

**THE IMPLICATIONS OF THE *KENYA VS SOMALIA* CASE
BEFORE THE INTERNATIONAL COURT OF JUSTICE ON
THE TERRITORIAL SOVEREIGNTY OF KENYA.**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree, Strathmore
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Declaration

I, **DAPHINE NATACHA LEKIPAIIKA** do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Allan Mukuki.

Abstract.

This dissertation sorts to determine the implications of the case before the International Court of Justice on the Maritime delimitation of the Somalia and Kenya coastline. As an important aspect that States still cherish, the principle of territorial sovereignty emerged as a major principle under International Law. Territorial sovereignty encompasses a State's freedom to assert its power the territorial borders of its jurisdiction. The aspect of exerting such control has now been extended to not only land territories but territories in the sea where such jurisdiction can be asserted. The Convention on the Law of the Sea defines five main generations of maritime boards, consisting of: the territorial sea, adjacent zone; continental shelf; exclusive economic zone (EEZ); and the area. There has been an increased rush among States to demarcate their territories so that they may be able to gain financially from the resources found on these maritime zones especially the Continental Shelf. The Commission on the Limits of the Continental Shelf is responsible for providing advice to the coastal States as they present their claims in respect of issues concerning the establishment of outer limits on the continental shelf above 200 nautical miles. However, as the court has established in the preliminary objection of the *Somalia vs Kenya maritime row*, that these does not preclude parties from resorting to other dispute resolution methods such as the ICJ. This dissertation was guided by an objective to analyse the exact method of delimitation used by the Courts and to analyse the implications of such approaches to the territorial sovereignty of Kenya and Somalia. The jurisprudence of the court has tried to analyse and determine the precise approach for delimitation. The court's approach is that the principle of equidistance/relevant circumstances is the starting point of every delimitation. However, the principle has not reached *jus cogen* status thus courts are still open to make use of alternative methods of delimitation such as the parallel latitude in light of the special circumstances of the case. The procedure of litigation can lead to injustices as one party will eventually lose the matter. Even the International Court of Justice understands that there is not one appropriate method for delimitation that leads to equity. Therefore, the recommendation of the dissertation is that, in the spirit of Pan Africanism, the two states concerned should engage in re-negotiation to achieve not only an equitable compromise but a binding one.

List of Abbreviations.

UN- United Nations.

UNGA- United Nations General Assembly.

Commission- Commission on the Limits of the Continental Shelf (CLCS).

CLCS- Commission on the Limits of the Continental Shelf.

ICJ- International Court of Justice.

ICC- International Criminal Court.

List of Cases

Aegean Sea Continental Shelf (Greece v Turkey), Judgment, ICJ Reports 1978.

Aerial Incident of 10 August 1999 (Pakistan v India), Judgment on jurisdiction, ICJ Reports 2000

Aerial Incident of 10 August 1999, ICJ Report 1999.

Arbitral Court in the Anglo–French Continental Shelf case.

Barbados v Trinidad and Tobago, Award, Permanent Court of Arbitration (PCA), 2006.

Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Reports 1985.

Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court Judgment, ICJ Reports 1998.

Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria), ICJ Reports 2002.

Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), ICJ Report 1992.

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), ICJ Reports 1993.

Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, ICJ Reports 2009,

Maritime Delimitation in the Indian Ocean (Somalia vs Kenya), Executive Summary (Somalia), ICJ Report 2019.

North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgement, ICJ Reports 1969.

Nuclear Tests (Australia v France), 1974 ICJ Reports 1974.

The Anglo-French Continental Shelf case (United Kingdom v. France), ICJ Reports 1977.

The Gulf of Maine case (Canada vs USA), ICJ Reports 1984.

Tunisia v Libyan Arab Jamahiriya (Continental Shelf Case), Application for Revision and Interpretation of the Judgment, ICJ Reports 1985.

United States v. the Netherlands, Permanent Court of Arbitration, 1928, 2 PCA. 829.

List of Legal Instruments

Charter of the United Nations, 24 October 1945, 1 UNTS 16.

Convention on the Continental Shelf, 29 April 1958, 499 UNTS 311.

Convention on the Territorial Sea and the Contiguous Zone, 10 September 1964, 516 UNTS.

Covenant of the League of Nations

International Law Commission, *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311.

UN *Statute of the International Court of Justice*, 18 April 1946.

UN The Final Act of The Third United Nations Conference on The Law of The Sea, *Statement of Understanding, Concerning A Specific Method, To Be Used In Establishing the Outer Edge Of The Continental Margin*, 1999.

United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397.

United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS.

United Nations Convention on the Law of the Sea, *Meeting of States Parties*, 29 May 2001 SPLOS/72.

Vienna convention on the law of treaties, 23 May 1969, 1155 UNTS 331.

Maritime zones act (Cap 371).

Territorial Waters Act (Act No. 2 of 1972).

CHAPTER 1: INTRODUCTION OF THE RESEARCH.

INTRODUCTION.

Judge Huber noted in the Island of Palmas case¹ that:

*'sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular state.'*²

Arthur C. Clarke made an important point concerning the proportion of water as opposed to land covering the surface of planet Earth. He states that *"How inappropriate to call this planet Earth when it is quite clearly Ocean"*.³ This dissertation will concern those very specific principles of International law that is the Law of the Sea and Territorial sovereignty.⁴ It is for these principles that the matter of *Somalia vs Kenya* was brought before the International Court of Justice for maritime delimitation on the Indian Ocean.

The matter at hand concerns contention of land which is a narrow triangle off the coast of Africa, in the Indian Ocean, about 100,000 square kilometers (62,000 square miles) that has a large deposit of oil and gas, that is currently Kenya's oil exploration blocs L5 and L28.⁵ Maritime boundaries are sometimes controversial, thus countries have to enlist help from the United Nations to solve such disputes. Controversies about territorial waters tend to encompass two dimensions: territorial sovereignty, which is a legacy of history; and relevant jurisdictional rights and interests in maritime boundaries, which are mainly due to differing interpretations of the Law of the Sea.

Under Article 76, paragraph 8, of UN General Assembly, *Convention on the Law of the Sea*, a State party to the Convention intending to establish the outer limits of its continental shelf beyond 200 nautical miles shall submit information on such limits to the Commission on the Limits of the

¹ *United States v. the Netherlands*, Permanent Court of Arbitration, 1928, 2 R.I.A.A. 829. By the Special Agreement of 23 January 1925.

² Malcolm Shaw, *International Law*, Cambridge University Press, 2016, 6th ed, 487.

³ Lovelock, J.E., *"Hands up for the Gaia Hypothesis"*, Nature, Volume 344, Blockhouse Press, 1990, 102.

⁴ UNGA, *Convention on the Law of the Sea*, 10 December 1982, available at: <https://www.refworld.org/docid/3dd8fd1b4.html> [accessed 17 February 2019].

⁵ <https://www.businessdailyafrica.com/economy/Kenya-pushes-back-border-row-Somalia/3946234-4234566-umijm1/index.html>

Continental Shelf (CLCS).⁶ The role of the Commission on the Limits of the Continental Shelf is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles. With regard to the disputed maritime areas, the Commission on the Limits of the Continental Shelf requires the prior consent of all the States concerned before it will consider submissions regarding such areas.

In March 2009, Kenya and Somalia signed a Memorandum of Understanding (MOU), agreeing to grant to each other no-objection in respect of submissions made to the CLCS on the outer limits of the continental shelf beyond 200 nautical miles.⁷ Paragraph 6 of the MOU further provided that the delimitation of maritime boundaries in the areas under dispute shall be agreed between the two coastal States after the Commission has concluded its examination of the separate submissions made by each of the two coastal States and made its recommendations.⁸ In the following years, both parties raised and withdrew objections to the consideration of each other's submissions by the Commission. Those submissions are still under consideration.

In its case, Somalia claims that the maritime boundary existing between the two countries should be at an equidistant line and that Kenya's oil exploration activities in the disputed area are unlawful. Article 12 of the 1958 *Territorial Sea Convention* defines equidistance as the line every point of which is equidistant from the nearest points of the baselines from which the territorial sea of each of the two states are measured.⁹ Kenya on the other hand submitted that the maritime boundary with Somalia is along a parallel of latitude as previously recognized since 1979 through a Presidential proclamation that both countries had signed.¹⁰ The matter concerns itself with what is the defined territory and what boundary limits are there with regard to Kenya and Somalia.

⁶ Article 75 paragraph 8, UNGA Convention on the Law of the Sea.

⁷ *Kenya vs Somali*, International Court of Justice, Press release, 12th February, 1.

⁸ *Kenya vs Somali*, International Court of Justice, Press release, 12th February, 2.

⁹ Article 12, International Law Commission, *Convention on the Continental Shelf*, 29 April 1958, United Nations, Treaty Series, vol. 499, p. 311.

¹⁰ *Kenya vs Somali*, International Court of Justice, Press release, 12th February, 4.

BACKGROUND TO THE STUDY.

Malcolm Shaw in his book *International law*, states that the basis of International Law is the concept of the state.¹¹ In international law and relations, ownership of territory is significant because sovereignty over land defines what constitutes a state.¹² According to article 1 of the Montevideo Convention on the Rights and Duties of States of 1933 (Montevideo Convention) a state as a person of international law should possess the following qualifications: a permanent population; a defined territory; a government; and capacity to enter into relations with the other states.¹³ A defined territory provides a tangible basis for the exercise of the state's effective control by delimiting the human and physical resources over which the state has some control.¹⁴

The concept of the State as a territorially bounded unit finds her origins in the 16th and 17th centuries when in Western-Europe, it replaced the dominant form of political organization of the Medieval order, known as the '*Respublica Christiana*'.¹⁵ The term sovereign originates from the Latin word '*suprema potestas*', which translates into 'highest authority' or 'highest power' indicating that the State is the highest body of authority, not inferring its powers from other earthly bodies for example, the Pope or Emperor.

The development of the State is closely linked to the ability to exercise effective control over a defined territory.¹⁶ This was already reflected by the principle of *cuius regio, eius religio*¹⁷ and became more important with the increased technical capabilities of border demarcation, the increased centralization of power within the State and the rise of nationalism.¹⁸

¹¹ Malcolm Shaw, *International Law*, Cambridge University Press, Cambridge, 2016, 6th ed, 487.

¹² Paul Gilbert, *The philosophy of Nationalism*, Westview Press, London, 1998, 1st ed, 34.

¹³ Article 1, *Montevideo Convention on the Rights and Duties of States* of 1933, Treaty series 165 LNTS 19; 49 Stat 3097.

¹⁴ Malcolm Shaw, *International Law*, Cambridge University Press, Cambridge, 2016, 6th ed, 492.

¹⁵ Pieter H. Kooijmans, *Internationaal Publiekrecht in Vogelvlucht* [Public International Law in a Nutshell], W.E.J. Tjeenk Willink press, Deventer, 2000, Eighth Revised Edition, 2.

¹⁶ Malcolm Shaw, *International Law*, Cambridge University Press, 2016, 6th ed, 451.

¹⁷ *Cuius regio, eius religio* is a Latin phrase which literally means "Whose realm, his religion", meaning that the religion of the ruler was to dictate the religion of those ruled.

¹⁸ James R. Crawford, *The Creation of States in International Law*, Oxford University Press, Oxford, 2007, p. 167 - 168.

Robert Sack defines territoriality as the attempt by an individual or a group to influence or control objects, people and relationships by delimiting and asserting control over a geographic area.¹⁹ The State is the highest authority within a given territory; outside that territory, the State is obliged to respect the principle of non-intervention in its relations with other States.²⁰ As territory gives the state a physical foundation to exercise its power; as its existence and autonomy is rooted in territory which is frequently a source of conflicts between states.²¹ The sovereignty of a coastal state extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters to an adjacent belt of sea, described as the territorial sea. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.²²

Majority of armed conflicts during the Second World war between states were due to territorial conflicts.²³ Nowadays, the potential political and security risks of boundary disputes are high, and unresolved maritime boundaries between states may easily affect bilateral relations or even international peace and security. Such disputes may also hamper economic activities such as exploitation of fishing sites due to fear of action by the other states.²⁴ The benefits of having territory, though, are only as great as a state's borders are clear, because a state's boundaries must be well defined for the modern state to function.²⁵

As stated in the introduction the land in contention is a narrow triangle off the coast of Africa, in the Indian Ocean, about 100,000 square kilometers (62,000 square miles) that has a large deposit of oil and gas, that is Kenya's oil exploration blocs L5 and L28.²⁶ At this particular time before the International Criminal Court, Kenya exercises independent and effective sovereignty and authority over this piece of land. Somalia claims that this part of their territory and Kenya is overstepping in its borders therefore violating international law.²⁷ Bertrand de Jouvenel in his prominent work

¹⁹ Robert D. Sack, *Human Territoriality: A Theory*, Annals of the Association of American Geographer, 1983, 65.

²⁰ Article 2(4), United Nations, *Charter of the United Nations*, 24 October 1945.

²¹ Michael Mann, *The autonomous power of the state: its origin, mechanisms and results*, European Journal of sociology, Volume 25, 1984, 187.

²² Rateng Jackline, *The status of Maritime Boundaries in Kenya*, Published, Nairobi University, Nairobi, 2008, 14.

²³ Malcolm Shaw, *International Law*, Cambridge University Press, 2016, 6th ed, 501.

²⁴ Rateng Jackline, *The status of Maritime Boundaries in Kenya*, Published, Nairobi University, Nairobi, 2008, 1.

²⁵ Malcolm Shaw, *International Law*, Cambridge University Press, 2016, 6th ed, 503.

²⁶ <https://www.businessdailyafrica.com/economy/Kenya-pushes-back-border-row-Somalia/3946234-4234566-umijml/index.html>

²⁷ *Somalia vs Kenya*, Preliminary objections, ICJ reports 2019, 3.

of 1957, *Sovereignty: An Inquiry Into the Political Good*, acknowledged that sovereignty is an important attribute of modern political authority needed to quell disputes within the state and to muster cooperation in defense against outsiders.²⁸ The importance of a state exercising its control over a particular piece of land, that is its defined territory, cannot be stressed more with regard to the principle of sovereignty.

JUSTIFICATION.

The purpose of this study is to explore the attitudes and practices of the international community in maritime delimitation between nations and to apply it to the maritime row between Somalia and Kenya. The Somalia vs Kenya case has been covered by several news articles and papers, however not an in-depth analysis. The paper aims to analyze the underlying aspects of the case, such as the historical context between the two states of land territory and maritime territory which will shed some insight on the reluctance of Somali Republic to engage in any form of maritime related negotiation. The recourse to take a case before the court is a right granted to all countries. This paper will, however, analyze the injustices that the parties may encounter in litigation and attempt to make a recommendation seeking to resolve this dispute between the two countries.

RESEARCH OBJECTIVES.

The main objective of this dissertation is to carry out research on the law governing delimitation of maritime boundaries in Kenya and to come up with a probable conclusion of the Court in the case.

Specific objectives are:

1. The implications of the Memorandum of Association signed by Kenya and Somali in 2009 on the decision of the Court.
2. The special circumstance and history of the *Somalia vs Kenya* Maritime Row.

²⁸ Bertrand de Jouvenel, *Sovereignty: an inquiry into the political good*, Translated by J. F. Huntington, The University of Chicago Press, Chicago, 1957, 320.

3. The specific decision that the International Court of Justice will conclude and the implications of the decision on both countries.

HYPOTHESIS

The decision of the International Court of Justice in the *Kenya vs Somalia* case will have implications on the territory, jurisdiction and future negotiations of both countries.

ASSUMPTIONS.

1. The principle of Territorial Sovereignty is highly guarded by states.
2. The equidistance method for delimitation is binding.
3. That the parties wish to engage in any other form of dispute resolution.

RESEARCH QUESTIONS.

1. What are the consequences of signing a presidential proclamation? Is it binding? Who can sign on behalf of a state? What are the implications of signing a memorandum of association? Do they constitute a binding treaty?
2. In relation to the previous recommendations made to the United Nations Commission on the Limits of the Continental shelf, what is the specific maritime boundary and history in Kenya and Somalia's case?
3. In relation to the previous decisions made by the International Court of Justice, what will be the court's decision and its consequent implications?

THEORETICAL FRAMEWORK.

This dissertation will primarily focus on the theory of private property propounded by scholars such as John Locke and Thomas Hobbes. In analyzing territorial sovereignty, the concept of *souveraineté* featured as a central concept in *De la république* by French philosopher Jean Bodin is important. He viewed the problem of order as central and did not think that it could be solved through outdated medieval notions of a segmented society, but only through a concept in which rulers and ruled were integrated into a single, unitary body politic that was above any other human

law and was in fact the source of human law. This concept was sovereignty. Only a supreme authority within a territory could strengthen a fractured community, this shows the importance of effective control in territorial sovereignty.

Furthermore, International relations theorists have pointed out that there is a similarity between sovereignty and the concept of private property propounded by Thomas Hobbes. Thomas Hobbes in Chapter 29 of *Leviathan* stated that every private man has an absolute possession in his goods which includes the right of sovereign.²⁹ He further stated that this right is connected to the person's right to exclude any other person from its use. This is enshrined under article 2(4) of the United Nations charter which provides that all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.³⁰

John Locke in the theory of private property, believes that all men have a natural right to private property; he sees the institution of private property as logically prior to the creation of the state and consequently is led to the conclusion that the state exists to protect the system of property relations. The territorial sovereignty of the State is a kind of property of international law, that is, an exclusive power of disposing of a territory as is the power to dispose of goods within the municipal legal order. The state also has real rights on the property for it refers to goods or things. Real rights, belonging to the family of absolute rights, attribute to their holders a capacity of ruling, sometimes full ownership and others limited.³¹

This dissertation will use the theory of private property to make the reader understand the importance of property as tied to territorial sovereignty and why territorial sovereignty is one of the main principles of international law. This paper aims to bring out the underlining jurisprudence behind the whole notion of the principle of territorial sovereignty to make sense of why states would do everything in their power to protect their 'property', that is their territory.

²⁹Thomas Hobbes, 1588-1679 (1968) *Leviathan*, Baltimore, Penguin Books.

³⁰ Article 2(4), United Nations, *Charter of the United Nations*, 24 October 1945.

³¹ Prof. Giovanni Distefano, *Theories on Territorial Sovereignty: A Reappraisal*, University of Geneva Switzerland law Journal, Vol 9, 43.

LITERATURE REVIEW.

Theme 1: Territorial sovereignty.

Regarding the principle of territorial sovereignty, there exists a lot of articles and books specifically covering this subject. As per article 2(1) of the United Nations Charter, territorial sovereignty is still the cornerstone of contemporary international legal order.³² Hence, it is not without interest to enquire into this fundamental legal notion. **Malcolm Shaw**³³ state that territorial sovereignty has a positive and a negative aspect. The positive aspect relates to the exclusivity of the competence of the state regarding its own territory while the negative aspect refers to the obligation to protect the rights of other states. Prof. Giovanni Distefano in his paper *Theories on Territorial Sovereignty*, states that the aspect of a state having a defined boundary is a crucial moment in the life of a state. He quotes the case of Guinea-Bissau v. Guinea, (Arbitral Award) by emphasizing that the demarcation of a state's territory implies existence of a legal title over that territory.³⁴

James Crawford further argues that the aspects of boundaries with regard to states must be emphasized.³⁵ He states that a literal marking of a state's territory is crucial as boundaries which are de facto will result to a legal limit upon the sovereignty of a state as the state won't be able to enjoy its rights of prohibition of unpermitted intrusion of other states with or without the use of force.³⁶

Prof. Giovanni Distefano further states that for the purpose of determining a boundary between two or more States, an important principle is that of *uti possidetis*, which is defined to mean that the former internal borders which delimited the regions became automatically the international boundaries between the newly independent States.³⁷ The application of *uti possidetis* within this

³² Article 2(1), United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

³³ Malcolm Shaw, *International Law*, Cambridge University Press, 2016, 6th ed, 490.

