

The Maritime Question on the Kenya–Somali Border

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Abstract

Globally, there are increasing concerns regarding maritime conflicts arising from competition over resources and territorial claims. These conflicts continue to derail efforts for regional integration and the implementation of maritime security strategies aimed at addressing escalating maritime security threats, including human trafficking, arms smuggling, terrorism, organised crime and piracy. Using a case study of the Kenya–Somalia border contestation over the exclusive economic zone (EEZ), this article discusses the genesis of the Kenya–Somalia maritime question. It views the maritime issue as a product of colonial construct. The qualitative study considers the Kenya–Somalia border dispute from two perspectives; firstly, the dispute is a maritime security risk that threatens to worsen the already precarious and vulnerable security situation in the region. Secondly, the dispute is caused by both countries’ efforts to protect their territorial integrity and preserve economic resources, including hydrocarbons found in the disputed area. The findings acknowledged that the decision by the International Court of Justice (ICJ) to integrate the equidistance principle into the delimitation of the contested boundary was effective, given that it embraced the principle of equal access and that no reliable evidence exists to ascertain earlier agreements of demarcation, since existing maritime agreements provided by Kenya were not binding. The article concludes by acknowledging the need for both parties to comply with the ICJ ruling and other international frameworks guiding maritime issues, and the need for both Kenya and Somalia to embrace good neighbourly policies. This article recommends that neither country engages in retaliatory actions, but should instead engage in joint security operations and joint public diplomacy on the necessity of maritime security, sign binding maritime security cooperation agreements, and strengthen their economic and diplomatic interactions, including trade and cultural exchanges.

Keywords: Maritime Security; inter-state relations; maritime issues; ICJ adjudication; Kenya-Somalia tensions

1. Introduction

Maritime issues have remained ubiquitous concerns globally, prompting scholars to refer to the 21st era as a maritime century. One of the paradigm shifts in academic discourse has involved an increase in studies aimed at assessing and establishing the drivers for the escalating maritime contests between neighbouring states and communities over control of both renewable and non-renewable resources. Studies have also focused on finding solutions to these maritime concerns. Kenya has historically experienced several maritime conflicts with other East African member nations, including the maritime tussle between Kenya and Uganda over Migingo, a rocky and resourceful island on Lake Victoria, and the Kenya–Somalia tussle over control of the EEZ in the Indian Ocean. Given that maritime sources are increasingly becoming a priority in formulating development strategies and in addressing the issues of climate change, maritime-related conflicts are expected to escalate, hence, the need to conduct research on maritime contestations as part of strategies to address Kenya’s maritime security threats.

The Kenya–Somalia dispute presents diverse implications for Kenya and Somalia’s maritime security and curtails both countries’ economic benefits of the region, including extraction of resources and trading activities. According to a study by Ida Gathoni (2021) titled *Implications of Piracy on Kenya - Somalia Maritime Border Dispute*, the dispute threatens to worsen the already precarious security status at the borderline. Given the political instability in Somalia and the prevalence of organised gangs in coastal towns, Kenya views the occupation of the coastline by Somalia as a key maritime security threat to national security and trade interests.

According to Venkataraman (2016) and Mbugua and Mwachinalo (2017), between 2007 and 2012 the Somali piracy crisis was at its peak with more than 237 attacks across the Arabian Sea, the Gulf of Eden and the Red Sea. These attacks were abetted by the fact that Somalia was politically unstable, yet is in a strategic location for over 40 per cent of world trade. Somalia is also a free economy with no strong financial system and is characterised by many warlords who offer protection to the pirates and coordinate their activities. Kenya is concerned about the prospect of losing control of the economic zone that harbours the growth and dominance of pirates on the Kenyan coast.

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The security dynamics linked to Kenya losing effective control of the disputed area also lie in the fact that this area facilitates the flow of small arms and light weapons. The International Ship Owners Association considers the disputed coastline, including the contested area, a high-risk area. This is justified by the increasing number of piracy attacks and the proliferation of small arms and light weapons from Somalia and other regions. Kenya fears that the continuation of arms trafficking within the disputed area is enabled by the weak security architecture of the Somali regime. The proliferation of small arms and light weapons in the region presents a possibility of these weapons getting into the hands of local and international criminals and vigilante groups, both on land and at sea, thereby compromising the country's national security. Therefore, Kenya views its control of the protected regions as a strategy to enhance its monitoring and surveillance of the coastline in order to prevent the smuggling of illegal products, and regards the loss of the contested regions as increasing the likelihood of piracy and illegal activities escalating due to the inadequate capacity of Somalia to protect its water bodies from criminal enterprises.

Both countries view losing control of the disputed regions as presenting spillover effects on their domestic economies. For instance, Onuoha (2009) found that Kenya's loss of the maritime boundary not only makes the region susceptible to piracy and armed robbery, but also unregulated fishing and toxic waste dumping. Subsequently, the border conflict has the potential to harbour the existence of 'ungoverned spaces' in the region which may facilitate terror activities and other practices that are against the provisions of international law.

Given what is at stake, the geostrategic importance of the disputed region also fuels the conflict between Somalia and Kenya. This region is resource-rich as a result of its possession of high-value hydrocarbons, including oil and gas, which both countries focus on exploiting. Both countries also fear losing their fishing rights in the disputed region as this would have a detrimental effect on their livelihoods. Essentially, both Kenya and Somalia consider that insecurity at the coastline hinders their ability to secure the trade routes and protect or harness the benefits of their blue economy. Both countries realise their mandate of not only protecting, but also providing socio-economic development for coastal communities. The dispute may provide leeway for the re-emergence of criminal enterprises engaging in extraction activities along the coastline and relying on the profit gains to sustain their illegal activities in the coastal region.

