

# MARITIME BORDER CHALLENGES AND IMPLICATIONS ON SECURITY:

The Kenya-Somalia Dispute in Perspective

REPORT



An Experts' Symposium



September 2019



### About the HORN Institute

The HORN International Institute for Strategic Studies is a non-profit, applied research, and policy think-do tank based in Nairobi, Kenya. Its mission is to contribute to informed, objective, definitive research and analytical inquiry that positively informs policies of governments, intergovernmental and non-governmental organizations. Its vision is a progressive Horn of Africa served by informed, evidence-based and problem-solving policy research and analysis.

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# Abbreviations and Acronyms

<b>AMISOM</b>	African Union Mission in Somalia
<b>APSA</b>	African Peace and Security Architecture
<b>AU</b>	African Union
<b>AUBP</b>	African Union Border Programme
<b>AUC</b>	African Union Commission
<b>CEWARN</b>	Conflict Early Warning and Response Mechanism
<b>DRC</b>	Democratic Republic of Congo
<b>EEZ</b>	Exclusive Economic Zone
<b>EU</b>	European Union
<b>FGS</b>	Federal Government State
<b>HoA</b>	Horn of Africa
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>KDF</b>	Kenya Defence Forces
<b>MoU</b>	Memorandum of Understanding
<b>nm</b>	Nautical miles
<b>NFD</b>	Northern Frontier District
<b>PS</b>	Principal Secretary
<b>PSC</b>	Peace and Security Council
<b>RECs</b>	Regional Economic Communities
<b>SALWs</b>	Small Arms and Light Weapons
<b>TMC</b>	Transitional Military Council
<b>UAE</b>	United Arab Emirates
<b>UNDP</b>	United Nations Development Programme
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNCLOS</b>	United Nations Convention on the Laws of the Sea
<b>USA/US</b>	United States of America /United States
<b>USD</b>	United States Dollar

## Key Terms

The following key terms are operationally defined based on their usage in this report:

**Conflict** is the result of a clash of interests (needs, drives, ideology) between individuals, groups of individuals, or states.

**Dispute** is a disagreement between two or more parties that has been presented before a court of law.

**Disputants** are the parties to a conflict that has been presented to a court of law.

**Contestation** is a struggle or competition between two or more opposing parties.

**Demarcate** is a term for the setting of boundaries of something (often land ones) or clearly separating different items. This term is often interchanged with '**delimit**' or '**delineate**.'

**Irredentism** is the political principle directed towards the incorporation of a territory historically or ethnically related to one political unit but under the political control of another, within the boundaries of one's own political unit. It could also refer to a national policy advocating the acquisition of some region in another country by reason of common linguistic, cultural, historical, ethnic, or racial ties.

# Acknowledgements

The HORN Institute would like to thank individuals who helped make this symposium a success. Special thanks go to the HORN Institute Maritime Study Group consisting of Mustafa Y. Ali, Ph.D., (Chairman, the HORN Institute, and member, Maritime Study Group); Prof. Macharia Munene, Ph.D., (Professor of History and International Relations at USIU-Africa, and Chairman, Maritime Study Group); Hassan Khannenje, Ph.D., (Director, the HORN Institute and member, Maritime Study Group); Mwachofi Singo (Lecturer, University of Nairobi, and Coordinator, Maritime Study Group); Mumo Nzau, Ph.D., (Senior Lecturer, University of Nairobi, and member, Maritime Study Group); Roselyne Omondi (Associate Director, Research, the HORN Institute, and member, Maritime Study Group); Daniel Iberi (Communications Manager, the HORN Institute, and Head of HORN Secretariat, Maritime Study Group); and Fauzia Hussein (Assistant Communications Manager, the HORN Institute, and member, HORN Secretariat) for their role in the organization and delivery of the symposium.

Sincere gratitude goes to the following key guests who attended the symposium and gave opening and closing speeches, and key presentations: Nancy Karigithu, C.B.S, Principal Secretary, Shipping and Maritime Affairs; Titus Ibui, Chairman, Lamu Port, South Sudan, Ethiopia Transport - LAPSSSET; Lt-Gen (Rtd) Humphrey Njoroge, Former Commandant, Kenya's National Defence College; H.E. Erastus J. Mwencha, E.G.H., M.B.S., Former Deputy Chairperson of the African Union Commission (AUC), and Chairperson, The African Capacity Building Foundation; and Prof. Peter Kagwanja Ph.D., CEO, Africa Policy Institute. The Institute also wishes to thank Col. (Rtd) Cyrus Oguna, the Spokesperson, the Government of Kenya for attending and participating in the symposium.

The Institute also wishes to appreciate symposium rapporteurs, Roselyne Omondi; Jules Swinkels; Edmond J. Pamba (HORN research team); and Michael Thuo Kinyua; Mary Ododa (Project Officer); Asia M. Yusuf (Social Media Officer) and Evans Ombisa (Designer); as well as all other members of staff at the HORN Institute who took part in the organization of this symposium.

Finally, the Institute would like to thank all the local and international maritime and legal experts, notably from Kenya, Nigeria, United States, Norway, South Korea, Poland, and Ghana; high-ranking serving and former military officers; representatives from Ministry of Foreign Affairs and Ministry of Defence; representative from the Government of Japan, and scholars in the fields of political science, security, and international relations who attended and contributed to the discussions.

## Summary

The yet-to-be-resolved dispute between Kenya and Somalia over an area in the Indian Ocean that both states claim continues to capture the imagination of the citizens of both countries. This Kenya v. Somalia case has been before the International Court of Justice (ICJ) since 2014, and its determination is expected in September 2019 (now postponed to November 2019). This report, which is a key output of a recently concluded Experts' Symposium on maritime border challenges, provides a brief background to this dispute.

This overview is followed by a discussion of several themes that include the importance (geo-strategic, military, commercial, or otherwise) of the maritime domain, with specific focus on the Horn of Africa region. Mention is also made of the parties to the dispute (Kenya, Somalia, the ICJ, and states interested in the region), and the options available for its resolution (peaceful and/or coercive). ICJ's ruling will redefine Kenya-Somalia relations, which is why both countries should work toward a negotiated settlement, for the peace and stability of the region. In the absence of a negotiated agreement, and if all other efforts to resolve this dispute fail, more challenges will emerge, exacerbating existing conflicts in an already tense region.



“Oceans and seas are the cornerstones of humanity,”  
– CS Nancy Karigithu



*Nancy Karigithu, C.B.S, Principal Secretary, Shipping and Maritime Affairs, giving the opening speech on Day One*



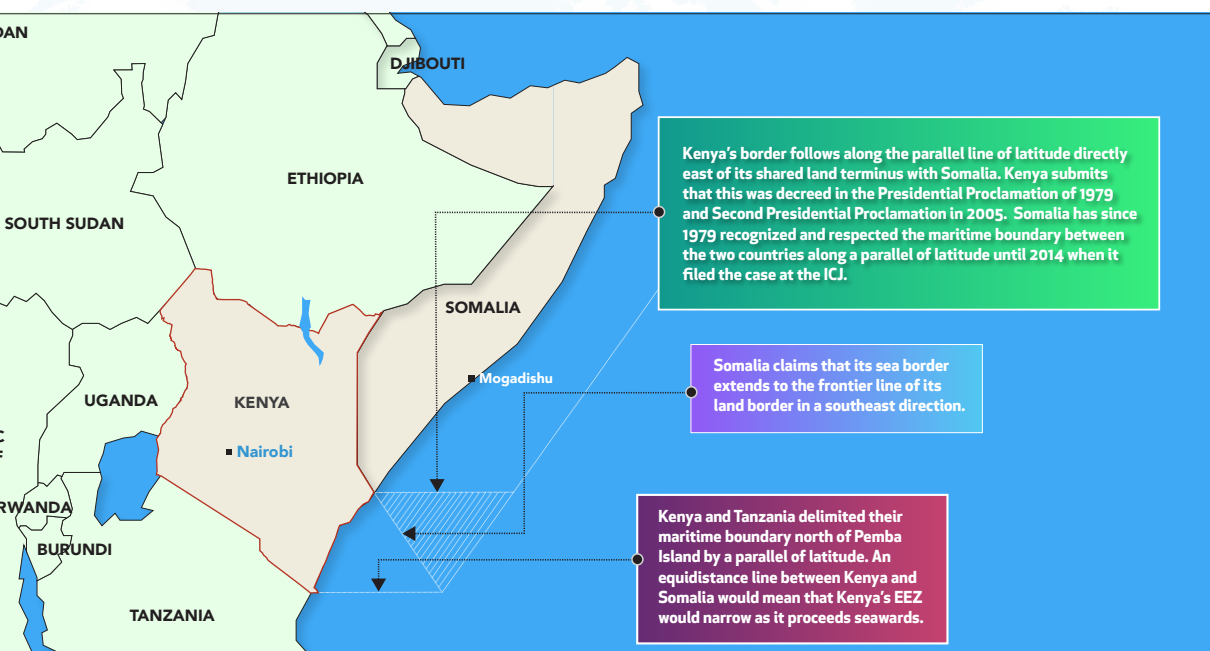
*A section of the audience on Day One*



*Group photo of participants*

## Background

Kenya and Somalia claim territorial jurisdiction over the same maritime zone on the outer limits of the continental shelf beyond 200 nautical miles (nm) in the Indian Ocean (see *Figure 1*). Kenya's claim to the maritime territory is based on the parallel of latitude or straight line principle of boundary delimitation that renders an eastward-running border, south of Kiunga. Somalia, on the other hand, claims the territory on the basis of the equidistance principle that renders a south-eastward-running border.



