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„Conflict Management over Maritime Territories : Use of ADR in Maritime Disputes: Kenya vs Somalia“

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« On my honour as a student of the Diplomatische Akademie Wien, I submit this work in good faith and pledge that I have neither given nor received unauthorized assistance on it. »

NATASHA LULIA MWALA

25.2 MAIS

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ABSTRACT

The recent discoveries of natural resources on both territorial and maritime borders have heightened the probability of conflicts between states specifically in the Horn of Africa and the Greater Lakes Region. As a highly volatile region, conflicts are not a foreign phenomenon which have been plaguing the region since transition to the post-colonial era. It is simple to argue that the cause of disputes is due to the arbitrary borders drawn by the European powers, however, the region is experiencing a contemporary 'scramble and petition' with countries racing to exploit and gain over the newfound resources. In addition to this, the rise of nationalist sentiments combined with the burgeoning population and struggle of governments to finance their domestic budgets while trying to reduce borrowing from foreign markets due to the inflation costs which makes it expensive, also plays a key role in the quest to benefit from mineral exploration and excavation.

While traditional conflicts rose from land border disputes that escalated to violence especially between border communities, maritime conflicts tend to be handled in legal ways with parties seeking intervention from bodies such as the International Tribunal of the Law of the Sea (ITLOS) and the International Court of Justice (ICJ). Most cases are solved by outright delimitation of the maritime borders rather that joint management of marine land masses or natural resources based on mutual understanding or mutually assured benefits. The recent Kenya-Somalia Maritime dispute is an excellent case study. The aim of this research is to not only show alternative dispute resolution methods that can be used in maritime border disputes but also analyse the switch from pacific means of settlement of disputes to judicial intervention of the court. It begins by looking at the evolution of land border disputes between the two states, touches on the maritime dispute and their diplomatic, economic and security relationship. It further critically analyses the points of view of the two countries and the court's ruling. Finally, it examines alternative dispute settlement mechanism that could have been used.

Keywords: maritime boundary dispute, , maritime delimitation, memorandum of understanding, ICJ,LOS, joint maritime agreements

ABSTRACT

Die jüngsten Entdeckungen natürlicher Ressourcen an den territorialen und maritimen Grenzen haben die Wahrscheinlichkeit von Konflikten zwischen Staaten insbesondere am Horn von Afrika und in der Region der Großen Seen erhöht. Da es sich um eine sehr unbeständige Region handelt, sind Konflikte kein neues Phänomen, das die Region seit dem Übergang zur postkolonialen Ära plagt. Es ist einfach zu argumentieren, dass die Ursache für die Streitigkeiten in den willkürlichen Grenzziehungen der europäischen Mächte liegt, doch erlebt die Region derzeit ein "Gerangel und Bitten", bei dem die Länder um die Ausbeutung und den Gewinn der neu entdeckten Ressourcen ringen. Darüber hinaus spielt das Aufkommen nationalistischer Gefühle in Verbindung mit der wachsenden Bevölkerung und dem Kampf der Regierungen um die Finanzierung ihrer Haushalte bei gleichzeitiger Verringerung der Kreditaufnahme auf ausländischen Märkten aufgrund der Inflation, die diese teuer macht, eine wichtige Rolle bei der Suche nach Vorteilen aus der Erkundung und dem Abbau von Mineralien.

Während die traditionellen Konflikte aus Streitigkeiten über Landgrenzen entstanden, die vor allem zwischen Grenzgemeinschaften zu Gewalt eskalierten, werden maritime Konflikte in der Regel auf rechtlichem Wege ausgetragen, wobei die Parteien das Eingreifen von Gremien wie dem Internationalen Seegerichtshof (ITLOS) und dem Internationalen Gerichtshof (IGH) beantragen. Die meisten Fälle werden durch die direkte Abgrenzung der Seegrenzen gelöst und nicht durch die gemeinsame Bewirtschaftung von Meeresflächen oder natürlichen Ressourcen auf der Grundlage gegenseitigen Verständnisses oder gegenseitiger Zusicherung von Vorteilen. Der jüngste Seestreit zwischen Kenia und Somalia ist eine hervorragende Fallstudie. Ziel dieser Untersuchung ist es nicht nur, alternative Streitbeilegungsmethoden aufzuzeigen, die bei maritimen Grenzstreitigkeiten angewandt werden können, sondern auch den Übergang von der friedlichen Beilegung von Streitigkeiten zur gerichtlichen Intervention zu analysieren. Zunächst wird die Entwicklung der Streitigkeiten an den Landgrenzen zwischen den beiden Staaten untersucht, dann werden der Seestreit und die diplomatischen, wirtschaftlichen und sicherheitspolitischen Beziehungen zwischen den beiden Staaten behandelt. Ferner werden die Standpunkte der beiden Länder und die Entscheidung des Gerichtshofs kritisch analysiert. Schließlich werden alternative Streitbeilegungsmechanismen untersucht, die hätten genutzt werden können.

INTRODUCTION

International conflict is a multifaceted concept with layers of analysis, so is management of conflict. But what is conflict? Conflict can be defined as *the situation in which two or more social entities or parties (however defined or structured) perceive that they possess mutually incompatible goals.* [1] There is a myriad of causes of conflicts, especially ones that transcend boundaries, but rarely is there a sole identifiable reason for this. Although some tactics may be effectively used in some conflicts they may not fit with others as conflict management is not a 'one-size fits all'.

The concepts of conflict management and conflict resolution are sometimes used interchangeably. Conflict management seeks to transform existing violence into a political process where the dispute can be addressed using a peaceful approach while conflict resolution means that the dispute has ceased to exist therefore losing its political importance.[2] For conflict management to work, it depends on the cause(s) of the conflict, the stance of the parties, the level of cooperation, the methods used, and the party played by third parties

Territorial conflicts can either be land or maritime, with the former being more common. This type of conflict arises from either disputed demarcation of borders between states or disputes territories with conflicting parties making claim to them. Causes of these conflicts could be based on cultural difference, discovery of natural resources and in the case of maritime disputes, development of new transport and trade routes, climate change that can affect fishing grounds forcing fishermen to go deeper into the ocean increasing their probability of trespassing. There can be two causes for maritime disputes are overlapping claims and unclear jurisdiction of land geographies at sea.

The rise of overlapping claims over maritime territories in Africa has increased with the development of the blue economy and the rush for states to exploit marine resources.[3] The spiked interest of African countries in maritime resources can be categorised into three factors; first, economic importance and the magnitude at which oil discoveries and oil trade can improve a country's economy, secondly, the discovery of new oil fields has the capability to alter the strategic importance of Africa in international markets and lastly, the quality of African oil is better and is geographically situated at better locations than the US and European ones.[4] In addition, there's increased importance in states' need to also balance their security and geopolitical interest in the shared maritime space.[5]

[1] Mitchell,1989

[2] Wolff & Yakinthou, 2013

[3] Okonkwo, 2017

[4] Walker, 2015

[5] *Supra note* 3

In the meantime, the ability to utilise these resources have been hampered by the lingering omen of colonial borders, non-existent legal frameworks, surge of the populace and lack of effective peaceful resolution mechanism.[6] There are approximately 400 boundaries that are recognized globally and only roughly 180 of them have been legally agreed on and in Africa, only 30 percent of the total land mass have been demarcated .[7] A boundary dispute can be described as conflict resulting from claims of state(s) on a section of the territory or its entirety. [8]This definition will be used for maritime boundary disputes. The continent has experienced numerous maritime boundary disputes with the current one being the Kenya-Somalia dispute. In order to manage boundary disputes in the sea, delimitation is important which establishes the jurisdiction of each state and thus can lead to beneficial exploitation of the maritime resources.[9]The benefits from establishing and delimiting boundaries appear to offset the concessions made through negotiations.[10]

Within the argument over boundaries lies the issue of management of transboundary resources. After analysis of several of the maritime disputes in Africa, it was found that the discovery of natural resources increased the likelihood of dispute. The contested area between Kenya and Somalia is a triangular parch of approximately 100,00 km^2. The area contains oil fields and is also a fertile fishing ground. Border communities of both countries have been benefiting from fishing in the area, but the problem arose when both countries issued exploration rights for the oil to different companies. If improperly managed, natural resource conflicts lead to heightened levels of insecurity. This conflict could be handled through cooperative management of the resources where they come up with a bilateral agreement for mutual benefits and on the other hand they could go for outright delimitation seeing as none of them is willing to concede to the other which exacerbated the dispute. There are pros and cons to cooperation agreement over outright delimitation. For instance, on top of maintaining the rapport between the two countries, it allows faster access to benefits from those resources.

The main problem facing maritime (territory) disputes in Africa is the principle of *Uti posseditis juri.* This principle provides that the boundaries established post-colonisation will be maintained as they are. As a consequence, there are two problems that arise from this. The first relates to how far a nation can exercise their right to self-determination within their borders and the second is the process of decolonisation, which allowed African leaders and other deep state officials to legitimatise their politicking.[11] This principle was adopted in the 1963 OAU Charter to prevent further conflicts but all it did was mask them. This does not mean that many countries adopted colonial lines as extensions of maritime boundaries and also these lines were not

[6] Kadiagi et al, 2020

[7] *Supra note* 3

[8] Kornprobst, 2002

[9] Schofield, 2010

[10] Østhagen &Schofield, 2021

[11] *Supra note* 6

meant to be used as maritime boundaries and thus do not justify the need to use them to support their validity.[12] Because most, if not all, African countries hold these boundaries as sacrosanct and therefore space for negotiation is limited. Before its disbandment in 2002, the OAU had set a deadline for the delimitation as July 2011, but this did not happen and under the AU it was pushed to the end of 2017.This target was further pushed to the end of 2050, which seems unattainable given the slow progress.

Maritime disputes can be handled through negotiation, conciliation, use of good offices, arbitration, mediation and through litigation via judicial settlement. The guiding document that is used in delimiting boundaries is the UNCLOS. Under part XV of the charter, there are guidelines that have been set for delimitation. The part begins by establishing that all states must settle their disputes in a peaceful manner according to whatever means that they choose. By doing this, they allow room for flexibility between the states to choose the resolution means on their own accord. There is also mention of conciliation methods. If parties are not able to peacefully settle this, then section two applies where they can submit the case to the ITLOS, the ICJ or an arbitration tribunal. Both the ICJ and ITLOS have compulsory jurisdiction according to the convention. In the last section, the convention spells out the limitations and optional exceptions of the procedures.

Other than litigation, there are four common alternative resolution methods that can be used to settle these disputes. The first is negotiation which happens between the two disputees with no third-party intervention. If this fails, they can consider mediation, which involves intervention by a neutral third party who makes non-binding decision or for the parties. Thirdly, they can use arbitration, by through of arbitral tribunals, unanimously chosen by the parties who the decide on disputes on the principles of fairness and equality and by administering awards that are binding. Fourth is the process of conciliation, which is similar to mediation in that, the conciliator is asked to make a non-binding agreement and different to arbitration which has a more structured approach. Parties can also make use of good offices to settle disputes. Kenya and Somalia began with negotiation before using litigation. The judgement was passed by the ICJ but although binding, is not enforceable. There is also no provision that prevents the two countries from going back to ADR to come up with an agreement .In light of this, my main research question will be :**What alternative methods could Kenya and Somalia have used other than the ICJ?**

Subsequent to this introduction, chapter one will look at the literature review, identify a suitable theoretical approach to anchor the research on and the methodology. Chapter two will look at the historical perspective of both maritime and land territory disputes between the two countries including the relationship between the two countries. Chapter three will focus on the case study and analyse the point of views of each party before looking at the Court's decision. Lastly, Chapter four will focus on the alternative methods that could have been used in lieu of litigation before proceeding to recommendation and conclusion.

[12] Prescott &Schofield,2005

CHAPTER ONE: THEORETICAL BACKGROUND

1.1 Literature Review

There has been extensive research on the roots, nature and management of conflict in the post-Cold war era. The existing literature albeit plentiful, does not always handle conflict management in a well-integrated manner. They approach conflict management from a historical, sociological, legal and even economic point of view.[13]This makes it one of the most interdisciplinary fields. On the other hand, literature on maritime disputes is limited and it primarily focuses on increased offshore activities and the states' ability to utilise the resources available.[14]The main resources are fish and natural oil Other causes have been linked to be overlapping claims and the limits of sovereignty.[15]. In addition to this causes one might add the power symmetry between confliction states as a cause. The increased level of competition for marine resources is said to be caused by the surge of global population, the economic aspect of the blue economy and blue growth, failing marine governance institutions and climate change.[16]As a result states are keener on delimiting their boundaries and ensuring they obtain maximum benefits. Correspondingly, the delimitation procedures have undergone transformations

Less than half of the world's boundaries are not delimited. Some scholars argue that this is because states do not prioritise this especially if there are no prospects of natural resources,[17] while on the other hand, others argue that states do care about delimitation regardless of the economic value attached to it especially after a dispute arises and its resolution is politicised thus gaining importance in domestic politics[18]. It can be concurred that delimitation is important, but states have not been able to establish their boundaries not only because of the intense scientific and technical aspect of it but also because of the cost associated with it. Other factors such as lack of domestic legal framework in accordance with UNCLOS and weak implementation strategies also play a role in this.

Delimitation processes are governed by the law of the sea whose framework includes but not limited to UNCLOS. When the maritime space gained importance in the 20th century, the objective was to establish jurisdiction and control of the sea. Maritime boundaries do not only outline the outer limits of a states' territory but also governs the limits of states with adjacent

[13] Bercovitch et al 2009 ;Wolf& Yakinthou 2013

[14] Prescott &Schofield,2005; Østhagen,2020

[15] Anderson,2006

[16] Alexander 2019

[17] *Supra note* 3

[18] Østhagen,2020

coastlines.[19] Previously, states were only allowed to claim territories up to 3NM.[20]Nowadays as states' maritime space not only includes the territorial sea , EEZ and continental zone. In contemporary maritime regime, importance has not only been placed on the jurisdictional aspect but also on the deep seabed, high seas, scientific marine research, military use and marine environmental protection.[21]

UNCLOS is the most revered framework used to govern the sea by most states, however its efficacy has come into question. The Convention was created from the UN Convention on the Law of the Sea with an objective to not only promote cooperation among states but to maintain maritime security. There is no denying that the current Convention is a 'package deal 'offered to states as a cure-all solution and therefore contains some limitations.[22]The previous Convention was a combination of four treaties which states selectively ratified and with the new Convention, the party states concluded with heavy compromises.[23]Some of the limitations arise from non-compliance from states such as the USA (who have not ratified the Convention) , a ,the built-in ambiguity of some of its clauses and geographical complexity of certain regions such as East Asia.[24]

The process of delimitation is one which is complex and multifaceted and encompasses both legal and technical facets. The legal aspect of it is quite new to international law and the international community has put efforts towards codification of customary maritime law from the 1930 Hague Codification Conference to the signature of UNCLOS in 1982.[25]Both Geneva Conventions and UNCLOS contained dispute settlement mechanism for states with adjacent coasts. The first principle used for delimitation after the WW II was the equidistant line, according to the 1958 Geneva Conventions but states later came to the realisation that the convention was not applicable due to the changing international order which saw an increase in states that had gained their independence as a result of the decolonisation process.[26]

Therefore, a new era of maritime delimitation emerged based on the principle of equality. During the third UNCLOs, there were two negotiating camps who either supported delimitation based on equidistance and that of equitable principles. Authors concurred that those who argued in favour of the equidistant method was because it is stable and predictable therefore offering better guidance in comparison to equality which would allow states to lay claims there-

[19] Jagota,2021

[20] Osgood, 1976

[21] Borgerson,2009

[22] Tamada,2018

[23] Caminos & Molitor, 1985

[24] Bateman, 2007

[25] Acikgonul 2020, & Lucas,2020

[26] Cottier,2015

fore causing disputes which would not exist if the law was strictly applied.[27] The stability aspect is questionable because when the method was first created, it did not have a strict geometric meaning and some aspects of inequality were still observed. After the *Case of Libya vs Malta 1958* , equitable principles were found to be a better option in accordance with international law and till date, they are the foundation of delimitation rule of the EEZ and continental shelf under UNCLOS except in special circumstances.[28]

In the case of delimitation, the ICJ came up with a three-stage which was first used in the *Romania vs Ukraine Black Sea Case* and has been used by the Court in delimitation of subsequent cases. It starts with the identification of the relevant area then proceeds to draw and equidistant line which can be adjusted when needed. Although the court has continuously used this method, it does not have any priority over any other delimitation methods.[29] This was Kenya's argument in opposition to the delimitation method and upholding this principle means that states who are not in favour of this delimitation method are not only likely to find it hard to defend their stance, but the Court also requires concrete justification in support of the argument.[30] A contemporary argument that could also soon change this codified approach od delimitation is anchored on the nexus of climate change. Climate change is creating new challenges in not only the administration of boundaries but the management of marine resources. Although the baseline approach is the most stable and legal process, due to changing sea levels, the use of the median line may one day become inaccurate.[31] During the UNCLOS agreements, climate change issues were unfathomable and thus the non-existing framework cannot be blamed on any party but there are working groups looking into this issue and trying to develop laws to address this before it is too late. UNCLOS has amendment procedures that have never been used and this could provide an opportunity for this to happen.