The contextual analysis of this study is premised on the fact that the Kenya–Somalia maritime dispute may result in ungoverned spaces in the disputed area, thereby harbouring the rise of maritime security threats. Subsequently, given the availability of hydrocarbons including oil and gas, and the fishing activities in the region, the study also explores how competition for resources can degenerate into conflict through a case analysis of the Kenya–Somalia border conflict. The study addresses the Kenya–Somalia maritime question by responding to two overall research questions: Is the Kenya–Somalia border dispute a maritime security threat? Does the exploitation of resources play any role in exacerbating the maritime border conflict?

This research adopted qualitative research approaches. Twenty-five purposively sampled respondents drawn from local communities domiciled in the contested region, including jurists, security actors and key stakeholders on maritime issues were telephonically or physically interviewed to answer questions relating to this study. Through key informant interviews, the use of an interview guide was integrated to facilitate the process of data collection. The primary sources of information were triangulated by a review of secondary literature from different contributors on maritime contestations. Both the primary and secondary data were thematically analysed to generate key themes that informed the findings.

2. Historical Context of the Kenya–Somalia Maritime Dispute

According to Rossi (2019) and Yoon (2009), the Kenya–Somalia maritime dispute began during the colonial era in East Africa in the 19th century, indicating that both authors view the Kenya–Somalia maritime contestations as a product of colonial constructs. According to Hersi (2018), during the colonial period, the colonial powers delimited/partitioned Somalia into five territories, including Italian Somaliland (Somalia), British Somaliland (Somaliland), French Somaliland (Djibouti) and Somalia enclaves in the Ethiopian Ogaden region and the North Eastern Province of Kenya. This is corroborated in the works of the International Court of Justice (ICJ) (2021), which highlighted that on 15 July 1924, Italy and Britain concluded a treaty that demarcated their boundaries in the East African region, including what Somalia describes as the Somalian colony in Juba land, located in current Somalia and the British colony of Kenya. In the period between 1925 and 1927, a British–Italian Commission led by different representatives surveyed the border regions and demarcated the borders. The agreements of 1925 and 17th December 1927 that redefined the boundaries were formally confirmed by an 'Exchange of Notes' on 22 November 1933, between the Italian and the British Governments.

Given that these colonial boundaries were drawn without taking the interests of local communities into cognizance, since they largely served colonial interests, Somalia sought to unite the five colonial territories into one Greater Somalia, a move that caused strife between Somalia and its neighbours, including Kenya. Somalia not only made attempts to reclaim Kenya's Northern Frontier region, but also parts of the Indian Ocean, with the aims of tapping the region's economic resources and bringing together all people of Somali descent under one territory.

Since the colonial boundaries were artificial and arbitrary and were imposed on unwilling and nonparticipating Kenyans and Somalians, the government of Somalia formally made its first declaration on the currently contested territorial area to a stretch of 200 nautical miles in 1972. The Somali government declared exclusive control of the EEZ. In a rejoinder to this claim, the then President of Kenya, through a presidential Proclamation of 1979 stated that, notwithstanding any rule of law or any practice which may hitherto have been observed about Kenya or the waters beyond or adjacent to the territorial Sea of Kenya, the EEZ of the Republic of Kenya extend[s] across the sea to a distance of two hundred nautical miles, starting from the appropriate baseline from which the territorial sea is measured, as indicated in the map annexed to the Proclamation.

Through the presidential proclamation of 1979, the president committed to protect Kenya's territorial integrity and affirmed Kenya's position that its northern territorial waters boundary with the Somali Republic is on the Eastern Latitude South of Diua Damascisca Island, being latitude 1 degrees 30' South. On 19 July 1979, Kenya's government transmitted the Presidential Proclamation of 1979 to the Secretary-General to the Permanent Missions of the Member States of the United Nations. To legalise the presidential proclamation of 1979, the government of Kenya enacted the 1989 Maritime Zones Act that re-emphasised the integration of a parallel line approach in boundary delimitations. Somalia has continually protested Kenya's presidential proclamation, asserting that it is not binding and contravenes Somalia's territorial integrity and jurisprudence.

To leverage the use of diplomatic mechanisms to settle their border contestations, both Kenya and Somalia signed the United Nations Convention on the Law of the Sea on 10 December 1982, and were ratified on 2 March 1989 and 24 July 1989, respectively. The convention provisions were affected for the two countries on 16 November 1994. Given their membership to the United Nations Convention on the Law of the Sea (UNCLOS), both countries have filed submissions to the convention to obtain UNCLOS recommendations on matters related to the delimitation of the outer limits of the continental shelves beyond the 200 nautical mile, as outlined in Article 76 Paragraph 8 of UNCLOS which stipulates that 'the limits of the shelf established by a coastal State on the basis of these recommendations [by the CLCS] shall be final and binding.' As Kadagi *et al.* (2020) assert, Somali submission to UNCLOS has been premised on Articles 15, 74 and 83 of UNCLOS, which asserts that "...maritime delimitation should be based on the three-step process which includes a straight line from the states' land boundary and extending to the territorial sea, EEZ, and [the] continental shelf".

With the failure to solve the matter through UNCLOS, both Kenya and Somalia attempted to integrate a bilateral/negotiations approach to settle the matter. In 2009, both Kenya and Somalia signed a Memorandum of Understanding, through which they agreed to delimit their borders through negotiations rather than a legal approach. The Somalia government, through its parliament, noted Kenya's lack of commitment to the negotiations, and so later rejected the provisions of the memorandum (Ioannides and Yiallourides 2021). The government of Kenya's action in 2012 to award exploration licenses for eight offshore blocks within the Indian Ocean to foreign companies, including Total, Eni Company Limited and USA-based Anadarko Petroleum, escalated the maritime issue between the two countries. Somalia considered Kenya's action to be in contravention of Somalia's Law No. 37 which defines Somalia's maritime borders, including its continental shelf and Maritime Economic Zones. The Somalia government also interpreted Kenya's decision to award exploration rights to foreign firms as a blatant violation of the provisions of the 2009 Memorandum of Understanding (MoU), signed by both Kenya and Somalia.

