

**Lancaster University**

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**REGIONAL COOPERATION OVER GULF OF GUINEA RESOURCES**

This thesis is submitted in fulfilment of the requirements  
for the award of the degree

**Doctor of Philosophy**

Law Department  
**Lancaster University**

May 2020

## DECLARATION

I Sylvia Ama Adusu declare that this thesis is my own work and has not been submitted in substantially the same form for the award of a higher degree elsewhere.

**Sylvia Adusu**

May 2020

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## **ABSTRACT**

This thesis explores how states bordering the Gulf of Guinea can cooperate in the exploitation, conservation and management of the region's marine resources. Within the framework of international law generally, and the United Nations law of the Sea Convention (UNCLOS) in particular, the thesis demonstrates the legal basis for cooperation in four key areas: - maritime boundary delimitation, exploitation of non-living marine resources of the seabed, protection of the marine environment from pollution arising out of such exploitation and the conservation and management of the living marine resources. The thesis applies a positivist analysis of international law, following a law-in-context approach. The key findings relate to challenges to the states' duties to cooperate in the areas of delimiting their maritime boundaries due to the many maritime boundary disputes in the area and the lack of cooperative regimes for joint development of non-living resources. Another challenge identified is inadequate regional and national frameworks for the protection of the marine environment from pollution arising out of exploitation as well as for dealing with issues of liability from pollution incidents. Cooperation in the conservation and management of marine living resources is also insufficient. The thesis recommends regional and sub-regional cooperation by means of appropriate regional, sub-regional and national mechanisms.



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## LIST OF ACRONYMS

ATLAFCO	Ministerial Conference on Fisheries Cooperation among African States bordering the Atlantic Ocean
AU-IBAR	The African Union Inter-African Bureau for Animal Resources
BCLME	Benguela Current Large Marine Ecosystem
CBD	Convention on Biodiversity
CCLME	Canary Current Large Marine Ecosystem
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CCSBT	Convention on the Conservation of Southern Bluefin Tuna
CECAF	Fishery Committee for the Eastern Central Atlantic
CLCS	Commission on the Limits of the Continental Shelf
CNA	Clean Nigeria Associates
CNA	Competent National Authority
COREP	Regional Commission of Fisheries of Gulf of Guinea
CS	Continental Shelf
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EEZ	Exclusive Economic Zone
FAD	Fish Aggregating Devices
FAO	Food and Agriculture Organization of the United Nations
FCECA	Fishery Committee for the Eastern Central Atlantic
FCWC	Fishery Committee of the West Central Gulf of Guinea
FPSO	Floating Production Storage Offloading
GCC	Guinea Current Commission
GCLME	Guinea Current Large Marine Ecosystem
GOG	Gulf of Guinea
ICC	International Chamber of Commerce
ICCAT	International Commission for the Conservation of Atlantic Tunas

ICJ	International Court of Justice
IGCC	Interim Guinea Current Commission
IMO	International Maritime Organization
INTERPOL	The International Criminal Police Organization
IPOA-IUU	International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
ITLOS	International Tribunal on the Law of the Sea
IUCN	International Union for Conservation of Nature
IUU	Illegal, unreported and unregulated
JDZ	Joint Development Zone
LME	Large Marine Ecosystem
MARPOL	International Convention for the Prevention of Pollution from Ships
MCS	Monitoring, Control and Surveillance
MPA	Marine Protected Areas
NAFO	Northwest Atlantic Fisheries Organization
NAP	National Strategic Action Plans
NEPAD	New Partnership for Africa's Development
NOAA	National Oceanic and Atmospheric Administration
OAPEC	Arab Petroleum Exporting Countries
OSPAR	Convention for the Protection of the Marine Environment of the North-East Atlantic
OSRL	Oil Spill Response Limited
PSC	Production Sharing Contractors
RCU	Regional Coordinating Unit
RFB	Regional Fisheries Bodies
RFMO	Regional Fisheries Management Organizations
SAP	Strategic Action Programme
SCRS	Standing Committee on Research and Statistics
SEAFO	South East Atlantic Fisheries Organisation
SPRFMO	South Pacific Regional Fisheries Management Organisation

SRFC	Sub-Regional Fisheries Commission
TAC	Total Allowable Catch
TDA	Trans boundary Diagnostic Analysis
UNCCC	United Nations Framework Convention on Climate Change
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Conference on the Law of the Sea
UNEP	United Nations Environment Programme
UNFSA	United Nations Fish Stocks Agreement
WATF	World Africa Task Force
WCPFC	Western and Central Pacific Fisheries Commission
WWF	World Wide Fund