³⁴ Prof. Giovanni Distefano, *Theories on Territorial Sovereignty: A Reappraisal*, University of Geneva Switzerland law Journal, Vol 9, 26. See Guinea-Bissau v. Guinea, Arbitral Award of 14 February 1985, in Rev. Gen. Dr. Int., 1985, at. 484 ff., para. 120.

³⁵ James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford, 2012, 213.

³⁶ James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford, 2012, 213.

³⁷ Prof. Giovanni Distefano, *Theories on Territorial Sovereignty: A Reappraisal*, University of Geneva Switzerland law Journal, Vol 9, 46.

specific historical context pursued two main aims: (i) to solve any potential territorial dispute without resorting on the use of force (endogenous purpose); (ii) at the same time, to assert that no territory was a terra nullius.³⁸ This principle of *uti possidetis* is tied to the legal assumption that the space where the state occupies in the world is in essence its territory therefore have full dominion over it. James Crawford posits that a title does not arise simply by physical occupation³⁹ but through acquisition in law.⁴⁰ This basic principle is stated by the ICJ in Frontier Dispute (Burkina Faso vs Mali) where the court states that the only role of *effectivite* is to confirm the exercise of the right derived from the title. With regard to disputes on territory such as the *Kenya vs Somalia* case preference is always given to the holder of the title.⁴¹ This is the general principle regarding the aspect of who owns a particular territory.

Specifically on the issue of maritime delimitation, article 15 of the UN General Assembly, *Convention on the Law of the Sea* states that unless otherwise agreed between states, a line of equidistant from the nearest baseline shall be used in the delimitation of the territorial sea between States with opposite or adjacent coasts.⁴² The underlining statement in this is that states can choose to have an agreement between them with regard to the delimitation of the land in contention such as the memorandum of understanding signed by Kenya and Somalia in 2009. Furthermore, Antonio Cassese in his book, *International law*, state that a state can also acquire territory from another party through cession by treaty.⁴³

The principle of territorial sovereignty seems to have specific regulation put in place regarding acquisition of territory and its importance to the state. Analyzing these different theories posited by different scholars would be of great assistance to the writer of these paper in analyzing and coming up with a probable decision of the ICJ in the case of *Kenya vs Somalia*.

³⁸ Prof. Giovanni Distefano, *Theories on Territorial Sovereignty: A Reappraisal*, University of Geneva Switzerland law Journal, Vol 9, 49.

³⁹ *Effectivite* principle means effective occupation.

⁴⁰ James Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford, 2012, 8th ed, 216.

⁴¹ Frontier Dispute Case (Burkina Faso vs Mali), International Court of Justice, 1986 I.C.J. 554.

⁴² Article 15, UNGA *Convention on the Law of the Sea*, 10 December 1982.

⁴³ Antonio Cassese, *International Law*, Oxford University Press, Oxford, 2005, 2nd ed, page 83.

Theme 2: The nature of Bilateral treaties.

On 7 April 2009, the Kenyan Minister for Foreign Affairs and the Somali Minister for National Planning and International Cooperation signed a “Memorandum of Understanding between the states to grant to 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”.⁴⁴ The court’s first objective was to analyze whether this MOU constituted a bilateral treaty between Kenya and Somalia. Article 2 of the Vienna Convention defines a treaty to mean an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.⁴⁵ The Court in analysis concluded that as the Memorandum of Understanding was a written document, in which the Parties recorded their agreement on certain points governed by international law and its binding character enshrined in the inclusion of a provision addressing the entry into force of the MOU⁴⁶, the MOU was a valid treaty that entered into force upon signature and is binding on the Parties under international law.

Phillip Jessup in his book *Modern law of nations* states that under International law a treaty is a source of rights and obligations only for the parties to it this is the principle of *pacta tertiis nec nocent nec prosunt*.⁴⁷ This is enshrined under article 26 of the Vienna Convention on the Law of treaties which states the principle of “*Pacta sunt servanda*” creates a rise of obligations that is every treaty in force is binding upon the parties to it and must be performed by them in good faith.⁴⁸

He further posits that this primary duty to observe the obligations assumed in the agreement would be difficult of operation if the law did not indicate when an agreement becomes binding, how it is to interpreted during its effective life, and how it may be terminated.⁴⁹ It is common practice to

⁴⁴ *Kenya vs Somali*, International Court of Justice, Summary of the Judgment of 2 February 2017, page 1.

⁴⁵ Article 2, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155.

⁴⁶ *Kenya vs Somali*, International Court of Justice, Summary of the Judgment of 2 February 2017, page 1.

⁴⁷ Philip C Jessup, *A modern law of Nations*, The Macmillan Company, New York, 1948, 134.

⁴⁸ Article 26, United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155.

⁴⁹ Philip C Jessup, *A modern law of Nations*, The Macmillan Company, New York, 1948, 125.

conclude that treaties are subject to ratification by the contracting parties.⁵⁰ Ratification establishes on the international plane the state's consent to be bound by the treaty.⁵¹ In a sense all international agreements are contractual in that they derive their validity from the agreement of the parties.⁵²

Justice Bennouna in his dissenting opinion (preliminary objection) in this case stated that the Court should have analyzed the MOU with regard to the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties, which has customary status: that the treaty should be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁵³ This is further echoed in the judgment of the ICJ Territorial Dispute (Libyan Arab Jamahiriya/Chad) that Interpretation must be based above all upon the text of the treaty.”⁵⁴

The aspect of treaties being binding in international law cannot be stressed further, the problem occurs when there occurs a conflict between the treaty and other sources of international law. Does this limit the interpretation of the ICJ in only the treaties signed therefore giving the Commission on the Limits of the Continental Shelf the mandate to conclude what is the defined boundary? Previous recommendations by the Commission on the Limits of the Continental Shelf on other maritime case are also important as they will provide an understanding on what guides the commission in making such recommendations. The mandate of the Commission is enshrined under article 76 of the UN Convention on the Law of the Sea which states that the commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf beyond 200 nautical miles.⁵⁵ This shall also provide an insight on the probable recommendation that the Commission will make in the *Kenya vs Somalia*, probably persuading the decision of the court once given.

⁵⁰ Philip C Jessup, *A modern law of Nations*, The Macmillan Company, New York, 1948, 125.

⁵¹ Article 2, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155.

⁵² Philip C Jessup, *A modern law of Nations*, The Macmillan Company, New York, 1948, 124.

⁵³ *Kenya vs Somali*, International Court of Justice, Dissenting opinion of Justice Bennouna, 2019, page 1.

⁵⁴ I.C.J. Reports 1994, Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, pp. 21-22, para. 41.

⁵⁵ Article 76, UNGA *Convention on the Law of the Sea*, 10 December 1982.

Theme three: The jurisprudence of the International Court of Justice.

Understanding the jurisprudence of the International Court of Justice when it comes to maritime matters is of importance as it will help the author to provide an informed conclusion at the end of this dissertation. Jiuyong Shi in his paper *Maritime Delimitation in the Jurisprudence of the International Court of Justice* propounds that the ICJ follows a particular structure when deciding on maritime delimitation. He states that the first task for the Court in any maritime delimitation exercise is to determine the relevant coasts to be taken into account in the delimitation.⁵⁶ He states that the court affirms the International law principle that “the land dominates the sea” which means that the maritime rights derive sovereignty from the coastal State’s sovereignty on the land. Meaning that the ICJ in assessing who owns the land in contention in *Kenya vs Somalia* needs to assess all the relevant coast that are adjacent to the piece of land.

The second task the Court will do is to identify the baselines which are the starting point from which each maritime zone is to be determined. In cases where States either do not agree on the relevant baselines along the relevant coast or have not mapped out baselines, the Court will also be called upon to determine the baselines.⁵⁷ He posits that the rule of ‘equidistance-special circumstances’ in maritime delimitation has overtime gained some character of being customary law. The first case that the ICJ heard on maritime delimitation was the matter of *Qatar vs Bahrain* where the court stated that:

*‘The most logical and widely practiced approach is first to draw provisionally an equidistance line and then to consider whether that line must be adjusted in the light of the existence of special circumstances.’*⁵⁸

This is of importance to this case as Somalia argues that the line to be used is equidistant which is enshrined under article 15 of the United Nations Convention on the Law of the Sea (UNCLOS). Article 15 further envisages that States should first attempt to agree on maritime delimitation

⁵⁶ Jiuyong Shi, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, *Chinese Journal of International Law*, Volume 9, Issue 2, 1 June 2010, Pages 271–291, para 24.

⁵⁷ Jiuyong Shi, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, *Chinese Journal of International Law*, Volume 9, Issue 2, 1 June 2010, Pages 271–291, para 26.

⁵⁸ *Qatar vs Bahrain*, International Court of Justice, ICJ Report 112, ICGJ 81 (ICJ 1994), 1st July 1994.

before seeking out the Court or any other international Tribunal.⁵⁹ Jiuyong Shi further states that as per article 15 of UNCLOS, when the ICJ in deciding on a maritime delimitation case, it must first be pushed to consider whether there exists any agreement, formal or tacit meaning state practice, providing for the case before it or stating a method.⁶⁰

Malcom Shaw posits that article 38(1) of the Statute of the International Court of Justice has been widely recognized as the most authoritative statement for the provisions of sources of International Law.⁶¹ Article 38⁶² of the ICJ statute states that the Court (ICJ) shall be guided in giving judgements in disputes by:

1. International conventions
2. International custom
3. The general principles of law
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists
5. To decide a case *ex aequo et bono* (from equity **and** conscience).

Therefore, it is safe to conclude that: as brought forth by Malcolm Shaw and Jiuyong Shi; the International Court of Justice is guided by international agreements as they form part of sources of international law while listening to maritime disputes such as the *Kenya vs Somalia* matter brought before it. Thus, the court will be guided by International Convention and any other relevant source of law as provided under Article 38 of the ICJ Statute which are relevant in the case.

⁵⁹ Article 15, UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982.

⁶⁰ Jiuyong Shi, *Maritime Delimitation in the Jurisprudence of the International Court of Justice*, *Chinese Journal of International Law*, Volume 9, Issue 2, 1 June 2010, Pages 271–291, para 30.

⁶¹ Malcolm Shaw, *International Law*, Cambridge University Press, 2016, 6th ed, pg 70.

⁶² Article 38, United Nations, *Statute of the International Court of Justice*, 18 April 1946.

RESEARCH DESIGN.

Research Design and Methodology.

My research methodology will be the qualitative research method and doctrinal desktop research. A qualitative method was considered appropriate for an analysis of concepts and themes derived from the concept of territorial sovereignty to understand the underlining themes in maritime delimitation. The doctrinal desktop research aspect of my research will focus on the historical development of international law on specifically maritime law and territorial sovereignty, which shall assist me in coming up with a probable conclusion with regard to the decision of the International Court of Justice. This will entail finding the relevant information through internet services and reading books available at the institution.

Limitation to the study.

Regarding the Kenya vs Somalia case, which is the subject matter of this paper, the research is limited to other resources other than the case as the matter is still ongoing in the International Court of Justice. Part of the information regarding this case is also confidential in nature therefore this will be a limitation because the research cannot establish the exact factual circumstances when writing a conclusion.

Chapter Breakdown.

Chapter 1: *Introduction to Research.*

This chapter shall entail:

- **An introduction to the topic.** This shall provide a general introduction to the topic by stating the relevant facts concerning the topic.
- **Background of the study.** This shall provide the background to the topic by stating the context of what the topic bases its relevance upon.
- **Hypothesis.** This will state the idea that the topic is based on and what the topic assumes on.

- **Research questions** and specific **objectives**. This will state the questions that the research question will seek to answer and the objectives.
- **Importance of the study**. This part will state why the study is important.
- **Scope and limitations of the study**. This part will state the scope of the studies and the limitations that the author will face while doing research for the topic.
- **Theoretical framework** that is the theories that are connected to the research question.
- **Literature review** which shall have the scholars and sources that the writer wishes to rely on for every theme in the topic.
- **A research design** which shall include the research methodology to be used, limitation to the study and a chapter breakdown.

Chapter 2: *Territorial Sovereignty And Maritime Boundaries*

This chapter shall purpose to analyse the principle of Territorial sovereignty in International law. It will entail the origin of this principle, the workings of the principle today and its relation to maritime delimitation.

Breakdown of the Chapter:

- Chapter 2.1 Introduction.
- Chapter 2.2. Maritime Zones under UNCLOS.
- Chapter 2.3 Continental Shelf
 - Chapter 2.3.1: Development
 - Chapter 2.3.2 Establishment of Outer limits of Continental Outer Limits of Continental Shelf.
- Chapter 2.4 Territorial Sovereignty in Maritime
- Chapter 2.5 Historical factors in the Territorial Disputes between the Republic of Kenya and Somalia.
- Chapter 2.6 Conclusion

Chapter 3:

The Preliminary Considerations Of The Somalia Vs Kenya Case.

This chapter shall discuss the specific circumstances surrounding the *Somalia vs Kenya* case that is the President proclamation of 1979 and 2005; the MOU dated March 2009 between the states, Kenya's Reservation and the role Commission on the Limits of Continental Shelf to this case and historical considerations in the case.

Breakdown of the Chapter:

- Chapter 3.1 Introduction.
- Chapter 3.2 Historical maritime background leading up to the determination of this case.
- Chapter 3.3 Jurisdictional questions.
- Chapter 3.3.1 Introduction
- Chapter 3.3.2 The Memorandum of Understanding: Legality and Validity.
- Chapter 3.3.4 The MOU- The Role of the Commission
- Chapter 3.4 Conclusion

Chapter 4: Approaches to delimitation.

This chapter shall seek to identify the jurisprudence of the Commission on the Limits of Continental Shelf and the International Court of Justice by researching on previous rulings given by both institutions. The purpose of this is help the writer to come up with a probable judgment of the case before the ICJ.

Breakdown of the Chapter:

- Chapter 4.1 Introduction.
- Chapter 4.2 The International Court of Justice.
- Chapter 4.3 The line of Equidistance.
- Chapter 4.4 The Equitable Principle and Special Circumstance.
- Chapter 4.4.1 Length of coastline and the Proportionality factor.
- Chapter 4.4.2 Security Considerations.
- Chapter 4.4.3 Oil Deposits and oil wells.
- Chapter 4.4.4 Conduct of the States.
- Chapter 4.5 Conclusion.

Chapter 5: Conclusions and Recommendations.

This chapter shall purpose to conclude the finding of the dissertation and to make recommendations to the parties after coming up with a probable judgment of the International Court of justice in this matter.

CHAPTER 2:

TERRITORIAL SOVEREIGNTY AND MARITIME BOUNDARIES

2.1 Introduction.

Territorial sovereignty comprises a state's exclusive liberty to enforce control over its jurisdiction.⁶³ Naturally, the territorial jurisdiction of the nation includes power over the land's emerging environments and certain waters under its territories where such control can be exercised by the nation.⁶⁴ The concept of the sanctity of Territorial Sovereignty has been echoed and emphasized in several International Instruments⁶⁵ such as the United Nations Charter and its presence traces back to 15th Century and appears even today in legal instruments.

Under international law, the right of the Sovereign nation to declare sovereignty over a marginal sea belt has traditionally been accepted as alluding to the territorial waters of the coastal nation where the nation has the same liberties and control as its territory.⁶⁶ After several international meetings and conferences mainly in the 18th and 19th Century, many nations came to agree upon three nautical miles as the limit that a state has territorial sovereignty in its territorial waters.⁶⁷

However, most states felt that the margin of three nautical miles was not enough for them to assert such control and ensure security on their territories.⁶⁸ This led to the decline in importance of the concept of the independence of the high seas under International law, specifically in relation to natural reserves from the ocean and the ocean floor, as States started to establish a special kind of exclusive sovereignty over these areas in order to gain such resources by the end of the 1940s.⁶⁹

⁶³Kohen M, 'Is The Notion Of Territorial Sovereignty Obsolete?', 3 *Graduate Institute of International Studies* 1, 2000, 3.

⁶⁴Kohen M, 'Is The Notion Of Territorial Sovereignty Obsolete?', 4.

⁶⁵ See Article 10, *Covenant of the League of Nations*, article 2(4) *UN Charter*, UN General Assembly Resolution 3314 (XXIX) *Definition of Aggression*, Article 8bis *ICC Statute*, Article 301, *United Nations Convention on the Law of the Sea*.

⁶⁶Fell L, 'Maritime Contiguous Zones', 62 *Michigan Law Review* 5, 1964, 848.

⁶⁷ Fell L, 'Maritime Contiguous Zones,' 850.

⁶⁸ Fell L, 'Maritime Contiguous Zones,' 849.

⁶⁹ Cottier T, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge University Press, Cambridge, 2015, 45.

Nevertheless, this did not affect the doctrine that the sea ought to be free for all to navigate as this doctrine was internationally recognized as important.

The motivations behind the need to define the specific zones where states can exercise their sovereignty, were the increased concerns of the coastal states due to the technological improvements in the exploitation of marine resources to specifically ensure protection of their national economic interests in the natural resources, conservation and environmental concerns, and national security.⁷⁰ The oceans and natural resources are split between different states not only beyond the conventional 3-mile territorial boundaries of national coastal waters, but also between different overlapping marine areas and legal regimes.⁷¹

To understand the aspects of the Continental shelf, which is the key issue surrounding this case, one must first identify and understand the different maritime zones under International law as they confer different jurisdictional rights upon states and assist in determine the specific territory the Shelf occupies. The goal of this chapter is to trace the development of the concept of territorial sovereignty in maritime matters. The chapter contains three key sections. The first section provides a trace of the current legal framework of the development of the different maritime zones and delves to analyze the zone of Continental Shelf which is the subject matter of the case before the International Court of Justice. The second section deals with the principle of Territorial Sovereign and its relation to maritime boundaries and the final section deals with the historical developments of the territorial Sovereignty of Kenya and Somalia.

Chapter 2.2. Maritime Zones under UNCLOS.

Following the decline of the marginal limit of territorial waters, States have conferred on high seas zones a special type of jurisdiction which has contributed to the need to establish the various types of maritime regions and the clear liberties afforded to coastal states.⁷² The United Nations Convention on the Law of the Sea establishes five key generations of successive maritime zones⁷³

⁷⁰ Hutchinson D, 'The Seaward Limit to the Continental Shelf Jurisdiction in Customary International Law', 56 *British Yearbook of International Law* 1, 123.

⁷¹ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 46.

⁷² Fell L, 'Maritime Contiguous Zones,' 849.

⁷³ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 47.

which are: territorial sea⁷⁴, adjacent zone⁷⁵; continental shelf⁷⁶; exclusive economic zone (EEZ)⁷⁷; and the area⁷⁸.

As noted above, the coastal nation has the freedom to impart its sovereignty outside its land territory and domestic bodies of water in its neighboring marginal belt typically described as territorial waters⁷⁹ which, after the United Nations Convention on the Law of the Sea came into effect in 1982, changed the limit to 12 nm from the traditional 3 nm.⁸⁰ On the other hand, the contiguous zone is the immediate adjoining area to the territorial sea and under UNCLOS should not surpass 12 nautical miles from this territorial sea.⁸¹ The contiguous zone's aim is to provide the coastal state with a buffer to effectively stop and prosecute land and sea invasion.⁸²

The Exclusive Economic Zone was created as a result of the creation of exclusive fishing areas, which gradually became the 200 nautical miles off the Exclusive Economic Zones.⁸³ Under Article 56 of UNCLOS, the Exclusive Economic Zone (EEZ) is a zone contiguous to the 200 nm territorial sea in which a coastal state can claim some sovereign rights over the discovered natural resources.⁸⁴ Within the specified area, the coastal states have control over these resources.⁸⁵

The High seas is founded on the principle that the seas should be free for all to navigate. This is commonly understood to apply to parts of the ocean that are not contained in the internal waters of a coastal nation; the exclusive economic zone; or a state's territorial waters. The high seas is beyond the claim of territorial jurisdiction of any state.⁸⁶

⁷⁴ Article 3, *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397.

