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Joint management of shared resources as an alternative approach for addressing maritime boundary disputes: the Kenya-Somalia maritime boundary dispute

Nelly Isigi Kadagi ^a, Ifesinachi Okafor-Yarwood ^{b,c}, Sarah Glaser ^d and Zachary Lien ^e

^aWorld Wildlife Fund, Education for Nature Program, Washington, DC, United States; ^bSchool of Geography and Sustainable Development, University of St Andrews, St Andrews, United Kingdom; ^cNational Defence College, Abuja, Nigeria; ^dOne Earth Future, Secure Fisheries, Broomfield, CO, United States; ^eJosef Korbel School of International Studies, University of Denver, Denver, CO, United States

ABSTRACT

Socio-economic security has motivated African states to explore natural resources in areas of overlapping maritime claims. However, Africa's maritime boundaries are characterized by unresolved disputes. Resolution of these disputes is time-consuming, expensive and can undermine the state's ability to exploit natural resources. The Somalia and Kenya maritime dispute under litigation with the International Court of Justice demonstrates the continental commitment to peaceful resolution. Citing cases from across Africa, we discuss outright delimitation or Joint Management Zones (JMZs) as means to address disputes over shared resources, particularly transboundary fisheries, which have received little attention. Reframing the Kenya-Somalia maritime dispute resolution process as cooperation over fisheries management will have spill-over effects into greater diplomatic relations. Fish do not abide by maritime boundaries. As such, we posit that the peaceful resolution of maritime boundary disputes lies in Africa's ability to consider settlements by way of JMZs to motivate sustainable use of natural resources.

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Introduction

Dormant, overlapping maritime boundary claims have become more actively disputed along Africa's coast, following countries' growing interest in exploiting marine natural resources (Khalfaoui & Yiallourides, 2019; Okonkwo, 2017; Osman, 2018; Walker, 2015; Edmond et al., 2019). The demand for countries to reconcile socio-economic, environmental and security interests is also growing, particularly within and around shared maritime domains (Alhassan, 2019; Ali & Tsamenyi, 2013; Majinge, 2012; Okafor-Yarwood, 2015; Okonkwo, 2017). Meanwhile, harnessing these benefits comes with its own challenges driven by the continent's colonial borders, increasing human population, weak legal frameworks, and lack of peaceful resolution mechanisms (Ikome, 2012; Okonkwo,

CONTACT Nelly Isigi Kadagi  nellykadagi@gmail.com  World Wildlife Fund, 24th St NW, Washington, DC 20037, United States

2017; Okumu, 2010). Amidst the contest over maritime boundaries for seabed energy resources are the implications of disputes for transboundary fisheries and fishing communities who depend on the resource for their livelihoods (Camargo, 2014; Tuan, 2013). Yet, limited attention has been directed to the role of fisheries as a driver of delimitation discourse (Bernard, 2012; Kopela, 2017). Further, conventional methods of maritime dispute resolution have largely ignored the significance of straddling fish stocks and fishing as a catalyst for fostering cooperation, joint development, and management of the disputed areas' natural resources (Boyle, 1999; Wang, 2001).

The delimitation of maritime boundaries plays an important role in clarifying jurisdiction of all users, which can minimize sources of disputes and conflicts and provide the first step for transboundary cooperation in the management of marine resources (Schofield, 2010). Relatedly, the resolution of maritime disputes through joint management agreements can result in jurisdictional certainty, which acts as a basis for cooperation in offshore resource development and management between states (Okafor-Yarwood, 2015; Wifa et al., 2017). Therefore, evaluating the case for fisheries in the maritime boundary resolution debate requires African states to consider the practical necessity of securing social, economic, and environmental benefits for its people. While access to oil and gas may make it possible to support the development of a country's local economy, cooperation on disputed hydrocarbons can be challenged by economic and political interests of the claimants (Ortung & Wenger, 2016; Østhagen, 2019). Fish then constitute an integral part of the resolution process to which states must build the political will to cooperatively manage the exploitation of shared resources.

Our paper examines the avenues for resolution and implications of the on-going maritime boundary dispute between Kenya and Somalia. A (maritime) boundary dispute is defined as a conflict between two states arising from the claim of at least one of these states to a part of territory or, in extreme cases, to the entire territory that is administered (Kornprobst, 2002). By drawing on examples from previous maritime boundary dispute resolutions across Africa that have involved either outright delimitation or Joint Development Agreements (JMAs), we highlight why JMAs offer a more favorable solution to resolving the Kenya/Somalia maritime dispute. We posit that establishing Joint Management Zones (JMZ) that allow for equitable access to fisheries resources represents a viable solution that cannot be easily ignored in the face of growing human population and declining fish stocks.

Several studies have examined the causes of maritime boundary disputes across the African continent. In West Africa, for example, sovereignty over the Bakassi Peninsula was not an issue between Nigeria and Cameroon until the discovery of large reserves of oil (Essombo, 1995; Olagunju, 2009). Similarly, the dispute between Guinea-Bissau and Senegal, and between Ghana and Ivory Coast, heightened because of the economic and strategic significance of hydrocarbon resources (Kpodo, 2014; Okafor-Yarwood, 2015). In Central Africa, the hydrocarbon potentials of the Mbanie, Cocotiers and Congas Islands have resulted in a protracted dispute between Gabon and Equatorial Guinea (Oloo, 2017; Yoon, 2009). In Southern Africa, the boundary dispute between Namibia and South Africa escalated over an area rich in fisheries and offshore diamond deposits from the Orange River (Hamman, 2000, 1995; Moller, 2003; Oduntan, 2015). These examples highlight the interconnectedness between marine resources and maritime disputes in the continent. As African governments focus on making gains from the

blue economy, underlying maritime boundary disputes, if left unresolved, will further undermine efforts to achieve national development agendas (Okafor-Yarwood et al., 2020).

