

**Interrogating an African Approach to Maritime Boundary Delimitation between  
Adjacent Coastal States under Article 83(1) of the United Nations Convention on the  
Law of the Sea**

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## Declaration

I, AZMAIRA ALIBHAI, 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.

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

Signed: .....  .....

Mr. Humphrey Sipalla

## List of Abbreviations

ICJ	International Court of Justice
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
NM	nautical miles
PCA	Permanent Court of Arbitration
TWAIL	Third World Approaches to International Law
UNCLOS	United Nations Convention on the Law of the Sea

## List of Cases

*Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India)*, Award, Permanent Court of Arbitration (PCA), 7 July 2014.

*Case Concerning the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, Award, 14 February 1985.

*Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports, 24 February 1982.

*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports, 3 June 1982.

*Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 30 June 1977.

*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports, 10 October 2002.

*Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports, 14 June 1993.

*Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, ICJ Reports, 3 February 2009.

*Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Institution of Proceedings, ICJ Reports, 28 August 2014.

*North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, ICJ Report, 20 February 1969.

*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports, 19 November 2012.

*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment, ICJ Reports, 8 October 2007.

## List of Legal Instruments

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

*Statute of the International Court of Justice*, 18 April 1946, 33 UNTS 993.

Truman HS, 'Policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf', 28 September 1945 (13 Dept St Bull 485).

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

*Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331.

## Abstract

A natural prolongation of a State's boundary envisioned by the 1945 Truman Declaration favoured a unilateral approach to maritime delimitation proclaiming that 'coastal States have an entitlement to neighbouring seabed areas whether they are in a position to vindicate the claim or not'.<sup>1</sup> Although an attractive form of appropriation of the common heritage of mankind,<sup>2</sup> the Declaration is in no way reflective of the dynamics of Third World States, landlocked, and geographically disadvantaged States, unlike Article 83(1) of the United Nations Convention on the Law of the Sea (herein UNCLOS).<sup>3</sup> One of the major concerns that was brought to the fore at The Third United Nations Conference on the Law of the Sea (UNCLOS III) was the initial lack of participation by the newly independent Third World States in the delimitation of maritime boundaries. This study shall evaluate whether the application of Article 83(1) by international institutions in respect of adjacent coastal African States is indicative of a common African approach to the delimitation of the continental shelf.

This study recommends that the regime of international law ought to be more receptive of the effects of equity as demonstrated by international institutions discussed herewith, especially in the adoption of equitable principles in achieving a just global standard. Even though the African approach strives for an equitable standard, those coastal States that prefer (based on their relevant circumstances) the adoption of one of the various technical methods, can employ it through peaceful negotiations and international adjudication.

Word Count: 245 words.

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<sup>1</sup> Truman H, 'Policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf', 28 September 1945 (13 Dept St Bull 485).

<sup>2</sup> UNGA, *Declaration of principles governing the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction*, UN/A/Res/2749 (XXV) 12 December 1970.

<sup>3</sup> For a concise historical development on the regime of the international law of the sea leading to UNCLOS III, see Dundua N, 'Delimitation of maritime boundaries between adjacent States', The Nippon Foundation Fellow (2006-2007), 7-14. Of interest to this study is the role of Third World States in the development of the jurisprudence in maritime boundary delimitation.

# 1. Introduction to the Study

## 1.1. Background of the problem

The equidistance method<sup>4</sup> of delimitation is a manifestation of the *unicum* theory<sup>5</sup> and the principle of equity.<sup>6</sup> It is designed to consider any unique factors<sup>7</sup> of the State to deliver an equitable solution - that is to say, a determination of the territory to which a State may exercise their sovereignty and consequent rights, including resource exploration and exploitation of the continental shelf.<sup>8</sup> The Truman Declaration introduces the idea of an equitable determination: 'in cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined...in accordance with equitable principles'.<sup>9</sup> Other sources of the law of the sea include case law, treaty law and customary law.<sup>10</sup>

This exploration of the legal and technical approaches to maritime boundary delimitation facilitates comparisons between several adjacent African States including the relevant factors considered towards an 'equitable determination'. In the Somalia-Kenya dispute before the International Court of Justice (ICJ) for example,<sup>11</sup> Somalia requested the Court to decide 'the complete course of the single maritime boundary dividing all the maritime areas appertaining to Somalia and to Kenya in the Indian Ocean, including the continental shelf beyond 200 nautical miles (nm)'.<sup>12</sup> Somalia made specific reference to the use of the relevant circumstances method.<sup>13</sup>

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<sup>4</sup> Lazare A, 'The concept of equidistance/relevant circumstances in the development of the law of maritime delimitation' Published MSc Thesis, World Maritime University, 24 August 2009, 3. The distinction between the equidistance/special circumstance method and the equidistance/relevant circumstance method is introduced.

<sup>5</sup> Lazare A, 'The concept of equidistance/relevant circumstances in the development of the law of maritime delimitation', 21.

<sup>6</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark and Federal Republic of Germany/Netherlands)*, Judgment, ICJ Reports, 20 February 1969.

<sup>7</sup> Means the geographical and non-geographical factors explored by courts when determining delimitation disputes. Mensah T, 'Delimitation of the continental shelf: The methodology' in Sainz-Borgo J, Gudmundsdottir H, Gudmundsdottir G, Amaya-Castro J, Kanade M, Saab Y and Sipalla H (eds) *Liber Amicorum - In honour of a modern Renaissance man His Excellency Gudmundur Eiriksson*, Ciudad Colon and Sonipat: UPEACE Press, 2017, 35.

<sup>8</sup> Article 77, *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 397. Subject to Article 82 of the same instrument.

<sup>9</sup> Truman H, 'Policy of the United States with respect to the natural resources of the subsoil and sea bed of the continental shelf'. Note, that the idea of 'equitable principles' was based on the equidistance/median line.

<sup>10</sup> Cottier T, *Equitable principles of maritime boundary delimitation: The quest for distributive justice in international law*, Cambridge University Press, 2015, 3.

<sup>11</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, ICJ Reports, 2014.

<sup>12</sup> *Maritime Delimitation in the Indian Ocean*, Application to institute proceedings, 8.

<sup>13</sup> *Maritime Delimitation in the Indian Ocean*, Application to institute proceedings, 8.

## 1.2. Statement of problem

Judge Wolfrum, in the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India)*, mentioned that UNCLOS III made a purposeful decision to avoid a particular method of delimitation of the continental shelf. Per Article 38(1)(d) of the Statute of the International Court of Justice (ICJ Statute) and Article 83(1) of UNCLOS, parties to the bilateral agreement may pronounce a preferred methodology that may be altered in the event that the views are conflicting by international adjudication bodies considering any relevant factors.<sup>14</sup>

Therefore, the problem that this study addresses is whether - considering the flexibility of the use of the sources governing maritime boundary delimitation - an African approach is prevalent. A case law-based approach to conducting this study explored the extent of the application of the equidistance-relevant circumstances method and equitable principles in delineating the continental shelf.

## 1.3. Purpose of the study

This study aimed to highlight the trend(s) identifiable when effecting a maritime boundary between adjacent States, particularly, adjacent African States. In doing so, the idea that UNCLOS is an operation of the Third World Approaches to International Law (TWAIL) and a manifestation of the principle of equity is exhibited. By identifying whether a trend is present in the way that adjacent African States delimit the continental shelf, due consideration should be paid to those factors that international adjudicative bodies favour in finally determining the most equitable mode of delimitation.

## 1.4. Hypothesis

*Sohn*, on the role of equity in maritime delimitation, observed that:

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<sup>14</sup> *In the Matter of the Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India)*, Award, Permanent Court of Arbitration (PCA), 7 July 2014, 131.

‘Precedent by precedent, equity has become an important factor in the determination of the maritime boundary, and new rules are slowly emerging, which are likely to crystallise soon, especially if anticipated numerous disputes find their way into international tribunals’.<sup>15</sup>

The existence of the ‘numerous disputes’ is as a result of the leeway given to Parties to UNCLOS in the preferred method for delimitation that best encapsulate their economic needs based on their geographic and non-geographic characteristics. Based on this, it is hypothesised that African States in particular tend towards the equitable principles method of delimitation more than any other method in light of their shared political history.

### 1.5. Research questions

1. Have international courts and tribunals consistently applied Article 83(1), making the relevant considerations for African States?
2. What are the relevant circumstances considered when delimiting the continental shelf?
3. Is the regime of maritime boundary delimitation legitimate, and can the wider body of international law benefit from its lessons?

### 1.6. Justification of the study

This study identified whether African States have adopted (knowingly or unknowingly) a common approach to maritime boundary delimitation. The greater justification is to appraise and expand the legal scholarship about African issues and African contributions to international law.

### 1.7. Scope and limitations of the study

This study would better identify the Third World approaches to maritime boundary delimitation if Asian and South American jurisprudence is evaluated. Unfortunately, due to the restriction

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<sup>15</sup> Sohn LB, ‘Exploring new potentials in maritime boundary dispute settlement’ in Vorsev LD and Dallmeyer D (eds), *Rights to oceanic resources*, Martinus Nijhoff Publishers, 1989, 153.

on the word count, only the African approach has been evaluated. Perhaps this shall inspire future scholarship by the candidate.

#### 1.8. Literature review

The core texts relied on to develop the theoretical framework were the prominent authors of TWAIL such as Gathii; Mutua; Chimni; Rajagopal, all of whom discussed what TWAIL is, its objectives and some ways in which the regime of international law can be 'reconstituted'.

Thomas Mensah's paper on the 'Delimitation of the Continental Shelf: The Methodology' elaborates the equidistance-relevant circumstances method vis-à-vis the angle bisector method. This study focuses on the former method and equitable principles.<sup>16</sup> It further discusses the place of equitable principles in delimitation using key case law. Dundua on 'Delimitation of Maritime Boundaries between Adjacent States' analyses how respective international institutions decided disputes amongst adjacent States across the seven continents.<sup>17</sup> Cottier on 'Equitable Principles of Maritime Boundary Delimitation' explains the legal framework and history of maritime boundary delimitation but expounds on the importance of equity and equitable principles in UNCLOS.

