2021/2l, pp. 40-41, paras. 12-16 (Sands).

[27] Appendix 2 to Kenya's 22 February 2021 Application, para. 153.

[28] Appendix 2 to Kenya's 22 February 2021 Application, paras. 46, 156.

[29] Annex 2 to the Convention on International Civil Aviation, Rules of the Air, p. 1-2. A "flight information service" is "[a] service provided for the purpose of giving advice and information useful for the safe and efficient conduct of flights", while an "alerting service" is "[a] service provided to notify appropriate organizations regarding aircraft in need of search and rescue aid, and assist such organizations as required".

[30] *See, e.g.*, the disclaimer at the beginning of the "Air Navigation Plan, Africa – Indian Ocean Region", Vol. I, 2nd edition, *ICAO*, 2010. Appendix 2 to Kenya's 22 February 2021 Application, Annex 29. ("The designations employed and the presentation of the material in this publication do not imply the expression of any opinion whatsoever on the part of ICAO concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries").

parallel of latitude maritime boundary,[31] none has a FIR limit that follows that parallel line. Two of the four examples relied on by Kenya (Mauritania-Morocco and Mozambique-Tanzania) have a FIR limit which does not even remotely correspond to a parallel of latitude. Another (Angola-Namibia) has a FIR limit which follows a south-westerly line for the first approximately 250 M, while the fourth example (Gambia-Senegal) has a joint FIR which is shared with several other countries, the limit of which at no point follows a parallel of latitude.[32] The same is true in respect of the maps and charts showing search and rescue regions off the coast of Africa.[33]

23. *Third*, it is notable that the southern limit of Somalia's FIR follows a south-easterly line for the first 30 or so miles above the waters off the Somali coast.[34] Accordingly, all of the airspace above the territorial sea and above the first portion of the EEZ is managed by reference to a FIR which follows a south-easterly line, not a parallel of latitude. After approximately 30 miles, the FIR boundary follows a horizontal line; however, this is many miles south of the parallel of latitude which Kenya claims the Parties have agreed to. As a result, even if (*quod non*) the parameters of the Mogadishu FIR were somehow relevant to the Court's determination of the location of the Parties' maritime boundary, it would provide no support for the position Kenya advances before the Court.

H. Soma Oil & Gas

24. Kenya devotes many pages of its legal memorandum to allegations and conjecture regarding Soma Oil & Gas, a company incorporated in 2013 which Kenya insinuates is the true driving force behind Somalia's Application to the Court. Kenya offers a lengthy submission full of unsubstantiated claims and assertions regarding "shadowy beneficial owners", a "lopsided" agreement "shrouded in mystery", and negotiations said to have been conducted "under suspicious circumstances".[35] By these means, Kenya seeks to divert attention from its manifestly inadequate case on acquiescence by invoking the spectre of alleged corruption and discreditable dealings to impugn Somalia's purpose and motive for bringing this case.

25. Somalia has been clear and consistent in explaining its reasons for seeking a judicial determination of this maritime dispute in accordance with international law.[36] Somalia seeks to vindicate its sovereignty and sovereign rights, for the benefit of the Somali people and

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[31] *See* Appendix 2 to Kenya's 22 February 2021 Application, para. 96.

[32] *See, e.g.*, Chart ATS 1 (Flight Information Service); Chart ATS 2A (Area Control Service – Lower Airspace); Chart ATS 3 (Area Control Service – Upper Airspace); Chart ATS 3B (Area Control Service – Upper Airspace); Chart SAR 1 in "Air Navigation Plan, Africa – Indian Ocean Region", Vol. I, 2nd edition, *ICAO*, 2010. Appendix 2 to Kenya's 22 February 2021 Application, Annex 29.

[33] This point is also reflected by maps showing the search and rescue regions. *See, e.g.*, "Air Navigation Plan, Africa – Indian Ocean Region", Vol. I, 2nd edition, *ICAO*, 2010, Chart SAR 1. Appendix 2 to Kenya's 22 February 2021 Application, Annex 29.

[34] *See, e.g.*, "Report of the African Region (AFI) – Asia/Pacific Region (APAC) – Middle East Region (MID) Air Traffic Management (ATM) Special Coordination Meeting (AAMA/SCM)", *ICAO*, 19-20 January 2017, Appendix C, Appendix E. Appendix 2 to Kenya's 22 February 2021 Application, Annex 30.

[35] Appendix 2 to Kenya's 22 February 2021 Application, paras. 185, 202, 217, 219.