*Figure 1: Location of the disputed area (Source: The HORN Institute)*

Kenya claimed the now-disputed area, which had not been delimited or delineated by either state before 1979, through presidential proclamations in 1979, and 2005; Somalia did not object. In 2014, Somalia's position regarding Kenya's proclamations seemingly changed when Somalia sought the help of the World Court (the International Court of Justice, ICJ) to determine which of the two states owns the territory. The jury on the delimitation of the area of overlapping claims is still out, but questions on what the Court's decision will be, and how that decision will affect Kenya-Somalia relations, and the peace, and stability of the Horn of Africa region abound.

In the light of these realities and developments, the HORN Institute constituted the HORN Institute Maritime Study Group (in February 2019, see also page 43), and organized a series of roundtable discussions involving different stakeholders (between February and July 2019). During these sessions, it emerged that the nature and dynamics of the four-decade-old matter have been changing over time. What began as a disagreement over the location of the maritime boundary has become a functional matter too (as the now-disputed area is said to contain high-value hydrocarbons, including oil, and gas), threatening national security of both states.

**“The jury on the delimitation of the area of overlapping claims is still out, but questions on what the Court’s decision will be, and how that decision will affect Kenya-Somalia relations, and the peace, and stability of the Horn of Africa region abound.” – Roselyne Omondi**

The dynamics of the matter has shifted in several domains, most notably: regional power, national polls, petroleum laws, Somali refugees, and national security (al Shabab). Since the 1970s, Kenya, which had signed a Defence Pact with Ethiopia in the 1950s, has been playing the role of regional peace maker. In April 2018, Ethiopia elected a new Prime Minister, Abiy Ahmed Ali. Since then, Ethiopia has been forging new alliances with Eritrea and Somalia, redefining the existing Kenya-Ethiopia alliance. Ethiopia is now emerging as a regional peace maker, and in July 2019, offered to mediate the Kenya-Somalia dispute.

The disagreement over the maritime boundary had not featured prominently in past national elections in Somalia. Elections in Somalia’s regional states are going on at the moment, ahead of a presidential poll in 2020. One of the regional candidates, Sheikh Madobe (Jubbaland State), is thought to be allied to Kenya, creating schisms between pro-local and anti-local Somali voters. It is not yet clear whether the two attacks by al Shabab in July 2019 in Mogadishu (July 23, 17 dead, left 28 injured) and Kismayo (July 13, left 28 dead) were motivated purely by the polls, or by other factors, but there is little doubt that the Kenya-Somalia dispute has become an item on president Farmajo’s re-election agenda.

Soon after the issue morphed into both a territorial and functional matter, Kenya recalled its envoy to Somalia. This followed Kenya’s realization that Somalia may have auctioned oil blocks in the disputed area to bidders at the Somalia Oil Conference that was held in London in February 2019. At least 15 oil and gas companies have shown interest in exploring Kenya’s and Somalia’s offshore, sparking debates on the presence and

impact of external foreign interests (commercial, military, or otherwise) on the ongoing dispute, and on the peace and stability of the Horn of Africa region, and raising the stakes of the Court’s impending determination. On July 23, 2019, for example, Qatar Petroleum signed an agreement with two foreign oil companies, Eni (Italy), and Total (France), to acquire 25 per cent participating interest from three oil blocks in Kenya’s (undisputed) offshore, to “explore this frontier offshore,” and “strengthen Qatar’s presence in Africa.” It should be noted that at the time of the Conference, Somalia did not have a law governing oil and gas exploration of the area. About three months after the Conference (on May 20, 2019), a new petroleum law was passed. That same day, two Somali officials were denied entry into Kenya on grounds that they lacked visas.

The other important dynamic relates to Somalia’s refugee population in Kenya. Previously, Dadaab refugee camp, in north-eastern Kenya, was referred to simply as the ‘largest refugee camp in the world.’ This reference has recently changed to ‘largest Somali refugee camp in the world.’ This could be in keeping with the development of Bidi Bidi (in Asia) as the world’s largest refugee camp, or a reflection of the foregrounding of a community and a humanitarian course that have been securitized in the years since Somalia-Kenya maritime boundary issue was filed at the Court.

Following the roundtable discussions, the HORN Institute also organized an Experts’ Symposium to increase understanding of the dynamics of contested maritime boundaries, and of judicial pronouncements on the same further, and seek tenable solutions to the ongoing Kenya-Somalia maritime dispute. The Symposium was held on July 25-26, 2019, in Nairobi (Kenya).

# Symposium Objectives and Themes

In his opening remarks, the HORN Institute Chairman, **Mustafa Y. Ali, Ph.D.**, said the main objectives of the Symposium, which prioritized experts' participation, were to:

- facilitate the exchange of knowledge on maritime challenges
- provide safe spaces for local and international scholars to explore options to the maritime dispute
- seek sustainable, issue-specific policy actions



*Dr. Mustafa Y. Ali, Chairman, the HORN Institute, giving the opening speech on Day One of the Symposium.*

The discussions centered around the following topics:

- Importance of the maritime domain
- Geo-strategic significance of seas to Kenya, the Horn of Africa region
- Rethinking approaches to naval matters Kenya, and the Horn of Africa region
- Conflict v. dispute, and conflict resolution
- Principle of effective occupation
- The other side of the coin
- Diplomacy
- Foreign relations

**“When diplomats fail, politicians take over. When politicians fail, diplomats try again. When they fail, soldiers take over. And when soldiers fail, terrorists take over.” – Dr. Mustafa Y. Ali**

“Historically, Africa’s security thinking has relegated the maritime domain below the terrestrial one.” – **Prof. Macharia Munene**

## Importance of the Maritime Domain

The marine environment has supported lives and livelihoods for millennia. It is expected that this environment will become a key lifeline, supporting future generations and the global economy, increasing its significance to human, national, environmental, and economic securities. This also underscores the importance of securing the maritime domain. **Prof. Macharia Munene, Ph.D.**, who is also the Chair of the HORN Institute Maritime Study Group, provided a theoretical discussion on *Centering the Sea in Africa*. He observed that, historically, naval power and capability contributed to the rise of empires and dynasties. He gave the examples of the establishment and/or expansion of ancient empires in Rome, Egypt, and by Great Britain,

and President Theodore Roosevelt’s expansion of the US navy. Russia annexed Crimea and exerted its influence in the Crimea Sea because it has the capacity and capability to do so. China’s power, he added, declined until the state started looking outward - China now has the third largest navy in the world.

**Prof. Munene** also noted that the colonial subjugation of Africans and Indians was largely a result of their neglect of the sea. It was observed that the African perspective on land and maritime boundaries proceeds from the 1964 Cairo Summit, which resolved to preserve colonial boundaries at the independence of African states. He faulted the tendency of African states to focus their efforts on securing the land at the expense of the sea.



*Prof. Macharia Munene, Ph.D., Professor of History and International Relations at United States International University - Africa, and Chairman, HORN Institute Maritime Study Group, giving a historical framework of maritime economy.*



*Prof. Maurice Owuor, Ph.D., Professor of International Law at Catholic University of Eastern Africa, making a presentation on the legal dynamics of the Kenya-Somalia case.*

**Prof. Maurice Ajwang' Owuor, Ph.D.**, speaking on the implications of the Kenya-Somalia maritime dispute on the security and stability of the Horn of Africa, referred to Africa's tendency to neglect the seas' importance, resources, and challenges, as 'sea blindness.'

Historically, **Prof. Munene** said, Africa's security thinking has relegated the maritime domain below the terrestrial one. Africa's neglect of the sea, he said, can be attributed to overreliance on colonialists and the US (especially on aid), and the adoption of Euro-centric military doctrines rather than finding or using African ones. These mentalities, he said, need to change as the importance of the sea is increasing. He called for the identification and use of African thinkers and strategists, as well as strategies, to explore and secure the sea.

**Prof. Stig Jarle Hansen, Ph.D.**, while discussing maritime disputes around the world, observed that only two Indian Ocean countries in Africa, Kenya, and South Africa, have *de facto* maritime control over their maritime territories. Somalia, he said, has no navy whatsoever.

**Prof. Makumi Mwagiru, Ph.D.**, in his discussion of *Selected Case Studies of Maritime Border Disputes in Africa* observed that the sea around the Horn of Africa region is currently being partitioned in a manner similar to the way the continent was partitioned at the 1884 Berlin Conference. He noted that the reasons for the earlier partition have not changed, but more locals are now collaborating with those partitioning the maritime territories, compared to 1884. **Prof. Mwagiru** argued that, in the past, seas around the continent were not associated with security, and

"Maritime conflicts happening now threaten the security and survival of African states concerned, leaving [some] African states at the frontiers of war." – **Prof. Makumi Mwagiru**



*Prof. Stig Jarle Hansen, Ph.D., Professor of Religion and Politics at Norwegian University of Life Sciences (Norway) explaining the nature of maritime disputes around the world.*

Africa understood mostly land security. African states are increasingly realizing the usefulness of the maritime domain, and that what happens in

the sea can affect what happens on land. He used the Kenya-Somalia case to illustrate the land-sea connection, and observed that maritime conflicts



*Prof. Makumi Mwagiru, Ph.D., Professor of International Conflict at Strathmore University (Kenya) making a presentation on maritime border disputes in Africa.*

“...the State that will command the sea will also command trade, and, consequently, the world.” – **Prof. fred Jonyo**

happening now threaten the security and survival of African states concerned, leaving African states at the frontiers of war.