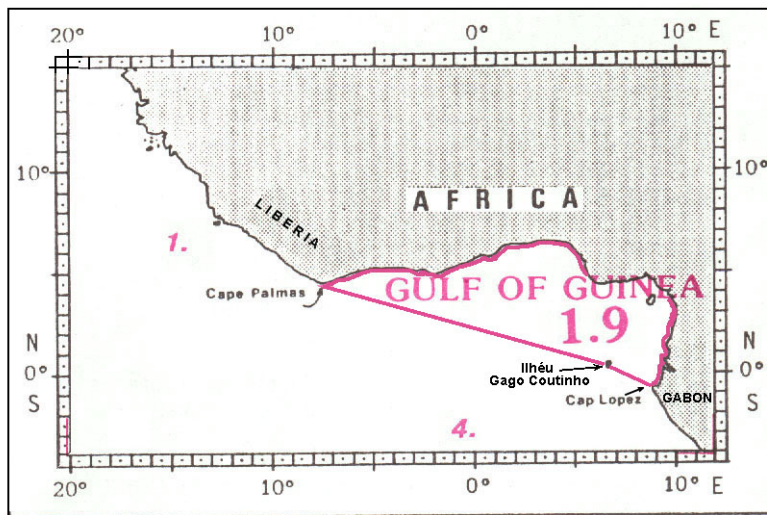


# INTRODUCTION

## I. The Gulf of Guinea Region: Geography and Resources

The Gulf of Guinea, is an area lying off the western coast of Central Africa.<sup>1</sup> According to the International Hydrographic Organisation, its limits on the north and east, stretch from Cape Palmas (4°22'N - 7°44'W), in Liberia, eastward and southward, along the western coast of Central Africa, to Cape Lopez (0°37'S - 8°43'E), in Gabon.<sup>2</sup> On the southwest, it stretches from Cape Lopez (0°37'S - 8°43'E), in Gabon, north-westward to Rolas Island in Sao Tome and Principe (0°01'S – 6°32'E); and continues from there north-westward to Cape Palmas (4°22'N - 7°44'W), in Liberia (see figure 1).<sup>3</sup> The coastal states located in the area are Cote d'Ivoire, Ghana, Togo, Benin, Nigeria, Cameroon, Equatorial Guinea, Sao Tome and Principe and Gabon. The region is also home to several islands notable among which are the Equatorial Guinean Islands of Annobón and Bioko. Other small islands are Corisco, Elobey Grande and Elobey Chico. Sao Tome and Principe is an island nation consisting of two islands - Sao Tome and Principe<sup>4</sup>

Figure 1: Gulf of Guinea Area



Source: International Hydrographic Organisation, *Names and Limits of Oceans and Seas* (Draft 4<sup>th</sup> edn of S-23, IHB 2002) para. 1.9.

<sup>1</sup> International Hydrographic Organisation, *Names and Limits of Oceans and Seas* (Draft 4<sup>th</sup> edn of S-23, IHB 2002) para. 1.9.

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> John Misachi and others, 'Where is the Gulf of Guinea?' (*WorldAtlas*, 2020)

<<https://www.worldatlas.com/articles/where-is-the-gulf-of-guinea.html>> accessed 22 May 2020.

These states share in common the marine environment of the Gulf of Guinea with its non-living and living marine resources which are mostly transboundary in nature. The global framework for managing these resources as well as the marine environment is the United Nations Convention on the Law of the Sea (UNCLOS),<sup>5</sup> and its Agreement for the implementation of the Provisions of the Convention of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Fish Stocks Agreement).<sup>6</sup> Together these instruments define the rights and responsibilities of nations with respect to their use of the world's oceans as well as the management of marine natural resources. All the states in the Gulf of Guinea are party to UNCLOS but, four of them<sup>7</sup> are not party to the Fish Stocks Agreement which provides for states to cooperate in the management of straddling and highly migratory fish stocks. The states have enacted legislation to implement the Convention and these include claims to 200M Exclusive Economic Zones (EEZ).<sup>8</sup> UNCLOS also requires states to deposit charts and lists of geographical coordinates of these zones with the UN Secretary General.<sup>9</sup> However, four of them<sup>10</sup> have not fulfilled this obligation which implies that there may be uncertainty where their perceived jurisdiction in the oceans begin and end.

Regarding its marine resources, the Gulf of Guinea is a major marine region in terms of hydrocarbon, and fisheries resources. Regarding hydrocarbon resources, the area is currently the largest zone where African oil resources are located and, consequently, the main region where crude oil is produced and traded.<sup>11</sup> Intense exploration activities are also underway for more discoveries.<sup>12</sup> This expansion in exploration and exploitation of oil, has given rise to seismic surveys, drilling, dredging, installation of

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<sup>5</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

<sup>6</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (Fish Stocks Agreement).

<sup>7</sup> Togo, Cameroon, Sao Tome and Principe and Equatorial Guinea

<sup>8</sup> See footnote 96

<sup>9</sup> UNCLOS art 16 (2), 75 (2)

<sup>10</sup> Togo, Benin, Cameroon and Nigeria

<sup>11</sup> Yoslán González, 'The Gulf of Guinea: The Future African Persian Gulf' [2016] BJAS 85-105

<sup>12</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit, February 2006) 104



oil rigs and other exploration and exploitation activities.<sup>13</sup> The region is also home to a variety of marine living resources, and is a rich fishing ground which has attracted fishing trawlers from all over the world<sup>14</sup> The fishing business in the region provides a source of livelihood for the region's artisanal fishers as well as foreign exchange for the states.<sup>15</sup> Additionally it provides more than 50% of the protein needs of the region.<sup>16</sup>

## **II. Challenges regarding marine resource exploitation, management and conservation**

However, there are challenges with respect to the effective exploitation of the resources. A fundamental one is that the states have not, in the majority of cases, delimited their maritime boundaries. Therefore, ocean space has not been allocated making it uncertain which states have sovereignty or sovereign rights over a maritime area, leading to uncertainty of title and disputes between them. This has negatively affected the states' ability to exploit the resources. Some oil producing states in the region which have not yet delimited their maritime boundaries with their neighbours, use boundaries developed by their experts for exploration and exploitation of oil. For instance, for about 50 years, Ghana and Cote d'Ivoire in their oil activities, such as the granting of oil concessions, seismic surveys, and drilling operations, used a line which corresponded to an equidistance line between the two states.<sup>17</sup>

Similarly Nigeria and Cameroon used a boundary for their oil concessions before Cameroon initiated proceedings at the International Court of Justice (ICJ) respecting the maritime boundary between the two states.<sup>18</sup> Nigeria therefore argued that Cameroon's claim to a maritime boundary should have taken account of the wells and other installations on each side of the line established by the oil practice and that the

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<sup>13</sup> *ibid*

<sup>14</sup> *ibid*

<sup>15</sup> *Ibid* p. 33

<sup>16</sup> *Ibid* p.53

<sup>17</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23, 2017) Para.213.