[36] *See, e.g.*, Memorial of Somalia (hereinafter "MS"), paras. 1.6-1.15; CR 2016/11, pp. 12-15, paras. 12-26 (Al-Sharmani); CR 2016/13, pp. 40-43, paras. 5-21 (Al-Sharmani); CR 2021/2, pp. 13-15, paras. 2-9 (Gulaid).

for the future security and development of the country. Such an approach is entirely proper. Kenya's suggestion that Somalia's recourse to the principal judicial organ of the United Nations is part of a scheme to advance allegedly corrupt private interests is unsubstantiated and without any foundation whatsoever. Unfortunately for Kenya, the factual premise on which this conspiracy theory is founded – namely that until February 2014 Somalia had consistently acquiesced in Kenya's claim to a parallel maritime boundary, and that it was only following the discovery of oil reserves in 2012 that Somalia expressed any interest in the area south of the parallel of latitude – is also without merit. As Somalia has explained in its written[37] and oral pleadings,[38] that premise is contradicted by the evidence on record, not least Kenya's own unequivocal statements – including to this Court[39] – which recognised the existence of the maritime boundary dispute years before Soma Oil & Gas existed.

26. The many pages of allegations, speculation and arguments concerning Soma Oil & Gas in Kenya's legal memorandum are a smokescreen, a written submission devoid of substance. It is entirely irrelevant for a case on maritime delimitation before the International Court of Justice, and contradicted by the material on record.

Section II: Somalia's Responses to Kenya's New Documents and Arguments on Delimitation of the Maritime Boundary

27. Kenya's legal memorandum attempts to enhance Kenya's argument that the Court should discard the three-step method of delimiting the maritime boundary in favour of the so-called "latitudinal delimitation method". It also argues, in the alternative, that the application of the three-step method results in a line that follows a parallel of latitude, as it desires. Kenya's new arguments lack any basis in law or in fact.

A. Kenya's Legal Memorandum Provides No Basis To Justify Discarding the Three-Step Method in Favour of the So-Called "Latitudinal Delimitation Method"

28. Chapter 3 of Kenya's legal memorandum contains a renewed attempt to justify its argument that the so-called "latitudinal delimitation method is the most appropriate way to reach an equitable solution in this case"[40] and should be applied in lieu of the three-step methodology. In particular, Kenya places great emphasis on the relevance of its maritime boundary agreement with Tanzania. The claim itself is not new, as it stood at the basis of Kenya's case in favour of the parallel in its regular written pleadings. Kenya makes two additional arguments in support of this claim, distorting the principles of interpretation it invokes. It argues that the (i) principles of intertemporal law,[41] and (ii) transparency and

[37] *See* SR, paras. 2.15-2.106.

[38] *See* CR 2021/2, pp. 38-54, paras. 6-63 (Sands).

[39] *See* SR, paras. 2.15-2.21; CR 2021/2, pp. 40-41, paras. 12-16 (Sands).

[40] Appendix 2 to Kenya's 22 February 2021 Application, para. 322.

[41] *Ibid.*, paras. 338-339.

predictability of the delimitation process[42] require that its agreements with Tanzania should be taken into account in choosing a method of delimitation.

29. Kenya invokes the principle of intertemporal law in a spurious manner. *First*, it cannot displace a principle as fundamental as *res inter alios acta*. *Second*, the Court is not called here to interpret the Kenya-Tanzania maritime boundary agreements, but to make an objective delimitation of the maritime boundary between Somalia and Kenya. *Third*, as already noted during Somalia's oral pleadings,[43] Kenya's agreements with Tanzania are far from reflecting general international law existing at the time of their adoption. The 2009 Kenya-Tanzania agreement on the exclusive economic zone and continental shelf, in particular, was concluded at a time when the Court's three-stage process, beginning with an equidistance line, was already consolidated and Somalia's claim to an equidistance boundary was known to Kenya.

30. The second principle which Kenya invokes is the one of transparency and predictability of the delimitation process. According to Kenya, "[d]isregarding delimitations established lawfully and reasonably in the past as if they simply never existed would be inconsistent with the principles of transparency and predictability".[44] Kenya's reliance on this principle, and on the underlying jurisprudence, in particular the *Bangladesh v. India* award,[45] is entirely misplaced. In that case, as already underlined in Somalia's oral pleadings,[46] this principle was put forward by arbitral tribunals and by ITLOS to justify their reliance on the three-stage process developed by the Court. Paragraph 339 of that award, which Kenya quotes in a truncated manner, reads in full:

> "Since articles 74 and 83 of the Convention do not provide for a particular method of delimitation, the appropriate delimitation method—if the States concerned cannot agree—is left to be determined through the mechanisms for the peaceful settlement of disputes. In addressing this question, international courts and tribunals are guided by a paramount objective, namely, that the method chosen be designed so as to lead to an equitable result and that, at the end of the process, an equitable result be achieved. In this connection, the Tribunal recalls the principles stated by the International Tribunal for the Law of the Sea in its judgment in *Bangladesh/Myanmar* (Judgment of 14 March 2012, paragraph 235). This Tribunal wishes to add that transparency and the predictability of the delimitation process as a whole are additional objectives to be achieved in the process. The ensuing—and still developing—*international case law constitutes, in the view of the Tribunal, an acquis judiciaire, a source of international law* under article 38(1)(d) of the Statute

[42] *Ibid*,, para. 337, 340.

[43] CR 2021/2, pp. 64-65, para. 33 (Miron).

[44] Appendix 2 to Kenya's 22 February 2021 Application, para. 340. *See also ibid*., paras. 337-338, 409.

[45] *Ibid.*, fn. 620.

[46] CR 2021/2, p. 58, paras. 10-11 (Miron).

of the International Court of Justice, and should be read into articles 74 and 83 of the Convention".[47]

31. Once again, the very principles invoked by Kenya lead invariably to the application of the standard, three-stage process.

B. The Application of the Three-Stage Method Results in An Equidistance Line

32. Kenya devotes a lengthy chapter of its legal memorandum – Chapter IV – comprising 100 pages, to the delimitation of the maritime boundary. Most of it is a rehash of arguments already made, in the Counter-Memorial and Rejoinder, and refuted by Somalia in the Reply and the oral pleadings.

33. What is new in this chapter is Kenya's engagement, for the first time, with the Court's three-stage method of maritime delimitation. Kenya did not address the three-stage process, much less show how it should be performed in the circumstances of this case, during the formal, written phase of the proceedings, in either its Counter-Memorial or its Rejoinder. In those pleadings, it did not identify base points along the Parties' relevant coasts; it did not construct a provisional equidistance line; and it did not propose any adjustment to the line owing to the existence of any special or relevant circumstances. Nor did it test the resulting line for disproportionality. Kenya, likewise, failed to challenge any of the base points identified, or the provisional equidistance line constructed, by Somalia in its Memorial.

34. It was not until the submission of Kenya's legal memorandum on 5 March 2021 – long after the written proceedings were closed, and shortly before the oral hearing was scheduled to open – that it addressed these matters. As shown in Somalia's oral pleadings, as supplemented below, the result of Kenya's new-found attention to these issues confirms the correctness of Somalia's approach to delimitation of the maritime boundary, and underscores the equitableness of the solution Somalia has proposed: an equidistance line from the land boundary terminus on the Indian Ocean coast to the outer limit of national jurisdiction in the extended continental shelf.[48]

1. Stage One

35. In performing Stage One of the three-stage process and constructing a provisional equidistance line, Kenya now relies on British Admiralty Chart 3362, which it claims to be more accurate than US NGA chart 61220, used by Somalia.[49] According to Kenya, the BA chart supplies "the best available charted data"[50]. It suggests that the US chart is based

[47] *The Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India)*, Award, 7 July 2014, PCA Case No. 2010-16, para. 339 (emphasis added). *See also Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire), Judgment of 23 September 2017, ITLOS Reports 2017* (hereinafter *Ghana v. Côte d'Ivoire*), para. 281.

[48] CR 2021/04, para. 6 (Ibrahim) (reading Final Submissions of the Federal Republic of Somalia).

[49] Appendix 2 to Kenya's 22 February 2021 Application, para. 365.

[50] *Ibid.*, para. 369.