Coupled with the dependency syndrome in Africa's external development and security relations, this thinking has made African governments vulnerable to foreign influence that often contribute to the development and persistence of intractable conflicts. Kenya, **Prof. Munene** also said, is currently facing Somali irredentism of the sea, which is backed by foreign powers (UK, Turkey, UAE, Qatar, Norway) that use the Somalia government as a proxy. He cited trust issues inherent to frameworks like the Yaoundé code of conduct (framework for repressing piracy, armed robbery of ships, and illicit maritime activity in west and central Africa), and of dialogue and coordination initiatives, saying 'partnering' with foreign powers is euphemism for aid. Partners in

the Indian Ocean, he added, perceive Africans as 'junior partners.' He urged African states to take the cue of the US that is exploring sea-basing navies, and pay attention to trends such as efforts to create land in the sea, and establish naval operations (sea-based security).

Responding to **Prof. Wanjala Nasongo's Ph.D., *The Sea and Global Security: State of the World and Horn of Africa***, **Prof. Fred Jonyo, Ph.D.**, echoed **Prof. Munene's** sentiments when **Prof. Jonyo** observed that, as capital exhausts traditional investment areas and looks to the sea to provide alternative avenues, the state that will command the sea will also commands trade, and, consequently, the world. China, he said, is redrawing the capital map by building all its ports for dual utility: naval power, and trade. Much of China's Silk Road, he said, passes over the sea.



*Prof. Fred Jonyo, Ph.D., Professor of Political Science, and Chairman, Department of Political Science and Public Administration at the University of Nairobi (Kenya) responding to a presentation on maritime disputes and sovereignty.*





*Nancy Karigithu, C.B.S., Principal Secretary, Shipping and Maritime Affairs (Kenya) explaining the importance of maritime economy to Kenya during her opening speech on Day One.*

While delivering the Symposium's opening speech, Principal Secretary (PS) Shipping and Maritime Affairs, **Nancy Karigithu, C.B.S.**, termed oceans and seas as the cornerstone of humanity. 80 per cent of global trade, she added, is facilitated by these waters, as is transport. She said transport via seas and oceans is the most reliable, efficient, and a clean mode of transport. This, she noted, also highlights the importance of managing choke points efficiently as choke points (areas of congestion and blockage) are one of the

most critical aspects of maritime trade.

The PS also presented the protection of the maritime domain as a responsibility that is both civilian and military in nature. Echoing the thoughts of **Prof. Munene, Karigithu** noted that most African governments do not prioritize maritime security, and only few have robust maritime security policies. This makes the states vulnerable to threats against their sovereignty as demonstrated by the Mumbai attacks, she argued.

### Fact Box 1: Mumbai attack

**When:** November 26-29, 2008

**Who:** 10 Pakistani, Lashkar-e-Tayyiba terrorists, armed with automatic weapons and grenades

**Number of casualties:** 164 people

**Summary of events:** The 10 attackers travelled by boat from Karachi (Pakistan) to Mumbai (India). *En route*, they hijacked a fishing trawler, and killed its four-member crew. Once they docked (near the Gateway of India monument), they hijacked cars, and stormed buildings in Mumbai (India). All the attackers were killed (nine during attack, one was executed four years later).

She also highlighted other threats that plague the maritime sector including unregistered ships and vessels, facilitation of organized, trans-national crimes, fishing (illegal, unreported, and/or unregulated), illegal dumping of toxic waste, and piracy. The detection and interdiction of the above often create a ripple effect that results in, among other things, hikes in insurance premiums, crew wages, and freight rates. She noted that the lack of complete transparency in the registration of ships and vessels in the Indian Ocean area can be remedied through technology, and regional collaboration (information sharing).

Additionally, **Karigithu** said that the marine environment provides habitats for living organisms, while its carbon sequestration (process of extracting carbon dioxide from the atmosphere, naturally or artificially, and storing it as a solid or liquid) protects it. She highlighted the use of global instruments that govern the access and use of the shared resources (oceans and seas), such as the United Nations Convention on the Laws of the Sea (UNCLOS). UNCLOS, she noted, represents a compromise

between the global 'North' and 'South' in terms of access to the sea and its resources. It also covers delineation of sea zones (see *Figure 2*), including the territorial sea, contiguous zone, the Exclusive Economic Zone (EEZ), which covers 35 per cent of all living resources at present), and the continental shelf (allows for development and exploitation). She highlighted the use of UNCLOS to resolve maritime disputes between the two or more parties.

**Prof. Jonyo**, speaking on *Maritime Disputes around the World: Sovereignty and Stability*, also built on the ideas that marine environments support lives and livelihoods, and that there is need to protect these environments. Citing the reliance of countries surrounding the Indian Ocean on tourism, he said states go to great lengths to defend their territories, and to counter sources of instability such as piracy which threaten tourism, and can damage economies, their varied capacities to utilize the sea notwithstanding. Stabilizing the sea, and governing the waters allows for interests to thrive, he said.

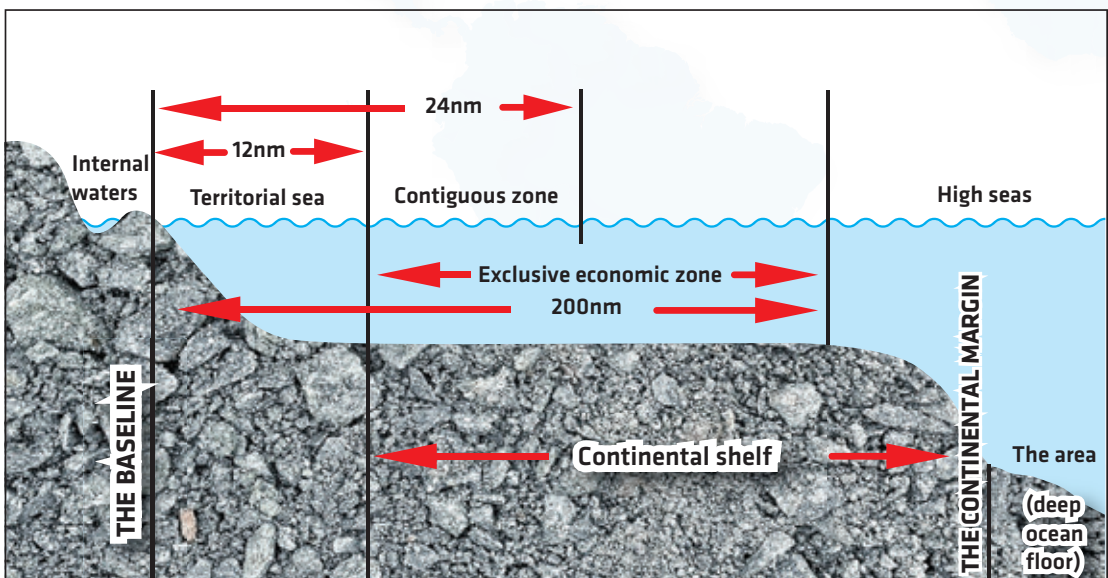


Figure 2: Maritime zones

“The consequences of piracy can be economic, political, or environmental. The estimates of the economic cost of piracy range from USD 1 to USD 16 billion per year.” – Prof. Wanjala Nasong’o



*Prof. Wanjala S. Nasong'o, Professor of International Studies, and Chair of the Department of International Studies at Rhodes College, Memphis, Tennessee (USA), making a presentation on the Sea and Global Security.*

**Prof. Wanjala Nasong’o Ph.D.**, introduced the idea of the seas (and oceans) as common goods. While discussing ‘*The Sea and Global Security: State of the World and Horn of Africa*,’ **Prof. Nasong’o** said the seas and oceans constitute the largest expanse of commons’ space. These spaces are emblematic of the ‘tragedy of the commons,’ which manifests itself in the following four threats: piracy, terrorism, toxic waste dumping, and contested maritime boundaries.

### 1. Piracy

**Prof. Nasong’o** cited three types of piracy: low-level armed robbery, medium level armed robbery, major criminal hijacking. There were 2,463 piracy cases between 2000 and 2006. The period 2009 to 2011 marked an explosion of

piracy cases, with around 400 cases occurring a year. In 2017, there were only 180 attacks. 50 per cent of pirate attacks go unreported. Ship owners are reluctant to alert authorities because of three reasons. First, investigations and delays result in costs that owners must bear. Secondly, they fear that reporting attacks will raise maritime insurance prices. Lastly, it is not cost-efficient to do so, as the cost of reporting piracy is often higher than that of neglecting to do so.

He listed the following eight factors that he said contribute to the rise of piracy:

- i) There is massive increase in maritime commercial traffic.
- ii) Increased traffic through choke points, such as Strait of Hormuz, Bab-el-Mandeb

- Strait, and Suez Canal that forces ships to slow down.
- iii) The proliferation of small weapons and light arms (SALW).
  - iv) 9/11, which generated pressure on governments to invest in land-based security initiatives instead of maritime security.
  - v) Corruption and the dysfunction of national criminal justice systems.
  - vi) The Asian financial crisis that forced more people into piracy, especially in Asia, mostly due to job losses and unemployment.
  - vii) Deficiency in the coastal and port side security and a functioning maritime security apparatus. This is especially true in Nigeria, the Horn of Africa and Bangladesh.
  - viii) Cost-efficiency and automation which have forced and allowed ship owners to trim down their crews.

The consequences of piracy can be economic, political, or environmental. The estimates of the economic cost of piracy range from USD 1 to USD 16 billion per year. Piracy can also undermine regime legitimacy, and encourage corruption. Attacks related to piracy have the potential to trigger major environmental disasters such as a major crash between oil tankers. Countries in East Africa have adopted legislation to deal with transnational crime and piracy. Fishing legislations, most of which are colonial era relics, are being revamped, and other legislations updated to suit the blue economy.