Following the failure of bilateral agreements between Kenya and Somalia and the reluctance of UNCLOS to provide suitable recommendations to resolve the maritime issues, Somalia opted to formally sue Kenya at the ICJ in August 2014. The government of Kenya formally objected to the application, since it raised preliminary objections on the ICJ jurisdiction to handle the case. The government of Kenya argued that the 2009 signed MoU and the 1979 Presidential Proclamation were binding. The court threw out the question of the ICJ's jurisdiction to handle the Kenya–Somalia maritime border dispute by asserting that the ICJ had original jurisdiction to settle the issue between the parties amicably.

3. Theoretical Framework

The Kenya–Somalia border dispute can best be contextualised through idealism. The critical proponents of idealism include John Locke, Jean Jacques Rousseau and Immanuel Kant, among others. Idealism philosophy was based largely on the ideas of human progress and enlightenment in the achievement of global peace and stability (Guyer, & Horstmann, 2023). Idealists contend that international peace and cooperation are feasible in international relations. As a result, they attach importance to moral values and respect for fundamental human rights and freedoms. While considering nation-states as rational actors, idealism opines that human progress is possible when states embrace peaceful coexistence and have a fundamental respect for individual freedoms. While acknowledging that states pursue national interests that may be conflictual, idealists contend that long-lasting peace is achievable through international law and international organisations.

Supranational structures are critical in the international system since they regulate the behaviour of states and foster the establishment of common interests on global and national issues. Post World War I, idealism gained prominence, and its philosophical underpinnings informed the establishment of the League of Nations, from which the United Nations later arose. Through its advocacy for a free market economy, idealism has informed the development of several international regimes, including the World Trade Organisation. Idealists therefore believe that international organisations and their associated regimes such as international laws, can foster the establishment of a peaceful society.

Idealism is the best fit for this study given its emphasis on international organisations, international laws, and moral values. Through the lens of idealism, the study assesses the effectiveness of international law and institutions such as the ICJ as tools for settling competing national interests among member states, including Kenya and Somalia. In the Kenya–Somalia maritime question, the member countries adopted idealism on several accounts, including bilateral agreements and even multilateralism, as evidenced by the petitioning of the maritime dispute at the ICJ. In the same vein, both countries are members of international regimes including UNCLOS, with both countries ratifying the convention in 1989. Therefore, the integration of idealism is critical in testing the utility of international agreements such as UNCLOS as benchmarks for solving global disputes and enhancing compliance among member states.

4. Geo-Strategic Significance of the Maritime Domain (EEZ)

According to Okoli and Ngwu (2019), boundary disputes are largely associated with territorial struggles motivated by the pursuit of control of geostrategic and economic resources on the affected borderlines and frontiers. The contentious maritime triangle in this case measures 100 000 square kilometres. The region is said to be resource-rich due to it having high-value hydrocarbons, including oil and gas. The two countries expect to auction oil blocks in the disputed areas in order to maximise profits from these resources. The utility of oil reserves in the region is exemplified by the fact that by 2019, at least 15 international oil companies had shown keen interest in exploring and exploiting Kenya and Somalia's offshore oil reserves within the disputed area. Some of the companies that have already expressed exclusive interest in exploiting the oil and gas reserves in the EEZ include French-based Total Company and Italy-based Eni Company, both of which have sought to acquire 25 per cent participating rights from three oil blocks in the EEZ.

The EEZ is also of geostrategic importance because of its fish economy. The 100 000 square kilometre region is projected to potentially produce between 150,000 - 300 000 metric tons of fish annually (Standard Newspaper, 2022). For this reason, a shift in the maritime borders would mean a loss of livelihoods for the fishing communities, especially those in Lamu County and communities domiciled along the Northern parts of Kenya's coast.

The maritime region is also of importance to the country's maritime security. Both countries as well as external actors consider control of the 100 000 square kilometres of the EEZ as a way to address the maritime security issues that threaten peaceful coexistence and economic development in the region. Some of these issues that plague the maritime borders between Kenya and Somalia include terrorism, the proliferation of small arms and light weapons, piracy, and child and drug trafficking. Both countries, therefore, view their control of the region as strategic to exerting their authority and implementing their security strategies, including patrols and surveillance within the region without the intervention of the other party. Control over the marine environment increases both countries' leverage in monitoring maritime regions and ensuring peace and tranquillity.