There are alternative options provided for under the DSM for UNCLOS which begins by urging states to negotiate. Other than negotiation, state can also use mediation and Conciliation. However, a contemporary alternative approach for maritime delimitation gaining traction is Joint Development Agreements(JDAs) or Joint Development Zones(JDZs). These are agreements concluded between government on either establishing jurisdiction over the joint area[32] or is provisional in nature and designed for purposes of joint exploration over an area beyond the sea territory.[33] From this the concept of unitization was created where deposits of mineral resources that occurred on the boundary should be treated as one and thus the conflicting par-

[27] *Ibid.*

[28] *Ibid.*

[29] Olorundami,2015

[30] *Ibid.*

[31] Qiu & Firestone, 2020

[32] Biang,2009

[33] Miyoshi, 1999

ties will agree on the appropriate methods of exploitation and division of profits.[34] This contributed to the agreement concluded between UK and Norway in 1976 in relation to their combined oil fields. Based on the median line established by the ICJ in *Somalia vs Kenya*, such an agreement is imminent not only due to Kenya's denial of the judgement but because the established median line dived the oil fields such that 75% is in Somalia and 15% is in Kenya.

In essence, the reviewed literature provided details on maritime delimitation law and principles, the importance of maritime resources and governance some critic on the three-step approach of the ICJ and also provided some insight to a new method that states can utilise in delimitation ;use of JDAs/JDZs.

1.2 Theoretical Framework

Based on existing and reviewed literature and the framework of conflict management theories, this research is anchored *in the integrative approach* of conflict management. The integrative method approaches *win-win point of view instead of a zero-sum approach.*[35].So when does conflict have integrative potential? This occurs when shared interests can be identified and a settlement is reached based on shared on mutual benefits. For this to happen, parties must be open and willing to disclose information on their priorities and come up with agreements that reflect them.

There are two sides to conflict, on one end there is full on war while the other side is peace and conflict management strategies used exists between these two extremities.

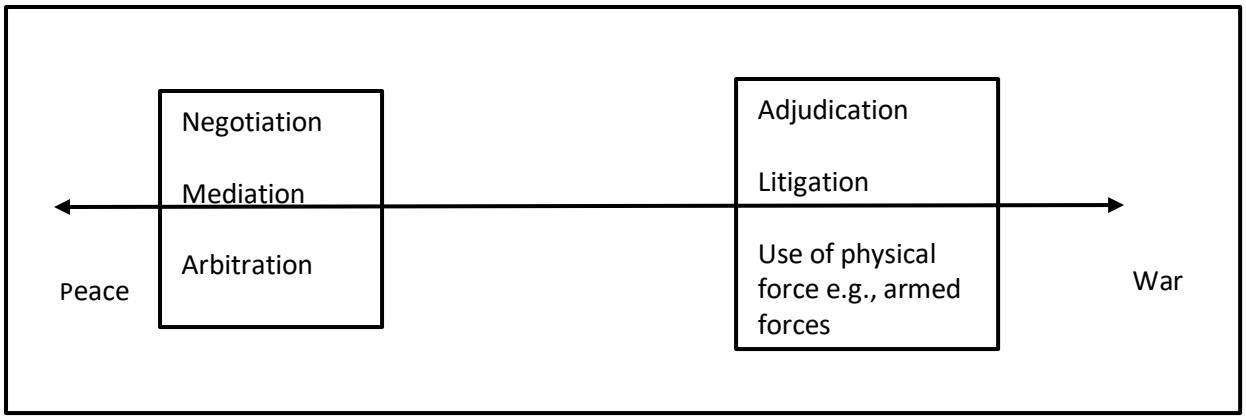


Fig 1: Continuum of conflict

Based on the figure above, this approach takes into account all conflict resolution processes, including litigation. Employing the using of ADR methods will tip the scale to the left which increases the chances of a win-win outcome and on the other hand, using the more coercive means will increase the chances of a lose-lose situation. Integration can be use at different

[34] *Supra note* 33

[35] Rognes &Schei, 2010

stages of the conflict from pre-negotiation, where the identification of shared values and alternatives are developed by each party) to post-negotiation, where there's implementation of the idea. For the integrative approach to be successful, there are three criteria that need to be fulfilled: trust, satisfaction, fairness and agreement value.[36]

First is trust, there is an undeniable relationship between conflict and trust.[37] Lack of trust can lead to resentment and therefore makes conflict resolution even more problematic. In situations of distrust, depending on the level, parties can work towards rebuilding and repairing the trust. Since the post-colonial era, Kenya and Somalia have had and still continue to have a turbulent diplomatic relationship. Both went through rounds of negotiation and even concluded an MOU between them to manage their conflict between them before the process went awry. Both parties showed willingness in establishing a maritime border through negotiations, which failed after two rounds of negotiation. The catalyst could be the loss of confidence after Kenya failed to show up for the third round in Mogadishu neither did they communicate with Somalia. This bred discontentment and distrust and thus Somali's application to the court.

Second is the satisfaction level of both parties. For positive results, both parties must exhibit similar levels of satisfaction in the outcome based on their interests. Both countries have different ideas on how the boundary should be drawn. Neither of the parties could agree on the delimitation method because they each had their own interest, and none was willing to compromise.

Third, is the level of fairness. Were the results equitable taking into account any necessary considerations? Was the any powerplay at hand? It is important to identify the power dynamics in the conflict to ensure that there is no coercion that can lead to perceived unfairness. Kenya has established itself as a regional hegemony and thus could foster a power imbalance. They have enjoyed relative political stability and economic growth in comparison to Somalia. They are also active in securing Somalia through AMISOM and threats to withdraw the troops to weaken Somali's stance could have been perceived as coercion.

Finally, we have the value of agreement and based on the positions of both parties seeks to ensure that both sides are getting the best deal possible in the situation. At this point, it is also salient that parties identify the best and worst alternatives to the negotiated agreement, BATNA\LATNA. The value of the agreement would be placed in relation to the material(oil and fish) of their agreement. Both parties seek to cut out each other from the resourceful zone. The BATNA here would be jointly managing the resources for mutual benefits while the LATNA is the litigation process.

Hence, the **hypothesis** of this research is the use of ADR methods to reach an agreement would have minimised the intensity of the dispute, led to better relations between them and increased mutual benefits for the two countries. This can be explained by the constructivist theo-

[36] *Supra note 35*

[37] Deutsch et al 2011

ry where states are socially constructed, and their norms dictate how states and other agencies relate to each other in relation to their interest.[38]

Therefore, f the win-win perspective , not only changes the perception of how these two countries view each other but also increases the economic gain from shared management of the resources.

1.3 Research Scope and Design

1.3.1 Methodology

The interdisciplinary nature of this research will lead to the navigation between the historical perspective to international law and international relations. Conceptual elements that have been revealed in the theoretical framework will be used in conjunction with the empirical aspect of this research. This research will be qualitative and empirical in nature. For the qualitative aspect, it will take into account the historical aspect of the conflict in question from tracing the countries relationship post-independence to the present and look at the domestic legislature of both countries and the legal documents and court proceeding from the case. The empirical aspect will be supported by the intractability of territorial conflicts where conquered territory undergoes entrenchment after years and becomes valuable [39]. The maritime dispute is territorial because the zone is considered an extension of the state territory. The study will focus on the time period between August 2014 , when the case was instituted to October 2021 when the judgement was delivered. This judgement did not resolve the dispute but rather terminated it. There is mention of a time period prior to this timeline but it works to contextualise the dispute. This will then be finalised by looking at alternative dispute resolution methods and recommendations will be made on the basis of the outcome. Although the empiric might not be sufficient to draw evidence from, it can serve as contribution to not only academia but future delimitation processes of other maritime borders in the continent.

1.3.2 Methods

This research depends on both primary and secondary sources. Some of the primary resources used were legal instruments such as legislative acts of both countries, some selected documents form the court case such as the written proceedings and the judgements of the ICJ, the UNCLOS and the MOU concluded between the two countries. Additionally, information available of the Foreign affairs' websites such as press statements , from the UN library and from speeches delivered by state representatives were also analysed. With the increased importance of digital diplomacy, select tweets were also analysed for information. The secondary sources that were used were works of literature related to international maritime law and conflict management such as articles, journals, books ,review and E-Newspapers. To finish, I also con-

[38] Finnmore 1996,

[39] Goddard et al, 2007

ducted semis structured interviews with individuals who identified as researchers, experts in maritime law and select civil service officials.

1.3.3 Limitations of Research

This research addresses the management of maritime delimitation conflicts but is limited in a number of ways. First is the language barrier. Some information available from Somali media was not in English and AI translation sometimes distorted the meaning of a sentence. Second is the sample size. Due to the limited correspondence especially from civil servant officials, it was challenging to make conclusive results.; the profiles were limiting in that, getting public opinion from citizens of both states would provide a different point of view. Third. the data collection process and methods used were limiting because, virtual interviews conducted may have led to concealing of information due to personal reasons and fear of implication and also made it impossible to read non-verbal cues from the respondent. Fourth I only analysed the Memorials of the countries and the two judgement passed by the court and neither did I analyse the individual opinions of the judges. Finally, there were geographical constrains due to distance from the locus of the study.

CHAPTER TWO : EVOLUTION OF KENYA-SOMALIA BOUNDARY DISPUTES AND RELATIONSHIP

One of the biggest challenges facing the Horn of Africa is based on boundary related issues and conflicts. This is because under the OAU, newly independent African states decided to uphold the erroneously demarcated borders by the colonial powers to prevent conflict. However, the opposite happened and led to the decades long dispute of boundaries among African countries. This context will specifically be used in analysing the relationship between Kenya and Somalia. This chapter will critically examine the historical boundary dispute, the current maritime dispute and the state of the relationship between two countries since 2014.

2.1 Land Boundary Dispute: A historic recount of the NFD and Shifta War

The genesis of the border challenges between the two countries can be traced back to the rise of Somali irridentism and the quest of having a *Greater Somalia* during the African revisionist period against imperialist Europe. Their desire to reunite was rooted in their religious and ethnical homogeneity.[40] This desire is depicted in the nation's flag, a white star on a blue background, whose five points represent the five regions that had been split up.[41]The region would have consisted of present day Somalia(a combination of previous Italian Somaliland and British Somaliland), the Northern Frontier District (NFD) in Kenya, Djibouti (previous French Somaliland) and the Ogaden region in Ethiopia.[42]According to the Somali people, the imposition of the new borders did not divide the land but the people. [43]

If a *Greater Somalia* had been realised, it would have meant that large portion of Ethiopia and Kenya would have been under Somalia and Djibouti would not exist or perhaps would be acquired by another territory. According to Touval, the succession in acquiring Ogaden region was unlikely because it would question the underpinning of Ethiopia as a country.[44] He further went

[40] Khadigala, 2010

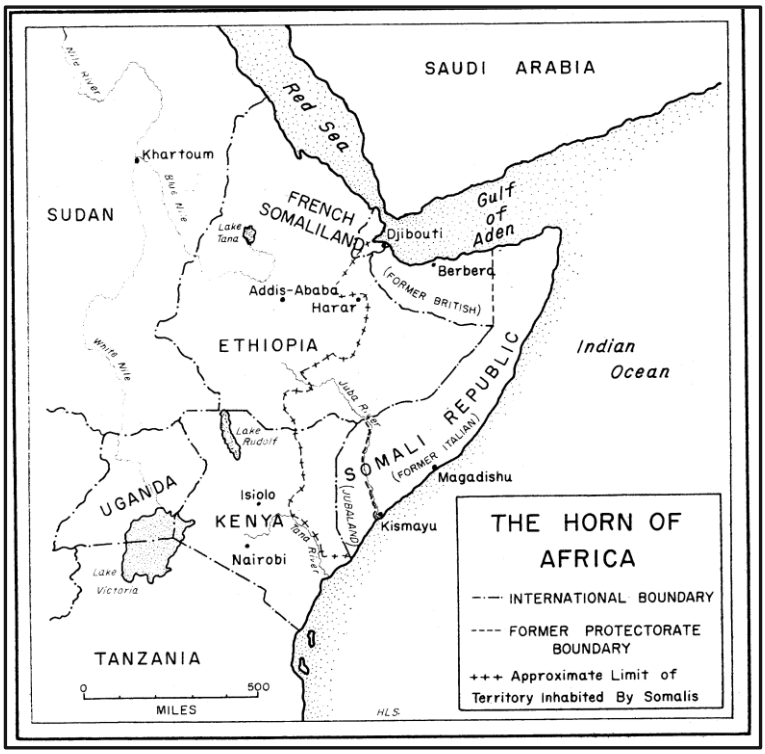
[41] Khalif&Oba,2013

[42] Zoppi,2015 p.49

[43] Khadigala, 2010

[44] Touval,1963

on and mention the NFD in Kenya and the rise Kenyan nationalism and that due to the fact that Kenya would not voluntarily cede the region back to Somalia, the existence of conflict between the two seemed highly probable.[45] His assumptions turned into a reality after the emergence of the *Shifta* war when then the Somali is Kenya attempted to secede and unite to form part of Somalia. The map below shows what a 'unified Somalia would have looked like:



Source: Kromm

Although the *Shifta* insurgency lasted between 1963-1967, the struggle for secession of the NFD began in 1960 with different speculations coming up of granting the NFD autonomy, giving Somalis in the NFD dual nationality or allowing them to have Somali citizenship while living in Kenya, others demanded for secession and unity with Somalia while others outrightly rejected the idea of secession. [46]

In 1962 after the legalisation of political parties in the NFD and the increase in the demand of secessionist sentiments, several political parties were formed such as: NPUA,NPPNU, NPPPP and NFDP, with NPPNU being the minority and the Pro-Kenyan group while the NPUA wanted regional autonomy but did not want to be associated with the Somali community while the NPPPP was the largest political party and pro-secession and pro-Unification with Somalia.[47]By the end of 1962,it was reported that majority of the NFD favoured the unification with Soma-

[45] *Ibid.* p.3

[46] Whittaker, 2015 p.24-25

[47] *Ibid.* p.29-30

lia.[48]On the other hand, Kenyan nationalist political parties KANU and KADU rejected the notion of a seceded NFD.[49] During this time, the Somali government also had the idea that they could convince Britain to hand over the NFD to Somalia before Kenya gained its independence, but this was crushed when Jomo Kenyatta mentioned that the NFD was a domestic affair in which Somalia had no right to interfere, while on the other hand, the Prime Minister Shermarke argued in their defence that any opposition to Somali reunification involving the Somali people was also an internal issue. [50]

Due to the ongoing tension, the British decided to appoint an independent commission that would conduct investigations with regard to the opinion of the residents of the NFD while also assuring Somalia that no decision regarding the area would be passed without prior consultation.[51]After the commission reported the outcome of their investigation to Britain, secession deemed unfavourable to Britain's interest and therefore the region was renamed the North Eastern Region(NER) as a way to appease the Somali resident in the region by giving them some degree of autonomy like having their own local government representation while Kenya retained territorial integrity over them, a move that was not welcomed by the Somali government that led to severed diplomatic ties with Britain.[52]

In 1963, Kenya became independent with the NER still under its mandate and later in 1964 after the constitution abolished a *majimbo* type of leadership replacing it with a central government; a move that was allegedly aimed at deterring Somali nationalism and a move to loosely integrate the region's inhabitants to give them a new identity within the native population.[53] This was also the foundation of the unstable relationship between the two countries. Presently, it is possible to criticise the successful integration of the Somali community with the other tribes who always seem to be discriminated against

With the increase in tensions in the region and the unwillingness of Kenya to release the NER, am insurgence dubbed the *Shifta* war between Kenya and some of the rogue insurgents who did not want to be under Kenya's rule. The insurgency lasted from late 1963 to 1967 under the Northern Frontier District Liberation Movement (NFDLM) formed by the NPPPP. It alleged the insurgents were supported by the Somali government and they even received weapons they used from them. [54]The NFDLM orchestrated attacks where they mostly targeted the police and some local administrative chiefs who were viewed to be defectors and pro-Kenya by working for the Kenyan government. It was not possible for security officers to be deployed immediately

[48] Kromm, 1967

[49] *Supra note* 46 p.31

[50] Touval, 1972

[51] Kromm, 1967

[52] *Ibid.* p.363; *Supra note 46* p.35

[53] *Supra note 51* p.363

[54] *Supra note* 46 p.55

to battle the insurgents due to the initial laxist reaction from Nairobi and the heavy rains.[55] The delayed response was not because the situation lacked importance but rather because Kenyatta's priority at the time was preventing a possible coup from the opposing KADU party and this a directly affected the fight against the *Shiftas* .He did so by ensuring the size of the army was not too strong that it could be used against him. He also created a specialised military wing, GSU and ensured that thy were loyal to him. He did this by training mostly Kikuyu men who were from his ethnic community. [56]

With the continued increase in attacks by the *Shiftas*, a state of emergency was declared in the region in December 1963. The Kenyan army was the deployed to the region and began their counterinsurgency strategies. They militarised a five-mile radius on either side of the border, and they were allowed to arrest and detain anyone who was found within the area.[57]They did not only attack the secessionist groups but other anti-secessionist tribes like the Turkana, Samburu, Rendille, Borana,Pokomo and Orma people were caught in the crossfire.[58] The armed forces mostly targeted the watering areas and areas that had recently been attacked by the insurgents. The insurgency zones were expanded after the *Shiftas* expanded their attacks to the Coast province and the armed forces responded by conducting several operations. [59]

In addition to their counterinsurgency efforts, the Kenyan government also responded by enacting a villagization mandate. This directive forced the resident of the region into small, concentrated villages that made it easy for the government to control them and it limited the movement of people through registration of everyone in their respective villages and issuing of identification documents that would be used when on needed to move from one district to another.[60]The inhabitants of the NER are mainly pastoralist communities whose way of life involved moving from one place to another searching for water and pasture for their livestock and as such this mandate forcibly tethered them to a specific location.

