KENYA-SOMALIA MARITIME TERRITORIAL DISPUTE: WHY SOMALIA TOOK KENYA TO THE IINTERNATIONAL COURT OF JUSTICE, ADVANTAGES, LIMITATIONS AND EXISTING MODES OF PEACEFUL SETTLEMENT?

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INTRODUCTION

Tensions between Kenya and Somalia have been there since the colonial times. However, overt disputes were not experienced until 2014 when Somalia took Kenya to the International Court of Justice (ICJ), claiming that Kenya is encroaching on its sea territory, an off shore area of 100,000 square kilometres. This was on the premise that both countries recognize the Court's obligatory jurisdiction as per Article 36 (2) of the ICJ's Statute, also referred to as the "optional clause declarations". This Article provides that all states party to the present Statute may at any time declare that they recognize as compulsory and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes[1]. Whereas Somalia wants the boundary defined by the ICJ, as stipulated by the United Nations Convention on the Law of the Sea (UNCLOS), as well as other global laws, Kenya has stuck to its guns on its preferred border demarcation according to the 1979 decree. The question this paper is asking therefore is; what prompted Somalia to take Kenya to ICJ, what are the advantages and limitations of the ICJ and what other peaceful modes of settlement exist?

THE AREA UNDER DISPUTE

The area under dispute is a triangular patch of 100,000 km2 (about 62,000 square miles) that comes about from projecting the Kenya-Somalia common border eastwards. It is not clear which country could be the rightful owner of the contested area.

Fig.1. Map of Kenya and Somalia Depicting the Disputed Areas

Source: *Mohamed Isse Trunji, March 14, 2017*

CLAIMS OF THE TWO COUNTRIES AT THE INTERNATIONAL COURT OF JUSTICE

Somalia is asking the ICJ not only to extend the continental shelf, but also to fix a line which touches and divides the territorial sea between her and Kenya and the Economic Exclusive Zone (EEZ). Somalia feels that Kenya has violated its international obligations and does not respect Somalia's territorial sovereignty and must be made to make full reparation to Somalia.

Kenya, on the other hand, is claiming that in 1979, a Memorandum of Understanding (MoU)[2], was signed between the two countries, which gave her jurisdiction over the disputed areas and she is also asking why Somalia did not object to this claim over all the years that they have had diplomatic relations, what has changed?

Kenya is pushing for the border to run on parallel latitude from a point in the south-east of Kyunga. She claims that the boundary corresponds to the line of latitude eastwards. Somalia is in favour of a diagonal trajectory running down the Coast of Kenya, insisting that the border needs to proceed on the same south-easterly trajectory, as a projection of the shore border, into the ocean.

In October 2015, Kenya made two separate objections, in a bid to challenge the Court's Jurisdiction to handle the case and its admissibility:[3] First, Kenya argued that there was a signed MoU between the two countries in 1979, which established an arrangement providing for different methods of settlement and that gave her the jurisdiction over the disputed area. She claims that by taking her to ICJ, Somalia is going against the status of recognition and mutual respect of the sea border along the parallel latitude.

According to the Kenyan authorities, the dispute was further escalated in February 2019, when Somalia went ahead to auction oil-prospecting rights in the heart of the contested area. Consequently, Kenya demanded that Somalia discards a map that was exhibited in an economic forum held in London, which depicted the contested triangle as belonging to Somalia. Similarly, Kenya demanded that Somalia notifies the potential investors that it does not own the contested oil blocks within the disputed area and hence has no authority to reach any deal with them.

STATUS OF THE CASE AT THE INTERNATIONAL COURT OF JUSTICE

The primary function of the United Nations is to maintain international peace and security globally. The United Nations does this using three means (1) By creating and maintaining conditions which can bring peaceful relations and a general feeling of security among the UN member states ; (2) through peaceful settlement of disputes or adjusting those international disputes or situations that are likely to be a threat to friendly relations among states; (3) through various actions which suppress or prevent any threats to international peace.