The challenges associated with Africa's maritime border disputes are exacerbated by the international law principle of *Utī possidetis juris* (Abraham, 2007). This principle holds that territorial boundaries should be maintained as they had existed before independence, reifying the indelible colonial legacy (Mnyongani, 2009). Therefore, two issues certainly impact the ability of African states to effectively define their maritime boundaries. The first entails the extent to which a country applies the right to self-determination, which means that the state's ability to uphold its sovereignty is evidence of peaceful and continuous display of actual sovereign powers within its territory (Castellino, 2007; Jackson, 1986). The second is decolonization, which provided an opportunity for a new crop of post-independence African leaders to question the established 'artificial frontiers' imposed by the imperial powers and the applicability of the principle of *Utī possidetis juris* (Abraham, 2007). However, decolonization was complicated by the Organization of African Unity (OAU) adoption of this principle in 1963, which maintained the 'status quo ante independence' as a way of protecting the stability of the continent (McCorquodale & Pangalangan, 2001). With the transition of the OAU to the African Union (AU) in 2002, the settlement of overlapping maritime claims have remained problematic given AU's stance of upholding colonial frontiers resulting in limited allowance for negotiations based on pre-colonial lines (Okafor-Yarwood, 2015). As such, maritime boundary disputes in the continent have resulted in two resolution mechanisms. First, outright delimitation, which is defined here as an outcome that results in the placement of a physical boundary, usually on paper or a map identifying the limits of a country's boundary (Rushworth, 1997). In the context of maritime boundary dispute resolution, this would involve the division of disputed areas where two (or more) states have competing claims (Dundua, 2006). Second, JDA whereby the disputing parties agree to develop and manage the resources in the disputed area (Ali & Tsamenyi, 2013; Egeran, 2015; Okafor-Yarwood, 2015).

Despite the trends around outright delimitation and JDAs, resolution of maritime border disputes through legal frameworks may not necessarily take into account the social structure or livelihoods of local communities who are likely to be affected by the outcome of the resolution (Scharer, 2018). What is implied here is that maritime boundary disputes have enormous consequences for the peace and stability of not only Kenya and Somalia, but also the region. Hence, concerted resolution is necessary for eliminating potential conflicts and minimizing negative impacts on local communities. Even then, the processes linked to the settlement of disputes are seldom easy. For instance, delimitation which involves the drawing of a definitive line may leave one or both parties unsatisfied (Dundua, 2006; Herbert, 1995; McHugh, 1985). Therefore, a more equitable resolution to maritime boundary disputes lies in the ability of African countries to view overlapping claims through JMZs, which offers a more likely route to sustainable use and management of natural resources.

The paper relies on a review of publicly available written sources on the Kenya-Somalia maritime boundary dispute, with specific focus on resolution mechanisms across the African continent. Most of the materials for this paper have been sourced from the International Court of Justice (ICJ) documents, newspaper articles, periodicals, government documents, and peer-reviewed articles. The present paper is divided into four sections.

Following the introduction, section two discusses outright delimitation versus Joint Development Agreements (JDAs). Discussions will also include international courts and tribunals' findings on delimitation and why Africa may be more amenable to establishing Joint Management Zones (JMZs). The third section explores the Kenya-Somalia maritime dispute, including the implications of the conflict for both countries and their people. The final section discusses the recommendations and conclusions.

Outright delimitation versus joint development agreement

The favorable outcome for disputing parties would be an outright delimitation, which allows states to make independent decisions relating to the use of their maritime resources. To ensure an equitable solution, Articles 74 (1) and 83 (1) of the United Nations Convention on the Law of the Sea (UNCLOS) stipulates that

the delimitation of the exclusive economic zone [continental shelf] 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 International Court of Justice. (UNCLOS, 1982)

Despite these stipulations, the outcome for disputing states may entail restriction to their perceived sovereign rights, which may leave them dissatisfied (Dundua, 2006; McHugh, 1985).

By contrast, disputing states have embraced JDAs to promote cooperation, in line with the provisions of Articles 74 (3) and 83 (3) of UNCLOS (1982) which calls on disputing parties to make '... every effort to enter into provisional arrangement of a practical nature ...'. The provision has encouraged the adoption of JMZs as a temporary solution for disputed maritime zones (Churchill & Ulfstein, 2005). Hence, the disputing parties have some rights to the maritime area, thereby countering the potential drawback of protracted arbitration (Schofield, 2014). JDAs come in two forms: limited and permanent agreements. A limited agreement enables disputing parties to jointly manage and develop resources in the area for a limited period, pending the resolution of the dispute. A permanent agreement, on the other hand, allows for the establishment of a long-term joint management system which requires the drawing of administrative lines within the area (Johnston, 1988).

Several African states have initiated joint exploitation arrangements which are mainly driven by consideration for offshore hydrocarbons deposits (Biang, 2010; Khalifaoui & Yialourides, 2019; Wifa et al., 2017). There is less emphasis on shared fisheries resources, yet they can generate cooperation and strengthen bilateral relationships (Franckx, 2012; Zang, 2018). Even with the benefits of JDAs, states need to consider the need for sustained cooperation which can be problematic in the absence of strong bilateral relations. The Kenya-Somalia maritime border dispute is no exception.

In view of the foregoing submissions, the ensuing sub-sections explore examples of outright delimitation and JDAs and their implications.

Outright delimitation fails in the long term: the case of Nigeria and Cameroon

An outright delimitation request might appear favorable for parties who feel they have enough evidence to lay claim to a disputed maritime boundary. However, as the Nigerian

and Cameroonian example on the handing over of the disputed oil-rich Bakassi Peninsula shows, a permanent settlement agreement can, in the long run, fail. For instance, though the Nigeria-Cameroon maritime dispute was successfully resolved, the process took several years. In 1994, Cameroon filed a case asking the ICJ to rule on a dispute over the Bakassi Peninsula which was under military possession by Nigeria. In October 2002, the ICJ determined that sovereignty over the Bakassi Peninsula rested with Cameroon citing a 1913 agreement between Germany and the United Kingdom, as well as the Thomson-Marchland Declaration of 1929–1930. Nigeria contended that the ruling failed to consider aspects of human welfare for the Nigerian inhabitants of the Peninsula, whose ancestral homes were in the Cameroonian territory (UN, 2002). While the Peninsula was transferred to Cameroon in 2008, the transition process has been challenging, as the rights of Nigerians—who once called the disputed area home and relied on the resources therein for subsistence—continue to be violated by the Cameroonian authorities (Alobo et al., 2016; Okafor-Yarwood, 2019; Oduntan, 2006; Udombana, 2002; The Editor, 2017). Many of the people displaced following the resolution of the dispute remain exiled and unhappy as their way of life, including their ancestral traditions, has been disrupted (The Editor, 2017; Unah, 2019). Even when outright delineation might present a viable solution, integrating the communities that are likely to be affected by such decisions is important to its sustainability.

