

SEPARATE OPINION OF JUDGE ABRAHAM

[*Translation*]

1. I agree with most of the conclusions reached by the Court in the present Judgment.

2. I am of the opinion that, as the Court notes in paragraph 89 of the Judgment, Somalia has not acquiesced to the maritime boundary claimed by Kenya along the parallel of latitude and that, consequently, there is no boundary that has already been agreed between the Parties. I therefore voted in favour of subparagraph 1 of the operative clause, which states that there is no tacit agreement between the Parties in this regard.

3. Since it was thus for the Court itself to delimit the maritime areas belonging respectively to Somalia and Kenya, it proceeded to do so, in my view correctly on the majority of points.

4. I have no objection to the manner in which the Court fixed the starting-point of the maritime boundary (in paragraphs 93 to 98). Nor do I disagree with the section of the Judgment concerning the delimitation of the territorial sea (paras. 99-118). I agree with the course of the median line, whose co-ordinates are given in paragraph 117 and which is depicted in sketch-map No. 5 (p. 249). I therefore voted in favour of subparagraphs 2 and 3 of the operative clause.

5. As regards the delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles, I fully agree with the Court applying the “three-stage” methodology which is now well established in the jurisprudence, reaffirming on this occasion that while this method is not mandatory, it is nonetheless applied as a rule unless there are specific factors rendering it inappropriate in a given case — there being no such factors in this instance.

6. As for the manner in which the Court applies the three-stage methodology in this case, I have no criticism to make with regard to the first and third stages. The construction of the provisional equidistance line (paras. 142-146) is beyond reproach in my view, and I agree with the co-ordinates of that line as indicated in paragraph 146 and its course as depicted in sketch-map No. 9 (p. 261). I also accept that the delimitation line adopted by the Court, after adjustment of the provisional equidistance line, is not invalidated by the final disproportionality test, since it does not lead to any “significant disproportionality” between the ratio of the lengths of the Parties’ respective relevant coasts and the ratio of the relevant areas attributed to each of them.

7. Where I disagree is on the second stage of the process, the purpose of which is to ascertain whether there are factors requiring an adjustment

of the provisional equidistance line and, if so, to make an appropriate adjustment taking account of the relevant circumstances (paras. 147-174). It is because I disagree with the choice, as the maritime boundary, of the “adjusted line” depicted in sketch-map No. 11 (p. 271) that I regretfully had to vote against subparagraph 4 of the operative clause, which determines the course of the single maritime boundary within 200 nautical miles, and, consequently, against subparagraph 5, which extends that boundary beyond 200 nautical miles, along the same geodetic line, in order to delimit the continental shelf.

8. Before explaining why I disagree, I will state briefly that I have no objection to the way in which the Judgment deals with the specific questions of law and fact relating to the determination of the boundary between the Parties on the continental shelf beyond 200 nautical miles, and that I also support the Court’s rejection (and the reasoning underpinning that rejection) of Somalia’s submissions requesting the Court to declare Kenya’s international responsibility engaged on account of that State’s violation of certain international obligations (which is why I voted in favour of subparagraph 6 of the operative clause).

9. Thus, my sole point of disagreement with the Judgment — though it relates to a matter of substance — concerns the Court’s examination of the circumstances warranting — or not — an adjustment of the provisional equidistance line, an examination that is described in paragraphs 147 to 174 and constitutes the second stage of the traditional method.

10. The Court considered that an adjustment of the provisional equidistance line by shifting it to the north — thus to the benefit of Kenya — was justified by the concavity of the East African coastline as a whole, from Somalia to Tanzania. It is argued that, owing to this concavity, Kenya, as a middle State, would be disadvantaged if a strict equidistance line were to be used to establish the maritime boundaries. More specifically, if equidistance lines were adopted as the maritime boundaries between both Kenya and Somalia and Kenya and Tanzania, it would result in a cut-off effect for Kenya. Sketch-map No. 10 (p. 269) is intended to illustrate this situation by showing that “[t]he provisional equidistance line between Somalia and Kenya progressively narrows the coastal projection of Kenya, substantially reducing its maritime entitlements within 200 nautical miles” (para. 169), even if no account is taken of the boundary line agreed by means of a treaty between Kenya and Tanzania along the parallel of latitude.

