Maritime Delimitation in the Indian Ocean: Has the ICJ marginalized the geological and geomorphological criteria in favor of a distance related criteria?

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Matter commented on: International Court of Justice (ICJ) Judgment in Maritime Delimitation in the Indian Ocean (Somalia v. Kenya), 12 October 2021

1 Introduction

In *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, the International Court of Justice (ICJ) was requested to establish the single maritime boundary between Somalia and Kenya in the Indian Ocean delimiting the territorial sea, exclusive economic zone and continental shelf, including the continental shelf beyond 200 nautical miles (nm). This is the fourth time an international court or tribunal has delimited the continental shelf beyond 200 nm from the baselines. Although the Judgment seemingly follows a pattern established through previous delimitation cases, the separate opinions of several judges reveal ripples below the surface.

The purpose of this post is to take a closer look at the parts of the Judgment dealing with the outer continental shelf delimitation, and assess whether the ICJ in *Somalia v. Kenya* acted in accordance with previous judicial practice.

This commentary takes a particularly deep dive into the question of entitlement to the continental shelf beyond 200 nm as a prerequisite for delimitation and echoes some of Judge Robinsons' concerns about the ICJ seemingly replacing the geological and geomorphological criteria with a simple distance criterion of a maximum of 350 nm.

2 Jurisdiction of the ICJ

Somalia and Kenya adopted fundamentally different approaches to the delimitation methodology, potentially resulting in very different outer continental shelf limits. However, both States agreed that the ICJ had jurisdiction to declare the maritime boundary between them in the Indian Ocean, extending to the outer limit of the continental shelf (Maritime Delimitation in the Indian Ocean (*Somalia v. Kenya*), preliminary objections).

Kenya chose not to participate in the oral proceedings before the ICJ. The ICJ regretted Kenya's decision not to participate but found that it had extensive information about Kenya's views, having received its counter-memorial and rejoinder. In addition, it received numerous volumes of additional evidence and argumentation both before and during the time of the oral proceedings (paras 17, 18, 21). This allowed the ICJ to continue its proceedings and decide the maritime delimitation between the States.

3 Admissibility of the case

The ICJ recalled that, as provided in the *Nicaragua v. Honduras*, "any claim of continental shelf rights beyond 200 miles (…) must be in accordance with Article 76 on UNCLOS and reviewed by the Commission on the Limits of the Continental Shelf established thereunder" (para 187).

Similar to the parties in *Bangladesh/Myanmar* and *Bangladesh v. India*, both Kenya and Somalia have made full submissions to the Commission on the Limits of the Continental Shelf (CLCS) in accordance with Article 76(8) of the UN Convention on the Law of the Sea (LOSC). Whereas Kenya initially objected to the CLCS consideration of the Somali submission, it withdrew its

objections in 2015. During the CLCS' thirty-eighth session, Somalia also submitted communication to the CLCS, where it withdrew its objections to the CLCS consideration of Kenya's submission. As a result of these developments, the deadlock was resolved and the CLCS decided to establish a sub-commission for the consideration of Kenya's submission since it was the submission next in line for consideration by the CLCS. At the time of the proceedings before the ICJ, the CLCS had not issued recommendations to either Kenya or Somalia.

In line with a number of cases involving the judicial delimitation of States' outer continental shelves, it is now clear that the absence of CLCS recommendations does not generally prevent a court or tribunal from exercising its jurisdiction over a dispute. In *Bangladesh/Myanmar*, the International Tribunal for the Law of the Sea (ITLOS) provided that

> "[T]here is a clear distinction between the delimitation of the continental shelf under article 83 and the delineation of its outer limits under article 76. Under the latter article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to the delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention." (*Bangladesh/Myanmar*, para 378)

In the delimitation cases following *Bangladesh/Myanmar*, courts and tribunals have reached a common understanding that there is no general requirement that the CLCS has to have reviewed a submission and issued its recommendations in accordance with Article 76(8) before a court or tribunal can undertake the delimitation of the continental shelf beyond 200 nm (see *Bangladesh/Myanmar* (para 373); *Bangladesh v. India* (paras 457-458); *Questions of the delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 nautical miles beyond 200 nautical miles* (paras 105-106).