Following the ICJ ruling, the process of handing over the Peninsula to Cameroon began with the signing of the Greentree Agreement in 2006 and culminated in the formal proceedings of the handover of the territory from Nigeria to Cameroon in 2008, followed by withdrawal of Nigerian law enforcement agents (UN, 2008). In exchange, Cameroon agreed to guarantee those living in Bakassi ‘the exercise of the fundamental rights and freedoms enshrined in international human rights law and in other relevant provisions of international law’ (Research Directorate, 2008). The resolution of the dispute was seen as a triumph of and respect for international law. Nevertheless, while the agreement attempted to cater to the Nigerian inhabitants of the disputed area, the handover of Bakassi Peninsula to Cameroon destabilized the culture and way of life of 32 villages along the border (Egeran, 2015) who continue to fight to maintain their sense of identity.

Not only is the Greentree Agreement yet to be ratified, and therefore implemented, by Nigeria (Sunday, 2019), the Agreement only addressed the issue of the rights of the inhabitants in Bakassi who remain in the territory, while failing to take into account the rights of those persons on the Nigeria side of the border (Odinkalu, 2012). The immediate aftermath of the handover saw tens of thousands of Nigerian fisherfolks and their families fleeing the Peninsula for nearby towns, with an estimated 100,000 fleeing to Akwa Ibom State in Nigeria, in the same year (Unah, 2019). As such, the failure to ratify the agreement has had a significant impact on the livelihood, wellbeing and human rights of the returnees and those living in Bakassi (Odinkalu, 2012), leading many of them to aspire to a New Bakassi whereby they would one day return to their homeland (Unah, 2019).

While there have been simmering grievances between the two countries over Bakassi, the political tension between Nigeria and Cameroon was heightened by the alleged killing of 97 Nigerian fisherfolk by Cameroonian Gendarmerie in 2017 (Okafor-Yarwood, 2019). The immediate aftermath of the ceding of Bakassi to Cameroon led to the call for an independent Bakassi by groups like the Bakassi Freedom Fighters who targeted oil installations, with the Bakassi Movement for Self-Determination (BMSD) joining with the

Southern Cameroons Peoples Organization (SCAPO) and the Movement for the Emancipation of the Niger Delta (MEND) to declare the establishment of the Democratic Republic of Bakassi in 2006 (Olukoya, 2012). Thirteen years after the signing of the Greentree Agreement whereby Cameroon agreed to uphold the rights of the inhabitants of Bakassi, many of them remain stateless as the state has failed to recognize them as Cameroonians. Their human rights continue to be violated through extortion as punitive taxes and forceful evictions are imposed by the Gendarmerie. For the part of the returnees who fled to Nigeria with the promise of resettlement, 16 years since Bakassi was ceded to Cameroon, they are still living in camps (Maja-Pearce, 2018). The impact of transferring Bakassi to Cameroon continues to be felt, as the communities that welcomed the returnees feel stretched (Unah, 2019). Unless Nigeria addresses the situation, it might lead to conflict.

Building cooperation through JDA: the case of Nigeria and São Tomé and Príncipe

In contrast, establishing a JMZ gives the disputing parties an opportunity to jointly explore and develop the natural resources within the disputed zone. Under JMZs the disputing parties often cooperate to hold licensing rounds unless they have devolved their sovereign and regulatory rights to a joint development authority (as is the case in the Nigeria-São Tomé and Príncipe arrangement) (Schofield, 2009).

The Nigeria/São Tomé and Príncipe's JMZ covers 34,540 km² and was established in 2001. The protracted nature of the boundary dispute between Nigeria and Cameroon influenced the decision by Nigeria and São Tomé and Príncipe to explore alternative means to resolving their boundary dispute (Wifa et al., 2017). The JMZ between the two countries exemplifies how JDAs can help states develop their economies while strengthening their relationships. The JDA between Nigeria/São Tomé and Príncipe allowed for joint development of petroleum and other resources, within their EEZs (Wifa et al., 2017).

The resources within the JMZ have been shared 60 per cent proportion to Nigerian and 40 per cent to São Tomé and Príncipe (Biang, 2010). The JDA established the Joint Ministerial Council consisting of ministers from both states and has the overall political responsibility and policy direction; and the Joint Authority, which sits in Abuja, Nigeria, is responsible for managing the activities relating to exploration and exploitation of the resources in the JMZ (Groves, 2005). The JMZ has provided several oil blocks for exploration, and while the full potential is yet to be realized, it has improved the economic outlook of both parties, but most notably that of São Tomé and Príncipe. According to a 2017 report by the Extractive Industries Transparency Initiative, between 2003 and 2015, the Nigerian government received US\$164,424,424 million, while the São Tomé and Príncipe government received US\$51,364,997 million from signature bonuses relating to activities in the JMZ – over 16 percent of its 2015 GDP (EITI, 2017). The prospect for more revenue from the JMZ remains high as the total oil reserves are estimated at about 500 m barrels, with a potential production of about 70,000 barrels per day for a period of 20 years; the actual oil production is expected to commence in 2022 (AfDB, 2018).

The JMZ has, however, faced several challenges. The government of São Tomé and Príncipe has previously noted that the Nigerian side exercises considerable influence on the JMZ projects, which creates a power imbalance and is contrary to the provisions of the JDA (Human Rights Watch, 2010). In 2013, major oil companies withdrew from the JMZ,

citing that the finds in the oil blocs were too limiting to justify further investments (IMF, 2016; Wifa et al., 2017). In addition, in its current states, the JMZ costs more money to manage than it has generated. Specifically, Article 17 of the JDA provides that the Joint Authority shall be financed using the revenue it generates from its activities (Wifa et al., 2017). However, the Joint Authority has maintained a budget of an estimated US\$12 m each year despite not generating enough revenue. As a result, São Tomé and Príncipe has failed to contribute its 40% share of the Joint Authority's operational cost, estimated at US\$27 m since 2008 (EIU, 2016).

Despite these challenges, including the fact that the prospects of the JMZ are not yet fully achieved, the JDA between Nigeria and São Tomé and Príncipe have facilitated cooperation on other issues. In particular, the two countries agreed to set up a joint maritime military commission owing to the pervasiveness of piracy and armed robbery at sea in the Gulf of Guinea region and to São Tomé and Príncipe's considerable lack of naval resources (Gustavo, 2015; Reuters, 2009). The partnership, which may not have materialized without the JMZ, has resulted in the successful interdiction of pirates operating in São Tomé's waters (Associated Press, 2016).

