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Security Challenges

Strategic Security Challenges of the Somalia-Kenya Maritime Conflict

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Introduction

The Somali-Kenya maritime issue is one of the most highly contested security challenges in the East African region. Unlike other security issues confronting these two countries, the territorial aspect of this conflict makes it a potential trigger for wider conflicts in East Africa. While it is true that the International Court of Justice (ICJ) issued a judgement in this matter,¹ this paper contends that the judgement may have ended a dispute but provided no basis for resolution of the underlying conflict. As then Kenya's president Uhuru Kenyatta stated responding to the judgment:

“The ruling is in the circumstances a zero-sum game, which will strain relations between the two countries. It will also reverse social, political, and economic gains, and potentially aggravate the peace and security situation in the fragile Horn of Africa region.”²

The conflict dimensions of the issue were underlined when the president stated that:

“Kenya, like other independent countries, possesses a determined geographical territory...we beseech the rest of the family of nations to appreciate and respect our inherent right to protect by all available means, our territory.”³

¹ Maritime delimitation in the Indian Ocean (Somalia v Kenya) Judgment, *ICJ Reports* 2021, p. 206.

² Peter Muiruri, “Kenya Rejects UN Court judgment giving Somalia control of resource rich waters” *The Guardian*, Thursday 14 October 2021, 15.41 BST.

³ Ibid.

This paper argues that the Somali-Kenya maritime issue contains the seeds of multiple security challenges for the East African region. Western perceptions on the issue claim that these security challenges can be nullified by implementing the ICJ's decision. However, the reality of the operational environment of the East Africa Indian Ocean Realm (EAIOR) suggests a different reality and other options. In particular, the proposal to admit Somalia as a member of the East Africa Community (EAC), and that organization's federalist objective offer fresh dimensions on the way forward in this security challenge.

Security Contexts of the Somali- Kenya Maritime Issue

The conflict regarding the Indian Ocean maritime territory between Somali and Kenya reinforces their existing strategic security threats. Both states are largely the product of colonial geo-political strategy the aim of which was the securing of India through control of Egypt via the River Nile. The geo-graphing of the two states' frontier was completed in 1925 when a large chunk of Jubaland was transferred to Italian Somaliland. This transferred the benign policies of marginalization and neglect by both Britain and post-colonial regimes in Kenya and Somalia. It also fed the Somali nationality question, and its strategies of irredentism and counterinsurgency. The consequent under-development of Somalia created favorable conditions that later anchored the asymmetrical activities of the *Al Shabaab*.

The Somalia-Kenya maritime conflict did not first emerge on its arrival at the ICJ registry. Both countries had earlier recognized that certain aspects of their maritime territorial environment required their joint diplomatic engagement. It was in that spirit that there were multiple bilateral meetings between them aimed at seeking mutually agreed outcomes through diplomatic negotiation. Those meetings were convened through ministerial authority. The outcome of those diplomatic engagements was reflected in a Memorandum of Understanding (MoU) bearing the ministerial signatures of both countries.

This MoU was the subject of preliminary proceedings at the ICJ. It was clear in those proceedings, that the two sides had different understandings of the content of the document.

While Kenya considered the MoU to be non-binding and hence not actionable, Somalia considered it to be a substantive document in the nature of agreement. This document also showed that the two sides had not agreed on substantive issues regarding the maritime territory.

In its preliminary ruling, the ICJ ruled that it had jurisdiction in the matters arising from the MoU. The Court also ruled that the MoU in question constituted a bilateral treaty between Somalia and Kenya, and hence fell under its jurisdiction. Indeed, it went further and stated that it would also determine the Somali-Kenya maritime border and all the maritime zones associated with it.

The Court first ruled on the key question of its Jurisdiction, earlier contested by Kenya in February 2017. It rejected Kenya's contention that the 2009 MoU between the two states amounted to commitment to settle the matter out of court, thus effectively ousting the ICJ's jurisdiction. At Kenya's request the Court scheduled a hearing on September 9-14, 2019, later pushed to November 4 on Kenya's request for more time, given changes in its legal team. Citing the Covid-19 pandemic challenges, Kenya requested for a further delay to March 2021. Its request for more time based on missing maps that it argued were a critical basis for its evidence was rejected, and the hearings were set for March 15, 2021.

Kenya withdrew from the proceedings, arguing that its legal team had not been given adequate time to prepare. It also raised misgivings over Judge Abdulgawi Yusuf, a national of Somalia who had served as the ICJ's President until February 2021. In its judgment in October 2021, the ICJ ruled largely in favor of Somalia's claims to a huge domain of the contested maritime area in the Eastern African Indian Ocean. This has implications for the control of fishing grounds, Sea Lanes of Communication (SLOCs), and potential energy resources in the disputed 100,000 sq. km space.