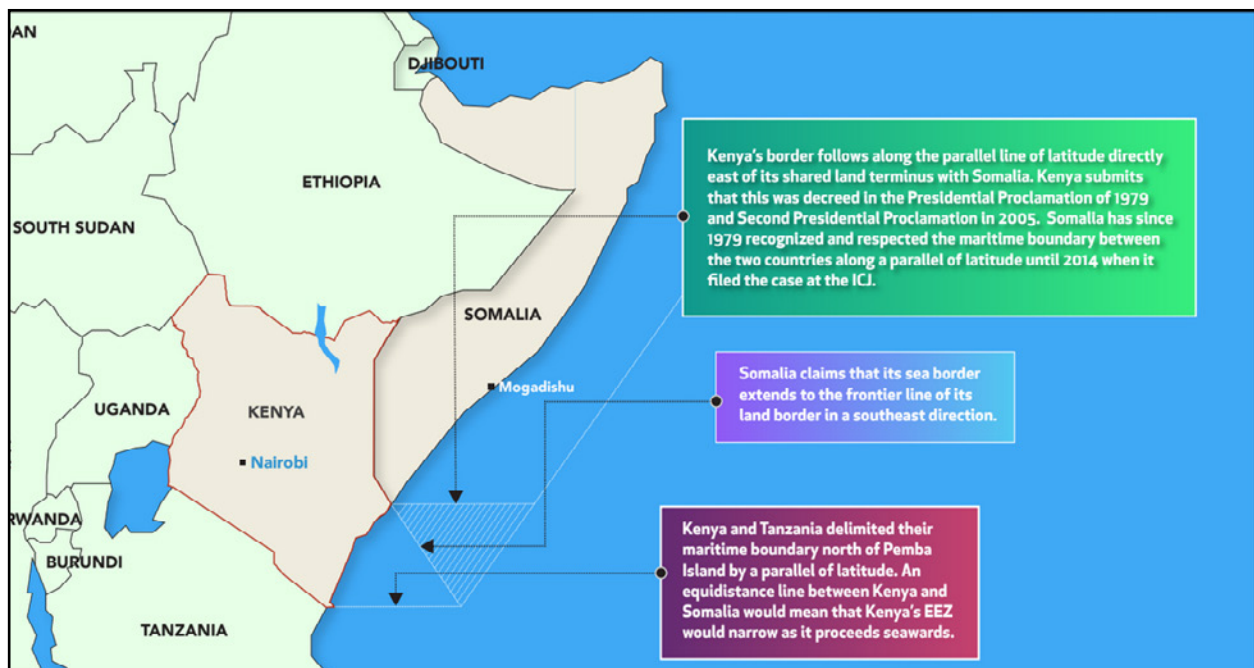
The Indian Ocean also presents a military advantage for the governments of both Kenya and Somalia. The Indian Ocean at large is of strategic interest to Kenya, given that it serves as a tactical training ground for its naval power—the Kenyan navy. As a result, Kenya relies on the Indian Ocean to undertake joint military exercises, including patrols aimed at countering the proliferation of small arms and light weapons, illicit drugs and pirates. Kenya's autonomy in the Indian Ocean is therefore critical to facilitating its naval operations within the ocean.

4.1. Cross-cutting issues on border contestations at the ICJ

The main contestation between both Kenya and Somalia remains how to delimit the borderline. As the ICJ (2021) pointed out, the two countries adopted fundamentally different approaches or mechanisms to delimit the maritime areas. Both parties are largely focused on expanding their naval power within the ocean and widening their economic leverage within the region by accessing and controlling larger economic blocks. While Kenya held the view that the Presidential Proclamation of 1979 and the 2009 signed MoU were binding legal documents, Somalia informed the court that no mutually acceptable maritime boundary agreement exists between the two countries. Following from this argument, Somalia requested that the ICJ plot a boundary line using the special circumstance method or even equidistance principle approach for the delimitation of the maritime areas, and the equidistance/relevant circumstances method for delimiting the maritime areas beyond the territorial areas. Somalia posited that the application of an unadjusted equidistance line throughout the equidistance areas achieves the equidistance result that is required in international law (ICJ 2021). Therefore, Somalia maintains that its maritime boundary with Kenya should run on a diagonal basis, extending from its land border and not from the parallel of the line of latitude as suggested by Kenya.

Somalia's position on the integration of the special circumstance method/equidistance principal approach for delimitation of contested coastlines gained attraction and support from foreign entities, and eventually informed the ICJ ruling. This was largely informed by the fact that the approach was regarded as providing an equitable solution to the disputed territory. This was also necessitated by the fact that no legally binding provision existed which clearly demarcated the boundaries between Kenya and Somalia.

Figure 1: Kenya–Somalia maritime boundary claims



Source: Horn of Africa Bulletin 2019

On its part, Kenya contends that, based on the 1979 Presidential Proclamation, a boundary agreement exists between them and Somalia. Kenya, in its written statements, argued that Somalia did not protest legally or forcefully against the 1979 Proclamation, a clear indication that it was binding. Kenya's written submission to the ICJ further avers that, following Somalia's failure to respond effectively to the 2005 Proclamation on the maritime boundary and the 2009 Kenya's Submission on the Continental Shelf beyond 200 nautical miles deposited with the Commission of the Limits of Continental Shelf on 6 May 2009, Somalia has acquiesced to Kenya's claim that the maritime boundary should follow the parallel of latitude approach (Gaver 2002). Kenya further argues that in both 2007 and 2008, Somalia did not react or submit any protest to two Notes Verbales in which it informed Somalia that it had drawn the boundaries with Somalia using the parallel of latitude approach, and requested Somalia to confirm its agreement to the boundaries. Kenya reaffirmed its commitment to the use of the parallel line approach, holding the view that the approach provides for equitable delimitation on both a geographical context and in terms of regional considerations.

As highlighted in the ICJ written submissions, Kenya asserted that:

even if the Court were to conclude that there is no maritime boundary in place, it should delimit the maritime areas following the parallel of latitude, and that, even if the Court were to employ the delimitation methodology suggested by Somalia, the outcome, following adjustment to reach an equitable result, would be a delimitation that follows the parallel of latitude (ICJ 2021).

Kenya further asserted that its activities in the maritime area, including naval patrols, maritime scientific research, interceptions and offshore oil exploration blocks among others have been consistent with Kenya's maritime claim and therefore not an act of violation of the sovereignty of Somalia. The government of Kenya, therefore, opined that the non-committal nature of Somalia in response to the maritime claims signified Somalia's acceptance of the parallel line approach to handling the maritime issue. Kenya also, through written submissions, opined that the maps and reports that Somalia presented to the ICJ were irrelevant as they did not clearly show the position of both parties (Gaver 2022).