## 2. Terrorism

Maritime attacks offer terrorists effective means of destabilizing the economy of a state. Furthermore, the expansive maritime trading environment offers terrorists a viable means to transfer weapons and personnel all over the globe.



*Bashir Shettima, Former Deputy Director, National Boundary Commission (Nigeria), reacts to a presentation during one of the plenary sessions on Day One.*

“Disastrous effects of disposing toxic waste in the sea can be illustrated by the examples of Italy (Naples, and Campania) where 60 per cent of the babies were born with defects as a direct consequence of waste dumping.” – Prof. Wanjala Nasong’o

### 3. Toxic waste disposal

States have used the maritime environment as a dumping site. Before 1973, for example, the US dumped nuclear waste in the sea. In 1973, President Nixon - out of concern for the environment, stopped the practice. Disastrous effects of disposing toxic waste in the sea can be illustrated by the examples of Italy (Naples, and Campania) where 60 per cent of the babies were born with defects as a direct consequence of waste dumping.

### 4. Contested maritime boundaries

As some sea beds and ocean floors are estimated to hold huge amounts of natural resources, these waters have started to matter more to states. Such territories are often located in contested areas, which is why maritime sovereignty disputes have become more visible in the recent past. In many cases, maritime disputes also reflect symbolic politics.

In sum, maritime issues, which have mostly been peripheral, are currently taking center stage, **Prof. Nasong’o** said.

## Geo-Strategic Significance of the Seas to Kenya and the Region



*Singo Mwachofi, Lecturer, University of Nairobi (Kenya), and Symposium Coordinator, making a presentation on how external interests are fueling instability in the Horn of Africa.*

Making reference to the recent HORN Institute publication, *‘Flirting with Hyenas: How External Interests are Fuelling Instability in the Horn of Africa (2019),’* **Singo Mwachofi’s** presentation centered on *The Sub-regional Context: External Interests and Instability in the Horn*. Singo noted the strategic location of the Horn of Africa, saying 10 per cent of global trade passes through the Red Sea. Countries in the region are endowed with resources, which are likely to draw attention, and with it, interference from elsewhere. He also said that many of the countries in the region have been poorly governed. He added that every state wants power, and suggested that how states pass that power is interesting, and has ramifications.

He also observed that the Horn of Africa, which is a potential sphere of influence, exhibits the destabilizing impact of foreign powers that is, in part, driven by commercial interests in the

region's resources, and the region's geostrategic significance to maritime security. Some of the internal problems in Somalia, Sudan, and the Democratic Republic of Congo (DRC) are a result of struggles between powers in the Middle East, and Asia, or of the presence of some Western countries. Each of these powers have allies in Somalia, creating tensions there. The situation is similar in Sudan where some support the Transitional Military Council (TMC), while others support civilians. In DRC, the interests of the Chinese have exacerbated tensions between different actors. Major economic deals guarantee that the Congolese will not benefit from their resources. These situations are summarized as follows:

- **Saudi Arabia** is seeking to contain Iran, Qatar, and Turkey using food production, grants or aid, and by establishing a military base in Djibouti.
- **UAE's** presence in Eritrea and Somaliland seeks to isolate Iran and Qatar, using grants and aid.
- **Qatar** is pursuing its economic (financial diversification) and security interests in Sudan, Somalia and Ethiopia.
- **Kuwait's** presence in Sudan is expressed in form of food security, and direct bilateral and policy instruments.
- The **US, France, China, Italy, UK**, among others, have military bases in Djibouti.
- **Norway** is interested in Somalia's offshore.



*Hassan Khannenje, Ph.D., Director, the HORN Institute, and Member, the HORN Institute Maritime Study Group, moderating Session One on Day One.*

- **Turkey** and **Japan** are interested in trade and investment opportunities, and military cooperation with the Federal State.

## Conflict v. Dispute, and Conflict Resolution

**Prof. Makumi Mwagiru, Ph.D.**, in his discussion of selected *Case Studies of Maritime Border Disputes in Africa*, illustrated the land-sea connection using the Kenya-Somalia case, but cautioned against approaching maritime contestations as disputes. Maritime contestations, he argued, are not disputes. On the contrary, these

“... the Horn of Africa, which is a potential sphere of influence, exhibits the destabilizing impact of foreign powers that is, in part, driven by commercial interests in the region's resources, and the region's geostrategic significance to maritime security.” – **Singo Mwachofi**

are conflicts in the prior stages of evolution. He said the Kenya-Somalia conflict's progression in the conflict cycle, which is complicated by: notions of territory and sovereignty, the natural resource richness in the maritime domain, and foreign interests and interference.

Speaking on the *Maritime Disputes around the World: Policy Options and Implications*, **Prof. Stig Jarle Hansen, Ph.D.**, provided some context to the stages of development of maritime border conflicts. The field (maritime domain), he said, has changed much over the years, in the following phases:

- First, there was the period in which the consolidation of the modern state was contrasted to universalist claims (The Pope's determination and gift of half the world to Spain).
- Secondly, power was used to determine borders, by shooting a canon, for example (the state which could shoot a canon farther

was more powerful compared to others. 'Sovereignty gaps' developed at this stage.

- Lastly, the new international regime emerged.

**Prof. Mwagiru** said states have created legal mechanisms for the management of maritime disputes. The UN mechanism is structured around UNCLOS. But, as **Prof. Mwagiru** noted, the US is not a signatory to the UNCLOS. This is a challenge since the available instrument for dispute resolution (UNCLOS) have not been acceded to by all UN member states. So Kenya, **Prof. Munene** argued, is at the Court (International Court of Justice, ICJ) out of respect but not obligation, and the legitimacy of international law is also in question.

In his keynote address, **Lt-Gen (Rtd) Humphrey Njoroge** noted that conflicts tend to be over access to strategic resources, such as minerals, and water. Many countries have not agreed on how challenges of border delimitation will be resolved. Conflict can be stopped in the region if strong



*Lt. Gen. (Rtd) Humphrey Njoroge, Former Commandant, National Defence College (Kenya), reacting to Prof. Mwagiru's presentation*

## Maritime Border Challenges and Implications on Security: AN EXPERTS SYMPOSIUM



*H.E. Erastus J. Mwencha, E.G.H., M.B.S., Chairman, African Capacity Building Foundation, and Former Deputy Chairperson, African Union Commission, explicating the role of African Union in maritime border dispute management.*

democracies are established. He mentioned external interference as a possible cause of war, but added that super powers will continue to influence the world. There should be a way that Kenya could exit ICJ, and come to regional institutions like AU and IGAD. He highlighted: a peaceful resolution of the dispute, coexistence, maintenance of national interest, and preservation of the integrity of territory and borders as Kenya's preferred outcomes in the dispute.

Africa's limited capacity to address disputes that arise in the maritime domain were also highlighted by **H.E. Erastus Mwencha, E.G.S., M.B.S.** Speaking on the *Role of the African Union in Maritime Border Dispute Management*,

**Amb. Mwencha** summed the potential and significance of maritime environment in two words: resources, and access. The African Union (AU), he said, is a subsidiary that acts in the spirit of complementarity with the UN, in keeping with the UN Charter. It (AU) plays the norm-setting role of establishing principles, policies, rules, and procedures for managing African maritime borders. It also provides an institutional capacity or framework, and coordinates the activities of regional economic communities (RECs) as regards dispute resolution in Africa, as illustrated in *Figure 3*. He cited the AU Border Programme (AUBP) as the continental framework for border dispute resolution.

"A winner takes all approach to dispute they can become unacceptable for the loser, and that involving citizens in such disputes [like the Kenya-Somalia one] raises national stakes, creating room for unimaginable outcomes." – **H.E. Erastus Mwencha**



“...the dynamics of notions of territory and sovereignty, natural resource richness of the maritime domain, and foreign interests and interferences that characterize the Kenya-Somalia case are turning good neighbours into bad ones.” – **Prof. Makumi Mwangiri**

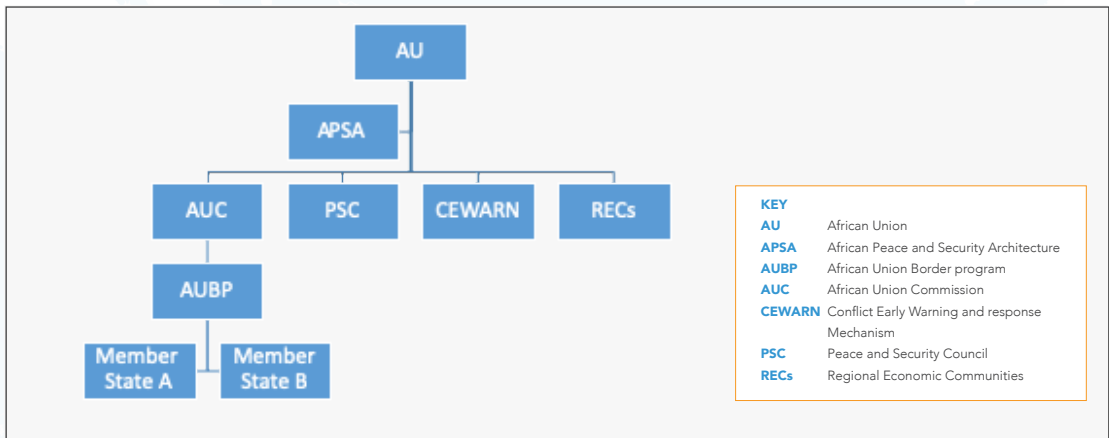


Figure 3: AU border disputes resolution framework

He noted that the AU does not have sufficient capacity to implement a ruling such as the one that the Court is expected to deliver in September 2019. **Amb. Mwencha** thus called for efforts to be placed in resolving issues such as the Kenya-Somalia dispute within the continent, exhausting all possible peaceful dispute resolution mechanisms available. He noted that the principle of negotiated border dispute settlement is enshrined in AU Resolution CM/Res.1069(XLIV) on peace and security in Africa that was adopted in Addis Ababa (Ethiopia), in 1986. He warned that a winner-takes-all approach to the dispute can become unacceptable for the loser, and that involving citizens in such disputes raises national stakes, creating room for unimaginable outcomes.

