

An analysis of Kenya-Somalia Maritime Territorial Dispute in IR perspective

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Abstract: Kenya-Somalia relations have been strained for some time due to economic and maritime boundary disputes. The area under dispute is a region in the Indian Ocean region stretching for more than 100,000 square kilometers. It is not clear which country could be the rightful owner of the contested area. Furthermore, countries in the global arena have, over the years, gained economic interest in the region as it is rich in oil. These countries include United States, France, Italy, Norway, the United Kingdom, Saudi Arabia, United Arab Emirates (UAE), Qatar, Turkey, and Italy. The International Court of Justice has been the main intermediary of the dispute between Kenya and Somali. However, The ICJ has faced a myriad of challenges in the dispute resolution. At last the International Court of Justice (ICJ) issued its long-awaited verdict in the case of Maritime Delimitation in the Indian Ocean (Somalia v Kenya) on the location of the maritime boundary between Somalia and Kenya on October 12, 2021. The study seeks to understand Kenya-Somalia Maritime Territorial Dispute. The objectives of the study is to analyze the role of the media in the Kenya-Somali maritime dispute and best mode of dispute settlement according to the provisions of Chapter VI of the UN Pacific Settlement of Disputes.

I. BACKGROUND OF THE STUDY

Kenya and Somalia have had a maritime dispute since colonial times. Nonetheless, Somalia filed a complaint with the International Criminal Court in 2014, claiming that Kenya was invading its maritime territory (offshore area of 100,000 square kilometers). This was based on both countries' recognition of the Court's obligatory jurisdiction under Article 36 (2) of the ICJ Statute, also known as the "optional clause declarations." This Article states that all states parties to the present Statute may declare at any time that they recognize the Court's jurisdiction in all legal disputes as mandatory and without special agreement, in relation to any other state accepting the same obligation. (United Nations, 1945) Whereas Somalia wants the boundary defined by the ICJ, as stipulated by the United Nations Convention on the Law of the Sea (UNCLOS), as well as other global laws, Kenya has stuck to its guns on its preferred border demarcation according to the 1979 decree.

The area under dispute is a region in the Indian Ocean region stretching for more than 100,000 square kilometers (about 62,000 square miles) that comes about from projecting the Kenya-Somalia common border eastwards (Wasike, 2021). Somalia appealed to the ICJ not only to extend the continental shelf, but also to fix a line which separates the territorial sea between her and Kenya and the Economic Exclusive Zone (EEZ). Somalia claims that Kenya has violated its international obligations and does not respect Somalia's territorial

sovereignty and must be made to make full reparation to Somalia. (International Court of Justice, 2018) Kenya claims that the border should run on parallel latitude from a point in the south-east of Kyunga. She claims that the boundary corresponds to the line of latitude eastwards. Somalia is in favour of a diagonal trajectory running down the Coast of Kenya, insisting that the border needs to proceed on the same south-easterly trajectory, as a projection of the shore border, into the ocean.

In October 2015, Kenya made two separate objections, in a bid to challenge the Court's Jurisdiction to handle the case and its admissibility: First, Kenya argued that there was a signed MoU between the two countries in 1979, which established an arrangement providing for different methods of settlement and that gave her the jurisdiction over the disputed area (Wetang'ula and Warsame, 2009). She claims that by taking her to ICJ, Somalia is going against the status of recognition and mutual respect of the sea border along the parallel latitude. According to the Kenyan authorities, the dispute was further escalated in February 2019, when Somalia went ahead to auction oil-prospecting rights in the heart of the contested area. Consequently, Kenya demanded that Somalia discards a map that was exhibited in an economic forum held in London, which depicted the contested triangle as belonging to Somalia. Similarly, Kenya demanded that Somalia notifies the potential investors that it does not own the contested oil blocks within the disputed area and hence has no authority to reach any deal with them.

This event led to the recall of Kenya's ambassador to the Federal Republic of Somalia, Ambassador Lt. General (Rtd) Lucas Tumbo. (Ministry of Foreign Affairs, 2019) Kenya also instructed the ambassador of Somalia to Kenya to depart to Somalia for consultations. As of February 2021, Kenya postponed the hearing at ICJ for the fourth time and Somali rejected Kenya's stand. (Dhaysane, 2021) According to media reports, Kenya also supports an in-person hearing, claiming that the epidemic has hampered its preparations and that an in-person hearing would provide a level playing field (Gwakeli, 2021). The primary function of the United Nations is to maintain international peace and security globally. On the other hand, the ICJ'S main role is to decide disputes of a justifiable nature i.e. disputes that can be submitted to a court and be determined by principles of a justice expressed in rules of law. (Scott, 1921) The ICJ held its maiden hearing of Kenya's petition on September 19th to 20th, 2016. Regarding the first objection made by Kenya, the Court decided to determine the