⁷⁵ Article 33 (Section 4), Part XI, *United Nations Convention on the Law of the Sea*.

⁷⁶ Article 76 (Part VI), *United Nations Convention on the Law of the Sea*.

⁷⁷ Article 55 (Part V), *United Nations Convention on the Law of the Sea*.

⁷⁸ Part XI, *United Nations Convention on the Law of the Sea*.

⁷⁹ Article 2, *United Nations Convention on the Law of the Sea*.

⁸⁰ Article 3, *United Nations Convention on the Law of the Sea*.

⁸¹ Article 33(1), *United Nations Convention on the Law of the Sea*.

⁸² Article 33(1A), *United Nations Convention on the Law of the Sea*.

⁸³ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 48.

⁸⁴ Article 56, *United Nations Convention on the Law of the Sea*.

⁸⁵ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 48.

⁸⁶ Article 89, *United Nations Convention on the Law of the Sea*.

CHAPTER 2.3 Continental Shelf

Chapter 2.3.1: Development

Following the first Conference of the United Nations on the Law of the Sea (UNCLOS I) in 1958 which culminated in the creation of the Conventions of the Law of the Sea in 1958, the Continental shelf first developed as a concept under treaty law.⁸⁷ Subsequently, two key factors resulted in the renegotiation of the concept of the continental shelf: the concern that member states would use the seabed as a hideout for nuclear weapons and the emergence of new opportunities of deep-sea minerals extraction.⁸⁸ These issues resulted in the Third Sea Law Conference meeting of the United Nations (UNCLOS III), which culminated in the adoption of what we now call UNCLOS.⁸⁹

Initially, interest focused primarily on oil and gas deposits within the Exclusive Economic Zone.⁹⁰ However, this led to an increase in interest on the continental shelf due to the increase in offshore oil and gas exploitation by nearly 50 percent by the 1990s.⁹¹ Furthermore, the continental shelf also has numerous opportunities for dredging sand and gravel,⁹² for setting out sedentary fisheries,⁹³ presence of fertilizers and for mining valuable polymetallic nodules which are vital elements in steel production.⁹⁴

Additionally, it was identified that the feature of the Continental shelf of being characterized to be of shallow waters not only benefited immensely the extraction of mineral resources, but also assisted in the legal protection of the rights and sovereignty of the coastal states.⁹⁵ The continental shelf of a coastal nation is defined as comprising the ocean floor and subsoil of submerged zones

⁸⁷ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 49.

⁸⁸ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 49.

⁸⁹ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 50.

⁹⁰ Krueger R and Nordquist M, 'The Evolution of the 200-mile Exclusive Economic Zone: State Practice in the Pacific Basin', 19 *Virginia Journal of International Law* 1, 1979, 321.

⁹¹ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 67.

⁹² Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 67.

⁹³ Article 2(4), International Law Commission, *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311.

⁹⁴ Post A, *'Deep Sea Mining and the Law of the Sea'*, Martinus Nijhoff Publishers, The Hague, 1983, 46.

⁹⁵ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 76.

extending beyond its territorial sea by natural result of its territorial boundaries to the outer parts of the continental rim at a range not exceeding 200 nautical miles.⁹⁶

Continental shelf jurisdiction's principle of natural prolongation and the *ipso jure* protection are intertwined. The meaning of the shelf's *ipso jure* rights is characterized as implying that these rights are granted to the coastal state by statute rather than by actual occupation.⁹⁷ The doctrine of natural prolongation, now reiterated in Article 76(1) of UNCLOS, was first voiced in the Truman Proclamation of 1945⁹⁸ by America and, subsequently, asserted in the International Court of Justice in the *North Sea Case*, that the liberties of the coastal state over its shelf are the natural consequence of a legitimate extension of the country's sovereignty.⁹⁹ The legal theory was based on the principle that the *sea is dominated by the land*¹⁰⁰

This doctrine emerged in order to ensure that the coastal states who were not in a position to enforce their territorial rights by either occupying the territory or preventing such occupation by others were protected.¹⁰¹ According to Article 77(3) of UNCLOS, this principle is further articulated that the rights of the coastal state over the continental shelf are not contingent on possession, whether real or notional, or any express declaration over the land.¹⁰²

Geographically, the continental shelf consists of tectonic terraces between coasts, continents and deep seabeds that are typically distinguished in three specific zones:¹⁰³

1. *The Continental Shelf* is made up of a relatively narrow and shallow surface with depths of 130 m and 200 m. The shelf covers approximately 7.5 per cent of all submarine soil which in itself amounts to some 18 per cent of the globe's terrace and 5 per cent of the overall surface. Comprising 11 million square miles (27 million km²), the

⁹⁶ Article 76(1), *United Nations Convention on the Law of the Sea*.

⁹⁷ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 77.

⁹⁸ Scharf M, 'The Truman Proclamation on the Continental Shelf, in *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, ' Cambridge University Press, Cambridge, 2013, 110.

⁹⁹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment, ICJ Reports 1969, 36.

¹⁰⁰ *Aegean Sea Continental Shelf (Greece v Turkey)*, Judgment, ICJ Reports 1978, 36.

¹⁰¹ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 80.

¹⁰² Article 77(3), *United Nations Convention on the Law of the Sea*.

¹⁰³ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 70.

combined area of shelves equal the size of the entire African continent. Together, the shelf and slope form the continental terrace.¹⁰⁴

2. Adjacent to the terrace and linked by the shelf edge, *The Continental Slope* descends at an average angle of 3 to 4 degrees to depths of 1,500 m to 3,500 m (others: 1,500 m, 2,000 m on average). This zone extends 40 km to 50 km seaward.¹⁰⁵
3. *The Continental Rise* makes a gentle decline seaward from its border with the continental slope. The rise reaches the deep seabed at depths of 15,000 feet to 17,000 feet or 1,500 m to 5,000 m according to others (5,000 m on average). The continental margin constitutes of the terrace and the rise.¹⁰⁶

Initially, the shelf term only included on the continental shelf, but now the meaning has been applied to the continental slope and continental rise.¹⁰⁷ The continental shelf theory also grants the state exclusive liberties to discover and exploit the natural minerals located on the shelf¹⁰⁸ and not territorial sovereignty over the land.¹⁰⁹ In other words, the interests of the coastal state must not impinge or contribute to unjustifiable infringement with the principle of freedom of navigate, and other freedoms and liberties of other countries provided under the Convention.¹¹⁰ However, these rights go hand in hand with the obligation of other states to refrain from exploring or exploitation of another state's shelf's natural resources without their consent.¹¹¹

Chapter 2.3.2 Establishment of Outer limits of Continental Outer Limits of Continental Shelf.

Introduction

The importance of the Continental shelf cannot be emphasized any further. Due to the increased rate of resource exploitation discovered on the shelf and the profits they would receive from them, the need for coastal states to secure such interest in ascertaining their maritime boundaries and

¹⁰⁴ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 70.

¹⁰⁵ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 70

¹⁰⁶ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 70.

¹⁰⁷ Article 76, *United Nations Convention on the Law of the Sea*.

¹⁰⁸ Article 77(1), *United Nations Convention on the Law of the Sea*.

¹⁰⁹ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 70.

¹¹⁰ Article 78(2) *United Nations Convention on the Law of the Sea*.

¹¹¹ Article 77(2), *United Nations Convention on the Law of the Sea*.

thus enforce their territorial rights has increased.¹¹² The issue at hand is a land dispute, which is a small region off the African coast, some 100,000 km² in the Indian Ocean, which has a significant oil and gas reserve and presently is part of the oil exploration blocks L5 and L28 in Kenya.¹¹³ The two countries definitely have a great deal of interest in the disputed territory not only because of presence of such profitable minerals, that is oil and gas, but also because of the sanctity that states place on the control their territories under international law.

In establishing these boundaries, the coastal states shall apply descriptions of these restrictions to the Continental Shelf Boundaries Commission in compliance with Article 76 of UNCLOS.¹¹⁴ This submission must be accompanied by sufficient scientific grounds and technical data to set such limits¹¹⁵ and must be submitted within 10 years of the Convention's commencement.¹¹⁶

Nevertheless, this time limit was extended by the Meeting of State Parties to the UNCLOS Convention in 2001 regarding the ability of developing countries, such as the two contesting states in this article, to fulfill their conditions under the Convention.¹¹⁷ The lack of financial and technological resources and the required capability and skills faced by developing countries were some of the reasons that led to this inability to meet the requirements. This paper would proceed to review submissions of the Republic of Somalia and Kenya to the Commission.

Chapter 2.3.3.1 Somalia Outer Limits Submissions.

In its report to the Commission in 2014, the Republic of Somalia stated that they faced several challenges such as lack of financial and technical support and that they as a country also face long periods of political and security instability which undermined their ability to submit their submissions of their Shelf as per UNCLOS.¹¹⁸

¹¹²Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 72.

¹¹³<<https://www.businessdailyafrica.com/economy/Kenya-pushes-back-border-row-Somalia/3946234-4234566-umijm1/index.html>>-

¹¹⁴ Article 4, Annexure II, *United Nations Convention on the Law of the Sea*.

¹¹⁵ Article 4, Annexure II, *United Nations Convention on the Law of the Sea*.

¹¹⁶ Article 4, Annexure II, *United Nations Convention on the Law of the Sea*.

¹¹⁷ *United Nations Convention on the Law of the Sea, Meeting of States Parties*, 29 May 2001 SPLOS/72.

¹¹⁸ *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya)*, Executive Summary (Somalia), ICJ Report 2019, 6.

The Republic of Somali's argument is that the continental margin of Somalia is defined by a narrow continental shelf that stretches marginally to the north and stretches south at least to an equidistance line drawn from its frontier.¹¹⁹ Equidistance is defined as the line of each point equidistant from the closest baseline points from which each of the two States defines the territorial sea.¹²⁰ It's imperative to understand that such unique steps that the Republic of Somalia has proposed bring the disputed land under its control.

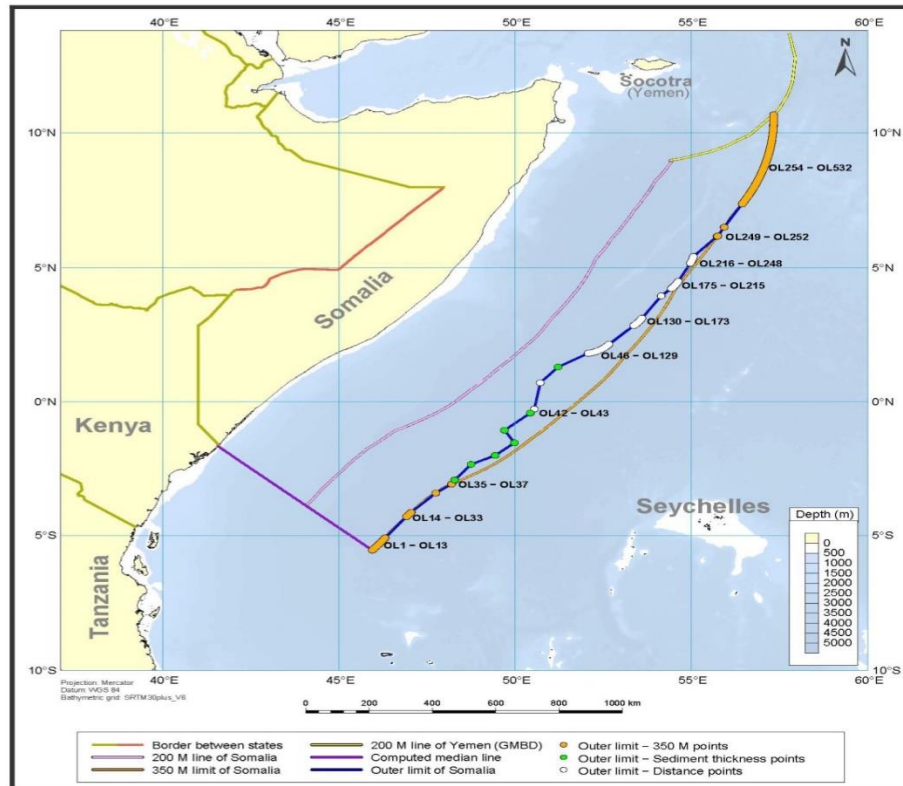


Figure 6. The outer limits of the continental shelf of Somalia.

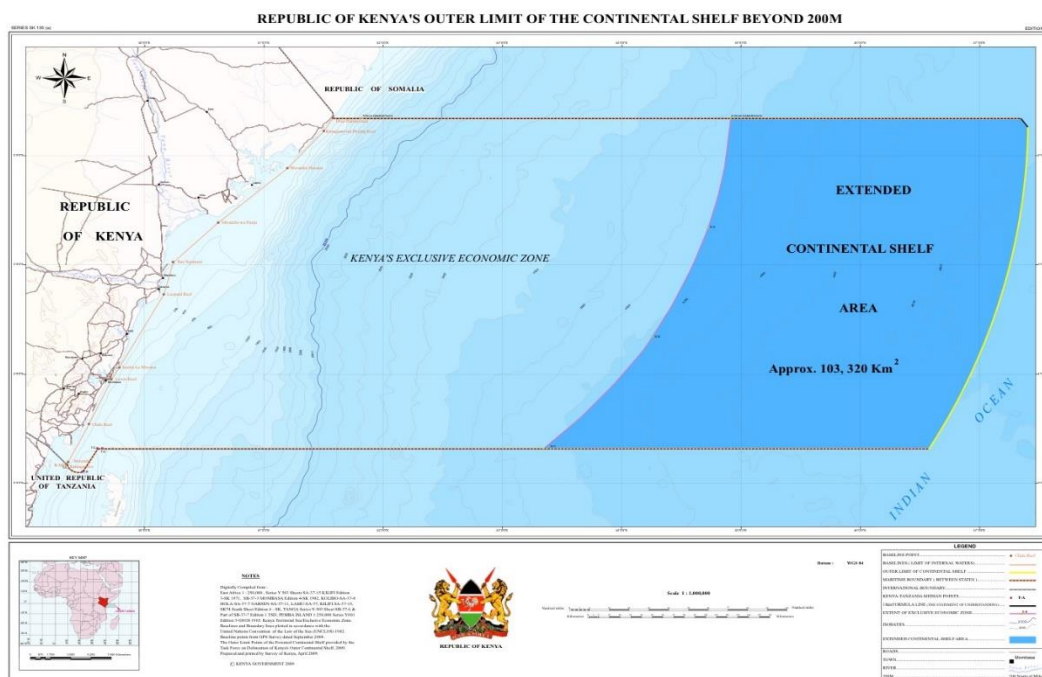
¹¹⁹ *Somalia vs Kenya*, ICJ, 7.

¹²⁰ Article 12, *ILC Convention on the Continental Shelf*.

Chapter 2.3.3.1 Kenya's Outer Limits Submissions.

Kenya's submission adopted the specific method used in the Statement of Understanding of UNCLOS to describe the outer edge of the continental rim.¹²¹ The Statement of Understanding, which is the last action of the Sea Law Conference of the Third United Nations, provides that the proper way is to use straight lines when determining on the outer limits of the continental shelf that do not exceed 60 nautical miles within fixed points.¹²²

Moreover, the Republic of Kenya protested that if they decide on their outer limits in compliance with UNCLOS Section 76(4) specific provisions, an inequity would arise.¹²³ Through a presidential decree signed by both countries, Kenya requested that the maritime border with Somalia be along a parallel latitude, as traditionally known since 1979.¹²⁴

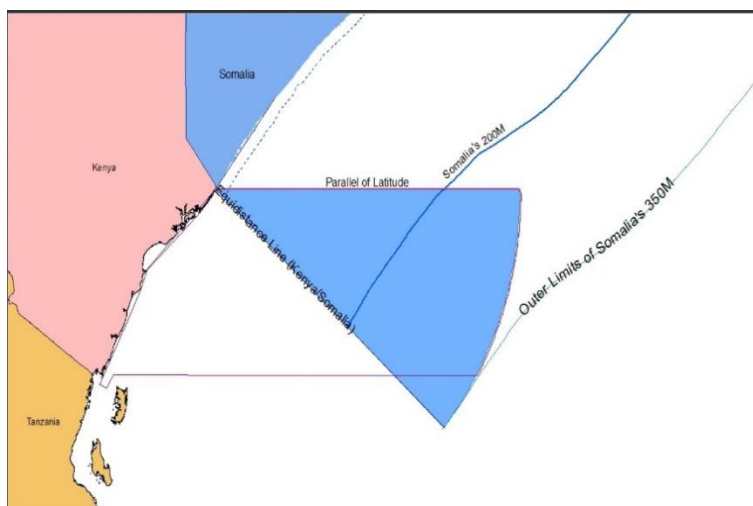


¹²¹ *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya)*, Executive Summary (Kenya), ICJ Report 2019, 2.

¹²² UN The Final Act of The Third United Nations Conference on The Law of The Sea, *Statement of Understanding, Concerning A Specific Method, To Be Used In Establishing the Outer Edge Of The Continental Margin*, 1999.

¹²³ *Somalia vs Kenya*, ICJ.

¹²⁴ *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya)*, Press release (Kenya), ICJ Report 2019, 4.



Chapter 2.4 Territorial Sovereignty in Maritime

Territory is the very nature and sovereignty of the government.¹²⁵ Through demarcating the human and physical resources within which the government has some control, it provides a clear structure for enforcing state power.¹²⁶ State property is the specified portion of the surface of the earth subject to the authority of the state. The advent of territorial sovereignty within customary international law can be traced back to the Peace of Westphalia 1648; it marked the end of the thirty-year religious war and contributed to the rise of secular authorities such as states as opposed to religious institutions.¹²⁷ Because of this importance on the territory, states are prepared and have taken up arms in order to safeguard their territory.

A.W Heffter¹²⁸ states that the principle of territory (*ius territorii*) grants a right to integrity to states that is inviolability of such territory. The first document to pave the way for territorial integrity was the Convention of the League of Nations, which required States to protect and maintain territorial integrity and the established political freedom from foreign interference of all member

¹²⁵ Mann M, 'The autonomous power of the state : its origins, mechanisms and results,' 25 *European Journal of Sociology* 2, 1984, 187.

¹²⁶ Mann M, 'The autonomous power of the state,' 189.

¹²⁷ Shaw M, *International Law*, Cambridge University Press, Cambridge, 2008, 2.

¹²⁸ Marxsen C, 'Territorial Integrity in International Law: Its Concept and Implications for Crimea,' 25 *Heidelberg Journal of International Law* 1, 2015, 8.

nations.¹²⁹ Under international law, the obligation to refraining from using aggression that threatens any country's territorial integrity is currently laid down in stone.¹³⁰

Since then, a significant number of UN resolutions have integrated the principle of territorial integrity, as well as multilateral and bilateral agreements. Safeguarding the territorial integrity of a particular State guarantees the survival of a country within territorial boundaries and any arbitrary transfers by invasion of other States to the region is in violation of international law.¹³¹ The preservation of a State's territorial integrity requires more than just the enjoyment of that territory, but includes the protection against irreversible alteration by other states.¹³² This shows the importance of demarcating borders that may be subject to state jurisdiction, not only those found on territory, but also those in waters such as the exclusive economic zone and the continental shelf. In the *1978 Aegean Sea Continental Shelf case*, the ICJ confirmed the relationship between territorial sovereignty and maritime delimitation by stating¹³³:

(The question for decision is whether the present dispute is one "relating to the territorial status of Greece", not whether the rights in dispute that is continental shelf are legally to be considered as "territorial" rights; and a dispute regarding entitlement to and delimitation of areas of continental shelf tends by its very nature to be one relating to territorial status. The reason is that legally a coastal State's rights over the continental shelf are both appurtenant to and directly derived from the State's sovereignty over the territory abutting on that continental shelf.)

