PRINCIPLES OF MARITIME DELIMITATION AS APPLIED BY INTERNATIONAL TRIBUNALS

BY

VIRGINIA WANGUI NDEGWA

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DECLARATION

I, **VIRGINIA WANGUI NDEGWA**, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in this or any other university.

VIRGINIA WANGUI NDEGWA G26/87818/2016

SIGNED ……

Date …….

This thesis has been submitted for examination with my approval as the University supervisor.

Prof. F.D.P. Situma

Signed …….

Date ……

Acknowledgment

I wish to thank God for his enduring love and grace that has enabled me to finalise this paper. All glory to Him.

To my supervisor, Prof. F.D.P Situma, please receive my gratitude for your unending support and patience. Thank you for encouraging me to finish what I started!

Dedication

To you my dearest mother, I will always love you.

List of Abbreviations

UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
ITLOS	International Tribunal for the Law of the Sea
ICJ	International Court of Justice

List of Conventions and Treaties

United Nations Charter

United Nations Convention on the Law of the Sea

List of Cases

Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between them, RIAA, Vol XXVII 2006, p.147.

Award in the Arbitration Regarding the Delimitation of the Maritime Boundary between Guyana and Suriname, RIAA vol. XXX/1-144.

Case of Certain Norwegian Loans, ICJ Reports 1957, p.24.

Case Concerning the Delimitation of the Continental Shelf between United Kingdom of Great Britain and Northern Ireland, and the French Republic, RIAA, 1977, Vol XVII, p 3.

Case Concerning the Continental Shelf (*Libya Arab Jamahiriya v Malta*) ICJ Reports 1985, p. 13.

Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya) ICJ Reports 1982, p. 18

Case Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal , ITLOS Case Number 16.

Case Concerning the Delimitation of the Boundary between Guinea and Guinea Bissau 1985 ILR Vol 77 p. 635

Maritime Delimitation in the Area Between Greenland and Jan Mayen ICJ Reports 1993, p.38.

Delimitation of the Maritime Boundary in the Gulf of Maine Area ICJ Reports, 1984, p. 246.

Dispute concerning Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean, ITLOS Case Number 23.

Land and Maritime Boundary Dispute Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening), ICJ Reports 2002, p. 303.

Maritime Delimitation in the Black Sea (Romania v Ukraine) ICJ Reports 2009, p.61

Maritime Delimitation in the Caribbean Sea and Pacific Ocean (Costa Rica v Nicaragua) ICJ Reports 2018, p. 1.

Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain) ICJ Reports 2001, p. 40

Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), ICJ Reports 1993, p.41

New Zealand v Japan; *Australia v Japan* (*Southern Bluefin Tuna Cases*, ITLOS Case Numbers 3 and 4 (Provisional Measures)) Order of 27 August 1999 (p. 60).

Table of Contents

CHAPTER ONE

INTRODUCTION

1.1 Background

The law of the sea, in its essence, divides the seas into zones and specifies the rights and duties of states and ships flying their flags in those zones.[1] Prior to 1945, there was variety in states' practice with respect to claiming maritime zones in which they could exercise full sovereignty over the seabed and subsoil, the water column, and the airspace.[2] The scarcity of land-based natural resources forced states to concentrate on the exploitation opportunities of offshore resources;[3] this was the chief reason for the emergence of the continental shelf concept.

The continental shelf concept gained notoriety after the United States President Harry Truman's Proclamation in 1945 which extended the landward territory of the United States to the continental shelf, to include the natural resources of the subsoil and seabed of the continental shelf beneath the high seas, but contiguous to the coast of the United States, subject to its jurisdiction and control.[4]

During the 1960s, again as a result of technological development, most fish stocks in the seas, which are concentrated over the continental shelf, were subjected to intensive exploitation by distant-water fishing fleets.[5] Coastal state efforts to acquire exclusive rights to manage and exploit these living resources were inevitable. The result was the emergence of the new off-shore zone, the exclusive economic zone (EEZ).

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1 Edward Collins Jr. & Martin Rogoff, '*The International Law of Maritime Boundary Delimitation'* (1982) 34 Maine LR 1-2.

2 Nugzar Dundua, '*Delimitation of Maritime Boundaries Between Adjacent States* (The United Nations-Nippon Foundation)<http://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/dundua_0607_georgia.pdf > (accessed 20 May 2017).

3 Ibid

4 Malcolm N. Shaw, *International Law* (Cambridge University Press: Cambridge, 2014).

5 Ibid., Collins & Rogoff (n.1)

The United Nations Convention on the Law of the Sea (the 1982 UNCLOS)[6] allows maritime zones established up to 200 nautical miles measured from the nearest points of the baselines.[7]

Maritime delimitation is the process by which the competing claims by states are resolved definitively, according to international law, so as to identify the maritime areas within which coastal States would be left to exercise their sovereign rights.[8] The process of delimitation involves establishing the boundaries of an area already, in principle, appertaining to the coastal state and not the determination *de novo* of such an area.

The law governing maritime delimitation is international law. The international law of maritime delimitation is that body of rules regulating the drawing of boundaries between the overlapping maritime entitlements of neighbouring coastal states.[9]

Maritime delimitation involves international co-operation in the sense that delimitation cannot be effected unilaterally, but must result from a process involving two or more states. This was expressed in the *Gulf of Maine case*[10] where the International Court of Justice held, *inter-alia*, that:

> No maritime delimitation between States with opposite or adjacent coasts may be effected unilaterally by one of those States. Such delimitation must be sought and effected by means of an agreement, following negotiations conducted in good faith and with the genuine intention of achieving a positive result.

[6] United Nations Convention on the Law of the Sea, Dec. 10, 1982; 1833 U.N.T.S. 397; (hereinafter UNCLOS), <http//www.un.org/DeptsAos/convention-agreements/texts/ unclos/unclose.pdf> (accessed 4 March 2018).
[7] Ibid., Article 57.
[8] Stephen Fietta & Robin Cleverly, *Practitioner's Guide to Maritime Boundary Delimitation* (Illustrated Edn., Oxford University Press 2016) 3.
[9] Ibid., (n.8).
[10] *The Gulf of Maine Case* ICJ Reports 1984, p.246, para 112.

The importance of maritime delimitation cannot be overstated as states exercise their sovereignty in maritime delimitation under international law. Maritime delimitation is an important function of international law due to the various interests that are affected on account of the resources, both living and non-living, that are available. The non-living resources include fossil fuels and minerals.

Over the years, the ICJ and other international tribunals have taken an approach that leads to the attainment of equitable resolution of the delimitation disputes thereby enlarging the circumstances of application of the principles of maritime delimitation. This approach has ostensibly led to what can be seen as a variation or enlargement of the principles of maritime delimitation.

In a bid to establish the reason for this variation, we shall briefly examine the history of the Court and tribunals.

The League of Nations, which is the precursor to the United Nations, was established in 1920 in which the Permanent Court of International Justice (PCIJ) was incorporated. Article 14 of the Covenant of the League of Nations gave the Council of the League responsibility for formulating plans for the establishment of the PCIJ. The Council tasked a Committee of Jurists with the making of a report on the establishment of a permanent international court. After the presentation of the report on a PCIJ, the same was adopted by the Council of the League in December 1920, thereby creating the PCIJ.

Although the PCIJ was brought into being through, and by, the League of Nations, it was nevertheless not part of the League. There was a close association between the two bodies,

reflected, *inter alia*, in the fact that the League Council and Assembly periodically elected the Members of the Court and that both Council and Assembly were entitled to seek advisory opinions from the Court. The PCIJ was mandated to hear disputes referred to it by the state parties.[11]

The International Court of Justice (ICJ) was formed after World War II under the United Nations Charter. [12] Article 92 of the UN Charter provides:

> The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter.

Despite the establishment of the ICJ, the states still reserved unto themselves the right to resolve their disputes, including maritime delimitation disputes, through other methods as outlined in Articles 33(1) and 95.

Although described as the principal judicial organ, the ICJ does not exercise compulsory jurisdiction on all disputes amongst states. In spite of the Court's existence, states also refer their disputes to conciliation commissions and even to arbitrations.[13]

It should also be pointed out that under Article 95 of the UN Charter, the sovereignty and independence of the state parties is re-emphasised by providing that states parties can resort to other tribunals to resolve their disputes.

[11] Statute of the Permanent Court of Justice; 6 LNTS 379; <https//:refworld.org/docid/40421d5e4.html//> (accessed 4th March 2018).
[12] Article 7(1) of the UN Charter; 1 UNTS; XVI < http://www.refworld.org/docid/3ae6b3930.html// (accessed 4 March 2018).
[13] Ibid, (n.12) Article 33.

The jurisdiction of the ICJ is provided for under Article 36(1) of the ICJ Statute which states:

> 36(1) The jurisdiction of the Court… comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."[14]

However, the jurisdiction of the ICJ is watered down by Article 36(2) (also referred to as the "optional clause") and 36(3) of the Statute that a state party can reserve the extent of its submission to the Court's jurisdiction.

Article 36(2) provides as follows:

> The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. The interpretation of a treaty;
> b. Any question of international law;
> c. The existence of any fact which, if established, would constitute a breach of an international obligation;
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

Article 36(3) provides that the declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states or for a certain time.

The ICJ has had occasion to determine the jurisdictional implication of Article 36(3) in the *Norwegian Loans Case*. [15] In brief, the facts are that between 1885 and 1909, the Norwegian government and two Norwegian state banks issued several series of public bonds, many of which were purchased by French citizens. During the unsettled years of World War I and the world-wide depression a decade later, Norway several times suspended the convertibility to gold of the Norwegian bank notes issued to pay interest and to redeem the bonds, and, in 1931, Norway abandoned the gold standard for an indefinite period. The French bond holders refused to accept payment in the nonconvertible Norwegian bank notes, and, in 1925, the French

[14] Ibid.
[15] ICJ Reports 1957, p.24

government, on behalf of its nationals, insisted to the government of Norway that it was obligated to pay the interest and to redeem the bonds in gold. The Norwegian government consistently maintained that its law forbade payment in gold.

Norway rejected the repeated suggestions of France that the dispute be submitted to international arbitration or judicial settlement on the ground that the dispute was governed by Norwegian national law rather than international law.

In 1955, France applied to the International Court of Justice for a determination of the rights of its nationals. In its decision, the Court stated, *at page 782*:

> Since two unilateral declarations are involved, such jurisdiction is conferred upon the Court only to the extent to which the declarations coincide in conferring it. A comparison between the two declarations shows that the French declaration accepts the Court's jurisdiction within narrower limits than the Norwegian declaration; consequently, the common will of the parties, which is the basis of the Court's jurisdiction, exists within these narrower limits indicated by the French reservation. [16]

The 1982 UNCLOS was born in Jamaica on 10th December, 1982. This Convention was negotiated through compromise negotiation and it introduced a complex settlement mechanism under Part XV which was considered to be a package deal to the states to balance all interests.[17] A reading of some of the clauses of the 1982 UNCLOS discloses obscurity and vagueness. The reasons for this, it is suggested, are mainly political, arising from the history of the negotiations of the third UNCLOS Conference which started in 1973. For instance, Sun Pyo Kim suggests that Article 74, which deals with maritime delimitation, is purposefully vague as to the mode of resolution of disputes because during the seventh negotiating session at the third UNCLOS, seven small negotiating groups were set up to negotiate the issue of settlement of international maritime delimitation disputes. These groups were split into two, that is, those in favour of the

[16] *Case of Certain Norwegian Loans* ICJ Reports 1957, p. 9.

[17] Rosemary Reyfuse, '*The Future of Compulsory Dispute Settlement under the Law of the Sea Convention'*, (2005) 36 Victoria University of Wellington Law Review, 683.

equidistance method of delimitation, and those in favour of the equitable method of delimitation.[18] They both gave different proposals as to the text on the issue of delimitation, thereby creating a deadlock in the negotiations. This was resolved by the President of the session, Ambassador Tomy Koh, who worked out a compromise formula by avoiding any particular reference to either "equidistance" or "equitable" in the text.[19]

The 1982 UNCLOS contains a detailed and complex dispute resolution mechanism. It introduced innovative compulsory dispute settlement mechanisms that are contained in Part XV of the Convention. [20] Article 279 of the 1982 UNCLOS reinforces the provisions of Article 2 of the UN Charter. Article 280 reinforces the sovereignty of states in the freedom of choice of dispute resolution. Article 287 provides for the choice of procedure in disputes concerning the interpretation and application of the Convention through a written declaration.[21] The 1982 1982 UNCLOS establishes ITLOS with jurisdiction to hear disputes amongst states parties under Article 288. It also establishes the Annex VII tribunals which have jurisdiction to hear

[18] UN Doc NG7/2/Rev.2, 28 March 1980, members of the Negotiating Group7/2 (Pro-equidistance principle) group were: Bahamas, Barbados, Canada, Cape Verde, Chile, Columbia, Cyprus, Democratic Yemen, Denmark, Gambia, Greece, Guinea-Bissau, Guyana, Italy, Japan, Kuwait, Malta, Norway, Portugal Spain, Sweden, United Arab Emirates, United Kingdom, Yugoslavia. : UN Doc NG7/10/Rev.1, 25 March 1980: Members of the Negotiating Group 7/10 (Pro-equitable principles) group were Algeria, Argentina, Bangladesh, Benin, Burundi, Congo, France, Iraq, Ireland, Ivory Coast, Kenya, Liberia, Libya, Madagascar, Maldives, Mali, Mauritania, Morocco, Nicaragua, Pakistan, Papua New Guinea, Poland, Romania, Senegal, Syrian Arab Republic, Somalia, Turkey, Venezuela and Vietnam; R. Platzöder, (*Third United Nations Conference on the Law of the Sea: Documents,* Vol. IX 5(Oceana: New York, 1986) at p. 394

[19] Sun Pyo Kim, *Maritime Delimitation And Interim Arrangements In North Asia*, Martins Nijhoff Publishers NY, 2004) 10

[20] Tomy TB Koh, '*A Constitution for the Oceans*', Remarks made by the President of the Third United Nations Conference on the Law of the Sea, in Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index (1983) E 83V5, xxxiii.

[21] Article 287 UNCLOS provides that, "*When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention:-*

(a) The International Tribunal for the Law of the Sea established in accordance with Annex VI;
(b) the International Court of Justice;
(c) an arbitral tribunal constituted in accordance with Annex VII;
(d) *a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein*."

disputes without any reservation, and Annex VIII tribunals which are specialised tribunals that deal with disputes related to fisheries, protection of marine environment, marine scientific research, and navigation.

The first case on maritime delimitation was determined by the ICJ in 1969. The *North Sea Continental Shelf Cases* [22]was a dispute between the Federal Republic of Germany, Denmark and The Netherlands. It involved a dispute on the delimitation of the continental shelf in the North Sea. The three states entered into special agreements dated 2nd February 1967, and in Article 1 thereof the Court was asked to determine, *inter alia,*

> What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertain to each of them beyond the partial boundary determined by the above-mentioned Convention of 9 June 1965?[23]

At page 23 of the judgement, the Court poses the question:

> [D]oes the equidistance-special circumstances principle constitute a mandatory rule, either on a conventional or on a customary international law basis, in such a way as to govern any delimitation of the North Sea continental shelf areas between the Federal Republic and the Kingdoms of Denmark and The Netherlands respectively? Another and shorter way of formulating the question would be to ask whether, in any delimitation of these areas, the Federal Republic is under a legal obligation to accept the application of the equidistance-special circumstances principle. [24]

The Court determined this dispute through the application of the doctrine of proportionality in order to achieve an equitable delimitation. [25]

[22] ICJ Reports 1969, p. 3.
[23]Ibid.,(n. 22), page 6
[24] Ibid., (n. 22) para 21
[25] Ibid., (n. 22) paras 97, and 98.

A chance to test the soundness of the principles applied by the ICJ in the *North Sea Continental Shelf* cases came about through the *Anglo-French Arbitration*[26] which related to the delimitation of the parties' continental shelf boundaries of North Western Europe extending over the submarine areas of the North Sea and English Channel, and waters lying westwards of France and the UK to the furthest limits of the continental shelf of the Atlantic Ocean. During the arbitration, France relied heavily on the principles of maritime delimitation pronounced in the *North Sea Continental Shelf Cases*. In the course of its judgement, the Tribunal made several observations on the decision of the ICJ in the *North Sea Continental Shelf Cases*. However, it did not rely on the principle of proportionality in arriving at its award. [27]

Since the establishment of ITLOS, it has had a chance to make a determination on disputes involving maritime delimitation where it had occasion to consider the decisions of the ICJ and of other tribunals with concurrent jurisdiction. In the case of *Ghana and Cote D' Ivoire*, the Annex VI Tribunal relied on equidistance/relevant circumstances principle. [28]

From the history of the negotiation of the 1982 UNCLOS III (1973-1982) it is apparent that political considerations form a big part of international law treaty making. The idealist will propose that the problem of differing decisions from the Court and tribunals with competent jurisdiction can be resolved through amendment to the Statute of the ICJ. However the writer opines that the provisions of Article 108 of the UN Charter relating to the amendments to the Charter may not be so easy to meet in matters where states may feel that their sovereignty may be impugned by a hierarchical court system.

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[26] *Case Concerning the Delimitation of the Continental Shelf between United Kingdom of Great Britain and Northern Ireland, and the French Republic*, RIAA, 1977, Vol XVII, p 3

[27] Ibid., paras 97 and 99.

[28] *Dispute concerning Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean,* ITLOS Case Number 23, para 289.< https://www.itlos.org/cases/list-of-cases/case-no-23(accessed 24th March 2018).

The problem appears to be the flexibility with which the Court and tribunals have discharged their jurisdiction in determining maritime delimitation disputes. Through time, the Court and the tribunals have expanded the circumstances to be taken into account to arrive at an equitable solution. For instance, in the *North Sea Continental Shelf Cases*[29] the Court adopted the principle of natural prolongation in arriving at its equitable decision; in the arbitration between France and England[30] the arbitral tribunal did not apply the proportionality test, although one of the parties relied heavily on it; however, in the *Tunisia-Libya*[31] case the Court applied this principle of proportionality in a most specific way; in the *Libya/Malta*[32] case the Court stated that the prolongation principle is not the only applicable principle and seemed to downplay its importance; in the *Jan Mayen* [33]case the court however abandoned the application of the equidistant line in favour of proportionality.

In the *Black Sea Case*,[34] the ICJ articulated a three stage approach to maritime delimitation. The first was the drawing of a provisional delimitation line using geometrically objective methods.[35] The second was to assess whether there are factors calling for shifting of the provisional equidistance line. The third was a verification of the resulting line which may or may not be adjusted through a "disproportionality" test.[36] This three stage process was applied in the *Bay of Bengal Case*[37] which was determined by ITLOS in 2012.