legitimacy of the MoU signed by the two countries, before considering what it contained. In its ruling on the Preliminary Objections made on 2nd February 2017 by Kenya, the Court found the MoU to be insignificant on three grounds: i) it did not have any commitments' or requirements on how the conflict should be determined ii) if Kenya really thought that delimitation was only to come after delineation, it would not have started those discussions iii) the 6th paragraph of the MoU did not have the role of dispute determination as claimed by Kenya.

Relying on Article 282 of the UNCLOS, Kenya had reservations on the jurisdiction of the Court and mandate over this dispute. (UNCLOS, 1982) Regarding this, the Court reasoned that if at all the intent to exclude its jurisdiction existed; then there would have been some dispute about it. The Court, hence, found itself to have jurisdiction over the matter at hand, affirming its suitability to hear the case and effectively squashing Kenya's plea. The conclusion of the Court was that reasserting the Court's jurisdiction came with the advantage of evading any disagreeable disputes of jurisdiction in future. As things are at the moment, there is a high possibility that the Court could end up deciding on who owns the contested maritime area, a decision that will most likely end up favoring only one of the two countries.

II. PROBLEM STATEMENT

Maritime disputes are a common between states who share a common maritime region. This means that these states can bilaterally resolve their disputes without the need to go to court. However, when a dispute involving two states goes on for a long period of time, external actors who bear interests in the conflict begin to emerge and affect the dynamics of the dispute. Interstate dispute resolution is consistent with the view that public international law comprises a set of rules and practices governing interstate relationships. Legal resolution of disputes takes place between states conceived of as unitary actors. States are the subjects of international law, which means that they control access to dispute resolution tribunals or courts. However, legal resolution of disputes doesn't always seem to work because of the shortcomings of international courts and tribunals. Therefore, this study seeks to look for an alternative dispute resolution that can be both effective and long term to ensure both Kenya and Somali reach a mutual agreement (Kadagi et. al. 2020).

III. RESEARCH METHODOLOGY

The methodology that this study seeks to enforce is the use of desktop research to find secondary data that can be used to analyze the Kenya and Somali dispute.

Objectives

1. To analyze the Role of Media in Kenya-Somali Maritime Border Dispute
2. To establish the best mode of Pacific Settlement of Disputes that would have applied to the Kenya and Somali dispute.

IV. LITERATURE REVIEW

According to Andreas Osthagen, maritime disputes stemmed in the 20th century when states legalized the maritime domain (Osthagen, 2020). This led to a change in relationship between states and maritime space. Global trends have further amplified the role of oceans in global affairs. Such global trends include technological advancements, sea trade and an increase in demand for marine resources that have resulted to a renewed focus on the maritime domain. This agrees with what Philip Steinberg stated in his journal, "Navigating to Multiple Horizons", which stated that "we are entering an era when human interactions with ocean space are even more intense and complex" (Steinberg, 1999). Writing about the Political Geography of Oceans, Victor Prescott claimed that states utilize the seas to provide security and enhance development (Prescott, 1975)

As states formed, developed, and expanded, the need to define and uphold territorial boundaries became increasingly relevant. As (Kratochwil, 1985) argues, boundaries are points of contact as well as of separation between a social system and an environment. According to (Ruggie,1993) the notion of firm boundary lines between the major territorial formations did not take hold until the thirteenth century; prior to that there were only 'frontiers', or large zones of transition. When the emphasis was placed on delimitation of all territory (terrestrial) in the 19th and 20th centuries, 'frontier' regions became a source of inter-state friction, as they lacked clear demarcation. Disputes emerged as states sought to expand their territory and define their borders. Even today, related border disputes exist.

According to Wiegand, territorial disputes concern 41% of all sovereign states today (Wiegand, 2011).The link between territory, sovereignty and conflict has been extensively proven. Disputes emerged and still emerge as states seek to expand their territory and define their external boundaries. The classic territorial dispute involves two states that disagree on where a border should go, either because one state does not recognize another state's border derived from a previously signed treaty, or because no treaty exists at all. Territory has been the primary source of conflict between states over the last millennium, as states grew into existence, developed and matured.