The ICJ held its maiden hearing of Kenya's petition on September 19th to 20th, 2016. Regarding the first objection made by Kenya, the Court decided to determine the legitimacy of the MoU signed by the two countries, before considering what it contained. In its ruling on the Preliminary Objections made on 2nd February 2017 by Kenya, the Court found the MoU to be insignificant on three grounds: i) it did not have any commitments' or requirements on how the conflict should be determined ii) if Kenya really thought that delimitation was only to come after delineation, it would not have started those discussions iii) the 6th paragraph of the MoU did not have the role of dispute determination as claimed by Kenya.

Relying on Article 282 of the UNCLOS, Kenya had reservations on the jurisdiction of the Court and mandate over this dispute. Regarding this, the Court reasoned that if at all the intent to exclude its jurisdiction existed; then there would have been some dispute about it. The Court, hence, found itself to have jurisdiction over the matter at hand, affirming its suitability to hear the case and effectively squashing Kenya's plea. The conclusion of the Court was that reasserting the Court's jurisdiction came with the advantage of evading any disagreeable disputes of jurisdiction in future.

As things are at the moment, there is a high possibility that the Court could end up deciding on who owns the contested maritime area – a decision that will most likely end up favouring only one of the two countries.

ADVANTAGES OF THE INTERNATIONAL COURT OF JUSTICE

Impartiality, Professionalism, Rules and Regulations

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

The Court is thus expected to give a careful and thorough consideration to the issues on which it has to pass. The relatively small number of cases submitted each year to the Court enables it to live up to a high standard of thoroughness, even if the conciseness of some of its opinions does not always make this evident. [4]

Consent of Parties

The basis under which the Court has jurisdiction over international disputes [5]submitted to it lies in the principle of the consent of parties. This consent can be given either (1) by a declaration that recognizes the fact that the Court has jurisdiction, with or without limitation, under the "optional clause" of Article 36 of the Statute, or (2) by the parties recognizing as compulsory the jurisdiction of the Court over any future disputes, or (3) by the parties agreeing to submit a particular dispute to the Court.

LIMITATIONS OF THE INTERNATIONAL COURT OF JUSTICE

Theoretically all international disputes, can be dealt with through legal means. This can be done by either applying the existing law or by creating new legal rules and regulations or by giving the Court the authority to decide without regard to these legal standards.[6] However, the fundamental limitation of the ICJ is the fact that not all international disputes can be terminated by judicial techniques and this can be illustrated as follows:

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

A case in point is when Security Council proceeded to intervene in the Indonesian situationafter rejecting a proposal to submit to the Court the question of its power to do so. [7] Furthermore, on 16 November 1950, the General Assembly approved a resolution requesting ICJ to advice on the legal effects of reservations to the Genocide Convention and at the same time invited the International

Law Commission[1] to study the question of reservations to multilateral conventions[8]. The General Assembly could have obtained an opinion from the ICJ on the specific question relating to the Genocide Convention before submitting the general question to the International Law Commission.

The Impartiality of Judges

The impartiality of ICJ could be suspect due to national and traditional loyalties and political interests of different states. This might affect the selection processes of members from those states. The argument is, every court member belongs to a certain state, and therefore, is connected in one way or the other with the political processes of the state. (Page 52) This brings legitimate doubts as to whether the Court has political independence when dealing with different cases.[9]

Failure of the Court's Decisions to Command Obedience

Theoretically, any judgment made by the ICJ should be final and without appeal and there should be compliance by all parties. What makes this difficult is that the Court does not have an enforcement machinery. In cases where states do not comply, the Security Council "may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."[10] The Security Council members may also have their own interest which can also influence their decisions whether to intervene or not. But, it is not under a duty to do so. Rarely or in no occasion has the Security Council been asked to enforce a judgment of the Court?