<sup>18</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Merits) [2004] ICJ Rep 411.

status quo in this respect should not be changed.<sup>19</sup> In the same case, Equatorial Guinea which intervened in the proceedings alluded to the fact that Cameroon had accepted the median line as the boundary between them and had never protested the many state actions authorised by Equatorial Guinea on its side of the boundary, including the issuance of oil concessions and the active exploitation of continental shelf resources.<sup>20</sup> Also Nigeria and Equatorial Guinea found that the Nigerian oil concession line and that of Equatorial Guinea agree with each other and so decided to use it as the basis for their maritime boundary agreement.<sup>21</sup> Nevertheless, it appears to be the understanding that such boundaries are not permanent maritime boundaries, in the absence of a formal negotiated agreement. This was illustrated in the *Ghana /Cote d'Ivoire* case, when Ghana made the argument that the oil line had been tacitly agreed.<sup>22</sup> Thus, there is always an underlying dispute brewing with the constant threat of an eruption especially when major oil discoveries are made in the area.<sup>23</sup> This raises the issue of the obligations states have under UNCLOS in undelimited areas, one of which is for them to make interim arrangements for exploiting the resources pending the delimitation of the boundary.<sup>24</sup> However in the region, only a few of the states have decided to make such interim arrangements and these have generally not been as successful as expected.

In spite of the lack of maritime boundaries the region has seen considerable exploitation of oil and gas in some states like Nigeria, and Ghana.<sup>25</sup> This has brought in its wake, pollution of the marine environment. Currently in the region, there is a growing number of offshore platforms, export and import oil terminals and oil refineries are cited on the coast without proper effluent treatment plants.<sup>26</sup> As oil pollution knows no boundaries, the whole region is exposed through these activities to the risk of major oil pollution incidents. The potential of future exploration and exploitation projects in the region is

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<sup>19</sup> *ibid* para 256.

<sup>20</sup> 'Written Statement of the Republic of Equatorial Guinea,' *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2001] ICJ Pleadings 197-232.

<sup>21</sup> David Aworawo, 'Decisive Thaw: The Changing Pattern of Relations between Nigeria and Equatorial Guinea, 1980-2005' [2010] 1 *Journal of International & Global Studies* 99

<sup>22</sup> UNCLOS art 74(3), 83(3)

<sup>23</sup> This happened in the case of Ghana and Cote d'Ivoire and eventually had to be settled by a Special Chamber of ITLOS in *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23, 2017)

<sup>24</sup> UNCLOS art 74(3) and 83(3)

<sup>25</sup> Monica Skaten, 'Ghana's Oil Industry: Steady Growth in a Challenging Environment' [2018] Oxford Institute for Energy Studies <<https://doi.org/10.26889/9781784671044>> accessed 15 May 2020.

<sup>26</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit, February 2006) 82

also likely to significantly increase the risk of pollution. Nonetheless, the regime for marine environmental protection from oil exploitation activities in the region is problematic. Additionally, the mechanism for dealing with liability for damages arising out of oil exploitation activities in the region is inadequate and makes the region ill prepared to cope with the liabilities that could arise out of any widespread accidental spill from oil exploitation and compensate victims who may be affected.<sup>27</sup>

The exploitation of the marine living resources of the region, is also fraught with major problems as there is overexploitation of the resources due to overcapacity, the use of destructive fishing gear and Illegal, Unregulated and Unreported (IUU) fishing both in areas under national jurisdiction and on the high seas particularly from third parties from outside the region.<sup>28</sup> The ability of the fisheries resources to replenish themselves is also being threatened by the destruction of important habitats.<sup>29</sup> However, the regimes for conservation and management of the fisheries resources like in the case of the non-living resources are inadequate and do not fully incorporate the UNCLOS regime which promotes regional cooperation. There is also poor implementation and enforcement of existing regulations. This has led to the depletion of the resources with consequential adverse impact on livelihoods of the region's populations as well as food security. Additionally, failure to establish cooperative legal and institutional frameworks, both at the national and regional level, for area-based management measures like fishing refugia and 'no take zones' has contributed to the degradation of important habitats of fisheries which are found along the region's coasts.

To deal with these transboundary challenges, international law notably UNCLOS and the Fish Stocks Agreement prescribe that states cooperate bilaterally and at the regional level and through regional organisations. In compliance with these instruments, the states in the region have made some efforts at regional cooperation. However, concerning cooperation in the management and conservation of non-living resources, the states sharing these resources are not as forthcoming in cooperating for joint development regimes, as states in other regions, like the Persian Gulf and Southeast

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<sup>27</sup> *ibid*

<sup>28</sup> Alfonso Daniels and others, 'Western Africa's Missing Fish' (*odi.org* 2016)

<<https://www.odi.org/sites/odi.org.uk/files/resource-documents/10665.pdf>> accessed 23 April 2020.