**Lt-Gen (Rtd) Njoroge** suggested the use of diplomacy and regional development to resolve conflicts in the region. He called for the harnessing of the diplomatic, economic, and military components of the Grand National

Strategy to manage and resolve the dispute with Somalia.

It emerged, in the course of the Symposium, that there is an ‘African’ and an ‘unAfrican’ way to resolve conflicts. ICJ in this sense is ‘unAfrica,’ while applying Pan-African ideals of good neighbourliness is African. **Prof. Mwangiri** argued that the dynamics of notions of territory and sovereignty, natural resource richness of the maritime domain, and foreign interests and interferences that characterize the Kenya-Somalia case are turning good neighbours into bad ones. Furthermore, the importance of the choice of method of conflict resolution was also emphasized. As such, political issues should not be resolved using legal means.

**Prof. Hansen** also spoke of the short history of maritime expansion. He noted that there have been tensions between the principles of equidistance, median line, baseline, and the

application of 'special circumstances' since the 1930s, and highlighted some cases: Gulf of Maine (1984); St Pierre and Miquelon (1992); El Salvador, Honduras, and Nicaragua (1992), Greenland – Jan Mayn (1992), and Greyzone (1978-2010).

One of the results of these tensions, as **Prof. Nasong'o** observed, is areas of claims and counter-claims such as the ones in the China Sea (see Figure 4).

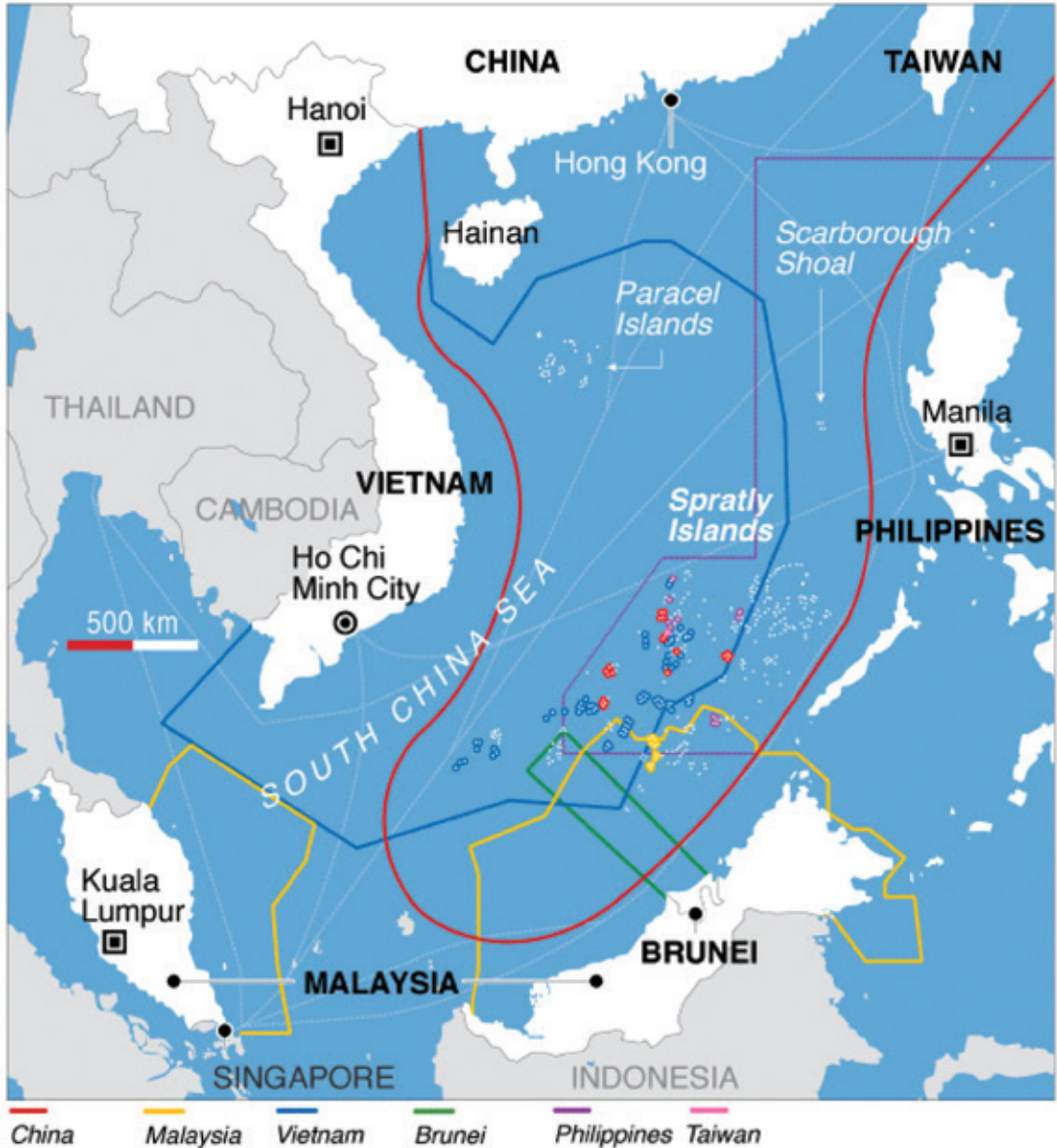


Figure 4: Areas of claims and counter-claims in the South China Sea. (Source: Voice of America)

## Fact Box 2: South China Sea

\*China claims large portions of the South China Sea, which is also counter-claimed by states neighboring the Sea

\*China has turned what was once a maritime dispute into a land dispute by building artificial islands in the Sea, and now claims large portions it.

\*There have been calls to limit China's access to the islands, but these have not yet been heeded.

\*An estimated USD 5 trillion in trade travels through it.

Source: *Global Risk Insights*

In 1982, **Prof. Hansen** said, sea borders were clarified (UNCLOS, 1982). Countries got more territory, and although many of them have experienced their largest expansion in this regard, this (expansion) seldom led to conflict. He also compared land-based issues to maritime ones,

and concluded that maritime issues often appear to be 'innocent' but are often deadlier. He listed the following tools to settle maritime disputes:

- Bilateral diplomacy (often simplified as modern equidistance)
- Arbitral tribunal
- Multilateral diplomacy
- International law
- Side payments

Law, participants were reminded, is a product of power relationships. **Prof. Hansen** noted that countries in the region lack the means to enforce rules at sea. He also warned that the non-resolution of maritime contestations comprehensively could leave room for other actors to exploit areas of dispute. Entrepreneurs emerge where clarity between two countries is lacking, he said, as is evident in parts of Africa. Somalia, he said, lost claim to its EEZ when its navy collapsed in 1984. Different actors began taking advantage of the situation to promote their own interests in the territorial waters of Somalia that Somalia could no longer control. Kenya has a stronger navy, compared to Somalia, but this, he said, is also the tragedy of Kenya.



*Prof. Stig Jarle Hansen, Ph.D., Professor of Religion and Politics, at Norwegian University of Life Sciences (Norway) responding to a question after his presentation.*

While speaking on *Maritime Challenges: Geo-Strategic and Security Implications*, **James Shikwati** discussed the dilemma of client states (states in which other states can interfere), and likened Kenya to a client state. Kenya, he said, was not the only such state; many exist the world over. He listed four factors that client states benefit from: acceptance, economic mindset, knowledge sharing, and naval capability. Kenya has to accept her status as a client state. If Kenya accepts this tag, she will pay attention to who the master [state] is, and what kind of game the master state plays. If Kenya chooses denial, the master will win. Client states seek rent from established economies, which is why it is difficult for Kenya to have an open mind in a situation like the one it finds itself in with Somalia. There is also the dilemma of wanting to share knowledge, on oil discoveries, for example. This he warned, might be troublesome. Lastly, Kenya lacks sufficient ship building capacity, which limits her heavy involvement in the seas. As was suggested

in 2012, he reiterated, Kenya should come up with a ship graveyard. The shipyard will become a place where Kenyans can learn how to deconstruct broken down ships, and build new ones said **Shikwati**.

**Prof. Peter Kagwanja** faulted Kenya's decision to go the court route a second time in 2014. In 2013, he recalled, Kenya had another case before the International Criminal Court (ICC). In retrospect, Kenya should not have gone to the ICJ, and instead made a case that Kenya does not believe in the ICJ, and that Somalia's equidistance argument in the Court does not apply to the region. If Kenya had insisted on the parallel principle, and not negotiated with Tanzania, Pemba (island in the Indian Ocean) would be part of Kenya's territory. He said Kenya negotiated its maritime border with Tanzania, and therefore both states are at peace with each other on that matter. The boundary between Tanzania and Mozambique runs parallel, and the two states are currently talking with the



*Prof. Peter Kagwanja, Ph.D., Chief Executive Officer, Africa Policy Institute, making a presentation on Kenya-Somalia dispute and implications on security in the Horn of Africa.*



*James Shikwati, Founder, Inter Regional Economic Network (left) and Abdiwahab Sheikh, Ph.D., Political Analyst, South Link Consultants (right) during their respective presentations on Day One.*

Comoros on how far that border is supposed to reach. Finally, Mozambique and South Africa have also negotiated their boundaries, he said.

