Examining the Role of Delimitation of the Continental Shelf and the Exclusive Economic Zone in relation to Maritime Boundary Disputes in Africa

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Abstract:

Delimitation of the continental shelf (CS) and the exclusive economic zone (EEZ) in Africa faces significant limitations, often leading to disputes. Whereas the 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS) which has been signed by all African States and ratified by 50 out of 55 African States provides a framework for the CS and EEZ delimitation, its effective implementation in Africa is dependent upon many varying factors. These factors include time, interests, circumstances and relationships. This article seeks to examine how the CS and EEZ delimitation process in Africa can be better managed in order to mitigate against disputes. Specifically, it considers whether an African based solution through the African Union could be more effective. In this context, the effect of colonial boundaries in Africa is presented as the place where a significant amount of the relevant factors and experiences of time, interests, circumstances and relationships with respect to CS and EEZ delimitation converge. This is especially because the 1982 UNCLOS framework of delimiting the CS and EEZ uses land territory of a coastal state as a critical pillar of measuring the base point of maritime boundaries. African States inherited their colonial boundaries. The paradoxical resource curse emerges as a consistent thread in this

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discussion, to the extent that the wealth of resources in Africa informed the scramble and partition of Africa and continue to afflict African States.

I. Introduction

Fixed maritime boundaries are a double edged sword for African States. On one hand, the boundaries have the potential for generating boundary disputes as it has happened in some parts of Africa. An example of this is the Somalia v. Kenya maritime boundary dispute commenced before the ICJ on 28th August 2014 and final judgement delivered on 12th October 2021.\(^2\) On the other hand, they have the potential of being bridges of stability and cooperation as they have done in other parts of Africa, such as in the case the agreements on the delimitation of maritime borders between the Comoros, Mozambique and Tanzania signed in 2011 through the African Union Border Programme (AUBP).\(^3\) This article examines the role of the 1982 UNCLOS framework for delimitation of the CS and the EEZ, in relation to maritime boundary disputes in Africa. The article seeks to identify a way through which Africa can rise through the challenges of this framework to a peaceful and sustainable existence.

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Theoretically, the article argues that whether or not delimitation of the CS and EEZ in Africa leads to disputes depends on a number of factors, divided into the historical context of Africa’s existing land boundaries, the efficacy of 1982 UNCLOS delimitation framework in Africa and finally, alternatives towards a peaceful delimitation and/ or management. To achieve its objectives, the article is divided into six sections.

Section I presents the overall layout of the article and establishes the article’s relevance. Section II locates the role of CS and EEZ delimitation to maritime boundary disputes in Africa. This section identifies Africa’s abundance of resources as a core reason for overlapping claims and resulting need for delimitation. This discussion sets the stage for section III which examines the 1982 UNCLOS framework for delimiting the CS and the EEZ. Section IV locates the geographical scope of this article as Africa. It specifically explores the nature of Africa’s boundaries, and juxtaposes it against the application of the 1982 UNCLOS framework for delimiting the CS and EEZ. Section V presents the AUBP as an existing vehicle under the African Union as complementary to the role of the 1982 UNCLOS delimitation of the CS and EEZ in relation to maritime boundary disputes in Africa. Finally, section VI sums up the discussions and packages the recommendations from the article.
II. The role of delimitation of the CS and the EEZ in relation to maritime boundary disputes in Africa - the Paradox of Plenty

In this article, ‘coastal State’ refers to a State that is situated by the ocean, and which has adjacent territorial waters, CS and EEZ. 150 of the 192 member states of 1982 UNCLOS are coastal States. Out of the global 150 coastal States, 38 are coastal and island States in Africa. All African States have signed the 1982 UNCLOS, and 50 out of 55 African States have ratified it. The five that are yet to ratify it are Burundi; Central African Republic; Ethiopia; Libya; and Rwanda. This effectively means that the 1982 UNCLOS is widely applicable among coastal States in Africa with respect to their to CS and EEZ delimitation.

The 1982 UNCLOS prescribes specific rights of a coastal State over its CS, different from other States. First is that the coastal State exercises exclusive sovereign rights over the CS for the purpose of exploring it and exploiting its natural resources. On the same breath, the 1982

9 ibid, article 77.
UNCLOS prescribes the rights of the coastal State in the EEZ. It effectively gives a coastal State sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of its EEZ. The coastal state also has jurisdiction to: establish and use of artificial islands, installations and structures; marine scientific research; and protection and preservation of the marine environment.

