Kenya's Non-Appearance and Withdrawal: The Melodrama Before the ICJ

By:

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I. Introduction

In a single case before the International Court of Justice (ICJ) - the 'Somalia v. Kenya' Maritime Delimitation in the Indian Ocean dispute – Kenya has engaged in non-appearance and withdrawal from the court's jurisdiction in order to defeat the conclusion and the effectiveness of the judgement that is set to be issued today. The first time was on 12th March 2021. On this day, Kenya refused to participate in the oral rounds of the hearing on the merits of the case. The second time was on 24th September 2021. On this day, which announced the date of delivering the final ICJ judgment on the case, Kenya withdrew its declaration under article 36(2) of the ICJ Statute as an attempt to deny the court jurisdiction over the case. Article 36(2) is known as the Optional Clause. It is the provision through which a state subjects itself to the compulsory jurisdiction to the ICJ.

Professor Andrea Bianci, in his famous essay Asking Questions, argues that the discipline of international law needs more intellectuals, less experts, and more amateurs. He further states that it is the amateurs who ask questions and they do not need to be philosophers or theorists or anything else that can easily tagged and dutifully set aside. I am then wearing my 'amateur' hat to metaphorically ask: Is Kenya's strategy terrible? To critically answer this question, I first consider the effect of the non-appearance of Kenya in the hearing on the merits of the case. Second, I look into the withdrawal of the declaration accepting compulsory jurisdiction the ICJ and what that means for the present case as well as for future disputes. Third, I provide concluding remarks.

II. Non- Appearance

This case involves a case initiated by Somalia against Kenya at the ICJ regarding a disputed Exclusive Economic Zone of around 42,000 square kilometers. Both Kenya and Somali participated in the dispute until the submission of all pleadings. The court then scheduled 9 September 2021 as the starting date for public hearings on the merits of the case. However, this was postponed upon Kenya's request to hire a new team of lawyers. The oral hearing was thus rescheduled to 8 June 2020. Given COVID-19-prevailing reasons, it was once again rescheduled to 15 March 2021 on 18 May 2020. In January 2021, Kenya requested for a further rescheduling of the hearing 'until such time as the pandemic would have subsided' – a request that the Court rejected.

The melodrama began three days before hearing on the merits of the case. Kenya wrote to the court that it was not going to participate in the hearing on the merits, citing, among other things, Covid- 19-related reasons such as the lack of a suitable internet connectivity in Nairobi. However, Kenya still went ahead to request to address the court for 30 minutes before the proceedings began. I can confirm that Nairobi, a place I have spent most of my life, has one of the fastest and best internet connectivity in the world. Further, most of the lawyers that Kenya had hired were based in the global North where the court is located and where a hybrid system of hearing was still possible via videoconferencing. Of course, the court rejected the request to allow the Kenyan agent to address it based on internet connectivity issues, and I think

rightly so.

What Kenya fails to appreciate is that non- appearance (which should not be confused with non-participation) could have been a better strategy. A state cannot fail to appear after participating in earlier stages of the case and possibly think that this will help a case that is already weak.

Non-appearance is not a new concept at the ICJ. In fact, from April 1972 to April 1984, which is a period of high number of cases of non-appearance before the ICJ, eight cases were brought to the ICJ by unilateral application. In the first seven, the respondent State did not participate in the proceedings at all. In the eighth case, the Military and Paramilitary Activities case, the United States of America (US) participated at first but withdrew after the Court rendered a judgment on jurisdiction and admissibility that was adverse to it.

This conduct was highly criticized by international law scholars and practitioners, including Africa's eminent jurist Professor Taslim Elias. In 1983, Taslim, President of the ICJ as he then was, dedicated a book chapter to the subject. During this same period of high number of cases non-appearance, the Institut de Droit International noted, with concern, 'that the absence of a party is such as to hinder the regular conduct of the proceedings, and may affect the good administration of justice'. Non-appearance has however recently resurfaced. About 11 states, including Kenya, failing to appear in cases involving them before international courts and tribunals in the last 9 years.

i. Effects of Non – Appearance

The law of non-appearance is provided for under Article 53 of the ICJ Statute. The main principle enshrined in this Article is that the Court cannot automatically rule in favor of a state participating in the case only because the other state does not appear. The court rather must satisfy itself that it has jurisdiction and that the claim before the Court is well founded in fact and law. In essence, Kenya's non- appearance had no effect in terms of the outcomes of the case, whatever the aim of Kenya was in not appearing.