Limits to JMZs: the case of Guinea-Bissau and Senegal

The JMZ between Guinea-Bissau and Senegal was established following the resolution of the maritime boundary between the two countries in 1993; it also demonstrates the viability of JMZs as a solution to maritime boundary dispute resolution. Nevertheless, it also exposes one critical limitation of JMZs, especially if such arrangements are not seen as fair by both parties. On the one hand, Guinea-Bissau and Senegal agreed that hydrocarbons in the zone would be administered under Senegal's petroleum law – with 85 per cent of the resources allocated to Senegal and only 15 per cent to Guinea-Bissau. On the other hand, the fisheries resources were to be administered under Guinea-Bissau's legislation, with the resources shared equally. This agreement came into force in 1995 and is renewable every 20 years (Okafor-Yarwood, 2015).

The JDA led to improved relations between Guinea-Bissau and Senegal. This is evidenced by the actions of the Senegalese government in 1998, as they intervened to avert a military coup in Guinea-Bissau (Okafor-Yarwood, 2015), and the shared commitment by the two countries to work together to turn the tides on illicit drugs trafficking which pervades their countries (UNODC, 2019). Despite this positive outcome, the authorities of Guinea-Bissau are critical of the uneven hydrocarbon allocation outlined in the JDA. As a result, the administration of President Kumba Yala (2000–2003) persuaded Senegal to increase Guinea-Bissau's share to 25 per cent, but this deal was never formalized. Further, President Jose Mario Vaz (2014–2019) of Guinea-Bissau requested that the terms of the agreements again be revised and set up a committee for renegotiation during agreement renewal in 2015 (Melly, 2010). Unfortunately, Guinea-Bissau remains politically unstable following years of political infighting, and renegotiation of the agreement has been put on hold (Dabo, 2020).

While many African countries have opted for outright delimitations compared to JDA as a tool for settling maritime disputes (Table 1), there is a lesson to be learnt from the examples of the JDAs in the continent. Specifically, JDAs offer a 'no gain, no loss' (Thao, 1999) solution for disputing parties and strengthening their relationship, especially in

other areas of bilateral relations. In the case of outright delimitation, states have sovereignty over their maritime boundaries. However, there is uncertainty about the benefits if the disputing party fails to access the resources on the other side of the boundary line.

Drawing from the above examples across the African continent, we turn our attention to the Kenya and Somalia maritime boundary dispute. First, we highlight the history of the maritime conflict between Kenya and Somalia and the implications of the dispute. Second, based on the overarching impacts of outright delimitation requests, we emphasize that JDAs offer a more favorable outcome to resolving the Kenya/Somalia maritime dispute in light of shared fisheries resources.

The Kenya-Somalia maritime boundary dispute

The Kenya-Somalia maritime dispute dates to the colonial era in East Africa (Rossi, 2019; Yoon, 2009). During the nineteenth century, colonial powers divided Somalia into five territories: Italian Somalia (Somalia), British Somaliland (Somaliland), French Somaliland (Djibouti), and notable Somali enclaves in Ethiopia's Ogaden region and Kenya's North Eastern province (Hersi, 2018). However, since its independence in July 1960, Somalia aimed to reunite the territories into a Greater Somalia. This aspiration has resulted in several conflicts between Somalia and its neighbors, including a war with Ethiopia (the Ogaden War between 1977 and 1978) and a quasi-war with Kenya, known as the Shifta (between 1963 and 1967) (Mburu, 2005; Munene, 2015).

Despite a series of peaceful negotiations between the involved parties, the boundary issue between Kenya and Somalia remains unresolved. In 1972, Somalia first declared its territorial sea boundary out to 200 nautical miles under Law No. 37 on the Territorial Sea.¹ Kenya, on the other hand, issued a Presidential proclamation in 1979 stating that, 'In respect of the boundary of its northern territorial waters with the Somali Republic be on Eastern latitude South of Diuia Damasciaca Island being latitude 1° 38' South.'² Both Kenya and Somalia ratified the United Nations Convention on the Law of the Sea (UNCLOS) in 1989.³ Specifically, Article 3 of the UNCLOS (1982) grants every state a right to a territorial sea of up to 12 nautical miles breadth and an EEZ that shall not exceed 200 nautical miles.⁴ Hence, in 2014, Somalia's President issued a proclamation declaring an EEZ out to 200 nautical miles.⁵

Articles 15, 74 and 83 of the UNCLOS (1982) relate to the delimitation of the territorial sea, the EEZ and the continental shelf, respectively. Although Article 15 is generally

Table 1. Highlights some examples of outright delimitations and joint development agreements involving African countries (Aqarone, 1995; Egede & Apaalse, 2019; Khalfauou & Yiallourides, 2019).

Delimitations	Joint Management Agreements
Nigeria v Cameroon (2002)	Guinea-Bissau v Senegal (1991)
Guinea v Guinea-Bissau (1985)	Nigeria v São Tomé and Príncipe (2001)
Gambia v Senegal (1975)	Libya v Tunisia (1988)
Kenya v Tanzania (1975)	Angola v Democratic Republic of Congo (2007)
French island of Reunion v Mauritius (1980)	
Comoros, Mozambique and Tanzania (2011)	
Comoros, the Seychelles and Tanzania (2012)	
Cape Verde v Senegal (1993)	
Mauritania v Cape Verde (2003)	
Ghana v Cote d'Ivoire (2017)	

regarded as uncontroversial (Evans, 2015), judicial decisions on its application have demonstrated some level of uncertainty in establishing interstate sea-boundaries (Lando, 2017), highlighting a complexity in its interpretation and application in international law. Calls have been made for a broader perspective on maritime delimitation whereby an equitable solution is recognized as a requirement under Article 15. This would imply extending the objective explicitly pursued in continental shelf and EEZ delimitation under Articles 74 and 83 of UNCLOS to territorial sea delimitation (Lando, 2017). Further, Article 76 of the UNCLOS denotes that parties to the Convention intending to determine the outer limits of their continental shelf beyond 200 nautical miles shall submit information on such limits to the Commission of the Limits of the Continental Shelf (CLCS).⁶