Eventually, the Shifta insurgency began dying down after the election of Prime Minister Egal. Whilst he still supported the aspiration of a Greater Somalia, he valued good diplomatic ties with Kenya more. The relationship between the two governments was almost non-existence due to clandestine support of the Shifta of the Somali government which had transformed a domestic dispute into one between the two countries. Attempts to fix this relationship began at the end of 1967 when representatives from both governments met at an OAU meeting. [61]Both parties agree to end uphold peace and security in the region and develop economic trade ties

[55] Branch, 2014

[56] Branch, 2015 p.

[57] *Supra note 51* p.363

[58] Bakpetu, 2015

[59] *Supra note 46* p.95

[60] *Supra note 46* pp. 349-350

[61],*Supra note 46* p 130

with each other. Somalia also agreed to uphold the territorial integrity of Kenya in relation to the NFD. This marked the end of secessionist attempts and military operations against the *Shiftas* in the region.

2.2 Maritime Boundary Dispute

The cause of maritime disputes in Africa is not only maintenance of territorial sovereignty but also the increased exploration of the blue economy for natural resources. Most of these resources are naturally occurring fossil fuels found in the seabed and fertile fishing grounds. This not only shows the economic importance of maritime territory but also includes the geopolitical aspect with control of the sea.

Kenya and Somalia have been at loggerheads over an approximately 100,00 km^2 territory in the Indian Ocean that allegedly has four oil blocks that are full of natural oil and a fishing area that has been used by the border communities in both countries. In 2014, Somalia went ahead and instituted proceedings against Kenya in the International Court of Justice requesting for outright delimitation of the area, establishment of an exclusive economic zone (EEZ) and a continental shelf, including beyond 200 Nautical miles.

The Court had scheduled a hearing for the case for September2019 from the 9th to the 13th which were then postponed three times after request from Kenya. The hearings proceeded and were held from 15th to the 18th of March without participation from Kenya. The Kenyan Ministry of Foreign Affairs announced their decision through a *press statement*. They cited procedural unfairness of the Court as the main reason stating that their abstinence was the best way to protect their territorial sovereignty. They stated that the ICJ did not have jurisdiction over the case, which the Court later rejected and that the ICJ was further imposing its jurisdiction on this case by ignoring the Optional Clause Declaration according to Article 36(2) of the ICJ statute and that the case was in admissible in court.

They also raised concerns of bias due to the participation of Judge Abdulqawi Ahmed Yusuf, a Somali national who had represented Somalia at a UN conference of the law of the sea. According to Article 31 of the ICJ, a judge with nationality of either of the parties is allowed to sit on the Bench and further states that if the Court does so, the other party is allowed to choose another person to sit on the Bench and thus Kenya chose Judge ad hoc Gilbert Guillaume. [62]Despite doing so, Kenya still refused to participate in the proceedings.

Another reason cited by Kenya was the lack of preparedness. This was because they had just recruited a new legal team when the COVID 19 Pandemic happened and therefore did not have ample time to prepare for the meeting. They further explained that the decision of the Court to change it rules to allow the proceedings to be held virtually without consulting the states was

[62] Saake,2021

unfair. The amendment of the rules by the Court was due to the many travel restrictions that countries had imposed because of the Pandemic. Instead of the proceedings being held completely virtually, they were held in a hybrid format with some judges and legal representatives being in Court in person while the rest followed virtually to promote fairness. They also alleged that there has been interference from third parties with economic interests in the oil reserves in the area and are taking advantage of Somalia's instability and as a result poses a security risk to the already fragile region.

The Jurisdiction of the ICJ in the Case.

As an antecedent for the Court's jurisdiction, Somalia recognised the jurisdiction of the compulsory jurisdiction of the court by the two states according to Article 36(2) of the ICJ Statute. On the other hand, in their preliminary objection, Kenya raised concerns on the jurisdiction of the court and the admissibility of the case. Kenya argues that the court does not have jurisdiction over the case because of one it's reservations in the Optional Declaration Clause where:

> "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."[63]

Kenya recognises that the MOU was an agreement that provided an alternative method of settling disputes. On the other hand, Somalia claims that for the MOU to be used as a recourse to another method of settlement, it should have contained an explicit statement explaining so and that this method will be used after the CLC made its recommendations.[64] Looking at the title, the MOU mentions that the two states were to grant each other "*No-Objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf."* It does not outline the purpose of the MOU to be used as a dispute settlement mechanism and looking at the MOU itself, neither does it contain provisions that lay specific methods of dispute settlement, nor does it bar any court from presiding over the matter. In addition to the MOU, Kenya also points to Article 282 under PART XV of UNCLOS, which both states are party to, contain provisions for dispute settlement mechanisms and thus is also an agreement to have other methods which supplements Kenya's reservation.[65] Somalia argued that the court does have jurisdiction over the matter because the CLC was mandated to address the continental shelf beyond 200 NM and neither does it have mandate to delimit continental shelf between adjacent states as provided for under Article 9 and 76 of UNCLOS.[66]

According to Article 36(6), in the event of a dispute regarding the jurisdiction of the Court, the matter shall be decided by the Court. For the Court to do so, they examined it in two ways, first they sought to establish the legal status of the MOU and Kenya's reservation in the optional

[63] Preliminary Objections of the Republic of Kenya para 140.

[64] Written Statement of Somalia Concerning the Preliminary Objections of Kenya paras 1.16-1.18

[65] *Supra note 63* para147.

[66] Memorial of Somalia paras 7.2-77

declaration clause under Article 36(2) and second, by examining the provisions under Part KV of UNCLOS. They did establish the legal status of the MOU, however they ruled that neither the MOU nor PART VX of UNCLOS was within the scope of Kenya's reservation and therefore rejected Kenya's objection to the jurisdiction of the Court in the dispute.[67]

Legal Status of the Memorandum of Understanding

Before the Court ruled that it had jurisdiction over the case, it first had to establish the legal status of the MOU and whether it is a treaty. Because neither Somalia, nor Kenya have ratified the V*ienna Convention on the Law of Treaties* the MOU falls under customary international law where an agreement between two States in written form under international law is a treaty.

The MOU between Kenya and Somalia was signed in 2009 where both countries agreed to submit their recommendations to The Commission on the Limits of the Continental Shelf (CLC) with respect to the area under dispute and the delimitation of the continental shelf beyond 200 NM. They both agreed that the delimitation process will occur after the CLC analysed submissions from both states in accordance with international law and they will grant each other 'no objection' to either party's submission. Somalia did not recognise the validity of the MOU as a document while Kenya upheld that it was a treaty signed between two countries, according to Article 102 of the UN Charter.

In October 2009, Somalia voted against the ratification of the MOU and informed the UN in their decision to do so.[68] This supported their claim of the MOU's invalidity. This claim was challenged by Kenya who argued that the MOU 'came into force upon its signature'.[69] The MOU did not have a clause that explicitly stated it required ratification for it to be in effect, rather it referred to the signatures by the representatives of the two parties. Additionally, nothing in the preliminary interactions before the adoption of the MOU referred to the requirement of ratification. Somalia also argued that the Minister who signed the treaty did not have the powers or the mandate to conclude the treaty on behalf of the government and neither was it customary Somali law to allow a minister to sign such treaties. Nevertheless, customary international law trumps customary Somali law and therefore since the MOU clearly stated that governments "duly authorised" both signatories to act on their behalf, it was still a valid treaty.

The Court held that the MOU was a legal document that entered into force upon signature and therefore is a valid treaty binding its signatories according to international law.[70]

Admissibility of Somalia's Case

[67] Judgement of 2 February 2017 para 134.

[68] *Supra note 66* para 3.40

[69] *Supra note 63* para 54.

[70] *Supra note 67* para 50.

Kenya argued that the case is inadmissible because Somalia did not act in 'good faith' therefore breaching the principle of *pacta sunt servanda* by objecting to Kenya's submission to the CLC, ignoring the prerequisite of a review from the CLC before any delimitation would occur and evading negotiations that were to happen after the CLC review by going to court.[71]These allegations would hold only if Somalia considered the MOU as a legal instrument imperative to this case but it does not and despite the fact that they may have breached the treaty, it does not affect the admissibility of its application. Therefore, the Court ruled in favour of Somalia.

2.3 Current Relationship Status of the two countries

The diplomatic relationship between the two states has been characterised by several instances of severance and restoration which got worse after 2014. For starters, in 2019, Kenya expelled the Somalia's ambassador and recalled their own into the country after they alleged that Somalia had already auctioned off oil exploration rights in the disputed area, a claim which Somalia denied. [72]In a tweet by Ambassador Macharia Kamau, he claimed that there was no expulsion, but it was rather a move for consultations by respective governments on the way forward. This raised the questions on why the consultations could not be held while the offices were occupied, and negotiations conducted between the two countries.

In May 2019, Kenya also denied entry to a delegation from Somalia. The individuals, who had diplomatic passports, were meant to attend and EU sponsored programme, could not enter the country due to lack of visas, a demand which they claimed they were ambushed with because they normally obtained visas arrival. [73]The Somali Embassy in Nairobi tried to intervene in this matter but to no avail and they were detained in the airport waiting for the next flight back.

The following year in 2020, Somalia recalled its ambassador and ordered the Kenyan envoy to leave Mogadishu, accusing them of meddling in their local political affairs after President Muse Bihi Abdi of Somaliland was received in Nairobi. [74]Somaliland is a *de facto* state in Somalia that declared its independence in 1991 but is not internationally recognised as an independent state. The move by Kenya to invite their president can be seen as a move of recognition, thereby giving the state legal status while Somalia recognises it as part of its country. Additionally, they were accused of meddling with the electoral process in Jubaland whose president is also accused of being an ally to Kenya. Kenya has always denied these claims and accused Farmajoo of using the country as a scapegoat for public political favour and because the basis of the disputes between the president and the federal states is an internal matter, in which Kenya has

[71] *Supra note 63* paras 148-151.

[72] Ogila,2019

[73] (Mutambo,2019

[74](Dahir,2020)

been pulled into.[75] Six months later, the diplomatic relations were re-instituted through mediation from Qatar. [76]

The diplomatic implications also exist for external actors. The potential to benefit from the exploration of oil resources have attracted countries such as the United States, the United Kingdom, France and Norway, where the US and France support Kenya while the UK and Norway support Somalia. [77]

In addition to diplomatic ties, Kenya and Somalia also have deep economic ties. One of the main export products from Kenya to Somalia is khat. In 2020, the Somali government banned the importation of khat citing COVID 19 as the main reason for this move. This affected the livelihoods of the farmers in Kenya. Although this ban was in effect alongside international travel bans, Somalia lifted the suspension of international flights, but they maintained the ban on the importation of khat from Kenya. Instead, they started importing Khat from Ethiopia. In retaliation to this, Kenya issued a suspension notice to all the flights between the two countries except for health and humanitarian assistance. The uncertainty of the relations between the two countries also affected the businesses of thousands of Kenyans in Somalia and vice versa because they could not get their shipment on time.

The security relationship between the two countries has also been severely affected and if no amicable solution is established, it could easily deteriorate. In 2011, Kenya launched *Operation Linda Nchi* which was aimed at protecting itself after a series of killings and kidnapping of a French aid development worker. Kenya then later incorporated its troops in with AMISOM in Somalia who have been serving for more than a decade. The troops' mandate was set to expire in 2021 and the president had been urged to withdraw the troops from Somalia especially after the US already withdrew its troops. The Somali government had also accused Kenya of purposely killing its civilians after an airstrike was used to target Al Shabaab. The likelihood of withdrawing the troops is very low because the Al Shabaab are still a major security threat in the region and President Uhuru reiterated that the troops will be stationed there if they need to be, to maintain peace in the region. If they did in fact withdraw, the security in the region will become highly destabilised and Kenya will not only become more prone to terrorist attacks, but Somalia could plummet into war again.

One cannot discuss security concerns between the two states without addressing refugees. Kenya hosts two of the largest refugee camps in the world, *Kakuma* and *Dadaab*. These camps host more than 500,000 refugees and asylum seekers with majority of them being from Somalia. There have been several threats to close these camps from the Kenyan government citing insecurity as a reason to do so, although it has yet to be proven. In April 2021, the Ministry of Foreign Affairs tweeted announcing the decision to close the camps by 30th June 2022. The

[75] Mwakideu,2021

[76] Custers,2021

[77] Sabala,2021

UNHCR and Kenya both decided to come up with a sustainable way to handle the refugee situation given that refugee camps are not a long-term solution for the refugees. These threats have been linked to the dispute between the two countries and the refugee camps are being used as political leverage against Somalia. (Mwakideu,2021) Due to the magnitude of the camps and legal complexities around resettlement of refugees, the closing of the camps is not imminent soon. Aside from voluntary repatriation of refugees, other ways to relocate the refugees would be through integration and repatriation in a third country. The Kenyan government could give the refugees and asylum seekers work permits and residence permits but it is currently not possible for them to be given citizenship in Kenya under the present constitution unless they apply for it through other means. They can also be resettled in a third country through the UNHCR Resettlement Program but this a procedural process that takes time.

CHAPTER THREE : COMPETING NARRATIVES: KENYA VS SOMALIA

Before the court ruled mostly in favour of Somalia in, the two countries had overlapping claims and5 opposing methods on how the border should be drawn delimiting the sea about the disputed territory. Kenya wanted the boundary to be drawn following a latitude while Somalia argued that the boundary should follow their land border. Before looking at the Court's verdict, this chapter will first begin with Somalia's point of view and then followed by Kenya's.

3.1 Somali Narrative

Somalia argued that there was no existing boundary between the two countries and requested the Court to delimit the maritime boundary between the two states both within and without the 200NM mark. They asked the court to do so by using the equidistance method and that there was no need to use an adjusted equidistance line due to the regular nature of the coastline. They did so by first identifying the precise location of the LBT between the two countries and then further suggested the delimitation method.

3.1.1 Locus of the Land Boundary Terminus (LBT)

In Chapter Four of their *Memorial*, Somalia began by identifying a land boundary terminus (LBT) that had been used pre-colonially by the UK and Italy to demarcate their respective boundaries. The first treaty was the 1891 Anglo-Italian Treaty which basically recognised the respective territories of the two countries. Thirty years after this treaty there was a need for a more accurate demarcation of borders both land and maritime and in 1924, they signed an agreement that established a maritime border between the two countries and established the Jubaland Commission, a task force that was responsible for the implementation of the Agreement. The first boundary was established with the southern point of Ras Kaambooni as the longitudinal reference.

According to the treaty, the part above the provisional boundary Italy and the part below was British territory.[78] However, this boundary was further revised, and a new boundary was demarcated by the task force under a new agreement. The commission had discovered that what they assumed to be only four small islands were part of six islands where five of them were clustered in the south of Ras Kaambooni. Following this discovery, the commission modified the first boundary to include the Diua Damasciaca islands as part of Italian territory in the 1927 Agreement. [79] Therefore, the new boundary between the two countries was stretching from the southernmost part of the Diua Damasciaca westwards towards the main shore. The map below shows the boundaries before and after adjustment where the red line shows old version of the boundary, and the red is after the discovery of Diua Damasciaca.

[78] *Supra note 66* paras 4.5 & 4.8

[79] *Supra note 66* para 4.11

Source: Memorial of Somalia

Before it was finalised, the agreement was further modified to allow the placement of a physical marker (Primary Beacon 29). The modification was created to allow the boundary commissioners to demarcate 15 meters inland from the high tide mark and this created a point known as *Dar es Salaam*. After reaching this point the land boundary created continued to run in a south easternly direction[80]. This direction is consistent with the maritime claim issued by Somalia today.