The ICJ noted in the Military and Paramilitary Activities case that when a state named as party to proceedings before the Court decides not to appear in the proceedings, or not to defend its case, the Court usually expresses regret

because such a decision obviously has a negative impact on the sound administration of justice. Non-appearance raises serious practical and structural difficulties for conducting the proceedings. The court is, in essence, placed in a position that it must explore the counterarguments that might reasonably be raised by the 'absentee' party to the grounds presented by the applicant. This measure is derived from its duty in paragraph 2 of Article 53 of the Statute, which alludes to the need of the court to "satisfy itself" in both the facts and law of the case. The Fisheries jurisdiction case between the United Kingdom and New Zealand confirmed this.

But be it as it may, Kenya's non-appearance doesn't place much in the way of structural difficulties for the court in the case under study. The reason for this, is that Kenya filed all its pleadings and even participated fully in the jurisdictional phase. The oral hearings are normally a clarification and parties do not even deviate much from the written pleadings. So, I ask my 'amateur' self the question 'what was this non-appearance meant to serve'?

Kenya also filed a 175-page positional paper when it notified the court that it was not going to appear in the oral hearings. A quick look at the ICJ website on the relevant documents of the case reveals that the said 'position paper' is not available on the website. Thus, a critique may conclude, the Court does not seem to have accorded it any weight. This is not a surprise to me because, while informal communication through positional papers where a state party has refused to participate are sometimes considered, such positional papers must be given in advance of the hearing.

China and Russia have previously presented arguments not just through communications to the tribunal, but also through "position papers", which they published online and transmitted to the tribunal. The South China Sea tribunal had no problem taking China's position paper into account, while the Arctic Sunrise tribunal "decided to take no formal action" on Russia's position paper, as it was brought to the tribunal's attention just one week before the award on the merits was rendered. I can therefore bet my bottom dollar that the positional paper by Kenya three days before the hearing will not feature in the ratio of the court today.

If Kenya had a well thought out strategy of non-appearance as have other states such as Pakistan had in the Marshall Islands case (in which they were successful), it would have declared non-appearance from the onset and given its positional papers then instead of wasting tax payers' money in legal fees, hiring expensive legal counsels in Geneva and the US for millions of dollars. This would have placed Kenya at a better position as the Court could have had to consider counterarguments against Somalia. This would therefore have served Kenya's best interest better and in the process helped it save on legal costs.

ii. Consequences

Non-appearance has in the past to upset the members of the court or tribunal adjudicating a case, thereby jeopardizing any goodwill they might have towards the non-participating State. In the Electricity Company of Sofia and Bulgaria case, the Permanent Court of International Justice (PCIJ) justified its indication of provisional measures in part by referring to "the successive postponements and resulting delays" caused by Bulgaria. Also, in the Corfu Channel case, the ICJ cited Albania's non-participation in the earlier phases in explaining why it refused to grant Albania an extension of the time-limit for submitting written observations on the expert report.

III. Withdrawal of Compulsory Jurisdiction

As if the non-appearance was not already enough drama, on the 24 September 2021 when the court announced that it would deliver its judgement on the 12 October 2021; the Government of Kenya notified the Secretary-General of the withdrawal of its declaration under Article 36(2) of the ICJ Statute. In a statement by the Kenyan ministry of foreign affairs, Kenya argued that, "the delivery of the judgement will be the culmination of a flawed judicial process that Kenya has had reservations with, and withdrawn from." Further, the statement states that 'as a sovereign nation, Kenya shall no longer be subjected to an international court or tribunal without its express consent.' Article 36(2) of the Statute to the ICJ allows parties, by declaration, to recognize the Court's compulsory jurisdiction in certain classes of international legal disputes. The Court may exercise compulsory jurisdiction over only those states which have expressly consented. When a state deposits a declaration with the

Secretary-General of the United Nations in accordance with Article 36(2), it immediately has the right to institute proceedings against other states which are parties to the system, and the obligation to submit to the Court's jurisdiction when it is invoked by such other states. In effect, consent to Article 36(2) is tantamount to a waiver of a state's absolute sovereignty.

i. Non-Retroactivity

If the statement released by Kenya on withdrawal of the compulsory jurisdiction is to not recognize the judgement of the court, then it is another failed strategy. Two principles are noteworthy here. The first is that of non-retroactivity, which was advanced in the Nottebohm case between Liechtenstein and Guatemala. I must however make it clear that the ICJ has in the rights of the passage case between Portugal and India established the proposition that the reservation of a right to vary or denounce a declaration is lawful. It is thus within Kenya’s right to issue the withdrawal declaration.