[29] *North Sea Continental Shelf Sea Cases,* ibid., (n.22)
[30] *Anglo French Arbitration*, ibid., (n.26)
[31] *Tunisia/Libyan Arab Jamahiriya* ICJ Reports 1982, p.18.
[32] *Libya V Malta* ICJ Reports 1985, p. 13.
[33] *Maritime Delimitation in the Area Between Greenland and Jan Mayen* ICJ Reports 1993, p.38.
[34] *Maritime Delimitation in the Black Sea (Romania V Ukraine*) ICJ Reports 2009, p.61.
[35] Ibid para 116
[36] Ibid (n.29) para 120
[37] *Case Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal* , ITLOS Case Number 16, <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf> (accessed 22nd March 2018).

These are a few examples of the evolving application of principles of maritime delimitation which the Court and international tribunals have applied over the years. Over time certain principles have been denuded in their application so as to favour generally, equitable outcomes of the various disputes.

1.2 Statement of the Problem

The judicial bodies established under the 1982 UNCLOS have the same juridical competence as the ICJ. In other words, they can handle and determine the same disputes as can the ICJ.[38] The creation of ITLOS and Annex VII Tribunals with jurisdiction to hear and determine conclusively any international law dispute amongst states parties, with no appellate procedure has been the subject of academic discourse.

In determining maritime delimitation disputes, the Court and tribunals are guided in general by certain principles, namely the equidistance principle (special circumstances), the equitable principle (relevant circumstances), natural prolongation and proportionality.[39]

Articles 74[40] and 83[41] of the 1982 UNCLOS, concerning the delimitation of the exclusive economic zone (EEZ) and the continental shelf, provide that states are to agree on delimitation, in accordance with international law and in order to achieve an equitable solution.

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[38] Alan Boyle, "*Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 ICLQ (1997) 37.

[39] *Handbook on the Delimitation of Maritime Boundaries*, Division of the Ocean Affairs and the Law of the Sea Office of Legal Affairs, (United Nations Publication, 2000) chapter 2.

[40] Article 74(1) provides that "The delimitation of the exclusive economic zone 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, in order to achieve an equitable solution"

[41] Article 83(1) states that "The delimitation of the 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, in order to achieve an equitable solution."

The law on equitable delimitation is vague, given that it provides for the desired result, but does not state the procedure to be followed to attain that result. The Articles 74 and 83 of the 1982 UNCLOS only mention equitability as an end, but does not expound on the means.

The vague provisions of the 1982 UNCLOS on delimitation of maritime boundaries have opened the way for the interpretation and determination of disputes and principles applicable by the Court and the various tribunals. The lack of specificity in the approach by the ICJ and the tribunals has led to the decisions being criticised for advancing numerous approaches, rules and concepts, but not articulating clear principles.[42] The consequences of the foregoing are the Court and tribunals producing "bewildering array of quasi-principles" leading to uncertainty regarding their delimitation reasons.[43]

This is seen in the differing application of principles in the decisions that will be examined in Chapter 3.

Is the new approach by the Court and tribunals to adopt a progressive two-stage, then three-stage process in delimitation disputes going to be a cure to the differing decisions or is this just a pedantic way of resolving maritime delimitation disputes? Would it be possible to have a harmonised approach to the application of the established principles in the absence of a hierarchical international court system?

The flexible approach by the courts seems to create a varied jurisprudence in this field. There appears to be no closed doors as far as the circumstances that the court will consider in arriving at an equitable decision. An open ended jurisprudence denies the parties a solid reference point in the resolution of their maritime delimitation disputes, leaving them to the discretion of the

[42] Ian Townsend-Gault, 'Maritime Boundaries in the Arabian Gulf', in Clive Scofield , David Newman Alasdair Drysdale & Janet Allison Brown,(Eds).*The Razor Edge: International Boundaries and Political Geography) (*2002), 224.

[43] Ibid., (n.44).

Court and tribunals. The flexible approach by the Court and tribunals is, therefore, a problem in the growth of the jurisprudence of international maritime delimitation.

The evolution of the application of the principles of maritime delimitation as noted above, resting with the application of the three stage approach, may be what appears to be a more practical approach to resolve differing decisions on the application of the principles of maritime delimitation.

1.3 Hypothesis

ITLOS and the Annex VII Tribunals have the jurisdiction which is concurrent with jurisdiction enjoyed by the ICJ and there is no hierarchy in the jurisdiction and authority of these international judicial bodies.

The study proceeds on the following presumptions;

(1) that the Court and international tribunals are evolving the law on maritime delimitation through their judgements and awards and the absence of a hierarchical system of international courts has not impeded this growth in jurisprudence.

(2) Further, we presume that although the provisions of the 1982 UNCLOS on maritime delimitation are vague, the decisions of the Court and international tribunals have given a sufficient guide to settle the law on delimitation.

(3) that the fact that there is no closed list of principles on maritime delimitation has given the Court and international tribunals free hand in determining disputes.

1.4 Research Questions

The study will seek to answer the following questions:-

1. How differently have the Court and international tribunals approached similar disputes on maritime delimitation and the application of the principles of maritime delimitation?
2. Has the lack of a hierarchical system of international courts hampered the growth of jurisprudence on maritime delimitation?
3. Are there any inconsistent decisions arising from the Court and international tribunals?

1.5 Theoretical and Conceptual Framework

States set up international organisations, including international tribunals, in international law. Through the exercise of the principle of sovereignty, states are able to donate some of their authority to organisations to run certain affairs on their behalf. Through the exercise of this function, state parties created the UN and its attendant organs, including the ICJ. Under the UN Charter, which embraces this principle under Article 2(1), states are at liberty to resolve their differences through various methods, including arbitration, and in the exercise of this preserve of states, the 1982 UNCLOS established ITLOS and Annex VII Tribunals.

The concept of sovereignty is jealously guarded by states. This is apparent in the formation of the PCIJ. During the 1899 and 1907 Hague Conferences, it was proposed that there be a compulsory jurisdiction of an international tribunal. However, the majority of the members of the Advisory Committee of Jurists that initiated the PCIJ planning did not agree to this proposition.[44] In the end, the sovereignty of states was recognised in the Statute of the PCIJ.[45]

[44] Shigeru Oda, 'Some Reflections on the Dispute Settlement Clauses in the United Nations Convention on the Law of the Sea' in J Maraczk (ed) *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nihoff, Zoetermeer (The Netherlands1984)) 39

[45] Article 13 of the Covenant of the League of Nations,< http://unhcr.org/refworld/docid >(accessed 22nd February, 2018).

Following on in this trend, during the formation of the UN and the ICJ, states reserved unto themselves the right to determine the nature of disputes that they would surrender to the ICJ's jurisdiction by making the jurisdiction of the ICJ consensual. Further, the states did not find it necessary to create a hierarchical international court system, a fact that has been commented upon by Jonathan Charney, [46] who states that:

> If states prefer a system with multiple options for third party settlement of international disputes, the question arises as to whether a hierarchy may be established among them. It is clear to me that the international community will not and cannot establish such a hierarchy of international tribunals that would place the ICJ or any other tribunal at the apex of international law serving as the 'Supreme Court of International Law.' While the reasons may be many, two primary reasons are: (1) the fact that a universal, or near universal, agreement of states to appoint any particular forum with this status seems practically and politically impossible, and (2) such a Supreme Court would undermine the community's desire for diverse forums since many of the perceived advantages of such forums would become impossible to attain with such a hierarchical structure. Review by a court of general jurisdiction would compromise the very features that make the alternative forums attractive in the first place, such as the special qualities of the panel members.

The jurisprudential basis for this phenomenon by states can be understood through Jeremy Bentham's concept of law. Bentham defined law as 'an assemblage of signs, declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain person or class of persons, who in the case in question are or are supposed to be subject to his power.'[47]

Whereas this definition is applicable in a state, in international law where there is no international sovereign or ruler, the "sovereign" is replaced by the state.

[46] Jonathan Charney, '*The Impact on the International and Legal System of the Growth of international Courts and Tribunals,' Vol 31 (1999)* Journal of International Law and Politics, 699.

[47] RW Dias, *Jurisprudence*, (Butterworths 1985 5th edn.,) 336

As the source of the law is the sovereign, according to Bentham, in international law, the source of the law is customary international law and state practice, and what the states agree and declare to be law. Bentham, who was a strong believer of written law, frowned upon judge-made law[48] (common law at his time). His analysis of the law, therefore, would not have favoured the making of law by the ICJ and international tribunals, but a more elaborate code of laws by the states themselves which the courts would apply, in this case, perhaps better provisions in the 1982 UNCLOS on maritime delimitation dispute resolution would be the cure. According to Allen Buchanan and David Golove,[49]modern Realists such as George Kennan and Kenneth Waltz, characterize international relations as a:

> Hobbessian state of nature with the following features: (a) There is no global sovereign, no supreme arbiter capable of enforcing rules of peaceful co-operation. (b) There is (approximate) equality of power, such that no one state can permanently dominate all others. (c) The fundamental preference of states is to survive. (d) Given conditions (a) and (b) what is rational for each state to do is to strive by all means to dominate others in order to avoid being dominated (to rely on what Hobbes calls 'the principle of anticipation'). (e) In a situation in which each party rationally anticipates that it is rational for others to dominate, without constraints on the means they use to do so, moral principles are inapplicable.[50]

With this as the jurisprudential approach, it may then be a herculean task to have a hierarchical court or as previously mentioned, a "supreme court of international law." The Court and the tribunals will have, therefore, to engineer the law in a way that settles the applicable principles and reduces ambiguity.

This may be easier said than done due to the principle of equality of states in international law. The Court and tribunals may not realistically expect a hierarchical international court system, and, for the sake of a harmonious growth of jurisprudence in the area of maritime delimitation,

[48] Ibid, (n.72), p.343
[49] Allen Buchanan & David Galove, '*Philosophy of Internal Law'*, (In Jules Coleman & Scott Shapiro (eds) *The Oxford Handbook of Jurisprudence& Philosophy of Law*) (OUP, 2002), 868.
[50] Ibid., (n.74).

the Court and tribunals may require to set out fixed principles and exceptions in the area under discussion.

The creation of multiple judicial organs which have concurrent jurisdiction by states can only be finally cured by the very same states as suggested by Gilbert Gillaume who said:

> Before creating a new court, the international legislator should, it seems to me, ask itself whether the functions which it wishes to entrust to that court could not properly be carried out by an existing body, as is the practice for example with the international administrative tribunals (UNAT and ILOAT).[51]

There are certain terms and principals of maritime delimitation that will require definitions before proceeding in order to put them in perspective and also understand their application by the international tribunals:

1.5.1 Land Dominates the Sea.

Before coming into the procedural principles used in delimitation, one principle lays the basis and overrides the others; the principle of land dominates the sea. In the *Fisheries Case*[52] the International Court of Justice held that, "*Certain basic considerations inherent in the nature of the territorial sea bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions.*"[53] Among these considerations, the court said, was that "… *[s]ome reference must be made to the close dependence of the territorial sea*

[51] Gilbert Gillaume, '*The Proliferation of International Judicial Bodies: The outlook for the International Legal Order'*(*Address to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000*)
[52] *Anglo-Norwegian Fisheries (U.K. v. Norway*) ,ICJ Reports, 1951 p.117 (Order Jan. 18).
[53] Ibid., (n.77)

upon the land domain.'[54] The land domain as described by the court, *"... [i]s the land which confers upon the coastal State a right to the waters off its coasts.*"[55]

In the *North Sea continental Shelf Cases*, the ICJ stressed why the land dominates the sea. It observed that "[t]he land is the legal source of the power which a State may exercise over territorial extensions to seaward."[56]

1.5.2 Equidistance Principle.

Article 15 of the 1982 UNCLOS provides for the application of the equidistance method in matters dealing with territorial sea. It states that:

> *"Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured*."[57]

"Equidistance line" method according to Jiuyong, is the maritime boundary between States which must follow "the median line every point of which is equidistant from the nearest points" on the coasts.[58] In essence, the equidistance principle is applied while having due regard as to the baselines along the coasts of the States whose territorial sea is subject to delimitation.

Whilst observing Article 12 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone[59] and Article 6 of the 1958 Geneva Convention on the Continental Shelf,[60] the equidistance method was to be applied in circumstances where there was an absence of

[54] Ibid,. (n.77).
[55] ibid., (n.77).
[56] *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*) , ICJ Reports 1969, p.3.
[57] United Nations Convention on the Law of the Sea, Dec. 10, 1982; 1833 U.N.T.S. 397; (hereinafter UNCLOS), <http//www.un.org/DeptsAos/convention-agreements/texts/ unclos/unclose.pdf> (accessed 4 March 2018)..
[58] Shi Jiuyong 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) Vol. 9 Issue 2 Chinese Journal of International Law 271, 273-274.
[59] UNTS Vol. 499, No. 7302. Entered into force 10 June 1964.
[60] UNTS Vol. 516, No. 7477

agreement between the states, historical titles or special circumstances. This rule came to be known as the 'equidistance-special circumstances' rule.

1.5.3 The legal status of the Equidistance-special circumstance rule.

As to whether the special circumstance rule is to be regarded as a customary rule or having a customary rule effect, the jurisprudence is contradictory. In the *North Sea Continental shelf cases*, the ICJ observed at paragraph 81 that:

> *"The Court accordingly concludes that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule;…"*[61].

On the other hand in *Qatar v Bahrain*,[62] the Court observed that the 'equidistance/special circumstance' rule was to be regarded as having a customary character given that it was found both under Article 15 of the 1982 UNCLOS and under Article 12, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone.[63]

1.5.4 <u>The Equitable Principle.</u>

The equity principle may also be referred to as the equitable principle. From the discussions on equidistance, one thing is apparent, that in the event of inequity arising from the pure application of the equidistance principle, the courts take into account circumstances that seek to bring equity. Jiuyong observes that "The other method *(equitable principle)* attempts to remedy inequities that can arise in delimitation based on equidistance (particularly in the case

[61] Ibid., (n 81) Para. 81.
[62] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* ICJ Reports 2001, p. 40.
[63] Ibid, (n.84).

of adjacent, as opposed to opposite, coasts) and posits a delimitation based simply on equitable principles or producing equitable results."[64]

1.5.4.1 Special vs. Relevant Circumstances.

There is basically no limit as to the circumstances the court might employ as factors to inform its equitable result.

One cannot help but notice that in application of **equidistance**, the circumstances informing the result are referred to as 'special circumstances' whereas in application of **equity**, the circumstances informing the result are 'relevant circumstances.' However the court in the maritime *Delimitation in the Area between Greenland and Jan Mayen*[65] states that there is no difference between the two concepts. It stated *inter alia:*

> "Although it is a matter of categories which are different in origin and in name, there is inevitably a tendency towards assimilation between the special circumstances of Article 6 of the 1958 Convention (equidistance method) and the relevant circumstances under customary law (equitable method), and this if only because they both are intended to enable the achievement of an equitable result. This must be especially true in the case of opposite coasts where … the tendency of customary law, like the terms of Article 6, has been to postulate the median line as leading prima facie to an equitable result. It cannot be surprising if an equidistance-special circumstances rule produces much the same result as an equitable principles-relevant circumstances rule in the case of opposite coasts, whether in the case of a delimitation of continental shelf, of fishery zone, or of an all-purpose single boundary."[66]

In as much as there exists no difference between the two in terms of result, there is a speck of distinguishing factor as to what can and cannot be regarded as relevant circumstances. In fact from the name 'relevant circumstances' itself, we deduce that what is to be considered as a

[64] Jiuyong, ibid., (n. 83) p.274.
[65] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway*), ICJ Reports 1993, p.41.
[66] ibid., (n. 90) at para. 56.

factor should be relevant to the nature of dispute in question. This was the observation of the ICJ in the *Continental Shelf Libyan Arab Jamahiriya/Malta*[67] case where it stated:-

> "Yet although there may be no legal limit to the considerations which States may take account of, this can hardly be true for a court applying equitable procedures. For a court, although there is assuredly no closed list of considerations, it is evident that only those that are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of equitable principles to its delimitation, will qualify for inclusion. Otherwise, the legal concept of continental shelf could itself be fundamentally changed by the introduction of considerations strange to its nature."[68]

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1.5.4.3 Configuration of coasts.

In the *North Sea Continental Shelf Cases* the ICJ held that the general configuration of the states' coasts, as well as the presence of any special or unusual features were circumstances

[67] *Case Concerning the Continental Shelf (Libya v. Malta), ICJ Reports* , 1985 p.313.
[68] Ibid., (n.92) at para. 48.
[69] Ibid., (n. 92) para 56.

that ought to be taken note of.[70] True to its acknowledgment, the court observed that Norway and Denmark had convex coastline which would cause the 'equidistance lines to leave the coasts on divergent courses, thus having a widening tendency on the area of continental shelf off that coast.'[71]

1.5.4.4 Proportionality concept.

The proportionality concept also plays a role in the configuration of the coast. Jiuyong observes that in cases, such as the *Gulf of Maine case*[72], and the *Greenland/Jan Mayen*[73] and *Libya/Malta*[74] delimitations, a comparison is drawn on the ratio between the length of a coast and the maritime space allocated by a provisional line.[75] "Where one Party has a significantly longer coastline than the other, but the maritime area allocated by the provisional line does not reflect the disparity in coastal length, the Court has, without requiring precise mathematical proportionality, modified the provisional line in order to achieve a more equitable ratio."[76]

1.5.4.5 Islands.

Prosper Weil notes that "Depending on circumstances, the island may be given full or partial effect. In certain cases, it may even be ignored. In others, it may be enclaved, which means that

[70] ibid., (n.81) at para. 96
[71] Ibid., (n.81) at para. 8.
[72] *Delimitation of the Maritime Boundary in the Gulf of Main*, ICJ Reports, 1984, p. 246.
[73] Ibid., (n.90).
[74] Ibid., (n.92).
[75] Ibid., Jiuyong (n. 83) 286.
[76] ibid., (n. 83).

the delimitation may be carried out between the mainland as if the island did not exist, and the island may then be given its own maritime space around its coast."[77]

1.5.4.6 Socio-economic factors:

The Court will only take socio-economic factors into account as a relevant circumstance where delimitation would "be revealed as radically inequitable, that is to say, as likely to entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned"[78] as was held in the *Gulf of Maine case*. Jiuyong posits that in other cases, the Court has taken the position that delimitation should not be influenced by the relative economic position of the two States in question,[79] in *Tunisia v Libya*[80] the court while refusing to take into account the poverty state of Tunis observed that:

> *"…these economic considerations cannot be taken into account for the delimitation of the continental shelf appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other*.