Somalia's response to Kenyan claims has largely been premised on the provisions of Articles 15, 74 and 83 of UNCLOS. The government of Somalia argued that based on UNCLOS provisions, the delimitation of maritime boundaries is to be affected or addressed through agreement. Somalia held that Kenya's position on the delimitation approach has been a unilateral act and has, therefore, not involved Somalia's government at all.

The government of Somalia, through written submissions, further noted that the lack of response to Kenya's proclamations and submissions by Somalia cannot be interpreted legally as an act of agreement to the unilateral acts proposed by Kenya. Contrary to Kenya's stance, Somalia maintains that historically, there has never been any binding agreement between Kenya and Somalia on the maritime border. Somalia therefore sought the intervention of the ICJ to facilitate legal delimitation of the boundary. The Somali government also submitted that prior to 2007, it was war-ravaged and lacked a functional government, so could not be assertive in international politics, hence its lack of response to Kenya's unilateral acts within the disputed maritime border.

Somalia, therefore, requested the court to invoke the provisions of Article 15 of UNCLOS which asserts that:

Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however where it is necessary because of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith (UNCLOS 1982).

4.2. Court decision

Based on the petition and the provided background, it is evident that the ICJ's ruling was dependent on its application and interpretation of critical cross-cutting issues and questions that were raised. Firstly, the court had the responsibility to ascertain whether there had been a binding maritime boundary between Kenya and Somalia based on acquiescence by Somalia, as claimed by Kenya. Secondly, the court was required to ascertain the legality and the applicability of both the 1997 Presidential Proclamation and the 2009 MoU, particularly with regard to their clarity and how binding they were. This meant that the court had to determine whether there had been a tacit agreement between Kenya and Somalia on the EEZ.

In case no tacit agreement had been effective, the court then had the primary responsibility to set the basis of delimitation; either the parallel of latitude approach as claimed by Kenya or the delimitation to be premised under Article 15 of the UNCLOS convention, as quoted above. In contrast to Kenya's interpretation of Article 15, Somalia maintained that a median line should constitute the maritime boundary between the two parties contesting the maritime boundary.

The ICJ also had a principal responsibility to determine the base points for the borderline, as Somalia maintained that the identification of the maritime boundary primarily begins with the identification of the land boundary terminus which is located at 1° 39' 44.07" S and 41° 33' 34.57" E. The land boundary located in Somalia slightly contradicted the land coordinates provided by Kenya which located the boundary terminus at 1° 39' 44.0" S and 41° 33' 34.4" E (Gaver 2022). At the request of Somalia, the ICJ was tasked to determine whether Kenya's actions within the contested region contravened Somalia's sovereignty rights and territorial integrity principles.

With Kenya failing to participate in the hearing, the ICJ largely relied on Kenya's written submissions and historical records to decide on the contested area between Kenya and Somalia. Kenya cited the ICJ's perceived 'biases and unwillingness' as critical reasons for boycotting the hearings. Kenya had initially petitioned the ICJ for the need to delay the hearing following the COVID-19 pandemic, a request that was overruled by the jurists. The hearings of the case adopted a hybrid format and took place between 15 and 18 March, with the ruling given on 12 October 2021.

4.3. *Existence of a tacit boundary*

The ruling by the ICJ began by first addressing Kenya's claim of the existence of a tacit agreement between the two countries. Through written records, Kenya argued that the tacit agreements, subject to the 1997 and 2005 Presidential Proclamations, the Note Verbal of 2007 and 2008, and the 2009 MoU signed by both parties as well as the lack of protest by Somalia in response to Kenya's actions, outline the course of maritime boundaries between Kenya and Somalia, especially the EEZ and the Continental Shelf within 200 nautical miles. In other words, Kenya argued that the lack of protest from Somalia on Kenya's claims signified Somalia's acquiescence on the maritime border dispute. The court, however, ruled that the lack of protest by Somalia on Kenya's actions and processes on the maritime border claim cannot be considered as a manifestation of acquiescence.

The ICJ termed the term maritime border contestations as "a matter of grave importance" (ICJ 2021) and therefore, a high evidentiary threshold is needed to prove or show a case that a maritime border or boundary has been established based on tacit agreement or acquiescence.

While referring to the historical case of Ghana vs Cote d'Ivoire and Nicaragua vs Honduras, evidence of an existing tacit agreement must be compelling. The court, therefore, ruled that based on the written records and written submissions submitted, Kenya failed to legally demonstrate to the court that the conduct of Somalia indicated clearly that Somalia had acquiesced to the maritime boundary claims and accepted that the borderline should be delimited on a parallel of latitude methodology as proposed by Kenya. The court, therefore, overruled the request by Kenya of the existence of a tacit agreement between the two parties on the maritime boundary. While acknowledging the existence of bilateral negotiations and even the presidential proclamations, the court concluded this cross-cutting issue by asserting that there was no tacit agreement on a de facto maritime boundary.

4.4. *Delimitation of the maritime boundary*

The two parties presented diverse claims on the methodology that should be applied to delimit the boundary. While Kenya claimed that the maritime borderline ought to run on a parallel of latitude approach, Somalia requested that the court invoke the provisions of UNCLOS Articles 15, 74 and 83, on the basis of which the maritime boundary would be delimited in terms of the three steps process, thereby including a straight line from the states land boundary and extending to the EEZ, Continental Shelf and to the territorial sea (Gaver 2022). In other words, following Somalia's declaration that there was no clear and binding agreement on the maritime border claim, the Somali government requested the court to demarcate its sea territory with Kenya by a line that runs Southeast of its land border. Somalia argued for an unadjusted equidistant line through all maritime areas.