The declaration is indeed valid. The damaging effect of instantaneously terminable declarations on the compulsory jurisdiction system has been widely recognized. Although such conditions are valid, their effect is limited by the Nottebohm principle of non-retroactivity. This principle provides that modification or termination of a declaration cannot deprive the Court of jurisdiction in a case of which it is already seized. The principle provides that the Court can never be divested of jurisdiction retrospectively. This principle primarily applies to termination and variation of declarations. Therefore, a withdrawal of the compulsory jurisdiction under Article 36(2) of the court has no effect on the court’s jurisdiction if the court was already deciding on the preliminary provisions to which Kenya participated fully. Therefore, the judgement released today, will be valid and enforceable even if it disregards Kenya’s declaration to withdraw the compulsory jurisdiction of the Court.

ii. Reciprocity

The second principle that Kenya now loses on is that of reciprocity. A basic provision of the Statute applying to every declaration under Article 36(2), also commonly known as the Optional Clause as stated above, is the principle of reciprocity. This principle derives from the language of the Optional Clause itself, under which every declaration is expressed to operate only "in relation to

any other State accepting the same obligation." The ICJ has interpreted Article 36(2) in the Land and Maritime Boundary between Cameroon and Nigeria to require that when the Court is seized of a dispute on the basis of compulsory jurisdiction, the reservations of each declaration will be binding on both parties, in the sense that each party is entitled to invoke any relevant reservation appearing in either party's declaration.

Further, the ripple effect of Kenya's invocation Article 36(2) goes beyond this maritime dispute. Essentially, what Kenya has done is that it has denied itself the chance to have a direct access to the court in the event of a dispute with another state that accepts compulsory jurisdiction. Kenya's statement on the withdrawal of the compulsory jurisdiction of the Court remains silent on this ripple effect. Also, whether under Kenyan law it is permissible for the executive to withdraw or amend a treaty provision without approval of the legislature needs to interrogation. This is because the Kenyan Constitution and the Treaty Ratification Act are silent on the withdrawal or amendment of treaties and thus it cannot be assumed automatically that such powers are bestowed with the executive without the approval of legislature.

iii. Talk is Cheap

Some commentators have argued on social media that states such as the United States have resulted in the same measures in the past. While this is true, Kenya should not do it only because the US has done it. In fact, the US withdrawals have equally been unsuccessful in terms of strategy. The US has come under harsh criticisms for this behavior. It has been stated that the US cessation of its obligations under the ICJ's compulsory jurisdiction was unwarranted and failed to recognize valid alternatives that were more responsive to the objections to the Court's alleged politicization.

Article 94(1) of the UN Charter obliges all states to comply with decisions of the ICJ to which they are party to. Many states such as Nigeria, Honduras and Libya previously came out strong before or after court's decisions involving them had been made. Noteworthy that these sates, respectively in the case of Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), the case concerning the Territorial Dispute on the Aouzou Strip and the Land (Libyan Arab Jamahiriya/Chad), and the case of Island and Maritime Frontier

Dispute (El Salvador/Honduras: Nicaragua intervening), stated that they were not going to recognize or comply with the decisions of the court. However, they soon after complied due to the immense pressure by the security council members and the international community. This is primarily because compliance of ICJ judgements is more of a political process than it is a legal one. The consequences for most developing countries are not worth the risk. I do not expect Kenya's position to be different. This talk is just to set stage for further diplomatic negotiations in the event the judgement is not in favor of Kenya. No country can risk its reputation even in territorial disputes.

IV. Conclusion

I cannot predict the decision court today, primarily because the ICJ has always surprised many with its decisions. I do not know why Kenya is running helter-skelter when the decision could not be as bad against them as they seem to suggest. It must also be acknowledged that Somalia had a pretty strong case and so we wait to see what the court will have to say. What I can predict with almost a 100-percent certainty is that the non-appearance and the withdrawal of the compulsory jurisdiction will have no effect in the case.

Abdulrazak Gurnah, the Zanzibar-born novelist who was last week awarded the Nobel peace prize for literature, stated that he always just wants to write as trustfully as he can, without trying to say something noble. I hope to attain the same through this blogpost by stating that Kenya's strategy before the ICJ, has been weak.

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