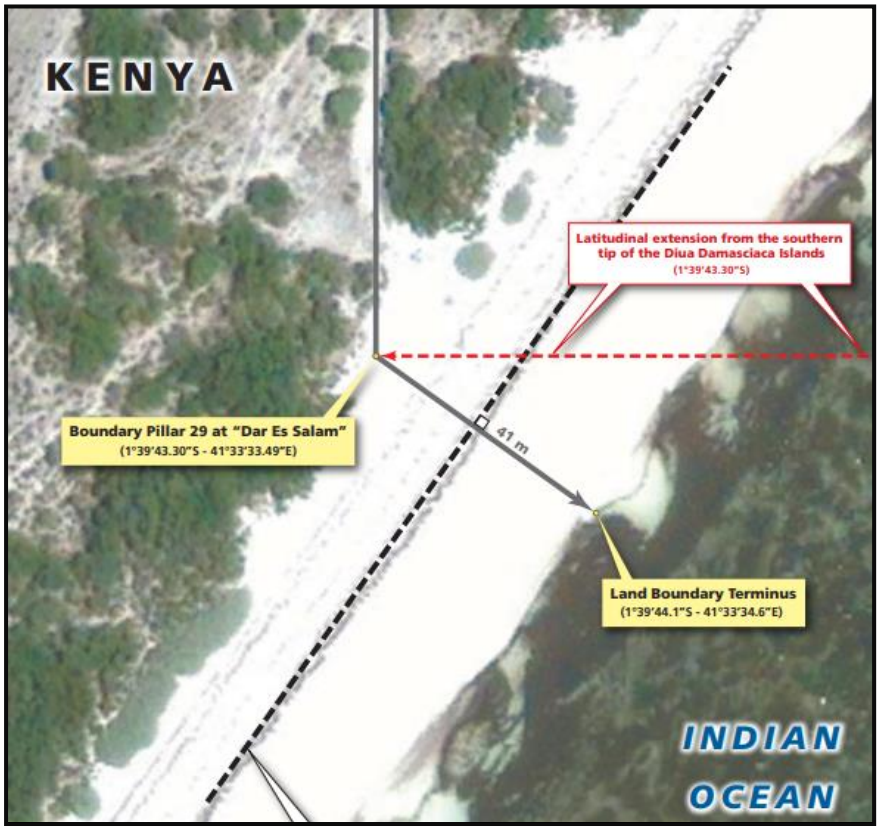
To accurately determine GPS coordinates of the LBT, Somalia had to determine the exact location of Primary Beacon 29 and even though the 1927 Agreement had coordinates to show the location, they would be considered inaccurate using the modern geodetic system (WGS84) and therefore went ahead and calculated the location by using the southernmost part of the island which they found to be located at 1°39'43.30" S - 41°34'35.40" E.[81] They then went ahead and established a corresponding longitudinal line westwards with the 15m adjustment to pinpoint the beacon. The corresponding coordinates were 1°39'43.30" S - 41°33'33.49" E.[82] It is therefore anticipated that a permanent marking can be found here.

After identification of the Primary Beacon, it is now imperative to determine the LBT between the two countries. This was identified by following the south-eastern direction from the coordinates to where the low tide level of the sea. The exact point was found at 1°39'44.07" S - 41°33'34.57" E. The following map shows the geographical locus of PB29 according to Somalia:

[80] *Supra note 66* para 4.12-4.14

[81] *Supra note 66* para 4.19

[82] *Supra note 66* para 4.20



Source: Memorial of Somalia

3.1.2 Delimitation of the Territorial Sea

According to Article 15 of UNCLOS, when two states that are adjacent to each other fail to agree on a boundary between them, neither is permitted to extend their borders beyond an equidistant line unless there is historic designation or special circumstances between them. The treaty does not specify what "special circumstances are" but some of them may include forms of national legislation also recognised under international law such as *Morocco-Act No. 1.73.211* and *Act No. 2674 of 20 May 1982, on the Territorial Sea of the Republic of Turkey*. They can also include treaties and agreements that had been previously concluded and a host of other geographical factors such as length and outline of the coast.

Regarding national legislature, Somalia recognised the *Kenya Territorial Waters Act* of 1972 which was enacted by parliament in order to delimit the territorial waters of Kenya and within the act, the territorial sea was delimited in accordance with the *1958 Convention on the Territorial Sea and the Contiguous Zone*.[83] This convention was the first the predecessor of UNCLOS and it used the equidistant line as way to delimit adjacent coastlines. Acknowledgement of this legislation supports Somalia's claim that Kenya had been following an equidistant maritime boundary. Following this, Kenya also enacted the *Maritime Zones Act of 1989,* which basically

[83] *Supra note 66* para 5.24

served the same purpose at the Waters Act but included provisions presaged by UNCLOS.[84]The equidistance claim is still supported by UNCLOS.

There is no historic agreement that precisely identified the border between Kenya and Somalia, and neither is the Kenya-Somalia coastline irregular and therefore, an equidistant line between would be considered as an accurate starting point.

Following the establishment of the LBT, for an equidistant line to be identified, there are three steps that must followed; first a baseline should be established, second the specific coordinates of the base points should be identified in order to calculate an equidistant line[85] and lastly the line is plotted. In order to establish a baseline, the low -water line of the sea is used, under Article 5 of UNCLOS and more provision regarding the establishment of baselines in reefs or the use of straight baselines under Article 6 and 7 respectively with exception of using a combination of methods found under Article 14. Based on the regularity of the coastline, it is simple to establish a normal baseline based on permanent beacon 29. This is in line with Somalia's claim of the boundary unlike Kenya's use of the straight baseline which is against Article 7(6) where:

> "The system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone."

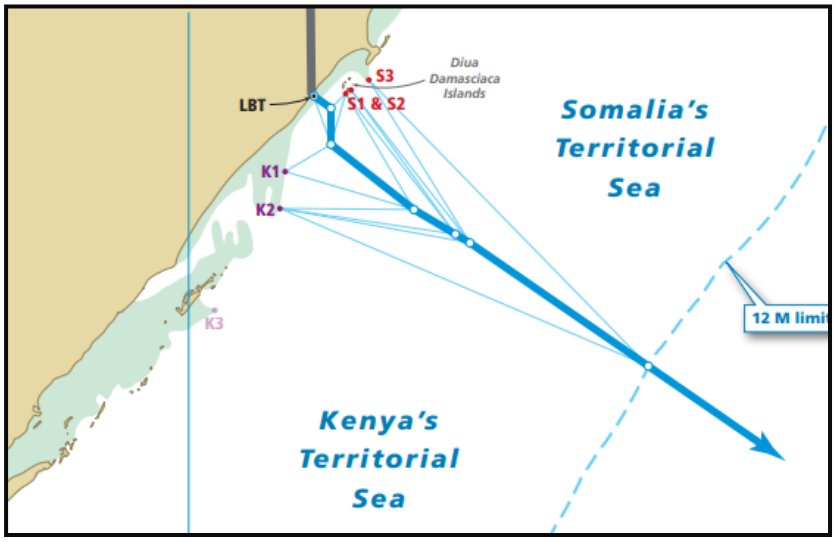
The next step would be to identify coordinates of the baseline to construct. Using the *Black Sea Case: Romania v Ukraine,* the Court maintained that equidistant and median lines should be constructed from the most appropriate point considering any prominent bulges located next to the delimitation area.[86]Using this approach, Somalia identified the base points of both countries to be 1°39'14.99" S - 41°35'15.68" E, based on the low- water level on the Somali side, and based on the LBT to be 1°39'43.30" S - 41°34'35.40" E and 1°39'35.90" S - 41°34'45.29" E.[87] The coordinates based off the LBT are also synonymous with the coordinates of the southernmost part of Diua Damasciaca Islands. They also used the same criteria to identify base point on the Kenyan side which were found to be at 1°42'00.06" S - 41°32'47.38" and 1°43'04.77" S - 41°32'37.18" E. Using those coordinates, the equidistant line would be constructed as seen in the map below:

[84] *Supra note 66* para 5.25

[85] *Supra note 66.* para 5.11

[86] Maritime Delimitation in the Black Sea (Romania v Ukraine), Judgment, I.C.J. Reports 2009 para. 117.

[87] *Supra note 66* para 5.19



Source: Memorial of Somalia

3.1.3 Delimitation of the Exclusive Economic Zone and Continental Shelf within 200 NM

Conferring to the UNCLOS, Part V of the treaty contains the procedures elated to the delimitation and use of the exclusive economic zone, while Article 57 clearly elucidates that the length of the EEZ should not extend beyond 200 NM from the baseline. For the purpose of conflict resolution in matters pertaining jurisdiction and rights of the EER, Article 59 explains that resolution should occur on the basis of equity between the conflicting parties taking into account the circumstances and the respective interests of said parties.

Somalia argues that in the delimitation of the two areas, the Court should maintain the use of the equidistant line from the perimeter of the territorial sea, and it should also be progressively used in the continental shelf.[88]According to UNCLOS, there is no specific methods that states can use to delimit these zones rather it reflects back to the ICJ Statute and calls for resolve through equitable solutions for both parties. The ICJ has been using a three-step approach for delimiting maritime cases to ensure equity. This approach involves construction of a provisional equidistant line, second, the adjustment of the equidistant line based on aspects calling for the adjustment or shifting of the provisional equidistance line to realise an equitable line and lastly verification from the court to ensure that line does not lead to an inequitable ratio in relation to coastal lengths.[89]

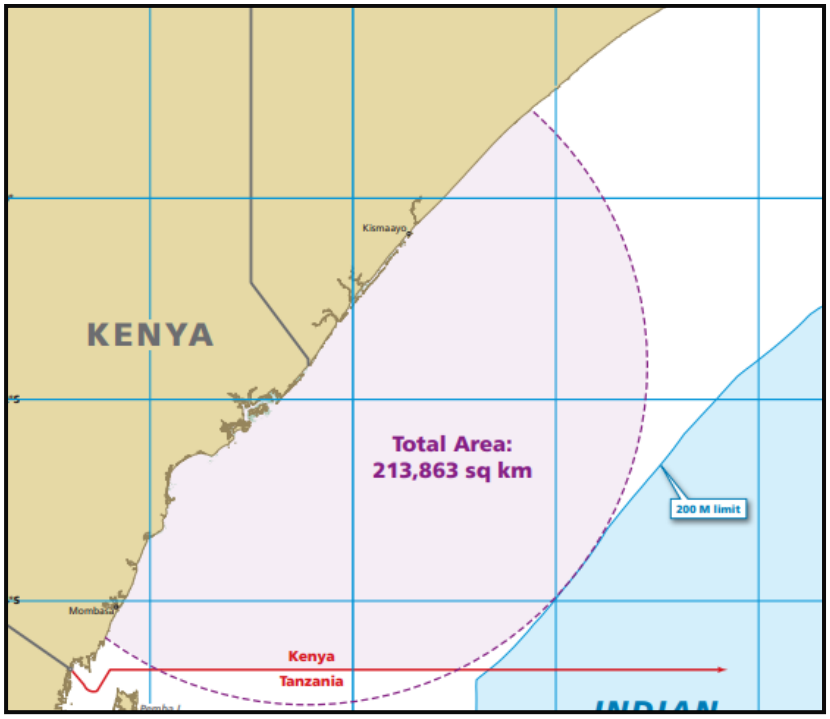
For the application of this method, Somalia first identified the relevant coastal distances of itself and Kenya to be 733km and 466km.[90] After application of the equidistant line from the established LBT following a southwards direction, the ratio between the two coasts would be 733:466, which is 1,57:1 in simplified form. However, since this is the ratio of the two coasts, it is necessary to deduce the ratios with regard to the relevant area, which is where the claims of

[88] *Supra note 66* para 6.2

[89] Lando,2019

[90] *Supra note 66* para 6.27&6.28

the two countries overlap not only in the territorial sea, but also in the EEZ and the internal continental shelf. Somalia measured this distance and found it to be 213,863 km^2.[91] The illustration of the area can be seen below:



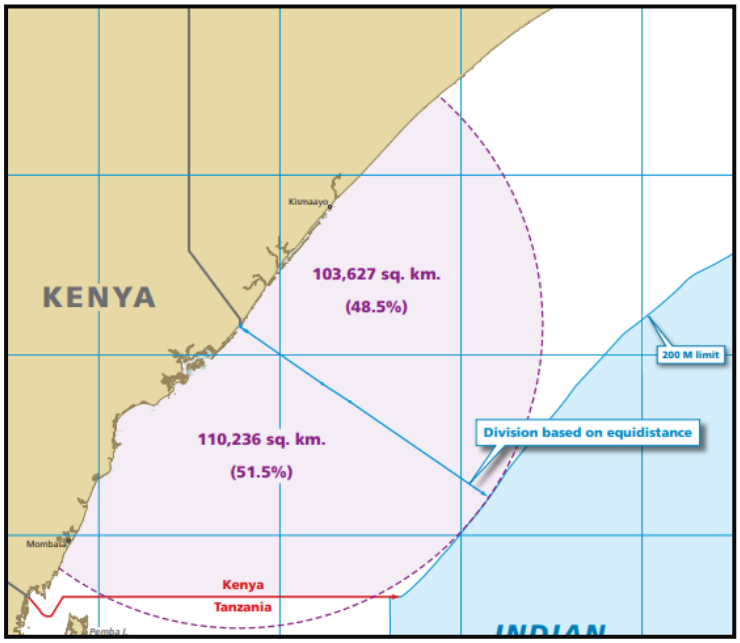
Source: Memorial of Somalia.

To construct the equidistant line between two countries, Somalia first used the base points they had initially mapped out and established an almost straight line looking at their estimate coordinates. This is largely due to the regular nature of the coastline. They found that the line intersected the 200 NM perimeter at 3°34'57.05" S - 44°18'49.83" E.[92] The next step would be to investigate for factors, if any, that would call for the re-adjustment of the line in a more equitable way. After thorough analysis Somalia found no need to readjust the line. The reason could be based off the fact that no geographical elements such as islands were cut off and Kenya still had access its own oil reserves. The last step would be to carry out a disproportionality test with respect to the coastal lengths of both countries. After the test was conducted, the test was in Kenya' favour because it would result in a divide of over 50% of the total square coverage[93]. The series of tests thus support Somalia's claim of an equidistant line. The map below shows the plotted line:

[91] *Supra note 66* para 6.36.

[92] *Supra note 66* para 6.44.

[93] *Supra note 66* para 6.56.



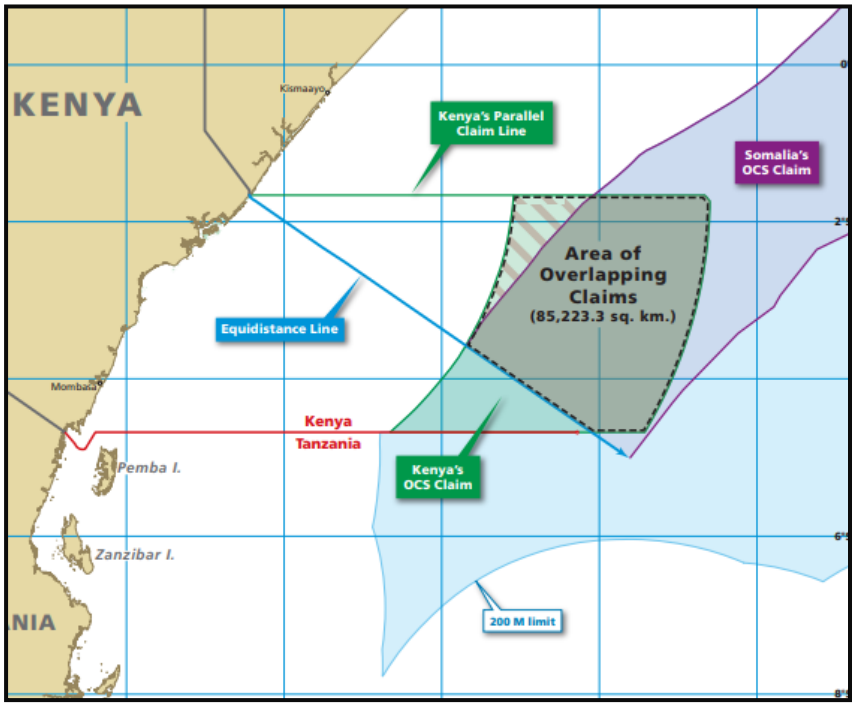
Source: Memorial of Somalia.

3.1.4 Delimitation of the Continental Shelf beyond 200 NM

Article 76 of UNCLOS provides the criteria of the continental shelf both within and beyond 200 NM where paragraph 8 unambiguously states that:

> "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographical representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal State on the basis of these recommendations shall be final and binding."

Although the article makes reference to the CLC, its mandated to *delineate* the continental shelf and not to *delimit* it and in this regard, since both countries have overlapping claims, the ICJ is not barred from making a ruling on this case and neither does it prevent the CLC from reviewing the submissions from both countries and making recommendations based on them with explicit consent. The following maps shows the overlapping claims in the continental shelf beyond 200NM:



Source: Memorial of Somalia.