<sup>29</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit, February 2006) 50

Asia, where it has been argued that there is a regional rule of customary law on joint development.<sup>30</sup> To protect the marine environment, from pollution arising out of exploitation of hydrocarbons, the regional framework is the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region together with its Protocol Concerning Cooperation in Combating Pollution in Cases of Emergency (Abidjan Convention).<sup>31</sup> Its inadequacy to deal with the specific issue of marine pollution arising from exploitation and liability for damages arising from pollution necessitated the recently adopted Protocol on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (Offshore Protocol).<sup>32</sup> However, the incorporation and implementation of these regional mechanisms at the national level has proved a challenge for states due mainly to lack of capacity and the financial burden involved.<sup>33</sup> Regarding the management and conservation of marine living resources the states have established cooperative regimes through a number of Regional Fisheries Bodies. However, a key issue is their fragmentation and lack of coordination.<sup>34</sup>

### **III. Research objectives and scope of thesis**

This thesis explores how the states in the Gulf of Guinea can cooperate through bilateral and regional means in the

- a) delimitation of maritime boundaries,
- b) management and conservation of non-living marine resources,
- c) protection and preservation of the marine environment and
- d) management of the marine living resources

This is done by examining the international legal obligations to cooperate in these areas. The main legal obligation to cooperate is provided in the provisions of UNCLOS and

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<sup>30</sup> David Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?' (1999) 93:4 AJIL 804

<sup>31</sup> Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region and Protocol concerning Cooperation in Combating Pollution in Cases of Emergency (adopted 23 March 1981, entered into force 4 August 1984) (Abidjan Convention) < <https://abidjanconvention.org/>> accessed 23 April 2020

<sup>32</sup> Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (adopted 3 July 2019, not yet in force) <<https://abidjanconvention.org/>> accessed 23 April 2020.

<sup>33</sup> See Chapter Three para 3.7.

<sup>34</sup> See Chapter Four, para 4.3.

the Fish Stocks Agreement. General international law and the jurisprudence of international Courts and tribunals also contain obligations to cooperate. Under UNCLOS, the duty to cooperate in the delimitation of adjacent and opposite maritime boundaries, and the management of non-living marine resources is found in Articles 74 (1), (3) and 83 (1), (3) dealing with the delimitation of the Exclusive Economic Zone and the Continental Shelf respectively. By the said provisions, states are mandated to delimit their maritime boundaries by agreement and pending agreement make provisional arrangements of a practical nature. The obligation to agree on maritime boundaries implies cooperation by the states involved. Indeed, the Special Chamber in the *Ghana/Cote d'Ivoire* case was of the opinion that the obligation necessarily entails negotiations in good faith by the states. The Chamber further noted the importance of the obligation under UNCLOS and general international law and opined that cooperation is particularly relevant for states that conduct their maritime activities in close proximity.<sup>35</sup> The other obligation to make provisional arrangements, also involves cooperation between states. Though the kinds of arrangements are not specified in the provisions, such practical arrangements are likely to pertain to cooperating in the form of joint arrangements for the exploitation and management of the non - living marine resources, as that is usually what motivates states in the first place to delimit their maritime boundaries.

Regarding the protection and preservation of the marine environment and the management of the marine living resources, the obligation to cooperate becomes even more pertinent to the Gulf of Guinea as a semi-enclosed sea under Article 122 of UNCLOS with shared resources and the risk of pollution occurring in one part of the region capable of spreading to other parts. Article 123 of UNCLOS provides in non-mandatory terms that states in semi enclosed seas cooperate with each other in the exercise of their rights and in the performance of their duties under the Convention.<sup>36</sup> The provision further exhorts states to endeavour, to coordinate the management and conservation, of the marine living resources either directly or through an appropriate regional organisation and also cooperate to protect and preserve the marine

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<sup>35</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23, 2017) para 604.

<sup>36</sup> The Gulf of Guinea's status as a semi -enclosed sea is discussed in Chapter 1 of this thesis

environment.<sup>37</sup> Cooperation in the area of the management and conservation of living marine resources is particularly mandated by the Fish Stocks Agreement. It provides for states to cooperate directly and emphasises cooperation through Regional Fisheries Organisations. These regional bodies are expected to promote agreement between States for the conservation and development of straddling and highly migratory stocks, as well as their optimum utilisation.<sup>38</sup> This situates Regional Fisheries Management Bodies at the centre of the regional cooperative regime.

However, the specific obligations and standards of state conduct are not clear. Thus, international courts and tribunal have filled the gaps. In the context of maritime boundary delimitation, the *North Sea Continental Shelf cases* have decided that the duty to cooperate is a duty to negotiate in good faith.<sup>39</sup> Regarding living resource conservation, the ITLOS Tribunal in the *Bluefin Case* decided that, under article 64, read together with articles 116 to 119, of UNCLOS, States Parties to the Convention have the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilisation of highly migratory species.<sup>40</sup> Concerning cooperation in the management and conservation of the non-living resources, though there is no specific express provision to cooperate as in the case of living marine resources, the same principles found in Article 123 regarding the management and conservation of living resources can arguably be applied to the non-living resource as they are also shared resources.<sup>41</sup> This is all the more relevant as states are exhorted to cooperate in in the exercise of their rights and obligation under the Convention which include the management of the non-living resources. Regarding the protection of the marine environment, the tribunals in the *Mox Plant*<sup>42</sup> and *Land Reclamation*<sup>43</sup> cases, were emphatic, that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the UNCLOS and general international law and that

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<sup>37</sup> UNCLOS art 123

<sup>38</sup> *ibid*

<sup>39</sup> *ibid*

<sup>40</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, (Provisional Measures Order of 27 August 1999) ITLOS Reports 1999, 293

<sup>41</sup> David Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?' (1999) 93:4 AJIL 783.