#### 1.9. Research Design and Methodology

The research design used in this dissertation is a case-by-case study. There is no better way of determining the extent to which equity and the relevant circumstances are appraised in this area of the law, as well as identify the reasons why any divergence from the general rule on delimitation was made. In each case study, the submissions by the parties were identified for an idea of that States preference, why, and the extent to which the institution upheld the importance attached to it.

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<sup>16</sup> Mensah T, 'Delimitation of the continental shelf: the methodology', 32.

<sup>17</sup> Dundua N, 'Delimitation of maritime boundaries between adjacent States', *Division for Oceans Affairs and the Law of the Sea*, 2006-2007.

Also, it was hypothesised that the relevant international institutions ought to be more 'considerate' of the relevant circumstances of Third World States. By adopting this methodology, an informed conclusion on the institutions actual considerations can be made.

## 1.20. Definition of terms

### 1.20.1 Continental Shelf

Article 76 of UNCLOS offers a comprehensive legal definition of the continental shelf. To extract the most basic elements from Article 76(1) for a preliminary understanding, the continental shelf:

'comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'

'It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof'<sup>18</sup> or

'exceed 350 nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres'.<sup>19</sup>

### 1.20.2 Baseline

A baseline is determined from a State's chart as a fixed low-water line that runs along the coast of a State.<sup>20</sup>

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<sup>18</sup> Article 76(3), *United Nations Convention on the Law of the Sea*.

<sup>19</sup> Article 76(5), *United Nations Convention on the Law of the Sea*.

<sup>20</sup> Article 5, *United Nations Convention on the Law of the Sea*. Article 7 states a method for drawing the baseline in the event that the 'coastline is deeply indented and cut into'. Evidently, there are several methods in determining the baseline (Article 13 states another) and so Article 14 allows for a combination of these methods for determining the baselines.

### 1.21. Outline of the dissertation, flow of argument, and chapter summary

Chapter one of this dissertation elucidated its architecture, including a background to the study, its significance, the research questions and hypothesis. Chapter two, the theoretical framework, was key to the development of the arguments as the purpose of TWAIL was to recognise a standard to assess whether the African States are adequately accommodated under Article 81(3) of UNCLOS. The cases used also highlighted the fact that UNCLOS fits within the literature of TWAIL and that its success lies in the fact that TWAIL is equity.

Boundary delimitation has two aspects, which were canvassed in Chapter three. One of the four legal approaches to maritime boundary delimitation (the model of equitable solutions based on international law) is characterised under Article 83(1) of UNCLOS. It allows for reasonable flexibility to adopt the various technical and scientific approaches by international institutions under Article 38 of the ICJ Statute. The literature review demonstrated that between adjacent coastal States, the two preferred methods of delimitation is the equidistance-relevant circumstances method and the use of equitable principles. The third Chapter goes on to discuss these two methods established by various legal instruments and selected case law.

The fourth Chapter is the crux of this paper as it posits a number of African maritime boundary disputes and the preferences (the technical methods) based on the identified relevant circumstances, as well as the institutions findings on the most equitable solution.

Chapter five presents a conclusion and some recommendations, identifying whether there is a trend exhibited by adjacent African coastal States in the delimitation of the continental shelf.

### 1.22. Summary of overall results

In summary, African States have the latitude to negotiate and agree on an equitable technical method as appropriate to their territorial claim over the continental shelf vis-à-vis the claim of other States. In the event that negotiations fail, States can seek redress from the relevant international adjudication bodies to decide on an equitable solution. Indeed, equitable solutions have been reached considering each States *unicum* coastlines and waters.

### 1.23. Summary of overall conclusions

African States do in fact vary on the technical approach to maritime boundary delimitation, and the institution tends to balance the interests of States in this determination considering their unique circumstances if any. The recommendation speaks to other areas of international law based on the example that Article 83(1) sets in fostering compromises, unity, and justice by making the place of equitable solutions and relative discretion on the part of States to decide on a maritime boundary prevalent.

## 2. Equity in the Pursuit for Justice Beyond 200nm: The Theoretical Framework

Jowitt describes equity as ‘the genius of every kind of human jurisprudence; since it expounds and limits the language of the positive laws, and construes them not according to their strict letter, but rather in their responsible and benignant spirit’.<sup>21</sup> The role of equity in international law is to introduce perspectives of ‘morality, good conscience and good faith’<sup>22</sup> in the pursuit of justice.<sup>23</sup> The *North Sea Continental Shelf* case reiterated this:

‘On a foundation of very *general precepts of justice and good faith*, actual rules of law are here involved which govern the delimitation of adjacent continental shelves - that is to say, rules binding upon States for all delimitations; in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field...’ (*emphasis mine*).<sup>24</sup>

The five identified functions of equity are closely connected to the objectives of TWAIL: ‘as a basis to temper the rigid application of rules; as a standard of fairness, reasonableness and good faith, as general principles in legal reasoning; as a mode of scarce resource allocation; and as redistributive justice’.<sup>25</sup> In doing so, an inclusive application is made of the nuances of States’ boundaries, State practice, and what is just, to the substantive law on maritime boundary delimitation. TWAIL advocates not for preference of developing States over the developed,<sup>26</sup> but for inclusion through the equitable application of the law:

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<sup>21</sup> Chattopadhyay SK, ‘Equity in international law: Its growth and development’, 5 *Journal of International and Comparative Law*, Centre for Studies and Research in International Law and International Relations, 382-383. Note that because of the nature of equity, the concept is difficult to define therefore, by describing it, Section 2.2 of this study will illustrate that TWAIL forms part of the jurisprudence of equity. For an elaboration of equity, particularly the maxims of equity, see also *Snell’s Equity*, 33ed, Sweet & Maxwell, 2015, London, 1.

<sup>22</sup> Lauterpacht H, ‘International law’, *Cambridge University Press*, (1970), 257.

<sup>23</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, ICJ Reports, 10 October 2002, 303. At paragraph 294 of the judgment, it was clarified that equity is not a method of delimitation.

<sup>24</sup> *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgment, ICJ Report, 20 February 1969, 46-47. See also *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports, 24 February 1982, 92. In the latter case, the ICJ had the following to say on the application of an objective standard in determining boundary disputes: ‘Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to over conceptualise the application of the principles and rules relating to the continental shelf’.

<sup>25</sup> Schatcher O, ‘International law in theory and in practice: General course’, 178 *Collected Courses of the Hague Academy of International Law* (1982), 82. See also Part II of *Snell’s Equity* on the maxims of equity.

<sup>26</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 21-31. The programmatic function of equity being States’ ability to make law and engage in diplomacy. See also Adede AO, ‘Toward the formulation of the

‘The developing countries have found that the international conferences on the law of the sea provide them with a unique opportunity for ensuring that their own ideas and needs are borne in mind in the formulation of the rules of international law and that the rules are formulated on the basis of equity’.<sup>27</sup>

A popular rhetoric as to the legitimacy of international law is that as a result of its European/Christian origin, pioneered by Hugo Grotius and Francisco de Vitoria,<sup>28</sup> deliberations on distribution of the world’s wealth; international investment; trade; human rights; and other disciplines in international law excludes the Third World. It is evident that Eurocentric domination of international legal policy exists in some areas of the law.<sup>29</sup> It is Makau Wa Mutua’s assertion therefore that the regime of international law is illegitimate.<sup>30</sup> Using the existing literature on TWAIL, the veracity of this statement will be put to task especially with regard to the regime of maritime boundary delimitation envisioned under Article 83(1) of UNCLOS, and the larger body of work on principles of equitable maritime boundary delimitation.

## 2.1 Objectives of TWAIL

The idea of the ‘Third World’ began as a description of the subordinate subjects of colonisation where the colonising European or Western powers accumulated wealth, resources and power;<sup>31</sup> and the colonised yielded the same under the oppressive regimes set up

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rule of delimitation of sea boundaries between States with adjacent and opposite coasts’ 19(2) *Virginia Journal of International Law* (1979), 208.

<sup>27</sup> Bello EG, ‘International equity and the law of the sea: new perspectives for developing countries’, 13 *Verfassung und Recht in Uebbersee* (1980), 201. See also *Preamble, United Nations Convention on the Law of the Sea*.

<sup>28</sup> Mutua M, ‘What is TWAIL?’, 94 *Proceedings of the Annual Meeting, American Society of International Law* (2000), 31-33. Perhaps the identification of the origin of international law in this way also speaks to the notion of domineering Western literature in international law when in fact, practices such as money lending; passage (of goods and people) by sea; etc, had rules in some form prevalent across different religions and societies.

<sup>29</sup> For example, the criticism about the permanent and non-permanent membership of the Security Council and the exercise of veto power in a bid to preserve peace and security. See generally Shah AK, ‘Security Council reform: An assessment of Article 23 and 27(3) of the Charter of the United Nations’, Unpublished LL. B Thesis, Strathmore University, January 2018.

<sup>30</sup> Mutua M, ‘What is TWAIL?’, 31. In agreement with Mutua’s statement on the illegitimacy of international law, Chimni qualifies that it is the legitimisation and sustenance of the same ‘unequal structures and processes’ that furthers the divide between the North and the South; see also Chimni BS, ‘Third World Approaches to International Law: A manifesto’, 8 *International Community Law Review* (2006), 3.

