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### MARITIME BORDER DISPUTE BETWEEN KENYA AND SOMALIA IN THE INDIAN OCEAN

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#### ABSTRACT

Among the recent cases adjudicated before the International Court of Justice (ICJ), the maritime dispute between Kenya and Somalia exhibited in the Indian Ocean is among the forefront one. Though there are several studies dealing with the case at hand, the decision of the aforementioned court has not been comprehensively reviewed. Therefore, having the ICJ's decision, which was rendered on 12 October 2021, this Article exhaustively reviews – not only Somalia's claim and Kenya's submission, – but also ICJ's ruling and decision on major disputed issues. Moreover, the Article provides some scholars critiques attributed to the latter ICJ's decision.

**Keywords:** *Indian Ocean, International Court of Justice, Law of the sea, Maritime Dispute.*

## 1. INTRODUCTION

The Republic of Kenya (Kenya) and the Federal Republic of Somalia (Somalia) are the two neighboring countries located in eastern Africa, sharing extends 681 Kilometers (i.e., 423 miles), among which the maritime border that intersects the Indian Ocean to the south-east is the one (Loannides & Yiallourides, 2021; Sovereign Limits, n.d.). During the colonial period, though Italy and Britain, the occupying power of 'Jubaland', located in the present-day Somalia, and Kenya, agreed to land border delimitation via the 1927 agreement and exchange of notes in 1933, maritime border delimitation has not been set. This scenario has not changed even after both Somalia and Kenya got their independence in 1960 and 1963, respectively. Consequently, the contested coastline area has been a source of conflict between the two countries for many years due to the economic significance of petroleum, marine resources, and maritime transportation services (Gunawan *et al*, 2021; Sabala, 2021).

Both Kenya and Somalia signed the United Nations Convention on the Law of the Sea (UNCLOS) on 10 December 1982, while they ratified it on 2 March 1989 and 24 July 1989, respectively (ICJ, 2021, para 33).

According to part 15 section 1 of the UNCLOS, there were several moments when both Kenya and Somalia attempted to settle their maritime dispute through negotiation, in which the 2009 Memorandum of Understanding (MoU), which was brokered by the United Nations (UN), deserves to be mentioned (Sharmerke, 2009). According to the latter MoU, the two coastal states had agreed to settle their maritime dispute per international laws. Accordingly, as per Article 76 paragraph 8 of the UNCLOS, both states have submitted their matter to the Commission on the Limits of the Continental Shelf (CLCS) and requested a recommendation on the areas that are subject to dispute, particularly on 'the outer limits of their continental shelves beyond 200 nautical miles,' though they later have acted otherwise and withdrawn their request in the course of time (ICJ, 2021, para. 34).

On top of the above, their MoU, unfortunately, could not bear fruit and, as such, was rejected by the Somalia Parliament (Loannides & Yiallourides, 2021). Consequently, the maritime dispute over the shared Indian coastal area continued.

Albeit absence of agreement, "in 2012, Kenya awarded exploration licenses for eight offshore blocks in the Indian Ocean to foreign oil companies, including Italy-based Eni, France-based Total, and US-based Anadarko Petroleum" (Loannides & Yiallourides, 2021). Being alarmed by the action of Kenya, on 28 August 2014, Somalia, finally, filed its maritime case against Kenya before the ICJ, on the subject of establishing a single maritime boundary between the two coastal states in the Indian Ocean.

## 2. MATERIAL FACTS – BENCHMARK

### 2.1. Somalia's Application and Claims

In its application, Somalia stated that no maritime boundary exists between the two coastal states (ICJ, 2021, para. 35). Moreover, Somalia submitted that, in the

absence of agreement, Kenya, with its unilateral action on the disputed Indian maritime area, notably on exclusive economic zone and continental shelf, acted not only in violation of its sovereign rights but also in contradiction with the principles enshrined in the UNCLOS (ICJ, 2021, para. 199).

Accordingly, per international laws, Somalia requested the ICJ: 1) to determine the full course of the single maritime border separating the whole designated maritime extent of the Indian Ocean to Kenya and Somalia, including in the continental shelf beyond 200 nautical miles; 2) to ascertain the exact topographical location of the single maritime boundary; 3) to adjudge that Kenya acted in violation international laws, particularly sovereign rights and jurisdiction of Somalia, thus, obligated to make full reparation (ICJ, 2021, para. 25).

### 2.2. Kenya's Defence and Counter Claims

In its counter Memorial, Kenya raised preliminary objections against the case of Somalia, claiming the existence of an accustomed acquiescent line between them that has been put into practice for a long time, as such affirmed the existence of an equitable delimitation (ICJ, 2021, para. 35).