The courts further emphasized the concept of natural prolongation established in the case of *Greece vs Turkey* in the ICJ, that it is only by dint of the authority of the coastal state on the land that the freedoms of extraction and production in the continental shelf can be attributed to it within international law.¹³⁴ The delineating of maritime territory includes the very same emphasis placed on the concept of sovereignty and perpetual possession by land territory.

¹²⁹ Article 10, *Covenant of the League of Nations*, 28 April 1919.

¹³⁰ Article 2(4), *Charter of the United Nations*, 24 October 1945, 1 UNTS 16.

¹³¹ Marxsen C, 'Territorial Integrity in International Law', 10.

¹³² Marxsen C, 'Territorial Integrity in International Law', 11.

¹³³ *Aegean Sea Continental Shelf*, ICJ, 36.

¹³⁴ *North Sea Continental Shelf Cases*, ICJ, 20.

Chapter 2.5 Historical factors in the Territorial Disputes between the Republic of Kenya and Somalia.

The roots of the present dispute date back to the nineteenth century, when Great Britain, Italy and France sought to outmaneuver each other in the race for what is referred to today as the Horn of Africa.¹³⁵ The growing need for a separate coal station in the Suez Canal drove the English, French, Italians into the present day East Africa Region.¹³⁶ Nevertheless, at the end of World War II, all Somali lands had been *de facto* controlled by the British Colonial Government. The then British Foreign Minister proposed the unification of all Somali land into one territory, which was consequently disregarded by the other powers who had interest in East Africa that is the French, the Italians, and the Ethiopia under Menelik II.¹³⁷ Imperial Europe's division of Africa created numerous borders that separate peoples from the same communities into a circumstance that could potentially lead to irredentist claims throughout the continent.¹³⁸

In 1960, the former Somali territories occupied by British and Italy gained independence and consequently establishing the current Somali Republic.¹³⁹ This union of regions governed by different colonial powers was a rare occurrence and success in African, and this integration, attested to the importance of the unification of the Somali people.¹⁴⁰ Unification helped instill in Somalis a sense of identity who had come to question the colonial splits. Their fragmentation by non-Muslim colonial powers had reinforced Somali sentiments of national unity shown in the demands of the Somali Republic to integrate all Somali-occupied lands.¹⁴¹

The call for irredentism of the Somali People was seen in the intentions of the new Somali state to once again integrate Ethiopia's Ogaden region with the Kenya's Northern Frontier District, into their current territory. But diplomacy, guerilla warfare, propaganda, and direct conflicts spurred

¹³⁵ Haile G, 'The Unity and Territorial Integrity of Ethiopia', 24 *The Journal of Modern African Studies* 3, 1986, 466.
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¹³⁶ Laitin D, 'International Perspective: Tensions in the Horn of Africa', 23 *Africa Today* 2, 1976, 30.

¹³⁷ Laitin D, 'Tensions in the Horn of Africa', 30.

¹³⁸ Kromm D, 'Irredentism in Africa: The Somali-Kenya Boundary Dispute', 70 *Transactions of the Kansas Academy of Science* 3, 1967, 359.

¹³⁹ Laitin D, 'Tensions in the Horn of Africa', 32.

¹⁴⁰ Laitin D, 'Tensions in the Horn of Africa', 32.

¹⁴¹ Kromm D, 'Irredentism in Africa,' 360.

them to fail.¹⁴² Barely incorporated into Kenya, the British were reluctant even to accept Somali independence of the northern Frontier Region. While about 240,000 of the 388,000 residents are Somalis in the larger NFD, nearly all of the population is Somali in the current northeastern province.¹⁴³

In independence talks with Kenya, the Northern Frontier District cessions were just a minor problem for the British. Nonetheless, at the London Constitutional Conference in 1962, the Somali Nation voiced its perspective through the Northern Province People's Progressive Party, where it was determined that to ascertain the fate of the disputed region, a commission was to be established.¹⁴⁴

The commission indicated that the large percentage of the region, if not all, was occupied by the Somali. While this was happening, on another panel, Independent Kenya was busy drawing borders of electoral regions following its independence.¹⁴⁵ On 8 March 1963, the United Kingdom declared the establishment of the North East Territory from the Northern Frontier District. This region presented the Somalis with a measure of democratic representation and was equivalent to Kenya's other six administrative regions. Displeased with this approach, on March 18, 1963, the Somali Republic cut all diplomatic ties with the British.¹⁴⁶

By 1963, Kenya's leaders, including KANU's Jomo Kenyatta and KADU's Ronald Ngala, and the British were determined to retain Kenya's Northern Frontier District. This culminated in the emergence of rebel groups that the Somali government supported the effort to regain control of the occupied region.¹⁴⁷ These rebel groups are what we commonly known as 'Shiftas' a word meaning bandit in Somali. The then Prime minister of Kenya, Jomo Kenyatta, had established emergency rules across the Northern region in response to the violent action of the locals.¹⁴⁸ The

¹⁴² Laitin D, 'Tensions in the Horn of Africa', 32.

¹⁴³ Laitin D, 'Tensions in the Horn of Africa', 32.

¹⁴⁴ Kromm D, 'Irredentism in Africa,' 360.

¹⁴⁵ Laitin D, 'Tensions in the Horn of Africa', 34.

¹⁴⁶ Kromm D, 'Irredentism in Africa,' 343.

¹⁴⁷ Laitin D, 'Tensions in the Horn of Africa', 32.

¹⁴⁸ Kromm D, 'Irredentism in Africa,' 342.

Somalis argued that there was no other place in Africa where a large, culturally homogeneous nation was fragmented and that their intention was to unite their people.

In addressing the Somali dilemma at the inception of the Organization for African Unity in Addis Ababa in 1963, the Kenyan envoy stressed on the doctrine of the Pan-Africanism to protect their territory and not cede the territory to Somalia. Several states echoed Kenya's sentiments by emphasizing on the sanctity of a state's territorial integrity.¹⁴⁹

The refusal of the Republic of Kenya to give the Northern region the cession they have been asking for since the coming of colonial powers and the Shifta wars of 1963-1967 cannot emphasize the tension that the two countries have had over their territories. This tension can be attributed to the reluctance of the Republic of Somalia to engage in any diplomatic conversation with regard to the maritime dispute despite several requests by the Republic of Kenya.

Conclusion.

When it is the role of a court such as the International Court of Justice to determine a case, the tribunal seeks to limit itself to the relevant legal factors when determining the case before it. Nonetheless, under the law of maritime delimitation, parties may be expected to negotiate in good faith. This is where other considerations come into play, such as historical and political inclinations. Despite stressing the importance of laws such as treaties and conventions in governing the conduct of state parties, the realm of international law is crowded with political issues that influence states' acts.

This can be seen in the actions of the parties involved in this dissertation Kenya and Somalia. Their actions, in particular Somalia's unwillingness to participate in any sort of negotiation with Kenya, are influenced by political and historical factors that have caused them to act this way. Due to Kenya's prior refusal to cede the largely Somali-occupied Northern Frontier Region, Kenya not only prompted the case at the International Court, but also contributed to tensions between the two countries.

¹⁴⁹ Kromm D, 'Irredentism in Africa,' 342.

These historical and political tensions between Kenya and Somalia reaffirm the sanctity that states place on Territorial Sovereign. This reverence has not only sparked conflicts in the frontlines but has also influenced how international states interact in diplomatic negotiations. The principle of territorial sovereignty can no longer be attributed to land-based territory, but also to other areas on the sea such as territorial waters, the Exclusive Economic Zone and the Continental Shelf.

The Court examined *travaux préparatoires* and the circumstances under which the MOU was concluded, in accordance with Article 32 of the Vienna Convention and considers that the MOU does not provide a procedure for the settlement of maritime boundary dispute between the Parties.¹⁵⁰ The Continental Shelf has emerged as a highly contested area that States today want to exert their sovereignty on. This interest has increased not only because of the presence of shallow waters but also because of the abundance of natural resources on the shelf. The contested area in this case is part of the oil blocks of Kenya which is currently under the control of Kenya.

The two countries have submitted their submissions to the Commission on the limits of the Continental Shelf where upon reading their Executive summaries, each country has placed the disputed area under their territory. The disparity stems from the method of demarcation used to ascertain the maritime boundary. The Republic of Somalia argued that a line of equidistance ought to be used to determine the precise territory under which the contested area lies, while the Republic of Kenya used a parallel line in order to define its territory. There is indeed a question arising as to the appropriate demarcation method which ought to be used under maritime boundary law.

In the next chapter of this dissertation, before examining a specific method to be applied for interpretation of the maritime boundary, it is intended first, to analyze the protracted nature of the case by analysing the history before the case was taken to the ICJ, secondly, it will discuss the context of other maritime boundaries that are relevant to the case such as the maritime boundary of Tanzania and lastly the chapter addresses the role of Court and the Commission on the Limits of Continental Shelf to the case.

¹⁵⁰*Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 4.

CHAPTER 3.

THE PRELIMINARY CONSIDERATIONS OF THE SOMALIA VS KENYA CASE.

Chapter 3.1 Introduction.

In current international affairs, the significance of maritime territories has grown in the past decade with the extension of national maritime sovereignty borders.¹⁵¹ An area of sea can be worth more than an area of barren land, especially if on the sea floor there is presence of oil or gas.¹⁵² Thus, every coastal nation is therefore conscious of its maritime territories for the discovery and development of both its natural and nourishment resources.¹⁵³ Once there is a maritime disagreement between countries, negotiation between them is the first and foremost step to settle the dispute. Often, the parties to the dispute fail to reach an agreement.

In several areas, maritime border conflicts arise as a result of disparate claims in specific maritime areas and disputing assertions of territorial sovereignty over the zones.¹⁵⁴ It is known to be a protracted maritime conflict at a period when the maritime conflict remains uncertain for quite a while or when it cannot be resolved within a sensible time frame.¹⁵⁵ Due to different national and international tensions, a dispute is delayed to be resolved once nations fail to reach a final agreement. The previous chapter of this dissertation analyzed the historical aspects such as the *Shifita wars* of the 1960's that resulted in the tensions between the two states with regard to their territorial sovereignty.

This chapter shall purpose to focus primarily on the material issues of this case by first analyzing historical maritime background leading up to the determination of this case, which greatly influenced the protracted nature of the case today. The chapter shall also focus on two other sections. The second part of this chapter shall analyse the preliminary consideration of the case

¹⁵¹ Shaw M, '*International law*', 345.

¹⁵² Hasan M, Jian H, Alam W and Chowdhury K, 'Protracted maritime boundary disputes and maritime laws', 2 *Journal of International Maritime Safety, Environmental Affairs, and Shipping* 2, 2018, 89.

¹⁵³ Hasan M, Jian H, Alam W and Chowdhury K, 'Protracted maritime boundary disputes and maritime laws', 89.

¹⁵⁴ Hutchinson D, 'The Seaward Limit to the Continental Shelf Jurisdiction in Customary International Law', 123.

¹⁵⁵ Hasan M, Jian H, Alam W and Chowdhury K, 'Protracted maritime boundary disputes and maritime laws', 90.

before the court that is the question of the Jurisdiction of the Court relating to the Memorandum of Understanding and article 282 of UNCLOS and the last section shall delve on the role of the International Court of Justice and the Commission on the Limits of Continental Shelf to this case.

Chapter 3.2 Historical maritime background leading up to the determination of this case.

On 28 August 2014, the Republic of Somalia initiated the maritime case against the Republic of Kenya regarding a conflict over the demarcation of a single maritime border between Somalia and Kenya,¹⁵⁶ but this is not the beginning of the maritime dispute between the two countries. The Republic of Kenya was very instrumental in the development of the Exclusive Economic Zone in its inception in the 1970's.¹⁵⁷ Following the completion at the end of 1960 of the First and Second Conferences of the United Nations on the Law of the Sea, the 1970 Montevideo Declaration on the Law of the Sea occurred as a result of a proposal by the United Nations Secretary-General encouraging States to voice their opinions on the convening of a new Conference on the Law of the Sea.¹⁵⁸

The Montevideo Declaration provides, principally, two fundamental principles:¹⁵⁹

1. The freedom of coastal nations to make use of the sea's natural minerals adjoining to their coastlines and their seafloor in an attempt to foster the maximum advancement of their markets and to increase the quality of life of their citizens and
2. The right to determine the boundaries of their maritime jurisdiction in line with their geographical features and the necessity for their reasonable exploitation. In areas under sovereign territorial control, the Declaration also preserved the principle of freedom of navigation of seas.¹⁶⁰

¹⁵⁶ *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya)*, Oral Preliminary Objections (Kenya), ICJ Report 2019, 13.

¹⁵⁷ Nandan S, 'The Exclusive Economic Zone: A Historical Perspective', 1 *Food and Agriculture Organization of the United Nation* 1, 1987, 160.

¹⁵⁸ Lay, S.H., Churchill, R. Nordquist, M, 'New directions in the Law of the Sea, Documents', 1 *Oceana Publications* 1, 1973, 235.

¹⁵⁹ Lay, Churchill, Nordquist, 'New directions in the Law of the Sea, Documents', 235.

¹⁶⁰ Nandan S, 'The Exclusive Economic Zone: A Historical Perspective' 162.

Initiatives to initiate communication with Asian countries and Africa were drawn at the Montevideo meeting. Consequently, the Asian-African Legal Consultative Committee (AALCC) met in 1970, of which Kenya was a participant, culminating in the production of a working paper drafted by Kenya on "The Exclusive Economic Zone Theory," which aimed to establish the main features of the Exclusive Economic Zone.¹⁶¹

In 1972, the Kenyan delegation submitted a policy paper entitled "Draft Articles on Exclusive Economic Definition" centered on a concept that gave the coastal nation sovereign powers to exert jurisdiction over the natural resources and environmental control in an economic zone not exceeding 200 nautical miles.¹⁶²

Following from this, the Republic of Kenya did not waste time as in 1979 the then President Daniel Arap Moi through a Presidential Proclamation proclaimed its Exclusive Economic Zone (EEZ)¹⁶³ which was further extended to 350 nm in 2009. Kenya exercised uncontested jurisdiction in this disputed area off the shore of the Indian Ocean since this proclamation. Furthermore, the Republic of Kenya submitted that they only conducted exploratory activities of a transitory character¹⁶⁴ in the disputed area which cause no irreparable prejudice to the rights of other States.¹⁶⁵

On 7th April 2009, the Republic of Kenya and the Transitional Federal Government of the Somali Republic signed a Memorandum of Understanding which first recognized the unresolved nature of the maritime dispute and placed a "no objection" with regard to the submissions made to the Commission.¹⁶⁶ This was the first step towards finalization of the maritime boundary dispute which opened the way for future cooperation between the two States.

However, tensions had already risen between the two States with regard to the MOU, as per the innumerable meetings which followed later. The Republic of Kenya maintains that a heated dispute over the MOU's no-objection provision arose from a misconception sparked by the Al-

¹⁶¹ Asian-African Legal Consultative Organization, *Report of the Sub-Committee on the Law of the Sea by the Asian-African Consultative Committee*, 1971, 20.

¹⁶² Asian-African Legal Consultative Organization, *Report of The Thirteenth Session of the Asian-African Consultative Committee*, 1972, 19.

¹⁶³ Article 1, *Proclamation by the President of the Republic of Kenya* (1979) Ken 4655.

¹⁶⁴ *Somalia vs Kenya*, ICJ, 27.

¹⁶⁵ *Aegean Sea Continental Shelf (Greece v Turkey)*, Judgment, ICJ Reports 1978, 38.

¹⁶⁶ *Somalia vs Kenya*, ICJ, 54.

Shabaab militia group that the Somalia government was giving up its territories.¹⁶⁷ This can be observed after a meeting held on 6 June 2013 in the Somali Council of Ministers that, following the Somalian letter dated 4 February 2014 to the United Nations, rejected any negotiations on marine demarcation of the continental shelf with Kenya¹⁶⁸ and repudiated the MOU by objecting to Kenya's CLCS submission.¹⁶⁹

Following from that, Kenya initiated a meeting in March 2014 where the purpose of the meeting was to persuade Somalia to comply with the MOU by withdrawing its objection. Compliance with the MOU was an urgent matter for Kenya as the Commission was scheduled to consider Kenya's submission in September 2014.¹⁷⁰ The record of that first meeting is clear, Somalia refused to even discuss the MOU; it demanded that any mention of the MOU be removed from the agenda.¹⁷¹ In a spirit of compromise, Kenya agreed to postpone this discussion to a second technical level meeting to be held in June 2014.¹⁷²

Consequently, before the last Technical Meeting, two crucial developments transpired, the Commission stated that it was not in a position to undertake the establishment of a committee at that moment; secondly, on 21 July 2014, Somalia made its own application to the CLCS at the exact summit where it barred Kenya's submission.¹⁷³ Kenya responded by holding a second meeting which took place on 28 and 29 July 2014 to encourage Somalia's compliance with the "no objection" agreement under the MOU, just four months after the first meeting. Both delegations agreed that in order to move forward, the meetings needed to be structured with agreed principles to guide negotiations.¹⁷⁴ This plainly contradicts Somalia's contention that negotiations had been exhausted.

The Parties agreed to reconvene for a third technical level meeting to be held on 25 and 26 August 2014 in Mogadishu. However, due to unforeseeable security reasons, Kenya communicated to

¹⁶⁷ *Somalia vs Kenya*, ICJ, 56.

¹⁶⁸ *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya)*, Preliminary Objections (Kenya), ICJ Report 2019, 90.

¹⁶⁹ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ, 56.

¹⁷⁰ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ, 51.

¹⁷¹ *Somalia vs Kenya*, Preliminary Objections (Kenya), 31.

¹⁷² *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ, 51.

¹⁷³ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ, 70.

¹⁷⁴ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ, 70.

Somalia on 23 August that it will be unable to attend the meeting and called for another date.¹⁷⁵ A letter from Somalia to Kenya dated 26 August 2014 affirmed that both States had concurred to an extra round of negotiations and conveyed the deep commitment of Somalia to solve the ongoing maritime boundary conflict in a civil manner.¹⁷⁶ Notwithstanding this assertion, the Republic of Somalia filed its case to the Court on 28 August 2014, and this is within which this case commences before the ICJ.

Chapter 3.3 Jurisdictional questions.

Chapter 3.3.1 Introduction

Due to the nature of international law, the parties must express their consent to the treaty at all stages, or, of particular importance to this case, to the jurisdiction of a court.¹⁷⁷ Before the merits of the case are heard, the parties are given the opportunity to challenge or consent to the jurisdiction of the court, which has been referred to as a preliminary objection. Challenges to the competence of the Court occur often if a provision of a Treaty or a declaration, under the optional clause¹⁷⁸ which relates to the term of jurisdiction are asserted by the applicant.¹⁷⁹ The optional clause establishes a mechanism allowing States party to the Statute to apply it by way of which they accept as mandatory the competence of the ICJ amongst them and the other parties who have made similar commitments.¹⁸⁰

States get to determine on the extent of their recognition of the jurisdiction of the Court whereby states have the liberty to amend, reduce, alter and revoke the optional clause¹⁸¹ in which these reservations form an intrinsic element of the declaration recognizing the jurisdiction of the bench.¹⁸² Kenya's submission was that the court had no jurisdiction on two legal grounds that is

¹⁷⁵ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ, 56.

¹⁷⁶ *Somalia vs Kenya*, Somalia's Memorial, letter dated 26th August 2014, ICJ.

¹⁷⁷ Shaw M, 'International law', 340.

¹⁷⁸ Article 36(2) UN *Statute of the International Court of Justice*, 18 April 1946.