<sup>31</sup> Chimni BS, ‘Third World Approaches to International Law’, 4-5. See also Rajagopal B, ‘International law and its discontents’, 176.

in Africa, Asia and Latin America.<sup>32</sup> The citizens of the Third World therefore were broadly categorised as such based on their shared experience, practices and governance systems irrespective of their diversity.<sup>33</sup>

Globalisation has shifted the classification of the subordinate States from a political classification to an economic one.<sup>34</sup> In a bid to achieve a 'unified global economic space', the economic classification favours the ideologies of developed States building on their notion of economics, trade, justice, and the like.<sup>35</sup> TWAIL does not operate as a scientific formula (or 'method') in international law that gives it legitimacy, neither does it invalidate existing discussions in international law, but proposes 'distinctive ways of thinking about what international law should be' in a bid to reformulate and realign its aims for *justice and unity*.<sup>36</sup>

The aims of TWAIL are threefold: the first is to 'understand, deconstruct, and unpack the uses of international law as a medium for the creation and perpetuation of a racialised hierarchy of international norms and institutions'. TWAIL thus establishes itself as antihierarchical.<sup>37</sup> The argument is for equal application of legal instruments that gives rise to obligations. The second is to 'construct and present an alternative normative legal edifice for international governance' in a bid to promote international democracy.<sup>38</sup> The ripple effect of this aim would be the promotion of accountability and transparency in the governance of States through central international institutions.<sup>39</sup> The third is to eradicate the underdevelopment of the global South through scholarship, policy and politics.<sup>40</sup> This third aim shall form part of the evidence of the resistance to the domineering scholarship, policy and policy of the North for a more equal

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<sup>32</sup> Chimni BS, 'Third World Approaches to International Law', 4-5.

<sup>33</sup> Chimni BS, 'Third World Approaches to International Law', 6. See also Okafor OC, 'Newness, imperialism, and international legal reform in our time: A TWAIL perspective', 43(1 & 2) *Osgoode Hall Law Journal* (2005), 174.

<sup>34</sup> Chimni BS, 'Third World Approaches to International Law', 5. In his paper, he adopts the terms 'developed' and 'developing' as opposed to 'First' and 'Third' World.

<sup>35</sup> Chimni BS, 'Third World Approaches to International Law', 7, 14.

<sup>36</sup> Anghie A and Chimni BS, 'Third World Approaches to International Law and individual responsibility in internal conflicts', 2(1) *Chinese Journal of International Law* (2003).77-78. The following description of 'TWAIL as equity' is a crucial way in which the standard of justice is reviewed, focusing on inclusiveness.

<sup>37</sup> Mutua M, 'What is TWAIL?', 31.

<sup>38</sup> Mutua M, 'What is TWAIL?', 31. See also Gathii JT, 'TWAIL', 32.

<sup>39</sup> Chimni BS, 'Third World Approaches to International Law', 24.

<sup>40</sup> Mutua M, 'What is TWAIL?', 31. Critique around a greater 'third world values' in the international space fixate on harmful traditional (African) practices such as female genital mutilation (FGM), child marriages, etc but Mutua qualifies that his support for TWAIL does not include any instance of an annihilation of the universal norms or values.

‘development of international legal norms, structures, claims or rules’.<sup>41</sup> TWAIL should be characterised by its agenda as opposed to its geography to encourage and build on the advocacy of oppositional practices against the Northern hierarchy.<sup>42</sup>

## 2.2. TWAIL as Equity: The Role of the G-77, and the Delegation of Algeria and Other States in UNCLOS Negotiations

The very description of equity makes its role in attaining the objectives of TWAIL; namely justice and unity, possible. To illustrate this nexus, the compromise on both the revenue-sharing and on the basic principle for delimitation, will be canvassed to illustrate the role that developing States played during UNCLOS negotiations.<sup>43</sup> An example of a unified approach in negotiations for an inclusive instrument on the law of the sea is the G-77, an alliance of States brought together as a result of a history of poverty, colonialism, and of dependency.<sup>44</sup>

The dissatisfaction of a few landlocked Northern States and Third World States described by Judge Tuerk motivated the alliance to seize the opportunities that the framework of UNCLOS provided, leading to UNCLOS III.<sup>45</sup> Namely, the negotiations that eventually resulted in a revenue-sharing compromise,<sup>46</sup> to the effect that resources obtained beyond the cut-off point of 200nm be shared with the landlocked and geographically disadvantaged through the

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<sup>41</sup> Chimni BS, ‘Third world approaches to international law’, 22. See also Okafor OC, ‘Newness, imperialism, and international legal reform in our time’, 178. Gathii JT ‘TWAIL’, 35 refers to this as the production of knowledge in a vertical hierarchy.

<sup>42</sup> Rajagopal B, ‘Locating the Third World in cultural geography’, *Third World Legal Studies* (1998-1999).

<sup>43</sup> For a more focused study on a developing State’s involvement in the UNCLOS negotiations, see generally Millicay G, ‘Argentina and the law of the sea’ in Sainz-Borgo JC et al (eds), *Liber Amicorum In Honour of a Modern Renaissance Man, His Excellency Gudmundur Eiriksson*, University for Peace Press/OP Jindal/Universal Law Publishing (2017).

<sup>44</sup> Hope-Thomson M, ‘The Third World and the law of the sea: The attitude of the Group of 77 towards the continental shelf’, 1(1) *Boston College Third World Law Journal* (1980), 40. The alliance of these geographically disadvantaged Northern States as well as Southern coastal States fuelled successful negotiations over the continental shelf. *Helmut* discusses the motivations of the geographically disadvantaged Northern States, see Tuerk H, ‘Landlocked States and the Law of the Sea’, UN Audiovisual Library of International Law (date accessed 13 February 2019). For a summary of the role of the G-77 and its impact on mining in the Area, see Sipalla H, ‘Bridging the business and human rights divide with lessons from UNCLOS’ deep sea mining regime’ in Sainz-Borgo JC et al (eds), *Liber Amicorum In Honour of a Modern Renaissance Man, His Excellency Gudmundur Eiriksson*, University for Peace Press/OP Jindal/Universal Law Publishing (2017), 243-244.

<sup>45</sup> Tuerk H, ‘Landlocked States and the Law of the Sea’, UN Audiovisual Library of International Law (date accessed 13 February 2019).

<sup>46</sup> Suggested by Ireland in 1978. See Hope-Thomson M, ‘The Third World and the law of the sea’, 58.

International Seabed Authority (ISA), and not only for the sole benefit of coastal States.<sup>47</sup> The consensus system that guided negotiations<sup>48</sup> is laudable for its focus on the most favoured solutions, deconstructing Eurocentric domination by embracing alternative constructive and reconstructive methods in international law to remedy the subjugation of States.<sup>49</sup> The ‘programmatic function of equity’,<sup>50</sup> that is, the exercise of sovereign power through law-making and diplomacy is in exercise by predominantly ‘Third World’ States in their attempts to control resource exploitation. As it relates to revenue-sharing, equity is seen to be done since G-77 countries:

‘such as Argentina, India, and Chile as well as developed countries such as Canada, the United States and New Zealand, would make payments to such poor landlocked countries as Nepal, Afghanistan, and Botswana, and also developed landlocked countries as Switzerland and Austria’.<sup>51</sup>

Advocacy by the G-77 resulted in the beneficial provisions on revenue-sharing for both developed landlocked States such as Switzerland and Austria, and developing African, Asian and Latin American States creating a ‘global standard’ in the international law of the sea.<sup>52</sup>

Similarly, the Negotiating Group No. 7 was tasked with forming dispute settlement provisions for the delimitation of the continental shelf.<sup>53</sup> The original conception of the delimitation method envisioned in Geneva<sup>54</sup> had three basic features: that delimitation shall be effected by party consent; the agreement will employ the equitable principles, or the median or equidistance line where appropriate (the latter forming the basic principle of delimitation), considering the relevant circumstances; and in the event of an agreement, that it be guided by

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<sup>47</sup> Hope-Thomson M, ‘The Third World and the law of the sea’, 59. See also Article 82, *United Nations Convention on the Law of the Sea*.

<sup>48</sup> Buzan B, ‘Negotiating by consensus: Developments in technique at the United Nations conference on the law of the sea’, 75(2) *The American Journal of International Law* (1981), 327.

<sup>49</sup> Gathii JT, ‘TWAAIL’, 39.

<sup>50</sup> Cottier T, *Equitable principles of maritime boundary delimitation: The quest for distributive justice in international law*, 21.

<sup>51</sup> Hope-Thomson M, ‘The Third World and the law of the sea’, 60-61.

<sup>52</sup> Chimni BS, ‘Capitalism, imperialism, and international law’, 46.

<sup>53</sup> Adede AO, ‘Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent and opposite coasts’, 209.

<sup>54</sup> Organization of work, 10(6) *Official Records of the United Nations Conference on the Law of the Sea*, UN Doc A/CONF.62/62 (1978).

the Convention.<sup>55</sup> This view was strongly opposed by the delegation of Algeria and other States, choosing to rely on equitable principles as the basic principle,<sup>56</sup> revising the Article with the following notable features: that delimitation be affected by an agreement; the agreement must be in accordance with equitable principles; consideration ought to be paid to all relevant circumstances; for an equitable solution.<sup>57</sup> There remained the question of what the basic principle should be, with each group rejecting the strict adoption of the other. The development of the 'neutral formula'<sup>58</sup> involved a compromise between the conflicting national interests in an attempt to reconcile the views and achieve the aims of UNCLOS.<sup>59</sup>

Chapter three shall profit the argument that the basic principles enumerated under Article 83(1) of UNCLOS creates an objective legal standard<sup>60</sup> that was sought for during negotiations led predominantly by developing States and geographically disadvantaged and landlocked States. Particularly by African States, that there is a common approach in practice, envisioned during UNCLOS negotiations. This is the effect of a global democracy envisioned by TWAIL scholars.<sup>61</sup> Article 83(1) is not just an objective legal standard but proof that developing States - when unified, are interested in developing scholarship, and seeking a just global order - can prevent the continuation of the political and economic tyranny in international law regardless of the States' inequalities.<sup>62</sup> In this analysis, the way in which TWAIL operates as equity has been demonstrated using evidence from UNCLOS; as well as how UNCLOS operates as TWAIL through the examples provided. This study shall evaluate whether the application of

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<sup>55</sup> Adede AO, 'Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent and opposite coasts', 210. Note that Article 83(1) under UNCLOS differs significantly and shall be discussed in the next Chapter.

<sup>56</sup> Adede AO, 'Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent and opposite coasts', 212. Specifically, this group included the following States: Algeria, Argentina, Bangladesh, Benin, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libyan Arab Jamahiriya, Madagascar, Mali, Mauritania, Morocco, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syrian Arab Republic, Somalia Democratic Republic, Turkey, and Venezuela.