On top of the above, Kenya further argued the inexistence of dispute let alone any form of a challenge until 2014, thus, its activities over the Indian sea were made in good faith and lawful (ICJ, 2021, para. 83). Accordingly, Kenya requested the ICJ to dismiss all of Somalia's claims and affirm the already agreed maritime boundary and long maritime practices between the two coastal states.

## 3. PRELIMINARY ISSUES

### 3.1. Kenya's Preliminary Objection

As provided above, Kenya asserted its preliminary objection arguing that there is an accustomed maritime line already in place, amplifying the existence long practiced maritime boundary in the Indian Ocean. Per Kenya's submission, though Somalia knew about Kenya's conduct in the shared coast maritime sea, the former failed to react and respond to the latter state's conduct within a reasonable time (ICJ, 2021, para. 37). Kenya added that Somalia's first objection was recorded on the 4<sup>th</sup> of February 2014 when it submitted its letter to the UN, which shows the consistent practice exhibited in the Indian Ocean. Thus, Kenya claimed that Somalia's request to negotiate on the maritime delimitation should not create a wrong impression, as if an acquiesced maritime boundary did not exist, underlining its otherwise argument (ICJ, 2021, para. 38).

### 3.2. Somalia's Counter-Defence

Somalia submitted its counter-defence against Kenya's preliminary objection. Accordingly, per Articles 15, 74, and 83 of the UNCLOS, Somalia argued the primary condition of an express agreement, written or unwritten, to assume the existence of a maritime boundary delimitation between coastal states. Somalia refuted Kenya's assumption of acquiescence arguing that

failing to object to Kenya's unilateral act doesn't constitute affirmation, negating silence amounts to acceptance (ICJ, 2021, para. 44). Somalia also added the timing when the unilateral act of Kenya took place, in which Somalia was at war with itself and no effective government that could actively oversight the situation of maritime boundaries of Indian Ocean, thus, was not in a position to assert its objection (ICJ, 2021, para. 47).

### 3.3. ICJ's Ruling

Upon evaluating Articles 15, 74, and 83 of the UNCLOS, the ICJ highlighted the usual track of expressing agreement is in a written format. Though the court didn't rule out the possibility of having an unwritten agreement, it underlined the crucial elements of having a 'shared understanding,' which shall be ascertained through 'acquiescence or tacit agreement' (ICJ, 2021, para. 50, 52).

Examining the case at hand per the forgoing baseline, the court uncovered the absence of 'shared understanding' between the two Parties. Moreover, the court also observed Kenya's affirmation as to the inexistence of indorsed agreement in its preliminary objection hearing and 'Note Verbales' to the UN (ICJ, 2021, para. 70).

Aside from the above, the ICJ took into consideration the situation of Somalia's internal civil war, where there was no effective governance structure in place, which Kenya did not deny. Thus, considering Somalia's inability to protest in the year between 1979 to 2014, the court ruled out the scenario of entailing Somalia's action as an acquiescence, reasoning the absence of 'clear and consistence' adherence to the maritime practice (ICJ, 2021, para. 80).

Finally, the ICJ adjudged the absence of compelling evidence as to the existence of acquiesced practice in the Indian Ocean, therefore, dismiss Kenya's preliminary objection (ICJ, 2021, para. 89).

## 4. MARITIME DELIMITATION ISSUES

After deciding the inexistence of maritime boundary accords, considering Somalia's request to ascertain the respective states' equitable maritime boundary, the ICJ proceeded to delimit the maritime demarcation of Somalia and Kenya in the Indian Ocean (ICJ, 2021, para. 90-91).

Recalling the adherence of the two coastal states to the UNCLOS, the ICJ maintained the application of the provisions of the aforesaid Convention in demarcating the equitable maritime line between Somalia and Kenya (ICJ, 2021, para. 92).

The ICJ noted the starting point which both Kenya and Somalis have already agreed on, which was deduced 'by connecting PB 29 to a point on the low-water line by a straight line that runs in a south-easterly direction and that is perpendicular to the general trend of the coastline at Dar Es Salam' per the 1927 and 1933 UK-Italy land border treaty arrangement (ICJ, 2021, para. 95).

However, unlike the starting point, both Kenya and Somalia submitted different stands on the demarcation of the territorial maritime sea (ICJ, 2021, para. 99).

### 4.1. Somalia's Claim

In demarcating the territorial maritime sea, Somalia argued a 'median line' need to be considered between the two coastal states (ICJ, 2021, para. 101).