<sup>42</sup> *MOX Plant (Ireland v. United Kingdom)*, (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, 110

<sup>43</sup> *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, 25

rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention.<sup>44</sup>

In this regard the research objective is to explore how states can cooperate in the allocation, exploitation, and sustainable management of the non-living and living resources of the region as required by international law and UNCLOS. As UNCLOS emphasises the use of scientific data in the management of marine issues, the thesis also explores other management techniques rooted in science such as the Large Marine Ecosystem (LME) approach which might provide a tool for the enhancement of the regional cooperative approach. Incidentally UNCLOS does not expressly make reference to the large marine ecosystem approach. However, there are a number of implicit references to the approach in the Convention which may provide a legal basis for its use. Large marine ecosystems (LMEs) are described as “regional units for the conservation and management of living marine resources in accordance with the legal mandates of UNCLOS”.<sup>45</sup> In the Preamble to the UNCLOS, it is noted that the problems of ocean space are closely interrelated and need to be considered as a whole.<sup>46</sup> This acknowledges that the oceans and the living resources in them are an integral part of an ecosystem which are affected by the dangers of ocean pollution, overexploitation, and coastal habitat alteration.<sup>47</sup>

The Convention also refers to the use of a science-based approach to decision making regarding uses and conservation of the marine environment.<sup>48</sup> States are also to take into account the effects of fishery management measures on associated or dependent species.<sup>49</sup> States are to adopt fisheries management measures on the basis of the best scientific evidence available and generally recommended international minimum standards.<sup>50</sup> These all point to the fact that cooperation should be based on current scientific approaches to ocean management. The large marine ecosystem approach is also considered a science-based approach as envisaged under the Convention. This

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<sup>44</sup>ibid

<sup>45</sup> Kenneth Sherman, 'The Large Marine Ecosystem Concept: Research and Management Strategy for Living Marine Resources' [1991] 1 *Ecological Applications* 349.

<sup>46</sup> UNCLOS Preamble

<sup>47</sup> 'Large Marine Ecosystems' (*CLME + Hub*) < <https://clmeplus.org/large-marine-ecosystems/> > accessed 15 May 2020.

<sup>48</sup> UNCLOS art 197 and 200

<sup>49</sup> UNCLOS art 61 (2)

<sup>50</sup> UNCLOS art 119

approach uses competent regional organisations in its cooperative regimes as envisaged under UNCLOS.

The concept of the LME approach is gradually gaining popularity and a number of international treaties applicable to the marine environment make specific reference to it.<sup>51</sup> In the region these include the Abidjan Convention mentioned above, which is currently forging a partnership with the three LMEs located in the Convention area namely the Benguela, Canary and Guinea Currents.<sup>52</sup> The Gulf of Guinea States with the exception of Sao Tome and Principe are parties to the Convention and have made attempts to implement the LME approach in line with the requirements of the Abidjan Convention within the framework of the Interim Guinea Current Commission, a body set up to implement the LME approach to management of the marine environment and fisheries within the Guinea Current LME.

As has been alluded to above, a common theme running through the thesis is regionalism in the context of ocean management. This concept has been defined by Alexander as “the management of oceans and their resources at the regional level.”<sup>53</sup> There are various types of regions delineated in the seas according to various factors and criteria.<sup>54</sup> One type of region is defined by physical characteristics like sea surface temperature, ocean currents bathymetry, plankton concentration and upwelling among other oceanographic parameters.<sup>55</sup> Another type of region is the economic region defined by fishery and hydrocarbon resources and other mineral resources.<sup>56</sup> The factors that determine the region’s boundaries are the location, extent and intensity of the economic activities. There are also management regions many of which have been associated with fishery resources and prevention of pollution of the marine

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<sup>51</sup> Aldo Chircop and others, *Ocean Yearbook* (Martinus Nijhoff Publishers 2012) 428

<sup>52</sup> UNEP, 'The Socioeconomics of the West, Central and Southern African Coastal Communities: A Synthesis of Studies Regarding Large Marine Ecosystems.' (*researchgate.net*, 5 September 2017) <[https://www.researchgate.net/publication/315755817\\_Addendum\\_The\\_SocioEconomics\\_of\\_the\\_West\\_Central\\_and\\_Southern\\_African\\_Coastal\\_Communities\\_A\\_Synthesis\\_of\\_Studies\\_Regarding\\_Large\\_Marine\\_Ecosystems](https://www.researchgate.net/publication/315755817_Addendum_The_SocioEconomics_of_the_West_Central_and_Southern_African_Coastal_Communities_A_Synthesis_of_Studies_Regarding_Large_Marine_Ecosystems)> assessed 17 May 2020.

<sup>53</sup> Lewis Alexander, 'Regionalism at Sea: Concept and Reality' in Douglas Johnston (ed), *Regionalization of the Law of the Sea* (Ballinger Publishing Co, 1978) 3.

<sup>54</sup> Joseph Morgan, 'Marine Regions and Regionalism in South-East Asia' [1984] 8 Mar. Policy 301.

<sup>55</sup> *ibid*

<sup>56</sup> *ibid*



environment. These are established by governments and the determination of their boundaries is on the basis of economic, political and oceanographic factors.<sup>57</sup> The states determine a region within which to cooperate based on a management problem common to them which requires cooperation regarding regulation and enforcement measures to solve.<sup>58</sup> The kinds of regional mechanisms also vary according to how flexible they are or how highly organised they are. Some arrangements have the power to make binding decisions whilst others are simply information sharing bodies. Where, as in the Gulf of Guinea, a number of states border a semi-enclosed sea and the challenges of the region need some kind of regulatory intervention, which is beyond the capability of a single state, new management regions will need to be established.<sup>59</sup>

Within this framework, the existing regional arrangements are studied to assess their contribution to the management of the sustainable exploitation of the resources and suggestions are made on how to better enhance them. Thus, this research applies international law and regionalism to the problems associated with the sustainable management of non-living and living marine resources as well as the protection of the marine environment. The thesis demonstrates that regional cooperation takes different forms depending on the subject involved.