From the foregoing rights conferred upon coastal States, it is therefore natural that the abundance of resources in Africa’s maritime space can be a trigger for many maritime boundary disputes. For instance, at the heart of the said Somalia v. Kenya maritime boundary dispute before the ICJ are disputed oil blocks. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening) also before the ICJ has been attributed to similar resource factors. History shows that the resources often trigger fresh or rekindling of old maritime boundary disputes. This is because the resources attract interest of global powers and corporations, many of which spare no harm in pursuing these resources.

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10 ibid, article 56.
11 ibid, article 56.
It is natural therefore that Africa’s natural resources, including her naturally strategic geographical location has been a double edged sword, considering her experiences such as colonialism and neo-colonialism as a result of clamour for her resources by external powers show that her wealth in resources have exposed her to great vulnerabilities and driven this blessing of resource into a great burden.\textsuperscript{16} On this basis and given ongoing speculation and resource discoveries in Africa, there is potential of more disputes emerging in the coming years.

III. **African Maritime Boundaries**

It is difficult to obtain a verifiable map of indigenous pre-colonial Africa.\textsuperscript{17} This article attributes this factor to the fact that relatively scanty attention has been directed at documenting this.\textsuperscript{18} Nevertheless, a common feature of the various available maps and literature in the area show that pre-colonial African territories was demarcated along various factors such as: (a) culture; and (b) topographical features such as the sea, lagoons, lakes, rivers, boulders, hills, mountains; valleys; certain outstanding trees and plants; and man-made constructions such as mounds.\textsuperscript{19} These territories were often separated by large uninhabited and unclaimed spaces, perhaps as a result of


\textsuperscript{17} Anthony I Asiwaju, ‘The Concept of Frontier in the Setting of States in Pre-Colonial Africa’ (1983) 127 Presence Africaine 43.

\textsuperscript{18} Gregor Dobler, ‘Boundary Drawing and the Notion of Territoriality in Pre-Colonial and Early Colonial Ovamboland’ (2008) 3 Journal of Namibian Studies: History Politics Culture 7; Asiwaju (n 17).

the relative low population at the time.\textsuperscript{20} Many pre-colonial African communities often migrated if their circumstances such as land productivity changed. For this reason, pre-colonial African boundaries were therefore also fluid.

The scramble for Africa started in the late 19\textsuperscript{th} century and crystalised through the partitioning of Africa at the Berlin conference from November 1884 till February 1885.\textsuperscript{21} While the Berlin conference mainly discussed the boundaries of Central Africa (the Congo Free State), it also laid down the principles that would be used among Europeans to divide the African continent.\textsuperscript{22} The rationale behind laying these principles was to end conflict among the European States and the United States of America (USA), which characterised the countries’ scramble for African territories before the conference.\textsuperscript{23}

The colonial partition of Africa and subsequent colonial delimitation bear four cross-cutting characteristics. Firstly, the colonial boundaries were based on shifting interests and rivalries between European countries, without factoring direct consultation and participation of the indigenous communities and their interests.\textsuperscript{24} Consequently, these boundaries placed many

\textsuperscript{20} Dobler (n 18).

\textsuperscript{21} Muriel Evelyn Chamberlain, \textit{The Scramble for Africa} (Routledge 2014).


\textsuperscript{23} ibid, The Berlin conference included 13 European powers and the United States. The 13 European powers are: Austria- Hungary, Belgium, Denmark, France, Germany, Italy, Netherlands, Ottoman Empire, Portugal, Russia, Spain, Sweden- Norway, United Kingdom, and the United States.

Africans within countries that do not represent their culture and similar systems, a contradiction that still troubles many to-date.\textsuperscript{25} Secondly, most of the colonial boundaries were poorly defined. Thirdly, the colonial boundaries themselves were fluid and kept changing as a result of various factors such as geo-political outcomes. Fourthly, the location of strategic natural resources in cross-border areas posed additional challenges.\textsuperscript{26}

Nonetheless, whereas Africa’s founding fathers had the option of pursuing the re-demarcation, they opted to retain the colonial boundaries.\textsuperscript{27} This is also despite the fact that in several areas across the world, national borders have shifted over time to reflect ethnic, linguistic, and sometimes religious divisions.\textsuperscript{28}