<sup>57</sup> Adede AO, 'Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent and opposite coasts', 212.

<sup>58</sup> Adede AO, 'Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent and opposite coasts', 240-242. Mexico pioneered the development of a neutral formula, with the support of India, Iraq and Morocco.

<sup>59</sup> Suggestions by the Chairman, UN Doc/NG.7/9 (1978), 843.

<sup>60</sup> Adede AO, 'Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent and opposite coasts', 253.

<sup>61</sup> Chimni BS, 'Capitalism, imperialism, and international law', 46.

<sup>62</sup> This international instrument is therefore responsible for 'a new imperial political formation'. Chimni BS, 'Capitalism, imperialism, and international law', 19. Also, Personal communication with Sipalla H on 1 February 2019 on the role of international institutions in affecting the TWAIL agenda.

the law on maritime boundary delimitation has been inclusive of developing African States in the attainment of an equitable solution.

### 3. The Legal Approaches to the Delimitation: Dispute Settlement under Article 83(1)

The previous chapter demonstrated how UNCLOS is an operation of TWAIL legal scholarship as well as a manifestation of the principle of equity. This is important in justifying the importance that dispute settlement provisions in UNCLOS (Article 83(1)) have in a global sense, taking cognisance of the implications of colonialisation still seen today in other areas of the law.

Legal certainty over a State's territory proves to be of immense economic benefit,<sup>63</sup> peace and security. States have a sovereign right to carry out the exploration and exploitation of natural resources over the continental shelf.<sup>64</sup> Other rights and duties pertaining to the management and use of the continental shelf include: the right of all States to lay,<sup>65</sup> maintain and monitor submarine cables and pipelines and to prevent, reduce and regulate the ensuing pollution;<sup>66</sup> the right to authorise and regulate drilling for all purposes;<sup>67</sup> to take measures that 'permit, reduce and control pollution of the marine environment by dumping';<sup>68</sup> the right to 'regulate, authorise, and conduct marine scientific research';<sup>69</sup> and the duty to make 'payments or contributions in kind in respect of the exploitation of the non-living resources' annually through the ISA to be distributed based on an equitable sharing criteria to the State Parties to UNCLOS.<sup>70</sup> Therefore, in order to exercise the aforesaid rights and duties over the continental shelf, there must be legal certainty as to the geographical limits of the territory that shall in turn facilitate for landlocked and other States' use of the Area.

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<sup>63</sup> Kindt J, 'Deep seabed exploitation', 4(1) *UCLA Journal of Environmental Law and Policy*, 1984.

<sup>64</sup> Article 77, *United Nations Convention on the Law of the Sea*. Kenya, for example, signed the UNCLOS on 10 December 1982 and ratified the same on 2 of March 1989.

<sup>65</sup> Article 112, *United Nations Convention on the Law of the Sea*.

<sup>66</sup> Article 79(2), *United Nations Convention on the Law of the Sea*.

<sup>67</sup> Article 81, *United Nations Convention on the Law of the Sea*.

<sup>68</sup> Article 210, *United Nations Convention on the Law of the Sea*.

<sup>69</sup> Article 246 (1), *United Nations Convention on the Law of the Sea*.

<sup>70</sup> Article 82, *United Nations Convention on the Law of the Sea*. Interesting questions as regards revenue sharing concerns where (or upon whom) the obligation to remunerate landlocked States lie, as well as the proportion.

### 3.1. An Introduction

There is a two-fold approach to boundary delimitation - the technical and scientific methods<sup>71</sup> and the legal approaches.<sup>72</sup> Each legal approach i.e. the model of juridical vacuum; the model of equitable principles; the model of residual rules and exceptions; and the model of equitable solutions based on international law, operates so as to arrive at an equitable solution.<sup>73</sup> Under considered circumstances, the technical and scientific methods are applied differently but in order to ascertain the proper use of the various methods under this approach, the legal approach articulated under Article 83(1) must be established as equitable.

The model of juridical vacuum, and of residual rules and exceptions left determinations of boundaries to the parties through negotiated agreements. Although the former is based on the principle *ex aequo et bono*,<sup>74</sup> its conception under the 1930 Hague Codification Conference tied it to compulsory arbitration, taking away some discretionary powers from the Parties.<sup>75</sup> As a result, it neither unified States nor developed the jurisprudence on boundary delimitation.

The model of equitable principles was envisioned in the 1945 Truman Proclamation in an attempt to fill the juridical vacuum;<sup>76</sup> not with State practice or decided boundary disputes, but with the idea of equity and equitable principles to be applied as a matter of law. There was movement away from the discretionary exercise of established principles on boundary delimitation to emphasis on negotiated settlements in tandem with the principles of equity.<sup>77</sup> *The North Sea Continental Shelf Cases* and the *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)* (herein the *Anglo-French Arbitration*) emphasised that equitable principles are an established standard of customary international law on delimitation with some limitations.<sup>78</sup>

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<sup>71</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 182-202.

<sup>72</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 204-213. See also Adede AO, 'Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent and opposite coasts', 225-233. Cottier's 4-part model is a derivative of Professor Louis B Sohn's 7-part model that Adede analyses in considerable detail under the Section in his paper on 'The Settlement of Disputes Question'.

<sup>73</sup> The mandatory nature of producing an equitable result in maritime boundary delimitation is an established principle of customary international law. Cottier T, *Equitable principles of maritime boundary delimitation*, 226.

<sup>74</sup> As expressed in Article 38(2), *Statute of the International Court of Justice*.

<sup>75</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 204-206.

<sup>76</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 206. See also Collins E and Rogoff MA, 'The international law of maritime boundary delimitation', *Maine Law Review* (1982), 3-4.

<sup>77</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 107.

<sup>78</sup> Adede AO, 'Toward the formulation of the rule of delimitation of sea boundaries between States with adjacent and opposite coasts', 216.

The model of residual rules and exceptions makes a preference for a particular method of delimitation, either the median or equidistance-special circumstances line, when negotiations break down.<sup>79</sup> This approach is favoured by States with relatively straight coastlines that lack exceptional geographic traits.<sup>80</sup> Lauterpacht stated that a rule-based approach of delimitation governed by the principle of the rule of law and the role of the International Law Commission (ILC) to 'provide situations in which such an agreement or goodwill was forthcoming',<sup>81</sup> a fairly strict/restrictive approach. Equity under this method is applied when the strict application of the residual rules produces unacceptable results and is only used as the preliminary consideration in the criteria for delimitation.<sup>82</sup>

The model of equitable solutions based on international law is enshrined in Article 83(1) in UNCLOS<sup>83</sup> in an attempt to reconcile<sup>84</sup> the historically conflicting approaches towards delimitation.<sup>85</sup> On the nature of maritime delimitation under UNCLOS, Jagota concluded that:

'[T]hat is how the delimitation provisions in the United Nations Convention on the Law of the Sea, 1982, may perhaps be interpreted and applied in State practice and by the Courts and other forums dealing with the delimitation of the exclusive economic zone and the continental shelf. These provisions make no mention of either equitable principles or the equidistance line. But the references to international law and to an equitable solution would imply reliance on the applicable principles and the assessment of the relevant circumstances. It is in this way that the aforementioned diverging trends in State practice, judicial and other decisions and at the Third United Nations Conference on the Law of the Sea, will need to be coordinated. In a judicial and other decision, this coordination will ensure that the decision is in accordance with international law and not *ex aequo et bono*, unless the parties have requested the latter'.<sup>86</sup>

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<sup>79</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 208. See also Article 7, *London Fisheries Convention*, 9 March 1966, 581 UNTS 57.

<sup>80</sup> The Convention on the Continental Shelf made specific reference for the application of the equidistance method but allowed for the exercise of discretionary power (during dispute settlement) to take cognisance of any special circumstances.

<sup>81</sup> *Yearbook of the International Law Commission*, UN Doc A/CN.4/Ser.A/1953 (1953).

<sup>82</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 209-212.

<sup>83</sup> Makes reference not only to customary international law and multilateral agreements as sources of the law on delimitation; but broadens the scope to include those envisaged under Article 38 of the ICJ Statute. See also Cottier T, *Equitable principles of maritime boundary delimitation*, 223.

<sup>84</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 216.

<sup>85</sup> See generally Adede AO, 'Towards the formulation of the rule of delimitation of sea boundaries between States with adjacent or opposite coasts' 19(2) *Virginia Journal of International Law* (1979).

<sup>86</sup> Jagota SP, *Maritime Boundary*, Volume 9, Martinus Nijhoff Publishers, Dordrecht, 1985, 277.

### 3.2. The Establishment of Equitable Principles in Delimitation: *The North Sea Continental Shelf Case* and the *Anglo-French Arbitration*

Considering this study's purpose (Section 1.3) and research questions (Section 1.5), it is important to mention that the two disputes that this Section shall discuss are relevant to the extent of the development of the equitable principles method and the role of equity in maritime boundary delimitation. They are neither adjacent coastal States nor African, but States whose jurisprudence can be applied to the situation of adjacent coastal African States like Kenya and Somalia.

In the *North Sea Continental Shelf* case,<sup>87</sup> the ICJ rejected the mandatory application of the equidistance method<sup>88</sup> argued by Netherlands and Denmark as the rule of law in maritime boundary disputes. The Federal Republic of Germany on the other hand, argued that a just and equitable apportionment of the continental shelf (particularly considering the concavity of their coasts)<sup>89</sup> should be available to all coastal States.<sup>90</sup> The Court relied on equity and equitable principles, as well as the 1945 Truman Proclamation<sup>91</sup> enumerating important factors to consider such as: the general configuration of the coasts, the coasts physical and geological structure and location of natural resources, a reasonable degree of proportionality when indicating the boundary, and the length of the coastline measured in the direction of the coast.<sup>92</sup> The foregoing was particularly significant because Article 6 of the Convention on the Continental Shelf had not provided for recourse of an unfair delimitation in equitable principles as Article 83(1) of UNCLOS does. The Court however stated that the rule on equidistance was deemed as a 'purely conventional rule'<sup>93</sup> and the application of equitable principles was within general principles law regarding delimitation.