As Gilblom (2012) asserted, Kenya claimed that the border should take a roughly 45-degree turn at the shoreline and run a latitudinal line that grants Kenya more access to the maritime area. Based on these divergent contestations, the court was obliged to refer to the criteria it had identified in earlier cases to delimit contested boundaries and to examine whether compelling evidence exists that Kenya's claim on the maritime boundary at the parallel of latitude was consistently maintained. The court also took into consideration whether or not Somalia had accepted the claim based on the tacit agreement as claimed by Kenya. In response to this maritime delimitation claim, the arguments of both parties largely referred to the 1979 Presidential Proclamation, the 2009 Submissions to the Commission on the Limits of the Continental Shelf, the 2005 Presidential Proclamation, and their Domestic Laws. Both Kenya and Somalia also made references to their conduct in the maritime area in the period between 1979 and 2014.

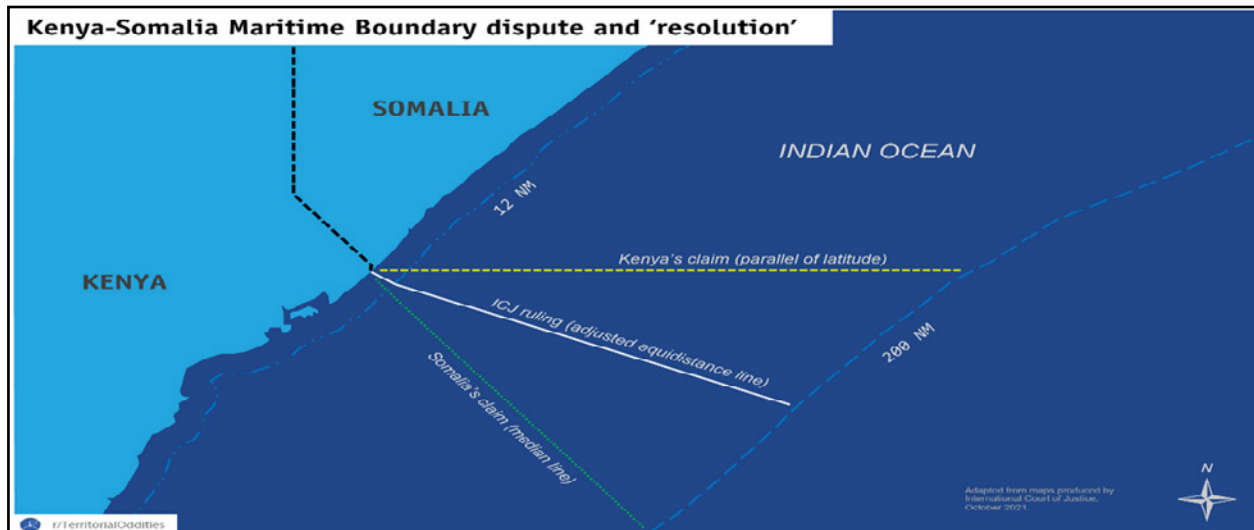
Upon reviewing the presented case, the ICJ determined that Kenya had not consistently maintained its claim that a parallel of latitude constitutes its borderline with Somalia. Based on the court ruling, Kenya's claim contradicted its 1989 Maritime Zone Act of 1989, Territorial Waters Act of 1972, and its 2009 Submission to the Commission on the Limits of the Continental Shelf. The court maintained that, despite the 1979 and 2005 Proclamations, the claim that a parallel of latitude determined the borderline, Kenya's domestic laws, and other submissions were inconsistent with this argument. For instance, the ICJ established that, based on written submissions and available records, Kenya's Territorial Waters Act of 172 as revised in 1977, Subsection 4, stipulated that "on the coastline adjacent to neighboring

(*sic*) states, the breadth of the territorial sea shall extend to a median line” (ICJ 2021). This contradicted the Presidential Proclamation of 1979 which asserted that the delimitation of the boundary would be based on a parallel of latitude methodology. Similarly, the provisions of Kenya’s Maritime Zone Act of 1989 further contradicted the provisions of the Kenya Territorial Waters Act of 1972 and the Presidential Proclamation. Section 4, Subsection 4 of the Maritime Zone Act regarding the EEZ provided that “The northern boundary of the EEZ with Somalia shall be delimited by notice in the Gazette by the Minister under an agreement between Kenya and Somalia based on international law”. This implies that Kenya noted that the delimitation of its Northern boundaries with Somalia on the EEZ would be based on mutual agreement with Somalia. These words contrast with both the Presidential Proclamation of 1979 and Maritime Waters Act of 1972 that delimited Kenya’s maritime areas on the basis of the parallel of latitude methodology.

The provisions of the Maritime Act of 1989 also implied that, by stating that maritime borders must be addressed through agreement, Kenya acknowledged that there was no formal or tacit agreement between the two countries on the maritime area. The court also observed that the Note Verbales written by Kenya to Somalia did not specify that the maritime boundary had been delimited through an agreement, but instead informed Somalia that they should confirm their agreement with Kenya’s unilateral decision. The court further observed that Kenya’s submission to the Commission on the Limits of the Continental Shelf in 2009 contradicted its earlier position on the maritime issue. The ICJ observed that in the 2009 submission, both parties acknowledged the existence of a maritime dispute which remains ‘unresolved’ and that the issue would need to be resolved by agreement between the two coastal states as provided in international law.