### 4.2. Kenya's Claim

On the other hand, Kenya asserted its stand arguing the territorial sea should go after the 'parallel of latitude', as it has already remained in place between the Parties (ICJ, 2021, para. 105).

### 4.3. ICJ's Ruling

However, the ICJ has already concluded, in its preliminary adjudication, that no maritime boundary with 'shared understanding' exists between the two coastal states, thus, it disregarded Kenya's argument from the get-go. Consequently, per Article 15 of the UNCLOS, the Court stick with Somalia's claim and ruled the viability of following the 'median line' of the coastal line and underlined the 1927 and 1933 UK-Italy land border treaty regime to objectively draw a line that run into the territorial maritime sea (ICJ, 2021, para. 118).

## 5. DELIMITATION OF THE EXCLUSIVE ECONOMIC ZONE AND THE CONTINENTAL SHELF WITHIN 200 NAUTICAL MILES

### 5.1. Maritime Delimitation Methodology

To have a clear take-off, it is crucial to set the pattern of ICJ in demarcating an exclusive economic zone and the continental shelf. As provided in the case of Romania vs. Ukraine Maritime Delimitation, since the UNCLOS was enforced, the court, to ease its task of maintaining equitable delimitation, has developed three stages of maritime territorial demarcation methodology in its jurisprudence (ICJ, 2021, para. 122, 128).

In its first stage, having a 'strict geometrical' qualification on the basis of objective data derived from the coasts of the Parties, the ICJ intends to create a 'provisional equidistance line from the most appropriate base points' (ICJ, 2021, para. 123).

In its next stage, to attain equitable maritime demarcation, the ICJ articulates if there are compelling circumstances, like geographical and other relevant factors, which need to be considered to modify or alter the 'provisional equidistance' established in the first stage (ICJ, 2021, para. 124).

Finally, to delimit a maritime boundary equitably, the ICJ, in its third stage, proceeds with the 'equidistance' or 'adjusted line', and, accordingly, demarcates a disputed territorial sea area (ICJ, 2021, para. 125).

#### 5.1.1. Somalia's Claim

Somalia, maintaining its argument in line with the above ICJ pattern, asserted the appropriateness of employing the three-stage methodology and requested the court to follow its usual track in delimiting the maritime boundaries between the coastal states (ICJ, 2021, para. 126).

### 5.1.2. Kenya's Claim

On the other hand, Kenya, although affirmed the relevance of the three-stage methodology in maintaining equitable delimitation in several instances, argued otherwise in the present case. Instead, basing itself on regional practice and geographical context, it stated that the parallel of latitude is the appropriate methodology in order to establish equitable maritime demarcation (ICJ, 2021, para. 127).

### 5.1.3. ICJ's Ruling

Though the ICJ normally adopts a three-stage delimitation methodology, it normally won't consider using those abovenamed methodologies – if parallel of latitude, as suggested by Kenya, is a relevant methodology to establish equitable delimitation, and – if there are other appropriate factors entailing the equidistance methodology irrelevant (ICJ, 2021, para. 129-130).

However, the ICJ didn't find any compelling reason to deviate from its usual jurisprudence, thus, ruled the application of the three-stage methodology in determining the territorial maritime border of the two coastal states (ICJ, 2021, para. 131).

Therefore, the Court, while ascertaining its appropriateness, proceed with the three-stage methodology to delimit the territorial maritime demarcation between the two coastal states.

## 5.2. Provisional Equidistance Line

Though Somalia at first suggested CARIS-LOTS software of US NGA Nautical Chart 61220, later compromised its stand and hesitantly accepted Kenya's suggestion of British Admiralty Chart 3362, and signaled the ICJ to choose an appropriate and reliable one. Accordingly, the court ruled to use the British Admiralty Chart 3362 and pursued drawing a provisional equidistance line (ICJ, 2021, para. 143-146).

While setting the equidistance line per the British Admiralty Chart 3362, the ICJ evaluated the existence of pushing factors compelling the adjustment or shifting of the provisional equidistance line. In this regard, the Court observed that Kenya and Somalia have an opposing stand (ICJ, 2021, para. 147).

### 5.2.1. Somalia's Claim

Somalia argued the inexistence of compelling factors requiring the adjustment or shifting of the provisional equidistance line, other than geographical factors (ICJ, 2021, para. 148).