1.5.4.7 Security:

In *Greenland/Jan Mayen* and *Libya/Malta*, the Court recognized that, in certain cases, security may be a relevant consideration.

1.6 Literature Review

Malcolm D Evans[81] sets out the principles of maritime delimitation as being formulaic, thus equidistance/special circumstances and equitable principles/relevant circumstances.

[77] Prosper Weil, *The Law of Maritime Delimitation : Reflections* (translated from the French by Maureen MacGlashan Grotius Cambridge 1989)p. 230.
[78] *The Gulf of Maine Case* ICJ Reports1984, p.246, para. 237.
[79] Juiyong (n. 83) p.289.
[80] Ibid., (n. 31).
[81] Malcolm D Evans *Maritime Boundary Delimitation*, in "The Law of the Sea" (2017 OUP).

The multiplication of international judicial bodies is a subject of interesting debate as to its advantages and disadvantages with respect to the development of maritime delimitation. In his article on the International Tribunal for the Law of the Sea, Thomas Mensah states that during the 1982 UNCLOS III meetings it was clear that many states were not willing to accept a 'legal obligation to submit their disputes to binding settlement by standing international judicial bodies'[82] Therefore, it was unrealistic to expect that all states would agree to submit all their disputes to a particular judicial body, resulting in the acknowledgment that no judicial body could be given exclusive jurisdiction to deal with all disputes arising under the 1982 UNCLOS.

Jonathan Charney states that judgments from the ICJ and ad hoc arbitration tribunals which are formed to resolve maritime delimitation disputes, ordinarily carry considerable importance in international law for two reasons: (1) The unique line of jurisprudence made possible by a series of decisions, and (2) the absence of clear guidelines from codified international law and state practice.[83] He goes further to state;

> Even though there is no doctrine of stare decisis in international adjudication, it is not inaccurate to consider the impressive line of maritime boundary decisions as forming a common law in the classic sense…
> This jurisprudence has defined the method of analysing boundaries and has limited the considerations that may be taken into account when determining the boundary.[84]

Charney goes further, while analysing the development of international law through the application of the major doctrines of international law as treated by several tribunals, to find that "the different international tribunals of the twentieth century share relatively coherent views on those doctrines of international law."[85] He however, admits that the increase in the

[82] Thomas Mensah, '*The International Tribunal for the Law of the Sea',* 11 (1998) Leiden Journal Of International Law*, 527 <http://www.cambridge.org/core > (accessed 28th* March 2018).
[83] Jonathan Charney, Progress in International Boundary Delimitation Law, (1994) 88 AJIL, 227
[84] Ibid., (n.108), p. 228.
[85] Jonathan Charney, "*The Impact on the International and Legal System of the Growth of international Courts and Tribunals,"* (1999) 31 Journal of International Law and Politics 699.

number of international law tribunals without an effective hierarchical system means that "complete uniformity of decisions is impossible." Whilst this is an indictment on the proliferation of international tribunals, Charney does not find that this would lead to a denuding of international law, but seems to suggest that there is already in place some sort of moral hierarchy amongst these international tribunals when he posits:

> On the other hand, it is clear that ongoing international tribunals tend to follow the reasoning of their prior decisions. Furthermore, the views of the ICJ, when on point are given considerable weight, and those of other international tribunals are often considered. Thus the variety of international tribunals functioning today do not appear to pose a threat to the coherence of an international legal system.

He finds that they permit a degree of "experimentation and exploration" which can lead to improvements in international law.[86] He also concludes that it is probable that the establishment of many more international tribunals will cease.

Other writers and scholars share a different view about the growth of maritime delimitation law through the Court and tribunals. Shigeru Oda, a former President of the ICJ, has argued that the institution of the ITLOS is not conducive to international law development. He states:

> The creation of a court of judicature in parallel with the International Court of Justice, which has been in existence for many years as the principal judicial organ of the United Nations, will prove to have been a great mistake. One should not lose sight of the fact that the law of the sea always has been, and always will be, an integral part of international law as a whole. The law of the sea must be interpreted in the light of the uniform development of jurisprudence within the international community and must not be dealt with in a fragmentary manner.... If the development of the law of the sea were to be separated from the general rules of international law and placed under the jurisdiction of a separate judicial authority, this could lead to the destruction of the very foundation of international law.[87]

[86] Ibid, (n.110), p.700.
[87] Oda, ibid (n.69) p. 864.

In her analysis of the 1985 *Guinea/Guinea Bissau* case,[88] Marie-Christine Aquarone writes of the "innovative" award of the ICJ tribunal that,

> The regional perspective significantly contributed to the body of maritime boundary cases because it demonstrated a freedom on the part of the arbitrators from legal correctness-defined as the mechanical application of well established rules of international law. [89]

Clive Schofield[90] in analysing the progress and challenges of maritime delimitation notes that the1982 UNCLOS is silent on how agreements between states are to be reached, especially in relation to there being no preferred mode of delimitation. He further notes that this ambiguity stemmed from the third UNCLOS Conference disagreement between negotiating states, some of whom favoured delimitation on the basis of principles of equity and others on equidistance/special circumstances rule. The end result was a compromise text which placed more emphasis on the objective of the delimitation exercise. He further states that due to the ambiguity of the provisions there is scant clear guidance thereby creating a scope for conflicting interpretations by the courts. He also notes that there appears to have been an evolution in the courts' application of the principles of delimitation because the factors or circumstances to be taken into account by the courts are, theoretically "limitless." He draws his support from the fact that the courts have moved away from considering geophysical factors in delimitation, such as in the *Libya-Malta* case where the court found that these factors are "completely immaterial."

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[88] *Case Concerning the Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, RIAA Vol XIX, 149 <http://lrgal.un.org/riaa/cases/Vol_XIX/149-196 > (accessed 22 July 2018).

[89] Marie-Christine Aquarone, '*The 1985 Guinea/Guinea-Bissau Maritime Boundary Case and its Implications*', 26 (1995) Ocean Development & International Law 413.

[90] Clive Schofield, *One Step Forwards, Two Steps Back: Progress and Challenges in the Delimitation of Maritime Boundaries since the Drafting of the United Nations Convention on the Law of the Sea*, (G Xue and A. White (eds) 30 years of UNCOS (1982-2012): Progress and Prospects) 2013, 21 -239 <http://www.ru.ouw.edu.au/lhapapers/1233> (accessed 12th May 2018).

He however concedes that there appears to be clearer guidelines on maritime delimitation that are emerging from the Court and tribunals through the adoption of a "two-stage" and subsequently "three-stage" approach on delimitation.

In the *UN Handbook on Maritime Delimitation*[91], the circumstances and factors that the courts are to take into account in arriving at an equitable solution are limitless. Chapter 2 of the Handbook analyses the various principles applied by the courts in maritime delimitation cases and the factors or circumstances that are considered in arriving at equitable solutions. The Handbook clearly states that the courts have avoided to give a "closed list" of relevant circumstances in view of the fact that each delimitation has to be decided on its merits.[92] The Handbook does however acknowledge that there are no parameters against which to establish the equity of a particular delimitation line.[93]

Ki Beom Lee argues in his unpublished thesis,[94] that since the *Jan Mayen Case* the Court has stopped trying to differentiate between equidistance-special circumstances rule, and equitable-relevant circumstances rule because the Court observed that the difference between the two rules is not remarkable.[95] He goes on to examine whether to achieve an equitable solution is the ultimate goal of maritime delimitation or is the delimitation rule in itself. He proposes three scenarios in answer to this, which need to be quoted in full:-

> Three opinions regarding this phrase can be presented. The first view contends that the achievement of an equitable result should be no more than the 'aim' or 'goal' of maritime delimitation. Thus, the view focuses on the clarification of another phrase ('on the basis of international law') referred to in Articles 74(1) and 83(1) of the UNCLOS,

[91] United Nations Handbook on the Delimitation of Maritime Boundaries, United Nations Publications New York (2000) ; <http//www://dx.doi.org/10.18356/cc72cd88>- (accessed 12th May 2018)
[92] Ibid., (n.116) page 31.
[93] Ibid., (n.116) page 31.
[94] Ki Beom Lee, *The Demise of Equitable Principles and the Rise of Relevant Circumstances in Maritime Boundary Delimitation,* (Submitted for the Degree of PhD University of Edinburgh School of Law) 2012 <http:// https://www.era.lib.ed.ac.uk/handle/1842/7576> (accessed 13th May 2018).
[95] Ibid (n. 119) page 31.

> instead of the achievement of an equitable solution. However, this opinion would reignite the conflict between the two Groups during the Third Conference. The second view assumes that the achievement of an equitable solution opens the door to the use of equity in maritime boundary delimitation. According to this argument, the term 'equitable solution' is the only substantial concept that can be found in Articles 74(1) and 83(1) of the UNCLOS. Subsequently, the term justifies the employment of equity in maritime delimitation. Philip Allott argues that the concept of equity employed by the term 'equitable solution' would evolve 'equitable principles' on a case-by-case basis. The third submits that an equitable solution needs another standard, such as proportionality, to confirm the equitability of the result produced. In other words, the result then reached needs the check of its equitability.[96]

In his thesis, however, Lee treats the phrase equitable solution as a rule governing maritime delimitation.[97]

The foregoing review shows that although the Court and tribunals seem to be flexible in their approach to the circumstances relating to maritime delimitation disputes, there seems to be emerging a body of jurisprudence from the various decisions and awards which are helping to clear the muddy waters of maritime delimitation principles.

1.7 Research Methodology

The research methodology will be the textual analysis of primary documents such as treaties and conventions, and secondary material, such as, academic writings and books on the subject. These will be sourced from the University Library as well as online sources. In addition to this, the study will review decisions of the ICJ, ITLOS and arbitral tribunals with a view to determining whether there is disharmony in the decisions rendered in matters that pertain to similar facts or the application of similar doctrine.

[96] Ibid (n.119) p. 33.
[97] Ibid (n. 119) p. 33.

1.8 Chapter Breakdown

This research paper is divided into 5 chapters outlined here below:

Chapter 1: Introduction

- Background
- Statement of the Problem
- Definitions
- Hypotheses
- Research Questions
- Theoretical Framework
- Literature Review
- Research Methodology

Chapter 2: The Dispute Resolution Mechanisms Under the 1982 UNCLOS

- Mechanisms for dispute settlement under the 1982 UNCLOS
- Jurisdiction of ICJ to settle disputes under the 1982 UNCLOS
- Efficacy of Compulsory dispute settlement provisions under the1982 UNCLOS
- Jurisdiction of ITLOS
- Jurisdiction of Annex VII and VIII Tribunals

Chapter 3: Decisions on Maritime Delimitation rendered by ICJ

- Jurisdiction of the ICJ on maritime delimitation
- Decisions of ICJ on maritime delimitation and principles emanating therefrom
- •Is there harmony in the ICJ's application of the principles of maritime delimitation?

Chapter 4: Decisions on Maritime Delimitation rendered by Tribunals

- Examination of decisions of ad hoc tribunals and tribunals under Annex VII
- Is there consistency in the application of principles of maritime delimitation from the Tribunal awards?
- Is there consistency in the application of principles of maritime delimitation between the ICJ and the Tribunals?
- What are the suggested mitigation measures?

Chapter 5: Conclusion and Recommendations

- Conclusions
- Recommendations

CHAPTER TWO

MARITIME DELIMITATION DISPUTE RESOLUTION MECHANISM UNDER THE 1982 UNCLOS

2.1 Introduction

As previously discussed in Chapter 1, the 1982 UNCLOS provides for dispute settlement procedures in Part XV thereof. This Part is divided into 3 sections. Section 1 sets out the principles concerning dispute settlement, Section 2 provides for the compulsory procedure to be adopted leading to binding decisions, and, Section 3 provides the limitations and exceptions to the application of Section 2.

Parties to a dispute must first attempt to arrive at a settlement through the procedures provided in Section 1, and, if there is no settlement, the parties can refer the dispute to the ICJ or tribunal having jurisdiction as provided in Section 2. The International Law of the Sea Tribunal (ITLOS) has held that a State Party is, however, not obliged to continue with pursuing the procedures in section 1 if it comes to the conclusion that there may not be a possibility of amicable settlement.[1]

The1982 UNCLOS establishes international tribunals under Annex VII and Annex VIII and also ITLOS which is established under Annex VI. Tribunals established under Annex VIII are specialised tribunals, dealing only with disputes arising under Part XI of the 1982 UNCLOS. Annex VII tribunals have jurisdiction to hear and determine any dispute arising from the interpretation of the 1982 UNCLOS which the states parties refer to them by agreement. The workings of tribunals and ITLOS will be looked at in detail in this chapter as well as an analysis of the dispute resolution mechanism under the 1982 UNCLOS.

[1] *New Zealand Vs. Japan*; *Australia Vs Japan* (*Southern Bluefin Tuna Cases*, ITLOS Case Numbers 3 and 4 (Provisional Measures)) Order of 27 August 1999 (p. 60).

2.2. Mechanisms for Dispute settlement Under PART XV of the1982 UNCLOS

The 1982 UNCLOS has established Annex VII and VIII tribunals in addition to ITLOS. It also recognises and incorporates the ICJ as a dispute resolution forum as it specifically sets it out in Article 287.

Article 279 of The 1982 UNCLOS re-emphasises the duty of states parties to the convention to settle their disputes through peaceful means and in accordance with the UN Charter. The disputes that are contemplated under this Part are any disputes which concern the '*application and interpretation or application of this Convention*'. The parties are not restricted in the choice of any means of peaceful settlement procedure.[2] The procedures set out under Part XV, therefore, apply only if there is no agreement on any peaceful settlement.

In the event that the parties to a dispute have agreed to seek settlement through peaceful means of their own choice, then the procedure under Part XV shall apply only when no settlement has been reached and also when such other procedure does not exclude any further procedure.[3]

Further, Article 282 provides that in the event that the parties to the dispute concerning interpretation or application of the Convention have formally agreed through treaty, to resolve their disputes through a procedure that entails a binding decision, then that procedure shall apply in lieu of Part XV.

Article 283 encourages parties to a dispute to exchange their views through negotiation or other peaceful means.

Article 284 provides for peaceful settlement through conciliation through Annex V of the 1982 UNCLOS or through any other conciliation procedure.

[2] United Nations Convention on the Law of the Sea, Dec. 10, 1982; 1833 U.N.T.S. 397; (hereinafter UNCLOS), <http//www.un.org/DeptsAos/convention-agreements/texts/ unclos/unclose.pdf> (accessed 4 March 2018 Article 280.

[3] Ibid, (n.2) Article 281.

Section 2 of Part XV of the 1982 UNCLOS provides for the compulsory procedure to be adopted in the event that the state parties to the dispute are not in agreement.

Article 286 specifically provides that *'[a]ny dispute concerning the interrelation or application of this Convention shall where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.*'

Article 287 regulates the choice of procedure to be adopted. We will set out the relevant article for ease of reference:-

> Article 287 Choice of Procedure
>
> 1. When signing, ratifying or acceding to this Convention or at any time thereafter a State shall be free to choose, by means of a written declaration, one or more of the following means of settlement of disputes concerning the interpretation or application of this Convention:
>   (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
>   (b) the International Court of Justice;
>   (c) an arbitral tribunal constituted in accordance with Annex VII;
>   (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.
> 2. A declaration made under paragraph 1 shall not affect or be affected by the obligation of a State Party to accept the jurisdiction of the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea to the extent and in the manner provided for in Part XI, section 5.
> 3. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted arbitration in accordance with Annex VII.
> 4. If the parties to the dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree.
> 5. If the parties to the dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to arbitration in accordance with Annex VII, unless the parties otherwise agree.

From the foregoing, the mechanisms for settlement of disputes can be classified into two broad categories, namely, the amicable procedure and the adversarial procedure. The amicable (or peaceful) procedure involves the parties engaging in negotiations or conciliation or even through other mechanisms provided for in any treaties they may have entered into. In this case, if the procedure adopted brings a peaceful resolution, then the procedure set out under section

2 is ousted. However, in the event that the parties are unable to peaceably agree on the resolution of their dispute, then the procedure under section 2 kicks in.

There have been instances when proceedings initially instituted before an arbitral tribunal have been referred to settlement by ITLOS.[4]

Upon reference of the dispute to any of the fora under Article 287, such court or tribunal shall have jurisdiction over any dispute that concerns the interpretation of the 1982 UNCLOS,[5] as well as jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of the 1982 UNCLOS. In the case of *Colombia versus Nicaragua*,[6] the Court determined the application of the 1982 UNCLOS despite the fact that Colombia was not a State party. It interpreted the relevant provisions of the 1982 UNCLOS to be international customary law and therefore binding upon Columbia.

2.3 Jurisdiction of ICJ to Settle Disputes Under the 1982 UNCLOS

The ICJ is established by the ICJ Statute which forms part of the UN Charter. Article 7 of the UN Charter establishes the ICJ as one of the principle organs of the UN. Article 1 of the Statute reiterates this and Article 36 of the Statute provides that the Court shall have jurisdiction to hear all legal disputes referred to it concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

[4] *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean*, ITLOS case number 23 < https://www.itlos.org/cases/list-of-cases/case-no-23> (accessed 21st August 2018) Ghana instituted proceedings against Cote D'Ivoire for arbitration under Annex VII in September 2014. In December 2014 the parties agreed to submit the dispute to a Special Chamber in ITLOS which heard the matter and rendered a decision.

[5] Article 288, UNCLOS

[6] *Territorial and Maritime Dispute (Nicaragua Vs. Colombia*) ICJ Reports 2012, 624

(c) the existence of any fact which, if established, would constitute a breach of international obligation;

(d) the nature and extent of reparation to be made for the breach of an international obligation.

Article 287 the 1982 UNCLOS lists the ICJ as one of the bodies that States parties may refer a dispute to for a binding decision. The States parties therefore have a choice of referring their dispute to the ICJ for settlement. In the case of *Territorial and Boundary dispute between Nicaragua and Colombia*[7] the ICJ was faced with a claim for territory and for maritime delimitation of the Nicaraguan continental shelf and EEZ and the continental shelf of the Colombian Islands.[8] The facts in brief are as follows, Colombia instituted a claim against Nicaragua, *inter alia*, for delimitation of the continental shelf and EEZ between the parties. Although Colombia was not a State Party to the 1982 UNCLOS, the parties agreed that the applicable law was customary international law reflected in the findings of the Court, ITLOS and the 1982 UNCLOS.[9] At paragraphs 137 and 138 the Court stated:

> *137. The Court must, therefore, determine the law applicable to this delimitation. The Court has already noted (paragraph 114 above) that, since Colombia is not a party to UNCLOS, the applicable law is customary international law.*
> *138. The parties also agreed that several of the most important provisions of UNCLOS reflect customary international law. In particular, they agreed that the provisions of Articles 74 and 83 on delimitation of the exclusive economic zone and continental shelf, and Article 121 on legal regime of islands, are to be considered declaratory of international law.*

Article 74 of the 1982 UNCLOS provides as follows:

1. The delimitation of the exclusive economic zone 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, in order to achieve an equitable solution.
2. If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part XV.
3. Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and co-operation, shall make every effort to enter into provisional

[7] ICJ Reports 2012, p.624.
[8] ibid., (n.7).
[9] Ibid (n.7) para 114, 118

> arrangements of a practical nature and, during this transitional period not to jeopardize or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final determination.