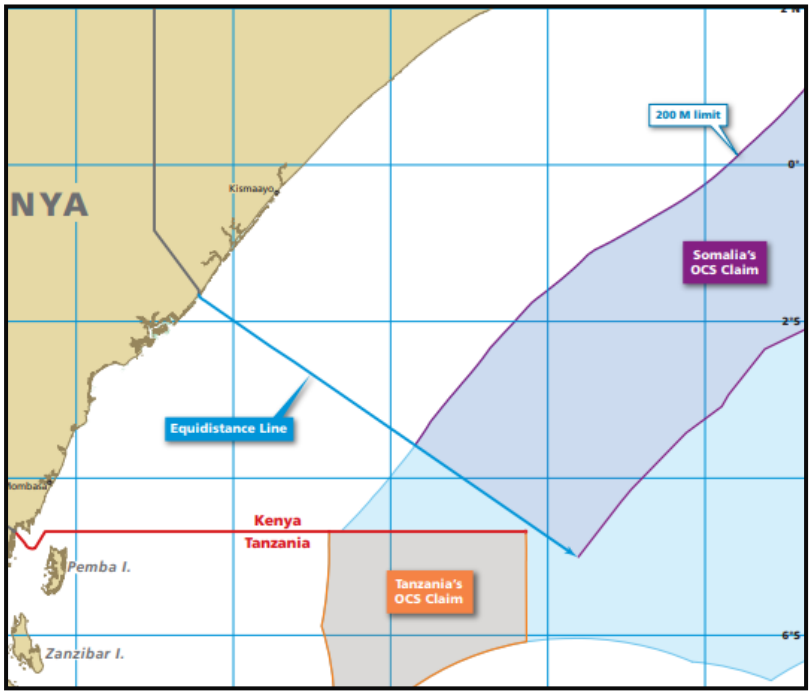
Somalia first disputed Kenya's submission to the CLC and then withdrew it, the Kenya followed suit and also file an objection to Somali's submission.[94]For the Commission to move forward, Kenya should withdraw its objections. Additionally, looking at the shaded area in the map above, although Kenya claims external continental shelf rights, it also lies within the 200 NM miles that Somalia claims, and both have respective entitlements but that is also where the conundrum lies and thus necessary for the court to intervene.

Somalia argues that if the court were to intervene, they should do so using the equidistant method and referred to a similar case between Myanmar and Bangladesh.[95] Following the claims of an equidistant line, Somalia noted that using the equidistant method may cut off Kenya's entitlement, not because of unfairness but because the pre-existing maritime boundary agreement between Kenya and Tanzania is causing this. For this to happen, another disproportionality test would need to be conducted to establish equality. The previously established ration of Kenya: Somalia was 1:1.51 which tested negative for gross disproportionality between the two coasts. [96]However, this would not be an opposable circumstance relevant in this case because it is the consequence of agreement between Kenya and Tanzania. Whilst plotting their own equidistant line, Somalia argued that they would not encroach Tanzania's legal maritime space.

[94] *Supra note 66 p*aras 7.23-7.25

[95] *Supra note 66* paras 7.40-7.42

[96] *Supra note 66* para 7.44



Source: Memorial of Somalia Vol II

The map above clearly depicts that the equidistant line does not overlap with Tanzania's claim and thus the court does not need to adjudicate on a matter that would affect Tanzania.

Therefore, Somalia argues that the equidistant method should be used up to the 200 NM mark that will be established based on the recommendations by the CLC.

3.2 Kenyan Narrative.

Kenya argued that a maritime boundary between the two countries already existed and has been running in a parallel direction. They also argued that Somalia had acquiesced to the boundary. Based on the principle of *qui tacet consentire videtur si loqui debuisset ac potuisset* because Somalia failed to react within a specific window to Kenya's boundary claim, the result is a binding legal effect.

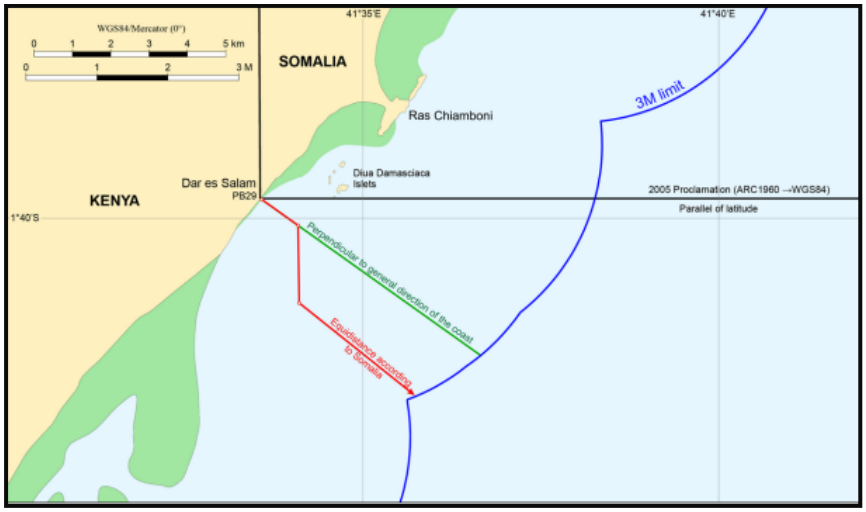
3.2.1 Locus of the Land Boundary Terminus

As previously established, PB29 was identified as the physical marking of the border between Kenya and Somalia. In response to Somalia's coordinates of the beacon, Kenya identified their own coordinates to be t 1° 39' 43.2" S.[97] The difference between their respective coordinates is minimal which can be attributed to the fact that both states used different technologies to map out their territorial claims.

Both states acknowledge the *Anglo Italian Treaty,* but their interpretation varies. The treaty describes the border as moving in a south easterly direction. According to Kenya, Somalia's illustration hits the coast perpendicularly and to the low tide level but does not continue in a

[97] Counter Memorial of Kenya para 30.

straight trajectory to the limit of the territorial waters.[98] Therefore if they were to follow the 1972 Agreement, the line should continue perpendicularly from the low tide limit. The map below is a sketch of the two opposing claims:



Source: Counter- Memorial of Kenya Vol I

The treaty made reference to a median line which was used as a provisional measure in the absence of a boundary agreement.[99] The arguments on the direction of the median line are pro latitude according to Kenya and along a longitude according to Somalia. Article 15 of UNCLOS supports that none of the disputing states shall lay claims to the territorial sea after the median line. Because the treaty did not explicitly state the direction to which the median line ran, it cannot prematurely be determined to have run along longitude or parallel to a latitude.

Kenya further argues that Somalia had initially recognised the straight-line border before changing tactic in 2014. They quoted Somalia's 1989 Maritime Law which provided that if there was no agreement on boundaries, the government will presume that the borders between her and both Djibouti and Kenya will run in a straight line, which Somali rebutted claiming that in Somali language, the line actually meant a median line and not a straight line.[100] During translations, it is normal for true meaning to be lost but the situation becomes more difficult in legal aspects.

3.2.2 The 1979 Proclamation.

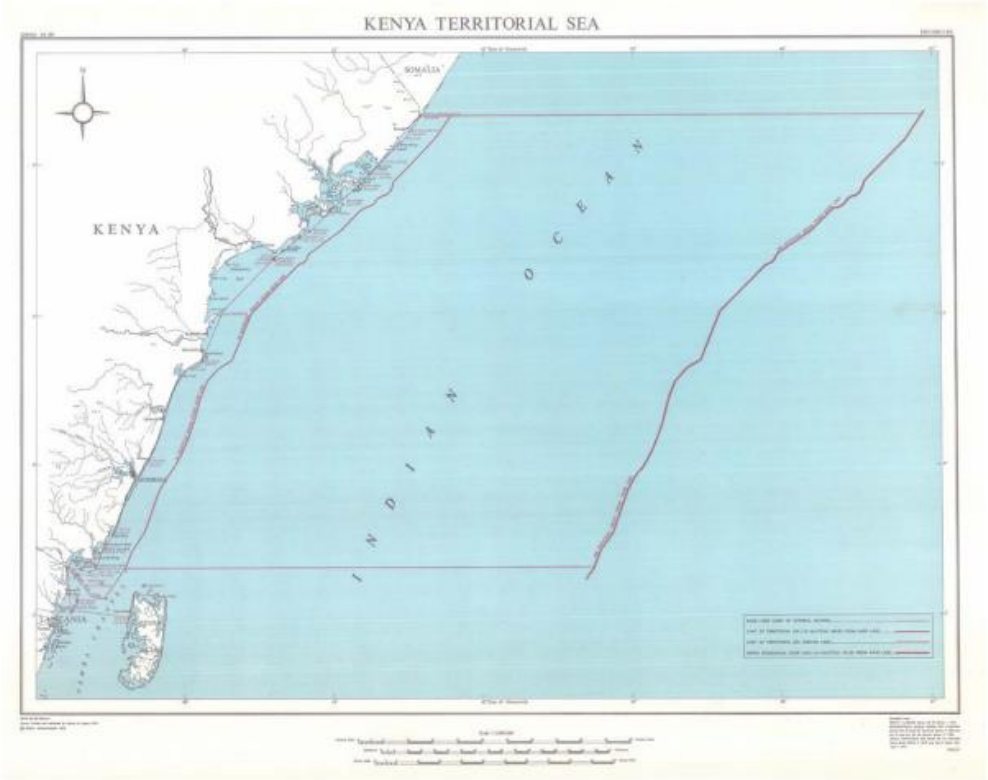
Prior to the adoption of the proclamation, the two countries had been embroiled in land territory disputes fuelled by irridentism in Somalia and this prevented any agreement on maritime boundaries adding to the already troubled diplomatic ties. There were also claims of illegal fishing activities happening in Kenya's already established EEZ which called for negotiations be-

[98] *Supra note 97* para 32.

[99] *Supra note 97* para 39

[100] *Supra note 97.* para 81

tween Somalia and Kenya on delimitation based on equitable principles rather than equidistance.[101] It was suggested that the line should be drawn along a latitude as it was with Tanzania's so as to ensure that Kenya has equitable claim. This is because if it followed a south easternly direction, it would severely cut off Kenya's maritime space. After the meeting with Tanzania and the coordinates established, a letter was sent to the Permanent Mission of UN alerting hem of this decision which they responded by commenting that a similar boundary be adapted with Somalia and a map drawn with technical assistance of the Canadian government to show the full extent.[102] The map below shows the final extent of Kenya's sea:



Source: Counter- Memorial of Kenya Vol I

The flaw that is exhibited with this agreement is that an agreement on the boundary between Kenya and Tanzania was mirrored to represent the Somalia Kenya boundary without consent or participation from Somalia. It almost seems like this boundary was forcefully imposed on them.[103]Kenya then deposited its proclamation with the UN, which published it and their legal team reported they had not received any communication with objections to the claim from any states.[104] The reason for this could be that Somalia had been dealing with a civil war.

[101] *Supra note 97* para 51

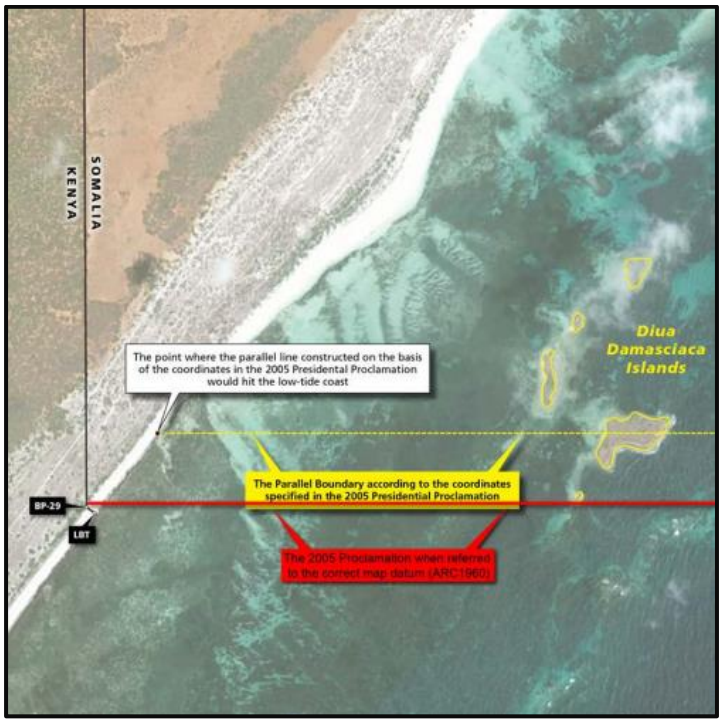
[102] *Supra note 97* para 56-62

[103] Anonymous 1

[104] *Supra note 97* para 67.

3.2.3 The 2005 Proclamation

This proclamation was issued to replace the one from 1979 and it maintained the existing rights of Kenya's territorial maritime zones. It served to adjust the latitudinal boundary between Kenya and Somalia as being 1° 39' 34" S which was adjusted to 1° 39' 43.2"S in relation to the WGS84.[105] The map below shows the boundary before and after adjustments which was previously cutting through Diua Damasciaca islands. It also shows that the boundary was adjusted to start at PB29.



Source: Counter- Memorial of Kenya Vol I

This proclamation was gazetted in the Kenyan constitution and deposited with UNSG as had been previously done and no objections were registered.[106]During this time, Somalia was experiencing a stable government and could have indeed lodged an objection against this claim. On the other hand, Kenya could have also informed Somalia through a *demarche* or *Note Verbale* because not only did Kenya and Somalia have good diplomatic relations, but the Transitional Federal Governments seat was in Nairobi before moving to Mogadishu in 2005.

3.2.4 Acquiescence of the Boundary.

The principle of acquiescence is based on silence. Silence can be used to refer to inaction, omissions and non-responsiveness[107]. There are legal provisions that deal with the effects from any form of silence for example Article 52 of UNCLOS that deals with implied consent only in rela-

[105] *Supra note 97* para 91

[106] *Supra note 97* para 92

[107] Lewis et al 2019

tion to scientific research but more often than not, the law remains unclear. Does any act of silence denote acquiescence, or could it also be a form of silent protest? This principal is based on silence that is judicially relevant that has been based of off several judicial proceedings. As such three characteristics have been identified to rule on the conditions to be based for acquiescence: where it refers to facts that should be known by the acquiescing State, where these facts have direct interest to the acquiescing state and the period within which these facts existed without a change in meaning and where the conduct is attributable to a relevant representative of the state.[108]

Kenya argues that Somalia indeed gave tacit agreement by not responding neither protesting to the previous claims of the maritime boundary. They made reference to a couple of cases such as the *Pedra Branca* where the court found that*:*

[t]he absence of reaction may well amount to acquiescence. The concept of acquiescence 'is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent …' … That is to say, silence may also speak, but only if the conduct of the other State calls for a response.[109]

Also, according to the *Temple of Preah Vihear* case, some sort of reaction was needed within a reasonable time frame and because they had not done so in a period of years, they were held to have acquiesced.[110]

The proclamations were publicly expressed , registered with the UN and all states notified and no objection was registered. But during this time, Somalia experienced a civil war where they had no functioning government and were termed a failed state. If a state has no functioning government, are the bound by the principle of acquiescence because they have no relevant representative, which was one of the characteristics? Although Somalia tried to argue their case, Kenya claimed that being a filed state was not legally relevant citing the *Eritrea vs Yemen* and *Guinea-Bissau and Senegal* cases as examples.*[111]* This because Somalia had the TFG which would have allowed them to dispute the claim.

3.2.5 Equal Delimitation of the Maritime Boundary

Somalia argued that delimitation of the maritime boundary in the EEZ and continental shelf should be using the equidistant method and approached it using the three-stage process developed and used by the Court. In contrast Kenya argues that delimitation should be equitable and that use of the three-step approach is neither mandatory, nor is it provided for in the UN-

[108] *Supra note 107*

[109] *Supra note 97*. para 210

[110] *Supra note 97* para 211.

[111] *Supra note 97* para 229

CLOS.[112]. They also argue that using this approach will result in unequitable distribution which is against Article 74 and 83 of UNCLOS which both call for use of "equitable measures" in delimitation. Additionally, Kenya also claimed that they had both agreed to equity delimitation.

The principle of equity is a major aspect of delimitation in the UNCLOS. The only shortcoming is that there are no exact provisions or methods that can be used to achieve equity. It is currently not possible to establish a clear set of rules because each case is unique as a result of some having unique geographical features. On top of this, the principle has been used to mitigate the "harshness of international law" where the results of its application would be unjust.[113]Furthermore, equitable measures in Article 74(1) and 83(1) of UNCLOS do not necessarily mean the result will be a uniform concept and has been applied in the *Bangladesh v. Myanmar* case.[114]Both countries suggested boundaries are straight lines in the EEZ and continental shelf which does not need to be the case. The equidistant boundary will cut off Kenya's maritime resources entitlement especially the oil fields and fishing grounds. Kenya also did not fully dispute the role of the proportionality test but recognised it a tool that can be used for equitable delimitation.[115]

Regarding the methodology suitable for delimitation, Kenya argues that Somalia is implying that this is the only way to delimit.[116]. The three-step approach is not codified but rather customary law based on previous maritime cases that have been deliberated by the court and therefore it is not a prescribed method needed or suitable for all maritime disputes. To defend their stance, besides referring to UNCLOS, they argued the state practice is also a relevant methodology in delimitation.[117] State practice is customary international law and they proceeded to list a number of maritime cases delimited based on other approaches. Kenya's boundary claim may also be considered a unilateral act that has legal effect on Somalia.

Going back to the third UNCLOS, during the seventh session a negotiation group, "NG-7" had been formed to decide between delimitation on the basis of equity or equidistance where both states were pro equity and later in the ninth session, representatives of both countries agreed on using the equity method.[118] This therefore constituted as an agreement to the delimitation method despite the fact that Somalia had allegedly acquiesced this.