On 26 and 27 March 2014, on the invitation of Kenya, both Somalia and Kenya met in Nairobi to negotiate on Kenya–Somalia border contestations. The fact that these negotiations took place clearly indicates that there was no contractual or tacit agreement between Kenya and Somalia on the maritime issue. In a joint report released at the end of the meeting, both parties acknowledged that they had pursued several options for border delimitations, including parallel of latitude, median, perpendicular and bisector approaches. However, they could not arrive at an agreed methodology on which to base the borderline. The report in no way acknowledged that there was already an existing agreement on the methodology of border delimitation by either party. The ICJ (2021) therefore concluded that there was no compelling evidence that the claim by Kenya of the existence of an agreement to delimit the maritime boundary based on the parallel of latitude methodology and its related conducts, was consistently maintained.

Given the lack of a tacit agreement between Kenya and Somalia on the delimitation methodology, the ICJ applied its standard delimitation methodology in a desire to maintain consistency in its maritime case laws and to ensure equal gains by both parties. The court delimited the territorial boundary by integrating the median line special circumstance rule. The ICJ (2021) argued that “The delimitation methodology is based on the geography of the coasts of the two States concerned, and that a median or equidistance line is constructed using base points appropriate to that geography.” While the court acknowledged that the application of the equidistant principle was not mandatory, it found no compelling reasons to depart from its ‘usual’ practice of applying the equidistance principle in contexts in which no agreement exists on the border lines between the two contesting parties. The demarcation process, as determined by the ICJ, involved drawing the most appropriate base points on the coasts of the parties based on geographically objective methodologies. The equidistance principal approach also established whether any relevant circumstances existed, including geographical and non-geographical factors to be considered while establishing the borderline. Based on the court ruling, the two countries’ borderline appears as outlined in Figure 2:

Figure 2: Kenya and Somalia maritime claims and ICJ boundary delimitation

Source: Horn of Africa Bulletin 2019

4.5. Implications of the ruling

Kenya has strongly refuted the ICJ ruling on the territorial conflicts with Somalia. The Kenyan government has affirmed its commitment to protect not only water bodies, but also its territorial integrity. Before the 2021 ruling, in February 2019, Kenya recalled its ambassador to Somalia and effectively expelled the Somali envoy in Nairobi. In June of the same year, Kenya closed its border with Somalia in Lamu, citing security concerns. Subsequently, in May 2021, Kenya suspended direct flights to Somalia.

The government of Somalia responded in a reciprocal fashion by declaring that its envoys would no longer attend meetings in Nairobi. Given these circumstances, a court ruling that was not in favour of Kenya was likely to exacerbate the tension between the two neighbouring states. With limited activities currently taking place in the contested areas, the court ruling has heightened the diplomatic feud between the two countries, particularly in light of the fact that the maritime conflict between Kenya and Somalia could be argued to be more political than legal.

Given the ungoverned spaces that define Somalia and its porous borders with Kenya, continued Somalia–Kenya maritime contestation is worsening the security situation in the coastal regions. The terrorist groups have more leeway to take advantage of the antipathy of Kenya towards Somalia in order to frustrate maritime security architectures integrated within the contested region and its borders. The *Al Shabaab* can leverage the contestations over the ruling to conduct mass recruitment and mobilisation campaigns which may jeopardise the region's security system. Subsequently, Kenya's rejection of the ICJ ruling, with a further promise to use all means to protect its territorial integrity and sovereignty rights, jeopardises oil and gas exploration in the contested region, as exploration of the hydrocarbons and oil requires clear boundaries and effective maritime security.

5. Recommendations

Considering the above analysis, the following recommendations are made with a view to promoting and embracing peaceful coexistence among the disputing parties:

- Given that the ruling was premised on the equidistance principle which implied an equal share of the disputed region, Kenya should acknowledge and accept the ICJ ruling.
- Kenya and Somalia are members of international frameworks, including UNCLOS, as well as regional frameworks, and both parties should, therefore, commit to preserving the obligations that define these frameworks. Such obligations include protecting and preserving the territorial integrity rights and sovereignty rights of both parties.
- Both countries must conduct relevant public diplomacy and outreach programmes in the coastal region so that the communities can learn to appreciate the need for good neighbourliness and also understand the implications of the court ruling.

- In the spirit of good neighbourliness, Kenya and Somalia must sign binding maritime cooperation agreements to augment the ICJ ruling. The cooperation agreements should detail joint management of maritime resources and fishing rights, and combat cross-border security threats, including arms smuggling, drug trafficking, terrorism, cyber security threats and illegal migration.
- Both Kenya and Somalia must adopt a workable joint resource exploration and management programme to help build cooperation and to share risks and benefits, including enhanced monitoring of the maritime area.
- Both countries must strengthen confidence-building measures, including embracing transparency and accountability, openness and regular communication on maritime issues to address the challenge of mistrust and suspicion of maritime actors operating in the maritime area.
- Both Kenya and Somalia must recognise the importance of regional stability and should, therefore, accommodate or embrace peaceful or non-militant approaches to conflict resolutions.
- Kenya and Somalia should strengthen their economic ties through trade and other tools of economic interaction such as cultural exchanges. Economic ties have the potential to neutralise the political feuds between the two countries.
- Both Kenya and Somalia must prioritise maritime security and the development of a mutually beneficial prospectus for a blue economy.
- Kenya and Somalia should avoid any retaliatory and escalatory actions including military actions, as such actions could essentially jeopardise the larger interests and national security interests of Kenya. Therefore, compliance with the ICJ ruling could be a potential option to permanently delimitate the boundaries.
- Kenya and Somalia must establish a joint commission for joint management and exploration of resources. Through a joint commission, both countries can develop common interests and goals, and jointly respond to security concerns in the region.