Article 83 provides for the delimitation of continental shelves between states with opposite or adjacent coasts. The Court went on to apply the three step approach applied previously in the *Black Sea Case*[10], that is, (1) the establishment of a provisional/equidistance line, and (2) consideration of relevant circumstances requiring adjustment of the line (3) determination of whether there is disproportionality as a result. The Court found that the disparity in coastal lengths merited the shifting of the equidistance line eastwards.[11] The decision is remarkable in its application of the 1982 UNCLOS provisions on Nicaragua, which was not a State Party, substantively through the provisions of the preamble to the 1982 UNCLOS.[12]

Prior to the coming into force of the 1982 UNCLOS, the Court had handled several cases involving maritime delimitation. In the following chapters we will examine these decisions against those rendered by tribunals exercising the same jurisdiction.

2.4 Compulsory Dispute Settlement Provisions under the 1982 UNCLOS

Part XV of the 1982 UNCLOS provides the dispute settlement procedure. This is set out in detail under Article 287.

Article 287 of the Convention has been seen as what provides a 'compulsory' dispute resolution procedure. Some scholars have argued that this provision creates 'procedural fragmentation'

[10] *Maritime Delimitation in the Black Sea (Romania versus Ukraine*) ICJ Reports 2009, p.61.
[11] *Colombia v Nicaragua*, ibid (n.7) para 233.
[12] Ibid., (n.7) para 126.

by allowing state parties to lodge declarations that can oust disputes from the compulsory process.[13]

The jurisdiction of the Court and tribunals therefore, can be invoked for the following disputes, according to Thomas Mensah:[14]

a. a complaint by a coastal state that has acted in contravention of the 1982 UNCLOS provisions with regard to overflight, navigation, laying of submarine cables and pipelines or in regard to other internationally lawful uses of the sea as provided under Article 58;
b. during the exercise of the freedoms and uses of the sea under the 1982 UNCLOS, a complaint that a state has acted in contravention of the 1982 UNCLOS or other rules of international law; and,
c. a complaint that a coastal state has acted in contravention of international law rules and standards in the protection and preservation of marine environment.

The jurisdiction of the Court and tribunals can be ousted or limited through general limitation as contained in the 1982 UNCLOS and through the optional exception to jurisdiction as provided under Article 297.[15]

The general limitations to jurisdiction are contained in Article 297(2) and (3). Article 297(2) provides that a coastal state is not obliged to accept the jurisdiction of ITLOS in matters

[13] Rosemary Rayfuse, "*The Future of Compulsory Dispute Settlement Under the Law of the Sea Convention*" (2005) Victoria university of Wellington Law Review, p.693.
[14] Thomas Mensah, '*The International Tribunal for the Law of the Sea',* 11 (1998) Leiden Journal Of International Law, *527* <*http://www.cambridge.org/core* > *(accessed 28th* March 2018) .
[15] ibid, (n.14) page532

concerning the interpretation of the 1982 UNCLOS on scientific research related matters if the coastal state's conduct is in accordance with Article 246 or Article 253.[16]

Article 297(3) provides that the jurisdiction is ousted if the coastal state considers that the dispute concerns its sovereign rights with respect to the living resources within the exclusive economic zone. These sovereign rights extend to the area of fisheries and harvesting of resources, allocation of surplus resources to other states and establishment of conservation and management laws and regulations by the concerned state.[17]

The optional exclusions to the jurisdiction are as specifically provided for under Article 298. States parties are entitled to exercise their discretion in this regard. Article 298 provides:

> 1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:
>
> (a) i) disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations or those involving historic bays or titles, …
>
> ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided in section 2, unless the parties otherwise agree;
>
> iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;
>
> b) disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service…
>
> c) disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the

[16] Ibid. (n.2) Article 297(2) UNCLOS. Article 246 UNCLOS provides for the undertaking of marine research in the exclusive economic zone and on the continental shelf and Article 253 deals with the suspension or cessation of marine scientific research activities.

[17] The rights of the coastal states are as set out in Articles 61 which deals with the actions of a State in conserving living resources in its exclusive economic zone and Article 62 which provides for the actions of the State Party in utilization of the living resources in the exclusive economic zone.

matter from its agenda or calls upon the parties to settle it by the means provided for in this Convention.

2. A State Party which has made a declaration under paragraph 1 may at any time withdraw it or agree to submit a dispute excluded by such declaration to any procedure specified in this Convention.
3. A State Party which has made a declaration under paragraph 1 shall not be entitled to submit any dispute falling within the excepted category of disputes to any procedure in this Convention as against another State Party, without the consent of that party.

Various states have invoked this Article and have lodged declarations limiting the jurisdiction of the Court and Tribunals. For instance, Canada, which in its ratification made a declaration which states:-

> With regard to article 287 of the Convention on the Law of the Sea, the Government of Canada hereby chooses the following means for the settlement of disputes concerning the interpretation or application of the Convention without specifying that one has precedence over the other:
> (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI of the Convention; and
> (b) an arbitral tribunal constituted in accordance with Annex VII of the Convention.
> With regard to Article 298, paragraph 1 of the Convention on the Law of the Sea, Canada does not accept any of the procedures provided for in Part XV, section 2, with respect to the following disputes:
> - Disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles;
> - Disputes concerning military activities, including military activities by government vessels and aircraft engaged in non-commercial service, and disputes concerning law enforcement activities in regard to the exercise of sovereign rights or jurisdiction excluded from the jurisdiction of a court or tribunal under Article 297, paragraph 2 or 3;
> - Disputes in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council decides to remove the matter from its agenda or calls upon the parties to settle it by the means provided for in the Convention.
> According to Article 309 of the Convention on the Law of the Sea, no reservations or exceptions may be made to the Convention unless expressly permitted by other articles of the Convention. A declaration or statement made pursuant to Article 310 of the Convention cannot purport to exclude or to modify the legal effect of the provisions of the Convention in their application to the state, entity or international organization making it. Consequently, the Government of Canada declares that it does not consider itself bound by declarations or statements that have been made or will be made by other states, entities and international organizations pursuant to Article 310 of the Convention and that exclude or modify the legal effect of the provisions of the Convention and their application to the State, entity or international organization making it. Lack of response

by the Government of Canada to any declaration or statement shall not be interpreted as tacit acceptance of that declaration or statement. The Government of Canada reserves the right at any time to take a position on any declaration or statement in the manner deemed appropriate.[18]

Several other countries have lodged declarations, although some are not as detailed as that lodged by Canada.[19]

Apart from the declarations exempting jurisdiction that can be filed by States parties, disputes relating to fisheries and marine scientific research are also excluded from compulsory procedures. Section 3 of Part XV provides for the exceptions to the applicability of section 2. The same is reproduced herein in *extenso*:

1. Disputes concerning the interpretation of this Convention with regard to the exercise by a Coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
   (a) when it is alleged that a coastal State has acted in contravention of the provision of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other traditionally lawful uses of the sea specified in article 58;
   (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
   (c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention…
2. a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to marine scientific research shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute arising out of:
   (i) the exercise by the coastal State of a right or discretion in accordance with article 246; or
   (ii) a decision by the coastal State to order suspension or cessation of a research project in accordance with article 253.

   b) A dispute arising from an allegation by the researching State that with respect to a specific project the coastal State is not exercising its rights under articles

[18] Declaration by Canada November 2003 < www.un.org/depts/los/convention_agreements/convention declarations.htm> (accessed 29th May 2018).
[19] 33 States Parties lodged declarations upon signing UNCLOS, 65 upon ratification, and 25 subsequently thereafter. < www.un.org/depts/los/convention_agreements/convention declarations.htm> (accessed 29th May 2018)

> 246 and 253… shall be submitted, at the request of ether party to conciliation under Annex V, section 2, provided that the conciliation commission shall not call in question the exercise by the coastal State of its discretion to designate specific areas as referred to in article 246 …or its discretion to withhold consent in accordance with article 246…
> 3 a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2, except that the coastal State shall not be obliged to accept the submission of such settlement relating to its sovereign rights with respect to the living resources in the exclusive economic zone …

This Article sets out the instances when a State Party can avoid the 'compulsory' dispute resolution mechanism of section 2. It is clear that the greatest of these exclusions arise from the State Party's exercise of sovereign rights under Articles 246 and 253. Article 246 provides for the marine scientific research in the EEZ and on the continental shelf. The coastal State is at liberty to exercise its sovereign jurisdiction to regulate authorise and conduct marine scientific research in its EEZ and continental shelf. Such research must be conducted with the consent of the coastal State which can, in its discretion, withhold the consent to conduct the research by another State if that project is of direct significance to the exploration or exploitation of natural resources, involves drilling into the continental shelf, involves construction of artificial islands, or contains inaccurate project details.[20] Article 253 provides for the cessation of marine scientific research by a coastal State if the information given to it is inaccurate, or the party undertaking the research fails to comply with Article 249.

Article 298 proceeds further to give instances when the State Parties can exercise their option to exclude the application of the compulsory dispute resolution procedures of Part XV. A State Party can declare that it does not accept any of the procedures provided in Article 287 for the following category of disputes, that is, (1) disputes concerning the interpretation of Articles 15,74 and 83 relating to the sea boundary delimitations or those involving historical bays or

[20] Article 246 UNCLOS

titles so long as the State making the declaration agrees to refer such dispute to conciliation under Annex V; (2) disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service; and (3) disputes in respect of which the Security Council of the United Nations is exercising functions under the UN Charter.

It appears that although Part XV purports to create a compulsory dispute resolution mechanism, the same is subject to exceptions by the states through unilateral declarations or through the provisions of the 1982 UNCLOS. In this regard, therefore, it cannot be successfully argued that the dispute settlement procedure under the 1982 UNCLOS is compulsory in the strict sense. However, the fora provided in the 1982 UNCLOS for dispute settlement is quite varied and it is expected that each state party can find one that it feels comfortable in referring its dispute to.

2.5 Jurisdiction of ITLOS

ITLOS is created under Annex VI of the 1982 UNCLOS. Article 20 of this Annex provides that ITLOS may be accessed by State Parties or by 'an entity other than a State Party' bringing forth an interpretation that even individuals can have recourse to it.[21] Article 21 gives the jurisdiction of ITLOS to handle all disputes and applications submitted to it in accordance with the Convention, and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal. This, read together with Article 288 of the 1982 UNCLOS, gives ITLOS jurisdiction in respect of disputes concerning the provisions of treaties or agreements other than the the 1982 UNCLOS.[22]

ITLOS also has a special jurisdiction under the 1982 UNCLOS to deal with disputes relating to the prompt release of ships and their crew and the grant of provisional measures ITLOS offers a forum of choice for the state parties to settle their disputes. It also performs two other

[21]Mensah ibid (n.14) p.539
[22] Ibid (n14) p.538

functions of great importance, namely, the establishment of a Sea Bed Disputes Chamber whose jurisdiction is provided for under Article 187 to deal with the provisions of Part XI of the Convention, and the second function is to provide a forum for the settlement of disputes which are identified under the 1982 UNCLOS as requiring expeditious decisions, such as applications for provisional measures and for prompt release of vessels and crew, as provided for under Article 290 and 292, respectively.

2.6 Jurisdiction of Annex VII and Annex VIII Tribunals

These are tribunals formed by agreement of the parties to the dispute within the meaning of Part XV. The States Parties will agree to the terms of reference of the tribunal and will submit to its jurisdiction. The tribunal upon hearing the parties will give a binding award subject to Articles 10 and 11 of Schedule VII of the 1982 UNCLOS.

The tribunal will set up its own procedure and its composition is governed by Article 3 thereof in Schedule VII. Entities, other than States Parties, can be party to arbitrations conducted under Annex VII.[23]

Since the coming into force of the 1982 UNCLOS, there have been several Annex VII tribunals that have been established for purposes of determining maritime delimitation disputes. One of the decisions is the *Dispute Concerning the Maritime Delimitation between Bangladesh and India*[24]. The tribunal established under Annex VII was invited to delimit the area in the Bay of Bengal, to delimit the maritime boundary in the territorial sea and EEZ and the continental shelf- within and beyond 200nm. Bangladesh and, its neighbours, India and Myanmar, had been having negotiations since 1970 in a bid to resolve the maritime delimitation dispute in the

[23] Article 13 Annex VII UNCLOS

[24] *Dispute Concerning the Delimitation of the Boundary Dispute Between Bangladesh and Myanmar (Bangladesh/ Myanmar*) ITLOS Reports 2012, page 4.

Bay of Bengal. Myanmar and India favoured a delimitation through equidistance method, but Bangladesh was opposed to this.

As a result, Bangladesh referred the dispute to arbitration under the 1982 UNCLOS Annex VII in 2009. It also instituted a similar arbitral process against Myanmar. However, this was referred to ITLOS by agreement of the parties and a judgment was delivered in March 2012. The arbitration proceedings between Bangladesh and India proceeded independent of the proceedings between Bangladesh and Myanmar. The arbitral tribunal delimited the disputed area using the equidistance method after finding that there were no special circumstances warranting a deviation, such as an unstable coastline as claimed by Bangladesh.

In the *Guyana and Suriname*[25] arbitration under Annex VII, Guyana brought arbitral proceedings against Suriname for breach of international law in the disputed maritime territory. Guyana instituted proceedings in 2004 against Suriname under Article 286 and 287 of the 1982 UNCLOS and Annex VII thereof. The issue for determination was the delimitation of the maritime boundary between the parties and a claim for damages resulting from the alleged breach. In determining the dispute, the arbitral tribunal applied Article 15 of the 1982 UNCLOS. It, however, found that there were special circumstances of navigation that allowed deviation from the median line.[26]

[25] *Award in the Arbitration Regarding the Delimitation of the Maritime Boundary between Guyana and Suriname*, <www.legal.un.org/riaa/cases/vol_XXX/1-144.pdf> (accessed 2nd August 2018).
[26] Ibid (n.30) para 306.

Annex VII tribunals have also been formed for purposes of determining other international law disputes, such as the South China Sea Arbitration between Philippines and China,[27] and the Southern Bluefin Tuna Case between Australia, New Zealand and Japan.[28]

Annex VIII establishes special tribunals for purposes of resolving disputes under the 1982 UNCLOS involving fisheries, protection and preservation of the marine environment, marine scientific research, and navigation.[29] The special tribunal is an adjudicative process that gives binding awards. The States Parties can be assisted by specialists or experts who can be drawn from people affiliated with UN agencies such as the Food and Agriculture Organisation, from the United Nations Environment Programme, Inter-Governmental Oceanographic Commission and International Maritime Organisation.[30] Under Article 3, the parties to the dispute may nominate 2 names from the list of experts in each field with established credentials and who enjoy the highest reputation for fairness and integrity.[31]

Article 5 gives Annex VIII a broader mandate other than simple dispute resolution. The special tribunal can, with the concurrence of the parties, carry out an inquiry and establish the facts giving rise to the dispute. Such findings are conclusive among the parties.

Further Article 5(3) provides that upon the request of the parties to the dispute, the special tribunal may formulate recommendations which shall not have the force of a decision, but which shall be the basis of review by the parties.

[27] *In the Matter of the South China Sea Arbitration between the Republic of the Philippines and the Peoples Republic of China*, < https://pca-cpa.org/wp-content/uploads/sites/175/.../PH-CN-20160712-Award.pdf> (accessed 8th August 2018).
[28] *The Southern Bluefin Tuna Case Between Australia and Japan and Between New Zealand and Japan* <https. legal.un.org/riaa/volumes/riaa_XXIII.pdf> (Accessed 8th August 2018).
[29] UNCLOS, Annex VIII Article 1.
[30] Ibid, Article 2(2).
[31] Ibid, Article 2(3).

Conclusion

There are many avenues for dispute resolution that are available to States in international law. The proliferation of these fora for dispute settlement may be a source of rich jurisprudence on maritime delimitation, or it can also be a source of conflicting jurisprudence on maritime delimitation. In all these tribunals, the jurisdiction is consensual, and there is no appeal mechanism. Any party that is aggrieved by the decision of the Tribunal would have to explore political means of peaceful redress. However, in most cases, the States involved in the dispute choose to comply with the judgement or award rendered, thereby making the dispute resolution mechanism effective.

In the following Chapter we will examine the decisions that have been rendered by the Court with a view to determining whether the jurisprudence is growing, and also, whether the availability of multiple fora for dispute settlement is creating an environment of harmonious decisions.

CHAPTER THREE

DECISIONS ON MARITIME DELIMITATION RENDERED BY THE ICJ

3.1 Introduction

The ICJ is mandated under Article 36 of the ICJ Statute to determine all cases referred by the State Parties under the UN Charter, more specifically, legal disputes concerning the interpretation of a treaty, any question of international law, the existence of any fact which would if established constitute a breach of an international obligation, the nature and extent of the reparation for the breach of an international obligation.[1]

In arriving at its decisions the ICJ is bound to apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) general principles of law recognised by civilised nations;

(d) judicial decisions and teachings of the most highly qualified publicists.[2]

In this Chapter we examine the decisions which have been rendered by the ICJ in maritime delimitation disputes to establish the trend of the jurisprudence that the Court has cultivated over the years.

[1] Article 36 Statute of the International Court of Justice, United Nations Charter, 1 UNTS, XVI available at <http//www.un.org/DeptsAos/convention-agreements/texts/ uncharter/unclose.pdf> (accessed 20 May 2018).

[2] Ibid, Article 38.

3.2 ICJ Case Law

3.2.1 What considerations can the Court take into account in arriving at an equitable decision?

We will start to examine the decisions of the Court in order to establish what the tribunals can consider as relevant circumstances in arriving at their decisions.