According to **Prof. Owour**, society and law coexist with each other, as human relations are regulated by various norms. The Kenya-Somalia dispute is also regulated by law. He said the international law of the sea is a relatively young branch of law whose frameworks on the delimitation of the sea, for example, are not adequately developed. He gave the example of EEZs which became part of international customary law in 1983 as a recent consideration. It is therefore not surprising that maritime disputes remain largely unresolved, at least through law, he said.

He said both in-court (judicial) and out-of-court (non-judicial) dispute mechanisms are viable options, adding that alternative dispute resolution mechanisms are beginning to gain a higher ground. In Kenya, he said, alternative dispute mechanisms are now part of the law following the adoption of

the 2010 Constitution. Judges and magistrates are now curious about whether disputants have exhausted all available non-judicial mechanisms before going to court, signaling a shift. Kenya, he said, needs to operate with its existing legal frameworks.

Treaties are agreements between states, he noted. The Memorandum of Understanding (MoU) between Kenya and Somalia is an agreement that makes reference to international law. United Nations Convention on the Law of the Sea (UNCLOS), for example, emphasizes the role of agreements. This means that the two states had an agreement with each other, and suggests that disputes should be resolved within the framework of such agreements. Kenya could now insist that more time should be allocated to this dispute so that the two states can exhaust their engagement within the framework of this agreement or within the framework of any other agreement. Kenya, he suggested, should not place herself in a position that will make her appear to be in contempt of the Court. There is room for autonomy for parties to

any (legal) dispute, he added. The parties have the right to withdraw their cases. If Somalia does not wish to withdraw the case, Kenya can adjourn it, and, in the interim, try to resolve the dispute.

**Prof. Owour** also made reference to the principles of maritime boundary delimitation. Proportionality, he said, will take into account the length of the coastline. If the Court applies the equidistance principle, Kenya could insist on equidistance with Tanzania too. Other issues, he cautioned, could arise from this one ruling (the Kenya v. Somalia case). In the Peru v. Chile case, the Court did not adopt any of the two positions. The line instead went along a parallel line, before going diagonal. The two states found the middle ground, a win-win situation.

**Njoki Mboce**, who made a presentation on the *Legal Implications of Maritime Disputes around the World*, observed that disputes arise from the delimitation methods used. Half of the 512 potential maritime boundaries still have to be decided on. UNCLOS provides different methods of delimitation, and the methods used by both Somalia and Kenya's are provided by UNCLOS, she said. This means that the document (UNCLOS) is inconclusive, and gives an underdetermined structure. It also suggests that it is better to find a negotiated settlement than to go through courts. She said that there will be a win-win situation if the two states adhere to the law strictly, as happened in the case between India and Bangladesh.

Whatever happens at the Court, she noted, ICJ cannot enforce its decision. Thus, alternative dispute resolution will be required. International law is a matter of interests. States have different

rights and obligations in different maritime zones. Additionally, she said, coastal ones have absolute jurisdiction over territorial sea in a manner similar to land. The contiguous zone is the enforcement zone, she noted. States have different rights and obligations in this zone. The EEZ that goes to 200nm gives the port state the right to explore resources. Most disputes, she added, involve the EEZ.

Echoing **Prof. Owour** argument that laws govern society, **Mboce** observed that international law rests on state consent, and on states' shared acceptance of the same. She emphasized the importance of inter-states relations in the aftermath of an ICJ ruling, and made reference to compromising in international relations, saying that Kenya and Somalia need to maintain good relations with each other. It is better to try and get a 60-40 arrangement than to go to a tribunal, she said. She also spoke of the interference of foreign powers, and called on the two states to tackle the matter together.

Responding to the main presentation within the thematic area of '*The Sea and Global Security: State of the World and Horn of Africa*', **Rachel Eshiwani**, noted that the law usually follows the event. Disputes are likely to arise as a result of the varied application of the principle of customary law and/or the general principles of law. Maritime disputes are usually localized. Main governing principles of maritime issues have been provided by UNCLOS, the international charter of the UN, and customary law. There is a lot of precedent on how countries in the South China Sea have dealt with disputes. The most current methods of settling disputes are through the UN charter

"Maritime decisions are often delivered in a manner that is final, and aggressive. It is often a winner-takes-all situation, which is not as good as reaching a negotiated settlement." – **Rachel Eshiwani**



*A section of the audience follow the proceedings at the symposium on Day One*

(Article 33), UNCLOS (Article 287), and so on. Additionally, there are negotiations, mediations, conciliation (Article 284), and arbitration (through ICJ and international tribunal for the law of the Sea for example). Maritime decisions are often delivered in a manner that is final, and aggressive. It is often a winner-takes-all-situation,' which is not as good as reaching a negotiated settlement.

Adding his voice to *Case Studies of Maritime Border Disputes in Africa*, **Bashir Shettima** highlighted the case of *Nigeria v. Cameroon*. He noted that the boundary between Nigeria and Cameroon was defined using the following instruments: the Anglo-German Agreement of 1913, and the Anglo-French declaration of 1931. The boundary was not demarcated by either Agreement. The entire population around Lake Chad depends on the Lake for survival, he said. During the exercise to demarcate boundaries in the lake, neighbouring countries experienced some problems. After the Nigerian civil war, they signed three agreements. Yaoundé I, Yaoundé II, and the demarcation of 1974. There were some

border skirmishes in the maritime area in 1993. In 1994, Cameroon filed a case at ICJ to define the entire Nigeria-Cameroon boundary from the Lake Chad to the Sea.

The case had the following components: Lake Chad (land boundary), Bakassi Peninsula (maritime boundary), and the payment of reparation, and the Court ruled in 2002. Prior to the judgement however, the UN Secretary General (SG) conducted meetings to ease tensions. He made both parties agree to whatever the Court would rule. The SG called on the two countries to renounce the use of force in their bilateral relations. Both countries agreed and established a joint commission. This commission created sub-commissions on demarcation of maritime, land, and Lake Chad boundaries. The Court granted the Bakassi Peninsula to Cameroon. The islands in Lake Chad also went to Cameroon. The Court also gave a boundary line for the maritime sector. The major issue was that the Court upheld earlier agreements made by the two parties. Signed bilateral agreements are binding on the parties.

The Court then established the maritime boundary using coordinates on equidistance principle, from where the boundary went straight down which was based on the coordinates and the copies of agreements deposited with the UN.

**Justice Srem-Sai** highlighted the Ghana v. Ivory Coast (Cote d'Ivoire) dispute. Before the dispute, Ghana had already allocated oil fields. Ivory Coast was claiming a part of this terrain. The dispute was based on the angle-bisector demarcation formula (Ivory Coast) against equidistance formula (Ghana). The issue here, he said, is not really about the legality of the same, as law is not predictable, there is the question of (international) interests. Other means to resolve disputes should be used. The maritime boundary was determined in favour of Ghana, but that is not really interesting to note, compared to the conflict that occurred during the judgement procedure. Some factors to consider in the conflict were territorial sovereignty and the seven aspects (dimensions) of human security. He cited an African proverb - "When brothers fight to death, a stranger inherits their property," adding that Ghana framed the case as if Ivory Coast was taking something from Ghana. Constant public engagement between the two



*Justice Srem-Sai, Legal Expert and Lecturer, Ghana Institute of Management and Public Administration [GIMP] (Ghana), making a presentation on the Ghana v. Cote d'Ivoire maritime border dispute.*

countries, and between the citizenry and leaders is both necessary and very important as politicians usually follow the citizens' demand. This requires open-mindedness and good leadership, he said. There was a deliberate intent by the two countries to make sure that the dispute did not escalate. It was decided that peace should be maintained at all costs.

### Fact Box 3: Seven dimensions of human security

1. Economic 2. Health 3. Personal 4. Political 5. Food 6. Environmental 7. Community

Source UNDP, 1994

"When brothers fight to death, a stranger inherits their property – African proverb." – Justice Srem-Sai



**Kemoli Sagala Ph.D.** highlighted the public hearings at ICJ on September 9 to 13, 2019, saying the Court may not be the best avenue to resolve some of Africa's problems as great powers have often neglected the ICJ or ignored its rulings. Clearly, 90 per cent of rulings from ICJ judges are biased towards their countries of appointment. He gave the example of the Court's current President who has noted that third parties can be involved in the dispute. He talked of the MoU in the Kenya-Somalia case, which was drafted by Norwegians, and wondered about the tendency of local actors to think they (locals) cannot draft such documents.

Kenya needs to defend her national interest. Kenya, which does not have to be the good neighbour all the time, should strengthen her military alliances. Kenya should also reject the interference of foreign powers and oil companies, and the decision of the ICJ [if it works against Kenya]. He also recalled Kenya's Foreign Affairs Cabinet Secretary's statement that that Kenya "will not cede an inch of territory," and said that as

a last resort, Kenya has to explore use of military force. Kenya's survival is dependent upon her unhindered access to the Indian Ocean waters. The ICJ may not be the suitable vehicle to resolve these kinds of disputes between countries. There should be other forums that can be explored.