In chapters one and two which deal with maritime delimitation, and joint exploitation of non-living marine resources respectively, regional cooperation is quite limited compared to regional cooperation in chapters three and four. In chapters one and two, cooperation is mainly between individual states delimiting the boundaries between them and making interim arrangements to exploit the non-living resources whilst the boundary delimitation is pending. The level of regional cooperation involved in these situations is limited to advisory and consultative bodies that can serve as a forum for states to discuss issues related to maritime delimitation and joint development as well as assist in settlement of disputes related thereto.

However, in chapters three and four which deal with pollution of the environment and shared fish stocks cooperation at another level is required. Such cooperation involves

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<sup>57</sup> *ibid*

<sup>58</sup> *ibid* 300

<sup>59</sup> *Ibid* 301

the whole region and beyond due to the transboundary nature of pollution and the straddling and highly migratory nature of the fisheries resources. Thus, cooperation is examined in another framework involving another unit of analysis, based on science – the large marine ecosystem- which is ecologically rather than politically determined. It thus involves the area covered by the Guinea Current LME which subsumes the Gulf of Guinea.<sup>60</sup> This approach is a methodology for monitoring, assessing and sustainably managing marine resources using five focal areas namely fish and fisheries, pollution and ecosystem health, productivity, socio - economic and governance. This therefore requires a holistic and integrated approach to the protection of the marine environment and the sustainable use of its living resources.<sup>61</sup>

To achieve this objective, the main research questions addressed are:

- a) How states in the region can cooperate to delimit the maritime boundaries in the region in accordance with international law, the principles developed by international courts and tribunals and with the objective of achieving an equitable solution in a spirit of cooperation;
- b) How states in the Gulf of Guinea, can peacefully settle their maritime boundary disputes using international dispute settlement mechanisms and enhance cooperation through joint development in the exploitation of the non-living resources;
- c) In the exploitation of these resources how the states in the region can cooperate to protect the marine environment, from pollution arising out of the exploration and exploitation of oil and gas as

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<sup>60</sup>“Large Marine Ecosystems (LMEs) are relatively large areas of ocean space of about 200,000 km<sup>2</sup> or more, adjacent to the continents in coastal waters and extending out seaward to the break or slope of the continental shelf or out to the seaward extent of a well-defined current system along coasts lacking continental shelves. LMEs are characterized by their unique undersea topography, current and water mass structure, marine productivity, and food chain interactions.” ‘What Are Large Marine Ecosystems (Lmes)?’ (*Iwlearn.net*, 2020) <<https://iwlearn.net/marine/lmes>> accessed 24 April 2020. The Guinea Current Large Marine Ecosystem (GCLME) extends from Bissagos Island (Guinea-Bissau) in the north to Cape Lopez (Gabon) and Angola in the south and is considered to include the Exclusive Economic Zones (EEZ) of sixteen countries, namely, Angola, Benin, Cameroon, Congo, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Ghana, Equatorial Guinea, Guinea, Guinea-Bissau, Liberia, Nigeria, Sao Tome & Principe, Sierra Leone and Togo. See 'Towards Ecosystem-Based Management of the Guinea Current Large Marine Ecosystem.' (United Nations Development Programme 2013).

<sup>61</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006)

well as in dealing with issues of liability arising out of such pollution; and

- d) How the states can cooperate to manage the exploitation of the marine living resources of the region in a sustainable manner, through regional mechanisms to ensure their preservation for future generations.

#### **IV. Originality of the research**

The literature on the Gulf of Guinea deals mainly with maritime security, as an emerging issue due to the rampant cases of a contemporary form of piracy in the Gulf of Guinea which is believed to have developed over the past 25 years, as well as other crimes at sea which are being perpetuated on the sea routes in the Gulf of Guinea.<sup>62</sup> However issues of regional cooperation and management of transboundary shared marine living and non-living resources have not received as much academic legal focus or are dealt with in a fragmented manner. This thesis on the other hand presents a comprehensive analysis of cooperation in the allocation and management of marine resources in the Gulf of Guinea. There is a focus on regional cooperation in four key areas - maritime boundary delimitation; the peaceful settlement of maritime boundary disputes and cooperation in the exploitation of non-living marine resources; the protection of the marine environment from pollution arising out of exploitation and the mechanism for dealing with liability for any harm caused in the course of exploitation; and the management and conservation of marine living resources.

The thesis addresses in each of the chapters, how international law promotes cooperation- bilateral and regional - as the best solution to tackle the transboundary issues of resource management in the region. It demonstrates in practice how the global regulation is applied in the regional context of the Gulf of Guinea in the exploitation of the non-living and living marine resources. The thesis thereby makes a contribution to the literature on the Gulf of Guinea by assessing how far the states have succeeded in

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<sup>62</sup> Some studies are: Katja Lindskov Jacobsen and Johannes Riber Nordby, 'Maritime Security in the Gulf of Guinea' (Royal Danish Defence College Publishing House 2015); Ali Kamal-Deen, *Maritime Security Cooperation in the Gulf of Guinea* (Brill 2015); Kamal-Deen Ali and Martin Tsamenyi, 'Fault Lines In Maritime Security' (2013) 22 Afr. Secur. Rev.1-16.

their efforts at cooperation using these global instruments and identifying areas needing enhancement with the aim of achieving full regional solutions to the Gulf of Guinea's resource management challenges. The proposals made may also be applied in regions with similar conservation and management challenges as the Gulf of Guinea, like the Red Sea and Gulf of Arden region.