While Kenya conceives Somalia's actions as part of a long *durée* irredentist project, Somalia accuses Kenya of interference in its internal matters. All these raised tensions leading to severance of their diplomatic relations, later reinstated. Kenya's President observed that while Kenya was not surprised by the decision, it was profoundly concerned with its import

and its implications for territoriality in the Horn of Africa region, and in turn for international law generally. This is the basis on which Kenya rejected the judgement.

Discourse and Realities of the Security Challenges

The situation regarding the Somali-Kenya maritime conflict is marked by both external interests and the resources present in that part of the Indian Ocean. The issues of access to geo-economic resources frame the contexts of the strategic security challenges in the East Africa and the Horn of Africa regional security systems.

The issues arising from the Somali-Kenya maritime conflict and the ICJ judgement exemplify failings of a strategic security culture. This is manifested by the unwillingness to maximize the social and diplomatic capital that would emerge in negotiation with other states. It also reflects a failure to appreciate that other states in the environment also have security challenges they must address. This is the only basis on which outcomes of interactions with other actors can lead to and build upon meaningful compromises.

Indeed, Kenya concluded a prior bilateral agreement with Tanzania establishing the Indian Ocean maritime boundaries of the two countries. That maritime boundary comprises segments constructed using a combination of delimitation methodologies. This extends to the limits of their extended Continental Shelf that were established in the 2009 Bilateral Agreement. The territorial sea boundary had been established in 1976 with exchange of notes. Exclusive Zone and continental shelf boundaries were established in 2009 Bilateral Agreement⁴. These outcomes are evidence of established processes and procedures regarding boundary delimitation and their national security concerns. Bilateral agreements emerging from such negotiations provide more stable outcomes, especially in regions as volatile as the Greater Horn of Africa region encompassing the Inter-Governmental Authority on Development (IGAD), East African Community (EAC) region and the Great Lakes regions. Clearly, such processes were lacking in the Somalia-Kenya maritime conflict and hence the continued maritime territorial challenges in the Eastern Africa Indian Ocean Realm (EAIOR).

⁴ See *Agreement Between the United Republic of Tanzania and The Republic of Kenya on The Delimitation of the Maritime Boundary of the Exclusive Economic Zone and The Continental Shelf, 2009*. *The Law of The Sea , Bulletin* ,No.70. International Agreement WWW.UN.Org. June 23,2009.

Strategic Security Policy Projections

The immediate threats in the Kenya-Somalia strategic challenges lies with *Al Shabaab*. From its perspective, *Al Shabaab* sees the solution to this issue as lying in its broad integration in the geography of a deconstructed region under an imagined caliphate. In the short term this issue is bound to lie in the background of the ongoing strategic security threats. It will however emerge as soon as Somalia is stabilized. Its potential threat is deeply embedded since with the enhanced desires to add value to the human, material, and territorial physical base of these states, it will be instrumentalized to affect survival and vital interests. Hence the potential use of military options and militarization of the seaboard will emerge, with critical implications for economic and other strategic security interests.

Should Kenya and Somalia fail to positively manage their strategic security relations, they risk exacerbating mutual strategic threats to the advantage of non-secular asymmetrical forces and other external actors. In comparative terms, Kenya is likely to lose more in the interim, given its underlying current and long-term strategic interests. Kenya is competing to have Mombasa become the preferred port of choice for regional importers and exporters. To this end, it has invested in undergirding rail, dryland and lake-based infrastructure. A functional high performing port of Mombasa is critical for Kenya's repayment of Chinese debts accrued from these investments. It is equally interested in revamping its tourism sector ravaged by *Al Shabaab* led insurgencies along its ocean board, and instabilities resulting from past elections. Kenya has also invested deeply in the Lamu Pipeline South Sudan, Ethiopia (LAPSSET) geo-economic and strategic infrastructure belts. The envisaged rail, road and pipelines are expected to connect South Sudan and Ethiopia to Lamu port. The intended outcome is to evolve a strategic belt bridge that links the East Coast Ocean board to the Atlantic Ocean board. A further outcome is to enable the integration of the North-Eastern and Western Kenya regions to the traditional road and rail networks based in the south of the Equator.