The first dispute on maritime delimitation to be referred to the Court was the *North Sea Continental Shelf Cases*[3], where the Federal Republic of Germany (Germany), Denmark and the Netherlands entered into a special agreement to submit the dispute concerning the delimitation of the continental shelf in the North Sea and in so doing framed the questions in the said agreement for the Court's determination. The parties invited the Court to determine "*what principles and rules of international law are applicable to the delimitation as between the parties*…"[4]

The brief facts are as follows. The parties had entered into agreements in December 1964 where partial boundaries had been agreed on the basis of the equidistance principle. The equidistance line was described by the Court as, '*one which leaves to each of the parties concerned all those portions of the continental shelf that are near to a point on its own coast than they are to any point on the coast of the other party.*'[5]

Further negotiations between the parties broke down because Germany was opposed to prolongation on the basis of the equidistance principle[6] since it would curtail its proper share

[33] *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark: Federal Republic of Germany/Netherlands) ICJ Reports 1969, p.3.
[4] Ibid., page 6.
[5] Ibid., page 17.
[6] Ibid., para 7.

of the continental shelf area. Denmark and Netherlands wished to apply Article 6 of the Convention on the Continental Shelf which provided that equidistance principle was to be applied in the absence of agreement of the parties in delimitation[7]. Germany did not agree to this and preferred the rule that ensured a "just and equitable" share of the continental shelf.[8]

In considering the issues before it, the Court posed the question, "*Does the equidistance-special circumstances principle constitute a mandatory rule either on a convention or customary international law basis*?"[9] The Court answered this in the negative[10] and also found that Article 6 of the Geneva Convention was not applicable. The Court instead considered the natural prolongation or continuation of the land territory. It analysed the historical formulation of the equidistance principle and found that in certain geographical circumstances the method can lead to inequity,[11] and, therefore, in such cases equity would exclude it as a sole method of delimitation.[12]

The Court emphasised that there was no legal limit to the considerations that states could take into account to ensure that the equitable procedures were applied in delimitation. Some factors that could be taken into account were geological, geographical, unity of deposits and reasonable degree of proportionality.[13] The Court also found that the parties were not bound to apply the equidistance method, and delimitation was to take into account relevant circumstances, and factor in natural prolongation of the natural territory into, and under the sea. The Court therefore determined that the factors to be taken into consideration were the

[7] Ibid, para 13.
[8] Ibid, para 15.
[9] Ibid, para 21.
[10] Ibid, para 23.
[11] Ibid, para 89.
[12] Ibid, para 90.
[13] Ibid, para 93.

general configuration of the coasts and any unusual features, and also, a reasonable degree of proportionality.[14]

This was the first decision to be rendered by the ICJ on maritime delimitation. At that time, the only relevant treaty in maritime matters was the Geneva Convention on the Continental Shelf, which provided for the delimitation of continental shelves based on equidistance principle. The Court was reserved in its observations, preferring to leave subsequent decisions enough room to create the law. However, it clearly determined the importance of equity in delimitation, stressing that this was the outcome to be preferred in all delimitations.

3.2.2 Is there a single obligatory method of delimitation?

The second occasion the ICJ had to delimit maritime boundary was in the *Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya)*[15]. The parties referred the dispute regarding the delimitation of the continental shelf to the Court through an agreement dated 10th June 1977.

The parties invited the Court to take into account equitable principles and relevant circumstances which characterized the area. During the hearing, detailed examination of the sea bed was made by the parties. Both parties were however, not signatory to the Geneva Convention on the Continental Shelf 1958. Libya contended that natural prolongation could be determined by geological criteria and therefore equity played no role.[16] The parties relied on the North Sea Continental Shelf Cases judgment which had endorsed and applied the concept of natural prolongation in determining equitable delimitation.[17]

[14] Ibid, page 54.
[15] ICJ Reports 1982, p. 18.
[16] Ibid, para 39.
[17] Ibid, para 44.

Libya relied on the plate tectonics theory to bolster its argument on prolongation of its coastline[18] into the Pelagian Block, whilst Tunisia emphasised the geological continuity of the Pelagian Block with its land territory in support of its prolongation argument.[19] The Court was therefore invited to interpret natural prolongation as a geological concept of deposit of minerals.

The Court stated that the scientific evidence given by the parties as evidence of prolongation was not sufficient to define the area pertaining to Tunisia and Libya through only geological considerations, and it instead reverted to the physical circumstances.[20] As regards the equitable principles to be taken into account, for Tunisia, the same referred to equitable limitation which related to the physical situation, whereas Libya viewed a delimitation that gave effect to natural prolongation as the equitable one.[21] **The Court emphasised that the method of delimitation was subordinate to the goal of achieving an equitable resolution and stated**, "*The equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an equitable result.*"[22] The Court noted, however, that it was its duty is to "apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result."[23] The Court looked at the relevant circumstances which characterise the area which were not limited to geography or geomorphology but all circumstances, such as, the position of the land frontier and economic considerations. Tunisia's position was that as Libya had oil deposits and minerals, it was wealthier and therefore Tunisia ought to have its fishing rights taken into account in

[18] Ibid, para 52.
[19] Ibid, para58.
[20] Ibid, para 61.
[21] Ibid, para 69.
[22] Ibid,para70.
[23] Ibid, para 71.

supplementing its economy.[24] The Court was of the view, however, that economic considerations cannot be taken into account in delimitation as they are extraneous factors, variables and unpredictable.[25]

The Court proceeded to find that the equidistance method is not a mandatory legal principle or a method having privilege over others, and that in international law, there is no single obligatory method of delimitation,[26] but that delimitation was to be done in accordance with equitable principles taking into account relevant circumstances and that the structure of the continental shelf would not determine delimitation. The Court defined relevant circumstances to include, the general configuration of the coasts, the Kerkennah Islands and the degree of proportionality.

The parties in this dispute had relied heavily on the dictum in the *North Sea Continental Shelf Cases* relating to the principle of land dominates sea (prolongation). The Court declined to rely on this principle because the coasts were adjacent and the sea bed deposits were also similar. The Court instead chose to rely on other grounds not only the geographical features of the relevant coasts in determining the delimitation, such as the configuration of the coasts, and the position of the Kerkannah Islands. It should also be noted, that there was a gap of at least 10 years between the two decisions, during which time the States parties were trying to work out the agreeable terms of the 1982 UNCLOS.

Another occasion presented itself to the Court to grow the jurisprudence on maritime delimitation in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area.*[27] The dispute was referred to the Court through a Special Agreement dated 29th March 1979. The

[24] Ibid para106.
[25] Ibid, para 107.
[26] Ibid, para 111.
[27] ICJ Reports 1984, p.246.

parties invited the Court to decide the delimitation of the continental shelf and EEZ on the basis of rules and principles of international law. The Court distinguished the *North Sea Continental Shelf Cases and the Libya/Tunisia* case because of the request by the parties in this instance to draw the line of delimitation. The Court recognised the importance of the equidistance method of delimitation, however, it conceded that this method is not a general rule of international law[28] and it proceeded to lay out what it called the prescribed rules in international law relating to maritime delimitation, as follows:

i) no delimitation may be effected unilaterally;

ii) delimitation is to be effected by application of equitable criteria and by use of practical methods to ensure an equitable result.[29]

The Court employed geometric methods of delimitation to arrive at an equitable solution, which also took into account the coastal configuration. It delimited the first sector through a lateral delimitation line, and the second sector through a median line.[30] The Court however declined to consider the scale of activities connected with fishing, navigation and exploration as relevant circumstances in determining the delimitation line.[31] In employing the angle bisector method, the Court was guided towards achieving equity. This method was the one to obtain a most equitable decision, in view of the characteristics of the relevant coasts.

3.2.3 What does the Court consider as relevant circumstances in delimitation?

Determining what are the relevant circumstances that the Court can take into account is like wading into a dark forest.

[28] Ibid., para 107.
[29] Ibid., para 112.
[30] Ibid., paras 199, 205 and 206.
[31] Ibid., para 237.

The list of circumstances is as long as it is short, because the Court considers the circumstances on a case by case basis.

In the previous cases examined in this Chapter, the Court has considered the lengths of coastlines, the geographical character and configuration of coastlines as relevant circumstances. It the cases we shall examine next, we see that the Court did not consider fishing or navigation as relevant circumstances, nor did it consider the presence of natural resources such as oil as relevant circumstances. It has in certain cases considered islands as relevant circumstances and in other cases it has declined to consider islands as relevant circumstances.

We will proceed to examine the *Gulf of Maine Case,* where the Court seems to set an independent trajectory in the realm of maritime delimitation, although in the same breath distinguishing its actions on account of the circumstances of the case.[32] It declined to follow the reasoning in the North Sea Continental Shelf Cases, and based this decision on the circumstances of the case. If the equidistance method was employed in delimitation, it would create a cut off effect and therefore render an iniquitous result. In order to prevent this from happening the Court resulted to a more scientific method of delimitation. The Court in this case also declined to follow the dicta in the *Libya/Tunisia* case by pointing out that the geographical circumstances were different in this case.

In the *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta*)[33] the parties referred the dispute to the Court through special agreement, where the Court was invited to

[32] Ibid para 199.
[33] ICJ Reports 1985, p. 13.

define the legal principles and rules applicable to the delimitation of the area of continental shelf "which appertains" to each of the Parties.

The Court in its judgment analysed the application of equitable principles in maritime delimitation, such as the question of refashioning geography or compensating the inequalities of nature, and no encroachment on the natural prolongation of the other's coast line.[34] Libya argued that the Court should consider land mass as a relevant factor, that is, a state with a greater land mass would have a more intense prolongation.[35] The Court however rejected this as a relevant factor in maritime delimitation. It however, noted that it was prepared to consider natural resources of the continental shelf under delimitation as constituting relevant circumstances, in addition to security interests.[36]

In drawing the boundary line, the Court in this instance took into account the great disparity in the lengths of the two states and relied on the following factors to arrive at what it considered an equitable delimitation:

1) general configuration of the parties' coasts;
2) disparity of the coast; and,
3) need to avoid excessive disproportion between the extent of the continental shelf areas appertaining to the length of the coast.[37]

It is important to note that although the Court did not consider the social or economic factors set out by Malta as relevant circumstances, it provided that it is possible to have these factors to be considered as relevant in delimitation subject to the circumstances of the case. The

[34] Ibid., (n.33) para 46.
[35] Ibid, para 49.
[36] Ibid, paras 50 and 51.
[37] Ibid, page 57.

Libya/Malta case was another case where the Court failed to apply the land dominates sea principle, in other words failing to apply the *North Sea Continental Shelf Cases*.

In the examination of the foregoing cases, it appears so far, that the court has adopted a pragmatic approach to arriving at equitable settlements of maritime delimitation disputes. The consistency of its pronouncements on the desired result of the delimitation process is not lost in the thread of its decisions. However, it can already be seen that the Court is hesitant to apply a previously considered "list of relevant circumstances" and preferring to leave it open to be determined case by case.

3.2.4 Is there a golden thread running through the decisions of the Court?

In the latter years, the Court has reemphasised that the purpose of delimitation is to achieve equitable solutions. The Court, whilst constantly reminding itself that the purpose of delimitation is not to refashion nature, has endeavoured to try and achieve equitable delimitations, mostly through the three stage procedure.

In the Case Concerning *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[38]*(Qatar v Bahrain),* Qatar filed proceedings against Bahrain seeking sovereignty over Hawar Islands and the shoals of Dibal and Qit'at Jaradah, and, also the delimitation of the maritime arears between the two states. Only Qatar was signatory to the 1982 UNCLOS.

The parties requested the Court to draw a single maritime boundary between them. In the process of determining this line, the court determined the relevant coast of the parties and disregarded the low tide elevations (being Qit'at al Jaradah). It reminded itself that the use of baselines should be applied restrictively especially if there is an indented coastline or fringe

[38] ICJ Reports 2001, p. 40

islands. As the fringe islands were small in number the court concluded that straight baselines would not produce an equitable result, and therefore each feature had its own effect on determining the baseline.[39] The Court then inquired of the existence of any special circumstances after having determined the equidistance line, which circumstances would necessitate an adjustment to the equidistance line. The Court found that the existence of islands such as Fasht al Azm and Qit'at Al Jaradah were special circumstances warranting the alteration of the line.[40]The Court observed the close interrelation of the equitable principle/relevant circumstances and the equidistance principle/special circumstances principle.[41] The Court disregarded the pearling banks as special circumstances as pearl diving was no longer practised.[42] It further stated that if it took into account the protrusion of Fasht Al Jarim onto Bahrain's coast it would distort the proposed boundary line and lead to an inequitable result, it therefore disregarded the same.[43] In making its final determination on the maritime boundary between the two states, the court had to consider historical practises such as pearl diving and islands and geographical protrusions of land masses into the sea. All these were well balanced in favour of an equitable solution.

In arriving at this decision the Court had to consider the effect of islands on the base points and relevant coasts. The Court developed the jurisprudence of delimitation when islands are present, which is that the islands must be taken on a case by case basis to determine basepoints. What is to be considered is the size of the island, the distance from the relevant coast and whether a delimitation that incorporates the islands would produce a cut off effect, or distort

[39] Ibid, para 215.
[40] Ibid, para 220.
[41] Ibid, para 231.
[42] Ibid, para 243.
[43] Ibid, para 248.

the equidistance line. In this case also, the Court merged the equidistance/special circumstances and equitable/relevant circumstances principles, as they were similar in their effect.

In the case of *Land and Maritime Boundary Dispute Between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening*),[44] the Court was invited to determine the dispute between Cameroon and Nigeria on the question of the sovereignty over the Bakassi Peninsula, and also for delimitation of the maritime boundary between the states. An additional application was filed on 6th June for the determination of the sovereignty in the area of Lake Chad.

In determining this case where both principle parties were members of the 1982 UNCLOS the Court relied on previous decisions of the Court on maritime delimitation and stated it would apply the same method,[45] namely:

i) It would first define the relevant coastlines; and

ii) then proceed thereafter to draw an equidistance line and thereafter consider the relevant circumstances that would necessitate adjustment.

The Court relied on the finding in the *North Sea Continental Shelf Cases*, that equity is not equality.[46] The Court did however, concede that the concavity of a coastline may be a circumstance relevant to the delimitation, but only at the area to be delimited.[47]It however rejected this ground and declined to consider the presence of Bioko Island as it involved Equatorial Guinea which was not a party in the dispute.

[44] ICJ Reports 2002, p.303
[45] Ibid, (n.44) para 289.
[46] Ibid, para 295.
[47] Ibid para 301.

As regards the length of the coastlines as a relevant circumstance, the Court declined to agree to this consideration[48] and also rejected the evidence of oil wells as a relevant circumstance.[49] The Court therefore, determined the maritime delimitation dispute through drawing the equidistance line.

In this case, the Court cited with approval the previous cases such as the *North Sea Continental Shelf Cases*; however, it declined to adopt the findings by distinguishing the circumstances of the case.

A reading of the decision discloses that the Court makes a conscious effort to set out the jurisprudence through the previous cases, however it does not fully adopt them. In spite of this, the Court emphasises the equitableness of the delimitation is the key consideration. Also, the Court rejects the arguments along the lines of economic advantage in relation to the oil wells, just as the Court did in the *Libya/Malta* case.

3.2.5 The Three Stage Process of Delimitation

In the *Delimitation in the Black Sea Case (Romania v Ukraine),*[50] Romania instituted proceedings against Ukraine on the delimitation of the continental shelf and EEZ between the parties in the Black Sea.

The Court once again, relied on the previous decisions rendered by it on maritime delimitation, in particular it relied on the dictum of the Court in the *Tunisia/Libya Case.*[51] In this decision, the Court as the first step examined the relevant coast in the geographical context.[52] Thereafter, the Court would check disproportionality as a means of checking whether the delimitation line

[48] Ibid.
[49] Ibid, para 304.
[50] ICJ Reports 2009, p. 61.
[51] Ibid., (n.50) para 77.
[52] Ibid, para 110.

needs adjustment due to significant difference in rations of the maritime areas and lengths of the coasts.

The Court upheld the reasoning in the *North Sea Continental Shelf Cases*, and the *Jan Mayen Case*, that the object of delimitation is to achieve equity and not equal apportionment of maritime areas.[53]The Court also considered the delimitation methodology[54], which it laid out as follows:

1. The Court will first proceed to establish a provisional delimitation line using objective methods which are appropriate for the geography of the area and proceed to draw an equidistant line;[55]
2. after the establishment of a provisional equidistant line, the Court will then consider whether there are factors calling for the adjustment or shifting of the line in order to attain an equitable result;[56]
3. The third and final stage to be undertaken is that the Court will verify the line after taking into account the relevant circumstances. If the line does not lead to an inequitable result then no adjustment need be made.[57]

In undertaking the delimitation exercise, the Court did not consider Serpents Island which lies 20 nautical miles off the Ukrainian coast as constituting a coast as it would be tantamount to refashioning geography,[58] and therefore it proceeded to exclude the island in the construction of a provisional equidistant line.

[53] Ibid, para 111.
[54] Ibid, para 116.
[55] Ibid, paras 116,117,118.
[56] Ibid para 120, 121.
[57] Ibid, para 122.
[58] Ibid, para 149.

As regards the relevant circumstances, the Court observed that the length of coasts can play a role in identifying the equidistance line.[59] Where the lengths of the coasts are particularly marked, the Court can treat this as a relevant circumstance that would require adjustment.[60] The Court however, failed to find that there was a marked difference in the length of the coasts to warrant an adjustment of the provisional line.

The *Black Sea Case* marks the watershed in maritime delimitation disputes. It put into perspective the procedure of delimitation to ensure an equitable result. **By setting out the three stage process, the Court removed the doubt and guesswork in the process of delimitation**. However, it emphasised that the relevant circumstances that a court would enquire into are not closed, leaving the field open for parties to continue to initiate their cases without a closed list of relevant circumstances. The lucid judgment weaves through Court's decisions through the decades and comes up with a simple and clear procedure to be employed by a tribunal which would lead to an equitable decision. In the subsequent years, the tribunals have adopted this approach leading to steady and sure growth in the jurisprudence.

3.2.6 Application of the Three Stage Process in delimitation

The Court has applied the 'Three Stage Process' in the successive cases as appears in the undernoted analysis.

In the *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica Vs Nicaragua)*[61] the Republic of Costa Rica instituted proceedings against Nicaragua seeking the

[59] Ibid, para 163.

[60] Ibid, para 164. The Court proceeds to quote the *Cameroon v Nigeria Case* where it said that the length of the coast "may" be taken into account as a relevant factor in delimitation. The Court also remarked that in the *Jan Mayen Case* the Court also considered the length of the coastlines as a relevant factor and adjusted the median line.

[61] *Maritime Delimitation in the Caribbean Sea and Pacific Ocean (Costa Rica v Nicaragua*) ICJ Reports 2018, p. 1.

establishment of single maritime boundary between the parties in the Caribbean Sea and Pacific Ocean.