Dissatisfaction of some States with the Prescribed Standards

Not all disputes of this nature can actually be terminated by decisions of judicial tribunals. There are cases where parties are dissatisfied with the prescribed standards or judgment. This was the case when in 1931, Austria and Germany bowed to the contention of France and her allies, supported by an advisory opinion of the Court, that their proposed customs union would be contrary to the international obligations of Austria, and called it off. Agitation for union between the two countries continued, however, and culminated in the annexation of Austria by Hitler in 1938, when the political and economic balance of power had shifted in Germany's favor.

Negative implications of legal options on the two countries

The United Nations (UN) member states appreciate that only when states are unable to resolve their dispute peacefully, can they then submit it to tribunals such as the International Tribunal for the Law of the Sea (ITLOS), ICJ or any other body of arbitration. When Somalia filed a maritime boundary dispute at the ICJ in 2014, it drove a wedge between two countries whose relationship had been very close and who had worked closely and in collaboration to deal with the security

[1] This Commission is set up by the General Assembly for the purpose of progressive development and codification of international law.

situation in Somalia. Kenya has long been a protector and defender of Somalian interests, yet it now found itself at loggerheads with its northeastern neighbour.

WHAT MODES OF PEACEFUL SETTLEMENT AND DIPLOMATIC OPTIONS EXIST?

The Law of the Sea (LOS) Convention has established a rule-of-law regime for the oceans. Compliance with international law including the LOS Convention is one of the requirements when States interact and cooperate in international relations. There is a special provision in the LOS Convention requesting contracting States bordering enclosed or semi-enclosed seas to cooperate among themselves.[11]

Article 33 of the Charter imposes upon parties to such disputes the duty "first of all" to "seek a solution through peaceful means before going to the ICJ." All Members of the United Nations therefore undertake to "settle their international disputes in such a manner that international peace and security, and justice, are not endangered."[12]

The peaceful settlement of international disputes include: Negotiation, Good Offices, Mediation, International Commission of Inquiry, Conciliation, Arbitration, Judicial settlement (Arbitration), the Organs of the United Nations (The General Assembly and The Security Council) or resort to regional mechanisms, or any other peaceful means as their own initiative of before going to ICJ.

Diplomatic means are definitely better than legal options since in all of them, the termination of the disputes normally depends upon the voluntary acceptance by all parties of the proposed terms of settlement. Furthermore, as much as territorial disputes are thought to be the most evident examples of zero-sum disputes (Kratochwil 1985), the bulk of states that have been involved in territorial clashes since the twentieth century have tried to resolve their disagreements amiably, and very few have been settled through armed struggle[13]. There is no doubt that peaceful settlement of territorial disputes is not only less costly but it also enhances cooperation and mutual respect between neighbouring states.

EXAMPLES ILLUSTRATING WHERE DIPLOMATIC MEANS HAVE WORKED

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

Following complicated negotiations going to as far back as the early 1970s, on 25 December 2000, Vietnam and China reached an amicable agreement which permanently delimited their maritime border in the Gulf of Tonkin. The settlement delimited one territorial sea as well as continental shelf border, besides establishing a huge common fishing area on both sides of the continental shelf border. Negotiations on the common fishing regime went on for additional three and half years; hence the settlement was not fully effected until 30 June, 2004.[14]

South Korea and Japan

In January 1974, South Korea and Japan reached a maritime boundary settlement that finally came into force in June 1978. Due to their disagreement on the Sea of Japan/East Sea concerning the Liancourt Rocks, also referred to as Tokdo in Korea and Takeshima in Japan, this contract only delimited a border via the Tsushima/Korea Strait, for roughly 260 nm.[15]The border generally follows an equidistance line via the strait, though farther south the two neighbours had a considerable area of overlapping claims. The outstanding claims threatened to derail the settlement, but the oil crises which occurred in the early 1970s pushed the two states to strike an amicable arrangement so as to commence offshore exploration in the territory.

West-African Nigeria and the archipelago of Sao Tome Principe

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

Other Examples of Negotiations

In 1965, New Zealand and Australia Settled their disputes using negotiation; In 1974, Sri-Lanka and India Settled their Boundary dispute; In 1976, Pakistan and India used negotiations to settle their long outstanding differences during the conference of Shimla and ; In 1977, Bangladesh and India found solutions to the Farraka Barrage (gunfire) through Negotiation.