Justification

The study findings are of importance to both state and non-state actors. Kenyan scholars, government officials and other policy makers may refer to the study to design and re-design effective peaceful settlement and diplomatic options that can be applied to various interstate conflicts as well as use the study findings as a benchmark for evaluating various mechanisms for dispute settlements.

V. THEORETICAL REVIEW

The Neo liberalism theory best explains the Kenya and Somalia maritime dispute. Liberalism is a distinguishing trait of liberal democracy that has developed into its own distinct entity. It includes a number of ideas and arguments about how the violent power of states is contained and mitigated by

organizations, behaviors and economic relations. Liberalism as opposed to realism in International Relations theory offers a more optimistic world view (Meister, 2018), Liberalism states that the right of an individual to life, liberty and property is the highest aim of government. Therefore, liberalism's primary issue is to create institutions that monitoring political power in order to preserve individual rights. Foreign relations are also essential because the actions of a state abroad can have a direct impact on freedom at home. Militaristic foreign policies are a red flag for liberals. This is because war involves enhancing military power by states. This power can be used to combat foreign countries, but it can also be used to exploit the country's own people. As a result, political structures based on liberalism often use civilian control of the military to restrict military power.

Liberals therefore seek to advance a political system that ensures state protection from foreign adversaries without sabotaging citizens' rights and liberties. In liberal states, the primary institutional check on power is free and fair elections that allow citizens to choose good leaders while removing those they view bad. This ensures that the government's conduct is in check. The separation of political power among various agencies, such as a parliament, an executive, and a judicial system also allows for checks and balances. The liberal theory advocates for public opinion in foreign policy, as well as media engagement. The democratic peace theory, as an aspect of liberalism, suggests that democratic states should not use force because of the innate willingness to cooperate. It was first suggested by a German philosopher Immanuel Kant and later developed by Michael Doyle. This is due to the fact that democracies have a higher capability to cooperate among themselves than with non-democracies. Also, a proactive public exists to curb executives (McGlinchey, 2017)

Daniel Deudney and G. John Ikenberry explained three connected factors of the liberal world order to begin, international law and agreements are supported by international institutions, resulting in a global system that transcends states. The United Nations for example mobilizes resources for common objectives (such as improving climate change), offers dispute resolution mechanisms between states gives a voice to all member states in the international community. Second, a market-based, open and global economic system are created through international organizations, such as the World Trade Organization, the International Monetary Fund and the World Bank. This results to cooperation through trade between countries that decreases conflict. It also decreases the risk of war, since a war will weaken or destroy the advantages of trade. As a result, states with close trade links are more likely to have friendly relations. In this regard, war is not beneficial for the state, but rather counterproductive. (Deudney & Ikenberry, 1999).

The third facet of liberalism is international standards. Liberal norms encourage international cooperation, human rights, equality, and the rule of law. When a state does not meet these requirements, it is subject to a variety of sanctions. International standards are often questioned due to the broad

variety in values across the world. Breaching liberal norms, however, comes with a price. In the Kenya and Somalia maritime dispute, the International Court of Justice under the United Nations has played a key role in trying to resolve the issue. However, it has also had some setbacks that have made states question its capability. Below are some of the merits and limitations of the International Court of Justice.

The maritime dispute between Kenya and Somali has brought on board external parties who are supporting either sides depending on which county serves their oil interest best (Maluki, 2019). The external interested parties include; the United States, France, Italy, Norway and the United Kingdom. Kenya and Somalia are important to these countries because they have the largest and most recent oil finds in Africa. The UK has been seen to support Somalia because its relations with Kenya have not been the best, particularly under President Uhuru's government. This has been attributed to the charges he faced at the International Court of Justice due to his alleged involvement in the 2007 Kenyan post-election violence. As a result, the UK has expressed its economic interests through Somalia (Tom Collins, 2020). As a result, Kenya sought refuge in US and China. America supports Kenya because they were allies in the "War and terror" while the US sees Somalia as a threat to their security as it offers a haven for extremist groups (Office of the director of national intelligence, 2021).

In addition to that, the US stands to gain economically from Kenya's oil and gas exploration if the disputed territory is handed over to Kenya. On the other hand, Norway supports Somalia. Norway is allegedly claimed to be one of the highest bidders at the Somali Oil and Gas Conference in London (Maluki, 2019). Other interested countries include Saudi Arabia, United Arab Emirates (UAE), Qatar, Turkey, Italy who also seek colonial, historical, social, economic, political, and military ties and interests in the region (HORN international institute for strategic studies, 2019a). This incidentally influences the dynamics of stability not only in the Somalia but in the Horn of Africa. The political division in the Middle East, pits Saudi Arabia and the United Arab Emirates against Turkey and Qatar for control of Mogadishu (Nageeye, 2019). If the ICJ is to be involved, it should be to the mutual benefit of Kenya and Somali excluding the external interested states. This is because these countries only seem to intensify the conflict in the aim of exploiting both countries' oil resources. It is therefore important to restore the diplomatic relations between these two countries.