Equity reflects scenarios of fairness, justice, reasonableness, and appropriateness<sup>94</sup> which is different from *ex aequo et bono*, whose application is only possible with the consent of both

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<sup>87</sup> *North Sea Continental Shelf Cases*, 7. The basis of their argument was Article 6 of the Convention on the Continental Shelf.

<sup>88</sup> *North Sea Continental Shelf Cases*, 43-44.

<sup>89</sup> *North Sea Continental Shelf Cases*, 18, 53.

<sup>90</sup> *North Sea Continental Shelf Cases*, 9, 21.

<sup>91</sup> *North Sea Continental Shelf Cases*, 32.

<sup>92</sup> *North Sea Continental Shelf Cases*, 47-54.

<sup>93</sup> *North Sea Continental Shelf Cases*, 41. Note that The Federal Republic of Germany was not a party to the Convention on the Continental Shelf like the Netherlands and Denmark.

<sup>94</sup> *North Sea Continental Shelf Cases*, 48.

parties. The latter is the application of ‘a rule of law which itself requires the application of equitable principles’<sup>95</sup> but ‘decisions based on practical considerations and expediency, disregarding, if necessary, existing and recognised rights’<sup>96</sup> finding authority under Article 38(2) of the ICJ Statute.<sup>97</sup> The application of equitable principles is characterised by these three features: negotiations with an aim of arriving at an agreement; delimitation as per these equitable principles; and that the natural prolongation of the land territory of one State should not encroach that of the other State:<sup>98</sup>

‘The principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorised by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, “equity does not necessarily imply equality”...., nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice’.<sup>99</sup>

As a result, in the *North Sea Continental Shelf case*, each State came up with a compromise based on the aforementioned equitable principles that saw the German North Sea coast extend to the centre of the North Sea preserving the already exploited areas under each States’ jurisdiction.<sup>100</sup>

In accordance with Article 2(1) of the arbitration agreement concerning the parties to the *Anglo-French Arbitration*, the Tribunal was tasked with applying the rules of international law in determining the continental shelf. As parties to the Convention on the Continental Shelf, although the equidistance principle was a treaty obligation under Article 6, the Court had to have considered all the circumstances, including the applicability of equitable principles.<sup>101</sup>

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<sup>95</sup> *North Sea Continental Shelf Cases*, 47.

<sup>96</sup> Blecher MD, ‘Equitable delimitation of the continental shelf’, 73(60) *American Journal of International Law* (1979), 61. See also Cheng B, ‘Justice and equity in international law’, 8 (185) *Current Legal Problems* (1955), 204.

<sup>97</sup> *North Sea Continental Shelf Cases*, 48.

<sup>98</sup> *North Sea Continental Shelf Cases*, 47. The third feature in the *Anglo-French Arbitration* ‘states the problem rather than solves it’ see *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)*, Award, 1977, 179.

<sup>99</sup> *North Sea Continental Shelf Cases*, 49.

<sup>100</sup> *North Sea Continental Shelf Cases*, 46.

<sup>101</sup> *Anglo-French Arbitration*, 44.

The equitable principles identified were: the obligation on parties to enter into negotiations in good faith; the obligation to consider these equitable principles; and that the continental shelf must not encroach onto another States' territory but be a natural prolongation of the State's own land territory,<sup>102</sup> echoing the distinction between equitable principles and *ex aequo et bono* as in the *North Sea Continental Shelf case*.<sup>103</sup>

The principles of natural prolongation and non-encroachment are key. France submitted that the delineation of the Atlantic region (which is not bound to the French or English coastline) can be achieved by drawing lines expressing the general area of the Channel coasts, extending the median line in the Channel to bisect the angle formed by the two lines. This position was rejected because if both States naturally prolongate their coastlines, they would encroach on the other's territory.<sup>104</sup> In such instances, the Tribunal found that 'the particular geographical and other circumstances' as well as 'other considerations of law and equity' should be relied on as key sources for delimitation.<sup>105</sup> In the *North Sea Continental Shelf case*, the nature of equitable principles i.e. being a means for delimitation rather than the end, was discussed as having 'no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures'<sup>106</sup> however, in the *Anglo-French Arbitration*, the equitable principles were used as an end therefore making it part of the substantive law.<sup>107</sup>

### 3.3. Equitable Solutions Based on International Law: The Normative and Mandatory Aspects of Article 83(1)

Article 83(1) reads as follows:

'The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.'

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<sup>102</sup> *Anglo-French Arbitration*, 49, 114-115.

<sup>103</sup> *Anglo-French Arbitration*, 114.

<sup>104</sup> *Anglo-French Arbitration*, 115.

<sup>105</sup> *Anglo-French Arbitration*, 228.

<sup>106</sup> *North Sea Continental Shelf Cases*, 50.

<sup>107</sup> Blecher MD, 'Equitable delimitation of the continental shelf', 64.

As demonstrated in Section 2.2, the relationship between the law and equity in the delimitation of the continental shelf is a complicated one that has received strong opposition from different interest groups. UNCLOS envisions the application of the law where the equidistance-special circumstance method as well as the equitable principles can operate concurrently creating a balance 'between predictability and flexibility, objectivity and discretion'.<sup>108</sup>

The normative aspect is what fuelled the disagreement on the method of delimitation when assessing national interests. In the *Bay of Bengal arbitration*, the Tribunal held that decided cases by international tribunals and courts constitute:

'*acquis judiciaire*, a source of international law under Article 38(1)(d) of the Statute of the International Court of Justice, and should be read into [Article 83] of this Convention [on the Law of the Sea]'.<sup>109</sup>

The basic principle under Article 83(1) is indecisive, leading parties to multilateral agreements, customary international law, the general principles of the law of the sea, judicial decisions, the teachings of recognised authors, and *ex aequo et bono* to establish the basic principle most suitable to their geographic traits.<sup>110</sup> This model is distinguishable from the other three described in Section 3.1. because of its standing as substantive law however, the technical method (what is being referred to as the normative aspect) of delimitation is still not discernible. This position of uncertainty is favoured:

'Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to over conceptualise the application of the principles and rules relating to the continental shelf'.<sup>111</sup>

Criticism against this preferred position is that States will strive for 'particular justice'<sup>112</sup> as opposed to complying with an established and universal norm of delimitation. However, every State enjoys differing geographical traits and cannot ascribe to a uniform method of

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<sup>108</sup> Dundua N, 'Delimitation of maritime boundaries between adjacent States', 15.

<sup>109</sup> *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India (Bangladesh v India)*, 98.

<sup>110</sup> Article 38, *Statute of the International Court of Justice*.

<sup>111</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 92.

<sup>112</sup> Nelson LDM, 'The roles of equity in the delimitation of maritime boundaries', 84(4) *American Journal of International Law* (1990), 842.

delimitation, at least not with the aim of attaining an equitable solution. It is for this reason that Tuerk discounted the principle of reciprocity in the international law of the sea.<sup>113</sup>

The mandatory aspect<sup>114</sup> in the same provision (Article 83(1)) prevents the unilateral determination of the maritime boundary by: obligating States to negotiate in good faith, leaving such technical determinations to the discretion of the parties for a mutually acceptable agreement (*pactum de negotiando*); whether the agreement is based on international law, meaning a preference for the application of the substantive rules departing from the residual rules; and whether the solutions are equitable.<sup>115</sup> The significance of the latter intends to operate as a corrective measure to limit the liberty of States when negotiating disputes by preventing inequities and the harshness of the law, closely linked with justice.<sup>116</sup> This model departs from the juridical vacuum as the mandatory aspect serves as the ‘minimum generality’<sup>117</sup> required to be characterised as substantive law.

Modern day delimitation practice has observed the use of the equidistance line for the initial construction of the maritime boundary<sup>118</sup> based on the baselines along the coast.<sup>119</sup> In the subsequent assessment on whether the line is fair, the aforementioned factors are scrutinised. Any alteration is per the equitable principles<sup>120</sup> taking into consideration the length of the coastline and the proportion of the continental shelf allocated - this speaks to the proportionality that the line indicates to.<sup>121</sup> The step applying the residual rules also aims to remedy deadlocks or a breakdown of negotiations that could result in any number of methods being adopted; and

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<sup>113</sup> Tuerk H, ‘Landlocked States and the Law of the Sea’, UN Audiovisual Library of International Law (date accessed 13 February 2019).

<sup>114</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 226.

<sup>115</sup> Established in customary international law as well. Mensah T, ‘Delimitation of the continental shelf: The methodology’, 33. Cottier T, *Equitable principles of maritime boundary delimitation*, 218. See also Antunes NSM, ‘Towards the conceptualisation of maritime delimitation: legal and technical aspects of a political process’, Unpublished Doctoral Thesis, University of Durham, 2002, 1.

<sup>116</sup> Nelson LDM, ‘The roles of equity in the delimitation of maritime boundaries’, 839-840.

<sup>117</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, ICJ Reports (1982), 106.

<sup>118</sup> This is an established principle in customary international law. Collins E and Rogoff MA, ‘The international law of maritime boundary delimitation’, 14. It is a practical method as opposed to a procedural obligation, see Cottier T, *Equitable principles of maritime boundary delimitation*, 387.

<sup>119</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 185. See also Dundua N, ‘Delimitation of maritime boundaries between adjacent States’, 15. Dundua posited that the baseline method is obligatory per Article 6 on the Convention on the Continental Shelf.

<sup>120</sup> *North Sea Continental Shelf Cases*, 47. The Court noted that: ‘Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea, leads to the conclusion that equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed’.

<sup>121</sup> Collins E and Rogoff MA, ‘The international law of maritime boundary delimitation’, 14.

so a reasonable exercise of judicial flexibility within the scope of the Article 83(1) is needed.<sup>122</sup> If the proportionality requirement is met, delimitation is said to have been carried out using the equidistance method. If the inverse is true, the States' geographical traits will be discounted from the consideration of the equidistance line, constituting another equidistance line accordingly. The final boundary is then a compromise between the original equidistance line and the second equidistance line.<sup>123</sup> The next section discusses the two widely accepted technical approaches employed by adjacent coastal States.