¹⁷⁹ Quintana, J, '12 Challenges to the Court's Jurisdiction (Preliminary Objections)', 10 *International Litigation in Practice Journal* 1, 2015, 725.

¹⁸⁰ Fitzmaurice M, 'International Court of Justice, Optional Clause', *Max Planck Encyclopedias of International Law*, 2011, 123-<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e68> on 20th November 2019.

¹⁸¹ Fitzmaurice M, 'International Court of Justice, Optional Clause', 123.

¹⁸² *Aerial Incident of 10 August 1999 (Pakistan v India)*, Judgment on jurisdiction, ICJ Reports 2000, 23.

pursuant to the reservation placed under article 36 of the ICJ statute the MOU provides for an alternative method of dispute resolution as opposed to litigation before the Court and that the reservation also provides that even though the MOU is not operative, other procedures of resolving the dispute must be sort out first. Somalia on the other hand relied on article 282 of the ICJ statute to bring the case before the ICJ. This section shall first analyse the aspects of the MOU and its legality, then, analyse validity of article 284 of the ICJ statute as relied upon by Somalia.

Chapter 3.3.2 The Memorandum of Understanding: Legality and Validity.

The purpose of the MOU was to assist the two states in solving the maritime boundary conflict that had resulted.¹⁸³ The MOU provided that the Commission was to be afforded the opportunity to consider submissions made by Somalia and Kenya regarding the outer limits of the continental shelf beyond 200 nautical miles, and to issue recommendations, notwithstanding the existence of a maritime dispute between the two States.¹⁸⁴ Each party had an obligation to refrain from placing an objection with regard to the submissions made by the other states to the Commission.¹⁸⁵

As the form of the MOU was deemed to be a bilateral treaty between the parties¹⁸⁶, it had to be interpreted by the court in accordance with the rules of interpretation laid down in Articles 31 and 32 of the Vienna Convention, which are consistently recognized as indicative of customary international law.¹⁸⁷ The general rule under international law is that a treaty shall be construed in good faith pursuant to the ordinary meaning of the terms of the agreement in their scope and taking into consideration its end goal.¹⁸⁸ The court presented that all these elements that is the ordinary meaning, the scope and the end goal of the treaty ought to be considered as a whole.¹⁸⁹

The main provision of the MOU that was highly controversial and raised before the court was the provision under paragraph 6 which the Republic of Kenya claimed was providing for an alternative

¹⁸³ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ,

¹⁸⁴ Paragraph 1-5, *Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic*, 7th April 2009, Bilateral Treaty. ***

¹⁸⁵ Paragraph 1, *Memorandum of Understanding*.

¹⁸⁶ *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya)*, Judgement on Preliminary Objections, ICJ Report 2019, 1.

¹⁸⁷ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 1.

¹⁸⁸ Article 31(1), *Vienna convention on the law of treaties*, 23 May 1969, 1155 UNTS 331.

¹⁸⁹ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 1.

method of demarcation as opposed to bringing the case before the ICC.¹⁹⁰ Before considering the conclusion of the court on this clause, it is interesting to note that the rationale behind Kenya's claim was based on the reservation placed by Kenya under Article 36 on the jurisdiction of the Court.¹⁹¹

The optional clause of the ICJ statute establishes a mechanism allowing States party to the Statute to apply it by way of which they accept as mandatory the competence of the ICJ amongst them and other parties who have stated similar conditions.¹⁹² States get to determine on the extent of their recognition of this jurisdiction whereby they have the liberty to amend, reduce, alter and revoke the optional clause¹⁹³ in form of reservations which form an intrinsic element of the declaration recognizing the autonomy of the court.¹⁹⁴ Such mandate operates only within the constraints under which it has been recognized, and its reservations do not veer away from a broader recognition which has already been established, but rather specify the conditions of the State's acceptance of the Court's mandatory jurisdiction.¹⁹⁵

Kenya's declaration under Article 36 (2) was made on 19 April 1965 which the material part of the declaration reads that the Republic of Kenya accepts as compulsory *ipso facto* and on the basis and condition of reciprocity the jurisdiction over all disputes arising after 12th December, 1963 other than 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.¹⁹⁶ Kenya contends that the direct interpretation of Kenya's reservation is that if Kenya and Somalia have consented to succumb to another means or procedure of resolving the disagreement regarding their maritime limits, the negotiation would trigger the reservation, therefore, court will have no competence to settle the matter.¹⁹⁷

¹⁹⁰ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 1.

¹⁹¹ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya), ICJ, 57.

¹⁹² Fitzmaurice M, 'International Court of Justice, Optional Clause', 125.

¹⁹³ Fitzmaurice M, 'International Court of Justice, Optional Clause', 125.

¹⁹⁴ *Aerial Incident of 10 August 1999*, ICJ Report 1999, 25.

¹⁹⁵ *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court Judgment, ICJ Reports 1998, 453.

¹⁹⁶ *Kenya's Optional Clause Reservation under Art. 36 (2) of the ICJ Statute*, 19th April 1965, 531 UNTS 113.

¹⁹⁷ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ,

The question before the Court then emerges as to whether the parties in the sixth paragraph of the MOU settled on a form of settlement of their conflict other than by means of litigation before the Court in which the reservation would apply. The subject matter of the sixth paragraph reads that,

*'the demarcation of maritime borders in the disputed areas including the delimitation of the continental shelf beyond 200 nautical miles.'*¹⁹⁸

In its analysis, the Court took note of the use of the term 'including' to suggest that the parties intended to include something more than the continental shelf within the areas in question. However, the court stated that, it is apparent from the text as a whole that the MOU concerned only the area of the continental shelf within and beyond 200 nautical miles of the respective coasts of the two States with regard to demarcation.¹⁹⁹ Therefore, the sixth chapter addresses only the delimitation of the continental shelf and not the delimitation of the territorial sea, nor the delimitation of the exclusive economic zone.²⁰⁰ In its interpretation, the Court further noted that, all specific principles of international law relating to relations between the parties should be taken into account bearing in mind the scope of the Treaty.²⁰¹

Since the MOU alluded to UNCLOS and both States are parties to it, the Court held that the rules of the UNCLOS are therefore relevant to the interpretation of the context of the MOU. The Court held that the UNCLOS rules also apply to the interpretation of the structure of the MOU as the MOU refers to the UNCLOS and both States are parties to this MOU. In particular, it is pertinent to interpret the sixth paragraph of the MOU in light of UNCLOS Article 83(1), which states that the delimitation of the continental shelf by countries with neighboring coastlines ought to be conducted in compliance with international law in order to achieve an equitable solution.²⁰² The reference to delimitation by agreement under UNCLOS is not preconditional to the form of dispute settlement to be followed and, if agreement is not reached, it does not prohibit the parties from taking up other forms of dispute settlement procedures.²⁰³

¹⁹⁸ Paragraph 6, *Memorandum of Understanding*.

¹⁹⁹ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 3.

²⁰⁰ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 3.

²⁰¹ Article 31(3), Vienna Convention on the law of treaties.

²⁰² Article 83(1), *United Nations Convention on the Law of the Sea*.

²⁰³ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 5.

The MOU's main objective provides that delimitation will be agreed upon after the Commission has concluded its review and made its recommendations, and that no objection will be raised by each party to the submission of the other.²⁰⁴ The court inferred from the rigorous push by the republic of Kenya to engage in negotiations with regard to the disputed area despite the provision under paragraph 6 to wait for the determination of the CLCS as a direct contravention of the MOU.²⁰⁵ Thus, it can be inferred, that Kenya did not consider itself bound by the wording of the sixth paragraph to wait for the CLCS's recommendations to at least commence the process of delineation as opposed to delimitation.

In order to fully understand the Court's decision, a contrast must be made between the delimitation and delineation of the continental shelf: although both operations are essentially coastal nations that demarcate their territory, their subject matter and procedure are different. Delineation entails making a distinct line between a coastal nation and the area in order to determine the precise location whereas delimiting is the act of designing the border zone between the coastal nations. Under UNCLOS, signatory States have an obligation to submit a submission to the CLCS with regard to the delineation of their continental shelf²⁰⁶, as opposed to the delimitation where there is no precise method.²⁰⁷ The CLCS' acts are without prejudice to questions of border delimitation between states with opposite or neighboring coasts.²⁰⁸

Nevertheless, Kenya argued using the 'logical' temporal link that maritime delimitation agreements could not be concluded before delineation and, as a result, no definitive agreement could be reached until the CLCS recommendations were issued.²⁰⁹ Certain scholars have argued that this is indeed the position; that delimitation must be undertaken as a subsequent step after delineation.²¹⁰ It certainly makes sense from a practical point of view that assessing the proposal

²⁰⁴ Paragraph 1, *Memorandum of Understanding*.

²⁰⁵ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 5.

²⁰⁶ Article 76(3), *United Nations Convention on the Law of the Sea*.

²⁰⁷ Magnússon B, 'Is there a Temporal Relationship between the Delineation and the Delimitation of the Continental Shelf beyond 200 Nautical Miles?', 25 *The International Journal of Marine and Coastal Law* 237, 2013, 467.

²⁰⁸ Article 9 of Annex II, *United Nations Convention on the Law of the Sea*.

²⁰⁹ *Somalia vs Kenya*, Oral submissions Preliminary Objections (Kenya) ICJ,

²¹⁰ Kunoy B, 'The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf,' 25 *International Journal of Marine and Coastal Law* 1, 2010, 270.

of a Country and making recommendations on this proposal by the Commission is an essential precursor to any assessment of the continental shelf.

The Court's position, however, is that the lack of certainty as to the outer limits of the continental shelf and thus the precise location of the boundary in the area beyond 200 nautical miles does not necessarily preclude either the States concerned or the Court from undertaking the delimitation of the boundary in the appropriate circumstance.²¹¹ This creates a precedent that the court considers that the delineation of the territory of a country is not an essential process that must be determined before the delimiting process takes place.

Moreover, having read in light of Article 83(1) of UNCLOS, the use of the phrase 'shall be agreed' under paragraph 6 calls on the parties to engage in negotiations in good faith with a view to reaching an agreement²¹² rather than an obligation to conclude an agreement on the dispute.²¹³ There are no temporary restrictions on the obligation to negotiate under the MOU nor does it prohibit a Party from resorting to dispute settlement proceedings before the CLCS instructions are issued.²¹⁴ The MOU also reaffirms that the CLCS system leading to delineation must be dealt with separately and without prejudice to delimitation.²¹⁵

The Court examined *travaux préparatoires* and the circumstances under which the MOU was concluded, in accordance with Article 32 of the Vienna Convention and considers that the MOU does not provide a procedure for the settlement of maritime boundary dispute between the Parties.²¹⁶ It is interesting to note the precedent that the court is setting with regard to reservations of the Kenyan-type. Judge Robinson wrote a dissenting opinion which took note of the analysis taken by the majority of the bench that the *travaux préparatoires* can be construed as excluding the Kenyan-type reservation as opposed to a qualitative evaluation of the impact of Kenya's reservation on the optional clause declarations of both States.²¹⁷ It is safe to infer from the majority

²¹¹ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 5.

²¹² Paragraph 1, *Memorandum of Understanding*.

²¹³ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 6.

²¹⁴ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 6.

²¹⁵ Paragraph 1, *Memorandum of Understanding*.

²¹⁶ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 4.

²¹⁷ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 9.

bench's judgement that Countries with a Kenyan-type reservation shall be confined to the mandatory jurisdiction of the Court.

In connection with the second objection, Kenya argued that under Article 287(3) of UNCLOS, Nation Parties which do not define the method of dispute settlement that have been chosen shall, in accordance with Annex VII of UNCLOS, be considered to be admitted for arbitration. Somalia, on the other side, depended on Article 282 of UNCLOS, that requires that even if the participating countries ' have consented, through any type of agreement or other means, that such conflict will be forwarded to a method incorporating a legally enforceable judgment at the recommendation of any party to the dispute, that legal process will be adhered to rather than Annex VII Arbitration. The court held that it still has jurisdiction over the matter.²¹⁸ Judge Robinson concluded that, by considering the ICJ as the mechanism of default, the overall effect of the majority judgment would be to invert Article 287(3) of the UNCLOS when the provision allocated this function to the Annex VII Tribunal.²¹⁹

In conclusion, the Court finalized the objection by stating that, in the light of the text of the MOU as a whole, the text of paragraph six could not have been meant to describe the intent and object of the MOU as a way of settling disputes in respect of the maritime boundary boundaries established between the Parties.²²⁰ The court's arguments is that the MOU does not shackle the Parties to wait for the outcome of the CLCS process before attempting to reach agreement on their maritime boundaries, nor does it exert a duty on the Parties to settle their disputed territory through a specific settlement method.

Chapter 3.3.4 The MOU- The Role of the Commission.

The purpose of evaluating the role of the Commission with regard to this case is the because of the importance of Republic of Kenya and other nations who object to the jurisdiction of the court place on it. The ability of the Commission to create the assurance needed to delineate the shelf is largely ascribed to the authority it enjoys in fulfilling its mandate.²²¹ The Commission effects legal

²¹⁸ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 7.

²¹⁹ Article 287(1c), *United Nations Convention on the Law of the Sea*.

²²⁰ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 8.

²²¹ Sari Graben,' Arctic Networks and Legal Interpretations of the UN Commission on the Limits of the Continental Shelf', 28 *Leiden Journal of International Law* 4, 2015, 774.

certainty and implementation by its competence to review coastal states' submissions and make recommendations on continental shelf extensions.²²² As the only legal institution able to arbitrate conflicting and dichotomous interpretations of the Treaty and the evidence needed to satisfy its criteria, its decisions have a legal effect.²²³

In this formulation, the Commission is to act as an independent body as an interpreter of both the technical and the legal norms.²²⁴ To be clear, the Convention did not give the Commission authority to rule on the legal interpretation of the rules in the Convention by the coastal state. Instead, its function is to determine whether the proposed boundaries are defined by the coastal state using recognised scientific standards and correct methodology.²²⁵

The Commission does not intend to safeguard the interests of either a country or the International Seabed Authority whose interests are also influenced by the review of submissions. It aims to represent the international community's interests and must therefore evaluate the proposals made by coastal countries in a way that respects the interests of all the parties involved.²²⁶

The Commission constantly receives legal guidance from numerous legal consultants²²⁷ and its work has legal implications.²²⁸ The Commission takes stances implicitly on the technical assessment of the information collected. In addition, by alluding to its previous decisions or recommendations, the Commission informally sets precedents on which the Nations and the Tribunal depend on. Since international organizations can coordinate international interactions to improve the probability that Nations submit to the jurisdiction of dispute resolution institutions, these institutions play a significant role in international law.²²⁹

²²² Annex II, *United Nations Convention on the Law of the Sea*.

²²³ Rothwell D, 'Building on the Strengths and Addressing the Challenges: The Role of the Law of the Sea Institutions', 35 *Ocean Publishers* 1, 2004, 133.

²²⁴ Sari Graben, 'Arctic Networks and Legal Interpretations of the UN Commission on the Limits of the Continental Shelf', 792.

²²⁵ Sari Graben, 'Arctic Networks and Legal Interpretations of the UN Commission on the Limits of the Continental Shelf', 779.

²²⁶ Sari Graben, 'Arctic Networks and Legal Interpretations of the UN Commission on the Limits of the Continental Shelf', 779.

²²⁷ Article 2 of Annex III, *United Nations Convention on the Law of the Sea*.

²²⁸ Noyes J, 'Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf', 42 *Vanderbilt Journal of Transitional Law* 4, 2009, 1232.

²²⁹ Guzman A, 'A Compliance Based Theory of International Law', 90 *California Law review* 14, 2002, 1829.

Where the Commission relies on its competence to make decisions in a same manner as similar cases, it also finds itself as a vital actor in the application of international law.²³⁰ In the end, the objective of the Commission signifies that the Commission endorses or rejects the unilateral nature of coastal state delineation. In view of the wording of the convention, the cumulative impact of assessing information is for legal and technical professionals to be granted competence and thus to be able to interpret what constitutes the outer limit of the continental shelf and the particular demonstrations that are required to define it.²³¹

The Commission shall assess, against the State's arguments, the validity of the data presented by States.²³² The Commission is required to endorse this statement if there is consensus on the evidence submitted. The Commission's 'Scientific and Technical Guidelines' (The Guidelines) also make it very clear that, the Commission addresses uncertainties in the treaty with scientific or technical methods.²³³ The Guidelines provide claims by the Commission on the requirements required to develop an argument and are intended to provide a significant scientific and technical comparison for the evaluation of the Commission's own guidelines being submitted and prepared. Nonetheless, the Commission's interpretations to resolve disputes between States are highly unlikely. Instead, the spread of authority creates an opportunity for a number of interpretations of Article 76 in the light of the definitional uncertainty.²³⁴

Chapter 3.4: CONCLUSION.

Understanding the borders of the continental shelf of the coastal state has numerous consequences for the coastal states and the rights and responsibilities of other nations. States definitely have an interest to set and demarcate their territories. Certainty empowers coastal nations to discover, strategize, permit excavation of raw materials and to exert control over actions by non-coastal states that are allowed on the shelf such as coastal scientific study. When a dispute arises, States

²³⁰ Rothwell D, 'Building on the Strengths and Addressing the Challenges', 133.

²³¹ Sari Graben, 'Arctic Networks and Legal Interpretations of the UN Commission on the Limits of the Continental Shelf', 790.

²³² Sari Graben, 'Arctic Networks and Legal Interpretations of the UN Commission on the Limits of the Continental Shelf', 791.

⁷⁹ Article 2 of Annex III, *United Nations Convention on the Law of the Sea*.

²³⁴ Sari Graben, 'Arctic Networks and Legal Interpretations of the UN Commission on the Limits of the Continental Shelf', 795.

under international law have several dispute mechanisms that they can pursue. Particularly to Court based litigation under the International Court of Justice Statute, the optional clause sets out a procedure for the request, by means of which the States that are party to the Statute recognize the competence of the ICJ as necessary. This is based on the principle of state sovereignty which is a fundamental principle under international law and something that states hold dear. States have the freedom to modify, reduce, amend and repeal the optional clause in which these reservations form an integral part of their recognition of the jurisdiction of the court.

Kenya placed a reservation under article 36 on the jurisdiction of the ICJ.²³⁵ In summary, the reservation provided that the court shall have jurisdiction in all matters except those where an alternative dispute resolution method has been provided. The presence of these alternative procedure would automatically revoke the competence of the Court to hear the matter. This is the fundamental basis of the Memorandum of Understanding signed by Kenya and Somalia. Kenya contends that under paragraph 6 the MOU alludes to an alternative procedure that is the process of delineation that revoked the competence of the court to hear the matter. Kenya also argued that the process of delimitation may only come after delineation by the Commission is done.

By dismissing Kenya's claim that the state's delineation process is before the delineation of the shelf, the Court concludes that the two processes are completely distinct. Thus, a Party is not necessarily barred from seeking the alternative due to the lack of exhausting the other procedure. Accordingly, the present rule of law, is that States have the right to pick the best procedure either to pursue the path of the Commission first or to demarcate the continental shelf with their adjoining nations alternatively.

With regard to the reservation, the Court established itself the matter as its default judge, unless the reservation to the ICJ statute is adequately descriptive and exact in the case of maritime disputes law. The rationale behind this is that the text of the sixth paragraph of the MOU reflects that of Article 83(1) of UNCLOS which implies that the States engage in agreements with an opinion to attaining an accord and not to stipulate an obligatory process of dispute resolution. The court held that paragraph 6 does not prohibit them from completing negotiations or bringing the case before the ICJ before they have received the CLCS recommendations. Countries are not

²³⁵ *Kenya's Optional Clause Reservation under Art. 36 (2) of the ICJ Statute*, 19th April 1965, 531 UNTS 113.

obligated to pursue a particular direction in marking their territories; that is, countries are allowed to opt to delineate or first demarcate their extended continental shelf.