VI. ROLE OF MEDIA IN THE KENYA-SOMALI DISPUTE

The media as a non-state actor, is used to inform publics by disseminating information about an event or issue therefore bringing it to the attention of the masses. In addition to news coverage, the media shapes the learning process of people concerning the world, therefore media have a strong impact on the image that individuals have of the world. The media thus helps to construct the reality of foreign relations. Media has played an active role in documenting the events in the Kenya-Somalia row since 2014 (KTN News Kenya, 2019). Media channels like Television stations, radio and even social

media platform like you tube reported the events that occurred between Somali and Kenya since 2014. This helped to create awareness to the general public concerning the deep seated issue between Kenya and Somalia. The decision for Somalia to sue Kenya to ICJ brought global attention with global, regional and local media reporting the events. Most global media corporations were neutral to the issue like BBC, TRT World and Aljazeera. In the period when Somalia sued Kenya to the ICJ, the International Court of Justice also issued a press release in August 2014 revealing Somalia's proceedings against Kenya with regard to "a dispute concerning maritime delimitation in the Indian Ocean."

In these proceedings, Somalia was requesting ICJ to determine the precise geographical co-ordinates of the single maritime boundary in the Indian Ocean. (International Court of Justice, 2014). Fast forward to 2021, Aljazeera reported on Kenya boycotting the first hearing of ICJ (Tzanakopoulos, 2021). The diplomatic row between Kenya and Somalia in 2019, where Kenya recalled its ambassador to Somalia was also reported by the media. This incident occurred after the Mogadishu government auctioned oil and gas exploration blocks at the center of a maritime territorial dispute in the Indian Ocean (Reuters, 2019) Somali however denied this claims. In 2020, Somalia recalled its Ambassador to Kenya Mohamud Ahmed Nur 'Tarzan' and ordered Kenya's envoy to Mogadishu Lucas Tumbo out of the country. All Africa, a website that aggregates news produced primarily on the African continent, was one of the news outlets that reported the diplomatic row (All Africa, 2020) The East African, a regional news outlet was also keen to report this matter (Mutambo, 2020) This caught the attention of Kenyan officials, with Kenya's Foreign affairs Principal Secretary Macharia Kamau stating that Nairobi regrets Somalia's decision to recall its envoy, and the two countries will need to discuss the matter diplomatically.

VII. MERITS OF THE INTERNATIONAL COURT OF JUSTICE

Impartiality, Professionalism, Rules and Regulations

The prestige of the Court depends not only on its impartiality, but also on the skill and conscientiousness with which its tasks are performed, and on the professional and personal standing of its members, most of whom before coming to the bench had distinguished themselves as renowned scholars, judges, or legal advisers to governments, and had acquired wide recognition (Brower & Lando, 2020).

Consent of Parties

The basis under which the Court has jurisdiction over international disputes 5 submitted to it lies in the principle of the consent of parties.

VIII. THE INTERNATIONAL COURT OF JUSTICE

The Undermining of the Courts' Authority by the Organs of the United Nations or States

A case in point is when Security Council proceeded to intervene in the Indonesian situation after rejecting a proposal to submit to the Court the question of its power to do so.

The Impartiality of Judges

The impartiality of ICJ could be suspect due to national and traditional loyalties and political interests of different states. This might affect the selection processes of members from those states.

Failure of the Court's Decisions to Command Obedience

Theoretically, any judgment made by the ICJ should be final and without appeal and there should be compliance by all parties. What makes this difficult is that the Court does not have an enforcement machinery (HORN international institute for strategic studies, 2019b).

Dissatisfaction of some States with the Prescribed Standards

Not all disputes of this nature can actually be terminated by decisions of judicial tribunals. There are cases where parties are dissatisfied with the prescribed standards or judgment. Following the limitations that the International Court of justice has, the legal way of solving disputes might not be the most effective way of solving the Kenya and Somalia maritime dispute (HORN international institute for strategic studies, 2019b) A more political way of solving the dispute, that is, a diplomatic and peaceful settlement can therefore be employed to find a sustainable solution.