**Mustafa Y. Ali, Ph. D.**, in his closing remarks, called for a comprehensive conclusion to the Kenya-Somalia dispute. He noted the potential lifeline that the unresolved or poorly resolved dispute could hand violent extremist, cautioning that 'when diplomats fail, politicians take over. When they fail, they take it back to diplomats. When diplomats fail for a second time, the problem goes back to politicians. When they fail again, soldiers take over. And when they fail, terrorists take over.'

In his closing speech, **Titus Ibui, E.G.H.** Lamu Port-South Sudan-Ethiopia-Transport (LAPSSET) Corridor project Chairman, said the maritime issue could affect the multi-country, infrastructure



*Titus Ibui, E.G.H., Chairman, Lamu Port, South Sudan, Ethiopia Transport Corridor [LAPSSET] (Kenya), explaining the impact of the dispute on the LAPSSET Project. He also gave the closing speech on Day Two of the Symposium.*

“Somalis are a strong people who have been hardened for thousands of years, and who are driven by the force of life.” – Titus Ibui

development LAPPSET Corridor Project. Through this Project, which was launched in 2012, a port would be built in Lamu (Kenya) to serve South Sudan and Ethiopia, and open up the Northern Frontier District. Roads, power lines, railway lines,

and fuel transportation pipelines, among others, would be developed. Unless measures are put in place, the Court’s determination the Kenya-Somalia dispute will likely affect the LAPPSET project negatively, he said.

## Principle of ‘Effective Occupation’

According to **Prof. Kagwanja**, Kenya, because she has effectively occupied the now-disputed area for decades, could pursue the principle of effective occupation. After 1984, when Somalia’s navy collapsed, Somalia lost the capability to enforce the rule of law in its EEZ. That said, the escalatory actions by Kenya could be detrimental to Kenya’s larger interests, national security, and regional stability, hence diplomatic or peaceful settlement mechanisms such as negotiated agreement are the most preferable options.

### Fact Box 4: Effective occupation

- \*The principle of effective occupation is used to determine or claim sovereignty over a disputed territory.
- \*Disputing states stake their claim to sovereignty on their presence (national population, national security personnel, national structures, and so forth), influence, exercise of authority, and development initiatives in the disputed territory.
- \*Politically, it is used to assert a state’s claim to sovereignty over a territory.
- \*Treaties and maps confirming established sovereignty are also cited.

Source: *The HORN Institute*

## The Other Side of the Coin

Mogadishu does not have another option, according to **Prof. Kagwanja**, but to be seen to be dealing with its dispute with Nairobi. He suggested that many leaders at the highest level (in Somalia) are not comfortable about the Kenya v. Somalia case, but are pre-occupied with the ongoing polls. An election year, he added, is an environment where sentiment for or against Kenya

can be whipped. Somalia is thus in a dilemma, as the elite cannot stand up and negotiate with Kenya, because this could cost them the elections next year. He referred to Hassan Khayre’s (Somalia’s Prime Minister) temperament, and added he too cannot do anything about the dispute. This case, **Prof. Kagwanja** said, is giving President Farmajo the wind he needs to push the ship of his re-

election. In September 2019, the election mood will spread over Somalia and last until the polls are completed in 2020. After the elections, everything will have cooled down, he argued. Al Shabab, it was noted, exists in the same environment, and uses such sentiment too. This dispute, he (Prof. Kagwanja) said, is not a victor vanquished situation. Kenya, he added, should consider this elite-with-tied-hands situation, and begin to explore her options.

**Titus Ibui, E.G.H.**, while making the closing remarks, cautioned the Symposium (participants) against underrating Somalia, and instead spend some time understanding the country and its people. When the Americans went to war with Vietnam, he observed, they did not know they were getting into themselves. The super power lost to such a 'small' country, he said, because the Americans overlooked the potential of the enemy's nationalism. Somalis are a different, strong people (ethnic group) with one religion, and are one nation. The Somali have also been hardened for thousands of years, and are driven by the force of life. They are not just pawns by

external interests, he said, adding their belief that if one does not wash the land with the blood of the enemy is not a Somali. They are very united against a common enemy, and therefore pose a formidable threat such as the one that could result if the Kenya-Somalia dispute escalates, he argued.

**Maj Gen (Rtd) Bashir Haji** added his voice to the realities in both states, saying terrorism is prevalent in Kenya and Somalia on account of factors like poverty, poor governance, and mismanagement, for example. At independence, Somalia was the most democratic country in Africa. Additionally, Somalia has become more and more nationalistic. He also said that although Somalis have their own internal differences, most of which are clan-based, any outside interference or threatening external power tends to unite Somalis.

He noted that AMISOM has been in Somalia for years, but the joint forces have not fully pacified the country for very serious reasons such as lack of equipment and funding. **Maj. Bashir** liked AMISOM to a drop in the ocean due to the sheer size of Somalia. AMISOM, he said, gave the



*Maj. Gen. (Rtd) Bashir Haji reacts to a presentation during Session 4 on Day Two of the Symposium*

government some sense of legitimacy, but locals in the regional states often do not recognize federal government state (FGS). The European Union (EU), he said, is drawing down while Somalia does have had no fully functioning government. He compared AMISOM's exit strategy to that of the United Nations (UN). In UN missions, he said peace is established. After that, and agreement is made, elections are conducted, before the missions exit. This will not be the case with AMISOM. If AMISOM withdraws, Somalia will return to square one.

He cast doubt over the intention of Ethiopia, which he referred to as 'the elephant in the room.' Local Somalis mistrust Ethiopia, and those in Jubaland would rather relate with Kenya than with Ethiopia.

He also decried the lack of statesmanship in the continent, noting that Africa does not have a statesman who can bring other leaders together. He suggested that it is too early to judge Prime Minister Abiy as he is still in his infancy as far as leadership and statesmanship are concerned.

Reference was made to the internal dynamics (politics in Somalia) such as forthcoming elections and the troubled relationship between the FGS and federal member states, which are key to understanding the escalating maritime dispute between Kenya and Somalia. It was noted that President Farmajo is a very nationalistic leader who is using this nationalistic sentiment to secure his position in the first one-man-one-vote elections in 2020. Additionally, relationships between federal member states and the FGS are very tense and showing signs of weakness might give federal member states the necessary gunpowder to resist FGS' leadership.

He mentioned that the dual identity or citizenship of top Somali government officials sustains the perception of foreign influence in Somalia's aggressive prosecution of the maritime dispute with Kenya. This argument is however of limited importance as Kenya assisted in installing these leaders, and thus cannot turn around now and tell Somalis that their leaders are foreigners. He said this would damage Kenya's image as a



*Titus Ibui, Chairman LAPSSSET (left), Maj. Gen. Tai Gituai, Kenya Defence Forces (center), and Maj. Gen (Rtd) Bashir Haji confer during one of the Symposium breaks.*

“...relationships between federal member states and the FGS are very tense and showing signs of weakness might give federal member states the necessary gunpowder to resist FGS’ leadership.” – Prof. Peter Kagwanja

state building partner in Somalia. Additionally, it was noted that Kenya should engage foreign powers rather than blaming them, and desist from spreading conspiracy theories.

Somalis, he emphasized, are very united on this issue (Kenya-Somalia dispute), cautioning that there is no void between leadership and the people when it concerns the topic of land or borders.

## Diplomacy

Words like ‘wanting,’ ‘lacking,’ and ‘absent’ were used to describe Kenya’s diplomacy as Kenya has been very slow and reactive in its approach to the Kenya-Somalia dispute. This matter has been in the public domain for decades, and Kenya let it escalate to this point, the Symposium heard.

Speaking on *Maritime Border Disputes in Africa: Case Studies*, Prof. Makumi Mwangiru, Ph.D., highlighted the disconnect between the realms of law and foreign policy. He said the law cannot manage the Kenya-Somalia case adequately, emphasizing that it was never intended to do so. International law, from its founding, was meant to deal with disputes about things, not to enter the domain of foreign policy. This only gives the parties four judicial options, he said:

- i) States can use the mechanism under of UNCLOS
- ii) They can take diplomatic measures
- iii) They can opt for domestic legislation
- iv) They can use other mechanisms like regional courts

The problem, Prof. Makumi said, is that Kenya favours diplomacy rather than peaceful methods to deal with maritime conflicts. He observed frustrations related to the use of diplomatic measures such as the limitations of effectiveness (these do not always work) or and time consuming (these take too long). The Djibouti-Eritrea, Guinea-Gabon, and Guinea Bissau-Senegal cases, it was noted, were resolved through negotiation and mediation by Qatar. It took two years to resolve the Djibouti-Eritrea one, but that approach yielded the desired results faster than any other judicial means possible. This case shows that there is much room for individual mediators, either people or countries. South China Sea, however, cannot be fixed through judicial methods. The law, he concluded, cannot resolve deep foreign policy or diplomatic issues. He urged Kenya to move her thinking away from (over)reliance on the law to resolve the Kenya-Somalia maritime dispute.

## Foreign Relations

Prof. Kagwanja, speaking on the *Implications (of the Kenya-Somalia Dispute) on the Horn’s Security and Stability*, asked the participants to imagine that the Court rules in favour of Somalia. Such a determination will be an existential threat to Kenya, as Kenya will be cut off from the Indian Ocean, effectively becoming landlocked, and lose direct access to international waters. He wondered whether it was wise for Kenya to consider approaching the UN Security Council to look into the case before it escalates farther.

Prof. Kagwanja also said Kenya’s difference with Somalia is peripheral. The person who took this case to the ICJ, he recalled, is the same one whose



A section of participants during the Symposium

government Kenya helped to put in place. As soon as this president was in office, Kenya and Somalia had a Memorandum of Understanding (MoU, in 2009). Kenya woke up one day to find the case was in Court, and there was a sense of betrayal. Kenya thought however that we could comfortably settle the case (2014), he noted.