Examples of Good Offices

In 1949, the Security Council rendered good offices in the dispute between the Republic of Indonesia and the Government of Netherlands. The Prime Minister of the United Kingdom, Mr. Wilson also provided his good offices to Pakistan and India which resulted in the parties reaching an agreement to refer Kutch issue to an Arbitral Tribunal.

Examples of Mediation

In 1966, President Kosygin of the Soviet Union mediated in the dispute between India and Pakistan which led to the conclusion of a Tashkant agreement.

Examples of International Commission of Inquiry

Cases in point are: the Tavignano, Camouna Gaulois Inquiry, the North Sea Incident Inquiry the Tubantia

Examples of Arbitration

This method was used in the arbitration in Alabama of Claims between Great Britain and the United States.

It should also be noted that as way of resolving conflicts using peaceful means, the United Nations General Assembly and the Security Council have been given the mandate to discharge certain functions in this regard (Article 2 para, 3)

CONCLUSIONS AND WAY FORWARD

The two states should ask themselves, how come they have managed to live with this status quo for a long time and no disputes have arisen. Maybe if they take it easy and continue the way they have, maybe the passage of time will improve the power position of the two.

The could use the mechanisms in Africa like African Union, Intergovernmental Authority on Development among others before going to ICJ.

It should be noted that all international disputes have both political and legal ways of resolving them depending on the dispute. The question whether a dispute is political or legal will depend on the view of the contesting parties of this dispute. If both of them feel the legal way is the best way to resolve the dispute then automatically it becomes legal. But if one party does not concur, then political solutions must be sought. The current case is more political than legal since the real issues at stake for the two countries are much more important than this conflict at hand.[16]

Ake Hammarskjöld, the Registrar of the Court from 1922 to 1936, stated that to his knowledge dozens of disputes were settled by negotiation after the parties had been faced with the possibility of resort to the Court. Thus, the two countries might want to consider a political settlement, rather than a legal one.

Kenya and Somalia must also note that such threats have been part of day to day life for some communities such as the Pakistanis, Indians, South Koreans, Taiwanese, Israelis, Georgians and many others. Therefore, lack of diplomatic and peaceful settlement will definitely lead to persistence of this disputes which can only lead to multiple costs that end up putting a strain not only on the involved states but also on the entire international community.[17]

ENDNOTES

[1] **SRD Law Notes:** Jurisdiction of the International Court of Justice. https://www.srdlawnotes.com/2017/11/jurisdiction-of-international-court-of.html

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[3] **Mohamed Isse Trunji,** Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), March 14,2017.https://hiiraan.com/op4/2017/mar/141039/maritime_delimitation_in_the_indian_ocean_somalia_v_kenya.aspx

[4] For procedures followed by the Court in its deliberations and in the drafting of its opinions, see Manley O. Hudson, The Permanent Court of International Justice 1920-1942, pp. 579-83.

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[8] **General Assembly,** Official Records: Fifth Session, Supplement No. 20.

[9] **Hans Kelsen,** *The Law of the United Nations* (New York, Frederick A. Praeger Inc., 1950), pp. 466-75. **Cf. H. Lauterpacht,** *The Function of Law in the International Community*, pp. 237-41.

[10] **United Nations Charter, Article 94 (2**). The Covenant of the League provided in Article 13 (4) that in "the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken On the interpretation of these provisions see Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (Revised ed., Boston, World Peace Foundation, 1949), pp. 485-87; Hans Kelsen, *The Law of the United Nations*, pp. 539-44, 720-21; F. Blaine Sloan, "Enforcement of Arbitral Awards in International Agencies", *The Arbitration Journal*, New Series, Vol. III (1948), pp. 140-46; Edvard Hambro , *L'Exéution des Sentences Internationales* (Liège, H. VaillantCarmanne, 1936), pp. 68-95; Constantin Vulcan,

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