11. I am not convinced.

I would first observe that, in order to detect a concavity that produces a cut-off effect justifying an adjustment of the equidistance line, the Court is obliged to move a considerable distance away from the relevant coasts, adopting what could be termed a “macro-geographical” approach, i.e. by considering the concavity of the coastline “in a broader geographical configuration” than that of the States concerned (para. 164). Yet, in the case

concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, the Court made the following statement, which in my view could not be clearer:

“The Court does not deny that the concavity of the coastline may be a circumstance relevant to delimitation, as it was held to be by the Court in the *North Sea Continental Shelf* cases and as was also so held by the Arbitral Tribunal in the case concerning the *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, decisions on which Cameroon relies. Nevertheless the Court stresses that this can only be the case when such concavity lies within the area to be delimited.” (*Judgment, I.C.J. Reports 2002*, p. 445, para. 297.)

It is difficult, in the present case, to claim that the concavity of the coastline lies “within the area to be delimited”. An examination of the relevant coasts of Somalia and Kenya — as depicted, for example, in sketch-map No. 8 (p. 256) which precedes paragraph 141 of the Judgment — reveals no particular concavity, which, moreover, the Judgment acknowledges.

In an attempt to counter the objection resulting from the *Cameroon v. Nigeria* precedent, which is referred to (although only partially quoted), the Judgment underlines “the specific context of that case” (para. 164), but the explanation it offers in this regard is hardly convincing.

12. I accept that it is reasonable, in some cases, to take account not only of the coastal configuration of the two States parties to the proceedings, but also that of a third State (or several third States), when it is clear that those coasts may, by the projections they generate, have significant effects on the equity of the delimitation to be made between the two States directly concerned. This is the case when there are three adjacent States along a concave coastline, and the middle State, hemmed in by the two other States, finds itself deprived of a large part of its maritime areas by the strict application of the equidistance method. In such a situation, even if the case submitted for judicial or arbitral decision is between only two of the three States concerned, it would be difficult for the court or arbitration body not to take account of the configuration of the third State’s coastline. The Court is right, in this regard, to refer to the precedents of the *Bangladesh/Myanmar* and *Bangladesh v. India* cases, decided respectively by the International Tribunal for the Law of the Sea and an arbitral tribunal (paragraph 166 of the Judgment).

13. But even if we agree to move away from the directly relevant coasts in order to take a general view of the region, by looking at the coastline as a whole from Somalia, in the north, to Tanzania, or even Mozambique, in the south, it is plain to see that the situation of Kenya, which is located more or less in the middle of this group, is in no way analogous to that of Bangladesh, which is enclaved between India and Myanmar within a deep concave bay, or to that of the German coastline between the Danish and Dutch coasts, such that the Court considered them together in the *North Sea Continental Shelf* case.

In the present case, there is no conspicuous concavity in the configuration of Somalia's coast to the north of Kenya, or in the way in which the Somalian and Kenyan coastlines extend in broadly the same general direction. It is the coast of Tanzania to the south, and this coast alone, which is somewhat concave.

14. It is true that it is not the concavity of the coasts in itself that motivates the adjustment of the equidistance line carried out by the Court, but the "cut-off" effect it would produce for Kenya. However, the jurisprudence clearly and consistently states that a cut-off effect is not in itself sufficient to justify the shifting of the provisional equidistance line; this is understandable, since any delimitation between two States whose maritime projections overlap inevitably creates a cut-off effect for one of them or, more often than not, both.

It is only when the cut-off effect is "serious" or "significant" that there is cause to correct — or mitigate — it by adjusting the equidistance line, as shown by the jurisprudence rightly cited by the Court in paragraph 170 of the Judgment.

15. I very much doubt that the "serious" criterion is met in this case. Sketch-map No. 10 (p. 269), which shows the maritime areas that would appertain to Kenya if both its northern and southern maritime boundaries were fixed using the equidistance method, does not in my view show a sufficiently serious cut-off to justify an adjustment on the scale of that adopted by the Court, which shifts the equidistance line between Somalia and Kenya northwards by approximately a third of the distance between that line and the parallel of latitude claimed by Kenya, without any valid legal basis, as the agreed boundary. Furthermore, it is patently clear that the cut-off effect for Kenya results mainly from the configuration of its coast in relation to that of Tanzania to the south, and in particular from the presence of the Tanzanian island of Pemba, which the Court mentions in paragraph 168 of the Judgment. Somalia thus finds itself deprived of part of its maritime rights for a cause that should normally be relevant only in the context of the delimitation of a maritime boundary between two other States.

The circumstances of the case did not, in my view, justify the adjustment made by the Court, if indeed any shift in the equidistance line were warranted, and I cannot support the solution that it adopted.

(Signed) Ronny ABRAHAM.