During the hearing on the Caribbean Sea dispute, the Court appointed experts to conduct a site visit to determine the starting point of the maritime boundary[62]despite an objection by Nicaragua. Both parties at the time of the hearing of the dispute were parties to the 1982 THE 1982 UNCLOS. Costa Rica requested the Court to apply two different methods to delimit the EEZ and the territorial sea.[63] Nicaragua, however, wished to have a flexible application of the equidistance/special circumstances rule[64] in order to take into account local characteristics of the coastline.

The Court proceeded to draw a provisional median line in accordance with the established jurisprudence. It thereafter considered whether there were special circumstances present to justify the adjustment thereof.[65] The Court delimited the territorial sea and then proceeded to delimit the EEZ and continental shelf in accordance with Article 74 and 83 of the 1982 THE 1982 UNCLOS.[66] It set out the relevant coast as prescribed in the *Romania v Ukraine case*. The Court adopted the definition of 'relevant area' as stated in *Nicaragua v Colombia*,[67]where the Court defined it as part of the marine space in which the potential entitlements of the parties overlap.[68] In the instant case, the relevant area was also subject to numerous treaties with third parties which the court was invited to determine their effect, however the court declined to consider such treaties relevant for purposes of this delimitation.[69]

[62] Ibid para 14.
[63] Ibid para 91.
[64] Ibid para 92
[65] Para 98. (The Court relied and quoted the Court's reasoning in *Qatar v Bahrain* and *Nicaragua Vs Honduras*)
[66] Ibid para 107.
[67]ICJ Reports 2012, p. 624.
[68] Maritime Delimitation in the Caribbean, (n. 61), para 116.
[69] The court declined to consider the 1976 treaty between Panama and Colombia as relevant.

After identifying the relevant area, the Court then proceeded to apply the laid down procedure in delimitation by first establishing a provisional equidistance line using the appropriate points on the relevant coast. It thereafter considered whether there were circumstances justifying its adjustment.[70] Subsequently it assessed the equitableness of the resulting boundary to see if there was marked disproportionality.[71] The Court remarked **that the *Black Sea Case* had been adopted by several international tribunals dealing with maritime delimitation**. After analysis of the parties' respective positions and the position of the relevant area, the Court proceeded to place base points on the Corn Islands for construction of a provisional equidistance line a set out in figure 1. Thereafter the Court considered whether there were factors calling for the adjustment of the provisional line in order to achieve an equitable result.[72] The Court in a lengthy analysis considered the effect of the islands off the coast of Nicaragua and their impact on the provisional equidistance line.[73] It adjusted the provisional equidistance line in favour of Costa Rica, however, it rejected the reasons advanced for a further adjustment of the provisional line on the ground that Costa Rica had a concave coast line.[74] In applying the disproportionality test, the Court was guided by *the Black Sea Case* and the *Nicaragua v Columbia Case*[75], where in the latter case the court observed as follows:-

> *'In carrying out this third stage, the Court … is not applying a principle of strict proportionality. Maritime delimitation is not designed to produce a correlation between the lengths of the parties' relevant coast and the respective shares of the relevant area… The Court's task is to check for a significant disproportionality. What constitutes such disproportionality will vary according to the precise situation in each case, for the third stage of the process cannot require the Court to disregard all of the considerations which were important in the earlier stages.*'[76]

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[70] Ibid, para 135.
[71] The Court applied the *Black Sea Case*, ICJ Reports 2009, pp101-103; *Nicaragua v Colombia* ICJ Reports 2012 pp 695-696 and *Peru v Chile* ICJ Reports 2014, p 65.
[72] Ibid para 146.
[73] Ibid, para 153. The Court in particular, dwelt on the effect the Corn Islands would have on the provisional line.
[74] Ibid, para 151,156.
[75] *Territorial and Maritime Dispute Nicaragua v Colombia*, ICJ Reports 2012, para 240.
[76] *Nicaragua vs Costa Rica*, Ibid para 161.

The Court did not find that there was gross disproportion and therefore did not adjust the provisional line. Thereafter, the Court proceeded to delimit the area in the dispute in the Pacific Ocean. The Court proceeded in accordance with the established jurisprudence.[77] First it drew the provisional median line and then proceeded to consider whether there were special circumstances necessitating adjustment. The Court also considered the geographical features of the relevant coast and whether they would have an impact on the adjustment of the provisional equidistance line. It relied on the dictum in the *North Sea Continental Shelf Cases*[78] and adjusted the provisional equidistance line to give effect to the Santa Elena Peninsula in order to achieve an equitable solution.[79] Subsequently the Court carried out the disproportionality test by evaluating the lengths of the respective coastlines. Nicaragua's coast measured 1,500 kilometres squared and that of Costa Rica measured 93,000 kilometres squared. The Court in the end determined that the boundary established did not result in gross disproportionality and it was therefore unnecessary to adjust the equidistance line.[80]

The 'Three Stage Process' was also adopted in the case of *The Territorial and Maritime Dispute (Nicaragua v Colombia)* [81], the Court had yet another opportunity to follow the established jurisprudence and on maritime delimitation. In that case, Nicaragua instituted proceedings against Colombia in December 2001 to get a resolution, *inter alia*, on the delimitation of the continental shelf and EEZ in the Western Caribbean.

[77] Ibid, para 172
[78] ICJ Reports 1969, para 91.
[79] *Nicaragua v Costa Rica*, ibid, para 198.
[80] Ibid, para 203.
[81] *Territorial and Maritime Dispute (Nicaragua v Colombia)* ICJ Reports 2012, p.624, para 194.

The Court applied the three step approach in the *Black Sea Case*[82]. The Court remarked that the three step approach is not to be applied in a mechanical fashion as it may not be possible to draw the median line in every case.[83] The Court however, cited the *Black Sea Case* with approval and further quoted and adopted the holding in the *Arbitration over the Bay of Bengal*[84] where the Tribunal stated;

> *Bangladesh has the right to a 12-nautical-mile territorial sea around St. Martin's Island in the area where such territorial sea no longer overlaps with Myanmar's territorial sea. A conclusion contrary would result in giving more weight to the sovereign rights and jurisdiction of Myanmar in its exclusive economic zone and continental shelf than the sovereignty of Bangladesh over its territorial sea.*[85]

Following this thinking, the Court concluded that the islands of Roncador Serana and Alberquerque Cays and Southeast Cays are each entitled to a territorial sea of 12 nautical miles irrespective of the exception in Article 121(3) of the 1982 THE 1982 UNCLOS. The Court embarked on this exercise in the course of establishing the relevant area. The Court also applied the *Black Sea Case* dictum and holding regarding the Serpents Islands. The Court concluded that as regards the smaller islands it was not necessary to determine their status as that would interfere with the continental shelf and EEZ of islands of San Andreas, Providencia and Santa Catalina.[86]

As regards the method of delimitation, Nicaragua was opposed to the court proceeding in the normal position of first establishing a provisional equidistance line then analysing relevant circumstances to see if there is need for adjustment thereof.[87] Nicaragua objected to this method because it claimed that this would result in a distorted line due to the numerous islands on the Colombian Coast. Nicaragua proposed a method that would recognise that the Colombian

[82] *Romania v Ukraine* ICJ Reports, p.89, para 77.
[83] Ibid n.80, para 194
[84] *Dispute Concerning the Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* ITLOS 14 March 2012, 55.
[85] Ibid, *Bangladesh/Myanmar,* para 169.
[86] Ibid (n.80), *Nicaragua Vs Colombia*, para 180.
[87] Ibid, para 185.

islands were located in the Nicaragua continental shelf and reduce their effect during the delimitation exercise. Nicaragua proposed the adoption of an enclave method around each island and relied on the UK/French Arbitration decision.[88] Colombia, on its part, preferred the usual method of having a provisional equitable line drawn and then thereafter adjusting it.[89] As the issue of the methodology was contested, the Court proceeded to set out its methodology on delimitation which is necessary to set out *in extenso* herein:

> *190. The Court has made clear on a number of occasions that the methodology which it will normally employ when called upon to effect a delimitation between overlapping continental shelf and exclusive economic zone entitlements involves proceeding in three stages (Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 46, para. 60 ; Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 101, paras. 115-116).*
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> *191. In the first stage, the Court establishes a provisional delimitation line between territories (including the island territories) of the Parties. In doing so it will use methods that are geometrically objective and appropriate for the geography of the area. This task will consist of the construction of an equidistance line, where the relevant coasts are adjacent, or a median line between the two coasts, where the relevant coasts are opposite, unless in either case there are compelling reasons as a result of which the establishment of such a line is not feasible (see Territorial and Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 745, para. 281). No legal consequences flow from the use of the terms "median line" and "equidistance line" since the method of delimitation in each case involves constructing a line each point on which is an equal distance from the nearest points on the two relevant coasts (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 101, para. 116). The line is constructed using the most appropriate base points on the coasts of the Parties (ibid., p. 101, paras. 116-117). 6 CIJ1034.indb 146 7/01/14 12:43 696 territorial and maritime dispute (judgment) 76*
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> *192. In the second stage, the Court considers whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result. If it concludes that such circumstances are present, it establishes a different boundary which usually entails such adjustment or shifting of the equidistance/median line as is necessary to take account of those circumstances (Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985, p. 47, para. 63 ; Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, pp. 102-103, paras. 119-121). Where the relevant circumstances so require, the Court may also employ other techniques, such as the construction of an enclave around isolated islands, in order to achieve an equitable result.*

[88] *UK/French Arbitration (Delimitation of the Continental Shelf between the UK of Great Britain & Northern Ireland and the French Republic* (1977) RIAA Vol. XVIII p.3.
[89] Ibid, *Nicaragua v Colombia*, (n.80) para 187.

> *193. In the third and final stage, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is that the Parties' respective shares of the relevant area are markedly disproportionate to their respective relevant coasts. As the Court explained in the Maritime Delimitation in the Black Sea case "Finally, and at a third stage, the Court will verify that the line (a provisional equidistance line which may or may not have been adjusted by taking into account the relevant circumstances) does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line . . . A final check for an equitable outcome entails a confirmation that no great disproportionality of maritime areas is evident by comparison to the ratio of coastal lengths. This is not to suggest that these respective areas should be proportionate to coastal lengths — as the Court has said 'the sharing out of the area is therefore the consequence of the delimitation, not vice versa' (Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgment, I.C.J. Reports 1993, p. 67, para. 64)." (Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009, p. 103, para. 122.)*
>
> *194. The three-stage process is not, of course, to be applied in a mechanical fashion and the Court has recognized that it will not be appropriate in every case to begin with a provisional equidistance/median line (see, e.g., Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras), Judgment, I.C.J. Reports 2007 (II), p. 741, para. 272). The Court has therefore given careful consideration to Nicaragua's argument that the geographical context of the present case is one in which the Court should not begin by constructing a provisional median line.*

From the foregoing extensive quote, it is clear that the Court acknowledged that the process is never to be undertaken in a mechanical fashion but indeed it is subject to the circumstances of each case. It therefore, proceeded to determine that the Nicaraguan coast and islands and the western islands of San Andres and Providencia stand in a relationship of opposite coasts with distances of more than 65 nautical miles and therefore it would not be difficult to draw a provisional line. The Court remarked that the overlapping entitlements on the east of Colombian islands would perhaps necessitate an adjustment however, this did not pre-empt the exercise of drawing an equitable line. The Court rejected the analogy that Nicaragua sought to

apply based on the UK/French arbitration award on the basis that the award was rendered in 1977 before the Court established the jurisprudence on the methodology on delimitation.[90]

The Court therefore proceeded to draw a provisional median line and thereafter considered whether there were relevant circumstances calling for its adjustment.[91]

One of the factors considered was the disparity in the lengths of the 2 coastlines. Nicaragua has a much longer coast than Colombia. The Court adopted the finding in the *Black Sea Case* that, the respective lengths of coast can play no role in identifying the equidistance line which has been provisionally established.[92]

However, a substantial difference in the lengths of the parties' coastlines may be a factor to be taken into consideration to adjust the provisional line as decided in the *Cameroon v Nigeria Case*.[93] The Court drew conclusions from its previous decisions: 1) that it is only when the disparity of the length of the relevant coast is substantial that it would necessitate an adjustment or shift of the provisional line ; 2) that in the *Jan Mayen Case*[94] the Court emphasised that taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front.[95] In conclusion the Court found that the disparity between the parties' coastlines is in the ratio of 1:8:2 which merited an adjustment.[96]

[90] Ibid n.80, para 198.
[91] Ibid, para 204.
[92] *Black Sea Case*, ibid (n.50) para 163.
[93] ICJ Reports 2002, p. 303 para 301.
[94] *Maritime Delimitation in the Area Between Greenland and Jan Mayen* ICJ Reports 1993, para 69.
[95] Ibid (n.80) para 210.
[96] Ibid, para 211.

This case analysed the line of decisions from the Court on maritime delimitation brings to the fore the development of the jurisprudence over the years. It also confirmed that the aim of the Court was to ensure that there was harmony in the decided cases. Further, it also confirmed that the grounds that a State can rely on in setting out relevant circumstances are not closed, and the primary function of a tribunal in delimitation matters is to achieve an equitable delimitation. The Court also deeply analysed the issue relating to islands in delimitation. It established the instances that islands can be taken into account in the disproportionality test and also in the setting out of baselines. This was an important part of this decision in view of the previous fragmented decisions on islands, starting with the *Libya/Malta* case and also the *Cameroon v Nigeria case*. The Court applied the test in the *Black Sea Case*, as relating to Serpents Island as a guide.

This open and transparent approach by the Court in arriving at its decision has settled many issues, however, it still left the issue of the relevant circumstances open to the tribunal to determine on a case by case basis.

3.3 Conclusion

The Court has right from the beginning appreciated its position with respect to its role as an arbiter in maritime delimitation disputes. The Court appreciates that the maritime resources of States is something that is guarded jealously and preferred to err on the side of allowing a wide platform for States to base their causes of action. In other words, the open list of relevant circumstances that a tribunal can take into account while determining a maritime delimitation dispute allows the parties to be able to approach any forum of their choice to ventilate their dispute, knowing that the ultimate decision will be guided by principles of equity.

Although it is clear that since 1969 the Court has declined to apply or follow some of its decisions on account of the circumstances of the instant case being different, it has nonetheless ensured that the principle considerations such as prolongation, length of the relevant coasts, geographical nature of the relevant coasts, presence of islands and existence of treaties with third parties are all necessary factors to be considered in the delimitation exercise.

The settling of the procedure or process of delimitation through the Black Sea case has created an opportunity to grow the jurisprudence in a systematic way. Therefore, even without the existence of a hierarchical system of courts in international law, the Court has itself been able to grow the law without rendering conflicting decisions. In spite of this, however, the open ended allowance to use any ground as a relevant circumstance creates instability in the jurisprudential growth in delimitation. There is no certainty that the relevant circumstances that were considered with approval in one case will also be acceptable in another. There are several cases where this is evident, for instance, starting with the *North Sea Continental Shelf Cases*, the court considered the prolongation and length of the coasts as relevant. However it declined to do so in the *Libya/Tunisia* case. Similarly, in the *UK Arbitration case* the tribunal applied the enclave method when drawing the baselines around the Channel Islands, however, in the *Nicaragua v Colombia case* it declined to do so to the islands off the coast of Nicaragua.

The settling of the procedure or process of delimitation through the *Black Sea case* has created an opportunity to grow the jurisprudence in a systematic way. Therefore, even without the existence of a hierarchical system of courts in international law, the Court has itself been able to grow the law without rendering conflicting decisions. In spite of this, however, the open ended allowance to use any ground as a relevant circumstance creates instability in the jurisprudential growth in delimitation. There is no certainty that the relevant circumstances that were considered with approval in one case will also be acceptable in another. There are several cases where this is evident, for instance, starting with the *North Sea Continental Shelf Cases*,

the court considered the prolongation and length of the coasts as relevant. However it declined to do so in the *Libya/Tunisia* case. Similarly, in the *UK Arbitration case* the tribunal applied the enclave method when drawing the baselines around the Channel Islands, however, in the *Nicaragua v Colombia case* it declined to do so to the islands off the coast of Nicaragua.

The Three Stage Approach has assisted the Court in having a transparent process of arriving at an equitable solution to the disputes brought before it. It has also helped to streamline the growth of the maritime delimitation law- in as far as procedure is concerned. However, the list of relevant circumstances remains open ended and none of the decisions of the Court have attempted to curtail them.

In the following chapter we will examine the growth of maritime delimitation law through the decisions rendered by arbitral tribunals and ITLOS

CHAPTER FOUR

DECISIONS ON MARITIME DELIMITATION BY ITLOS AND *AD HOC* INTERNATIONAL TRIBUNALS

4.1 Introduction

In Chapter 2 we examined the jurisdiction of ITLOS and *ad hoc* international tribunals in determination of maritime delimitation. The jurisdiction of these international tribunals under the 1982 UNCLOS is clearly stated in the relevant annexes, Annex VI and Annex VII.

We will now consider some of the awards that have emanated from these tribunals.