Kenya's disagreement with Somalia over the maritime boundary heightened in 2009 when both countries were locked in a dispute over a portion of their EEZ, a total area of around 100,000 square kilometers (Figure 1; Ahmed & Audu, 2016; Rossi, 2019; Yoon, 2009). However, Kenya and Somalia reached a Memorandum of Understanding (MOU) on 7 April 2009 with parties agreeing to settle the maritime boundary dispute through negotiation.⁷ The Kenyan Minister of Foreign Affairs and the Somalia Minister for National Planning and International Cooperation authorized a

Memorandum of Understanding between the Government of the Republic of Kenya and the Transitional Federal Government of the Somali Republic to grant to each other No-Objection

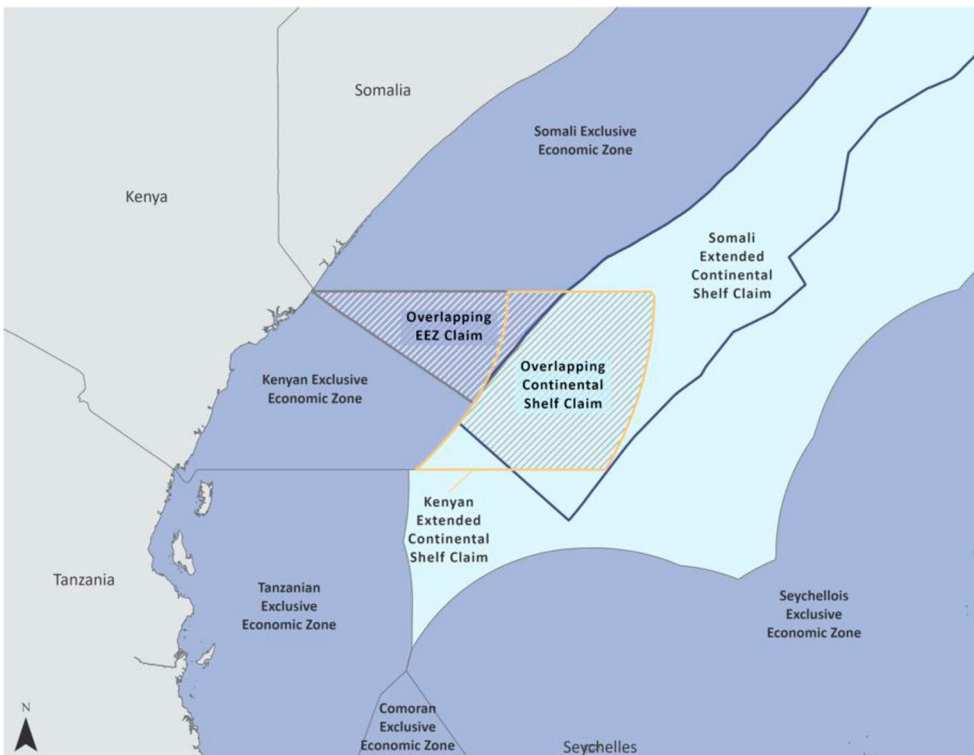


Figure 1. Geographical location of Kenya and Somalia including maritime area under dispute.

in respect of submissions on the Outer Limits of the Continental Shelf beyond 200 nm to the Commission on the Limits of the Continental Shelf (CLCS).⁸

The MOU was rejected by the Transitional Federal Parliament of Somalia in October 2009 based on two reasons.⁹ First, the signature of the Minister was not sufficient to express on behalf of Somalia a consent to a binding agreement. Second, Somalia opposed CLCS consideration of Kenya's submission with respect to continental shelf beyond 200 nautical miles citing that the MOU had been declared invalid and non-effective. As such, Somalia argues for a south-eastern bound median line perpendicular to its coast and as an extension of the land border, while Kenya insists that its maritime delimitation boundary is determined by a straight eastern-bound latitudinal line extending from the common land boundary.¹⁰

Following a failure in diplomatic negotiations between the two countries, Somalia started proceedings against Kenya before the ICJ in 2014 requesting the Court to determine the complete course of a single maritime boundary, including the continental shelf.¹¹ Following Articles 15, 74 and 83 of UNCLOS, Somalia asserted that maritime delimitation should be based on the three-step process which includes a straight line from the states' land boundary and extending to the territorial sea, EEZ, and continental shelf. In 2015, Kenya submitted two objections concerning ICJ's jurisdiction and admissibility of the case. First, Kenya pointed out that the two states had agreed on a method of settlement other than the Court arguing that the UNCLOS, to which both states are parties, had provisions for another method of negotiating outside of the Court's jurisdiction. Second, Kenya asserted that the MOU signed between the states constituted an agreement for both parties to have alternative methods of dispute settlement (Chan, 2018; Olorundami, 2018).

In examining the legal status of the MOU, the Court concluded that the MOU was a valid treaty which signifies the states consent to be bound by the MOU under international law upon the signature (Chan, 2018). In the interpretation of the MOU, however, the Court observed that the MOU solely addressed the delimitation of the area of the continental shelf, within and beyond the 200 nautical miles in the sixth paragraph, but did not explicitly specify the delimitation of the territorial sea and the EEZ.¹² The Court recognized that the sixth paragraph of the MOU may relate to the party's prospects to negotiate their maritime boundary in the continental shelf in accordance with Article 83 of the UNCLOS and following recommendations of the CLCS. However, with the single focus on the continental shelf, the Court concluded that the MOU failed to create a dispute resolution procedure for maritime boundary delimitation.¹³ In relation to Kenya's objection, the Court observed that the MOU does not impose an obligation or agreement between the parties to a given method of dispute settlement and thus the Court had jurisdiction and admissibility of the case¹⁴ (Chan, 2018).

Notably, the Kenya-Somalia case is pending hearing in March 2021 following ICJ's postponement from June 2020 due to COVID-19 (ICJ, 2020). Therefore, this paper does not focus on the outcome of the pending ICJ judgement. Instead, we concentrate on the role of fisheries as catalysts in dispute resolution. Focus is paid on the potential implications of the dispute for shared natural resources such as fish that are vital for the livelihoods of communities who are often overlooked. Based on Article 56 of UNCLOS, coastal states have the sovereign rights for exploring, exploiting, conserving, and managing the

natural resources of the waters within their 200 nautical miles EEZs.¹⁵ Thus, fishing fleets of disputing states can exploit their own territorial seas, EEZs, and continental shelves, but have no right to fish in the adjacent or opposite state's EEZ unless approval is granted by the other country. Despite the reference of natural resources in Article 56, the importance of fish and fishing rarely have been considered by African states in the delimitation of the territorial sea, EEZ and continental shelf.