Similarly, in *Somalia v. Kenya* the ICJ emphasized that "the lack of delineation of the outer limit of the continental shelf is not, in and of itself, an impediment to its delimitation between two States with adjacent coasts, as is the case here" (para 189). The Court then proceed to the delimitation of the outer continental shelf on the basis of the information provided by the parties to the dispute (paras 190-196).

4 Entitlement as prerequisite for delimitation of the continental shelf beyond 200 nm

Although the lack of CLCS recommendations does not hinder a court or tribunal from delimiting the continental shelf beyond 200 nm, it does increase the expectation that the Court will make a thorough investigation of the legal and factual basis for the parties claims to the disputed areas. As problematized in an earlier blogpost (Busch, NCLOS blog), entitlement to the continental shelf is a prerequisite for the court to be able to delimit the outer continental shelf between the parties, otherwise the delimitation would be a purely hypothetical exercise.

In *Somalia v. Kenya*, the ICJ observed that the entitlement of the parties to the continental shelf should be determined by reference to the outer edge of the continental margin, and be ascertained in accordance with Art. 76, para 4 which provides geological and geomorphological criteria, and para 5 setting constraints at 350 nm from the baselines, or 100 nm from the 1,500 metre isobath (para 193).

The ICJ further noted that "neither Party questions the existence of the other Party's entitlement to a continental shelf beyond 200 nautical miles or the extent of that claim. Their dispute concerns the boundary delimiting that shelf between them" (para 194). The parties to the dispute requested the Court to "delimit the maritime boundary between them in the Indian Ocean up to the outer limit of the continental shelf", and the ICJ stated that "[f]or the reasons set out above, the Court will proceed to do so" (para 194).

The Court, by nine votes to five, decided that

> "(…) the maritime boundary delimiting the continental shelf continues along the same geodetic line until it reaches the outer limits of the continental shelf or the area where the rights of third States may be affected." (Para 214(5))

5 Passing the test of certainty as a requirement for delimitation

For a curious reader, the Court's reference to "the reasons set out above" is somewhat of a mystery, because the Court set out only very limited reasons for its decision. In fact, it can be argued that the Court did *not* discuss the entitlement of the parties; it merely based its decision to delimit the outer continental shelf on the Parties' assertion that there were entitlements, and that they overlapped.

Previous case law has established a clear order in which questions of the delimitation beyond 200 nm should be considered: "Delimitation presupposes an area of overlapping entitlement. Therefore, the first stap in any delimitation is to determine whether there are entitlements and whether they overlap" (*Bangladesh/Myanmar*, para 397). In *Bangladesh/Myanmar*, the ITLOS also developed a *test of certainty* as a requirement for entitlement, where the Tribunal required scientific certainty of entitlement for delimiting the continental shelf beyond 200 nm. Subsequent cases have adopted this test of certainty.

Interestingly, whilst explicitly stating that the delimitation between Somalia and Kenya was not the same as the unique situation of the Bay of Bengal in *Bangladesh/Myanmar*, the ICJ in *Somalia v. Kenya* still explored the reasoning provided by the ITLOS in that case (para 193). In *Bangladesh/Myanmar* the ITLOS had observed that the uniqueness of the Bay of Bengal, was acknowledged already during UNCLOS III, with practically the entire sea floor of the Bay of Bengal being covered by a thick layer of sedimentary rocks (paras. 444-445). Due to the "uncontested scientific evidence regarding the unique nature of the Bay of Bengal and information submitted during the proceedings, the Tribunal is satisfied that there is a continuous and substantial layer of sedimentary rocks extending from Myanmar's coast to the area beyond 200 nm" (*Bangladesh/Myanmar*, para 446).