In this scenario, the equitable solution would be to stick to the parallel of latitude. Kenya argues that using the median line would reduce Kenya's coastal projections by more than half from

[112] *Supra note 97* para *276*

[113] Nelson. 1990

[114] *Supra note 26*

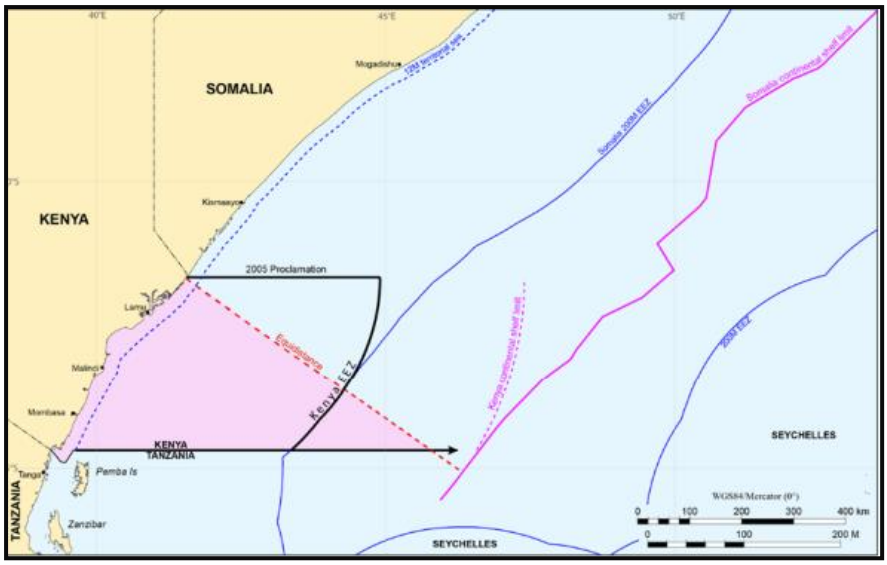
[115] *Supra note 97*. para *292*

[116] *Supra note 97* para 295.

[117] *Supra note 97*. para 303

[118] *Supra note 97* paras 70-76

424 km to 180km in the EEZ and it would reduce it even more in the continental shelf[119]In this situation the principle of non-encroachment would be applicable, which provides that the boundary should not be drawn in a way that areas that belong to one state 'naturally' ,scilicet ,because of natural prolongation, area cut off from the other.



Source: Counter- Memorial of Kenya Vol I

Looking at the map, application of the equidistant line would mean that Kenya's external continental shelf would cease to exist, and it would be occupied by only Somalia and Tanzania, despite the natural prolongation from Kenya's coast.

3.3 Judgement of the Court

Before the ICJ applied its three-step approach in the delimitation of the territory, they first had to ascertain the existence of a boundary through acquiescence of a boundary.

3.3.1 Acquiescence of a boundary.

As a quick recap, Kenya claims that Somalia acquiesced to the parallel line boundary between them and thus there is an existing boundary. Kenya maintained that there are three fundamentals of acquiescence; course of conduct of a state that indicates its stance on the applicable ,acknowledgement of such conduct and the failure to respond, where a reaction is needed within an appropriate time. They backed their position by claiming that acquiescence happened when they both supported the equidistant line negotiation group during UNCLOS III, that Somalia's Maritime Act makes reference to a straight line and not an equidistant one (which Somalia had argued saying there is no word to describe median line in Somali language and by

[119] *Supra note 97* paras 343 &344.

referring the 1979 and 2005 Proclamations, to which Somalia did not react to in time, neither did they protest to the fishing and marine research Kenya had undertaken in the area. On the other hand, Somalia argued that under UNCLOS, delimitation of the sea is only under effected by an agreement and if acquiescence was to apply, there should have been consistent claim in the territory, that the documents Kenya was using were contradicting and it was irrational and impractical for Kenya to expect them to react in the middle of a civil war.

The ICJ maintained that because the creation of a maritime boundary is extremely important, they have set a high threshold for compelling evidence to show that a maritime boundary has been acquiesced or established through tacit agreement.[120] Because of this , the Court recognised the existence of a tacit agreement in one case which was the *Temple of Preah Vihear Case* .During its deliberations, the Court found that both 1979 and 2005 Proclamation claim a boundary line but looking at the country's legislation, it refers to a median line according the *1989 Maritime Zones Act* ,which is still in force and reflects the provisions under Article 15 of UNCLOS[121] and therefore found the claims to be inconsistent. The Court also determined that none of the *Note Verbales* issued by Kenya did not illustrate Kenya's boundary claim as the agreed boundary but rather asked Somalia to agree[122] which Somalia did not respond to. The court also reaffirmed this inconsistency by ruling that after analysing the conduct of the Parties Somalia has always been consistent with its claim.[123]

They also further analysed the MOU and found that Kenya's submission to the CLC shows that there was a dispute between the two countries and that it did not act as an agreement and the fact that they held subsequent negotiation meetings to try and resolve the dispute is evidence that there was no recognition of a boundary, and that Somalia was right in upholding that there was no agreement concluded.[124] They also concluded that contrary to Kenya's claims that during the third UNCLOS they were both in the equitable principles negotiation group, it does not inherently mean that Somalia completely rejected the use of a median line as a delimitation method and neither is there a bilateral agreement between them from the 1980-1981 negotiations. [125]

In addition, Somali's 1988 Maritime Law makes reference to a straight line and mentioned charts. Somalia did not produce these charts in court as evidence . They claimed they got lost or damaged during the civil war and the line was meant to be equidistant while Kenya produced its own version of Somalia's Mining Codes which according to them supported their claim [126]

[120]Maritime Delimitation In The Indian Ocean :*Somalia v Kenya*, Judgement of 12 October 2021. Para 52.

[121] *Supra note 120* paras 58-62,70&71

[122] *Supra note 120* paras 63&64

[123] *Supra note 120*. paras 80-88

[124] *Supra note 120* paras 65-69

[125] *Supra note 120* paras 73&74

[126]*Supra note 120* para 76&77

Because the mining codes provided were outdated and Somalia did not have the actual charts, it was unclear which direction the line ran in.

Lastly although Kenya claims that being in war does not constitute grounds for no response, the Court argued that the Civil war immensely affected Somalia and thus did not have a functioning government and therefore this must be considered in the ruling.[127] Therefore, the Court concluded that Somalia had not acquiesced to the boundary.

The Court's deliberations in this case were different from normal judicial reasoning because despite the fact that they had already concluded that Kenya's inconsistent claim was enough ground to show that Somali had not acquiesced the boundary they acknowledged the necessity of looking into the reason for Somali's extended silence and may have wanted to acknowledge this.[128]

3.3.2 Maritime Delimitation Process

Because both countries are both party to UNCLOS, so the Court delimited the boundary following the provisions in the Convention. They did this using the three- step approach. During the trail, the Court recognised that although the three-step approach is not mandatory, it was established within its jurisprudence on maritime delimitation to achieve an equitable solution.[129] This ruling showed that the ICJ is set in its ways and changing how they delimit boundaries is not possible in the near future.[130]

3.3.2.1 Establishing a basepoint

To draw a median boundary, it is important to have basepoints which serve as the starting point and can be used to both delimit maritime zones and measure the limits if a countries maritime zone . In the *Black Sea Case*, the Court stated that identifying the basepoint for measuring maritime zones vs for delimitation are two distinct issues.

Under UNCLOS Article 15, in the application of the equidistant method, basepoints should be used. This principle does not apply when the result will be inequitable and the Court or ITLOS may use their power to determine a suitable starting point. Basepoints are important in ensuring that equitable results are achieved as opposed to using straight baselines which will increase the chances of unequal demarcation.

While looking at each countries' claim, we saw that they both made reference to PB 29 and was used to identify the LBT. Although they had slightly different coordinates, both of them agreed that it was a suitable starting point. Therefore, the Court concluded that both parties had

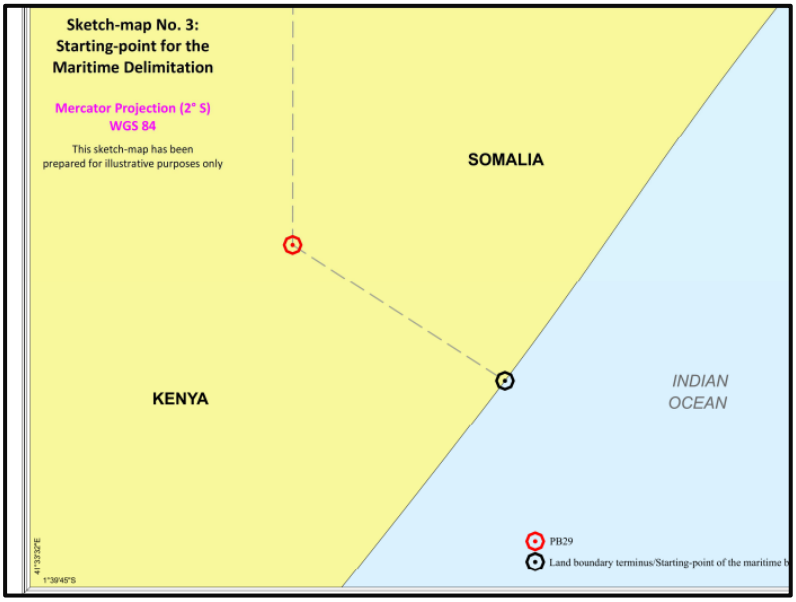
[127] *Supra note 120* para 79

[128] Lando & Herbert ,2022

[129] *Supra note 120* para 128.

[130] Anonymous 3

agreed on the method to be used to identify the starting point.[131] The different coordinates can be attributed to the fact that they both used different technology. The Court used the British Admiralty Chart and determined that the coordinates were WGS84 1° 39' 44.0" S and 41° 33' 34.4" E.[132] The map below shows a visual representation of the baseline:



Source: ICJ Judgement of 12 October 2021

3.3.2.2 Delimitation of the territorial sea

After identifying the LBT, the next step would be to draw a provisional equidistance line in the territorial sea. Under the LOS, the territorial sea has different status in comparison to the EEZ and Continental Shelf [133] Somalia's suggested delimitation Procedure is in accordance with UN-CLOS Art 15 while Kenya argued the line not equidistant but Parallel. Before passing it judgement the Court maintained that neither of the parties had asked for delimitation to be done in accordance with the Anglo-Italian Agreement as they had not made reference to it.[134] One of the special circumstances in which equidistance method doesn't apply is in the event of a historical treaty, but since neither party claimed to have used the agreement, it was not used by the Court.

In accordance with the geography of the coast, with consideration to eliminate disproportionate effects, the locus of an equidistant line is constructed using the already established basepoint. The Court maintained that even though it will take into account the basepoint proposals

[131] *Supra note 120* para 95

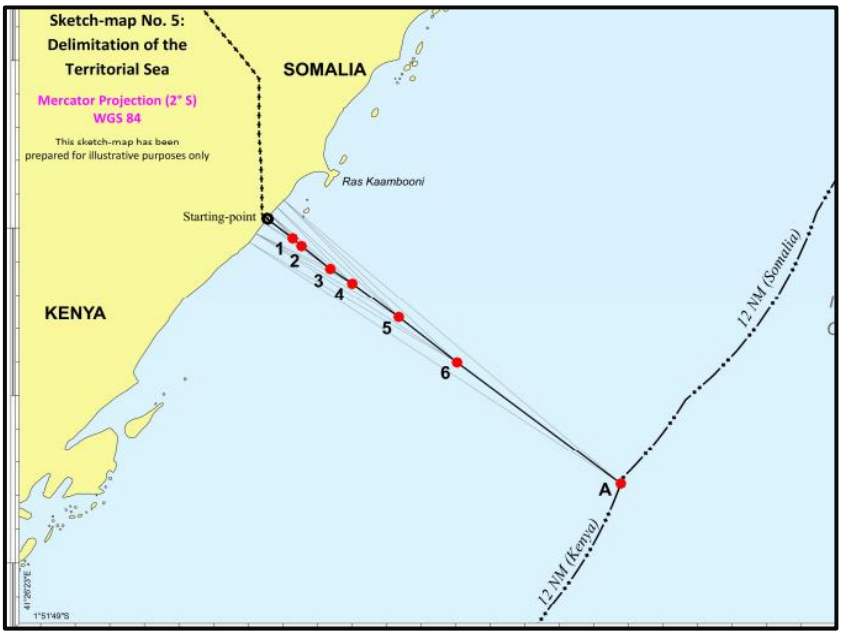
[132] *Supra note 120*. para 98.

[133] Vidas,2018

[134] *Supra note 120* para 106&107

from both parties they are at liberty to select their own basepoints even if the parties are in agreement or not.[135] In this case, the parties did not select the same base points and the Court indeed established its own. Kenya expressed fear over Somalia's base points in Diua Damasciaca and Ras Kaambooni which they claimed were in the middle of nowhere. The Court maintained that basepoints will be established on land on the mainland of both coasts because when they tried to establish one at both Diua Damasciaca and Ras Kaambooni , there was significant effect on the median line .[136] This would make the median line disproportional.

The court identified the suitable coordinates for establishment of baselines to be: S1 1° 39' 36.7" S - 41° 33' 34.3" E, S2 1° 39' 34.4" S - 41° 33' 36.6" E ,S3 1° 39' 21.6" S - 41° 33' 48.6" E & S4 1° 39' 09.2" S - 41° 34' 00.7" E on Somalia's side and K1 1° 39' 42.4" S - 41° 33' 29.5" E ,K2 1° 39' 49.0" S - 41° 33' 24.9" E ,K3 1° 40' 09.3" S - 41° 33' 12.9" E & K4 1° 40' 25.5" S - 41° 33' 02.9" E.[137] This would be used in the construction of the median line. The coordinates of the line identified were 1° 47' 39.1" S and 41° 43' 46.8" .[138] This line was 12NM from the distance of the coasts in accordance with the law and is depicted in the map below,



Source: Source: ICJ Judgement of 12 October 2021

Looking at the median line constructed, it hits the coast of both countries almost perpendicularly and they Court upheld that if the Anglo-Italy treaty would have been used to delimit the territorial sea, it would look similar.[139]

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[135] *Supra note 120 para* 111

[136] *Supra note 120* para 113&114

[137] *Supra note 120* para 115&116

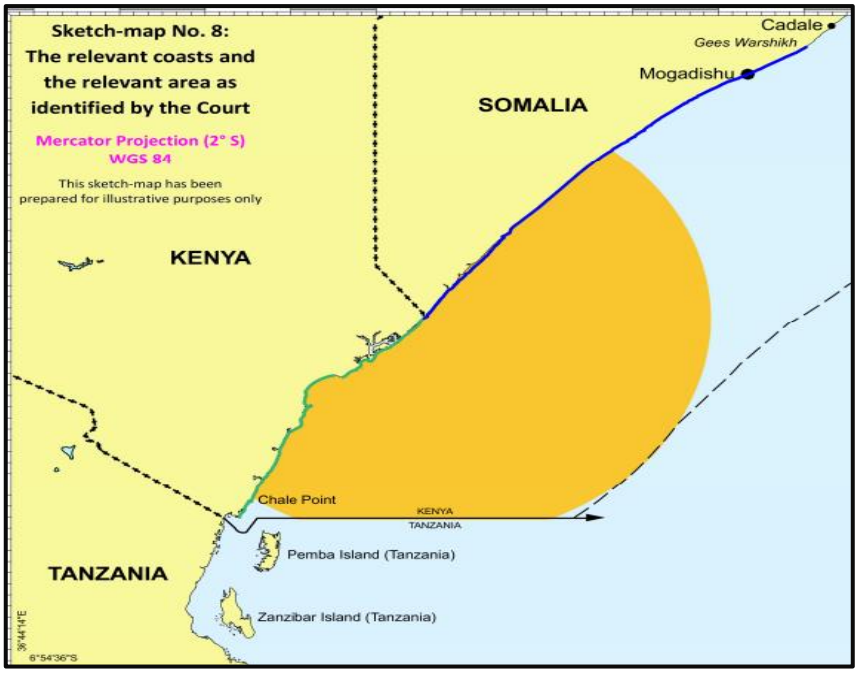
[138] *Supra note 120* para 117

[139] *Supra note 120* para 118

3.3.2.3 Delimitation of the exclusive economic zone and the continental shelf within 200 nautical miles

Delimitation of the EEZ and Continental shelf within 200NM of adjacent states is done in provided for in both Article 74 and Article 83 of UNCLOS respectively where delimitation is done in accordance with international law. Although the two Articles do not prescribe an exact method for this delimitation, the goal is to come up with equitable solutions as per the Court's advisory. After construction of the provisional equidistant line, the next step to investigate and see if there are any factors that would call for adjustment of that line to ensure equality.