#### 3.4. Technical and Scientific Methods of Delimitation: Focus on the Implications of the Equidistance-Relevant Circumstances Method and Equitable Principles

*The North Sea Continental Shelf case* deconstructed the notion that the equidistance method was a mandatory method in international law. The methods (not rules or principles of law) are governed by the relevant 'geometrical, mathematical, geographical, geological, and ecological' factors.<sup>124</sup> They include: the method of equidistance or median line; the bisector method; perpendicular to the general direction of the coastline; the extrapolation of the land boundary; parallel lines (corridors); and enclaving.<sup>125</sup> In some instances, the methods have been adopted as procedural rules in conventions or as customary international law.<sup>126</sup> These methods go so far as to describe the boundary line which, as the *North Sea Continental Shelf case* demonstrated can leave geographically disadvantaged States like the Federal Republic of Germany at a loss. In each case, there 'is no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures'.<sup>127</sup>

The equidistance method is dependent on the baselines along the coast.<sup>128</sup> It is a three-stage process that begins by drawing a provisional equidistance line, evaluating the relevant circumstances that may adjust the provisional line to achieve an equitable solution, and finally

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<sup>122</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 387.

<sup>123</sup> Collins E and Rogoff MA, 'The international law of maritime boundary delimitation', 14. For more on the technique, see Cottier T, *Equitable principles of maritime boundary delimitation*, 184.

<sup>124</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 182.

<sup>125</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 184-198.

<sup>126</sup> Through State practice and *opinion juris*. Cottier T, *Equitable principles of maritime boundary delimitation*, 182.

<sup>127</sup> *North Sea Continental Shelf Cases*, 50.

<sup>128</sup> Dundua N, 'Delimitation of maritime boundaries between adjacent States', 15.

an *ex post facto* determination on proportionality.<sup>129</sup> The *Nicaragua-Columbia* case discussed the importance of the equidistance method because of its ‘intrinsic value’ and should be considered first when delimiting States’ maritime boundaries.<sup>130</sup> This section shall focus on the equidistance and equitable principles method however, States are not precluded from choosing to apply different technical methods to delimit their boundaries.

In the *North Sea Continental Shelf* case, the Court considered the concavity of the coasts (geography) to be a relevant factor for delimitation ‘as well as the presence of any special or unusual features’<sup>131</sup> and in the *Anglo-French Arbitration*, the Channel Islands were considered a special feature.<sup>132</sup> In both cases, the abundance of natural resources<sup>133</sup> geology, national security interests,<sup>134</sup> concerned the Court as relevant factors. The support for this method is that it is more reliable or predictable than the sole application of equitable principles. However, it assumes that the baselines computed are accurate, making it is difficult to appeal to any inconsistency.<sup>135</sup> Secondly, the step on proportionality cannot begin to divide ecological systems to guarantee that the second line will in fact be equitable.<sup>136</sup> Thirdly, there is little consideration for a State’s national security which is a major concern for developing States with recently delineated marine waters plagued with criminal violations of the international law of the sea.<sup>137</sup>

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<sup>129</sup> Mensah T, ‘Delimitation of the continental shelf: The methodology’, 34-35. For a reiteration of the equidistance method, see *Maritime Delimitation in the Black Sea (Romania v Ukraine)*, Judgment, ICJ Reports, 3 February 2009, 101.

<sup>130</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports, 19 November 2012, 47. The exception to the general rule on the application of the equidistance method is identified in the *Nicaragua-Honduras* case; if the equidistance method gives rise to an inequality, the Court would have to consider ‘special circumstances’ as the equidistance-relevant circumstances method would no longer be appropriate, see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment ICJ Reports, 8 October 2007, 741.

<sup>131</sup> *North Sea Continental Shelf Cases*, 53-54.

<sup>132</sup> *Anglo-French Arbitration*, 229.

<sup>133</sup> *North Sea Continental Shelf Cases*, 54.

<sup>134</sup> The United Kingdom and France claim that the Channel Islands were necessary for their security, defense and navigational waters were equally as strong: ‘[the claims] may support and strengthen [the link between the continental shelf and their interests of security], but they cannot negate, any conclusions that are already indicated by the geographical, political and legal circumstances of the region which the Court has identified’. See *Anglo-French Arbitration*, 161-188.

<sup>135</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 200, 382. Cottier refers to this as the geographical inaccuracies in the mathematical and geographical determination of the basepoints.

<sup>136</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 201. Judge Arechaga established a very high standard of proof in relation to ecological facts as being ‘beyond all doubts’ to discourage the division of ecological systems using cumbersome scientific evidence.

<sup>137</sup> Cottier T, *Equitable principles of maritime boundary delimitation*, 384-386; this method of delimitation on its own is not considered *in extenso*. See also *Anglo-French Arbitration*, 80.

The equidistance-relevant circumstances method goes hand in hand with Article 83(1) embodying the mandatory nature of equitable principles under UNCLOS. Equitable principles were intended as the procedural means for delimitation, acting as a corrective measure to a strict and inequitable line<sup>138</sup> however, in the *Anglo-French Arbitration*, there were used as substantive law. By combining the two methods (or allowing them to operate concurrently), concerns of an unequal division of the Area or converging and overlapping claims were addressed as well as the ‘adjacency or proximity to the coast as the legal basis of title...as an integral part of the basis of title for the continental shelf’.<sup>139</sup>

This Chapter served as an introduction to delimitation, particularly the legal approaches that can be employed. The legal approach of concern to this study is the mode of equitable principles based in international law characterised by Article 83(1) of UNCLOS. Article 83(1) is more nuanced than being a characterisation of the principles established by the two disputes (*North Sea Continental Shelf cases* and the *Anglo-French Arbitration*) but includes the joint mandatory and normative aspects when considering the most equitable technical (and overall) solution to the boundary dispute.

The next Chapter shall canvass cases that discuss the most equitable solutions employed by the ICJ in selected boundary disputes over the continental shelf. Of particular interest is the considerations made i.e. the relevant factors, that have influenced the determination of an equitable maritime boundary by African States. The cases discussed herewith shall explore the application of Article 83(1) by African States (in particular) to test whether their participation under UNCLOS is inclusive of their unique circumstances and preferred technical approaches to boundary delimitation.

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<sup>138</sup> *North Sea Continental Shelf Cases*, 50.

<sup>139</sup> Dundua N, ‘Delimitation of maritime boundaries between adjacent States’, 15.

## 4. African Approaches in Maritime Boundary Disputes

The following sections shall present the relevant factors, rules and principles adopted by Courts in determining boundary disputes involving one or more African States, addressing the first two research questions. The intention is to identify any motifs in the dispute settlement process.

### 4.1. *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*

The ICJ in this case attempted to define equity in the following way which resulted in a description of the concept:

‘Equity as a legal concept is a direct emanation of the idea of justice... It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law...it is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result’.<sup>140</sup>

The Special Agreement<sup>141</sup> at Article 1 gave the Court the right to choose the method that the States would apply based on the principles and rules of international law, particularly equitable principles taking into consideration the relevant circumstances. It also gave the Court the latitude to adopt ‘new accepted trends’ under the same Article. However, the Court declined to apply this to the current set of facts as the principles and rules of international law had not been affected by the trends.<sup>142</sup> Although both parties agreed to apply equitable principles, the considerations preferred differed; Tunisia highlighted that the principles must reflect their geographical circumstances.<sup>143</sup> The relevant circumstances were:

‘(1) The irregularity of the Tunisian coast compared to the general regularity of the Libyan coast; (2) the presence of islands, islets and low-tide elevations forming part of the eastern Tunisian coast; and, (3) certain historic rights’.<sup>144</sup>

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<sup>140</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 60.

<sup>141</sup> Special Agreement between the Republic of Tunisia and the Socialist People's Libyan Arab Jamahiriya for the Submission of the Question of the Continental Shelf Between the Two Countries to the International Court of Justice, 10 June 1977.

<sup>142</sup> Hodgson DC, ‘The Tunisia-Libyan continental shelf case’, 16(1) *Case Western Reserve Journal of International Law* (1984), 10.

<sup>143</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 58.

<sup>144</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 26-27.

On the other hand, Libya favoured the natural prolongation method. The Court found that the natural prolongation would be unacceptable for a lateral continental shelf.<sup>145</sup> Speaking to the relationship between the rules, principles and results, it held:

‘The result of the application of equitable principles must be equitable. This terminology, which is generally used, is not entirely satisfactory because it employs the term equitable to characterise both the result to be achieved and the means to be applied to reach this result. It is, however, *the result which is predominant*; the principles are subordinate to the goal. The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result .... [T]he term “equitable principles” cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result’ (*emphasis mine*).<sup>146</sup>

An important distinction of the sources of international law was made - between equitable principles and *ex aequo et bono*.<sup>147</sup> Simply, it held that Article 1 of the Special Agreement bound them to settle the dispute in accordance with substantive law<sup>148</sup> as opposed to the exercise of discretionary powers to derogate from the established principles to achieve an equitable outcome.<sup>149</sup> The factors that the Court did take into account are as follows:

‘(1) The general configuration of the coasts of the parties, and in particular the marked change in direction of the Tunisian coastline between Ras Ajdir and Ras Kaboudia; (2) The existence and position of the Kerkennah Islands; (3) The land frontier between the Parties, and their conduct prior to 1974 in the grant of petroleum concessions, resulting in the employment of a line seawards from Ras Ajdir at an angle of approximately 260 east of the meridian, which line corresponds to the line perpendicular to the coast at the frontier point which had in the past been observed as a *de facto* maritime limit; (4) The element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of the relevant part of its coast, measured in the general direction of the coastlines, account being taken for this purpose of the effects, actual or prospective, of any other continental shelf delimitation between States in the same region’.<sup>150</sup>

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<sup>145</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 59.

<sup>146</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 59.

<sup>147</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 60.