As the ICJ itself observed, the uniqueness of the situation in the Bay of Bengal does not automatically lend itself for use in comparison with the ongoing delimitation between Kenya and Somalia. Although Kenya and Somalia did not contest each other's claims of entitlement, this does not automatically mean that their claims are not contested from a scientific point of view. The parties' positions cannot serve as 'uncontested scientific evidence' in the context of the test of certainty. *Somalia v. Kenya* is accordingly quite different than the *Bangladesh/Myanmar* case.

Likewise, Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (*Ghana/Côte d'Ivoire*) does neither lend itself for comparison with *Somalia v. Kenya*. In *Ghana/Côte d'Ivoire*, the Special Chamber was in no doubt that a continental shelf beyond 200 nm existed in respect of both Ghana and Côte d'Ivoire (para 496). Both parties agreed that each of them had an entitlement to the continental shelf beyond 200 nm but disagreed on the scope of such entitlement (para 496).

In *Ghana/Côte d'Ivoire,* Ghana had made a full submission to the CLCS and received recommendations from the CLCS, and it had "already accepted the outer limits of its outer continental shelf based on the Commission's recommendations" (para 500). Accordingly, the outer continental shelf limits of Ghana had become "final and binding" in accordance with article 76(8) of the LOSC. Although the recommendations of the CLCS shall not to prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts (LOSC Annex II, art. 9), the recommendations contributed to provide the Special Chamber with scientific certainty of the existence of and entitlement to the continental shelf. Although Côte d'Ivoire had not yet received recommendations, the Special Chamber observed that it had "no doubt that a continental margin beyond 200 nm exists for Côte d'Ivoire since its geological situation is identical to that of Ghana" (para 491).

It is nowhere to be found in the judgment in *Somalia v. Kenya* that the ICJ has made similar considerations before reaching its decision. In fact, Judge Robinson in his individual opinion bluntly observed that "[t]he Judgment is bereft of even a scintilla of reliable evidence that the geological and geomorphological criteria (…) have been met." (Diss. op. Robinson, para. 13).

In *Bangladesh/Myanmar*, the ITLOS explicitly provided that it "would have been hesitant to proceed with the delimitation of the area beyond 200 nm had it concluded that there was significant uncertainty as to the existence of a continental margin in the area in question" (para 442). The lack of such hesitance of the ICJ in *Somalia v. Kenya* suggests that the ICJ for some unspoken reason is indeed *certain* that the parties to the dispute have entitlements to the continental shelf beyond 200 nm in accordance with Article 76.

6 How is entitlement to the outer continental shelf established with *certainty*?

The ICJ's reasoning for delimiting the continental shelf beyond 200 nm in *Somalia v. Kenya* is very sparse and must be analyzed with great care for the purpose of identifying the relevant details leading up to its decision. It seems that the arguments of the Parties are assigned decisive weight. Thus, the Court observed that:

> "(…) in their submissions to the Commission both Somalia and Kenya claim on the basis of scientific evidence a continental shelf beyond 200 nautical miles, and their claims overlap. In most of the area of overlapping claims beyond 200 nautical miles, both Parties claim that their continental shelf extends to a maximum distance of 350 nautical miles. The Court further notes that neither Party questions the existence of the other Party's entitlement to a continental shelf of the extent of that claim" (para 194).

The Court did not go into a discussion on whether the geological and geomorphological criteria in article 76(4) (a) and (b) are fulfilled. Despite this, the ICJ decided to proceed with the delimitation of the outer continental shelf.

In fairness to the Court, it should be noted that the ICJ was not requested by the Parties to examine any scientific data that would establish the existence of a continental shelf beyond 200 nm. However, and as argued by Judge Robinson, it can be expected that when the Court bases its decision on the sole basis of the Parties' submissions to the CLCS, it should also explain why it finds the submissions persuasive (Diss. op. Robinson, para 14). It should be kept in mind that coastal State submissions to the CLCS are unilaterally prepared by the coastal States themselves, for the purpose of maximising the seabed area subject to their sovereign rights, and that the scientific evidence included in the submission is developed and communicated for that sole purpose.