## **V. Methodology**

This thesis is a doctrinal research which involves analysing the current state of the international law of the sea from a positivist perspective but mindful of the law in its context. From this positivist perspective, it considers international law as the product of recognised law-making processes, which requires states giving consent. Within this framework the thesis utilises a combination of references to primary sources such as multilateral, regional and bilateral treaties, the cases of international courts and tribunals and references to handbooks and recent journal articles. Meeting documents of various regional bodies are also analysed. Secondary sources like scholarly books and articles which interpret and analyse the primary sources also feature significantly in this research as well as online resources. Information not publicly available was sourced from personal communication with officials of states and some of the regional bodies. However, these were often not structured interviews characteristic of empirical research methods.

The legal research questions in the thesis are normative. They provide an evaluation of the legal state of affairs and offer legal solutions to the legal problems identified, namely the problems of delimiting maritime boundaries in a flexible and predictable manner, settling maritime boundary disputes, making provisional arrangements of a practical nature; protecting the marine environment from pollution arising out of exploitation; and managing the marine living resources, specifically fisheries, using the international law of the sea with particular reference to the 1982 UN Law of the Sea (UNCLOS), the Fish stocks agreement and other multilateral and regional instruments. This normative framework thus links existing research with the basis for the discussions or solutions provided in the thesis.

The benefits of this approach is that it brings a clear understanding of particular legal issues and provides a foundation for the study of various socio-legal issues.<sup>63</sup> Judges, lawyers and jurists need doctrinal legal research to develop principles to guide implementation of treaties and legislation which may need interpretation due to their ambiguous nature.<sup>64</sup> However, there are pitfalls in utilising such a doctrinal approach. These include the limitations associated with the legal positivist approach, considering the uncertain scientific and social context within which this approach is applied. Therefore, this work takes into account that the law may need to be structured to address scientific uncertainty, through review and reporting procedures. There are also issues of lack of effective institutional frameworks at the regional and national levels, lack of financial resources and the political will of states to act as well as the lack of capacity to implement rules, principles and standards adopted through international and regional cooperation regarding the transboundary marine resources in the Gulf of Guinea. Conscious effort has therefore been made in this thesis to utilise the law-in-context approach referred to above to mitigate the rigidity of the doctrinal approach by taking due cognisance of such non-legal issues which are relevant to the legal processes being studied.

## **VI. Structure of the Thesis**

The key argument reflected by the structure of this thesis is cooperation - regional and bilateral and its importance in all aspects of the sustainable management of the non-living and living resources of the Gulf of Guinea as required by international law and UNCLOS. Chapter one emphasises that cooperation in maritime boundary delimitation is an important prerequisite for resource allocation, exploitation, and management. It discusses how states can delimit their maritime boundaries in accordance with international law and the principles and rules developed by international courts and tribunals. It also examines the state of maritime boundary delimitation in the Gulf of Guinea and the protracted maritime boundary disputes that are a hinderance to resource exploitation in the region. Some recommendations are made in the concluding part.

The second chapter discusses how states can settle their maritime boundary disputes peacefully and promote cooperation by joint exploitation of the resources as required

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<sup>63</sup> Amrit Kharel, 'Doctrinal Legal Research' [2018] SSRN Electronic Journal.

<sup>64</sup> *ibid*

by UNCLOS. This also includes joint efforts to exploit non-living resources that straddle an agreed boundary. This is with the objective of identifying challenges that make cooperation in the exploitation difficult and to propose how cooperation can be enhanced by recourse to a regional framework.

The third chapter follows from the discussion of exploitation of the non-living resources and focuses on the states' obligations to protect and preserve of the marine environment from pollution arising out of oil and gas exploration and exploitation activities as required by international law. Due to the fact that pollution by such means knows no boundaries and can have a devastating effect on the entire region, the chapter emphasises the role of regional cooperation in the protection of the marine environment and regional mechanism for addressing issues of liability arising out of pollution. It assesses the cooperation efforts by the states in the region, identifies challenges and proffers suggestions to enhance regional cooperation.

The fourth chapter explores how states in the Gulf of Guinea can cooperate as mandated by international law to sustainably manage the marine living resources with specific reference to fisheries which are transboundary in nature. The chapter has three parts, the first of which presents an overview of the international legal instruments that relate to fisheries conservation and management. The second part assesses the regional and national regulatory frameworks in the Gulf of Guinea that implement these global instruments. In so doing the challenges to management and conservation as well as the inadequacies of these regulatory frameworks, are identified and discussed. Based on this discussion and using examples from best practice, the third part is devoted to making proposals on the way forward within the framework of regional cooperation based on the LME approach to the management and conservation of fisheries.

The concluding chapter of the thesis draws together the main arguments of the thesis and presents conclusions and recommendations made therefrom.

## CHAPTER ONE

### COOPERATION IN THE DELIMITATION OF MARITIME BOUNDARIES IN THE GULF OF GUINEA

#### 1.1 Introduction

The Gulf of Guinea has more undelimited maritime boundaries than agreed boundaries.<sup>65</sup> Nevertheless, all the states in the region have ratified the 1982 UN Convention on the Law of the Sea, which imposes obligations on states to delimit their maritime boundaries by agreement.<sup>66</sup> Cooperation is therefore central to the allocation of marine jurisdictions. Further, in order to fulfil the other obligations in the Convention regarding the protection of the marine environment and the management of the marine resources, within the context of the Gulf of Guinea as a semi -enclosed sea,<sup>67</sup> the states must have their boundaries in place. Knowing their respective jurisdictional areas would facilitate regional cooperation for these important tasks. It is important therefore to discuss cooperation in maritime boundary delimitation as a precursor to the discussions in the ensuing chapters on cooperation in the exploitation of non-living resources, protecting the marine environment from pollution arising out of exploitation and cooperation in the management of marine living resources.