Having analyzed the preliminary objection of this case, the next chapter shall purpose to evaluate the merits of the case, the function of the ICJ and the jurisprudence on the process of delimitation. Of particular interest to this case is the process of equitable delimitation, the line of equidistance and the parallel latitude procedure.

CHAPTER 4

APPROACHES TO DELIMITATION.

Chapter 4.1 Introduction.

Based on the third objective of this dissertation which is to ascertain the specific decision that the International Court of Justice will conclude, the task now is to analyse the delimitation process of the International Court of Justice. Bearing in mind the concept of discretion in the judicial process, coming up with the exact decision is somewhat not possible. However, this author will endeavor to analyse the jurisprudence on delimitation of maritime territories to come up with a guide on how the court approaches delimitation.

Having assessed the preliminary objections before the court, this dissertation will now focus on the merits of the case. The Republic of Somalia asserts that the method of delimitation to be used to demarcate the maritime boundary is the equidistance approach.²³⁶ While Kenya contends that the use of the equidistance method would lead to unfair outcome in the demarcation and proposes the use of the parallel latitude.²³⁷ Pursuant to article 38 of the ICJ statute,²³⁸ judges are to be guided by either primary sources of law that is Treaty law, *jus cogen*, and concepts of law or secondary sources that is, legal decisions and academics of International law.²³⁹

This confinement or reference to specific codified law will not only assist us in determining the court's decision but also come up with recommendations at the end of this dissertation. Particularly under the regime of the law of the sea, this dissertation shall confine itself to methods used in delimiting maritime territories by both the ICJ and the Commission, that is the equitable approach and the equidistance concept. The first section of this chapter will first analyse the critical role of

²³⁶ *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya)*, Memorial of Somalia, ICJ Report 2019, 2.

²³⁷ *Maritime Delimitation in the Indian Ocean (Somalia vs Kenya)*, Preliminary Objections (Kenya), ICJ Report 2019, 10.

²³⁸ Article 38, *UN Statute of the International Court of Justice*, 18 April 1946.

²³⁹ Omar S, 'Sources of International law, In the light of the Article 38 of the International Court of Justice', *International Islamic University*, 6- <https://ssrn.com/abstract=1877123> on 4 December 2019.

the court then the second section shall delve into the different methods adopted by the court in delimitation.

Chapter 4.2 The International Court of Justice.

The International court of Justice is an impartial entity that responds to legal questions in conformance with principles of law put in place under International law.²⁴⁰ Courts have a written catalogue of decisions and rulings which can steer future litigation settlement and the advancement of International law. Once jurisdiction has been determined, it is the onus of the court to discern whether there is a conflict and if the conflict is a legal one.²⁴¹

The ICJ has noted that there is no need for explicit actions to be taken in order to invoke the presence of a conflict and, if there is one, it is merely a matter of fact to be decided by the Court.²⁴² A dispute between two States regarding the delimitation of their continental shelf can often not lack a political element in Maritime Delimitation cases, however if both countries assert sovereign freedoms in the contested zone, it qualifies as a legal case.²⁴³

Four key aspects of the judicial role have been more specifically defined by academics: the capacity to examine the submissions by the parties in the case involved and the object of their arguments to be determined; the competence of the court to hear the particular case and the right of the court to refrain from exercising its jurisdiction.²⁴⁴ The Court's intrinsic jurisdiction in which it is empowered to render any determination, arises from the simple presence of the Court as a body in the judiciary constituted by the cooperation of Nations and is bestowed on it to preserve its fundamental judicial roles.²⁴⁵

²⁴⁰ Shelton D, 'Form, Function, and the Powers of International Courts', 9 *Chicago Journal of International Law* 1, 2009, 2.

²⁴¹ Shelton D, 'Form, Function, and the Powers of International Courts', 3.

²⁴² *Tunisia v Libyan Arab Jamahiriya (Continental Shelf Case)*, Application for Revision and Interpretation of the Judgment, ICJ Reports 1985, 27.

²⁴³ *Aegean Sea Continental Shelf Case (Greece v Turkey)*, ICJ Reports 1978, 13.

²⁴⁴ Pauwelyn J, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International Law* 3, 2001, 537.

²⁴⁵ *Nuclear Tests (Australia v France)*, 1974 ICJ Reports 1974, 259.

Particularly, the judicial role would be to extend the preceding issues to current and agreed maritime laws and principles.²⁴⁶ The principles set out in Article 38 of the Statute of the International Court of Justice²⁴⁷ apply in any interpretation of the sources in international law tribunals and courts as they have been acknowledged to constitute a concrete pronouncement of both primary and secondary sources of law.²⁴⁸ In its interpretation of the legal facts before it, the Court shall apply four primary legal sources:²⁴⁹ international conventions,²⁵⁰ international customs,²⁵¹ recognized principles of law by the Member States concerned, court decisions²⁵² and the publications of acknowledged academics of international law.²⁵³

As the EEZ and continental shelf are concerned, the main purpose of demarcation of coastal borders is to partition the sea area fairly.²⁵⁴ It is incorporated into the UNCLOS, which aims in tandem with international law expressed under Article 38 of the ICJ Statute to achieve a far-reaching and peaceful solution in delimitation of the EEZ²⁵⁵ and Shelf Zones²⁵⁶ between Nations with adjacent or opposite coasts.

States have become concerned in defining universal and consistent maritime boundary laws due to political and financial uncertainty associated with delimitation issues.²⁵⁷ It is in the objectives of the international society in general that simple, specific and efficient principles be established on the foundations of which boundary disputes can be settled and, if possible, amicably decided.²⁵⁸ However, due to the unique features of the maritime formations, island layouts, ocean floor

²⁴⁶ Pauwelyn J, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International Law* 3, 2001, 537.

²⁴⁷ Article 38, *ICJ Statute*.

²⁴⁸ Hamid A, 'Sources Of International Law: A Re-Evaluation', 11 *International Islamic University Malaysia Law Journal* 2, 2003, 3.

²⁴⁹ Article 38, *ICJ statute*.

²⁵⁰ Eg UNCLOS.

²⁵¹ Eg, Vienna Conventions on the laws of Treaties which have been recognized as customary International law.

²⁵² This is subject to the provisions of article 59 of the ICJ Statute, as per article 38(4), ICJ Statute.

²⁵³ Writings of Grotius see Shaw M, *International Law*, 112.

²⁵⁴ Pratt M, 'The Role of the Technical Expert in Maritime Delimitation Cases', 53 *Publications on Ocean Development* 1, 2009, 80.

²⁵⁵ Article 74, *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397.

²⁵⁶ Article 83, *United Nations Convention on the Law of the Sea*.

²⁵⁷ Cottier T, *Equitable Principles of Maritime Boundary Delimitation*, 180.

²⁵⁸ Cottier T, *Equitable Principles of Maritime Boundary Delimitation*, 180.

landscape and facets of the ecosystem found in the oceans, each case of demarcation has its unique features.²⁵⁹

There are two key approaches of delimitation under maritime, that is, technical and scientific approach and the legal approach.²⁶⁰ The technical approach includes the application of approaches such as geometry, arithmetic, geography, geology, or ecology. Currently, the technical methods of significance are restricted to geographical floor related processes, the most prevalent is the equidistance approach also known as the median line. While these practical techniques are not conclusive, they also represent the main techniques employed, individually or in conjunction, in state exercise and judicial process.²⁶¹ This dissertation shall now analyse the relevance of the equidistance method under delimitation.

Chapter 4.3 The line of Equidistance.

Somalia's submissions is that the method of equidistance ought to be used in the case as equidistance approach is the general rule and the usual methodology applicable to maritime delimitation disputes.²⁶² The concept of equidistance or median line which was formed by Whittemore Boggs is perhaps the most significant and commonly employed geographic method of demarcating between adjoining and opposite coastlines.²⁶³ The use of the two distinct terms that is 'equidistance' and 'median line' leads to no legal ramifications as they have an identical delimitation process and the use of such different words are only intended to distinguish the delimitation line specifically for opposite coasts to be median line and for adjacent coasts to be equidistance.²⁶⁴

Article 12(1) Convention on the Territorial Sea and the Contiguous Zone provides that, where the coasts of both States are opposite and adjacent to each other, the two States shall not direct their territorial sea beyond the median line, each point being equidistance unless otherwise agreed

²⁵⁹ Cottier T, *Equitable Principles of Maritime Boundary Delimitation*, 180.

²⁶⁰ Cottier T, *Equitable Principles of Maritime Boundary Delimitation*, 180.

²⁶¹ Cottier T, *Equitable Principles of Maritime Boundary Delimitation*, 180.

²⁶² *Somalia vs Kenya*, Memorial of Somalia, ICJ, 1.20.

²⁶³ Cottier T, *Equitable Principles of Maritime Boundary Delimitation*, 184.

²⁶⁴ *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment, ICJ Reports 2009, 116.

between them.²⁶⁵ The article enumerates the rule under delimitation that, in the absence of an agreement between the party's shall employ the equidistance approach which may be modified in the presence of special circumstances.²⁶⁶

This is also provided for in Article 6(2) of the 1958 Continental Shelf Convention, which states that the boundary shall first be demarcated, by agreement between the Parties and in the absence of any such agreement, by the application of the equidistance rule unless there is special circumstance warranting the use of another method.²⁶⁷ In light of this, it is important to highlight the inclusion of 'special circumstances' under the two statutes which has been inferred that the *raison d'être* of the exception is to provide a remedy to unfair outcomes that might emerge in the implementation of the rule of equidistance in certain delimitation cases.²⁶⁸

However, several schools of thought have argued that there arises two different approaches to both article 6 of the Continental Shelf Convention and Article 12(1) Convention on the Territorial Sea. On one side the equidistance approach is referred as a principle and special circumstances as an exception and the other approach is that the 'special circumstances is the principle and equidistance is the exception'.²⁶⁹ The argument that the equidistance is the rule and the special circumstance as the exception appears to be the rational formulation in the context of the *travaux préparatoires*.²⁷⁰

The prevailing jurisprudence is that the two approaches that is equidistance and special circumstances are not distinct rules, rather a cumulative rule for producing a fair outcome.²⁷¹ This approach points to a two-stage delimitation process where the line equidistance would be determined first and consequently modified taking into consideration any 'special circumstance'.²⁷²

²⁶⁵ Article 12(1), *Convention on the Territorial Sea and the Contiguous Zone*, 10 September 1964, 516 UNTS.

²⁶⁶ Tanaka Y, *Predictability and Flexibility in the Law of Maritime Delimitation*, Hart publishing, New York, 2006, 37.

²⁶⁷ Article 6, *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311.

²⁶⁸ Caflisch L, 'The Delimitation of Marine Spaces between States with Opposite and Adjacent Coasts' in Dupuy R and Vignes D, (eds), *A Handbook on the New Law of the Sea*, 1st ed, Brill Publisher, Leiden, 2009, 459.

³⁴ Tanaka Y, *Predictability and Flexibility in the Law of Maritime Delimitation*, 40.

²⁷⁰ M Miyoshi, 'Transition of Legal Principles on Delimitation of Continental Shelf', 5 *Law of the Sea and Ocean Policy* 1, 1982, 41.

²⁷¹ Tanaka Y, *Predictability and Flexibility in the Law of Maritime Delimitation*, 40.

²⁷² *Arbitral Court in the Anglo-French Continental Shelf case*.

Somalia's submission is that the equidistance approach has been acknowledge as state practice,²⁷³ however this is not the case. Bearing in mind the statutory development of Article 6, the court found in the North Sea Continental shelf case that the Provision was introduced by the ILC only as *lege ferenda*²⁷⁴ as opposed to an existing principle of customary international law.²⁷⁵

In order to transform a law into a customary norm, the Court has specified that there are multiple requirements that need to be met According to international law, there are three key fundamental elements to assess whether the law has achieved *jus cogen* norm status.²⁷⁶ The first prerequisite is if the rule has attained status as a general international law principle. The court ruled that Article 6 did not meet this requirement in two respects: first the manner the article was structured that only in the absence of an agreement between them could the State submit to an equidistance process.

The court held that it is an unusual addendum to what is asserted to be a possible state practice that states have this duty to negotiate. Furthermore, Article 6's provision of special circumstances poses further questions as to the rule's theoretically norm creating nature. The second condition for a *jus cogen* standard is that there must be a prevalent and participatory presence in relation to the rule.²⁷⁷ As far as Article 6 is concerned, the Court found the proportion of ratifications and accessions thus far obtained, whereas impressive, scarcely sufficient.²⁷⁸

Thirdly, there deserves to be an *opinio juris sive necessitatis*. This is the principle that states believe that their actions are required by law.²⁷⁹ As per the Court, there was no evidence of such a conviction between Countries that have established limits as per the equidistance rule, and much less amongst those States that have not defined their boundaries.²⁸⁰

Having dismissed the obligatory essence of the equidistance process, the court concluded that there are alternative methods to shelf delimitation other than the equidistance method and that in the process of delimitation, this alternative methods maybe be employed, alone or in combination of

²⁷³ *Somalia vs Kenya*, Memorial of Somalia, ICJ, 2.

²⁷⁴ *What the law ought to be*, Black law dictionary, 2nd ed.

²⁷⁵ *The North Sea Continental Shelf cases (Germany v Denmark and the Netherlands)*, ICJ Reports 1969, 62.

²⁷⁶ *The North Sea Continental Shelf cases*, ICJ, 72.

²⁷⁷ *The North Sea Continental Shelf cases*, ICJ, 73.

²⁷⁸ *The North Sea Continental Shelf cases*, ICJ, 73.

²⁷⁹ Tanaka Y, *Predictability and Flexibility in the Law of Maritime Delimitation*, 40.

²⁸⁰ *The North Sea Continental Shelf cases*, ICJ, 77.

the equidistance model as per the specific features of the area involved.²⁸¹ As per the Court, delimitation should be the purpose of a compromise between the States in which must be concluded in line with the principles of equity.²⁸² After this, the equitable principles became the core of the law of maritime delimitation.

This holding was also held in the *Anglo-French Atlantic case* where the ICJ called attention to the point that there is a substantive contrast between the circumstance of the opposite and adjoining coasts, as held in the *North Sea Continental Shelf case*.²⁸³ As for opposite coastlines, the ICJ itself agreed that no approach besides the equidistance/median approach offered the appropriate balance of pragmatic simplicity and assurance of operation, and the Court of Arbitration upheld this opinion from the perspective of state practice.²⁸⁴ In addition, with regard to adjacent boundaries, the approach of equidistance appears to yield unequal outcomes. The court further asserted that the relevance of the equidistance system or any other approach is based on the emphasis put by the treaties on equitable delimitation which ought to be comparative to the specific geographical circumstance.²⁸⁵

Chapter 4.4 The Equitable Principle and Special Circumstance.

The principle stems²⁸⁶ from Truman's Proclamation, which stipulates shelf limits ought to be established as per the principle of equity among the concerned states.²⁸⁷ Throughout international practice the purpose of the approach used is that the equidistance threshold is but a temporary boundary that operates as a point of reference for assessing the special circumstances which may trigger its modification to achieve the equitable solution required by law.²⁸⁸

The equity approach in its essence is not a specific method of delimitation but the end result and purpose of any delimitation procedure which is based on the unique circumstances of the specific

²⁸¹ *The North Sea Continental Shelf cases*, ICJ, 88.

²⁸² *The North Sea Continental Shelf cases*, ICJ, 85.

²⁸³ *The Anglo-French Continental Shelf case (United Kingdom v. France)*, ICJ Reports 1977, 63.

²⁸⁴ *Anglo-French Continental Shelf case*, ICJ, 85.

²⁸⁵ *Anglo-French Continental Shelf case*, ICJ, 70.

²⁸⁶ *Anglo-French Continental Shelf case*, ICJ, 72.

²⁸⁷ *The North Sea Continental Shelf cases*, ICJ, 47.

²⁸⁸ *Barbados v Trinidad and Tobago*, Award, Permanent Court of Arbitration (PCA), 2006, 317.

maritime case.²⁸⁹ The principle of Equity does not constitute equality.²⁹⁰ The jurisprudence of the court on maritime delimitation demonstrates the move from the approach of equity to equidistance/relevant circumstances.²⁹¹ Relevant/special circumstance is defined as any objective factor which a court regards able of possessing some element of effect on the delimitation of the boundary.²⁹² The principle emulates that in determining the boundary limit in any maritime row, the history and conditions of the particular case prevail over any statute.²⁹³

On what constitutes 'special circumstances', States have held a number of discussions on the special circumstance debate,²⁹⁴ and there is an acknowledgement that there are two dimensions to it, that is geographical considerations and non-geographical aspects.²⁹⁵ On non-geographical aspects, the navigation and fishing interests have been suggested by the International Law Commission as interests that constitute special circumstances.²⁹⁶ The ILC also mentioned the exceptional shape of the coast and the islands' navigable channels as key examples of geographical features which constitute special/relevant circumstances in which would necessitate the adjustment of the line of equidistance.²⁹⁷ This dissertation will now analyse four key features of the Maritime delimitation dispute between Somalia and Kenya as brought up by the parties and whether they constitute special/relevant circumstance to require the modification of the equidistance line proposed by the Republic of Somalia.

Chapter 4.4.1 Length of coastline and the Proportionality factor.

In the case of Barbados, the tribunal held there is zero ambiguity in determining that coastline shorelines is a unique factor applicable to delimitation and that their respective spans may

²⁸⁹ Aké L, 'The concept of equidistance/relevant circumstances in the development of the law of maritime delimitation' Published PHD Disserattion, World Maritime University, Sweden, 2009, 21.

²⁹⁰ *The North Sea Continental Shelf cases*, ICJ, 91.

²⁹¹ Aké L, 'The concept of equidistance/relevant circumstances in the development of the law of maritime delimitation', 23.

²⁹² *Tunisia vs Libya*, ICJ, 34.

²⁹³ Aké L, 'The concept of equidistance/relevant circumstances in the development of the law of maritime delimitation', 23.

²⁹⁴ Special circumstances can be found in the discussion in the ILC and in UNCLOS I.

²⁹⁵ Tanaka Y, *Predictability and Flexibility in the Law of Maritime Delimitation*, 23.

²⁹⁶ Tanaka Y, *Predictability and Flexibility in the Law of Maritime Delimitation*, 23.

²⁹⁷ Tanaka Y, *Predictability and Flexibility in the Law of Maritime Delimitation*, 24.

necessitate the modification of the preliminary equidistance line.²⁹⁸ The ICJ has upheld this by stating that the disparities in distance of the Countries' distinct coastline are so important that such an aspect ought to be recognized at the process of delimitation.²⁹⁹

Somalia's coastline of about 3025km is the longest shoreline in Africa with an approximated shelf zone of 32, 500km³⁰⁰ while Kenya's coastline is estimated to be 1430km.³⁰¹ Of the 1430km coastline, 650 km representing about 46% of the total coastline of Kenya is the Lamu County which is comprised of an irregular coastline that has presence of several islands.³⁰²

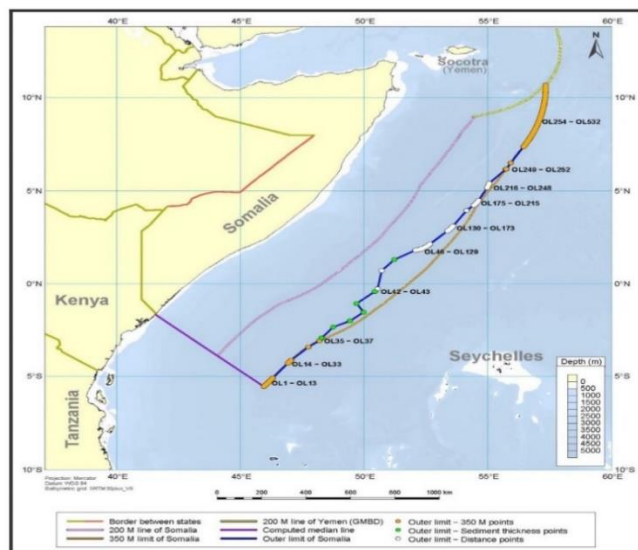
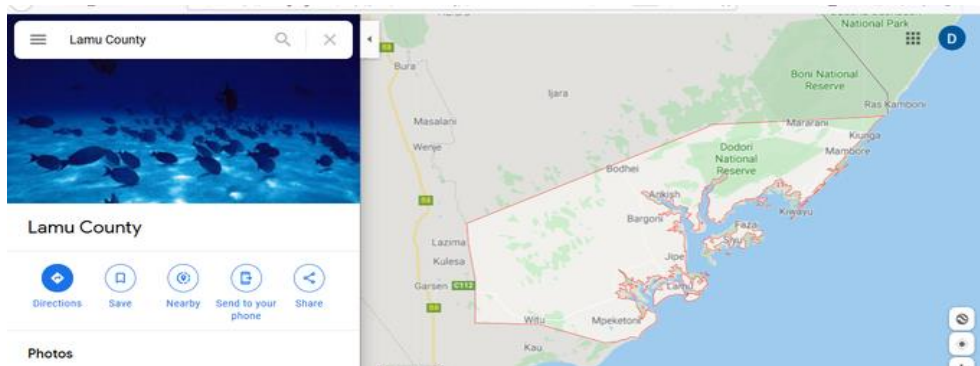


Figure 6: The outer limits of the continental shelf of Somalia.