The Court started by identifying the relevant coasts between the two countries and found that Somalia's relevant coast was roughly 733km, which both countries had agreed with in their separate pleadings and that Kenya's was roughly 511 km[140] which was different from the 466km that's Somalia claimed was Kenya's coastal length but later backtracked during the proceedings. The figure below shows the relevant coastline according to the Court :



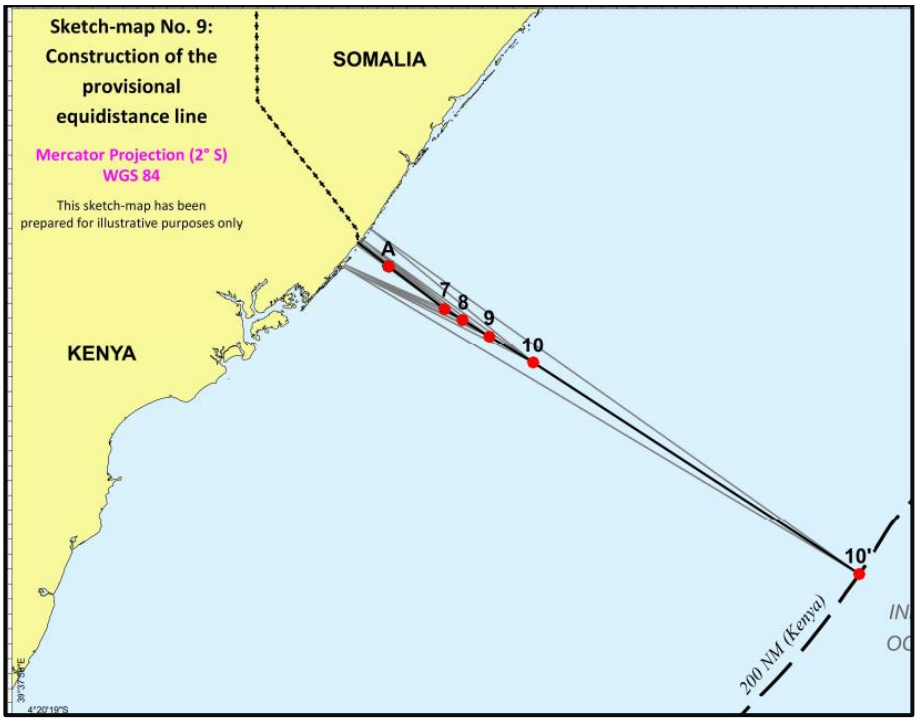
Source: Source: ICJ Judgement of 12 October 2021

The Court then proceeded to determine the relevant area for delimitation after recognising that both parties had agreed that Kenya-Tanzania coast is not part of the relevant area. As previously seen, Somalia argued that the relevant coastline according to their method is 319,542 km^2 as opposed to Kenya's 525,300 km^2 .The court ruled that the relevant area measures roughly 212,844 km^2 [141]and determined that although Somalia used the same approach, their

[140] *Supra note 120* para 132-137

[141] *Supra note 120* para 141

claim of the continental shelf is inconsistent with previous cases judged and that the relevant area cannot extend up to the areas where both parties have overlapping entitlement.[142] After this, the court then progressed and drew the provisional equidistance line using appropriate baselines on each countries coasts. These lines extend up to 200NM from the identified starting point. The map below shows the line before subjecting it to a proportionality test:



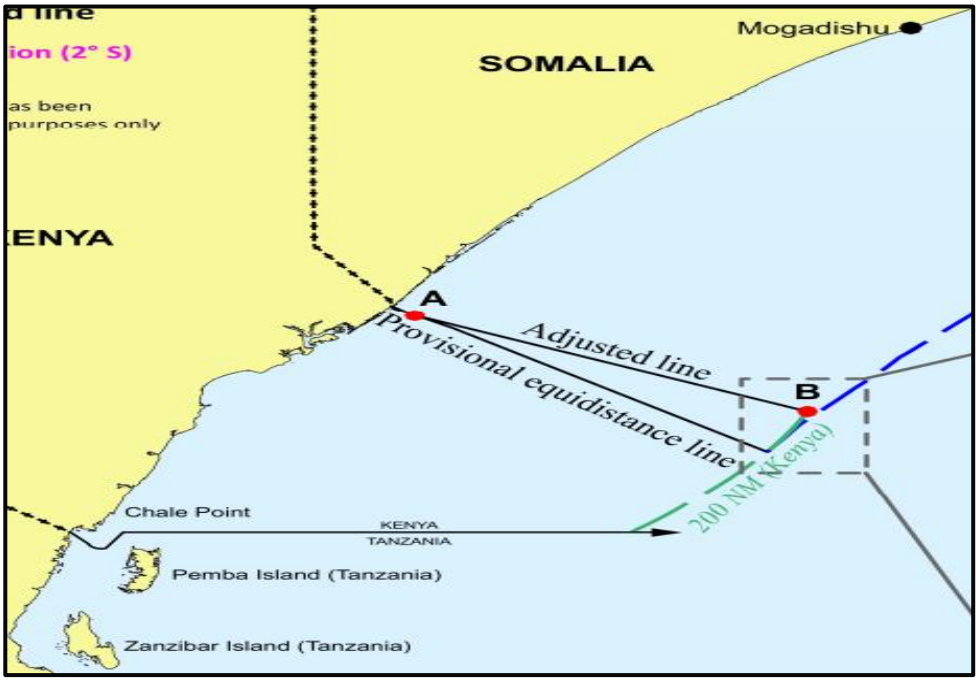
Source: Source: ICJ Judgement of 12 October 2021

The Court then analysed factors presented by Kenya on the need to adjust the line. Kenya listed five factors which were :severe cut off effects to the country's coastline, that it was a regional practice to delimit boundaries using the parallel lines(Kenya-Tanzania boundary), security interest, consistent conduct in the area in relation to oil exploration and that the line would affect the economic income of the fishing communities. As per security concerns, the Court ruled that possibility of the security situation in Somalia causing a spill over effect are minimal and therefore not considerable grounds, and the fishing communities would not be severely disadvantaged from the existing provisional line, and neither will it result in inequitable access to the resources; in relation to oil exploration activities the Court found that the cant rule in the defence of a *de facto* maritime boundary and final that there-'s is minimal cut off effect on Kenya's coastline on geographical grounds(after examining the coastline, (they found no concaves that would affect this) but rather because of its agreement with Tanzania.[143] Out of all the factors listed by Kenya, the considered the cut off factor because although minimal, it is still grounds to warrant and adjustment. The line was horizontally shifted at 114º, and the new line

[142] *Supra note 120* para 140

[143] *Supra note 120 p*ara 156-173.

intersected with Kenya's coastline at 3° 4' 21.3" S and 44° 35' 30.7" E[144] The line sought to reduce and unequal delimitation while considering the coasts of Kenya, Somalia and Tanzania. The map below shows the new adjusted line:



Source: Source: ICJ Judgement of 12 October 2021

The last and final step after this is conducting a disproportionality test . The ration between Somalia and Kenya given the initial measurement of the coast would be 733:511, 1.143:1(simplified form)in favour of Somalia. As per the adjusted line, the relevant coast of Somalia is 92,389 km^2 and Kenya 120,455 km^2 which results in a 1:1.30 ratio between the two countries. [145] The Court was satisfied that this line was bot severely inequitable and thus a boundary was established in accordance with international law. It is evident that the court went to great lengths based on this judgement and although newspapers and media outlets are reporting that Kenya 'lost' just because the boundary was not drawn in a parallel manner they still have considerable claim over the oil fields and should accept the judgement.[146]

3.3.2.4 Delimitation of the continental shelf beyond 200 nautical miles

Delimitation of the continental should be done in accordance UNCLOS and CLC. Despite the fact that this case was submitted to the CLC for deliberation , it never analysed the submissions by

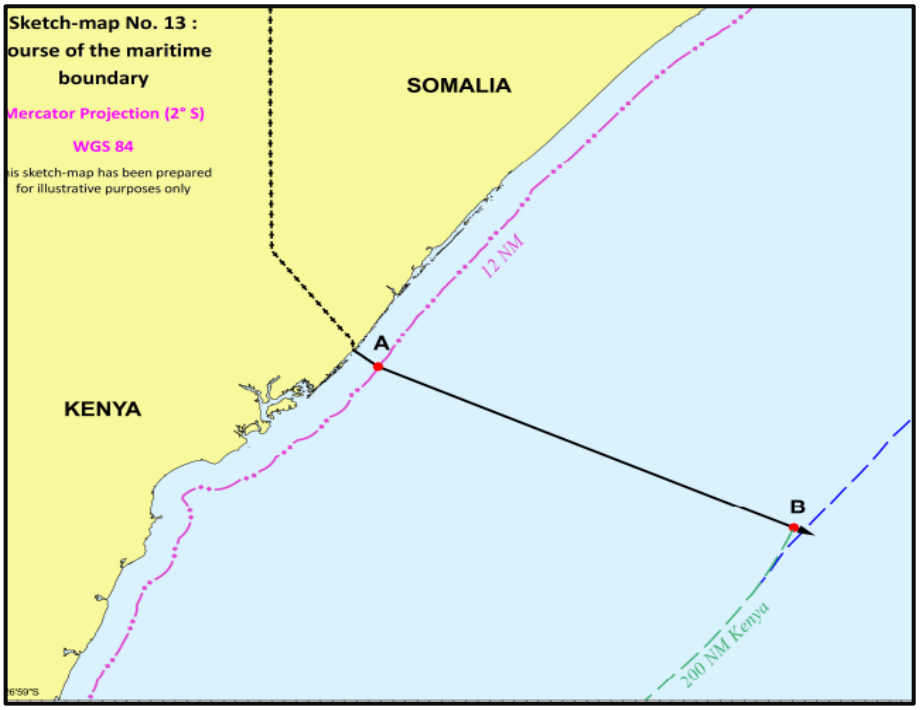
[144] *Supra note 120* para 174.

[145] *Supra note 120* para 1745-177

[146] Anonymous 2

both countries neither submitted their own recommendation for delimitation procedures, so the Court did so after being requested by both parties to do so.

Although both parties had argued for their own methods of delimitation the Court proceeded by extending the already adjusted maritime boundary they had created up to a distance of 350NM. On Kenya's side they found a possible existence of the grey area, but the Court considered it unnecessary and established itself as the legal regime if necessary.[147] Thus the map below shows the fully delimited maritime space up to 350 NM as per the Court :



Source: Source: ICJ Judgement of 12 October 2021

Despite the court's verdict, it is important that the two countries maintain good relations for security and development purposes, particularly if both countries are to benefit from the exploration of oil and other marine resources in the region.

Kenya continues to uphold that they do not recognise the verdict. Because Kenya's president is about to leave office and Somalia have a newly elected one, it will be up to them to steer the direction of this conflict.[148]

[147] *Supra note 120* para 197.

[148] Both Anonymous 3&4 agreed on this.

CHAPTER FOUR : ALTERNATIVE RESOLUTION METHODS

Because of the increase in alternative recourses to settle dispute apart from litigation have increased, many disputed parties use these methods especially because their time and cost effectiveness. These methods include and are not limited to negotiation, mediation, conciliation, valuations, certifications and hybrids of these[149]. However, due to the complex technical aspect of settling maritime disputes, majority of the maritime cases begin with pacific methods and later end up in litigation. This doesn't take away from the fact that institutions such as UN and AU still encourage use of pacific methods. These methods also have their own strengths and weaknesses which shall be addressed individually. The rationale is to examine dispute resolutions other than the ones that have been used in the case study of this research, namely the Kenya/Somalia maritime boundary dispute. For that reason, arbitration despite its relevance as an alternative dispute resolution mechanism is not part of the settlement mechanisms studied here given that the dispute between Kenya and Somalia was sent for arbitration in front of the International Court of Justice. After analysing the common concepts, we will look at the contemporary method of Joint Maritime Agreements.

4.1 Negotiation

As incontestably the oldest form ADR, negotiation is one of the most thought about dispute settlement methods outside litigation. Simply put, it can be referred to as a 'quid pro quo' of sorts, that is, giving up something in order to get something else in return[150]. The goal set at the start is to find a compromise by means of discussions that would aim at reconciling conflicting views of the parties involved. Compromise here is to be understood as an agreement recached based on the willingness from both sides to find a way to settle the dispute amicably. The strength of negotiation lies in the opportunity it gives the parties involved to settle the disputes on their own initiative and terms without the intervention of court restrictions and rules. Both parties get to appreciate each other's divergent positions and negotiate a lasting settlement that would bring an end to the dispute.

As in most ADR processes however, the non-binding effect of the decisions reached in a negotiation remains one of the major pitfalls of this dispute settlement method. Unless parties agree to it, the negotiation agreements have no legal value and cannot bind the parties who approved of them. That is the reason why despite negotiation being used daily, it is not a proper way to settle maritime disputes[151]. Negotiation is merely helpful in resolving a dispute, not in settling it insofar as the psychological element underlying maritime boundaries makes it most of the time hard to compromise on, which often leads the discussions to reach an impasse that can only be resolved in court[152]. A very good example that illustrates the complexity of maritime negotiation is the maritime dispute between China and Japan over the East of China sea

[149] Nwachukwu & Nwakoby, 2022

[150] *Supra note 146*

[151] Merrills, 2011

[152] *Supra note* 146

which went over nine rounds of talk but ended up going to litigation because of unreconcilable views of both parties. In most cases, the failure to reach an agreement after negotiation can trigger and set out a military conflict unless a follow-up action is taken promptly to resolve the dispute and prevent parties to go to war. Besides, another element that renders negotiations difficult to be fruitful is the pressure from lobbies and interest groups that may obstruct discussions or make dialogue impracticable between parties involved[153]. With the involvement of a third party, states may also deflect the responsibility to compromise on the third party and therefore make negotiations trapped in a cul-de-sac.

Three major phases are outlined by Anderson as critical steps to be taken to ensure that negotiations are successful: the pre-negotiation phase, the negotiating phase and the drafting of boundary agreements[154]. First, it is recommended, prior to opening negotiations, to constitute a team that focuses on the issues at hand. Such a team should be composed of an international lawyer, a hydrographer, experts on the bilateral public relations between the two negotiating states and the specific domestic interests such as hydrocarbons and fishing and the team should be spearheaded by a political or legal expert. The utility of having this variety of experts resides in the need to study the full background of the area of contention including geographical and material interests on both sides as well as the diplomatic history of the current maritime boundary dispute[155]. Besides, it is critical for the team to form a view on the system of law that should be applicable, that is, whether the Geneva Conventions on Territorial Sea and on the Continental Shelf are in force between the two parties or if there is a land boundary treaty in place already that gives any indications on the divisions of the territorial sea. The rationale behind this process is to resolve any outstanding sovereignty dispute either before or while concluding the boundary agreement.

Second, the negotiating phase is initiated through the exchange of written diplomatic communications which lay the ground to face-to-face meetings between delegations of the two negotiating states. Given the sensitive nature of negotiations that involve political, legal and economic stakes, it is more practical to define at the outset of the negotiating phase agreed guidelines, bearing in mind the possibility for negotiations to end in litigation. In case the initial diplomatic communications indicated divergent viewpoints, it is best not to attempt to do too much on the first face-to-face encounter to give both parties time to acclimate to each other's side[156]. An opening proposal can be made at the right moment and should state with clarity the methods used to arrive at said proposal boundary delimitation i.e., the exact equidistance between all available basepoints on both sides or simplified equidistance or adjusted equidistance to achieve an equitable result or a bisector of an angle between the relevant coasts. From that point on, the discussions can further develop with counterproposals until an agreement is

[153] *Supra note* 146

[154] *Supra note* 15

[155] *Supra note* 15

[156] *Supra note* 15

reached. In case of severe disagreements, it may be then useful to introduce a discussion on the possibility of a litigation, bearing in mind that it still is possible to conduct negotiations despite the parties agreeing in principle to litigate. If on the contrary, parties managed to come to an agreement, it is then judicious to draft a joint statement mapping and articulating the common understanding of both sides. The next step which is the drafting of the treaty should be left until a later stage as it would give time to both sides to come to an agreement on the future boundary line. Once such a consensus is met, it then becomes easier to complete the negotiation as both parties are in general anxious to conclude and would display goodwill consequently.

Finally, after parties have agreed to the new maritime boundary, they can proceed to the drafting of the boundary agreements. Bearing in mind that a boundary treaty has both constitutional and international significance, it is noteworthy to remind that it can be subjected to national legislature as it is something which is designed to last. The permanent significance of the boundary treaty is guaranteed by the Vienna Convention in Succession of States in Respect of Treaties of 1978 which provides that a succession of states "does not as such affect a boundary established by a treaty or obligations and rights established by a treaty and relating to the regime of a boundary"[157]. Such a provision legally excludes boundary treaties that a party to a treaty may invoke "a fundamental change in circumstances" as a ground for terminating a treating on notice. Moreover, it is of utmost importance, when it comes to the content of the boundary agreement to state with clarity the definition of the boundary. The history of boundary disputes shows that the use of vague language and indistinct geographical expressions in boundary treaties is a fertile ground for further disputes. Other factors such as the involvement of third states, the possibility of oil or gas fields being found to straddle the boundary need to be addressed in the treaty as well.