<sup>148</sup> *Equity intra legem*. See Sohn LB, ‘Equity in international law’, 82 *American Society of International Law* (1988), 278.

<sup>149</sup> *Equity contra legem*. Sohn LB, ‘Equity in international law’, 278.

<sup>150</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 93.

Proportionality as a relevant factor<sup>151</sup> was prominent as it was in the *North Sea Continental Shelf case* as creating a ‘necessary balance between States’<sup>152</sup> by testing the equitable character of the method used to produce the result.<sup>153</sup> However, instead of adopting a socio-political view of proportionality, a mathematical one (in terms of ratios) was taken.<sup>154</sup>

These considerations are critical especially in the *Kenya-Somalia case* since Somalia is proposing that the Court find that the natural prolongation of their southern boundary is the most equitable solution.<sup>155</sup> As in the *Tunisia-Libya case* due consideration should be made as regards the equitable principles, particularly whether this proposed method constitutes as an encroachment of Somalia’s jurisdiction to that of Kenya’s.

#### 4.2. *Continental Shelf (Libyan Arab Jamahiriya/Malta)*

A Special Agreement between Libya and Malta in 1982<sup>156</sup> that resulted in an Article 40(1) submission of this case to the ICJ concerning the delimitation of the continental shelf.<sup>157</sup> Neither party specified a preferred method of delimitation, but Malta put forward the source for the most equitable method to consider when delimiting the boundary that is, the principles and rules of international law that shall aid in negotiations to ensure that the equidistance and median line is equitable.<sup>158</sup> Considering all the relevant circumstances, the Court did not grant the equidistance-relevant circumstances method a special status referring to the parties consent to apply customary international law.<sup>159</sup> Libya argued for the natural prolongation of the coasts, the application of equitable principles, as well as the need to consider the land mass behind the States’ coastline. The Court granted priority to the equidistance principles ‘as a first step, to examine the effects of a delimitation by application of the equidistance method’ over the natural prolongation of the coastlines, and found that the only relevant geographical

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<sup>151</sup> Hodgson DC, ‘The Tunisia-Libyan continental shelf case’, 34.

<sup>152</sup> *North Sea Continental Shelf Case*, 52.

<sup>153</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 138.

<sup>154</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 91.

<sup>155</sup> *Maritime Delimitation in the Indian Ocean*, Memorial of Somalia, 28, 77. Somalia’s claim is also reliant on Article 76(1) of UNCLOS.

<sup>156</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, ICJ Reports 1985. Note that this case did not involve adjacent States but it crucial in identifying how an African State would approach the question of delimitation against a European State.

<sup>157</sup> McGinley GP, ‘Intervention in the International Court: The Libya/Malta continental shelf case’, 34(4) *The International and Comparative Law Quarterly* (1985).

<sup>158</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 19.

<sup>159</sup> Gutiérrez NAM, *Serving the rule of international maritime law: Essays in honour of professor David Joseph Attard*, Routledge, 2009, 84.

consideration as to the coastline is its length and not the preceding landmass.<sup>160</sup> This being said, the equidistance method would not be the only method resorted to if the equitable criteria is not sufficed by equidistance.<sup>161</sup> This case is relevant to this study to compare how a developing State argues for an equitable maritime boundary vis-à-vis a developed State, and what method Courts tend to apply when opposite boundaries are concerned. It is significant to identify whether Libya makes the same argument (therefore indicating a trend by an African State) when the delimitation of a State's maritime boundary is in dispute as against another African States. Indeed, in the *Tunisia-Libya case* and in this present case, Libya choose to argue for the natural prolongation of their boundary.

Several established equitable principles contribute to the predictability and accountability of this mandatory norm in international law:

'The principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, "equity does not necessarily imply equality". . . , nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice'.<sup>162</sup>

In light of the foregoing, the Court actually applied the median line after considering the semi-enclosed nature of the Mediterranean and the 400nm distance between the opposite States. As opposed to the equidistance line, the median line would account for the disparity in the length of the coastline and make a proportional determination.<sup>163</sup> It was therefore seen as a corrective measure for a crucial factor in achieving an equitable delimitation. Within the limits of the 'principles of international law', the Court went ahead to draw two median lines: between Sicily-Libya; and Malta-Libya, to prevent Libya from extending their jurisdiction over the continental shelf beyond Malta (beyond the Malta-Libya line).<sup>164</sup>

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<sup>160</sup> Wlosowicz Z, 'Malta/Libya case', 343.

<sup>161</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 297-298.

<sup>162</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 39-40.

<sup>163</sup> Wlosowicz Z, 'Malta/Libya case', 343.

<sup>164</sup> *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 344.

#### 4.3. *Case Concerning the Delimitation of the Maritime Boundary Between Guinea and Guinea-Bissau*

In May 1886, France and Portugal agreed to divide their colonial land holdings in West Africa by the 1886 Franco-Portuguese Convention but only came to negotiate the maritime boundary in 1959 because of the identification of petroleum oil deposits off the Guinea coast leading to the 1960 Franco-Portuguese Agreement.<sup>165</sup> The Peoples Revolutionary Republic of Guinea (herein Guinea) and the Republic of Guinea-Bissau gained independence from France in 1957 and Portugal in 1973 respectively. The newly independent States entered into a Special Agreement giving an Arbitral Tribunal the mandate to decide a maritime boundary between the two States.

Guinea-Bissau argued for the application of the equidistance method for an equitable solution basing its arguments on the *Anglo-French Arbitration* and the *North Sea Continental Shelf cases*, whereas Guinea argued that the 1886 Convention was valid and ought to be applied.<sup>166</sup> The Tribunal, in analysing the 'limits' described in the 1886 Convention, found that there was ambiguity as to whether land or maritime limits were described (or both) but concluded that under the Convention, only the land was delineated between the States.<sup>167</sup> Guinea then argued for the 'parallels of latitude' method.<sup>168</sup> The Tribunal resorted to Article 83(1) of UNCLOS and international customary law to provide 'basic legal principles, which lay down guidelines to be followed with a view to reaching an essential objective' in boundary delimitation.<sup>169</sup> Several 'physical, mathematical, historical, political, economic, or other facts'<sup>170</sup> were considered to enable the Tribunal to an equitable solution on the delimitation of the Guinea Coast.<sup>171</sup>

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<sup>165</sup> McLlarky CA, 'Guinea/Guinea-Bissau: Dispute Concerning Delimitation of the Maritime Boundary', 11(1) *Maryland Journal of International Law* (1987), 94.

<sup>166</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, Award, 1985, 261-262. See also McLlarky CA, 'Guinea/Guinea-Bissau', 97.

<sup>167</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 277, 279. The Court sought clarification on the interpretation of the 1886 Convention from Article 31 of the Vienna Convention on the Law of Treaties.

<sup>168</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 293.

<sup>169</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 289. Note that the Tribunal quoted the Gulf of Maine case.

<sup>170</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 289.

<sup>171</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 292.

Guinea-Bissau identified that the equidistance method gave due consideration to adjacent States and its convex coastline but the Tribunal noted that employing this method would lead to an disproportionate maritime zone to coastline ratio, putting Guinea at a disadvantage by encroaching on their territory.<sup>172</sup> The Tribunal indicated a provisional line gave due consideration to the geographical features of the continental shelf that was a natural prolongation of Guinea's territory because both the States' continental shelves were the similar.<sup>173</sup> Further to a proportional determination of the shelf for an equitable result, the Tribunal considered the length of the coastlines and the relevant factors as opposed to the landmass-to-water ratio.<sup>174</sup> Both parties then stressed that there was an economic interest in the development of their petroleum industries as it relates to the continental shelf, also tying their argument to national security.<sup>175</sup> Considering all the other relevant factors,<sup>176</sup> the Tribunal upheld the considerations that gave rise to the provisional line as the maritime boundary but allowed for the particular coordinates of the line to be determined as per Article 9(2) of the 1983 Special Agreement.<sup>177</sup>

#### 4.4. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening)*

Cameroon questioned Nigeria's sovereignty over the Bakassi Peninsula in 1994 as well as requested the Court to determine the maritime boundary between the two States,<sup>178</sup> accepting the jurisdiction of the ICJ under Article 36(2).<sup>179</sup> Three Agreements were valid at the time Cameroon filed this case: the Anglo-German Agreement; Cameroon-Nigeria Agreement including the Yaounde Declaration; and the Maroua Declaration.<sup>180</sup> Cameroon argued for the

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<sup>172</sup> McLlarky CA, 'Guinea/Guinea-Bissau', 105.

<sup>173</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 299-300.

<sup>174</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 300-301. The *North Sea cases* reiterated this as well.

<sup>175</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 302.

<sup>176</sup> Both parties argued that because they are developing States, delimitation of the continental shelf with respect to the petroleum deposits would greatly develop their petroleum industries and provide security. However, the Tribunal noted that it would not be equitable to rely on this criterion because the 'developing' classification is not a permanent one. *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 302.

<sup>177</sup> *Case concerning the delimitation of the maritime boundary between Guinea and Guinea-Bissau*, 302-303.

<sup>178</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*, Judgment ICJ Reports 2002, 312.

<sup>179</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 312.

<sup>180</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 319.

application of an equitable solution based on the circumstances or relevant factors unique to their coastlines,<sup>181</sup> rejecting the use of equidistance method between adjacent States as customary international law. However, Nigeria recognised that international courts usually begin with the equidistance method but are not limited to it:<sup>182</sup>

‘They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves *first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an “equitable result”*’(emphasis mine).<sup>183</sup>

In this case, the Court adopted the ‘corrective-equity approach’ under Article 83(1), where the relevant circumstances led to an alteration of the original equidistance line,<sup>184</sup> and discussed the rights of third-party States seeing that the Gulf of Guinea is concerned with Nigeria, Cameroon, Equatorial Guinea, Gabon, and Sao Tome and Principe. Geography was the first consideration when identifying the relevant factors, such as the concavity of the Gulf of Guinea.<sup>185</sup> Nigeria did not agree that the re-definition of Cameroon’s coast was necessary (*uti possidetis juris*),<sup>186</sup> but the Court identified that if the area involved fell within the area to be delimited, it ought to pronounce itself on the definition of that boundary.<sup>187</sup> The area in question lacked concavity and was therefore not considered as a relevant factor. The sovereignty of the Bioko Islands was contested as it formed part of Equatorial Guinea’s territory. The Court did not consider this to be a relevant factor<sup>188</sup> neither were the oil concessions as these are a non-geographical factor. The Court identified that State practice<sup>189</sup> on oil concessions dictate that delimitation would not redistribute the concessions between parties to the delimitation.<sup>190</sup>

‘Overall, it follows from the jurisprudence that, although the existence of an express or tacit agreement between the parties on the siting of their respective oil concessions may indicate a

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<sup>181</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 135.