²⁹⁸ *Barbados v Trinidad and Tobago*, PCA, 328.

²⁹⁹ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, ICJ Reports 1993, 68.

³⁰⁰ Carbone F and Accordi G, 'The Indian Ocean Coast of Somalia Author links open overlay panel', 41 *Marine Pollution Bulletin* 1, 1.

³⁰¹ Yap W and Remus J, 'Report on a Survey of the Coastal Areas of Kenya for Shrimp Farm Development', FAO, Rome, 1986, 1- <http://www.fao.org/3/AC574E/AC574E00.htm> accessed on 5 December 2019.

³⁰² Yap W and Remus J, 'Report on a Survey of the Coastal Areas of Kenya for Shrimp Farm Development', 1.

1-Proposed map by the Republic of Somalia. Image 2- Google Maps aerial view of Lamu County.

With regard geographical circumstances such a curved or concave coastline, in the *North Sea Continental Shelf Case* the court held that the use of the equidistance method in light of such factors would unquestionably lead to an unequitable outcome.³⁰³ It is no longer an argument that geographical considerations such as an irregular coastline of Kenya would indeed require the court to adjust the line of equidistance in the delimitation.

On the length of the Coastline, the proportionality principle is to be considered as a final factor in the interpretation of the delimitation of the shelf of the States concerned taking into consideration the size of their various maritime zones and the shelf, which ought to be carried out according to fair principles.³⁰⁴ These should be calculated in line with their direction to determine the required alignment between straight coastline states and those with distinctly curved maritime shores. In light of the subject matter of this dissertation, the Republic of Somalia asserts that the coastline being contested has no unique geographical factors that would necessarily require an adjustment of the equidistance rule.³⁰⁵

The distinct disparity between the coastline lengths of both Kenya and Somali is definitely a relevant factor in its delimitation. However, the proportionality principle is construed to mean that the mere presence of an extensive coastline doesn't necessarily put the concerned state at a disadvantage.³⁰⁶ Rather, the principle must be assessed as a measure to ascertain the equitable result from some geographical contexts and not some kind of concept that generates an origin of sovereign liberties to the shelf by merely having a smaller coastline.³⁰⁷ Therefore, the court's role in this case would be to consider the lengths of the coastline of both Kenya and Somalia in the process of delimitation as a whole.³⁰⁸

³⁰³ *The North Sea Continental Shelf cases*, ICJ, 89.

³⁰⁴ *The North Sea Continental Shelf cases*, ICJ, 98.

³⁰⁵ *Somalia vs Kenya*, Memorial of Somalia, ICJ, 3.

³⁰⁶ *Anglo-French Continental Shelf case*, ICJ, 101.

³⁰⁷ *Anglo-French Continental Shelf case*, ICJ, 101.

³⁰⁸ *Barbados v Trinidad and Tobago*, PCA, 337.

Chapter 4.4.2 Security Considerations.

The importance of maritime security has increased over the years with the coming of the enclosure movement.³⁰⁹ As addressed in chapter 2 of this dissertation, there has been an increased interest among states to protect their national resources which has now extended to enforcing these rights in their maritime zones.³¹⁰ Maritime safety issues have drawn the interest of the globe by the high prevalence of piracy on the East African Coast and in the Niger Delta region.³¹¹ The 2008–2012 emergence and worsening of Somali piracy on the maritime coast in EA Africa as well as in the Gulf of Aden has demonstrated prevalence of insecurity in the area.³¹²

In the maritime borders of countries such as Kenya, Tanzania and Seychelles, the Somali pirates have continuously looted boats in these regions.³¹³ Whether it is piracy or organized crime or terrorism, these challenges are inextricably connected to insecurity and state fragility on land.³¹⁴ Nonetheless, recent developments have indicated that the piracy at the East African zone has decreased which can be accredited to active initiatives by numerous countries surveying and monitoring the coastal area in particular Kenya.³¹⁵ The region is nevertheless still susceptible to radical attacks by factions such as the Al-Shabaab and the pirates of Somalia.³¹⁶

The question arises whether such security interests may be considered to be relevant circumstances. In the *Libya vs Malta Case* the court asserted that the concept of maritime security are interconnected with the concept of the Shelf.³¹⁷ The court stated that the key element to ascertain whether security is a relevant consideration is whether the line used in the delimitation would be so close to the coast of the state arguing for the security interest.³¹⁸ In light of the

³⁰⁹ Cottier T, *Equitable Principles of Maritime Boundary Delimitation*, 48.

³¹⁰ Hutchinson N, 'The Seaward Limit to the Continental Shelf Jurisdiction in Customary International Law', 1985, 123.

³¹¹ Mishra A, 'India-Africa Maritime Cooperation: The case of Western Indian Ocean', *Observer Research Foundation*, 2019, 3- https://www.orfonline.org/research/india-africa-maritime-cooperation-the-case-of-western-indian-ocean-57250/#_edn40 accessed on 5 December 2019.

³¹² Mishra A, 'India-Africa Maritime Cooperation: The case of Western Indian Ocean', 3.

³¹³ Mishra A, 'India-Africa Maritime Cooperation: The case of Western Indian Ocean', 3.

³¹⁴ Mishra A, 'India-Africa Maritime Cooperation: The case of Western Indian Ocean', 4.

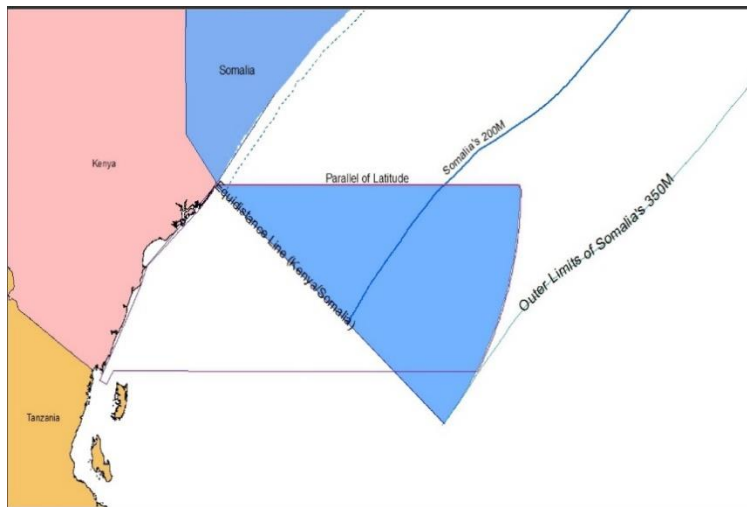
³¹⁵ I Mishra A, 'India-Africa Maritime Cooperation: The case of Western Indian Ocean', 4.

³¹⁶ I Mishra A, 'India-Africa Maritime Cooperation: The case of Western Indian Ocean', 4.

³¹⁷ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ Reports 1985, 51.

³¹⁸ *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, ICJ, 51.

Somalia/Kenya situation, if the line of equidistance is not adjusted this author asserts that the line would be too close to the coast of Kenya. The courts definitely haven't determined what constitutes of being too close to the shoreline but from objectively looking into the maps provided below, it can be inferred the line will be too close. This is taking into consideration that too ascertain maritime security control one needs some area other than the territorial sea to be able exercise such control.



The line of equidistance proposed.

Chapter 4.4.3 Oil Deposits and oil wells.

At the heart of the contested area between Somalia and Kenya is the presence of oil deposits in the area³¹⁹ which ought to be taken into account in the delimitation.³²⁰ A good deposit is often discovered on both fronts of the demarcation line which separates the continental shelf and it is often problematic in choosing the method of delimitation because of the presence of such interests and claims of over-exploitation by the respective states.³²¹

On whether the oil despoits constitute relevant circumstances to necessitate the adjustment of the equidistance line, the ICJ held that oil wells are not in themselves to be considered as relevant

³¹⁹ <https://www.businessdailyafrica.com/economy/Kenya-pushes-back-border-row-Somalia/3946234-4234566-umijm1/index.html>

³²⁰ *The North Sea Continental Shelf cases*, ICJ, 97.

³²¹ *The North Sea Continental Shelf cases*, ICJ, 97.

circumstances justifying the adjustment or shifting of the provisional delimitation line.³²² Only if they are based on express or tacit agreement between the parties will they be constituted as relevant circumstances.³²³

Therefore, as the MOU between Kenya and Somalia doesn't not mention even in passing oil deposits or wells, and the absence of any other agreement between the two on such interests, the presence of the oil deposits are irrelevant with regard to the delimitation. To further state the position of the Court with regard to mineral resources in the shelf, the court determined that the presence of the minerals was nothing but an objective element that should be taken into account throughout the process of the delimitation.³²⁴ The Parties know exactly how the problem exists, as well as how it can be addressed.

Chapter 4.4.4 Conduct of the States

When there are no legally negotiated maritime limits among the Nations concerned, their actions may be of significant importance to be considered in the delimitation. Upon the reading the preliminary objections of Kenya, several statements allude to the fact that there is an agreement between the two states on the maritime boundary.³²⁵ The conduct and agreement of a country may be attributed to the acquiescence rule and estoppel triggering a duty to preclude the State from resisting the activity being conducted or if that action may have led to a *modus vivendi* between the states.³²⁶

The jurisprudence of the court on this subject can be traced to the *Gulf Maine Case of 1984*. In the case, acquiescence was defined as conduct in which a person is conscious that another party has exerted rights over the contested subject and in its conduct the person does not object against such

³²² *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)*, ICJ Reports 2002, 304.

³²³ *Cameroon v Nigeria*, ICJ, 305.

³²⁴ *The North Sea Continental Shelf cases*, ICJ, 97.m

³²⁵ See *Somalia vs Kenya*, Preliminary Objections (Kenya) discussions on the numerous steps taken by Kenya to negotiate an agreement between the two States.

³²⁶ *The Gulf of Maine case (Canada vs USA)*, ICJ Reports 1984, 126.

declaration of rights.³²⁷ On the other hand, estoppel is where one makes a commitment or performs an action that the other party depends on either to their own loss or benefit.³²⁸

Canada's arguments is that in 1964 it started issuing permits for the exploration in the contested shelf and consequently published an article on the matter in the Month & Oil and Gas Report and that USA only opposed Canada's Contention.³²⁹ In addressing the conduct of the USA, the chamber held that USA's silence on matter till the end of 1969, spanning over 10 years, definitely revealed some uncertainties with regard to USA's act.³³⁰ However, such conduct does not lead to a conclusion that the USA had recognized the use of the median line approach as the final and correct method.³³¹

Furthermore, the Court concluded that the United States did not 'acquiesced' to the inclusion of the equidistant line in the delimitation on two further grounds: first the platform alluded to was just a small fraction of the territory to be delimited, and secondly, the shelf zone was but one of the two regions put before the chamber.³³² In addition, the courts seem hesitant to attribute a parties' silence to warrant estoppel acceptance. The court concluded that any effort to relate the silence of the United States on the declaration of the rights by Canada to legal implications that invoke the doctrine of estoppel appears to be an extreme.³³³

In *El Salvador vs Honduras* where the court accepted the principle of acquiescence was a case where the contested island of Meanguera was under the full control and possession of El Salvador from 1854.³³⁴ The fact that El Salvador exercised this sovereignty from 1854 till 1992 when the case was first filed was sufficient to show effective control and possessions of the island and the absence of an opposition from Honduras was constituted acquiescence.³³⁵

³²⁷ *The Gulf of Maine case*, ICJ, 129.

³²⁸ *The Gulf of Maine case*, ICJ, 129.

³²⁹ *The Gulf of Maine case*, ICJ, 135.

³³⁰ *The Gulf of Maine case*, ICJ, 138.

³³¹ *The Gulf of Maine case*, ICJ, 138.

³³² *The Gulf of Maine case*, ICJ, 137.

³³³ *The Gulf of Maine case*, ICJ, 140.

³³⁴ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Report 1992, 363.

³³⁵ *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, 367.

The question then arises in one can infer from the conduct of Somalia to constitute acquiescence to the use of the parallel approach in the demarcation. From the decisions of the *Gulf Maine Case* and the *El Salvador vs Honduras case*, the court seems to place a lot of importance to the period of occupation. In the word of the chamber in *the Gulf Maine case*,

‘any attempt to attribute to such silence, a brief silence at that, legal consequences taking the concrete form of an estoppel, seems to be going too far.’³³⁶

The court held that a period amounting to almost 10 years is a brief silence and would not amount to any form of consent and in the *Honduras case* the court held that a period running from 1834-1992 was sufficient to show effective occupation in the absence of any opposition from the other party.

The Republic of Kenya argued that the disputed territorial waters have historically been under their jurisdiction and by Somalia’s unilateral act to not oppose such occupation amounts to acquiescence. Kenya, however, has altered its maritime boundary with respect to the Exclusive Economic Zone three times. The first relevant statute was the *1972 Territorial Waters Act*, which alluded to the principle of equidistance as the method of delimitation with regard to the territorial sea³³⁷ in which Somalia did not to protest to this. In February 1979, through a *Presidential Proclamation*, the Exclusive Economic Zone was changed to a boundary of a straight line following the latitudinal measure of 1 degree 38’³³⁸ which Somalia also did not oppose. This is the first formulation of the parallel latitude approach in the case.

The third statute was the *1989 Maritime Zones Act* which states that with regard to the northern boundary of the exclusive economic zone with Somalia, it shall be delimited by notice in the Gazette by the Minister pursuant to an agreement between Kenya and Somalia.³³⁹ Seventeen years later, Kenya changed the border of the exclusive economic zone for the fourth time in a *Presidential Proclamation issued on 9 June 2005*, which established in respect of its northern territorial waters boundary with Somali Republic to be on eastern latitude South of Diua

³³⁶ *The Gulf of Maine case*, ICJ, 140.

³³⁷ Article 2(4), *Territorial Waters Act* (Act No. 2 of 1972).

³³⁸ Article 1(b), *Proclamation by the President of the Republic of Kenya* (1979) Ken 4655.

³³⁹ Article 4(4), *Maritime zones act* (Cap 371).

Damascian Island being latitude 1°39'34" degrees south.³⁴⁰ In 2009, Kenya also filed submissions to extend the outer limits of its continental shelf. The question therefore arises whether Kenya's historic claims can allude to presence of any conduct from Somalia alluding to acquiesce or estoppel. Under its Memorial, Somalia rejects the argument of acquiescence proposed by Kenya on the basis that delimitation by acquiescence cannot take place in a unilateral claim.³⁴¹

In assessing the claim by Kenya, there are three proclamations that it relies on, that is:

- the *1972 Territorial Waters Act*, which alluded to the **principle of equidistance** as the method of delimitation with regard to the territorial sea
- The *1979 Presidential Proclamation* which provided that the Exclusive Economic Zone was changed to a **boundary of a straight line** following the latitudinal measure of 1 degree 38'.
- The *1989 Maritime Zones Act* which states that with regard to the northern boundary of the exclusive economic zone with Somalia, it shall be delimited by notice in the Gazette by the Minister **pursuant to an agreement** between Kenya and Somalia.³⁴²
- *Presidential Proclamation issued on 9 June 2005*, which established in respect of its northern territorial waters boundary with Somali Republic **to be on eastern latitude** South of Diua Damascian Island being latitude 1°39'34" degrees south.³⁴³

Kenya's claim is that the prolonged silence of Somalia, the complete absence of protest against, in particular, two notified and explicit proclamations adopted 25 years apart, clearly meets the acquiescence standard. Kenya alludes to a period of 25 years amounting to effective exercise of sovereignty over the disputed areas. However, this cannot be the case as the period being claimed has no element of consistency in effective occupation on the territory. First, the 1972 Territorial Sea Act provides that the territorial sea would be demarcated by the use of the equidistance approach while the 1979 Presidential proclamation pertains to the parallel latitude approach for

³⁴⁰ Article 1(b), *Proclamation by the President of the Republic of Kenya* (2005).

³⁴¹ *Somalia vs Kenya*, Memorial of Somalia, ICJ, 2.70.

³⁴² Article 4(4), *Maritime zones act* (Cap 371).

³⁴³ Article 1(b), *Proclamation by the President of the Republic of Kenya* (2005).

the Exclusive Economic Zone. As they deal with two different maritime boundaries, the time period for the parallel latitude approach would be counted from 1979.

The effective control of EEZ on a line of parallel latitude was effectively halted by the coming of the *1989 Maritime Zones Act* which states that the EEZ would be demarcated by way of agreement between the parties. The enjoyed occupation amounts to a period of about 10 years, which in light of *the Gulf Maine* Judgement is not sufficient to invoke acquiescence from Somalia. With regard to the Continental Shelf, it is only until 2009 that the parallel line was extended to the outer limits of the continental shelf. However, the fact that the MOU between the Countries which provided for a 'no-objection' clause to the parties in respect to the submissions of the Continental Shelf to the CLCS may be inferred that the parties were not able to come up with an agreement with regard to the correct maritime boundary between them.

Thus, it would be fair to conclude that, as there is no presence of any agreement or conduct inferring that either party consented to the proposed method of demarcation, the states are not bound by either estoppel or the doctrine of acquiescence. Following from that, the historical claim argument presented by Kenya is not sufficient to constitute a relevant circumstance to require modification of the equidistance line.

Chapter 4.5 Conclusion.

Principles of delimitation of the continental shelf and the exclusive economic zone have evolved over the past years. State practice suggests no process of delimitation as compulsory as no established practice persists as to the exact approach of delimitation administered by countries. Furthermore, there exists no proof that countries feel obliged by the legal framework to adhere to a specific approach. However, legal decisions have been considered significant in evaluating the stance taken by the court on the process of delimitation. Both article 6 of the Continental shelf Convention and article 12 of the Convention on the Territorial Sea assert that in the absence of an agreement between the state the appropriate method of delimitation is the equidistance approach.

However, courts have found that some unfairness might result from applying this method arbitrarily which has led to the emergence of the rule of equidistance/special circumstance or the equidistance/relevant circumstances. It has been established, that no process of delimitation could

avoid an injustice resulting from the demarcation³⁴⁴ and the court's approach would be to start with an equidistance line then upon assessing the specific features of the area, the court may make use of alternative methods, alone or in conjunction with the equidistance line in the aim of achieving an equitable result.

Furthermore, the view of the court is that, although the law is now more pronounced on the method of delimitation, each instance is special. A fair outcome is practically futile unless the particular circumstances of the area in delimitation is analyzed critically. In summary, the special circumstances stay central in every context.