4.2 Mediation

Mediation happens to be the most common form of alternative dispute resolution process and can be defined as a flexible procedure that is conducted under confidence and in which the parties working towards a negotiated settlement are assisted by a third party which is a neutral entity known as a mediator. The negotiating parties keep the ultimate control of the decision to settle and the terms of procedure of settlement[158]. For the mediation to be effective, it is important that both parties repose confidence and trust in the chosen mediator who must be in any event neutral and willing to convince parties to reach an amicable resolution by themselves. The mediator's role is not that of a decision-maker as he does not suggest or offer any compromise to the dispute but rather brings parties together and arrange discussions to go towards the direction of an amiable settlement by using the technique of persuasion.

The mediation process starts with the mediator meeting each party in private to understand each side's own story of the dispute. This phase is then followed by a joint meeting with both

[157] Art. 11, *Boundary Regimes* of the Vienna Convention of 1978

[158] Aina, 2006

parties together to work a negotiated settlement to the dispute based on a compromise solution. It is no place for the mediator to suggest himself a solution to the dispute nor it is to compel the parties to reach an agreement. It is also noteworthy that the agreements resulting from a mediation are not legally binding. However, mediation when done right, can lead to a peaceful settlement of a maritime dispute as illustrated by two boundary disputes on the African continent: the maritime dispute between Djibouti and Eritrea on the one hand, and the one between Guinea and Gabon on the other. Both disputes were peacefully resolved through successful mediations respectively by the Government of Qatar and the United Nations.[159]

It is critical to point out that, just as negotiation and conciliation, mediation has a non-binding effect which is a recurrent criticism regarding its efficacity in a definite settlement of maritime disputes.[160] Once a party provides proof of not accepting the decision, there is no possibility to tender the decision in front of a court. This leads disputing parties sometimes to lack trust in the mediation process and treat it with the seriousness required.

4.3 Conciliation

Another alternative dispute resolution mechanism that is lauded for its smoothness and efficiency is conciliation which aims at an amiable settlement between the two parties thanks to the good offices of a third party who is the conciliator. Unlike the mediator who is merely a facilitator who does not offer compromise solutions, it is incumbent upon the conciliator to formulate and propose a solution to the dispute following the conciliatory talks.[161] The process of conciliation usually entails four steps: a preliminary phase, joint meeting, separate meetings with each side and the proposal of a solution. First, the conciliator, upon notification of the pending dispute, initiates the process by inquiring whether the parties are prepared to settle the dispute amicably. In case of a positive response from both sides, he then closes the preliminary dispute by meeting both parties to understand the nuts and bolts of the dispute at hand. These meetings consist only of hearing each side's own story without any attempt other than decrypting the causes of the dispute. He then proceeds by calling a joint meeting with both sides in which each party presents their case and gives their arguments on the ongoing contention. During this stage, the conciliator lends an attentive ear to both sides, asks questions and draws out the various issues raised by the parties and which they disagree on. After the joint session, he calls each party in a separate meeting during which he attempts to find each side's bottom line, that is the point beyond which they are not prepared to go. Drawing from the outcomes of these separate meetings, the conciliator then formulates his solution to the dispute in the form of a suggestion, with the view to midwife a just and amicable settlement based on both parties' bottom lines. It is important to note that the parties are at liberty to accept or reject the proposed solution. The conciliation's success depends solely on the acceptance by both parties of the terms of the settlement proposed by the conciliator: if they accept the pro-

[159] *Supra note* 3

[160] *Supra note* 146

[161] *Supra note 146*

posed solution, it then becomes binding, in case of a rejection by the parties, the settlement simply fails.

It is glaring that the careful process of conciliation makes this method a good way to amicably resolve a maritime dispute when parties agree to the solution proposed by the conciliator. However, the non-binding it features renders its efficiency more difficult. Foremost, the parties can make the conscious to abandon the process halfway through the talks and decide to return to litigation just as they can also wait until the end of the process to still choose to bring the case in front of a litigation court[162]. Such a scenario would make the entire process a wastage of time and resources that could have been used more wisely by choosing directly to go to court in the first place. The cost-effectiveness and time-saving aspect of conciliation are solely contingent upon the acceptance of the decision as legally binding which, in most of the time, is not the case. Furthermore, conciliation makes no room for appeal, nor does it provide legal precedents since decisions rendered in previous conciliation proceedings bear no legal value in subsequent ones.

Despite these notable caveats regarding conciliation processes, there are instances such as the Timor Sea conciliation where conciliation proves to be successful and bear fruits of a longstanding amicable resolution of a maritime boundary dispute.[163] Given that the dispute could be settled neither by negotiation or litigation that took place within the International Tribunal for the Law of the Sea or the International Court of Justice proceedings, nor by arbitration within the context of an UNCLOS Annex VII tribunal, conciliation appeared to be the natural next resort to settle the dispute.[164] The success of this particular case however is attributable to a large extend to the economic incentives that the Timor Sea maritime delimitation entailed. Those economic factors, namely the sharing ratio of the natural resources in the Greater Sunrise gas fields, played a major role in pulling the talks into an amicable settlement of the maritime boundary dispute. This approach goes on to show that the introduction of non-legal considerations to the negotiations such as economic factors can help break deadlocks and bring disputing parties to work towards a compromise. In the Timor Sea conciliation, such an approach came about by initiative of the conciliation committee who decided to disregard the four-phase approach of the conciliation process and decided to bring the parties directly to address the economic stakes of the maritime delimitation.[165] This proves that a neglect of procedural jurisprudence or at least more flexibility in the process from the conciliator can favour a rapprochement between the two parties about views on the dispute other than legal ones and help reach a consensus which both sides would be favourable of. Lastly, the discretion granted by the applicable law to both the conciliator and the parties involved to raise non-legal consideration

[162] *Supra note 146*

[163] Dai, 2020

[164] *Supra note* 146

[165] *Supra note* 146

makes conciliation a dispute resolution mechanism that has the potential to lead to an equitable solution that wins the approval of the disputing parties

4Joint Maritime Agreements

The idea of joint development zones as an agreement for maritime resources exploitation between states started gaining popularity 1970s[166] and although it was not readily accepted, it has found its way to be a favourable method of solving maritime delimitation disputes between adjacent states. When two states both have overlapping claim in an area, and they have both reached a stalemate in the negotiation process, using this method as opposed to unilateral administration over the territory proves more fruitful and effective. It is also quite flexible. One of the earliest joint agreements ever made was the *Bahrain-Saudi Arabia Agreement that was signed in 1958*[167]*.*Agreements do not only work to resolve disputes, but they also help in rebuilding relations between states and increases the chances of cooperation between states through other ways such as combined technical expertise that would not have been possible individually and it is also time and cost-saving especially for developing countries who have limited resources.[168]

Although JDZ/JDAs are seen as a legal approach they are still an alternative to intervention of ITLOS and the ICJ because while the ICJ is more focused on delimitation on geodesic aspect, these agreements are formed on the mutual benefits from existing resources.

This method of delimitation also has its legal basis under Articles 74(3) and 83(3). The former is responsible for dispute located in the EEZ while the latter handles disputes in the continental shelf Both articles highlight that during the transition process, both parties in the spirit of cooperation will not indulge in any activities that hamper the process of establishing an agreement without bias to the final delimitation. In spite of this, the articles do not explicitly contain formal agreements that can be used but majority of the states either use bilateral or multilateral treaties, or a memorandum of understanding. It goes without saying that like any other treaty, this agreement should be conducted in good faith.

The presence of marine resources and JDAs/JDZs are interlinked and cannot be separated. In the beginning states may not pay close attention to the overlapped maritime space until the potential is discovered or one of the states has started granting exploration rights to private oil companies. Deliberation of cooperation and development is more beneficial that two countries negotiation and preserving their respective reservation on jurisdictional claims. It is better for the two parties to discuss how they can jointly manage the area by establishing a commission composed of both their representatives thus ensuring profitable cooperation rather than un-

[166] Mensah, 2006

[167] Schofield,2009

[168] *Supra note* 163

profitable war.[169] JDAs can be limited to a certain period of time or permanent.[170] The joint agreements can be used in addition to an existing boundary line or in lieu of a boundary line. When the agreement is used in addition with a boundary line, it works to offset any potential conflicts that arise when the median line is established, and it is found that more resources fall on the opposite side of the line.

The implementation of the agreements can be done through various administrative agreements like; the states agree that one of the parties has formally recognised sovereignty of the region but they both receive equal shares of the revenue generated from the resources like in the *Bahrain-Saudi Arabia Case,* the other one is to divide the joint zone among the disputing states and have jurisdiction over their respective areas but each is entitled to a percentage of profits from their counterpart's zone, such as the *Iceland -Norway Case* where each country receives 25% off each other.[171]

Some of the component the agreement can cover are the sectors which are covered by the agreements (does it cover one or multiple resources),flexibility to allow negotiation, whether the agreement will be unicameral or bicameral, rights of the respective governments, applicable laws, and DSM.[172]

After the negotiation rounds between Kenya and Somalia failed, both countries could have resorted to establishing JDA/JDZs. This would not have been more time effective but would prevent the current situation where the Court established a median boundary that cuts through oil fields which will still need both countries to cooperation of they were to issue concession rights to an oil exploring company.

Proposing alternative methods of delimitation other than ITLOS or ICJ does not imply that their importance is weakened but rather promote peaceful settlement of disputes in accordance with the LOS.

[169] Aziz,2017

[170] Johnstone, 1988

[171] *Supra note* 163

[172] *Supra note* 166

CONCLUSION

In conclusion, this research has tried to not only explain the theoretical framework of conflict management of maritime resources but the existing approaches of delimitation of African maritime boundaries. Th research established that the existing framework could explain marine relationship between adjacent states, legal aspect of maritime delimitation procedures, grounds for conflict or cooperation between states and the approaches to managing maritime boundary disputes they can have limitations which renders them insufficient. The most pronounced limitation is that the interest of maritime resources is at the epicentre and relates it to the causation of either cooperation or conflict among states.

Subsequently maritime delimitation conflicts and politicization of the resolution mechanism are no longer only based on national interest but are also intertwined with 'low politics.' Although the research began by establishing a conflict continuum, where both war and peace are a dialectical in nature therefore cooperation and peace can exist during war and vice versa. The case study used is an example where both have existed, but the relationship tipped scales in response to the measures employed by the different states. Resolution of the disputes could affect politics in a positive way by promoting regional cooperation, collaboration and integration according to the AU Border Programme, AIMS 2050 and Agenda 2063.

In relations to DSM, the research shows that intervention of the ICJ and ITLOS for maritime delimitation disputes is how majority of disputes have been settled after failed negotiations especially in the African maritime space. Although majority of the verdicts have resulted in outright delimitation, there are exceptions where the court established JDZs which have had more positive results. This approach is not only too technical and strenuous but can also cause more conflict and worsen state relationships. In the Court's verdict between Kenya and Somalia, the line of equidistance they established cut through some of the oil fields in the disputed area which will make exploration in that region more difficult as both countries will need to cooperate to both benefit from them. Secondly, Kenya did not recognise the judgement passed by the ICJ which can have serious repercussions because although the decision is binding, the ICJ has no enforcement powers. The way next for the two states would be going back to the drawing board and devising an agreement that both countries consent to, and the worst possible outcome is seeking intervention the UNSC, which Kenya is currently a non-permanent member of.

In the context of ADR, both countries had started with a negotiation process to determine ownership of the territory. They should have both identified common goals and worked towards them. They placed importance on outright ownership rather than exploitation of the oil resources and fish, the compatible goal. Additionally, after they failed to agree on a delimita-

tion method they sought the assistance of the CLC, through the MOU, whose mandate is to facilitate implementation of the LOS on a legal aspect not considering underlying interest of both parties. The MOU also had its weaknesses because it is not an agreement that would result in negotiations from between countries rather it was a mechanism meant to protect either state from blocking each other's recommendations to the CLC. The MOU could have also served as an aspect of the pre-negotiation phased and allowed space for continued dialogue and effective management of the conflict.

The aspect of powerplay was also denoted in this conflict. This was not only influenced on the inter-state level but on the domestic level. The alleged closing of refugee camps, economic retaliation through limitation of miraa export and the suspension of flights between the two countries to the revision of visa policies that affected both citizens are examples on the state level. On the domestic levels speeches from the president from both countries influenced domestic politics and once the regime changed in Somalia, reconstitution of relations post-verdict provided positive affirmation to the future context of the conflict. Therefore, it can be argued these threats were used for the sole purpose of inducing feat to legitimise their power both in the domestic and international domain.

Maritime conflicts, especially in Africa are more complex than they are portrayed. African maritime spaces should be delimited, in consideration of underlying issues. If unresolved, they might lead to calamitous effects on the strides taking to achieve maritime development and security. In effect the boundary dispute , the troubled historical border relationship between the two countries and interference forms external third parties also influenced its extent. Development of solutions is contingent on the decision of maintaining the *status quo* of colonial boundaries while also accommodating the go strategic interests of the countries. The current approach used by states to manage their boundaries approaches it from a 'barriers' perspective rather than a 'bridge' perspective. Examining boundaries as bridges will prevent them from being sources of conflict.

Finally, to address the issues on maritime delimitation in the African context there are some reservations that need to be addressed. For starter, although I have looked at other methods Somalia and Kenya could have used to manage this conflict, more research is needed on the MAB benefits of approach I came up with. Although it is based on the evidence of success from JDZs actualisation of the agreement needs to be investigated using a broad range of maritime delimitation cases. Second, the court case between them although finalised, was not efficient in managing the conflict and the full scope of the efficiency of the other ADR methods that were not used but suggested cannot be extensively supported .Lastly, this research establishes that African states are obligated to delimit their boundaries and should respond with immediate urgency to a painstaking process that although time consuming will result in much needed benefit.

RECOMMENDATIONS

Based on the conclusion, for successful management of maritime delimitation conflicts either on an individual level ,bilaterally or on regional scale. I proffer the following recommendations :

- Kenya and Somalia both need to take part in Confidence Building Measures to only cultivate the trust between them and promote their relationship but also allow space for re-opening negotiation between them.
- Both countries conducted elections which resulted in a regime change from when the verdict was delivered. There is a current impasse between the two countries and the two new Head of State should work towards peacefully resolving this dispute.
- Although the process of delimitation is highly technical, for actual progress to happen, there needs to be political will from disputing parties to establish these boundaries and also allocate maritime resources.
- Oil companies should make sure that states have explicit ownership over oil fields before they begin exploration activities. With regard to fishing resources, decision on the delimitation should be done in consideration of the fishing communities
- Seeking intervention of the UNSC should be the absolute last straw and Somalia should not be quick to do.
- African states should first exhaust peaceful resolution of such disputes through bilateral, multilateral or regional agreements before internationalising disputes and seeking intervention from the ICJ. This is also in relation to *African solutions for African problems* and promoting the use of African conflict resolution methods.
- States should ensure the maritime claims reflected in their domestic laws are in line with UNCLOS
- The Lomé Charter should be amended to include DSM with African approaches and thus encourage countries to first seek resolve from the AU before going to other international organisations.
- All states should review and implement the policies listed out in the 2050 AIMS by first delimiting their boundaries and this would assist in the realisation of the Combined Exclusive Maritime Zone of Africa (CEMZA).
- Because of climate change, sea levels are changing which ultimately means that the already existing baselines will change therefore altering the maritime limits and submer-

sion of islands.[173]Research needs to be carried out because existing framework on the LOS will be rendered redundant and new approaches needed.

ANNEX

Sample questionnaire for the semi-structured interview.

My name is Ms Natasha Mwala, a post graduate student at the Vienna School of International Studies and I am conducting research for my thesis titled 'Conflict Management over Maritime Territories : Use of ADR in Maritime Disputes: Kenya vs Somalia'. I would like to supplement the findings from written forms of literature with sentiments from not only legal counsel but also from maritime experts, researchers and diplomatic personnel from both countries, to bolster my findings.

Before we begin, I would like to express my sincere gratitude for taking time out of your schedule to participate in this meeting and contribute towards my research. I would like to add that because the interview is semi-structured in nature feel free to give detailed responses and personal opinions. I would also like to add that I will be recording the interviews which I will later transcribe, and this information and your identity is protected under EU Data Privacy Laws.

Qn. 1 Would you please state your full name, your profession and current position in your workplace?

Qn. 2 Based on my research topic, do you have any information or experience with my thesis case study?

Qn. 3 How would you rate your knowledge in conflict management of maritime disputes in relation to this case? (basic, intermediate, advanced, expert)

Qn. 4 Do you think both countries had valid arguments supporting their claim to the disputed territory?

Qn. 5 Do you think the verdict delivered by the court was fair to both countries? Please provide extensive answers to support your stance.

Qn.6 Do you think Kenya's non-recognition of the verdict is warranted? If so why?/If not why?

Qn.7 In your opinion, what other methods could the parties have used other than litigation to handle the dispute? Please expound on the method(s) you have listed and how they could have been applied.

[173] *Supra note* 3

Qn. 8 Do you think an agreement to get equal benefits from the natural resources in the territory is plausible? Support your answer.

Qn. 9 What do you think is the future of the conflict?

We have come to the end of our interview thank you for your valuable contribution.

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