In her Separate Opinion, President Donoghue acknowledged that she reluctantly voted in favour of subparagraph (5) of the dispositive paragraph of the Judgment (Sep. op. Donoghue, para 1), and explained that her

> "(…) hesitancy about the Court's decision to delimit the outer continental shelf in this case stems from the fact that the Court has scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf that might appertain to the Parties. The Court is not well positioned to identify, even approximately, any area of overlapping entitlement and thus to arrive at an equitable delimitation of any area of overlap" (Sep. op. Donoghue, para 4).

In order to avoid doubt, she further explained that her misgivings about the Courts decision were *not* based on procedural concerns and they were unrelated to the fact that the CLCS had not yet issued recommendations. (Sep. op. Donoghue, para 5).

President Donoghue observed that unlike the *Bangladesh/Myanmar* or *Ghana/Côte d'Ivorie*, in the present case, "the Court has no comparable evidence regarding the existence, extent, shape or continuity of any outer continental shelf appertaining to either Party" and acknowledged that "[i]t cannot be assumed that the Commission will adopt any State's submission" (Sep. op. Donoghue, para 8).

She accordingly ascribed considerable weight to the Parties' arguments and noted that "both Parties consider that the Court has sufficient information to arrive at an equitable delimitation of the outer continental shelf. It is on this basis that I have reached the conclusion that the Court should delimit the outer continental shelf in this case" (Sep. op. Donoghue, para 3).

The explanation provided by President Donoghue suggests that the decision to delimit is based solely on the fact that the court allegedly has sufficient information to undertake an equitable delimitation between two coastal states. However, this is not necessarily the same as having sufficient geological and geomorphological information required to meet the objective test of *certainty*, which is a prerequisite to decide on entitlement. Previous case law has established a clear order in which question of the delimitation beyond 200 nm should be considered: "Delimitation presupposes an area of overlapping entitlement. Therefore, the first step in any delimitation is to determine whether there are entitlements and whether they overlap" (*Bangladesh/Myanmar*, para 397).

In spite of her legitimate concerns, President Donoghue voted in favour of the Court delimiting the outer continental shelf. Upon this basis it is tempting to draw the conclusion that the ICJ does not require the same degree of certainty of entitlement to the continental shelf as a prerequisite for outer continental shelf delimitation, as the ITLOS argued for in *Bangladesh/Myanmar* (para 442).

7 Is the ICJ replacing the geological and geomorphological criteria with a simple distance criterion of a maximum of 350 nautical miles?

Judge Robinson, who voted against the principal conclusion in *Somalia v. Kenya* para 214 (5), explicitly stated that the Court was not in a position to carry out a delimitation of the continental shelf beyond 200 nm (Diss. op. Robinson, para 3).

He explained that the determination of entitlement within and beyond 200 nautical miles was very different and argued that whilst the distance criterion supersedes the geological and geomorphological criteria in defining continental shelf entitlement up to 200 nm as a result of the

wording of Article 76(1), different considerations must apply to the continental shelf beyond 200 nm (Diss. op. Robinson, para 7).

In order to delimit the continental shelf beyond 200 nm there "must be in existence a continental margin that extends beyond 200 nautical miles, by virtue of Article 76(1) of the Convention" (Diss. op. Robinson, para 6). Article 76(3) further specifies that the "continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise". Therefore, he argued that "the Court must have before it reliable evidence that there is in existence, in the area beyond 200 nautical miles, a 'submerged prolongation of the land mass of the coastal state' (…)" (Diss. op. Robinson, para 6). In addition to this comes the constraint provided in article 76(5) and (6), that the outer continental shelf shall not exceed 350 nm measured from the baselines.