The decision by Africa’s fore fathers to retain the colonial boundaries is anchored on two main reasons. Firstly, they expressed reservations that re-drawing of the boundaries would more likely cause a more violent disruption than the alternative retention of the colonial boundaries.\textsuperscript{29} This includes the fact that many post-colonial States would effectively be fundamentally altered. To

\textsuperscript{25} E Papaioannou and S Michalopoulos, ‘The Scramble for Africa and Its Legacy’.
\textsuperscript{26} Kodjo, ‘Ending Conflicts, Sustaining Peace - African Union - Peace and Security Department’ (n 24).
\textsuperscript{29} African Union (n 27).
them, the fundamental unity of Africa was more paramount.\textsuperscript{30} Secondly, many of the countries had entered into agreements with their former colonial masters that they would retain the colonial boundaries. To many of these founding fathers, despite their personal and ideological conflicts against colonialism, the practical factors that compelled their compliance with this commitment such as facilitation of national programmes by the former colonial masters far outweighed the factors calling for breach.\textsuperscript{31}

This therefore acknowledges that the adoption of colonial boundaries by African founding fathers is not the perfect scenario. Their underlying parameters expose the best alternative under the prevailing circumstances. A common thread emerges from these considerations by the founding fathers on how to treat colonial boundaries post-independence: that Africa’s common interests are paramount to any individual African State and that these interests are best achieved through a united Africa.\textsuperscript{32} These principles espouse that no State can optimally achieve its goals in relation to its claims over internationally disputed maritime areas or resources without the cooperation of the co-disputants.\textsuperscript{33}


This scepticism of the role of external players in Africa’s boundary disputes is buttressed by the devastating experiences arising from implementation of ICJ disputes regarding maritime boundaries in Africa. In the case of *Cameroon v. Nigeria; Equatorial Guinea intervening*, by its Judgment issued on 10th October 2002, the ICJ gave ownership of the disputed oil-rich Bakassi peninsula to Cameroon over Nigeria.\(^{34}\) This decision had significant adverse geo-political, socio-economic and security implications against Nigeria and its citizens, especially those that had directly invested in the area.\(^{35}\) Such challenges also affect ongoing cases as experienced in the course of the hearing of the Somalia v. Kenya dispute before the ICJ where diplomatic tiffs were witnessed in the course of the case. For instance, in February 2019, Kenya summoned its ambassador to the Federal Republic of Somalia and instructed the ambassador of Somalia to Kenya to depart to Somalia for consultations, citing that this was a consequence of a decision by the Government of Somalia to auction off oil and gas blocks in Kenya’s maritime territorial area that borders Somalia.\(^{36}\) This area was the subject of then ongoing case of *Somalia v Kenya* instituted

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\(^{34}\) ‘Judgments | Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening) | International Court of Justice’ (n 14).


by Somalia at the ICJ in the year 2016. On 14th December 2020, Somalia issued a statement that it would cut diplomatic ties with Kenya, citing violations of Somalia’s sovereignty.

The challenges highlighted from the cases of *Cameroon v. Nigeria; Equatorial Guinea intervening* and *Somalia v. Kenya* over maritime boundary disputes are not unique to maritime boundary disputes. Studies of national land boundary disputes in Africa such as: Algeria’s experience in boundary demarcation with several of its neighbouring States, the Burkina Faso-Mali post-conflict nature of the ICJ decision, and maintenance of the international boundaries of Mozambique, have shown similar challenges as the African maritime boundary disputes. These factors therefore call for a familial form of dispute resolution in dealing with maritime boundary disputes in Africa.

Because the colonial boundaries were mainly in relation to land, and given that the 1982 UNCLOS, delimitation of maritime boundaries discussed in the next section is anchored on baselines whose measurements flow from land, the colonial boundaries continue to haunt Africa maritime boundaries to date.

**IV. Framework for Delimitation of the CS and the EEZ under the UNCLOS 1982**

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39 Aghemelo and Ibhasebhor (n 35).
40 Amadife and Warhola (n 28).
The 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS) establishes five main maritime zones with distinct legal statuses being: Internal Waters, Territorial Sea, Contiguous Zone, Exclusive Economic Zone (EEZ) and the High Seas. Each of these zones also confer varying rights and obligations upon States and non-state maritime users and stakeholders, which often overlap leading to boundary disputes. Due to time limitations, this article focuses on the CS and EEZ.

