



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL  
&  
DEPARTMENT OF JUSTICE

Our Ref: AG/CONF/19/153 VOL. II

22<sup>nd</sup> February, 2021

Mr Philippe Gautier  
Registrar  
International Court of Justice  
Peace Palace  
Carnegieplein 2  
2517 KJ The Hague  
THE NETHERLANDS

Sir,

RE: IN THE MARITIME DELIMITATION IN THE INDIAN OCEAN (SOMALIA V. KENYA) CASE

As Agent of the Republic of Kenya ("Kenya") in the above-referenced case, I have the honour to submit this Application requesting the Court to authorize Kenya to file new documentation and evidence, in the case concerning the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)* (the "Application").

Procedural History

1. Somalia instituted proceedings against Kenya at the Court on the 28<sup>th</sup> August, 2014. The dispute concerns "*the establishment of the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone...and continental shelf, including the continental shelf beyond 200 nautical miles.*" Somalia asks the Court to delimit its single maritime border with Kenya in the Indian Ocean in respect of the territorial sea, the Exclusive Economic Zone (EEZ) and the continental shelf in accordance with international law, and to also find that because of its conduct in the disputed area, Kenya has violated Somalia's territorial integrity and ought to make reparations to Somalia.
2. On the 7<sup>th</sup> October, 2015, Kenya submitted preliminary objections to jurisdiction and admissibility of the case herein. Kenya contended, *inter alia*, that the dispute

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fell within its reservation to the Court's jurisdiction, as expressed in its Declaration of the 19<sup>th</sup> April, 1965 under Article 36(2) of the Statute of the Court. Kenya's acceptance of the Court's jurisdiction specifically excludes:

*"Disputes in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement."*<sup>1</sup>

3. In the meantime, by letters dated the 22<sup>nd</sup> February, 2016 and the 29<sup>th</sup> April, 2019, Kenya informed the Court that it was making attempts to locate critical evidence in the nature of a map referred to in Somalia's 1988 Maritime Law, as depicting the relevant maritime boundary with Kenya. While Somalia had presented its 1988 Maritime Law to the Court through its Memorial, it did not annex the map referred to in the said law.
4. On the 2<sup>nd</sup> February 2017, the Court, by a majority, rejected Kenya's preliminary objections to jurisdiction and admissibility of the case herein. By an order of the same date, the Court fixed the 18<sup>th</sup> December, 2017 as the new time-limit for the filing of the Counter-Memorial by Kenya. The Counter-Memorial was filed within the time-limit thus fixed.
5. On the 16<sup>th</sup> November, 2017, Kenya wrote to the then President of the Court, seeking the disqualification of Justice Abdulqawi Ahmed Yusuf, a Somali national, from sitting on the case herein. The reasons for Kenya's request for Judge Yusuf's disqualification revolved around the Judge's participation, on behalf of Somalia, in the Third United Nations Conference on the Law of the Sea. The said participation, Kenya asserted, made him privy to facts and evidence that are crucial in the case herein, and therefore placed him in a position of conflict of interest.
6. By an Order dated the 2<sup>nd</sup> February, 2018, the Court fixed the 18<sup>th</sup> June, 2018 and the 18<sup>th</sup> December, 2018 as the time-limits for the filing of a Reply by Somalia and of a Rejoinder by Kenya. The pleadings were filed within the time-limits thus fixed.
7. Subsequently, the Court fixed the hearings in the case herein for the 9<sup>th</sup> September, 2019 to the 13<sup>th</sup> September, 2019.
8. On the 3<sup>rd</sup> September, 2019, Kenya requested the Court for a postponement of the hearings for a period of twelve (12) months, in order to recruit a new legal team, following the disengagement with its erstwhile lawyers on account of "*exceptional circumstances that render [ered] it untenable to continue retaining the services of its [current] legal team on record.*" Kenya also informed the Court of its intention to augment its case by adducing additional evidence.

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<sup>1</sup> The Declaration of Kenya is cited in full in Somalia's Memorial at fn 5. It was deposited on 19 April 1965. It is referred to below as "Kenya's Declaration".