Fisheries resources have been recognized in the process of determining territorial sea boundaries. For example, in the 1993 case of *Greenland and Jan Mayen (Denmark v. Norway)*, ICJ took the capelin fishery into consideration of maritime boundary delimitation to ensure that both parties had equitable access.¹⁶ The maritime boundary dispute between Kenya and Somalia presents an opportunity for fisheries cooperation to be an overriding factor in shaping the ability of parties to negotiate a resolution mechanism. Therefore, we argue that fisheries can provide a basis for the disputing parties to reach the dual purpose of jointly exploiting the natural resources in the area of overlapping claims. But, ultimately, facilitating such cooperation and resolution urgently calls for an understanding of the implications of the maritime boundary disputes between Kenya and Somalia.

Impacts of the Kenya-Somalia maritime dispute

The process of boundary delimitation is often time-consuming, expensive, and uncertain which may have major repercussions on local communities, political stability, and sustainable use of natural resources (Hasan et al., 2019; Walker, 2015). This section explores some of the possible national, geopolitical, socio-economic, and global implications of the Kenya-Somalia maritime boundary dispute.

Geopolitical implications

The dispute over the maritime boundary between Kenya and Somalia has already affected the geopolitical landscape of the two states, constituting a serious challenge to the peace of the region. Somalia's stability is paramount to the security of the entire region and for facilitating international trade such as shipping routes (Healy, 2011; Ikome, 2012). However, even with both sides having much to lose, tit-for-tat diplomatic tactics have taken the center stage of this dispute and prevented a solution. In February 2019, for example, Kenya temporarily expelled the Somali ambassador to Kenya and recalled its ambassador to Somalia, effectively cutting diplomatic ties (The East African, 2019). Then, in May 2019, Kenya suspended direct flights from Mogadishu to Nairobi citing security concerns, but Somali leaders claimed the decision was politically motivated (Mutambo, 2019).

According to Ali and Tsamenyi (2013), maritime disputes impede security cooperation and potentially contribute to regional instability. Their argument holds true for the current dispute between Kenya and Somalia: recent reports suggest Kenya is likely to withdraw troops from key areas of conflict. If so, al-Shabab may gain a greater foothold in the region (Farmer, 2019; Felter et al., 2019; Wabuke, 2019). The estimated 3000 Kenyan Defense Forces (KDF) troops are considered crucial to the African Union's Mission in Somalia (AMISOM) fight against al-Shabab, an insurgent group based in Somalia;

however, since early 2019, the KDF have systematically moved their bases in Somalia closer to the Kenyan border (Wabuke, 2019). As such, in recognition of Kenya's 'huge' (The Herald, 2015) and 'extraordinary sacrifices' (UN, 2012) for Somalia,¹⁷ the escalation of this dispute could potentially hinder the fight against al-Shabab, and lead to the emergence of new threats in the region.

Further, Kenya hosts more than 300,000 Somali refugees in Kakuma and Dadaab refugee camps, and a significant number of Somali citizens throughout the country¹⁸ (Sabala, 2019). For years, Nairobi has been the center of humanitarian coordination efforts for conflict-affected Somalia. The ongoing dispute between the two states may have adverse effects on refugees in Kenya, the majority of whom are from Somalia, whether they have resettled in the Daadab refugee camp or in other areas. Kenya's announcement in 2017 to close the Dadaab refugee camp could be seen as a political response to souring diplomatic relations, which could exacerbate the humanitarian crisis given economic and food security challenges in Somalia (Anker, 2018; Bhalla, 2019; Schlein, 2019; USAID, 2017).

Ultimately, it is in the interest of both countries to reach an agreement that would not undermine their diplomatic relations, as this would likely have wider security and economic implications. The susceptibility of the Gulf of Aden to maritime security threats like piracy and armed robbery at sea, illegal, unreported and unregulated fishing and toxic waste dumping (Onuoha, 2009; Weldemichael, 2012), requires that both countries seek a solution that allows them to cooperate on maritime security issues. Specifically, at the peak of piracy and armed robbery at sea in the Gulf of Aden, countries in the region lost revenue from their shipping and tourism sectors. Kenya lost an estimated US\$300 and \$400 million per year from its shipping sector and US\$15 from tourism each year (Otto, 2012). With both Kenya and Somalia keen to make gains from the hydrocarbons that lay in the disputed areas (Mutambo & Ongiri, 2016), and to preserve the gains against piracy in the region, it is in their interest that a resolution that is amenable to their needs is reached.

Socio-economic implications

Largely forgotten in literature and public discourse are the implications of maritime disputes on fishing communities and transboundary fisheries (Dupont & Baker, 2014; Song, 2015; Zang, 2018). Zhang (2018) argues that joint development and management of natural resources in areas of overlapping claims could encourage cooperation over contentious issues. When approached from a social and economic viewpoint, the Indian Ocean Rim fisheries are commercially important and provide livelihoods and a source of food to communities (Obura et al., 2017; Techera, 2018). Additionally, fish recognize no national jurisdiction and the presence of shared and straddling or highly migratory stocks such as tuna and tuna-like species make a case for bilateral cooperation in the management and conservation of shared fisheries. While international courts have taken the well-being of fishing communities into account in several maritime boundary dispute cases, the case studies presented here indicate that hydrocarbon resources are often at the forefront of negotiations for African states.

Our paper highlights the viability of fisheries as significant drivers of community livelihoods and socio-economic security making them tangible objects of negotiation and re-evaluating power relationships between the disputants. While there are no communities inhabiting the disputed Kenya-Somalia EEZ, the Nigerian v. Cameroon case is a prime

example of the negative implications of outright delimitation, as communities who depend on fisheries for livelihood are disenfranchised by the process resulting in violent conflicts over fishing rights (Okafor-Yarwood, 2019; Unah, 2019).