There are two factors that relevant circumstances relate to, that is geographical considerations and non-geographical consideration. Geographical considerations pertain to the characteristics of the shore-line that is either straight or curve, the length of the shore lines and presence of islands or waterways. The non-geographical considerations, which are the main interest of this dissertation consists of political factors such as security interests, economic factors such as oil and gas deposits, historical rights and the conduct of states.

In the *Somalia vs Kenya* case, in light of the determination of the courts on the relevant circumstances, two features seem to hold water, that is the security considerations and the length of their respective coastlines. However, as the decision of the court is dependent on the Judge's discretion and the facts presented before it, it is hard to ascertain whether the above features would necessarily constitute special circumstances. This is wholly dependent on the court's understanding on the submissions of Kenya and Somalia.

The distinction of legal and political questions leads, as described in the Iranian hostage case, to an unresolved political dispute in cases. Nonetheless, there is no justification why it is not possible to accomplish the demarcation of the boundary effectively and to reach a level that fits the criteria of all concerned with exploiting the area over a lifetime. In light of this, the next chapter of this dissertation will attempt to come up with recommendations from the findings of this analysis and a final conclusion.

³⁴⁴ *The North Sea Continental Shelf cases*, ICJ, 92.

It has been established, that no process of delimitation could avoid an injustice resulting from the demarcation. It can only affirm the belief that no particular form of delimitation must be pursued, but one purpose. In this spirit, the Court needs to consider how to delimit the shelf if, in reality, the principle of equidistance may not deliver an equitable remedy by not pursuing a particular approach but a particular goal, that is equity.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS.

Conclusion.

The concept of Territorial sovereignty has emerged as a critical aspect that States till to date hold very dear. Territorial sovereignty encompasses the restricted freedom of a state to impose its jurisdictional control. Inevitably, the sovereign authority of the country requires autonomy over the land's developing ecosystems and certain waters within its borders in which such influence may be enforced by the government.

During the period of colonialism in Africa in particular, territories were established, where foreign nations divided the land of Africa into the countries we know today. After Independence, many governments needed to set up their own territories to maintain and expand their control. In the oceans, there has been a rush to demarcate territories where states will exercise their unique sovereignty. The reasons underlying the desire to establish the areas in which States would exert their sovereignty arose as legitimate fears of the coastal countries due to various technological advancements in the exploitation of marine assets to defend their domestic economic ambitions specifically in relation to minerals, biodiversity, environmental impacts and national security. The issue at hand here is the conflict over a small triangle off the coast of Africa, in the Indian Ocean, of about 100,000 m² (62,000 square miles) of oil and gas that has a large deposit of oil and gas.

Often ocean borders are contentious, and countries often seek the United Nations such as the Commission on the Limits of the Continental Shelf assistance in resolving these conflicts. Maritime boundary conflicts tend to reflect two facets: territorial jurisdiction as a historical legacy; and the specific legal and maritime limits, which are primarily due to different interpretations of the law of the sea.

In matters related to the creation of outer limits on the continental shelf beyond 200 nautical miles the Commission's function is to provide recommendations to coastal States upon submission of their claims. The *Convention on the Law of the Sea* establishes five key generations of successive

maritime zones³⁴⁵ which are: territorial sea³⁴⁶, adjacent zone³⁴⁷; continental shelf³⁴⁸; exclusive economic zone (EEZ)³⁴⁹; and the area.³⁵⁰ The two nations have certainly a strong interest in the area being contested, not only due to the presence of such valuable resources, including oil and gas, but also the sacredness that States have in their territories.

Somalia's submission is that the line for delimitation for the maritime boundary between them and Kenya is the equidistance approach while Kenya's claim is that the line should be a parallel latitude. When deciding a matter, the court seeks to limit itself to the relevant legal considerations before giving a decision. The optional clause in the statute of the ICJ provides that mandatory jurisdiction shall apply to the case unless they have exercised their liberty to amend, reduce, alter and revoke the optional clause in form of reservations which the court will be bound by. Kenya published the declaration under Article 36(2) on 19 April 1965 in summary, provided that the court shall have jurisdiction in all matters except those where an alternative dispute resolution method has been provided. This is where Kenya argued that in the paragraph 6 of the MOU between them and Somalia there established another procedure for delimitation that is the submission to the Commission on the Limits of the Continental Shelf.

In accordance with Article 32 of the Vienna Convention, the court established that the MOU does not provide a procedure for the settlement of maritime boundary dispute between the Parties.³⁵¹ The duty to negotiate under the MOU is not permanently obligatory, nor does it preclude a Party from resorting to dispute settlement proceedings before the CLCS instructions are given, therefore, the court has jurisdiction as a party is not necessarily barred from seeking the alternative due to non-exhaustion of the other procedure.

In compliance with Art. 38 of the ICJ Statute, judges shall, in merit evaluation, be informed by Treaty law, *jus cogen*, principles of law, legal judgments and international law academics. With regard to delimitation, the Court's approach is based on the test deduced from both Article 6 of the

³⁴⁵ Cottier, *Equitable Principles of Maritime Boundary Delimitation*, 47.

³⁴⁶ Article 3, *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397.

³⁴⁷ Article 33 (Section 4), Part XI, *United Nations Convention on the Law of the Sea*.

³⁴⁸ Article 76 (Part VI), *United Nations Convention on the Law of the Sea*.

³⁴⁹ Article 55 (Part V), *United Nations Convention on the Law of the Sea*.

³⁵⁰ Part XI, *United Nations Convention on the Law of the Sea*.

³⁵¹ *Somalia vs Kenya*, Judgement on Preliminary Objections, ICJ, 4.

Continental Shelf Convention and Article 12 of the Territorial Sea Convention which states that the equidistance solution is appropriate in the absence of an agreement between the States which may be modified in the presence of special circumstances. That is the equidistance/special circumstances rule.

There are two factors that relate to relevant circumstances: geographical and non-geographical considerations. Geographical aspects apply to the attributes of the straight or curve shoreline, the distance of sea lines as well as the occurrence of islands or channels. While non-geographical factors include, political considerations including security interests, economic factors such as oil and gas reserves, historical rights and conduct of states. In the case of *Somalia vs. Kenya*, two aspects seem to work in practice in the light of the court's jurisprudence, namely the security concerns and the length of their respective coastlines. Nonetheless, since the Court decision is based on the discretion of the Judge and the evidence before him, it is difficult to determine whether the above characteristics are actually specific circumstances.

Recommendations.

In conclusion, there are two obvious recommendations that can be made with regard to the *Somalia vs Kenya* case. The obvious one is to wait for the decision of the court. The court's in delimitation cases has consistently and pronounced itself on the issue of demarcation, that irrespective of the method use, the goal shall always be equity. In as much as the rule of equidistance/relevant circumstances seem to be the particular approach of the court, this does not limit the chamber in using other methods of delimitation together with or without equidistance. Furthermore, the ICJ has listened and determined several matters over the years, from the *Corfu Channel case of 1949*³⁵² to the *Gambai vs Mynamar case of 2019*³⁵³, the court is not only competent to analyse and determine the issue, but also fair in its decision. Therefore, there is no reason why it's not possible to effectively complete the boundary demarcation and achieve a level that meets the requirements of all those concerned in the lifelong exploitation of the region.

³⁵² *Corfu Channel Case* (United Kingdom v. Albania), ICJ Reports 1949.

³⁵³ *Gambai vs Mynamar*, ICJ Reports 2019.

Unfortunately, due to the nature of the case, one party has to lose, and taking into account the complexity of the allegations brought before the ICJ, the decision may either significantly alter Kenya's territory or vice versa, deprive Somalia of any mineral resources that may be located in the disputed area. It is definitely obvious that the decision will also significantly damage the relationship between the two countries. Furthermore, no method of delimitation could prevent such unjust outcomes as all could result to relative injustices.³⁵⁴ Then what is the purpose of subjecting oneself to such a process? The probability of winning could go both ways.

In the spirit of Pan-Africanism and the motion of African states for African states, my recommendation is re-negotiation. It is definitely not a new aspect under international law or even in this case, but there is a reason why even the International Court of Justice strongly advocates for this.³⁵⁵

The wordings of both article 12 of the Territorial Sea and Contiguous Zone and article 6 of the Convention on the continental shelf seem to advocate for one thing, agreement between states. It is in the absence of such an agreement that other maritime delimitation processes may be used. International instruments are continuously urging states to negotiate which is based on the principle of equality of all states.

It is agreed that Conflicts can definitely arise in relation to the exploitation of mineral resources in the marine territory due to overlapping interests and claims such as in this case. State practice shows how this issue has been addressed, all that is required would be to return to the commitments agreed by the coastal nations in order to ensure the most effective extraction or distribution of the resources derived.³⁵⁶

Specifically, see:

1. The agreement of 10 March 1965 between the United Kingdom and Norway.

³⁵⁴ *North Sea Continental Shelf Cases*, ICJ, 92.

³⁵⁵ *North Sea Continental Shelf Cases*, ICJ, 85.

³⁵⁶ *North Sea Continental Shelf Cases*, ICJ, 97.

Article 4³⁵⁷

'If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving therefrom shall be apportioned.'

2. The agreement of 6 October 1965 between the Netherlands and the United Kingdom.
3. The 14 May 1962 agreement between the Federal Republic and the Netherlands.

Somalia's arguments as to why they delayed submitting their submissions on the continental shelf to the Commission on the Outer Limits was because they lacked the expertise to conduct such a process and financial inability to hire experts on time, and that they also faced a long period of civil war in their country.³⁵⁸ Kenya, on the other hand, claimed that they spent nearly 700 million kshs in the process of submitting their claims on the outer limits of their continental shelf.

It is common knowledge that there is a large amount of money going into oil and gas drilling, which is the main reason why most developing countries like Kenya have signed contractual agreements with multinational companies like Tullow oil to assist in drilling. In the light of all the arguments and discussions in this paper, the argument of this dissertation is that the continental shelf has two major interests, namely mineral exploitation and security interests.

Because of the involvement of cartels, terrorists and pirates, it would be challenging and almost impossible for the two contesting states to mine or exploit the resources contained in the contested in time, and also to implement safety and stability on the coast of the Indian Ocean. The recommendation of this paper is that both countries will strengthen their maritime forces by entering into a bilateral agreement that is fair to both countries in the face of it, and it is reasonable

³⁵⁷ Article 4, *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the delimitation of the continental shelf between the two countries*, 10 March 1965.

³⁵⁸ *Somalia vs Kenya*, Preliminary objections (Kenya), ICJ, 27.

to conclude that, with such reinforcements, the war on terrorism and piracy will not only minimize but cease to exist.

If we aim to achieve an equitable outcome from this case, the best and most effective method is not litigation but having an agreement which outlines the various obligations and benefits of both states.

BIBLIOGRAPHY

STATUTES

Kenya's Optional Clause Reservation under Art. 36 (2) of the ICJ Statute, 19th April 1965, 531 UNTS 113.

Maritime zones act (Cap 371).

Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic, 7th April 2009, Bilateral Treaty.

Proclamation by the President of the Republic of Kenya (1979) Ken 4655.

Territorial Waters Act (Act No. 2 of 1972).

JOURNAL ARTICLES

Article 1, Montevideo Convention on the Rights and Duties of States of 1933, Treaty series 165 LNTS 19; 49 Stat 3097

Article 12, International Law Commission, *Convention on the Continental Shelf*, 29 April 1958, United Nations, Treaty Series, vol. 499, p. 311.

Article 2(4), United Nations, *Charter of the United Nations*, 24 October 1945

Carbone F and Accordi G, 'The Indian Ocean Coast of Somalia Author links open overlay panel', 41 *Marine Pollution Bulletin* 1.

Fell L, 'Maritime Contiguous Zones', 62 *Michigan Law Review* 5, 1964.

Fitzmaurice M, 'International Court of Justice, Optional Clause', *Max Planck Encyclopedias of International Law*, 2011.-<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e68> on 20th November 2019.

Guzman A, 'A Compliance Based Theory of International Law', 90 *California Law review* 14, 2002.

Haile G, 'The Unity and Territorial Integrity of Ethiopia', 24 *The Journal of Modern African Studies* 3, 1986.

Hamid A, 'Sources Of International Law: A Re-Evaluation', 11 *International Islamic University Malaysia Law Journal* 2, 2003, 3.

- Hasan M, Jian H, Alam W and Chowdhury K, 'Protracted maritime boundary disputes and maritime laws', 2 *Journal of International Maritime Safety, Environmental Affairs, and Shipping* 2, 2018.
- Hutchinson D, 'The Seaward Limit to the Continental Shelf Jurisdiction in Customary International Law', 56 *British Yearbook of International Law* 1.
- Kohen M, 'Is The Notion Of Territorial Sovereignty Obsolete?', 3 *Graduate Institute of International Studies* 1, 2000, 3.
- Kromm D, 'Irredentism in Africa: The Somali-Kenya Boundary Dispute', 70 *Transactions of the Kansas Academy of Science* 3, 1967, 359.
- Krueger R and Nordquist M, 'The Evolution of the 200-mile Exclusive Economic Zone: State Practice in the Pacific Basin', 19 *Virginia Journal of International Law* 1, 1979.
- Kunoy B, 'The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf Prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf,' 25 *International Journal of Marine and Coastal Law* 1, 2010.
- Laitin D, 'International Perspective: Tensions in the Horn of Africa', 23 *Africa Today* 2, 1976.
- Lay, S.H., Churchill, R. Nordquist, M, 'New directions in the Law of the Sea, Documents', 1 *Oceana Publications* 1, 1973.
- M Miyoshi, 'Transition of Legal Principles on Delimitation of Continental Shelf', 5 *Law of the Sea and Ocean Policy* 1, 1982,
- Magnússon B, 'Is there a Temporal Relationship between the Delineation and the Delimitation of the Continental Shelf beyond 200 Nautical Miles?', 25 *The International Journal of Marine and Coastal Law* 237, 2013.
- Mann M, 'The autonomous power of the state : its origins, mechanisms and results,' 25 *European Journal of Sociology* 2, 1984, 187.
- Marxsen C, 'Territorial Integrity in International Law: Its Concept and Implications for Crimea,' 25 *Heidelberg Journal of International Law* 1, 2015.
- Mishra A, 'India-Africa Maritime Cooperation: The case of Western Indian Ocean', *Observer Research Foundation*, 2019.- https://www.orfonline.org/research/india-africa-maritime-cooperation-the-case-of-western-indian-ocean-57250/#_edn40 accessed on 5 December 2019.
- Nandan S, 'The Exclusive Economic Zone: A Historical Perspective', 1 *Food and Agriculture Organization of the United Nation* 1, 1987.

- Noyes J, 'Judicial and Arbitral Proceedings and the Outer Limits of the Continental Shelf', 42 *Vanderbilt Journal of Transitional Law* 4, 2009.
- Omar S, 'Sources of International law, In the light of the Article 38 of the International Court of Justice', *International Islamic University*.- <https://ssrn.com/abstract=1877123> on 4 December 2019
- Pauwelyn J, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International law* 3, 2001,
- Pauwelyn J, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International law* 3, 2001.
- Pratt M, 'The Role of the Technical Expert in Maritime Delimitation Cases', 53 *Publications on Ocean Development* 1, 2009.
- Quintana, J, '12 Challenges to the Court's Jurisdiction (Preliminary Objections)', 10 *International Litigation in Practice Journal* 1, 2015.
- Rothwell D, 'Building on the Strengths and Addressing the Challenges: The Role of the Law of the Sea Institutions', 35 *Ocean Publishers* 1, 2004.
- Sari Graben,' Arctic Networks and Legal Interpretations of the UN Commission on the Limits of the Continental Shelf', 28 *Leiden Journal of International Law* 4, 2015.
- Shelton D, 'Form, Function, and the Powers of International Courts', 9 *Chicago Journal of International law* 1, 2009.
- UNGA, *Convention on the Law of the Sea*, 10 December 1982, available at: <https://www.refworld.org/docid/3dd8fd1b4.html> [accessed 17 February 2019]
- Yap W and Remus J, 'Report on a Survey of the Coastal Areas of Kenya for Shrimp Farm Development', FAO, Rome, 1986.- <http://www.fao.org/3/AC574E/AC574E00.htm> accessed on 5 December 2019.

BOOKS

- Bertrand de Jouvenel, *Sovereignty: an inquiry into the political good*, Translated by J. F. Huntington, The University of Chicago Press, Chicago, 1957.
- Cottier T, *Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law*, Cambridge University Press, Cambridge, 2015.

James R. Crawford, *The Creation of States in International Law*, Oxford University Press, Oxford, 2007.

Lovelock, J.E., “*Hands up for the Gaia Hypothesis*”, *Nature*, Volume 344, Blackhouse Press, 1990, 102

Malcolm Shaw, *International Law*, Cambridge University Press, 2016, 6th ed.

Michael Mann, *The autonomous power of the state: its origin, mechanisms and results*, *European Journal of sociology*, Volume 25, 1984.

Paul Gilbert, *The philosophy of Nationalism*, Westview Press, London, 1998, 1st ed.

Pieter H. Kooijmans, *Internationaal Publiekrecht in Vogelvlucht* [Public International Law in a Nutshell], W.E.J. Tjeenk Willink press, Deventer, 2000, Eighth Revised Edition.

Post A, ‘*Deep Sea Mining and the Law of the Sea*’, Martinus Nijhoff Publishers, The Hague, 1983.

Rateng Jackline, *The status of Maritime Boundaries in Kenya*, Published, Nairobi University, Nairobi, 2008.

Robert D. Sack, *Human Territoriality: A Theory*, *Annals of the Association of American Geographer*, 1983.

Scharf M, ‘*The Truman Proclamation on the Continental Shelf, in Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments*, ’ Cambridge University Press, Cambridge, 2013.

Shaw M, *International Law*, Cambridge University Press, Cambridge, 2008.

Tanaka Y, *Predictability and Flexibility in the Law of Maritime Delimitation*, Hart publishing, New York, 2006.

Thomas Hobbes, 1588-1679 (1968) *Leviathan*, Baltimore, Penguin Books

CHAPTER IN BOOKS

Caflisch L, ‘The Delimitation of Marine Spaces between States with Opposite and Adjacent Coasts’ in Dupuy R and Vignes D, (eds), *A Handbook on the New Law of the Sea*, 1st ed, Brill Publisher, Leiden, 2009.

INTERNATIONAL INSTRUMENTS

Charter of the United Nations, 24 October 1945, 1 UNTS 16.

Convention on the Continental Shelf, 29 April 1958, 499 UNTS 311.

Convention on the Territorial Sea and the Contiguous Zone, 10 September 1964, 516 UNTS.

Covenant of the League of Nations

International Law Commission, *Convention on the Continental Shelf*, 29 April 1958, 499 UNTS 311.

UN Statute of the International Court of Justice, 18 April 1946.

UN The Final Act of The Third United Nations Conference on The Law of The Sea, *Statement of Understanding, Concerning A Specific Method, To Be Used In Establishing the Outer Edge Of The Continental Margin*, 1999.

United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397.

United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS.

United Nations Convention on the Law of the Sea, *Meeting of States Parties*, 29 May 2001 SPLOS/72.

Vienna convention on the law of treaties, 23 May 1969, 1155 UNTS 331.

REPORT

Asian-African Legal Consultative Organization, *Report of the Sub-Committee on the Law of the Sea by the Asian-African Consultative Committee*, 1971.

Asian-African Legal Consultative Organization, *Report of The Thirteenth Session of the Asian-African Consultative Committee*, 1972.

DICTIONARY

Black law dictionary, 2nd ed.

DISSERTATION

Aké L, 'The concept of equidistance/relevant circumstances in the development of the law of maritime delimitation' Published PHD Disserattion, World Maritime University, Sweden, 2009.