9. By its decision of the 5<sup>th</sup> September, 2019, the Court postponed the hearings to the week beginning the 4<sup>th</sup> November, 2019.
10. Kenya requested the Court to review the postponement of the hearings to the week beginning the 4<sup>th</sup> November, 2019, because the postponement of fifty-five (55) days was too short for Kenya to procure a new legal team in accordance with its procurement laws and to undertake a comprehensive review of the pleadings and prepare for the hearings.
11. On the 30<sup>th</sup> September, 2019, the Vice President of the Court and the acting President in the case herein invited the representatives of the Parties to a meeting at The Hague on the 3<sup>rd</sup> October, 2019. The meeting was called in accordance with Article 31 of the Rules of Court for the purpose of ascertaining the Parties' views with regard to questions of procedure in the case, and in particular, as concerned Kenya's renewed request for a postponement of the hearings.
12. During the said meeting, Kenya affirmed its continued commitment to the Court, despite adverse decisions by the Court. In this regard, Kenya made reference to the Court's decision dismissing Kenya's preliminary objections to jurisdiction and admissibility of the case herein, the failure by Justice Yusuf to recuse himself from the case and the decision by the Court to pronounce itself on Kenya's request for postponement before granting Kenya the opportunity to respond to Somalia's contentions, despite Kenya having promptly expressed the intention to respond thereto.
13. Following the said meeting, the Registrar, by a letter dated the 16<sup>th</sup> October, 2019, informed the Parties of the Court's decision to postpone the hearings to the week beginning the 8<sup>th</sup> June, 2020. There has never been a response to Kenya's request to the Court for the recusal of Judge Yusuf.
14. By a letter dated the 23<sup>rd</sup> April, 2020, Kenya requested the Court to postpone the hearing on account of the difficulties occasioned to Kenya's preparations by the COVID-19 pandemic. By a letter of the 19<sup>th</sup> May, 2020, the Registrar informed Kenya that the Court had decided to postpone the oral proceedings to March 2021, "*in light of the exceptional circumstances related to the COVID-19 pandemic.*"
15. On the 25<sup>th</sup> June, 2020, the Court amended Article 59(2) of the Rules of Court, to provide for hearings via video link, as follows:

*"The Court may decide, for health, security or other compelling reasons, to hold a hearing entirely or in part by video link. The parties shall be consulted on the organization of such a hearing."*
16. On the 11<sup>th</sup> December, 2020, Kenya wrote to the Court informing it of the difficulties that it was facing in its preparations for the case, including the fact that



it had not been possible, due to the pandemic conditions, to hold preparatory meetings with the new legal team.

17. By a letter dated the 23<sup>rd</sup> December, 2020, and without any reference to Kenya's letter of the 11<sup>th</sup> December, 2020 informing the Court of the difficulties Kenya was facing in its preparations for the hearings due to the pandemic conditions, the Registrar informed Kenya that the Court had decided to hold the March 2021 hearing by video link.
18. On the 28<sup>th</sup> January, 2021, Kenya wrote to the Court seeking a postponement of the hearing, on the ground that Kenya was unprepared for the hearing due to, *inter alia*, the difficulties occasioned by the COVID-19 pandemic. By a communication dated the 12<sup>th</sup> February, 2021 and following an exchange of correspondence between the Parties, the Court decided to maintain the hearing dates as scheduled, that is, as commencing on the 15<sup>th</sup> March, 2021. The Court did not provide any reason(s) for not granting Kenya's request.

### The Reason for the Application

19. Kenya makes this Application while being well aware of the current stage of the proceedings but also conscious of its fundamental right to present the best defence possible in this important matter. Kenya submits that the submission of the evidence and documents is necessary to provide the Court with a complete factual record of the relationship between the Parties as it relates to the maritime boundary, which the Court may not currently possess. The admission of such evidence is necessary for the sound administration of justice by the Court and to ensure that the Court has before it all the relevant facts in order to properly and fairly adjudicate the matter.
20. The present Application to submit new evidence is a continuation of the ongoing efforts of Kenya to present all of the relevant facts and evidence to the Court, in support of its claims. Notably, the existence of missing and highly relevant evidence was already evident during the written proceedings and was further highlighted during subsequent communications with the Court, as set out in the procedural history hereinabove. Most particularly, the Republic of Somalia ("Somalia"), while asserting that its 1988 Maritime Law's reference to a "straight line" refers to an equidistance line, conveniently failed to produce the map included in the law.<sup>2</sup>
21. This Somali map, which the Court should reasonably expect Somalia to produce, is critical since it has the potential of undermining Somalia's entire claim, as "by the express terms of Article 4(6) of Somalia's 1988 Maritime Law, whatever Somalia's missing map depicts is categorically *not* an equidistant line."<sup>3</sup> The fact that this

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<sup>2</sup> See MS Vol. III, Annex 10 and Somalia's arguments in MS, para. 3.6, especially fn. 62; SR, paras. 2.99-2.100; see also KCM, para. 85 and KR, para. 105.