<sup>182</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 131.

<sup>183</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 135.

<sup>184</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 432, 443.

<sup>185</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 134.

<sup>186</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 319, 336, 400.

<sup>187</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 138.

<sup>188</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 138.

<sup>189</sup> This position was affirmed in the cases of Tunisia/Libya, Gulf of Maine and Guinea/Guinea-Bissau.

<sup>190</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, Counter Memorial of Nigeria, ICJ Reports, 581-587.

consensus on the maritime areas to which they are entitled, oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line. Only if they are based on express or tacit agreement between the parties may they be taken into account. In the present case there is no agreement between the parties regarding oil concessions'.<sup>191</sup>

The role of the equitable principles in the present case was result-oriented in applying the non-obligatory equidistance line promoting the flexibility of this approach.<sup>192</sup> The Court found that the equidistance line was indeed the most equitable method for an equitable solution considering the third-party claims. The Court noted also that there was essentially no difference between and special circumstances and relevant circumstances, a distinction made by the Court in other cases.<sup>193</sup>

#### 4.5. Concluding Remarks

Mensah highlights that the equidistance/relevant circumstance method is the most favoured methodology as opposed to the other technical methods.<sup>194</sup> This has been exhibited in the preceding cases by Tunisia, Malta, Guinea-Bissau and Nigeria. However, States such as Libya favour the natural prolongation method, Guinea (in respect of the boundary of Guinea-Bissau) the parallels of latitude method, and Cameroon for the equitable solutions method based on the relevant factors. Each State chose the method that would benefit their own economic needs but this bias was mitigated by the adjudicative body. Decisions often demonstrate a compromise between the conflicting methods applying the equitable principles to the equidistance method. The recurring concern is whether there is a need to alter the provisional equidistance line based on equitable principles.

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<sup>191</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 140-141.

<sup>192</sup> Tanaka Y, 'Reflections on maritime delimitation in the Cameroon/Nigeria case', 53(2) *The International and Comparative Law Quarterly* (2004), 381.

<sup>193</sup> *Land and Maritime Boundary between Cameroon and Nigeria*, 436, 442.

<sup>194</sup> Mensah T, 'Delimitation of the continental shelf: The methodology' in Sainz-Borgo J, Gudmundsdottir H, Gudmundsdottir G, Amaya-Castro J, Kanade M, Saab Y and Sipalla H (eds) *Liber Amicorum - In honour of a modern Renaissance man His Excellency Gudmundur Eiriksson*, Ciudad Colon and Sonipat: UPEACE Press, 2017, 32.

## 5. Conclusion and Recommendations

### 5.1. Conclusion

The aim of this study was to identify whether adjacent coastal States in Africa have adopted a common approach to maritime boundary delimitation. Fife discussed the role of the Norwegian Foreign Ministry in strengthening the involvement of developing States,<sup>195</sup> especially those States that lacked ‘financial and technical resources and relevant capacity and expertise’.<sup>196</sup> Somalia, was faced with political and security challenges that prevented their attempt to fulfil the mandate under the Convention and in 2008, the Special Representative of the Secretary-General of the United Nations for Somalia, Mr Ahmedou Ould Abdallah, accepted an offer by the Norwegian Government to provide Somalia with information on the outer limits of the continental shelf in the Indian Ocean. Similar help was extended to, amongst other developing States, Guinea-Bissau, Guinea, and Senegal.<sup>197</sup> Whether or not the States’ relationship with the Government of Norway influenced their choice of a technical method to employ in boundary delimitation, a trend is identified in the cases concerning Somalia, Guinea, Guinea-Bissau, and Senegal.<sup>198</sup> To determine whether the median line is a method employed by Norway, the example of the *Denmark/Norway case* is taken,<sup>199</sup> where both parties under Article 1 of the 1965 bilateral Agreement agreed to apply the equidistance median line to delimit the continental shelf.<sup>200</sup>

In light of the foregoing, can a trend in maritime boundary delimitation be identified if some of its boundary disputes over the continental shelf is influenced by Norwegian conclusions as to the most appropriate technical methods to employ? The answer, based on the literature on TWAIL, is yes. Notice that TWAIL is corrective in nature, as is the aim of the mandatory

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<sup>195</sup> Fife RE, ‘A perspective on development and the law of the sea: How to provide support for the establishment of the outer limits of the continental shelf’ in Sainz-Borgo J, Gudmundsdottir H, Gudmundsdottir G, Amaya-Castro J, Kanade M, Saab Y and Sipalla H (eds) *Liber Amicorum - In honour of a modern Renaissance man His Excellency Gudmundur Eiriksson*, Ciudad Colon and Sonipat: UPEACE Press, 2017. The States chosen were those that were not able to fulfil the mandate - including information on the outer limits of the continental shelf—found under Article 4, Annex II, *United Nations Convention on the Law of the Sea*.

<sup>196</sup> Fife RE, ‘How to provide support for the establishment of the outer limits of the continental shelf’, 63.

<sup>197</sup> Fife RE, ‘How to provide support for the establishment of the outer limits of the continental shelf’, 60-64.

<sup>198</sup> Fife RE, ‘How to provide support for the establishment of the outer limits of the continental shelf’, 65.

<sup>199</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, Judgment, ICJ Reports, 14 June 1993.

<sup>200</sup> *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)*, 43. Note that Norway submitted to the Court to use the median line to determine the maritime boundary in the region between Jan Mayen and Greenland considering all relevant factors.

aspects of Article 83(1) to avoid a situation characterised by inequalities. TWAIL neither expects nor advocates for entirely new concepts in international law to correct historical and legal deficiencies against the Third World. Rather, it brings to the fore the need to reconstitute the way in which Third World States approach international law. UNCLOS gives States the latitude - which we have demonstrated is itself the result of active participation of Third World during UNCLOS III - under Article 83(1) to choose the technical approach to delimitation, and if any other State contributes to their realisation of this, it brings across a much broader idea of unity towards a global standard.<sup>201</sup> As a further safeguard, the relevant international court or tribunal is obligated to ensure that an equitable solution is achieved.

Chapter three canvassed the legal regime on maritime boundary delimitation, highlighting the mandatory and normative aspects of the governing Article on dispute settlement over the delimitation of the continental shelf. This creates a clear understanding of how and why it is possible to adopt any number of technical methods with a qualification; that the result must be equitable.<sup>202</sup> Boundary delimitation is therefore not monotypic but *unicum*,<sup>203</sup> placing the duty to administer justice and preserve peace in international law on the appropriate international court or tribunal, whether ITLOS, arbitral tribunals, or the ICJ. From the *Tunisia-Libya*; *Libya-Malta*; *Guinea-Guinea Bissau*; and *Cameroon-Nigeria* cases, it is evident that African States alternate between the equidistance and equitable principles method of delimitation. In each case, the Court considers the relevant factors; from geography to history and security, and it is for this reason that UNCLOS is characterised as TWAIL in Chapter 2. Therefore, the 'call for equity, viewed as the criterion of an optimal state of relative mutual satisfaction between the parties, enters into the matter of continental shelf dispute'.<sup>204</sup>

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<sup>201</sup> The State's primary aim under the provisions on maritime boundary delimitation is resource exploration and exploitation towards their economic development.

<sup>202</sup> Nelson LDM, 'The roles of equity in the delimitation of maritime boundaries', 858. *Nelson* concludes this paper by stating that 'equity assumes a lead role- an autonomous role- in the search for principles, or rather criteria, "in order to achieve an equitable solution" in the particular situation'.

<sup>203</sup> Nelson LDM, 'The roles of equity in the delimitation of maritime boundaries', 857.

<sup>204</sup> Rothpfeffer T, 'Equity, in the North Sea Continental Shelf cases- A case study in the legal reasoning of the International Court of Justice', 42 *Nordisk Tidsskrift for International ret* (1972), 120.

## 5.2. Recommendations

The regime of the international law of the sea is fairly inclusive of all States, particularly in the area of the delimitation of the continental shelf. This study was limited to coastal adjacent States whose background under UNCLOS has been substantiated by powerful alliances, negotiations, and concessions for the application of just global standard. As a result, the recommendation that this study can profit is that of the crucial role of international institutions in delivering justice in international law. The aim is not homogeneity as Article 83(1) displays.<sup>205</sup> It is to enable States to achieve the global standard<sup>206</sup> by balancing the mandatory requirements in that area of law and the ability to negotiate agreements that achieve the aims whether it is criminal justice or fair trade practices. A preliminary challenge with this is that decisions left to international institutions may still be characterised as too political. However, adopting the UNCLOS approach once again, nothing prevents institutions from forming similar special interest groups in order to collate similar views towards a consensus or a compromise.<sup>207</sup> As a parting comment, the preceding views intend encourage debate towards a more legitimate (as Mutua put it) international regime characterised as fair, just, and inclusive.

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<sup>205</sup> Rothpfeffer T, 'Equity, in the North Sea Continental Shelf cases', 86.

<sup>206</sup> Chimni BS, 'Capitalism, imperialism, and international law', 46. For example, the role of the Gacaca Court System as an alternative dispute resolution method; see generally Haberstock L, 'An analysis of the effectiveness of the Gacaca Court System in post-genocide Rwanda', 8(4) *Global Tides* (2014).

<sup>207</sup> This would be a significant step towards inclusivity in international law.

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