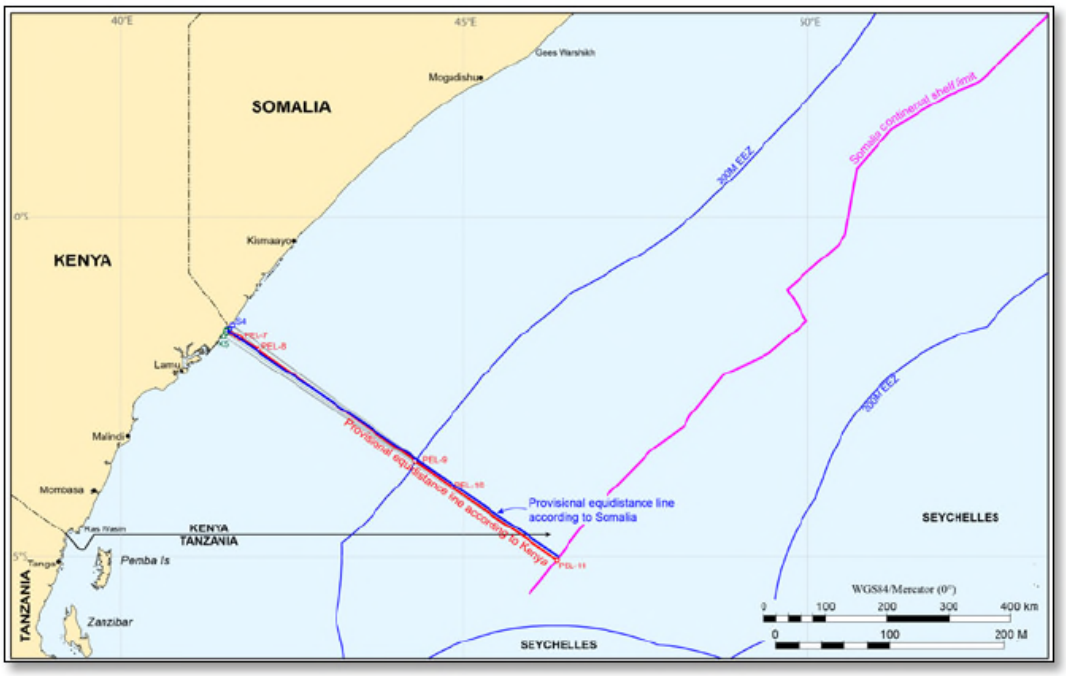
on the British chart, but exhibits minor differences, which means that, for Kenya, the US chart is in error.[51]

36. Kenya then employs standard CARIS software (as Somalia did) to identify the base points for construction of the provisional equidistance line, based on the BA chart.[52] Because of the minor discrepancies between the two charts, there are also minor differences in the coordinates of the base points used by each Party to construct the provisional equidistance line. This results in two very slightly different equidistance lines.

37. Notably, the difference between them is so small as to be irrelevant. This is reflected in Kenya's own Figure 12, which follows paragraph 367 of its legal memorandum, and is reproduced below. This is Kenya's depiction of the two provisional equidistance lines: its line in red, which relies on BA 3362, and Somalia's in blue, which relies on US NGA 61220. Significantly, there is hardly any difference between them.

38. In Kenya's own words:

> "Kenya's proposed provisional equidistance line shows only slight differences from that proposed by Somalia. As constructed above, beyond the third turning point, the line follows a virtually constant bearing of 125 degrees all the way to the 350 M limit".[53]



[51] *Ibid.*, para. 366.

[52] *Ibid.*, para. 368.

[53] *Ibid.*, para. 369.

Kenya's legal memorandum Figure 12: Construction of the Provisional Equidistance Lines in the EEZ and Continental Shelf

39. Five conclusions can be drawn from Kenya's performance of Stage One of the three-stage process. First, the construction of a provisional equidistance line is feasible. There are no obstacles or difficulties, geographical or otherwise, that render the construction of such a line problematical; certainly, Kenya did not identify any. Second, reliable charts exist that show the locations of the Parties' relevant coasts, and that permit the identification of precise coastal base points through application of CARIS software. Third, an accurate provisional equidistance line can be drawn from those base points. Fourth, there is no significant difference in the direction ("a south-easterly direction" according to both Kenya[54] and Somalia[55]) of the lines drawn by Somalia and Kenya, respectively. And *fifth*, these facts are not in dispute and confirm the propriety of beginning the three-stage process with the construction of a provisional equidistance line, in conformity with the Court's well-established jurisprudence.

40. Somalia stands by its use of US NGA chart 61220, and its depiction of the provisional equidistance line. It understands, however, that the Court will determine for itself which chart is most reliable, and it will then construct a provisional equidistance line using the most appropriate chart. Somalia trusts the Court to perform this technical exercise. If the Court determines that it should be based on BA 3362, Somalia would have no objection. Whichever chart is used, the construction of a provisional equidistance line is both feasible and appropriate, and it is mandated by the rules and procedures of maritime delimitation followed consistently by the Court since the *Black Sea* case.[56]

2. Stage Two

41. Kenya also engages with Stage Two of the three-stage process for the first time in its new legal memorandum. This contrasts with its earlier written pleadings, namely its Counter-Memorial and Rejoinder, where Kenya does not address the subject of special or relevant circumstances at all, presumably because it was then pursuing a strategy of not engaging with the three-stage process.

