

Telephone: 070 350 42 15
Telefax: 070 355 35 94
E-mail: info@kenyanembassy-nl.com
Website: www.kenyaembassy.nl



EMBASSY OF THE REPUBLIC OF KENYA

Nieuwe Parklaan 21
2597 LA The Hague
The Netherlands

When replying please quote:

KEH/LEG/5A VOL. IV (87)

18th March, 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
VERSUS KENYA) CASE

The Co-Agent of the Republic of Kenya on behalf of the Government of Kenya, presents his compliments to the Registrar of the International Court of Justice (the Registrar) and has the honour to refer to the above-captioned subject matter and to our previous correspondence thereon.

Kenya has previously brought to the Court's attention the fact that there was certain critical evidence, relevant and material to the determination of the dispute herein, that was missing. In particular, by letters dated the 22nd February, 2016 and the 8th June 2016, addressed to the Minister of Foreign Affairs and Investment Promotion of Somalia and to Ambassador of Norway to the Kingdom of the Netherlands, respectively, and copied to the Registrar, Kenya made inquiries concerning the charts referred to in Somalia's 1988 Maritime Law, which was submitted to the Court as part of Somalia's Memorial. As per the said law, the charts depict Somalia's maritime boundary. In its response by the letter dated the 13th May, 2016, Somalia informed the Court that it was "*unable to locate any copies of the said chart...*" and that the "*Somali Government will continue to search for the said charts but as the Court will be aware, Somalia has endured a protracted civil war. Many public institutions have been destroyed and historical records, including certain legislation...have been lost.*"

By the letter dated the 28th January, 2021, under Ref. AG/CONF/19/153/2 VOL. I, Kenya reiterated its erstwhile position to the Court, that it was still making efforts to locate and access critical evidence relevant and material to the case herein, the difficulties occasioned by the pandemic notwithstanding. In the letter dated the 22nd February, 2021, under Ref. AG/CONF/19/153/2 VOL. I, by which Kenya sought the Court's authorization to submit new and additional evidence, Kenya was clear that the

evidence it sought to submit was incomplete and that efforts to locate and gather further evidence were ongoing.

Against this backdrop, Kenya is pleased to inform the Court that on the 16th March, 2021, its efforts at locating critical evidence unearthed the *Mining Code of the Somali Democratic Republic of 1984* (the Mining Code). Kenya believes that this is a critical piece of evidence that lends strong support to Kenya's position that Somalia has all along acquiesced to the parallel of latitude as the maritime boundary.

The Mining Code was signed into law by former President Said Barre on the 9th January, 1984 as Law Number 7. The provisions of this law pertinent to the case herein are Articles 2 and 58 thereof. Article 2 of the Mining Code provides as follows:

"The purpose of the Mining code is to vest the entire property in control of all minerals (a) In any land territory of the Republic (b) Under the territorial sea as determined by the relevant legislation in force from time to time in the State."
[Emphasis supplied]

Article 58 of the Mining Code stipulates as follows:

"This Article provides that for the purposes of awarding areas pursuant to this part, the areas of the Republic referred in Article 2 hereof, shall be divided into blocks, according to a grid system determined in accordance with rules to be prescribed by Minister. Blocks must be of a rectangular shape with 2 of their sides oriented in the north south direction except where the borders of the Republic, other natural boundaries or the boundaries of other areas which are currently subject to a permit or lease, prevent it." [Emphasis supplied]

The above-quoted Article 58 of the Mining Code is clear in its import to the extent that it:

- (a) provides that the country will be divided into blocks for purposes of awarding areas for mineral exploration and exploitation;
- (b) prescribes the manner in which the blocks will be drawn (rectangular) "*...except where the borders of the Republic, other natural boundaries or the boundaries of other areas which are currently subject to a permit or lease, prevent it*". [Emphasis supplied]
- (c) recognizes that where a block neighbors another country, the shape of that block does not have to be rectangular.

Thus, the Mining Code recognizes that the relevant lines in a particular block depict Somalia's maritime boundary. Somalia published concession block maps in 1978, 1986, 1988 and 1991. In 1978, the block adjacent to Kenya (Jorre Block), was drawn using the median line in accordance with the Anglo-Italian Treaty of 1924 and in accordance with the prevailing practice of recognizing three nautical miles as areas falling under national jurisdiction. This practice changed after Kenya deposited its 1979 Proclamation that established the maritime boundary with Somalia at the parallel of latitude. Following the 1979 Proclamation, Somalia:

- (i) amended its blocks to align them with the parallel of latitude in accordance with the boundary established by Kenya as illustrated in the attachments;
- (ii) in 1981, entered into negotiations with Kenya to end the long running Shifita War by denouncing all territorial claims against Kenya, as evidenced by the minutes of meetings between the then Presidents Daniel Moi of Kenya and Said Barre of Somalia);
- (iii) enacted the Mining Code and published maps of the blocks that aligned with Kenya's established boundary along the parallel of latitude in full compliance with the provisions of Article 58 of the Mining Code;
- (iv) enacted the Maritime law of Somali in 1988 which recognizes the maritime boundary of Kenya and Somali as a "straight line."

The Mining Code, as read together with the Somalia's published blocks, clearly demonstrates Somalia's consistent State practice that confirms the maritime boundary between Kenya and Somalia as proclaimed in Kenya's 1979 Proclamation. This also explains why Somalia, which was very active during the UNCLOS negotiations, did not object to Kenya's Proclamation until 2014. Notably, this piece of legislation is inexplicably missing from the evidence submitted to the Court by Somalia. Kenya submits herewith the following documents for the Court's information and consideration:

- (1) A copy of the Law No. 7 of 9 January 1984 Approving and Containing the Mineral Code of the Somali Democratic Republic;
- (2) A map depicting Somali concessions and key 1988 wells;
- (3) A map depicting Somalia's blocks;
- (4) Maps depicting Somali Concession Blocks 1978, 1986, 1988, 1991 and the Jorre Block, 2009.

Considering the consistent practice demonstrated in this law and in the maps, Kenya is of the considered opinion that even the "missing" charts in Somalia's 1988 Maritime Law would be line with this practice. The said 1988 law defined the Somalia-Kenya maritime boundary as "*a straight line toward the sea from the land as indicated on the enclosed charts.*" The Mining Code now provides clarity as to the nature of the straight line referred to in the 1988 law.

While Kenya is fully aware of the current stage of the proceedings and of the Court's procedural rules, Kenya deems it essential to draw this new piece of critical evidence to the Court because of its long-stated commitment to ensure that the Court is seized of all the relevant and material evidence in relation to the case herein. Kenya hopes that the submission of this new piece of critical evidence – which Somalia has always had access to but elected to suppress – will serve as a further confirmation to the Court of Kenya's good faith in its request for a postponement of the hearings, to enable it locate and access relevant and material evidence for submission to the Court. In any event, Kenya does not expect that Somalia will object to the Court's consideration of this piece of evidence, in the spirit of assisting the Court make a considered and informed decision.

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.



Lawrence LENAYAPA
Ambassador of the Republic of Kenya to the
Kingdom of the Netherlands and
Co-Agent of the Republic of Kenya