<sup>3</sup> KR, para. 105.



critical evidence was missing and that Kenya was making attempts at locating the same was communicated to the Court through Kenya's letters of the 22<sup>nd</sup> February, 2016 and the 29<sup>th</sup> April, 2016, referenced hereinabove. In its letter of the 3<sup>rd</sup> September, 2019, Kenya also informed the Court of its intention to adduce additional evidence in the context of the then intended change in its legal team. We have enclosed herewith copies of the said letter for ease of reference.

22. It is on the basis of the foregoing that Kenya has continued its ongoing efforts to locate and present all of the relevant facts and evidence to the Court, in support of its claims, including since the initial postponement of the oral proceedings in September 2019. The fact that the Court does not yet have all of the relevant evidence before it is a critical factor in assessing the merits of the Application.
23. Despite Kenya's best efforts, the COVID-19 pandemic has prevented Kenya and its advisers from locating evidence, which Kenya understands is located in historical and national archives around the world. This is demonstrated in detail in the Witness Statement of Charles Gurdon, the Head of Kenya's Research Team annexed hereto as Appendix 1. Given that the dawn of the pandemic was nearly at the same time that Kenya had commenced the gathering of additional relevant evidence, Kenya has not been able to access or access fully many of these archives that can reasonably be assumed to contain material evidence relevant to the issues before the Court in this case. The COVID-19 pandemic is an exceptional circumstance that Kenya could not have foreseen. Nor can Kenya mitigate or control the effects that the pandemic has had on its ability to collect relevant evidence and to have a fair and equal opportunity to present its position in this case.
24. Notwithstanding the difficulties occasioned by the pandemic, Kenya has taken best efforts to gather some evidence which it considers relevant and material to the fair resolution of the dispute herein. While the evidence gathering is incomplete, Kenya wishes to submit to the Court what has thus far been gathered, as an indication of its good faith and determination to ensure that the Court is adequately informed with regard to the matters in issue.
25. Kenya's continued research and analysis has yielded significant evidence. The evidence relates to key issues in dispute between the Parties. Amongst other things, the evidence relates to the following:
  - (i) That for over three decades, both Parties acted in a manner that was consistent with Kenya's claim to a maritime boundary along the parallel of latitude;
  - (ii) the parallel of latitude achieves an equitable result in this case;
  - (iii) in its submissions to the Court, Somalia has misapplied the three-step delimitation methodology in multiple ways;



- (iv) refuting Somalia's argument that it was unable to protest against Kenya's claim to a boundary along the parallel of latitude during Somalia's civil war; and
- (v) contradicting Somalia's claims regarding the lawfulness of Kenya's activities in the now-disputed maritime area.

26. Kenya recognizes that Somalia will be entitled to respond to the totality of new evidence that Kenya requests to submit in due course. The Application in no way prejudices Somalia's procedural rights in the current proceedings. Indeed, much of the documentation, such as Somalia's relationship with Soma Oil & Gas, is already known to Somalia. Ensuring that the Court's eventual Judgment is based on the totality of relevant evidence – and thus not vulnerable to criticism relating to procedural and substantive fairness – will benefit Somalia as much as Kenya.

27. Kenya submits that the jurisprudence of the Court demonstrates that the Court has endeavored to perform its adjudicative function based on a factual record that is complete and up-to-date.<sup>4</sup> This fundamental approach is especially appropriate in the present case, which concerns the determination of the maritime boundary between two sovereign States in perpetuity, and which is without an appellate recourse. Moreover, the Court's Judgment will not only determine the rights of the Parties, but directly impact local communities that have depended on the maritime areas in question for their livelihood for decades. The Court, therefore, must reach its conclusions regarding the existence and location of a boundary on a fully informed basis. This imperative must take priority over any minimal inconvenience that Somalia might experience from reviewing and addressing relevant additional evidence and documentation or any inconvenience caused by the necessary procedural adaptations.

28. In making this Application, Kenya reiterates its respectful submission to the Court, made initially in Kenya's letter dated the 28<sup>th</sup> January, 2021 under Ref. AG/CONF/19/153 VOL. II, about the inappropriateness of conducting hearings in this matter by video link. As Kenya observed in the said letter:

“...holding an oral proceeding on the merits by video link in this case would be highly prejudicial to Kenya and comparatively favorable to Somalia. Kenya's essential position is that an agreement was reached between the two countries on the existence of the maritime boundary along a parallel of latitude in the 1970s and 1980s, which endured thereafter until the filing of this case. Demonstrating this to the Court at an oral proceeding requires a

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<sup>4</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, at p. 39, para. 58 (“general principles as to the judicial process require that the facts on which its Judgment is based should be those occurring up to the close of the oral proceedings on the merits of the case.”).



complex presentation of numerous historical documents, maps, and other information that is not suitable for presentation by video link. Kenya is very willing to appear before the Court to present its position, but is concerned that it does not possess reliable and high-quality technology necessary for doing so by video link, to guarantee reliable Internet connectivity from Nairobi. Having counsel in the Peace Palace able to address the Court directly and in-person, while simultaneously presenting visual evidence with the support of proximate technical staff, is critical to a fair and full presentation of Kenya's case, and cannot be undertaken adequately by counsel and support staff scattered across the globe."