4.2 Awards Rendered by International Tribunals on Maritime Delimitation.

The first decision on maritime delimitation to be determined on merits by ITLOS is the *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*[1]. On 8th October 2009 the government of Bangladesh instituted arbitral proceedings against the union of Myanmar under Annex VII the 1982 UNCLOS to '*secure the full and satisfactory delimitation of Bangladesh's maritime boundaries with … Myanmar in the territorial sea, exclusive economic zone and continental shelf in accordance with international law*.'[2]

The parties submitted to the jurisdiction of ITLOS under Article 287 the 1982 UNCLOS.[3] Myanmar subsequently withdrew the acceptance of the jurisdiction of ITLOS[4] through a letter to the Registrar. This was challenged by Bangladesh which declared that the proceedings had

[1] ITLOS Reports 2012, page 2, Case Number 16 ITLOS <www.itlos.org/en/cases/case-no 16/#c964 > (accessed 27th June 2019).
[2] Ibid., para.1.
[3] Ibid., para 2.
[4] Ibid., para 8.

already commenced before ITLOS and therefore the withdrawal was invalid.[5] Later, the parties agreed that the Tribunal was properly seized of the matter.[6]

The dispute concerned the delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal, over the territorial sea, exclusive economic zone and continental shelf. The parties had through a series of meetings held between 1974 and 2010 agreed on some issues and the minutes of the agreements were presented to the Tribunal.[7] Bangladesh insisted that the agreement entered into in 1974 and rendered in minutes was binding,[8] however Myanmar denied that this was an agreement in the literal sense, but an "understanding" on a "technical level" during ongoing negotiations.[9] Myanmar further stated that it was understood between the parties that a treaty would only be signed when there was an agreement on the territorial sea, EEZ and continental shelf.[10]

Differing positions were taken by the parties on the legal implication of the Agreed Minutes of the 1974 meeting.[11] Myanmar also argued that the delegation to the 1974 meeting lacked authority to legally bind the government.[12]

The Tribunal considered the arguments and came to the conclusion that the parties' representatives were not competent to bind their respective countries under the Vienna Convention.[13] Further, the parties did not submit the 1974 Minutes to the required procedures

[5] Ibid., para 10.
[6] Ibid.,(n.5)
[7] Ibid., para 57.
[8] Ibid., para 64
[9] Ibid., para 65.
[10] Ibid., para 66.
[11] Ibid., paras 72,73,74 and 75.
[12] Ibid., para 83.
[13] Ibid., para 96

to make them binding under international law,[14] and, therefore, the Tribunal concluded that the Minutes were not intended to be legally binding.[15]

The Tribunal determined that Bangladesh had failed to demonstrate that it had acted on the 1974 minutes so as to succeed in its plea of estoppel against Myanmar[16] and, it therefore, dismissed the claim of estoppel claimed by Bangladesh. The Tribunal then proceeded to determine the territorial sea under Article 15 of the 1982 UNCLOS. In considering this issue, the Tribunal heard representations on the effect of the St Martin's island which Myanmar argued could not be defined as a "coastal island" due to its positioning.[17] The Tribunal noted that St. Martin's Island could not be compared to Qitat Al Jaradah[18] which was much smaller and uninhabited. The Tribunal, however, declined to treat St Martin's Island as a special encumbrance under Article 15 of the 1982 UNCLOS[19] and proceeded to delimit the territorial sea by drawing an equidistance line.[20]

The Tribunal then proceeded to delimit the EEZ and continental shelf through drawing a single delimitation line.[21] It did this by first identifying the relevant coasts[22] thereby adopting the dictum in the *Black Sea Case*.[23] The Tribunal concluded that the entire coast of Bangladesh

[14] Ibid., para 97.
[15] Ibid., para 98.
[16] Ibid., para 125.
[17] Ibid., paras 135-145.
[18] *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* ICJ Reports, 2001, p. 40.
[19] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar*) Ibid n.1, para 152.
[20] Ibid., paras 153, 154, 155.
[21] Ibid., para 181.
[22] Ibid., para 185.
[23] *Delimitation in the Black Sea (Romania Vs Ukraine*) ICJ Reports 2009, p. 61 para 77.

was relevant for purposes of delimitation[24] and, it also identified Myanmar's relevant coast.[25] It noted that the length ratio was 1:1.42 in favour of Myanmar.[26]

As regards the method of delimitation, Bangladesh did not think that the equidistance method would produce an equitable result in this case[27] and further argued that the concavity of its coast in the northern part of the Bay of Bengal, should favour the use of the angle bisector method of delimitation.[28] For this argument, Bangladesh relied on the *Tunisia/Libya Arab Jamahiriya Case*[29] and *the Gulf of Maine Case*.[30] The Tribunal noted that the international courts and tribunals have developed a body of case law on maritime delimitation which has reduced the elements of subjectivity and uncertainty in the determination of maritime boundaries and in the choice of method to be employed.[31] The Tribunal analysed its foregoing statement by beginning with the dicta in the *North Sea Continental Shelf Cases*[32] where it was emphasised that no method of delimitation was mandatory. The Tribunal proceeded to state:

> *Over time, the absence of a settled method of delimitation prompted increased interest in enhancing objectivity and predictability of the process. The varied geographical situations addressed in the early cases nevertheless confirmed that, even f the pendulum had swung too far away from the objective provision of equidistance, the use of equidistance could not ensure an equitable solution in each and every case. A method of delimitation suitable for general use would need to combine its constraints on objectivity with flexibility necessary to accommodate circumstances in a particular case that are relevant to maritime delimitation.*[33]

[24] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar*) Ibid., (n.10), para 201.
[25] Ibid., paras 203, 204.
[26] Ibid., para 205. The Tribunal noted that the length of Bangladesh's coast was 413km and Myanmar 587Km.
[27] Ibid., paras 208 to 212.
[28] Ibid., para 213.
[29] *Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya*) ICJ Reports 1982, p. 18.
[30] *Delimitation of Maritime Boundary in the Gulf of Maine Area,* ICJ Reports 1984, p.246.
[31] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar*) Ibid., (n.1), para 226.
[32] *North Sea Continental Shelf Cases*, ICJ Reports 1969, p.3.
[33] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar)* Ibid., (n.1), para 228.

The Tribunal proceeded to analyse the decisions of various cases:

1) *Maritime Delimitation in the Area Between Greenland and Jan Mayen*[34]- The ICJ approached delimitation in two stages; beginning with the median line as a provisional line and then enquiring as to special circumstances that necessitate its adjustment.
2) *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*[35] which shared the same approach, as above.
3) *Land and Maritime Boundary between Cameroon and Nigeria*[36] which also adopted the similar approach;
4) *Tribunal Arbitration between Barbados and Trinidad and Tobago*[37] followed the 2 steps approach having a provisional equidistance line and then examining the relevant circumstances;
5) *Guyana and Suriname Arbitration*[38] which also adopted the same approach; and
6) *The Black Sea Case*[39] where the Court adopted the three stage approach.

The Tribunal went further to note that the previous decisions have also adopted angle bisector method where it has not been appropriate to use the equidistance method,[40] for instance, in the *Libya/Malta case*[41], *Tunisia/Libya*[42] case, *Gulf of Maine case*[43] and *Nicaragua/Honduras dispute*.[44] It further noted that the method of delimitation depends of the circumstances of the

[34] ICJ Reports 1993, p. 69.
[35] ICJ Reports 2001, p. 40.
[36] ICJ Reports, 2002, p. 303.
[37] RIAA 2006 Vol. XXVII.
[38] ILM Vol 4, 2008
[39] Ibid., (n. 6) para 116.
[40] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar)* Ibid (n.1), para 234.
[41] *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta*) ICJ Reports 1985, p. 13.
[42] *Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya)* ICJ Reports, p. 18
[43] *Delimitation of the Maritime Boundary in the Gulf of Maine Area* ICJ Reports, 1984, p. 246.
[44] *Territorial and Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras),* ICJ Reports 2007.

case.[45] The Tribunal noted that the jurisprudence has developed in favour of the equidistance/relevant circumstances method[46] and found it to be an appropriate method in delimiting the case before it.[47] The Tribunal employed the three stage approach of first, constructing a provisional equidistance line and then, determining whether there are any relevant circumstances requiring adjustment of the provisional line, and, finally, to check whether the line as adjusted results in any significant disproportion.[48]

After drawing the provisional equidistance line, the Tribunal proceeded to consider whether there were any special circumstances. Bangladesh argued that there were geographical and geological features that were relevant, such as the concavity of the Bangladesh coastline on the boundary with India, the general concavity of its coastline, St Martin's island, and, the Bay of Bengal depositorial system.[49] Myanmar rejected the foregoing as relevant circumstances.

The Tribunal considered the grounds put forth by Bangladesh, and observed that Bangladesh seen as a whole is manifestly concave,[50] and, that as a result the provisional equidistance line produces a cut-off effect on the land projection of Bangladesh.[51] As a result, therefore, making it necessary to adjust the provisional line in order to achieve equity. The Tribunal adopted the *North Sea Continental Shelf Cases dictum*[52] where the Court had stated where there were concave or convex coastlines, then the use of the equidistance method may result in unreasonable results leading to inequity.[53] The Court had observed that in such a case if the

[45] *Dispute Concerning the Delimitation o the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar*) Ibid (n.1), para 235.
[46] Ibid., para 238
[47] Ibid., para 239.
[48] Ibid., para 240.
[49] Ibid., para 276.
[50] Ibid., para 291.
[51] Ibid., para 293.
[52] *North Sea Continental Shelf Cases* ICJ Reports 1969, p.3.
[53] *North Sea Continental Shelf Cases*, Ibid., (n.49) para 89.

equitable method is used, it would result in pulling in the boundary line in the direction of the concavity. The Tribunal also cited the decision in the *Delimitation of the Maritime Boundary between Guinea and Guinea Bissau*[54] however it did not apply it.

The Tribunal found that the concavity of the Bangladesh coastline was a relevant circumstance in the dispute, due to the cut-off effect.[55] As regards the St Martin's island which Bangladesh considered an important geographical feature, the Tribunal agreed with this argument, and, considered it a relevant circumstance to be considered in delimitation. However, doing that would result in a line that blocked the sea ward projected from Myanmar's coast, thereby distorting the delimitation line.[56] As a result of the foregoing, the Tribunal declined to consider St Martin as a relevant circumstance.[57] The Tribunal, thereafter, considered the adjustment of the provisional line[58] and was guided by the decision of the *Court in the Continental Shelf (Libya Arab Jamahiriya/Malta*; *Greenland and Jan Mayen* and *Arbitration between Barbados and Trinidad and Tobago*[59] and adjusted the provisional equidistance line based on the geographical relevant circumstances.[60]

This was the first case relating to maritime delimitation to be heard and determined by ITLOS. The Tribunal took time and care to set out all the previous cases determined by the Court (ICJ) and to set out the guiding principles in each case. It is clear that the Tribunal was trying to ensure that it did not go against the precedence and jurisprudence of the Court. It also examined

[54] Arbitration ILR Vol 77 p. 635 para 602.
[55] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar)* Ibid., (n.1),para 297.
[56] Ibid., para 318.
[57] Ibid., para 322.
[58] Ibid., para 324,325.
[59] ICJ Reports 1985, p13; ICJ Reports, 1993, p. 67; RIAA, Vol XXVII 2006, p.147.
[60] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar*) Ibid (n.1), para 329

the form of delimitation, either through an equidistance line or through the angle bisector method. It emphasised that the intention of the delimitation exercise is to reach an equitable decision. The case is also important because it was the first case to be determined by ITLOS since the 1982 UNCLOS came into effect. The Tribunal noted the concave nature of the Bangladesh coast was a relevant factor that needed to be taken into consideration in order to avoid an inequitable result.

Other tribunals established under Annex VII have also had the occasion to determine maritime delimitation disputes. One of such decisions is Arbitration between *Barbados and the Republic of Trinidad and Tobago*.[61] Barbados lodged a notice of commencement of proceedings against Trinidad and Tobago concerning the maritime boundary, EEZ and continental shelf under Article 286 of the 1982 UNCLOS.

None of the parties had lodged exceptions under Part XV of the 1982 UNCLOS nor any declarations under Article 287.[62] Barbados invited the Tribunal to draw a single unified maritime boundary line.[63] After determining that it had jurisdiction to determine the dispute, the Tribunal proceeded to determine the delimitation by first establishing the relevant coast.[64] It observed that "equitable considerations" *per se* are an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process, and, that some early attempts by international courts and tribunals to define the role of equity resulted in distancing the role of law and therefore there was confusion.[65]

[61] *Arbitration between Barbados and the Republic of Trinidad and Tobago relating to the Delimitation of the Exclusive Economic Zone and the Continental Shelf Between them,* RIAA, Vol XXVII 2006, p.147, <www.legal.unorg/riaa/cases/vol_xxvii/147-251 > (accessed 26th July 2019).
[62] Ibid., para 2.
[63] Ibid., para 57.
[64] Ibid., para 224.
[65] Ibid., para 230.

The Tribunal adopted the guidance given in the *North Sea Continental Shelf Cases, Gulf of Maine Case and the Libya/Malta case*.[66]

The Tribunal acknowledged that the coastal length of the parties has an influence on the delimitation because that is the basis of the entitlement over marine areas, and, may therefore be considered relevant. The Tribunal referred to the two step approach - first of drawing the provisional equidistance line and second the examination of the provisional line against relevant circumstances. It declined to adjust the provisional line based on the relevant circumstances provided by Barbados, namely, that the Barbadian artisanal fisher folk would lose their livelihood. It found that these facts were not proved and declined to adjust the line.[67] In another case involving an Annex VII tribunal, the *Dispute Concerning the Delimitation of the Maritime Boundary between Ghana and Cote D'Ivoire in the Atlantic Ocean*,[68] the Tribunal had occasion to apply the now established three stage procedure guiding maritime delimitation. Ghana instituted proceedings on 19th September, 2014 under Annex VII of the 1982 UNCLOS for the determination of a maritime boundary dispute between Ghana and Cote D'Ivoire. It sought the establishment of a single maritime boundary.[69] Ghana stressed that this was not a maritime delimitation case but a request to declare the existence of a boundary.[70] Cote d'Ivoire on the other hand, declared that the dispute was one of maritime delimitation, a position that was accepted by the Tribunal.[71]

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[66] North Sea Continental Shelf Cases, ICJ 1969 p. 3; *Delimitation of the Maritime Boundary in the Gulf of Maine Area* ICJ Reports1984, p. 246; *Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta)* ICJ Reports 1985 p. 3

[67] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar)* Ibid.,(n.1), para 265

[68] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean* <www.itlos.org/fileadmin/itlos/documents/cases/case_no_23_merits/judgement 23.09.2017> (accessed 4th August 2019).

[69] Ibid., para 2.

[70] Ibid., para 69.

[71] Ibid., para 74.

The parties agreed that the Tribunal would delimit the territorial sea, EEZ and continental shelf using one methodology.[72]Ghana contended that the equidistance/relevant circumstances method was the standard method of delimitation, whereas Cote d'Ivoire stated that there was no single method of delimitation that was acceptable, and, further, that the equidistance method was not obligatory.[73] It preferred the angle bisector method due to the geography of the area.[74]

The Tribunal rejected the contention advanced by Cote d'Ivoire that international jurisprudence favours the angle bisector method of delimitation.[75] It stressed that the majority of the delimitation cases have used the equidistance/relevant circumstances method,[76] and, that the angle bisector method was used in certain cases due to the particular circumstances.

The Tribunal also reiterated that the case of *Nicaragua vs Honduras*[77] where the angle bisector method was used, was due to peculiar circumstances of the case, namely, the highly unstable nature of River Coco's mouth and lots of small islands.[78] In the instant case before the Tribunal, there were no such circumstances, and further the Tribunal also determined that the case of *Tunisia/Libya Arab Jamahiriya*[79] was not applicable because in that case, the Court had applied the angle bisector method due to special geographical considerations which were not present in the instant case.[80]

[72] Ibid., para 263.
[73] Ibid., para 270.
[74] Ibid., para 273.
[75] Ibid., para284.
[76] Ibid., para 284
[77] *Territorial and Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras),* ICJ Reports 2007, p. 659.
[78] Ibid., para 742.
[79] ICJ Reports 1982, p.18
[80] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean*, Ibid., (n.66), para 285.

In the *Case Concerning the Delimitation of the Boundary between Guinea and Guinea Bissau*[81] the equidistance methodology was not given preference and was considered just as one of the many methodologies and the Tribunal was therefore not persuaded that this decision was persuasive due to the geographical lay out of the relevant coasts of the parties in that dispute.[82] It further noted that the *Guinea/Guinea Bissau Award* was not followed by subsequent international tribunals.[83]

The Tribunal concluded that international jurisprudence on maritime delimitation favours the equidistance/relevant circumstances methodology, and, that the angle bisector methodology was used due to the particular circumstances of the case. It emphasised that for the sake of "transparency and predictability," the Tribunal would use and adopt the equidistance/relevant circumstances method of delimitation.[84]

The Tribunal determined that the coasts of the parties were straight and without any features. It established the basepoints and drew the provisional equidistance line. However, before it did this, it had to determine which nautical charts would be used for the purpose.[85] The parties were in agreement on the adoption of the three stage process.[86] The Tribunal adopted the dictum in the *Black Sea Case*.[87]

The Tribunal then proceeded to determine whether there were any relevant circumstances that would lead to the adjustment of the provisional equidistance line. Cote d'Ivoire argued that its

[81] *Case Concerning the Delimitation of the Boundary between Guinea and Guinea Bissau* 1985 ILR Vol 77 p. 635
[82] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean*, Ibid (n. 66) para 286.
[83] Ibid., para 287.
[84] Ibid., para 289.
[85] Ibid., para 326.
[86] Ibid., para 358.
[87] Maritime Delimitation in the Black Sea (*Romania v Ukraine)* ICJ Reports, 2009 p.61, para 116, 120. The Tribunal identified the relevant coast of Ghana as being 139kms and that of Cote d'Ivoire as 352km with a total area of 198,723 square kilometres

coast was concave whilst that of Guinea was convex and therefore this ought to be considered as a relevant circumstance.[88] It also argued that the provisional line cut off the seaward projection of the Ivorian coat, rendering a cut-off effect and this needed to be considered as a relevant factor.[89] It relied on the Award in the *Bay of Bengal Case* to determine whether the provisional equidistance line necessitated adjustment due to a cut-off effect. It noted that the concavity of the Ivorian coast was not so pronounced and that the convexity of the Ghanaian coast produced a cut-off on the eastern coast.[90] The Tribunal, however, noted that, if this line was to be adjusted it would cut off the seaward projection of Ghana and it therefore declined to adjust the line on this ground.[91]

The Tribunal also declined to consider the island of Jomoro, off the Ghanaian coast, as a relevant circumstance.[92] Another ground of relevant circumstance that was introduced by Cote d'Ivoire was the presence of hydrocarbon resources. In considering this ground, the Tribunal relied on the decided cases of *Gulf of Maine,*[93] *Nicaragua Vs Columbia,*[94] *and the Black Sea Case*[95] where the Court stated that resource related considerations may be taken into account only if such delimitations would have a catastrophic economic repercussion,[96] on this ground the Tribunal declined to consider this as a special circumstance.