IX. MODES OF PEACEFUL SETTLEMENT AND DIPLOMATIC OPTIONS THAT EXIST

The peaceful settlement of international disputes includes: Negotiation, Good Offices, Mediation, International Commission of Inquiry, Conciliation, Arbitration, Judicial settlement (Arbitration), or resort to regional mechanisms before going to ICJ (Hamza, 2017). Diplomatic means are definitely better than legal options since in all of them, the termination of the disputes normally depends upon the voluntary acceptance by all parties of the proposed terms of settlement.

West-African Nigeria and the archipelago of Sao Tome Principe

Both states established a Joint Development Zones (JDZ) in 2004 whereby they teamed up to produce oil in a disputed area, in their maritime territories within the Atlantic Ocean, hence bringing their border dispute to an end (Seibert, 2004) Such examples go a long way to demonstrate that a willingness of any two countries to settle their border disagreements through diplomatic avenues of dialogue and creativity can actually bear fruit. Somalia and Kenya can still choose to sort out their dispute diplomatically. The two countries reached an agreement by sharing the disputed area as well as the natural resources such as minerals therein.

The People's Republic of China (PRC) and Japan

Following complicated negotiations going to as far back as the early 1970s, on 25 December 2000, Vietnam and China reached an amicable agreement which permanently delimited their maritime border in the Gulf of Tonkin. The settlement

delimited one territorial sea as well as continental shelf border, besides establishing a huge common fishing area on both sides of the continental shelf border. Negotiations on the common fishing regime went on for additional three and half years; hence the settlement was not fully effected until 30 June, 2004 (Liu & Atsumi, 2008).

Examples of Good Offices

In international law, good offices are a means of peacefully resolving disputes between states. By good offices is meant the assistance of a state or international body in establishing contact or beginning direct negotiations between the disputing parties, with the aim of the peaceful settlement of the conflict. In 1949, the Security Council rendered good offices in the dispute between the Republic of Indonesia and the Government of Netherlands. The Prime Minister of the United Kingdom, Mr. Wilson also provided his good offices to Pakistan and India which resulted in the parties reaching an agreement to refer Kutch issue to an Arbitral Tribunal.

Examples of Mediation

In 1966, President Kosygin of the Soviet Union mediated in the dispute between India and Pakistan which led to the conclusion of a Tashkent agreement. Birmingham Mediation Contract Dispute. Birmingham mediation was required for a contracts dispute between the Birmingham based claimants who sued the defendants for £43,500 in relation to the supply of jewellery and failure by the defendants to send the items who claimed that they had got lost in the post. The defendants were adamant that this was beyond their control and they had fulfilled their legal obligations. The claimants felt that the defendants had not sent the jewellery, did not have it in stock or generally were being dishonest.

Examples of International Commission of Inquiry

Cases in point are: The Tavignano, Camouna Gaulois Inquiry, the North Sea Incident Inquiry the Tubantia. Following the crisis that took place in Mali between 2012 and 2013, the parties to the conflict negotiated a peace agreement that was signed in Algiers in June 2015. The Agreement on Peace and Reconciliation in Mali provided, in its article 46, several measures to address reconciliation and justice including the establishment of an International Commission of Inquiry. The Secretary General of the United Nations established the International Commission of Inquiry for Mali on 19 January 2018.

Examples of Arbitration

This method was used in the arbitration in Alabama of Claims between Great Britain and the United States. *Rent-A-Center, West v. Jackson*, 130 S. Ct. 2772 (2010). This case is the culmination of the severability doctrine, which explains whether a litigant's challenge to enforceability should be heard in arbitration or in court. For the uninitiated, reading this case is like reading that Bruce Springsteen is actually an alien. It is that counter-intuitive. *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014). This case tries to explain

which of the other potentially dispositive issues get decided in arbitration and which are decided in court (conditions precedent, waiver, scope, etc.). It also gives some guidance as to the deferential standard of review for arbitrator decisions, and shows the importance of the rules parties chose to govern the arbitration.

X. CONCLUSION

The best mode of peaceful settlement and diplomatic options that can be applied to the Kenya and Somali dispute was arbitration, as it allows both parties to be actively involved; while involving a neutral party to listen in on the contested issue, and advise both parties on a concrete way of solving the issue. The beauty of this is many cards can be played such as; regime protection, admission of Somalia into the East African Community as well as access to markets, academic institutions or establishment of long term regimes between the two countries. If Kenya and Somali both employed this and deemed successful, other countries in East Africa, within or outside Africa can use this case as a benchmark of future cases that can be tailor made to suit their particular interstate dispute.

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