6. Conclusion

This research finds that the Kenya–Somalia maritime question is a product of a colonial legacy that not only requires a legal settlement approach, but a political settlement approach. The findings of this study show that, before Somalia petitioned the case at the ICJ, there had been concerted attempts by both parties to settle the matter internally through diplomacy or the involvement of a third party, including the Prime Minister of Ethiopia. These attempted initiatives stalled due to a lack of political will and perceived mistrust by both parties. Kenya then failed to present its case in person at the ICJ on the basis that the ICJ court was not neutral given the presence of a Somali judge. This article has also reiterated the argument by Somalia that, prior to the ICJ ruling, no tacit agreement was in place. This prompted the ICJ to integrate the standard delimitation principle to delimit the maritime borderline between the two countries.

Based on the findings of this qualitative study, the ICJ’s ruling on this case, especially its application of the equidistance principle to the delimitation of boundaries, has implications for the contested region. An immediate implication was that Kenya rejected the ruling and affirmed its commitment to protecting its territorial integrity. However, given that Kenya and Somalia share problems including global terrorism and the prevalence of organised gangs, it is crucial that the two countries normalise their relationship. This will be best achieved if both parties comply with the provisions of the ICJ. Both Kenya and Somalia must work collaboratively to enhance maritime security in the water bodies and their own contours. This will only be possible if they engage in maritime cooperation agreements that focus on countering the maritime security threats in the coastal region.

It should be noted that, since the ICJ determination of the Kenya–Somalia maritime border dispute, there has not been much activity in the contested zone since Kenya has not undertaken any retaliatory missions in the zone and Somalia appears to be engrossed in addressing internal issues. Neither country has proffered reactions to the contested region, maybe signalling efforts towards normalising relations between them. It is, therefore, a matter of necessity that both member states continue to respect international institutions and norms designed to maintain sustainable borders.

References

- Gaver, C.D. 2022. “Maritime Delimitation in the Indian Ocean (Som. v. Kenya) (ICJ)”, *International Legal Materials*, Vol 61, No 4, pp 501-604.

- Gilblom, K. (2012). Kenya, Somalia border row threatens oil exploration” (20 April 2012) Reuters, available at: <<http://www.reuters.com/article/2012/04/20/us-kenya-exploration-idUSBRE83>
- Guyer, P., & Horstmann, R. P. (2023). *Idealism in Modern Philosophy*. Oxford University Press.
- Hersi, M. F. (2018). State fragility in Somaliland and Somalia: A contrast in peace and state building. *London, London School of Economics (LSE), LSE-Oxford Commission on State Fragility, Growth and Development*.
- Horn of Africa Bulletin (2019) Somalia v. Kenya Maritime Boundary Dispute: Preliminary Proceedings and Possible Legal Questions ; Volume II, Issue IV, July -August 2019.
- International Court of Justice. 2021, 12 October. *Reports of Judgement, Advisory Opinions, and Orders: Maritime Delimitation in the Indian Ocean (–Somalia - Kenya) Border*, pp. 210-250.
- Ida Gathoni (2021) ‘Implications of Piracy on the Kenya -Somalia Maritime Dispute’ A Bulletin of the Global Center for Policy and Strategy ;January-March 2021 Issue.
- Ioannides, N. and Yiallourides, C. 2021. *A Commentary on the Dispute Concerning the Maritime Delimitation in the Indian Ocean (Somalia v Kenya)*. EJIL: Talk! Available at: <https://www.ejiltalk.org/a-commentary-on-the-dispute-concerning-the-maritime-delimitation-in-the-indian-ocean-somalia-v-kenya/>
- Kadagi, N.I., Okafor-Yarwood, I., Glaser, S. and Lien, S. 2020. “Joint Management of Shared Resources as an Alternative Approach for Addressing Maritime Boundary Disputes: The Kenya-Somalia Maritime Boundary Dispute”, *Journal of the Indian Ocean Region*, Vol 16, No 3, pp 348-370. DOI: 10.1080/19480881.2020.1823169
- Mbugua, J. K., & Mwachinalo, S. (2017). An assessment of maritime insecurity in the Kenya maritime domain. *Occasional Paper Series*, 8.
- Okoli, A.C. and Ngwu, E.C. 2019. “Borderlines, Natural Resources, and Conflicts: Towards a Territorial Materialism of Boundary Disputes in East Africa”. *Central European Journal of International and Security Studies*, Vol 13, No 2, pp 91-110. DOI: 10.51870/CEJISS.A130203
- Onuoha, F. (2009). Sea piracy and maritime security in the Horn of Africa: The Somali coast and Gulf of Aden in perspective. *African Security Review*, 18(3), 31–44. <https://doi.org/10.1080/10246029.2009.9627540>
- Rossi, C. R. (2019, March 4). Kenya and Somalia’s row over offshore rights is rooted in the carve up of Africa. Retrieved from <https://qz.com/africa/1564609/kenya-somalia-row-over-offshore-rights-rooted-in-colonial-africa>
- Standard Newspaper (2022), “Fishing Industry : Sleeping Giant in Coast” Available at <https://www.standardmedia.co.ke/farmkenya/amp/smart-harvest/article/2001435877/fishing-industry-sleeping-giant-in-coast>
- UNCLOS (1982) United Nations Convention on the Law of the Sea [online] Retrieved from http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
- Venkataraman, M. (2016). Piracy off the coast of Somalia: implications for China’s maritime security. *Bandung*, 3(1), 1-13.
- Yoon, M.Y. 2009. “European Colonialism and Territorial Disputes in Africa: The Gulf of Guinea and the Indian Ocean”, *Mediterranean Quarterly*, Vol 20, No 2. DOI: 10.1215/10474552-2009-006