A stable, secular Somalia can potentially call for support from its allies to operationalize long *durée* destabilization strategies like denying Kenya access into certain areas through conventional means. Asymmetrical actors like *Al Shabaab* can engage in maritime terrorism

acts in maritime domains, against port, airports, energy platforms, settlements, individuals, and tourism resorts. Earlier, there was for example Mohamed Fazul's attack on Kikambala resort, and failed surface to air missiles brought in by boat from Yemen and directed at an Israel Airliner at Moi International Airport Mombasa⁵. Attacks have also been launched on assets such as the joint base on Manda Island.⁶ It is probable that similar maritime terror attacks directed at port and energy platforms will be launched in the future by *Al Shabaab*, this time citing the ICJ judgment as a justification.

The absence of strategic security cooperation has the potential of undermining ongoing counter terrorism and piracy operations between Kenya and Somalia. Failed efforts run the risk of advantaging *Al Shabaab* against the two states. Ramifications will be felt within states, in the region and in the international system. Without meaningful strategic security cooperation, neither Kenya nor Somalia will be able to access and much less add value to energy and aquatic resources obtaining in the contested maritime domain.

Kenya's refusal to accept the ICJ judgment will certainly not affect the standing of the judgment, or its jurisprudence. But the court lacks the means of enforcement of its decisions. This enables the conflict to become entrenched and mixed up with other deep-seated East African security challenges. It however creates an opportunity for positive engagement between Kenya and Somalia mediated by influential actors within the Inter-Governmental Authority on Development (IGAD), the East African Community (EAC) or the African Union (AU). Indeed, the fact that Somalia's becoming a member state of the EAC is agreed to be only a matter of time may make the negotiation option as part of the implementation of the judgment more attractive. And it is equally clear that when the EAC federation envisaged in the Treaty Establishing the East African Community eventually happens, the maritime conflict will have been resolved. Meanwhile however, diplomatic activities hinged on negotiation offer options to move the conflict beyond its current zero-sum perspective.

⁵ See Peleman Johan Et al : Report of The Panel of Experts on Somalia Pursuant to Security Council Resolution 1474(2003). United Nations Security Council November 4,2003.

⁶ See Rashid Abdallah, "It is Time to Negotiate With Al Shabaab" *Al Jazeera*,. Opinion. Feb26,2020

According to Schofield et al (2021), the ICJ's delimitation of the continental shelf sea awards of 200m EEZ limits adjustment. Thus, the considered approach to outer limits of parties' continental shelf has consequences. Following this discrepancy, portions of the outer continental shelf were allocated to Somalia rather than Kenya. Approximately 324.Km² or 94.4 square nautical miles of the combined EEZ and continental shelf areas beyond 200m EEZ limits lies within Somalia rather than the Kenya side of the boundary line.⁷

It is thus argued that:

“as the outer continental shelf limits submitted by Somalia to the commission on the limits of the continental shelf (CLCs) are in places considerably seawards of those submitted by Kenya for areas of continental shelf located on the Kenyan side of the adjusted boundary line, some adjustments to Kenya 's outer continental shelf limits may eventuate”.

The ICJ itself acknowledged that in the light of the unpredictable outcome of the CLCs procedure, its ruling has the potential to give rise to a grey area located beyond 200m from Kenya but within 200m of Somalia but on the Kenya side of the delimitation line. This means that in this area, Kenya would have jurisdiction over the seabed, and Somalia would have jurisdiction over the water column.⁸

Kenya could opt to initiate state building programmes as part of its National Security consolidation project under what can be referred to as Concerted Operations in Vulnerable Areas for Reintegration and Transforms (COVART). These could target the LAPSET corridor border land, sea, and landward areas in former Coastal and North-Eastern counties to effect security driven micro and macro-economic, social, and political infrastructure. These should retain the potential of spill-over in Somalia enough to entice it towards such joint state

⁷ See Schofield Clive, Bekker Pieter and Van de Poll Robert. “The World Court Fixes the Somalia -Kenya Maritime Boundary: Technical considerations and legal Consequences. *American Society of International law*. Vol 25, Issue 25, December, 2021.

⁸ Ibid.

building efforts. Such initiatives have the potential of being transformed into strategic security platforms for bilateral and trilateral state cooperation under the auspices of either the East African Community or the Inter-Governmental Authority on Development. These have the potential of integrating populations while effecting control over space. Their spill-over effect would include shared mutual resources, knowledge and institution building within contested maritime domains.

Conclusions

In the short term, tensions between Somalia and Kenya over the maritime boundary are unlikely to escalate into an open conflict. It is possible that both states may opt to let the *status quo* stand. Over time however, either of the states may resort to unilateral actions motivated by the desire to exploit the vast ocean resources. More specifically, Somalia could also decide to implement its sovereign claims as awarded by the ICJ. This would potentially lead to militarization of the maritime domain, with a potential for military escalation.