42. Kenya did, however, identify in its prior written submissions three specific factors that it invoked for abandoning the three-stage process altogether, in favour of a "parallel of latitude delimitation methodology". These were (i) the so-called "regional practice" by which a single State, Tanzania, negotiated boundaries with its two neighbouring States along a parallel of latitude;[57] (ii) the purported "practice of the Parties" by which Somalia is alleged to have tacitly agreed to a boundary with Kenya following a parallel of latitude;[58] and (iii) the impacts of Kenya's 1976 and 2009 maritime boundary agreements with Tanzania on delimitation with Somalia.[59] Somalia demonstrated in its written pleadings,[60] and again at the

[54] *Ibid.*.

[55] CR 2021/03, para. 21 (Reichler).

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

[57] KCM paras. 302-325, 323; KR, paras. 143-146, 161, 188.

[58] KCM, Chapter III, Section D; KR, Chapter I.

[59] KCM, paras. 110, 326-331; KR, paras. 135-143.

[60] SR, Chapter 3, Section II.B.

oral hearings,[61] that none of these circumstances is sufficient to support an abandonment of the three-stage process, or adjustment of a provisional equidistance line.

43. In its legal memorandum, in which Kenya finally acknowledges the proper use of the three-stage process, it identifies five so-called "relevant circumstances" that, in its submission, warrant adjustment of the provisional equidistance line in Stage Two of the process. Three of these are the same factors it raised in its written pleadings, this time recharacterized as "relevant circumstances" for consideration in Stage Two: regional practice, the practice of the Parties, and Kenya's boundary agreements with Tanzania. For the reasons given by Somalia in its written and oral pleadings, none of these constitutes a "relevant circumstance" sufficient to warrant adjustment of the provisional equidistance line in the second stage.[62]

44. Kenya's legal memorandum goes on to propose two additional "relevant circumstances", not previously mentioned by Kenya. These are (i) the interests of its fisherfolk; and (ii) protection of its security interests.[63] These inevitably suffer the same fate as its other circumstances, as Somalia demonstrated in its oral pleadings. In particular, as Somalia pointed out, Kenya failed to offer any evidence that its fisherfolk used or otherwise frequented any of the fishing grounds located in the disputed area, which lies north of the equidistance line claimed by Somalia and south of the parallel of latitude claimed by Kenya.[64] In fact, Kenya's evidence proved exactly the opposite; its maps of the "prominent fishing grounds frequented by artisanal fishers" show that they do not frequent the disputed area.[65] The figure below, was displayed by Somalia during the oral hearings and was included in Somalia's Judges' Folder as Tab 60. Cartographic experts georeferenced the information on Kenya's maps, and superimposed it on this sketch map. It shows, based on Kenya's own evidence, that its fisherfolk do not frequent the area north of the equidistance line. In any case, even if, *quod non*, its fisherfolk could be shown to have suffered some injury, that would not constitute sufficient grounds for adjusting the equidistance line. Kenya has come nowhere close to meeting the high bar of "catastrophic repercussions for the livelihood and economic well-being of the population",[66] which Kenya itself recognises as the threshold for such an adjustment.[67]

[61] CR 2021/03, paras. 22-33 (Reichler).

[62] CR 2021/03 (16 March. 2016), paras. 22-33 (Reichler); *see* SR, Chapter 3, Section II.B.

