

Kenya-Somalia maritime boundary dispute

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Today (3 September) at 3pm the African Union (AU) Peace and Security Council (PSC) will hold a session on the maritime boundary dispute between Kenya and Somalia. This session is a follow up to the earlier 871st session of the PSC. It was put on the agenda following a request from Kenya for this matter to be considered by the PSC.

While Kenya and Somalia have been debating the delimitation of their maritime boundaries since 2009, in recent years the tension over the boundary dispute shows signs of boiling over. Following the signing in 2009 of a 'Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant to each other No-Objection in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 Nautical Miles to the Commission on the Limits of the Continental Shelf', Somalia and Kenya made a submission to the Commission on the Limits of the Continental Shelf (CLCS), whose role is to make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf (as per the MoU both within and beyond) 200 nautical miles. As provided for in the MoU, the CLCS's process is limited to the delineation of the continental shelf and is to be without prejudice to the delimitation of the maritime boundary between the two parties.

It was agreed in the MoU that the delimitation of their maritime boundaries, in the areas under dispute to be 'on the basis of international law.' While the CLCS process for the delimitation of the continental shelf was underway, in 2014, Somalia instituted proceedings against Kenya at the

International Court of Justice (ICJ) requesting the latter to determine, on the basis of international law, 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.

The proceeding before the ICJ has gone through various stages. Following the institution of the proceeding, the ICJ received submissions from both Kenya and Somalia. Pursuant to the procedures of the ICJ, Kenya made submissions raising objections to the jurisdiction of the ICJ and to the admissibility of Somalia's application before ICJ in October 2015. The ICJ as per its procedures received the observations of Somalia on Kenya's objections in February 2016. In September 2016, the ICJ as per established practice held public hearings on Kenya's preliminary objections. Following review of the written submissions as well as those in the public hearings, the ICJ delivered its judgment on Kenya's preliminary objection in February 2017. With Kenya's objections rejected by the ICJ, the proceeding moved to the next stage involving consideration of the submissions of the two states on the merits of the case. During the remaining period of 2017 and in 2018, ICJ received counter memorial from Kenya. After granting the submission of a reply by Somalia and a rejoinder by Kenya, the ICJ has proceeded to receive to receive the reply by Somalia to Kenya's counter memorial and Kenya's rejoinder to Somalia's reply.

Currently, the proceeding is at a stage for conducting public hearings. To this end, the ICJ has set the period between 9 and 13 September for holding public hearings on the merits of the case.

Kenya objected to the proceedings before the ICJ. It was of the opinion that the 2009 MoU, which the ICJ considered to be a treaty binding under international law, required the two countries to negotiate delimitation of the disputed boundary,

and to do so only after completion of CLCS review of the submissions that the two states made on the delineation of the outer limits of the continental shelf beyond 200 nautical miles. It was also Kenya's view that the MoU has set the method of negotiation for delimitation of the disputed boundary.

As the ICJ proceedings continue unabated and efforts for settling the matter out of the ICJ process failing, tensions have been mounting between Kenya and Somalia. The tension boiled over particularly after reports that Somalia plans to auction for oil exploration blocks in the disputed area during an event held in London in early February 2019. In response, Kenya recalled its ambassador to Somalia, Lukas Tumbo, and summoned his Somali counterpart in Kenya, Mohamoud Nur, demanding a withdrawal of the maps that were displayed in London. Various developments including disputes over the treatment of Somalia officials in Kenya and air travel between the two countries have in the ensuing months have further exacerbated the tension. There are legitimate concerns that the situation also endangers the peace process in Somalia, particularly AMISOM for which Kenya is a major contributor. These concerns also relate to the impact this mounting tension would have over Kenya's role as the major host of Somalia refugees.

As noted above, the PSC considered the issue for the first time at its 871th session held on 22 August 2019. While Kenya presented a briefing statement during that session, Somalia declined to attend the session sending instead a note verbal indicating that the matter was pending before ICJ. While invitations have been extended to it, it was not clear if Somalia would participate in today's session.

A major sticking point relates to the possibility of settling the matter out of court. If efforts made thus far including intervention by Ethiopia's Prime Minister Abiy Ahmed are anything to go by, it seems unlikely that the ICJ proceeding will stop. It also remains unclear there is a way for the PSC

to stop the ICJ process at this point in time other than through the agreement of the two states (Of course the PSC can appeal to the ICJ to the sensitivities of the situation for peace and security and speed up the process).

Yet in the light of the escalating situation, the PSC has a role to play. As pointed out in the AU's User Guide on African Border Dispute Settlement pointed out, '[b]oundary disputes are not only of concern for the States that directly contest the boundary; they can affect the stability of the international system as a whole. Accordingly, the system of international dispute settlement provides a role for regional and international organisations – such as the African Union and the United Nations – to facilitate boundary dispute resolution.' Within this context, it is possible and even necessary that the PSC, parallel to the ICJ, initiates measures to de-escalate the tension between the two countries and ensure that it would not lead to conflicts. Perhaps part of the effort is to find ways of mitigating the fall out that may arise from the eventual outcome of the ICJ process.

At the time of going to press, it remained unclear the form that the outcome of the session would take. If there would be an official outcome, it is sure to be a communique. It is expected that the PSC will urge the two countries from taking actions that would exacerbate the crisis. It is also possible for the PSC to urge the two states to avail themselves for a mediation process that the AU and the regional organization the Inter-Governmental Authority on Development (IGAD) could facilitate.