Side-stepping sovereignty concerns over energy resources, the Kenya-Somalia maritime boundary dispute could provide a catalyst for collaboration in fisheries research and management, focusing on the common interest of food and socio-economic security. Difficulties posed by the prevailing dispute can be viewed two-fold. First, fishing remains an important lifeblood for coastal communities as a source of food and income in the Western Indian Ocean (WIO) (Obura et al., 2017; Van der Elst et al., 2005). Second, fish, fishers and fishing operations are active constituents in disputed areas (Baye, 2010; Dupont & Baker, 2014; Song, 2015). Thus, fisheries can be seen as a common resource that serves as a wildcard for both Kenya and Somalia to reach a compromise. In this context, cooperation over fisheries mitigates the prospect of food and economic security being undermined for communities that rely on fishery resources during the dispute resolution. Claims by local residents and leaders of Lamu County (located on the Northern Kenya coast near Somali) point to the potential consequences of the dispute to the country's economy and livelihoods of people:

Fishing is the mainstay of Lamu's economy, and we cannot underscore the value that our traditional fishing grounds hold for the county's blue economy prospects. – Deputy Governor Abdulhakim About Bwana¹⁹

There is also potential loss of fishing grounds, given that the disputed maritime area constitutes Kiunga, one of Lamu County's richest fishing grounds.²⁰ The dispute has a direct impact on artisanal catches, which in turn, undermines the livelihoods of communities, an issue that has been largely ignored.

If we end up losing the Kiunga fishing grounds because of the Kenya-Somalia maritime water dispute, many of us will be forced to leave fishing altogether, because we might end up being subjected to the cruelties that our brothers in Migingo are enduring at the hands of Uganda, because of maritime water disputes (Lamu fishermen Association Chairman, Somo Bin Somo).²¹

Pervasive insecurity hinders traditional fishing activities in areas near the dispute zones and significantly constrains economic prospects associated with exploitation fisheries by large scale industrial fishing fleets. Kenya suspended fishing activities off the coast near the Somali border over what it referred to as a 'security precaution' (Brooks, 2019). Several studies have indicated the potential of the upwelling area near Kenya and Somalia as one of the Western Indian Ocean Rich fishing grounds (Dua, 2013; Jury et al., 2010; Nguli, 2002). The decision to limit fishing activities may not only have implications for catches from local fishing fleets, but also Distant Water Fishing (DWF) fleets, as well as the fishing communities that have historically depended on fishing for their livelihoods. Changes in fishing dynamics due to security measures may consequently put excessive pressure on fisheries, impacting stocks. If we add to the regional picture the fact that a significant number of fish species commercially exploited in the Western Indian Ocean are highly migratory in nature, such as tuna and billfish, cooperation between states becomes crucial for sustainable fisheries management (Kadagi et al., 2020).

What we imply here is that States should see fisheries as closely attached and as an integral part of the maritime boundary dispute rather than as a passive constituent, especially

when the livelihoods of millions of people are threatened. The ability to compromise on important issues such as food security can provide spill-over effects for larger diplomatic relations. Our paper takes the opportunity to expand our understanding of the Kenya-Somalia maritime dispute in the context of fisheries and contributes to the ongoing discourse of addressing food and economic security for local communities in the Western Indian Ocean region. We recognize that maritime boundary disputes are complicated in nature and can result in inter-state tensions. For example, the South China Sea (SCS), specifically China's bilateral fisheries agreements with Japan, Korean and Vietnam, demonstrates that fish can be an element of cooperation between states and presents an opportunity for collaboration on issues of high political sensitivity (Franckx, 2012; Zhang 2018). However, as shown by the prevalence of illegal fishing in the Yellow Sea, the China-Korea joint agreement has failed to address fisheries related conflicts (Kim, 2012). Despite these complexities, cooperation on maritime boundaries can provide a framework to clarify jurisdiction for resource users, which in turn are the starting point for transboundary cooperative management measures, including those related to the marine environment, resources such as fisheries, and maritime security.

Shaping global interest

The maritime dispute between Somalia and Kenya has attracted the attention of global powers. Players far-afield such as the United States, United Kingdom, France, Italy, and Norway have taken positions given the increasing strategic importance of two states in recent oil finds (Saoke, 2019). The keenness of these players to exploit the resource-rich maritime blocks has led to differences in allegiance, with each country taking sides in support of either party. The economic incentive for Kenya and Somalia to explore hydrocarbon resources in the disputed area, unsurprisingly, are heavily influenced by elitism, drawing international attention that accentuates the importance of one state over the other (Arrieta, 2017). The idea that elite structures have an impact on the Kenya-Somalia maritime dispute is implicitly demonstrated in the consensus and patterns of operations by the actors.

The United Kingdom's support of Somalia is rooted in historical relationships between British Petroleum (BP) and Somalia as well as the U.K.'s humanitarian assistance during Somalia's conflicts, in part fueled by a desire to continue resource acquisition (Carmody, 2017). Moreover, the U.K.'s relationship with Kenya has been strained since the election of President Uhuru Kenyatta in 2013, who has been friendlier to American and Chinese investment (Maluki, 2019). Likewise, Norway supports Somalia due to a historical relationship as well as recent animosities with Kenya.²² Somalia's Prime Minister Hassan Ali Khaye maintains dual citizenship with Norway, while Kenya expelled Statoil—a Norwegian oil giant—from further exploring the area.^{23,24} Both U.K. and Norwegian oil companies were present for the Somalia Oil and Gas Conference in London.²⁵ Conversely, the United States appears to side with Kenya,²⁶ who have been critical allies in the 'war on terror,' and Kenya has already contracted French oil giant Total Oil to work in the disputed maritime zone (Maluki, 2019; Hill, 2016).

The unresolved maritime claim between Kenya and Somalia has the potential to undermine economic investments. The longevity of the boundary dispute blocks exploration of natural gas, oil, and other marine resources, which has hindered economic development.

Hasan et al. (2019) examine how these disputes delay exploration and management of resources. In some cases, International Oil Companies have encouraged the resolution of disputes as companies have continued to sign agreements to operate in the disputed maritime boundaries (Harwood, 2012). These capital investments may be at risk and therefore the pressure from oil companies then forces the disputants to seek suboptimal dispute resolution mechanisms. The litigation process and decision may be unfavorable and may take a long time, resulting in economic losses as the disputed area remains unexploited. The Kenya-Somalia dispute hinges on these commerce-related agreements, and the delay in the resolution already has some economic implications for both countries, especially due to the lack of exploration activities. Resolving maritime boundary disputes increasingly depends on the ability of African states to find a response repertoire that reaches further than merely global powers taking sides.

Ultimately, regardless of the ICJ decision, both countries must focus on mitigating the impact on their bilateral relationships and safeguarding the food and economic security of their people.