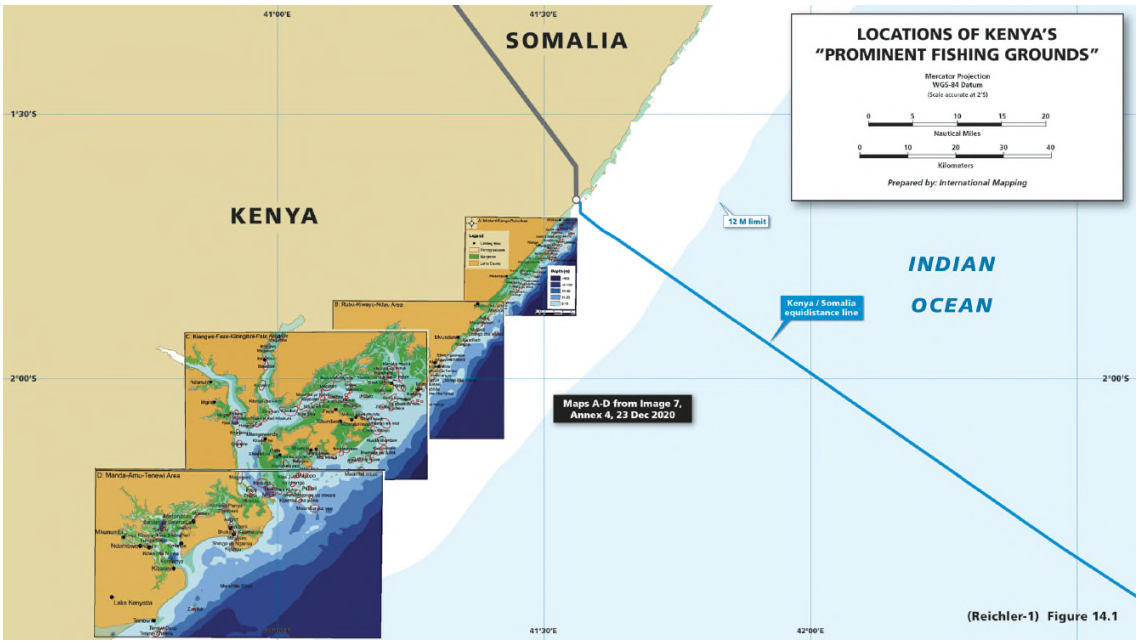
[63] Appendix 2 to Kenya's 22 February 2021 Application, paras. 411-461, 475-499.

[64] CR 2021/03, para. 35 (Reichler).

[65] Appendix 2 to Kenya's 22 February 2021 Application, Annex 4, p. 13.

[66] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America), Judgment of 12 October 1984, I.C.J. Reports 1984*, p. 246, para. 327; *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012*, p. 624 (hereinafter *Nicaragua v. Colombia*), para. 223.

[67] Appendix 2 to Kenya's 22 February 2021 Application, paras. 478-479.



45. Kenya devotes many pages of its legal memorandum to an account of the security problems faced by Somalia, and consequent problems faced by neighbouring States, including Kenya, due to Somalia's inability to effectively police its waters.[68] But only in very narrow circumstances – entirely inapposite here – has the Court ever considered adjustment of an equidistance line in Stage Two of the three-stage process in order to protect a State's security interests.

46. Kenya itself acknowledges this. At paragraph 415 of Appendix 2, it points to Colombia's invocation of its security interest "in relation to drug trafficking and related crimes in the disputed area" as a relevant circumstance justifying adjustment of the delimitation line in its favour. What Kenya fails to disclose is the Court's rejection of that argument in *Nicaragua v. Colombia*, and its refusal to adjust the line on this basis. The Court explained (as quoted in Kenya's legal memorandum):

> "legitimate security concerns might be a relevant consideration if a maritime delimitation was effected *particularly near the coast of a State* and the Court will bear this consideration in mind in determining what adjustment to make to the provisional median line or in what way that line should be shifted".[69]

47. The same alleged "relevant circumstance" was considered, and rejected, by the arbitral tribunal in *Guinea v. Guinea Bissau*. In that case, also quoted by Kenya in its legal memorandum, the tribunal indicated that it would take such concerns into account only if the

[68] *Ibid.*, paras. 411-461.

[69] *Nicaragua v. Colombia*, para. 222.

provisional delimitation line would "compromise [a State's] security in front of its coasts and in their immediate vicinity".[70]

48. Kenya's reliance on these cases, which have no relation to its particular situation, which is entirely distinguishable from these earlier cases, underscore the weakness of its argument. The provisional equidistance line, whether drawn by Somalia or Kenya, plainly does not pass "particularly near the coast of" Kenya, much less "in front of its coasts and in its immediate vicinity". To the contrary, it extends directly away from the coast in a south-easterly direction along an azimuth of approximately 125 degrees for up to 350 M. The circumstance that concerned the Court, and arbitral tribunals in the cases cited above (and in other cases cited in Kenya's legal memorandum) involved delimitation between States with closely situated opposite coasts – including the presence of small islands of one State in close proximity to the other's coast. Even in those cases, the delimitation lines were not adjusted in response to the stated security concerns.[71] In any event, Kenya, despite the many pages devoted to this section of its legal memorandum, fails to allege, let alone offer evidence, that the provisional equidistance line threatens its security by "passing particularly near [its] coast". That is because it indisputably does not.