**Abdiwahab Sheikh Abdi Ph.D.** spoke of *Specific Interests and other Implications*, urging both countries to resolve their issues. It is unfortunate that this issue exists in the first place, he noted. He focused on specific interests. Kenya hosts Somali businessmen and women, and thousands of Somali refugees. Kenya has been actively engaged in peace building, and there are new dynamics

going on in the Horn of Africa, among them the Somali government in office now. He gave the examples of Ethiopia's peace with Eritrea, and regional integration of Somalia and Djibouti. The foreign ministries are not doing enough though. Kenya has a lot at stake. First, Kenya cannot afford to engage in negative diplomacy. Secondly, Kenya needs to rephrase her foreign policy. Thirdly, national think tanks should engage in objective policy research. If the current dispute deteriorates, the country will lose the war on terror, he said.

This dispute is not for the policy community only, he stated. It is for all of us to help resolve this dispute amicably. He urged Kenya to review its foreign policy towards the region.

“... national think tanks should engage in objective policy research. If the current dispute deteriorates, the country will lose the war on terror.” – **Dr. Abdiwahab Sheikh Abdi**

## Key Findings

- Presentations were largely binary. One such binary was the 'peace' vs. 'war' one. While some presenters argued for peaceful resolution of the dispute, others thought coercive methods would suffice.
- There was disagreement over whether the Kenya-Somalia matter is a conflict or a dispute. Some presenters see it as a dispute that could develop into a conflict. Others see it as a conflict progressing in a conflict cycle. Others still interchanged the two words.
- A state's naval capability is a marker of its power.
- A state that controls the sea also controls trade and, by extension, the world.
- Many African states that have a coastline have, until recently, been 'sea blind' (tendency to neglect the seas' importance, resources, and challenges), and have not prioritized maritime security.
- New thinking, complemented by investment in naval capability, is required to secure coastal states, and to spur development of the said states.
- Vested external interests are compounding the ongoing maritime dispute between Somalia and Kenya.
- Until recently, maritime issues were mostly at the periphery of national agenda, but these are increasingly taking the center stage.
- Maritime boundary disputes are not uncommon. Many of them remain unresolved because of overlapping claims based on the application of different maritime boundary delimitation methods to the same area. Some of these are unresolved because these have implication in more than one area (legal and political, or legal and security, for example). The maritime dispute between Kenya and Somalia is more political than legal, hence political settlement is more preferable to judicial recourse.
- Regional mechanisms for conflict management, including for maritime boundary dispute settlement, are evidentially weak, leaving room for recourse to international dispute settlement mechanisms such as International Court of Justice (ICJ).
- There is an 'unAfrican' and an 'African' way (Pan-Africanism) to resolve the dispute.
- The viability of deferral, termination or withdrawal of the case at ICJ hinges on mutual agreement between the parties to such options.
- Kenya has not used its diplomatic tools effectively and efficiently to resolve its dispute with Somalia.
- Somalis are patriotic people who unite against a common enemy when threatened. They are united on the Kenya-Somalia dispute.
- There is a chance that the dispute may become a conflict, if ICJ's decision is rejected by one of the two states.
- Consistent with the UN Charter and the AU Constitutive Act (2002), regional spirit

towards structural conflict prevention and management, gravitates towards peaceful resolution or settlement mechanisms such as negotiation and mediation.

- Dependency syndrome in Africa's external development and security relations and thinking, has made African governments

vulnerable to foreign influence, making conflicts intractable.

- There is a need to reinvigorate Pan-African ideals of good neighbourliness among African states with regards to maritime border challenges.



## Conclusions

Disputes over maritime boundaries are not uncommon. Such disputes are over the demarcation of Exclusive Economic Zones, and remain largely unresolved because of: availability and/or use of different delimitation methods, and the underdevelopment of existing delimitation frameworks. Kenya should pursue legal and diplomatic means to resolve the dispute. If these fail, she should resort to military force to secure its national interests. The following notable trends emerged from the Symposium:

- Increased interest, globally, on establishing sea-based security mechanisms
- Countries in the region have adopted legislation to deal with transnational crime and piracy
- The region has seen a revamp of fishing legislation, which was inherited from colonial times
- Legislation have been updated to benefit from blue economy
- Maritime issues have mostly been periphery but are currently taking centre stage
- Increasingly, people in policy are paying more attention maritime issues

# Recommendations

## Importance of the maritime domain

### Kenya

- Revamp the maritime sector at the state and regional level.
- Kenya should develop her naval capability. To facilitate this, Kenya should explore the option of establishing a 'ship graveyard' where Kenyans can learn how to deconstruct broken down naval vessels, and build new ones.
- In the course of the legal dispute, Kenya and Somalia should promote public education, high-level bilateral consensus, and exercise constant engagement, open-mindedness and leadership for its de-escalatory significance.

### Africa

- Enhance the capacity and capability of maritime enforcement of the legal framework.
- Shift from the aid mentality in securing Africa's seas, and enhance the capability to defend our maritime interests
- Learn from India and China about taking the sea seriously.
- Coastal countries need to develop grand strategies and far-sighted leadership such as Elizabeth I, Theodore Roosevelt, Mao Tse Tsung and President Xi Jin Ping.
- African governments should prioritize maritime security and prospects for the blue economy.
- A political solution through dialogue, negotiation and mediation should be explored as the best alternative to judicial settlement mechanisms.
- Escalatory actions by Kenya are detrimental to Kenya's larger interests, national security, and regional stability, hence diplomatic/peaceful settlement mechanisms such as negotiated agreement are the most preferable options.
- Kenya and Somalia should not pursue escalatory actions such as war for potentially destabilizing impact it has nationally and regionally.
- Kenya should use military force as a last resort.
- Map all actors in this dispute, and expose the role of multinational oil giants in this dispute, including the geo-political role of the Gulf States.

### General

Information sharing can increase transparency in the registration of ships and vessels in the Indian Ocean. Technology and regional collaboration can be used to enhance the process.

## Conflict v. dispute, and conflict resolution

### Kenya

- Kenya should entice the Court to drop the case. Kenya should reach out to her partners to get them on Kenya's side.
- Find own solutions - need to stop thinking that our problems can be solved elsewhere.
- Utilize of the existing regional and global maritime frameworks to resolve disputes arising such as the Kenya-Somali dispute.
- African states should develop or strengthen local capacity for dispute settlement to prevent African issues from being resolved through international dispute mechanisms.

- African states should leverage on the African Union Border Program (AUBP) dispute resolution mechanisms. AUBP was formed in 2007 to provide technical and financial support to boundaries delimitation and delineation across Africa.

### General

- Apprehension that the Court may not resolve this dispute comprehensively.
- The maritime dispute between Kenya and Somalia is more political than legal, hence political settlement is more preferable to judicial recourse.
- Study existing maps (Pie agreement). These maps were not drawn by us or by Somalis. We have to look at what it means to share borders, cultures, and peoples.

### Effective occupation

Kenya should implement and demonstrate the principle of effective occupation in the disputed waters. Her fishermen should continue fishing, and her Forces (KDF) defending the area to reinforce the idea that the area is effectively Kenya's.

### Diplomacy

#### Kenya should:

- Find some allies (for example - bring in China, US, Japan, EU, France, and Germany) and convince them that Kenya and Somalia need to be left alone (meaning given space and maybe two years in which the Court will determine the case) to resolve the dispute case. This will give the two countries time to wait out the Somali elections.
- Seek an 'interested party' e.g. other countries that could be affected by the ICJ ruling who could ask to be adjoined to the case, complicating the dispute and delaying ICJ's pronouncement over the matter in September 2019

- Renegotiate with Somalia's federal state separately from the federal member states. Ethiopia is, for example, getting a foothold in all federal states.

### Foreign relations

#### Kenya

- Develop a clear maritime asset management policy and protection.
- Kenya can involve China to mediate and give an offer to China for the use of ports to create a balanced outcome for this challenging situation.
- Kenya should leverage her position as regional hegemon with international powers to help resolve the dispute.
- Kenya and Somalia should explore joint development initiatives in the disputed zone or enlarging 'the pie' to enhance the viability of concession-making.

#### Africa

- Forge a common Africa Maritime Security framework
- Build institutions (like IGAD) and regional capacity to tackle these disputes as well as build stronger cooperation bilaterally.
- There is need to renegotiate as neighbours. Somalia's position is expedient. We need to help them (Somalia) get out of that situation at the ICJ, and to understand the Kenyan position. In this tight spot we are in, how do we deal with the situation? First, we need to carry the population with us in this case. The population needs to be seriously engaged to update them and win their hearts and minds. How do we make them see it the way we are seeing it? What kind of structures do we need to put in place for them to see it as we see it? Kenya needs to get them on board of our vision, and find the best way out of this dispute.

# Appendices

## Participants Lists

### Guests

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2.	Lt. Gen. (Rtd) Humphrey Njoroge	Former Commandant	National Defence College, Kenya
3.	Col. (Rtd) Cyrus Oguna	Spokesperson	Government of Kenya
4.	Titus Ibui, E.G.H.	Chairman	Lamu Port, South Sudan, Ethiopia Transport Corridor – LAPSSET
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# *Symposium at a glance*



MARITIME BORDER CHALLENGES  
AND IMPLICATIONS ON SECURITY:  
The Kenya-Somalia Dispute in Perspective

**Report**

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