### 5.2.2. Kenya's Claim

On the other hand, Kenya submitted five factors as compelling circumstances, requiring the shift/adjustment of the provisional equidistance line. These circumstances are: 1) the substantial 'cut-off' due to territorial sea demarcation between Kenya and Tanzania; 2) the usage of 'parallel latitude' as the regional *modus operandi* in determining the maritime delimitation of East Africa 3) the security issues, notably terrorism and piracy, of the

region; 4) the accustomed longstanding coastal states economic activities, such as oil concessions, naval patrols, and fishing among others; 5) the access route for fisherfolk and/or other natural resources (ICJ, 2021, para. 149-153).

### 5.2.3. ICJ's Ruling

Taking into account the relevant provisions of the UNCLOS, Articles 74 and 83 in particular, the ICJ evaluated the viability of those factors asserted by Kenya as follows (ICJ, 2021, para. 157).

With respect to Kenya's argument in terms of substantial 'cut-off' due to territorial sea demarcation between Kenya and Tanzania, the ICJ ruled out its significance reasoning that any cut-off effect due to the aforesaid bilateral *inter alios acta* maritime accord is irrelevant, thus, cannot impact the contemporary maritime delimitation case of the two coastal states (ICJ, 2021, para. 163).

Concerning Kenya's claim of using 'parallel latitude' as the regional *modus operandi*, the ICJ, while affirming Somalia's geographical consideration, opt to consider the concavity of the broader geographical context of the coastline, which is congruous with its precedent and other international tribunal/s, like Arbitral Tribunal in the *Guinea/Guinea-Bissau* case (ICJ, 2021, para. 165, 167).

In relation to Kenya's security threat assertion, the ICJ, underlining its awareness about how serious terrorism and/or piracy menace is, negated its relevance in the present case, reasoning that the sway over the maritime sea is not typically related to security situations, thus, doesn't impact the coastal state/s right of navigation (ICJ, 2021, para. 158).

As to Kenya's submission in the context of the longstanding accustomed coastal states' economic activities, the ICJ automatically rejected the claim, as the decision had already been made as to the non-existence of territorial maritime accord between Kenya and Somalia (ICJ, 2021, para. 160).

Concerning Kenya's claim to access route for fisherfolk and/or other natural resources, the ICJ remarks the probability of considering it as an important factor exceptionally, only if the equidistance line would probably result in 'catastrophic repercussions for the livelihood and economic well-being of the population' of a given coastal state/s. Within the foregoing context, the court, however, is not satisfied with Kenya's claim, providing its weak premises as to the actual implication and repercussion of the equidistance line on its wider population, thus, rejected it (ICJ, 2021, para. 159).

At the backdrop of the above, the ICJ, after evaluating the significance of geographical configuration in the coastal area of Kenya and Somalia in the Indian Ocean, has underlined and ruled on the need to adjust a provisional equidistance line to attain the ultimate objective of equitable maritime delimitation (ICJ, 2021, para. 172-173).

As a result, considering the geographical configuration of the coastal area, the ICJ technically pursued to adjust the provisional equidistance line toward the north, which go after 'a geodetic line with an initial azimuth of 114°' (ICJ, 2021, para. 174).

According to the above adjustment, Somalia and Kenya are awarded 733 km and 511 km coastline long respectively, which favour the former state with its 1:1.43

ratio. In the case of a territorial sea demarcation, about 120,455 sq. km. and 92,387 sq. km. were assigned to Kenya and Somalia respectively, which favour the former state with its 1:1.30 ratio. Comparatively, the court underscored the aforementioned two ratios don't entail 'any significant or marked disproportionality' (ICJ, 2021, para. 176).

Therefore, per paragraph 1 of Article 74 and 83 of the UNCLOS qualification in maintaining equitability, the ICJ remained satisfied with the above territorial maritime seacoast and its outskirts delimitation for the exclusive economic zones and continental shelves of the two coastal states (ICJ, 2021, para. 177).

## 6. DELIMITATION OF THE CONTINENTAL SHELF BEYOND 200 NAUTICAL MILES

With respect to the limits of the continental shelf beyond 200 nautical miles, though both Kenya and Somalia had made submissions to the Commission per Article 76 of the UNCLOS in May 2009 and July 2015 respectively, both coastal states still requested the ICJ to delimitate it. As a result, the court considered the matter from two aspects and concluded that – the territorial maritime sea 'beyond 200 nautical miles continues along the same geodetic line as the adjusted line within 200 nautical miles until it reaches the outer limits of the coastal states' continental shelves,' – while the remaining delimitation of the continental shelf beyond 200 nautical miles should be delineated based on the recommendations to be made by the Commission (ICJ, 2021, para. 178-181).