3. Stage Three

49. Kenya's failure properly to perform Stage Three of the three-stage process, and the fallacies of its approach, were described in detail in Somalia's oral pleading, and no repetition is needed here.[72] It is interesting to note, and somewhat ironical, that the application of Kenya's disproportionality test to the provisional equidistance line proposed by Somalia as the equitable solution to this dispute demonstrates, beyond any doubt, that *the provisional equidistance line is not disproportional.*

50. To be sure, as Somalia showed during the oral hearings, Kenya's disproportionality test is deeply flawed, because it misidentifies the relevant area to be taken into account.[73]As explained on 16 March, and demonstrated graphically before the Court, Kenya deliberately inflates the relevant area – by padding it with maritime space within and beyond 200 M where there are no overlapping entitlements, but only one of the Parties, Somalia, has entitlements – in order to give the impression that its proposed parallel of latitude distributes abundant space to Somalia. Somalia showed, from the Court's jurisprudence and even the authorities cited by Kenya, that this is an erroneous means of calculating the relevant area, because only maritime areas where both parties have overlapping entitlements can comprise it.[74]

51. Nevertheless, even on Kenya's flawed case, the distribution of what Kenya considers the relevant area resulting from the provisional equidistance line is manifestly *not*

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[70] *Delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985, RIAA, Vol. XIX, p. 149, para. 124 (unofficial translation).

[71] *Continental Shelf (Libyan Arab Jamahiriya/ Malta), Judgment, I.C.J. Reports 1985*, p. 42 (hereinafter *Libya v. Malta)*, para. 51*; Delimitation of Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977, RIAA, Vol. XVIII, p. 3, para. 188

[72] CR 2021/03, paras. 39-46 (Reichler).

[73] *Ibid.*, paras. 42-45 (Reichler).

[74] *Ibid.*, paras. 51-55 (Reichler).

disproportional. According to Kenya's own calculations, the area ratio is 1:2.99 in Somalia's favour, as compared to a coastal length ratio (on which the Parties agree) of 1:1.43 in Somalia's favour.[75] This is *not* a gross or significant disproportionality. In *Nicaragua v. Colombia*, the coastal length ratio was 8.2:1 in favour of Nicaragua, and the delimitation adopted by the Court resulted in an area ratio of 3.4:1 in Nicaragua's favour.[76] The coastal ratio was thus more than two times the area ratio – just as Kenya, based on its phony calculations, contends here. Yet, the Court found that this result was equitable. In the *Jan Mayen* case, the Court considered that a coastal length ratio of 1:9 in Denmark's favour, with a delimitation line that resulted in an area ratio of 1:2.7, did not produce a significant disproportionality.[77] Indeed, there is no case in which the Court, or any arbitral tribunal, has found a significant disproportionality where the coastal ratio was not at least less than eight times greater than the area ratio.[78]

52. In any event, as Somalia showed at the oral hearings, when the relevant area is defined properly – as the area where both Parties have overlapping entitlements – the equidistance line distributes that area in a ratio of 1.44:1 in favour of Somalia, as compared to 1.43:1, which is the coastal length ratio agreed by the Parties.[79] The equidistance line thus passes the disproportionality test with flying colours. It is plainly the equitable solution demanded by international law, and the well-established procedures consistently followed by the Court in the delimitation of maritime boundaries.

Section III: Somalia's Response to Kenya's New Documents and Arguments Regarding Its Responsibility for Unlawful Acts in the Disputed Maritime Area

53. The majority of Chapter V of Kenya's legal memorandum simply repeats and recycles arguments which Kenya has already made in its Counter-Memorial and Rejoinder to avoid a finding that it is responsible for unlawful acts in the disputed maritime area. Somalia has already addressed those arguments in its written[80] and oral[81] pleadings, and sees no need to repeat them once more here. Instead, Somalia will limit itself to two points arising from the few new arguments developed in that Chapter.

A. Kenya's Violations of Articles 74(3) and 83(3) of UNCLOS

54. Kenya mischaracterises Somalia's case regarding Articles 74(3) and 83(3) of UNCLOS as an "absolutist position" which, if accepted, would be "highly onerous" and which

[75] Appendix 2 to Kenya's 22 February 2021 Application, para. 537.

[76] *Nicaragua v. Colombia*, paras. 243-247.

[77] *Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, I.C.J. Reports 1993*, p. 38 (hereinafter *Denmark v. Norway*) para. 61; *see Nicaragua v. Colombia*, para. 246.

[78] *Libya v. Malta*, paras. 58, 74-75; *Denmark v. Norway*, para. 61.

[79] CR 2021/03, para. 45 (Reichler).

[80] SR, paras. 4.11-4.25.

[81] CR 2021/3, pp. 34-35, paras. 14-19 (Craven).

would indefinitely "frustrate" peaceful transitory activities "in vast swathes of the world's oceans".[82] This *in terrorem* submission is without merit.