This lead Judge Robinson to rightfully deduce that for the continental shelf beyond 200 nm, the "geological and geomorphological criteria supersede the distance criterion, because there can be no entitlement to a continental shelf in the area beyond 200 nautical miles and up to a distance of 350 nautical miles, unless there is certainty that there is in existence a continental margin in that area" (Diss. op. Robinson, para 7).

Robinson critically observed that despite having identified the crucial information on the basis of States' entitlement to an extended continental shelf per the decisions of the ITLOS in *Bangladesh/Myanmar* and the Special Chamber in *Ghana/Côte d'Ivoire*, the Court proceeded to delimit the continental shelf beyond 200 nm without such crucial information (Diss. op. Robinson, para 12). The closest the Court came to identifying evidence of a continental shelf beyond 200 nm, he argued, was when it noted that both States' submissions to the CLCS claim to be based on scientific evidence (Diss. op. Robinson, para 14). However, as pointed out above, the Court did not provide any explanation as to why it relied on the parties' submissions as basis for entitlement. Robinson therefore argued that

> "[I]t appears that the principal factors that explain the Court's decision to delimit the continental shelf beyond 200 nautical miles are the criterion of the 350-nautical-mile distance as the outer limit of the continental shelf and the volition of the Parties to have the Court effect a delimitation. But, in delimiting the continental shelf beyond 200 nautical miles, geological and geomorphological factors supersede distance as the criteria for determining a State's entitlement to that shelf, thereby rendering less consequential the request of the Parties to have the Court effect a delimitation in that area." (Diss. op. Robinson, para 14).

He continued that:

> "By effecting a delimitation of a party's continental shelf beyond 200 nautical miles without any reliable evidence of the existence of a shelf in that area, the Court has effectively eliminated the important difference drawn by the Convention between a coastal State's entitlement to a shelf within and beyond 200 nautical miles. In the result, by delimiting on the presumption that the Parties are entitled to a shelf up to 350 nautical miles, the Court has replaced the geological and geomorphological criteria required by the Convention for such an entitlement with a simple distance criterion of a maximum of 350 nautical miles." (Diss. op. Robinson, para 16).

The misgivings of Judge Robinson seem well-argued and reasonable. The ICJ in *Somalia v. Kenya* seems to depart from established practice, and employ a more flexible interpretation of article 76 (3)-(6) of the LOSC.

8 Are there any uncommunicated reasons for the ICJ to delimit the continental shelf beyond 200 nm in *Somalia v. Kenya?*

In *Somalia v. Kenya* the ICJ demonstrated a willingness to go ahead with the delimitation beyond 200 nm, in spite of having "scant evidence regarding the existence, shape, extent and continuity of any outer continental shelf" (Sep. op. Donoghue, para 4). This is not in accordance with established practice, where scientific certainty has previously been argued as a requirement.

For these reasons, it is important to the coherence of the Court's jurisprudence to discuss if there could be other factors in *Somalia v. Kenya* that may have necessitated the Court's delimitation.

In *Bangladesh/Myanmar*, the ITLOS was particularly mindful of the deadlock in the dispute between Myanmar and Bangladesh. Both States had invoked paragraph 5(a) of Annex 1 of the CLCS Rules of Procedure, and effectively blocked the CLCS from considering the submissions and issue recommendations on the location of the outer limit of the continental shelf beyond 200 nm. The ITLOS observed that "[a] decision by the tribunal not to exercise its jurisdiction over the dispute relating to the continental shelf beyond 200 nm would not only fail to resolve a long-standing dispute, but also would not be conductive to the efficient operations of the Convention" (para 391). In fact, it would be "contrary to the object and purpose of the Convention not to resolve the existing impasse", and "inaction in the present case, by the Commissions and the Tribunal (…) would leave the Parties in a position where they may be unable to benefit fully from their rights over the continental shelf" (para 392). In *Bangladesh/Myanmar,* the Tribunal accordingly had an extra incentive to exercise its jurisdiction in an attempt to resolve the deadlocked dispute between the Parties, and this is provided as one of the Tribunal's reasons for undertaking delimitation beyond 200 nm.