## 7. SOMALIA'S ALLEGED VIOLATIONS BY KENYA OF ITS INTERNATIONAL MARITIME OBLIGATIONS

### 7.1. Somalia's Claim

According to Somalia, Kenya unilaterally engaged in various economic activities, such as exploration and exploitation, in a contested coastal maritime area, which is contrary to the UNCLOS principles and Article 77 in particular. Somalia added that Kenya's activity not only amounts to its territorial sea violation but also against its exclusive economic zone and the continental shelf jurisdiction. Moreover, Somalia claims that the moment it became aware of Kenya's activity, it protested against them (ICJ, 2021, para. 199).

Therefore, Somalia demanded the ICJ to pronounce Kenya's action as contrary to its international obligations and adjudge the latter state to be liable to 'make full reparation' to the former state per international law (ICJ, 2021, para. 198).

### 7.2. Kenya's Claim

Kenya, on the other hand, denied the existence of antagonism over the practice of using maritime activities, thus, argued otherwise that it had been freely engaging in economic activities within its maritime boundary where it had assumed and held its undisputed territorial seacoast. Kenya also asserted that, even though the provided coastal areas had been subjected to dispute, its activities cannot be said to be unlawful for two main arguments: 1) arguing its activities did not 'lead to permanent physical

change'; 2) claiming paragraph 3 of both Article 74 and 83 of the UNCLOS is not relevant to their case at hand, arguing its 'activities commenced prior to a dispute.'

Therefore, Kenya underlined Somalia's inability to substantiate its claim, in terms of sanctioning its illicit economic activities in the contested coastal area, thus, requested the court to reject Somalia's asserted claim (ICJ, 2021, para. 201-202).

### 7.3. ICJ's Ruling

After evaluating the abovementioned issues, the ICJ marked that Kenya exercised its economic activities assuming its maritime boundary but suspended its activities in 2016 until an agreement is reached between the two coastal states, thus, learned Kenya was acting in good faith. Moreover, the Court was not convinced that Kenya's economic activities would hinder the process of attaining a final accord on the territorial sea delimitation between the two coastal states. Consequently, the Court was unable to draw a conclusion as to whether Kenya's action amounted to violating paragraph 3 of Articles 74 and 83 of the UNCLOS (ICJ, 2021, para. 210-211).

Therefore, the ICJ ruled against Somalia, underscoring that Kenya, while conducting its maritime economic activities in the contested coastal area, has not acted against its international duty, thus, rejected Somalia's full reparation claim (ICJ, 2021, para. 212).

## 8. CONCLUSION

All in one, the International Court of Justice, after examining both Kenya and Somalia's claim and counterclaim: decided there is no agreed maritime boundary between Somalia and Kenya that follows the parallel of latitude; delimited single maritime boundary which follows the geodetic line between Kenya and Somalia in the Indian Ocean; Kenya has not violated its international obligations through its maritime economic activities in the disputed area.

Aside from the aforementioned, in this maritime dispute adjudication between Kenya and Somalia, there are criticisms attributed to the ICJ decision.

The first criticism stems from an equal participation perspective. According to Article 287 (1) (b) of UNCLOS and Article 35 (2) of the ICJ Statute, all disputing parties need to be duly represented and have the same access to all information and be allowed to refute as well as produce their side of arguments so that they all have confidence in the overall proceedings and final adjudication of the case. Although Kenya participated in the preliminary hearing, it did not participate in the merit hearing phase due to – the Covid-19 pandemic, – unwillingness to participate via online video trial proceedings, and – other trust issues with the court itself (Bryant, 2021; ICJ, 2021, para. 16, 28). Bearing in mind these aforesaid arguments, the impartiality of the court decision has been criticized (Africanews, 2021; Anna & Barise, 2021; Wasike & Mukami, 2021). Here, it has to be recalled that the court decided the case believing that it has all it needs to give judgment on the case (ICJ, 2021, para. 29).

The other criticism arises from the technical content of the ruling that the Court had some access to technical input. According to scholars like Bekker *et al.* (2022) and Schofield *et al.* (2021), it is unclear precisely who

provides such technical expert support, as such question the impartiality of the court in its non-legal, but technical, decision.

Apart from the above, the Author has observed many scholars attest to the legality of the ICJ's decision, affirming that it is in line with the principle of the UNCLOS and its precedents. Moreover, even those scholars that criticize the decision do not rule out the validity of the overall court's adjudication, signaling its legitimacy in a general context. Saving the abovementioned concerns, this Author also believes the ICJ's decision on the territorial sea dispute between Somalia and Kenya in the Indian Ocean is legitimate per international laws.

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