Subsequently, the Tribunal considered the conduct of the parties as a relevant circumstance. The Tribunal determined that the conduct of the parties over the years fell short of estoppel or

[88] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean*, Ibid (n. 66) para 411.
[89] Ibid., paras 412 to 414.
[90] Ibid., para 424.
[91] Ibid., para 425.
[92] Ibid., para 434.
[93] 1984 ICJ Reports 1984, p. 246 at page 342.
[94] ICJ Reports 2012, p. 624 at page 706.
[95] ICJ Reports 2009, p.61 para 198.
[96] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean*, Ibid., (n. 66) para 462

tacit agreement.[97] It distinguished the *Tunisia/Libya Arab Jamahiriya* decision in which both parties had respected their own individual boundaries and the court had considered this *modus vivendi* as a factor in delimitation. The Tribunal distinguished this case on the following grounds:

> *The Special Chamber notes that in Continental Shelf (Tunisia/Libya Arab Jamahiriya) the on ICJ was requested by article 1 of the special agreement concluded between the parties on 10th June 1977 to determine the "principles and rules of international law [which] may be applied for the delimitation of the area of the continental shelf" and, in so doing, to take account of "equitable principles, and the relevant circumstances which characterize the area, as well as the new accepted trends in the Third Conference on the Law of the Sea" (Judgment, I.C.J. Reports 1982, p. 18, at p. 23, para. 4). On the other hand, the Special Chamber in the present case was asked to delimit an all-purpose maritime boundary delimiting the territorial sea, the exclusive economic zone and the continental shelf. As to which delimitation method to apply, the Special Chamber in this case adopted the three stage approach (see para. 360), in which relevant circumstances are considered in the second stage with a view to assessing the equitableness of a provisional equidistance line drawn in the first stage. Thus the subject matter of, and the approach to, the delimitation in the Continental Shelf case (Tunisia/Libyan Arab Jamahiriya) are different from those in the present case.[98] The Tribunal further noted that a de facto line or a modus vivendi related to oil practice cannot form a relevant circumstance in the delimitation of an all purpose maritime boundary[99]and it proceeded to reject this a s a relevant circumstance.*

Finally, the Tribunal conducted a disproportionality test. It applied the *dicta* in the *Black Sea Case*[100] and *the Bay of Bengal Case*.[101] It found that there was no disproportionality that created an inequitable result.[102]

In this decision, although it appears throughout the case that the Tribunal is guided by the previous decisions of the Court and other tribunals, it still fails to apply the principles that have been previously established. For instance, it declined to consider the concave coastline of Cote

[97] Ibid., para 468.
[98] Ibid., para 470. In the agreement before the chamber the parties had relied on the Tunisia/Libya case in which a modus vivendi sufficient to affect the delimitation line was recognised. The parties had agreed and recognised a customary equidistant line for more than five decades (para 459)
[99] Ibid., para 477.
[100] ICJ Reports 2009, p.61
[101] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh /Myanmar)* Ibid.,(n.1).
[102] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean,* Ibid., (n. 66) para538.

d'Ivoire as a relevant factor, despite this being a relevant factor in the Bay of Bengal case; it declined to consider the Jomoro Island as a relevant factor; it declined to adjust the equidistance line despite the cut off effect of the Ghanaian coast. All in all, this Tribunal declined to consider all the relevant circumstances previously considered by other tribunals and instead decided to be governed by an 'equitable delimitation.'

4.3. Is There Consistency in the Application of Principles of Maritime Delimitation from the Tribunal Awards?

The Court's decisions on maritime delimitation are more than those rendered by the international tribunals. However, there is an obvious thread running through these decisions, namely, that the Court and other international tribunals have endeavoured to provide a jurisprudence on principles of maritime delimitation that is harmonious.

In the *Arbitration between Ghana and Cote d'Ivoire*, the Tribunal, after analysing the cases determined on the basis of the equidistance/relevant circumstances method, remarked that it would be necessary for the sake of transparency and predictability to adopt the equidistance/relevant circumstances method of delimitation.[103]

It is apparent that with the settling of the procedure of delimitation in the *Black Sea Case*, all subsequent decisions of the Court and other tribunals have followed the three-stage approach

[103] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean,* Ibid., (n.66), para *289.*

of delimitation.[104] The three-stage approach is also adopted in the awards of the arbitral tribunals.[105]

However, in matters relating to the relevant circumstances to be considered during the delimitation process, the position seems to remain as was stated in the *North Sea Continental Shelf Cases,*

> *In fact, there is no legal limit to the considerations which states may take into account of for the purpose of ensuring that they apply equitable procedures, and more often than not, it is the balancing up of all such considerations that will produce this result rather than reliance on one to the exclusion of all others… in balancing the factors in question it would appear that various aspects must be taken into account. Some are related to the geological, others to the geographical aspect of the situation, others again to the idea of the unity of any deposits.* [106]

By failing to limit the nature of the circumstances that the tribunal can enquire into in arriving at an equitable delimitation, the floodgates of litigation are left open because the law is made through the determination of the cases. The end result is that the tribunals are kept occupied with delimitation disputes that perhaps, could have been resolved through conciliation or negotiation process, if the parties know that they will not succeed before the tribunals.

Conclusion

The tribunals have endeavoured to ensure that they uphold the growth of the jurisprudence by employing the principles of delimitation as interpreted by the Court, for instance, through the application of the Three Stage Process. This has ensured that the decisions are streamlined and the instances of deviation are few and far in between. This has happened despite the absence

[104] *The Territorial and Maritime Dispute (Nicaragua vs Colombia*), ICJ Reports 2012, p.624; at paras 190 to 194 the Court examines the history of the methodology of maritime delimitation settled through its decisions over the years. It acknowledges that the three stage process is no established jurisprudence.
[105] The three-stage method is adopted in the awards in the *Bay of Bengal Arbitration, Trinidad and Tobago Arbitration and Ghana and Cote d'Ivoire arbitration*
[106] *North Sea Continental Shelf Cases*, ICJ Reports 1969, p. 3, paras 93, 94.

of a hierarchical court system in international law. The tribunals are definitely playing a big role in the development of maritime delimitation jurisprudence.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The decisions of the international tribunals and the ICJ on maritime delimitation since 1969 have one consistent thread running through them, that their decisions shall be equitable. It is only with the determination of the *Black Sea Case*[1] that the procedure for undertaking delimitations was somewhat settled.

However, through the decisions that have been studied in this thesis it is clear that the principle preferred by the international tribunals is equitable/relevant circumstances.[2]

The existence of several fora for the resolution of international maritime delimitation disputes has not created disharmony in the decisions rendered, despite the absence of a hierarchical court system in international law.

5.2 Findings

5.2.1 Findings on the Statement of the Problem.

The study identifies the problem as the vague provisions of the 1982 UNCLOS Article 74 relating to the resolution of delimitation disputes, by merely stating that such disputes shall be resolved 'in order to achieve an equitable solution.' Through this vagueness, a free hand was given to the international tribunals to achieve equitable solutions, while still maintaining a semblance of uniformity, thereby growing the jurisprudence in the field.

[1] Delimitation of the Maritime Boundary in the Black Sea (Romania v Ukraine) ICJ Reports, 2009, p. 61

[2] In the *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway*), ICJ Reports 1993, p.41, the court noted that there is no difference between the equitable/relevant circumstances and equidistant /special circumstances principles.

The study also identified the problem as the lack of a hierarchical system of courts in the international court system, which would have, as in municipal tribunals, a 'supreme court' in the international system. This lack of a hierarchical court system is compounded by the existence of several fora which are available to states to litigate their disputes in. As a result of the foregoing situation, the study sought to establish through a study of the decided cases on international maritime delimitation, the emerging or settled principles of international maritime delimitation.

In Chapter 2 a study was conducted on the available avenues for settlement of international maritime disputes. These were identified as the ICJ, ITLOS and ad hoc tribunals under Annex VII of the 1982 UNCLOS.

In Chapter 3 and Chapter 4 we studied the decisions rendered by the Court and tribunals on the maritime delimitation. The study revealed that the guiding principle of achieving equitable delimitations was the guiding beacon for the tribunals. However, in the course of the delimitations the tribunals have created an open gate through allowing parties to rely on facts or circumstances that they consider to be "relevant" in the determination of the disputes. These "relevant circumstances" are employed both as a sword and as a shield by the parties. For instance, whereas the tribunals have accepted in principle that a concave coast can be a relevant factor, in the *Ghana v Cote d'Ivoire case*[3], the Tribunal declined to consider this as relevant, but in the *Bay of Bengal Case*[4], the Tribunal considered this as a relevant factor.

[3] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean* www.itlos.org/fileadmin/itlos/documents/cases/case_no_23_merits/judgment 23.09.2017 (accessed 4th August 2019

[4] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* ITLOS Reports 2012, page 2, Case Number 16 ITLOS www.itlos.org/en/cases/case-no 16/#c964 (accessed 27th June 2019

The settling of the methodology on the delimitation exercise in the *Black Sea Case*[5] has seen the increased application of the equidistance/relevant circumstances principle, and has settled the mode of undertaking the delimitations.

Despite this positive development, however, the area where there is a departure in uniformity is in determining what are the "relevant circumstances" which the international tribunal ought to take into account in the third stage of the delimitation methodology.

The list of relevant circumstances is endless, starting with geographical, geological, nature of the relevant coast, lengths of the relevant coasts, modus vivendi of the parties, to name a few. In all the decisions examined in this theses, the resounding chorus is that the list of these relevant circumstances is not closed.

5.2.2 Findings on the Hypotheses

The research is based on the hypotheses that international tribunals are evolving the law on maritime delimitation through their decisions and that they have in the process, given a sufficient guide to settle the law on the delimitation of maritime disputes. Despite of the lack of definitive principles to guide the tribunals, the flexible approach by the tribunals has increased the tribunal's jurisdiction.

The research finds that the above hypotheses are true. It has been found that through cases such as the *North Sea Continental Shelf Cases*[6] the primary goal of maritime delimitation to obtain equity, however, equity does not imply equality,[7] nor is it the function of the tribunal to refashion nature. This case although decided before the coming into force of the 1982

[5] *The Delimitation of the Black Sea (Romania V Ukraine)* ICJ Reports 2009, p.61.
[6] ICJ Reports 1969, p. 3.
[7] Ibid (n.6), para 91.

UNCLOS, has been cited with approval and *dicta* adopted in several other cases; however, the tribunals did not necessarily follow the mode of delimitation.[8] In the subsequent case of *Libya/ Tunisia*[9], the Court did not apply the doctrine of prolongation, but instead relied on the *modus vivendi* of the parties and other geographical grounds in making its decision, noting that there was no single obligatory method of delimitation.[10] In the *Nicaragua v Colombia case*[11], the Court cited with approval the line of cases from 1985 to 2009.[12] In the Bay of Bengal Case[13] ITLOS cited with approval and applied the previous decisions of the Court on maritime delimitation. It employed the three stage procedure laid out in the *Black Sea Case*[14], and took into account the concave nature of the Bangladesh coast as a relevant circumstance.[15]

The findings of the research conclude that not only is the law of maritime delimitation being settled by the international tribunals, but it is also being expanded through the tribunals allowing the application of any circumstances that they may consider as relevant circumstances to influence delimitation. Due to the fact that there is no closed list of relevant circumstances, the number of cases filed by States shall increase and the tribunals shall continue to determine the matters on a case by case basis. This will increase the pot of cases from which one could refer to, but will not necessarily settle the law on maritime delimitation.

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[8] *The North Sea Continental Shelf Cases* applied the doctrine of proportionality in the delimitation process. The subsequent decisions, however, failed to follow the reasoning, but applied the thinking of the Court, i.e being guided to achieve an equitable solution.

[9] *Case Concerning the Continental Shelf (Tunisia/Libya Arab Jamahiriya*) ICJ Reports 1982, p. 54.

[10] Ibid, (n.9) para 111.

[11] *The Territorial and Maritime Dispute (Nicaragua v Colombia*) ICJ Reports 2012, p.624.

[12] Ibid., (n.11) paras 190-194.

[13] *Dispute Concerning the Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar)* ITLOS Reports 2012, page 2, Case Number 16 ITLOS www.itlos.org/en/cases/case-no 16/#c964 (accessed 27th June 2019).

[14] Ibid, (n.5*) Black Sea Case*.

[15] Ibid, (n.13) para 297.

5.2.3 The Research Questions

The resulting situation leads to the answer to the research questions:

5.2.3.1 How differently have the Court and international tribunals approached similar disputes on maritime delimitation and the application of the principles of maritime delimitation?

This question can be answered in the positive, that, the Court and international tribunals have approached similar disputes on delimitation with the intention of creating a jurisprudence that is transparent.[16] The jurisprudence has been created by the Court over the years starting in 1969 with the *North Sea Continental Shelf Cases* to date. The Court decisions have culminated in the settling of the delimitation methodology as per the dictum in the *Black Sea Case*[17]. This methodology has been applied even when the method of delimitation is through the angle bisector method as opposed to the equidistance/relevant circumstances method.

The tribunals have also adopted the position of the Court in the applying the three stage methodology.

5.2.3.2 How has the Court and international tribunals dealt with the lack of a hierarchical system of international courts in matters related to maritime delimitation?

The lack of a hierarchical system of courts in international law has not affected nor impeded the development of maritime delimitation jurisprudence. The arbitral tribunals established pursuant to Annex VII of the 1982 UNCLOS have applied the dicta of the cases determined by the Court on maritime delimitation. In the *Ghana and Cote d'Ivoire*[18] arbitration, the Tribunal

[16] *Dispute Concerning the Delimitation of the Maritime Boundary Between Ghana and Cote D'Ivoire in the Atlantic Ocean* www.itlos.org/fileadmin/itlos/documents/cases/case_no_23_merits/judgment 23.09.2017 (accessed 4th August 2019).
[17] Ibid, (n.5)
[18] Ibid, (n. 16) .

cited with approval and applied the dicta in the Black Sea Case. The Tribunal also relied on the *Bay of Bengal Arbitration*[19] on the disproportionality test.

In the case of *Nicaragua vs Colombia*,[20] the Court cited with approval the dictum in the *Bay of Bengal Arbitration*[21] which was determined by ITLOS.

The harmonious integration of the various international tribunals is through a deliberate effort to ensure that the jurisprudence is clear.

5.2.3.3 What is the jurisprudence that has arisen from the Court and international tribunals on international maritime delimitation law?

This question may be answered in two limbs: a) the nature of the jurisprudence that has arisen; and b) the efficacy of the jurisprudence.

In the first case to be considered, the *North Sea Continental Shelf Cases*[22], the Court stressed that the object and result of the delimitation should be to achieve an equitable delimitation. It threw wide the considerations that the Court or tribunal ought to factor in this exercise. The second case to be considered was the *Tunisia/Libya Arab Jamahiriya*[23] case. In this case, the parties relied heavily on the dicta in the *North Sea Continental Shelf Cases.* They made elaborate submissions through expert geologists on the geological and geographical nature of the relevant coasts, including the relation to the plate tectonics. However, the Court declined to consider these considerations alone, but was influenced more by the physical nature of the relevant coasts and configuration thereof.

This was the beginning of the departure in what the tribunal ought to consider as a relevant circumstance in the delimitation exercise.

[19] Ibid, (n.4).
[20] Ibid., (n.11).
[21] Ibid., (n.13)
[22] Ibid., (n.6).
[23] Ibid., (n.9).

The third case to be considered was the *Gulf of Maine Case*[24], where the Court distinguished the *Tunisia/Libya Arab Jamahiriya case*[25], due to the nature of the question referred for resolution. In this case, although the court declared that its intention was to have an equitable delimitation, it applied the angle bisector method due to the circumstances of the relevant coasts. Even in this case, the relevant circumstances applied had no bearing to the former cases.

The trend of being led by equitable results continued until the *Black Sea Case*[26] decision which introduced the three-stage methodology in delimitation. This decision seemed to have settled the applicable methodology, in most cases, apart from those which the angle bisector method would be adopted. However, the one thing that this case failed to settle or create a uniform jurisprudence on is the nature of the relevant circumstances that a tribunal would take into account in delimitation.

This now answers the second limb of the question. In view of the lack of closed list or general guidance on what a relevant circumstance would be, the doors of dispute settlement have been thrown wide open for whichever party to instituted proceedings on the hope that at the very least, their relevant circumstance will be given recognition. In the last several years, the tribunals have faced several situations presented as relevant circumstances. For instance, the existence of islands off the relevant coast, the concavity of a relevant coastline, the existence of hydrocarbon resources, the lengths of the relevant coasts, the conduct of parties or *modus vivendi*, the presence of fish stock, the protection of cultural practises such as pearl fishing, just to name a few.

[24] Delimitation of the Maritime Boundary in the Gulf of Maine Area, ICJ Reports, 1984, p.246.
[25] Ibid, (n.9).
[26] Ibid., (n.5).

Further, it is clear that even when a certain relevant circumstance has been afforded "relevance" in a certain matter, it does not necessarily mean that this will be treated as a relevant circumstance in another matter. For instance, in the case of *Costa Rica vs Nicaragua*[27], the Court accepted that the presence of islands off the coast of the parties was a relevant factor in delimitation. However it declined to consider the same in the *Black Sea Case*,[28] and the *Qatar v Bahrain case*[29]. This means, therefore, that there lacks uniformity and therefore although part of the jurisprudence is settled, the holistic approach is lacking.

In view of the foregoing answers to the research question, are the hypotheses of this study justified?

The study was based on the hypotheses that the Court and international tribunals are evolving the jurisprudence on international maritime delimitation, and that the decisions of the Court and international tribunals have given a sufficient guide to settle the law on delimitation.

Whilst it is true that the Court and international tribunals are evolving the jurisprudence on delimitation, the decisions have failed to give sufficient guide to settle the law on delimitation. In other words the jurisprudence is not holistic and makes available far too many opportunities to present what a party may consider as a relevant circumstance in delimitation.

Therefore the hypotheses are partly justified.

[27] *Maritime Delimitation in the Caribbean Sea and Pacific Ocean (Costa Rica v Nicaragua)* ICJ Reports 2018, p. 1.
[28] Ibid., (n.5).
[29] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)* ICJ Reports 2001, p. 40

5.3 Recommendations

This research has studied the decisions spanning four decades from the international tribunals. It concludes that the international tribunals have tried to settle the jurisprudence of international maritime delimitation however they have not fully succeeded owing to the flexible approach in relation to the grounds that they can consider during the delimitation exercise.

It is recommended that in order to settle the law and jurisprudence in this area it is necessary to lay out a generic list of circumstances that can be considered as relevant. For instance, it is possible for the international tribunals to come up with a general guide of what they would consider as relevant circumstances. However, due to the challenges that the international tribunals face, especially due to the very nature of their jurisdiction being subject to the consent of the state parties, this may not be a very welcome or politically correct decision to endorse. This recommendation is made with the law relating to the sovereignty of states in mind and the consensual nature of the dispute resolution system under international law. The generic list would act as a guide in the cases before the tribunals, from which they would also be at liberty to comply with or reject, subject to the circumstances of the case before them. Such a list would be contained in an agreement or a protocol to the 1982 UNCLOS. Such a list would not take away the Court's or tribunals' jurisdiction to determine fresh circumstances, but would act as a guide to the Court and tribunals in determining the disputes before them.

In the alternative, it is recommended that Article 74 of the UNLCOS 1982 be amended to provide for the actual methods of delimitation and the circumstances to be considered by the tribunals and the Court. This may be a tall order in view of the initial difficulty by parties to compromise on the wording of this article during the UNCLOS III conference. This would require much lobbying among the states parties and perhaps even political inducement.

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