The 1982 UNCLOS, is an international agreement that resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III). It is composed of 320 articles and 9 annexes. It deals with various aspects of the law of the sea, including: a binding procedure for settlement of disputes between States; conservation and management of living marine resources; economic jurisdiction; a framework for delimitation of maritime boundaries; legal status of resources on the seabed beyond the limits of national jurisdiction; navigational rights; passage of ships through narrow straits; protection of the marine environment; a marine research regime; and territorial sea limits.

The definition of the CS and the criteria by which a coastal State may establish the outer limits of its CS are set out in article 76 of the 1982 UNCLOS. Additionally, the Third United Nations

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42 ibid.
43 ‘1982 UNCLOS’ (n 8), article 76.
Conference on the Law of the Sea (UNCLOS III) adopted on 29 August 1980 a "Statement of Understanding" which is contained in Annex II to the Final Act of the Conference.\(^{44}\) Article 76 of the 1982 UNCLOS uses the term CS as a juridical term.\(^{45}\) According to this provision, the CS of a coastal State comprises the submerged prolongation of the land territory of the coastal State - the seabed and subsoil of the submarine areas that extend beyond its territorial sea (TS) to the outer edge of the continental margin, or to a distance of 200 nautical miles (nm) where the outer edge of the continental margin does not extend up to that distance.\(^{46}\) In exceptional circumstances, a coastal State can extend its CS under certain conditions beyond 200 up to a maximum of 350 nm.\(^{47}\)

The definition of the EEZ is set out under article 55 of the 1982 UNCLOS. Article 57 sets the maximum outer limits of the EEZ at a maximum of 200 NM.

Article 83(1) and article 74 (1) of the 1982 UNCLOS establishes that delimitation of the CS and EEZ respectively between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in article 38 of the statute of the ICJ, in order to achieve an equitable solution. The International law recognised in article 38 of the statute of the ICJ is: (a) international custom, as evidence of a general practice accepted as law; (b) the general


\(^{46}\) ‘1 Nautical Miles to Kilometres Conversion - Convert 1 Nautical Miles to Kilometres (Nm to Km) - Distance and Length Conversion’<https://www.theunitconverter.com/nautical-miles-to-kilometers-conversion/1-nautical-miles-to-kilometers.html> accessed 13 October 2021 The nautical mile symbolised as ‘M’, NM or nmi is a unit of length, defined as the equivalent of 1.852 kilometres.

\(^{47}\) ‘1982 UNCLOS’ (n 8), article 76 paragraphs 4 to 7.
principles of law recognized by civilized nations; (c) subject to the provisions of Article 59, judicial
decisions and the teachings of the most highly qualified publicists of the various nations, as
subsidiary means for the determination of rules of law.\textsuperscript{48} Nevertheless, the stated sources of law
shall not prejudice the power of the Court to decide a case \textit{ex aequo et bono}, if the parties agree
thereto.\textsuperscript{49} If no agreement can be reached within a reasonable period of time, the States concerned
shall resort to the procedures provides for in Part XV of the 1982 UNCLOS.\textsuperscript{50} These procedures
relate to settlement of maritime disputes.

Pending agreement the States concerned, in a spirit of understanding and cooperation, must make
every effort to enter into provisional arrangements of a practical nature and, during this transitional
period, not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall
be without prejudice to the final delimitation.\textsuperscript{51} Where there is an agreement in force between the
States concerned, questions relating to the delimitation of the CS and EEZ shall be determined in
accordance with the provisions of that agreement.\textsuperscript{52}

It is apparent that the legal framework under article 38 of the ICJ Statute is relatively wide and
analysis of the 1982 UNCLOS maritime delimitation framework exposes its vagueness. The
framework is left to the interpretation good will of state parties. This ambiguity in the provisions

\textsuperscript{48} ‘Statute of the Court | International Court of Justice’ <https://www.icj-cij.org/en/statute> accessed 13
August 2020, article 38 (1).
\textsuperscript{49} ibid, article 38(2).
\textsuperscript{50} ‘1982 UNCLOS’ (n 8), article 83 (2) and article 74 (2).
\textsuperscript{51} ibid, article 83(3) and article 74(3) respectively.
\textsuperscript{52} ibid, article 83 (4) and article 74 (4) respectively.
creates a major avenue for disputes between States. While noting that the nature of the provisions of the 1982 UNCLOS maritime boundary delimitation framework mirrors the attitude of States towards externally binding processes, this chapter critiques the 1982 UNCLOS’ normative approach to maritime boundary delimitation. Africa would be the most suitable author of the solution to her maritime boundary problems. It further proposes that the solutions ought to be more prescriptive. It is for this reason that this article calls for more thought on the most productive approach to maritime boundary disputes in Africa.