55. Somalia's case is premised on a straightforward application of the text of Articles 74(3) and 83(3), as interpreted and applied by the ITLOS Special Chamber in *Ghana v. Côte d'Ivoire*.[83] Whether particular activities in a particular disputed maritime area "jeopardize or hamper" the reaching of a final agreement between States with competing claims to that area is a fact-sensitive and context-specific question. Contrary to Kenya's argument, where one State undertakes exploratory and exploitative activities in a disputed maritime area, the perception by the other State of the former's conduct and motives is relevant to the question of whether those activities are likely to "jeopardize or hamper" the reaching of a final agreement between the two States.

56. In the context of the present case, Kenya's unilateral activities within the disputed maritime area have fallen far short of its obligation to "make every effort" to avoid jeopardizing or hampering the reaching of a final agreement with Somalia. In particular – and as Kenya would have been aware at all relevant times – following Somalia's long civil war and the plunder of its marine resources, any agreement with Kenya regarding the Parties' maritime boundary would require the Somali people to have complete trust and confidence in Kenya's motives, intentions and good faith. Yet Kenya's actions in the disputed area were opportunistic and cynical – a powerful neighbour seeking to enrich itself by exploiting a poorer neighbour's inability[84] to defend its sovereignty and sovereign rights. Against the backdrop of Somalia's precarious security and economic vulnerability, those actions were self-evidently likely to impede the prospects for an agreement on the maritime boundary. It cannot be said on the basis of the evidence before the Court that Kenya made "every effort" to avoid creating such a risk.

B. Kenya's violations of Somalia's sovereignty and sovereign rights

57. Kenya suggests that Somalia is inviting the Court to reject the ruling of the ITLOS Special Chamber in *Ghana v. Côte d'Ivoire*. In particular, Kenya cites paragraphs 591 and 592 of the Special Chamber's Judgment in that case and argues that, "since the delimitation of a continental shelf is constitutive, not declaratory, good faith activities in a disputed area cannot become wrongful on a retroactive basis".[85] Kenya then argues that since its actions in the disputed area were all founded on "good faith" claims to the maritime space up to the parallel of latitude, those actions were incapable of infringing Somalia's sovereignty or sovereign rights or of violating Kenya's obligations under Articles 74(3) and 83(3) of UNCLOS.[86]

58. Kenya's claim is without foundation. *First*, Kenya's activities in the disputed area were not conducted in "good faith". Kenya was well aware that its activities were undertaken in an area which Somalia had long regarded as part of its maritime space. Kenya was equally well aware that there was (and is) no legal basis for its claim that the maritime

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[82] Appendix 2 to Kenya's 22 February 2021 Application, paras. 548-549.

[83] *Ghana v. Côte d'Ivoire*, paras. 627, 629, 630.

[84] *See supra* para. 13.

[85] Appendix 2 to Kenya's 22 February 2021 Application, para. 565.

[86] *Ibid.*, paras. 560-566.

boundary follows a parallel of latitude. That claim had no support around the world. The fact that Kenya's activities were not premised on a good faith claim to the disputed area is further evidenced by the contradictory positions it has taken before this Court and by the conflict between its claim and the terms of its own maritime legislation.[87]

59. *Second*, the passage of the *Ghana v. Côte d'Ivoire* Judgment on which Kenya relies is concerned exclusively with the question of violations of sovereignty and sovereign rights; it does not concern the application of Articles 74(3) and 83(3) of UNCLOS. There is nothing in either the text of those Articles or in the Special Chamber's Judgment to support the contention that actions in a disputed maritime area will not violate Articles 74(3) and 83(3) if they are based upon a "good faith" claim to the disputed area. The obligation to make "every effort" to avoid jeopardizing or hampering the reaching of a final agreement applies to all cases where the delimitation of the EEZ and continental shelf is unresolved. Accordingly, even if (*quod non*) Kenya's claim to a parallel maritime boundary was made in good faith, this would not absolve it of the obligations which apply under Articles 74(3) and 83(3).

60. For these reasons, and the reasons Somalia has set out in writing and orally, Kenya's conduct in the disputed maritime area trespassed upon Somalia's sovereignty and sovereign rights, and constituted a violation of Kenya's obligations under Articles 74(3) and 83(3) of UNCLOS.

61. Somalia expresses its gratitude to the Court for according it this opportunity to respond in writing to the new documents and arguments that Kenya submitted on 5 March 2021.

[87] *See* SR, paras. 2.15-2.21, 2.34-2.44.