29. Kenya affirms that the foregoing position holds true in respect of any hearings that the Court may hold concerning the merits of the present Application, pursuant to Article 56(2) of the Rules of Court.

### The Legal Basis for the Application

30. The Statute of the Court explicitly recognizes the discretion of the Court to accept new evidence after the expiration of the initial time-limits for such submissions.<sup>5</sup> According to Article 56 of the Rules of Court, even after the conclusion of written proceedings, the Parties have the ability to submit to the Court new documentation and evidence. Article 56(2) states that the Court, after hearing the Parties on the matter, can authorize the production of new evidence if deemed necessary, notwithstanding the opposition of one of the Parties.

31. The Court's Practice Direction IX adds that the Court will allow the admission of new evidence after the conclusion of the written proceedings, "if it considers it necessary and if the production of the document at this stage of the proceedings appears justified to the Court". In accordance with Practice Direction IX, the current Application indicates the necessity for the Court to admit the additional evidence and the difficulties in producing the document at an earlier stage.

32. The Court has repeatedly made clear that the Court's essential mandate to administer international justice on a fully informed basis must prevail over a rigid application of its procedural rules and the Court's proceedings, more generally. As the Court has explained,

"[t]he provisions of the Statute and Rules of Court concerning the presentation of pleadings and evidence are designed to secure a proper administration of justice, and a fair and equal opportunity for each party to comment on its opponent's contentions."<sup>6</sup>

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<sup>5</sup> Statute of the ICJ, Article 52.

<sup>6</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, at p. 26, para. 31.

33. Though no two cases are identical, the Court's jurisprudence and practice demonstrate that such requests have been favourably considered in the past. In the *Dispute regarding Navigational and Related Rights*, for example, Costa Rica expressed its desire to produce five new documents after the filing of the Parties' written submissions, in accordance with Article 56 of the Rules of Court. Notwithstanding Nicaragua's objection to the request, the Court decided to "authorize the production of four of the five documents [...], it being understood that Nicaragua would have the opportunity [...] to comment subsequently thereon and to submit documents in support of those comments."<sup>7</sup>

34. In the *Black Sea* case, the Court allowed Romania to submit additional evidence after the close of written proceedings, in accordance with Article 56 of the Rules of Court, despite objections from Ukraine, after Romania provided explanations as to the necessity of the additional documents.<sup>8</sup>

35. Indeed, the flexibility of the Court with respect to the application of its own time-limits and procedures in the interest of justice is well established, and its discretion is wide in this regard, even to the effect of reopening oral proceedings if deemed necessary in the interest of justice.<sup>9</sup> This reflects the understanding, first expressed by the Court's predecessor, that the sound administration of justice requires that a "decision of an international dispute of the present order should not mainly depend on a point of procedure"<sup>10</sup> but, rather, on the merits of the positions of the Parties, based on a complete factual record.

### The New Documentation and Evidence

36. Enclosed with this Application for the consideration of the Court are:

- i. The Witness Statement of Charles Gurdon, Head of Kenya's Research Team (Appendix 1);
- ii. Three hundred and fifteen (315) pages of submissions explaining the nature and relevance of the new and additional evidence (Appendix 2);
- iii. a list of the new documentation and evidence ("List of Annexes"); and,

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<sup>7</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, at p. 220, para. 8.

<sup>8</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, I.C.J. Reports 2009, p. 61, at p. 65, para. 7.

<sup>9</sup> *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, at p. 468, para. 34.

<sup>10</sup> *Free Zones of Upper Savoy and District of Gex (French Republic v. Swiss Confederation)*, PCIJ Report Series E-No. 8, p. 155, para. 176.




iv. two USB sticks, for use by the Registry, containing electronic copies of the Application, Appendix 1 (the Witness Statement), Appendix 2 (the Submissions), the List of Annexes, and the Annexes themselves.

37. For the reasons set out in this Application, Kenya respectfully requests that the Court grant the Application to submit new evidence and documents.

38. Kenya continues to be committed to this matter being determined fairly and in an environment that accords both Parties a reasonable and practical opportunity to holistically and fully present their respective cases.

The Republic of Kenya thanks the Registry of the International Court of Justice for its cooperation and takes the opportunity of this correspondence to renew to it the assurances of its highest consideration.



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Agent of the Republic of Kenya