With respect to delimitation of the CS and EEZ, the 1982 UNCLOS provides precise limits of delimitation. However going by the number of maritime boundary disputes arising from CS and EEZ delimitation, it is clear that the delimitation criteria is imprecise. Therefore, delimitation of boundaries may not be the most effective default mode of dealing with maritime boundary disputes in Africa.

An important step toward making boundaries responsive to African needs is to establish an African based legal and institutional framework which can centralize information on African CS and EEZ delimitation problems, understand the underlying factors, assess the problems against the underlying factors and the African vision, and facilitate the peaceful and sustainable resolution of

such disputes.\textsuperscript{54} The African Union (AU) is the only institution with the both the capacity and mandate to do this.\textsuperscript{55}

V. African Solutions

Peaceful and sustainable delimitation of the CS and EEZ delimitation in Africa and dealing with existing disputes on this requires a purely African based solution anchored on cooperation between states on a bilateral or, where necessary, multi- basis. These processes should be driven by the African Union.\textsuperscript{56} Any other approach, including the 1982 UNCLOS framework encounters challenges such as suspicion and rejection.

The African Union Border Program (AUBP) is such an available vehicle. The AUBP was established in January 2007 by the African Heads of States AUBP’s objectives are: to complete the delimitation and demarcation of African borders, to encourage and facilitate cross-border cooperation through joint planning and development of shared cross-border areas and to build the border management capacity of Member States in support of pragmatic border management and regional integration. The initial goal for AUBP was delimitation and demarcation of African boundaries by 2017. The deadline was extended to 2022. Given its foundation and domicile within the AU, the AUBP understands the intricacies of Africa’s history and long-term vision in a way


\textsuperscript{55} ibid.

that would be difficult for umbrella global players and instruments such as the 1982 UNCLOS can comprehend.

Additionally, the AUBP has demonstrated success in facilitating the delimitation of CS and EEZ by agreement between: the Comoros and Mozambique, the Comoros and Tanzania, the Comoros and Seychelles, as well as between Seychelles and Mauritius have been concluded.57

VI. Conclusion

From the foregoing discussions, this article concludes that delimitation of Africa’s CSs and EEZs has often led to divisive boundary disputes. Nevertheless, these zones of great resource have the potential for being strong bridges to Africa’s peace, unity and sustainable development. In this regard, the article draws out the following specific conclusions:

First, territorial ownership is flattering. This is because it comes with a great wealth of diverse resources. Second, the 1982 UNCLOS framework, specifically article 83 and 74 provide the general principles of delimitation of the CS and EEZ respectively. These provisions call for delimitation by peaceful means. CS and EEZ delimitation under the 1982 UNCLOS is pegged on land boundaries. Africa’s land boundaries are inherited colonial boundaries that neglected and contradicted relevant indigenous factors. As such, the use of Africa’s existing land boundaries as

the base point for maritime delimitation under the 1982 UNCLOS present significant inherent limitations. Consequently, delimitation of maritime boundaries in Africa through the 1982 framework picks old wounds thereby playing a divisive role. This often translates to security challenges.

Third, is that maritime disputes in Africa cannot be effectively resolved through adjudicative mechanisms nor history. The article finds the need for understanding the underlying backdrop of maritime boundary disputes as critical to resolving the dispute. By their inherent nature, adjudicating institutions encounter significant jurisdictional as well as capacity limitations in this regard. There is therefore need for Africa to prioritise a more cohesive approach to delimitation of maritime boundaries in Africa.

Finally, this article calls for a formal adoption and deliberate implementation of a determinate delimitation and management criteria as a potential way of mitigating boundary disputes in Africa, including maritime boundaries. The article identifies the AUBP as a ready and useful vehicle through which Africa’s maritime agenda with respect to the CS and EEZ can be peacefully aligned and implemented.

**BIBLIOGRAPHY**

1. ‘1 Nautical Miles to Kilometers Conversion - Convert 1 Nautical Miles to Kilometers (Nm to Km) - Distance and Length Conversion’<https://www.theunitconverter.com/nautical-miles-to-kilometers-conversion/1-nautical-miles-to-kilometers.html> accessed 13 October 2021
2. ‘1982 UNCLOS’


12. ‘Continental Shelf - General Description’