A similar argument cannot be used in *Somalia v. Kenya* because both States had at the time of the proceedings withdrawn their objections under Paragraph 5(a) Annex I of the CLCS' Rules of Procedure, and the CLCS had ascribed Kenya's submission to a sub-commission as it was next in line for consideration. Although the CLCS procedure is time consuming, there has been some movement in the dispute between Somalia and Kenya. The ICJ decision to delimit the continental shelf beyond 200 nm can accordingly not be said to be a response to a longstanding, deadlocked dispute.

Quite the opposite, it can be argued that because there is progress in the ongoing dispute, and because the ICJ does not have satisfactory scientific certainty on the Parties' entitlement to the continental shelf, the development in the CLCS process could itself be an argument for postponing the delimitation of the continental shelf beyond 200 nm by the Court. As seen in *Ghana/Côte d'Ivoire*, recommendations from the CLCS would contribute to provide the Court with the required scientific certainty.

9 A new way forward in *Somalia v. Kenya?*

Having pointed out this shift in delimitation case law, it is also timely to raise the question about what consequences this may have in practice. As a starting point, one should be very careful not to read too much into ICJ's decision in *Somalia v. Kenya* in order to avoid unintended side effects beyond this particular case. *Somalia v. Kenya* may be a one-off case, where the ICJ departed from the requirement of scientific certainty of entitlement as prerequisite for continental shelf

delimitation beyond 200 nm, in a situation where the States concerned have a relatively uncomplicated coastal geography.

However, if the ICJ's decision in *Somalia v. Kenya* is de facto a first step in a new direction, it should be note as highly worrying if the geological and geomorphological criteria is being replaced with a simple distance criterion of a maximum of 350 nautical miles. This could potentially result in an encroachment of the Area, at the cost of mankind as a whole.

On the other hand, an approach where a court or tribunal presupposes the existence of entitlement and bases its considerations on the 350 nm maximum limit alone could contribute to a clearer separation of the roles of the CLCS and international courts and tribunals operating under Part XV of the LOSC. In *Bangladesh/Myanmar*, ITLOS discussed the relationship between the CLCS and the judiciary in detail. The ITLOS maintained that the delineation and delimitation of the continental shelf beyond 200 nm relies on the interpretation and application of article 76, and in particular paras 3-6. It observed that the article contains elements of both law and science:

> "While the Commission is a scientific and technical body with recommendatory functions entrusted by the Convention to consider scientific and technical issues arising in the implementation of article 76 on the basis of submissions by coastal States, the Tribunal can interpret and apply the provisions of the Convention, including article 76. This may include dealing with uncontested scientific materials or require recourse to experts" (*Bangladesh/Myanmar*, para 411).

Myanmar and Bangladesh did not agree on the interpretation of Article 76 and in particular the meaning of "natural prolongation", and ITLOS decided that "as the question of the Parties' entitlement to a continental shelf beyond 200 nm in the Bay of Bengal raised issues that were predominantly legal in nature, the Tribunal can and should determine entitlements of the parties in this particular case" (*Bangladesh/Myanmar*, para 413). In *Somalia v. Kenya*, it can oppositely be argued that as the question of entitlement was predominantly of scientific nature, the CLCS would be better equipped than the Court in undertaking an objective assessment of the scant scientific evidence, to decide on the parties entitlement. By virtue of not involving itself in a discussion of the parties' entitlement based on insufficient scientific information, the ICJ has at the very least avoided encroaching on the functions of the CLCS. But at what cost?

As the ICJ did not provide a proper reasoning on this point for its decision to delimit the continental shelf beyond 200 between Somalia and Kenya, this leaves the Judgment open to criticism and speculation.