Conclusion

Using case studies of outright delimitation and Joint Development Agreements (JDAs), we have examined the implications of both resolution mechanisms on the Kenya v. Somalia maritime boundary dispute. On the one hand, outright delimitations seem to be the most applicable outcome for maritime boundary dispute resolution in the African continent. On the other hand, when JDAs are utilized, the potential for offshore hydrocarbons serves to act as a motivation than the prospects of shared fisheries resources. In this paper, we turned our attention to the efficacy of cooperation around fisheries which has been given less consideration yet are better suited for securing food and socio-economic security. While recognizing that the application of joint management of marine resources in practice is far from perfect, the fisheries and fishing communities could be a driving factor of cooperation for Kenya and Somalia, with potential spillover effects for larger diplomatic issues such as security in the maritime space and information sharing.

Following our present analysis of the choice of resolution mechanisms and the impacts arising from the dispute, if Kenya and Somalia consider a joint management arrangement for the shared resources in the disputed area, it could benefit the livelihoods of millions of people and further regional integration. Corresponding with the need to pay attention to conflict realities arising from global interests, shifting focus to a conciliatory framework with less interference from external players would facilitate bilateral relations. A failure to strengthen bilateral engagements between the two countries could hinder the progress towards an equitable exploitation of the ocean resources and maritime security in the Indian Ocean.

As most coastal states in the African continent are keen to harness the potential of their ocean's economy, there is a lesson to be learnt, especially by those currently in negotiation about their undelimited maritime boundaries. They must consider the time consuming, financial constraints and uncertainties associated with outright delimitation requests, including the lingering effect on either the inhabitants of the disputed area and the livelihoods of those who depend on the resources from the area. These would be useful for seriously considering JDAs as a viable solution, which will in turn improve relations,

secure livelihoods of communities and positively influence the economic development agenda through maritime cooperation and collaboration.

Notes

1. https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SOM_1972_Law.pdf
2. https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_1979_Proclamation.pdf
3. https://www.un.org/depts/los/doalos_publications/LOSBulletins/Bulletin_repertory.pdf
4. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf
5. https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SOM_2014_Proclamation.pdf
6. https://www.un.org/Depts/los/convention_agreements/texts/unclos/part6.htm
7. <http://extwprlegs1.fao.org/docs/pdf/bi-158813.pdf>
8. <http://extwprlegs1.fao.org/docs/pdf/bi-158813.pdf>
9. <https://www.icj-cij.org/files/case-related/161/19084.pdf>
10. <https://www.icj-cij.org/files/case-related/161/161-20140828-APP-01-00-EN.pdf>
11. <https://www.icj-cij.org/files/case-related/161/18360.pdf>
12. <https://www.icj-cij.org/files/case-related/161/161-20170202-JUD-01-00-EN.pdf>
13. <https://www.icj-cij.org/files/case-related/161/19342.pdf>
14. <http://kenyalaw.org/kenyalawblog/court-declares-it-has-jurisdiction-over-somalias-application-against-kenya/>
15. https://www.un.org/Depts/los/convention_agreements/texts/unclos/part5.htm
16. <https://www.icj-cij.org/en/case/78>
17. <https://www.icj-cij.org/files/case-related/161/19074.pdf>
18. <https://www.unhcr.org/ke/dadaab-refugee-complex>
19. <https://www.kenyanews.go.ke/kenya-somali-maritime-dispute-threatens-lamu-blue-economy-prospects/>
20. <http://www.mygov.go.ke/agriculture-livestock-and-fisheries/kenya-somali-maritime-border-dispute-is-a-threat-to-lamu-county-blue-economy-prospects-leaders/>
21. <https://stopillegalfishing.com/press-links/unease-in-lamu-over-risk-of-losing-fishing-grounds/>
22. <https://www.theeastafrican.co.ke/tea/news/east-africa/how-somalia-s-internal-politics-fuels-obstinacy-on-boundary-row-with-kenya-1419344>
23. <https://www.oxfordenergy.org/wpcms/wp-content/uploads/2014/10/WPM-53.pdf>
24. <https://www.csmonitor.com/Environment/Energy-Voices/2013/0115/Is-Kenya-the-future-of-oil>
25. <https://blogs.lse.ac.uk/crp/2020/06/17/whats-the-oil-rush-in-somalia/>
26. <https://www.worldpoliticsreview.com/insights/28660/the-long-simmering-kenya-somalia-maritime-dispute-threatens-to-boil-over>

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Notes on contributors

Nelly Isigi Kadagi, Ph.D., is the Director of the Education for Nature Program and Conservation Leadership at World Wildlife Fund, USA. She is also a Co-Principal Scientist at BILLFISH-WIO, an ongoing regional research project on billfish in the Western Indian Ocean (WIO). She works at the interface of science, policy, and conservation with a focus on the ecology and management of large pelagic fish species, maritime and fisheries conflicts, Blue Economy, and capacity development. The WWF-Education for Nature Program provides funding support for graduate-level training, research, and professional development to conservation leaders in the global South to accelerate conservation outcomes.

Ifesinachi Okafor-Yarwood, Ph.D., is a Lecturer in Sustainable Development at the School of Geography and Sustainable Development, University of St Andrews, Scotland. She is also a Visiting Research Fellow at the Centre for Strategic Research and Studies, National Defence College, Abuja, Nigeria. Her research investigates the extent to which unsustainable use of the marine environment and the resources therein might precipitate conflict and insecurity in the Gulf of Guinea region.

Sarah M. Glaser, Ph.D., is Director of Secure Fisheries, a program of One Earth Future Foundation. Her research investigates the causes of conflict over fisheries resources in the Horn of Africa and the ecology of fisheries in the Western Indian Ocean. Secure Fisheries supports sustainable fisheries management and scientific research in the Somali region.

Zachary Lien is a Sié Fellow at the Josef Korbel School of International Studies. His research focuses on the intersection of religion and international human rights, as well as investigates the relationships between religion, freedom of thought, apostasy and blasphemy laws, and religious violence.

ORCID

Nelly Isigi Kadagi  <http://orcid.org/0000-0002-0221-8260>

Ifesinachi Okafor-Yarwood  <http://orcid.org/0000-0003-4952-9979>

Sarah Glaser  <http://orcid.org/0000-0002-8240-5575>

Zachary Lien  <http://orcid.org/0000-0001-9293-086X>

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