Attempts by states in the Gulf of Guinea to take advantage of the provisions under UNCLOS to make maritime jurisdictional claims, have resulted in many of the current disputes and conflicts over maritime jurisdictions in the area.<sup>68</sup> Additionally, Article 76 of UNCLOS, requires states to make submissions in respect of their continental shelf beyond 200 nautical miles, within ten years from the date the Convention entered into force for that state. The risk of the deadline being missed and the perception that the extended shelf areas may be a reservoir of resource riches motivated states including

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<sup>65</sup> See the section 1.4.1 of this chapter

<sup>66</sup> UNCLOS art 15, 74(1), 83(1)

<sup>67</sup> Lewis Alexander, 'Regionalism and the law of the sea: The case of semi-enclosed seas' [1974], 2 *Ocean Dev&Int'l* 151.

<sup>68</sup> Daniel Dzurek, 'Gulf of Guinea Boundary Disputes' (Spring 1999) *IBRU Boundary and Security Bulletin* 98.

the Gulf of Guinea states to make submissions for extended continental shelves.<sup>69</sup> Many of these submissions overlap with one another since the States are located on shared continental margins, thereby giving rise to potential outer continental shelf boundary disputes which are likely to hinder resource development in the area.<sup>70</sup> These disputes also hinder the implementation of the states' obligations under international law and UNCLOS to cooperate in the allocation and management of marine resources as well as in the protection of the marine environment.<sup>71</sup>

The maritime boundary conflicts that have arisen out of all these claims in the region have also proved difficult to settle for a variety of reasons. For instance, the geography of the region, shows islands belonging to one state located in the EEZ of another state.<sup>72</sup> There is also the complexity presented by protrusions along some parts of the coast and the presence of islands has also produced cut off effects for some states like Cameroon. Additionally, unresolved disputes over the sovereignty of some islands make the end points of some boundaries difficult to determine.<sup>73</sup> Further, a number of the boundaries are complicated in that they cannot be resolved between just two states without the participation of third states, so that there are many outstanding tripoints to be settled in the region.

As the main objective of delimiting the maritime boundaries in many cases is access to hydrocarbon resources, the practice of some of the states in the region is to utilise boundaries developed by their technical experts for exploration and exploitation of oil in the absence of an agreed maritime boundary. For instance for about 50 years, Ghana and Cote d'Ivoire in their oil activities, such as the granting of oil concessions, seismic surveys, and drilling operations, used a line which corresponds to an equidistance line between the two states.<sup>74</sup> Similarly Nigeria and Cameroon used a boundary for their oil

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<sup>69</sup> Robert van de Poll and Clive Schofield, 'A Seabed Scramble: A Global Overview of Extended Continental Shelf Submissions' (International Conference on Contentious Issues in UNCLOS – Surely Not? organised by the Advisory Board on the Law of the Sea (ABLOS)), Monaco at the International Hydrographic Bureau, 25-27 October 2010 <<http://ro.uow.edu.au/lhapapers/1635>> accessed 17 May 2020.

<sup>70</sup> *ibid*

<sup>71</sup> UNCLOS art 123.

<sup>72</sup> An example is the Equatorial Guinean island of Bioko located in Cameroon's EEZ.

<sup>73</sup> Equatorial Guinea and Gabon dispute sovereignty of several small islets in Corisco Bay: Islote Mbane, Ile des Cocotiers and, possibly, Isla de Corisco. See Daniel Dzurek, 'Gulf of Guinea Boundary Disputes' [Spring 1999] IBRU Boundary and Security Bulletin 98.

<sup>74</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23 2017) Para.213.



concessions before Cameroon initiated proceedings at the International Court of Justice (ICJ) respecting the maritime boundary between the two states. Nigeria therefore argued that even if Cameroon's claim to Bakassi were valid, Cameroon's claim to a maritime boundary should have taken account of the wells and other installations on each side of the line established by the oil practice and that the status quo in this respect should not be changed.<sup>75</sup> In the same case, Equatorial Guinea which intervened in the proceedings alluded to the fact that Cameroon had accepted the median line as the boundary between them and had never protested the many state actions authorised by Equatorial Guinea on its side of the boundary, including the issuance of oil concessions and the active exploitation of continental shelf resources.<sup>76</sup> Also Nigeria and Equatorial Guinea found that the Nigerian oil concession line and that of Equatorial Guinea agree with each other and so decided to use it as the basis for their maritime boundary agreement.<sup>77</sup>

However, generally there is the understanding that such boundaries are not permanent maritime boundaries, in the absence of a formal negotiated agreement.<sup>78</sup> Thus there is always an underlying dispute brewing with the constant threat of an eruption especially when major oil discoveries are made in the area.<sup>79</sup> UNCLOS provides the framework for maritime boundary delimitation. Nevertheless, its provisions lack the necessary criteria for delimiting maritime boundaries, and international courts and tribunals have filled the gap by developing principles and practical methods for maritime boundary delimitation. This has arguably injected some predictability and flexibility into maritime boundary delimitation.<sup>80</sup> Nevertheless, difficulties can arise as a result of states interpreting the principles of UNCLOS subjectively without regard to the jurisprudence developed by international courts and tribunals.

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<sup>75</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon / Nigeria: Equatorial Guinea intervening)* (Merits) [2002] ICJ Rep 303 at 427 para 256.

<sup>76</sup> 'Written Statement of the Republic of Equatorial Guinea,' *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2001] ICJ Pleadings 197-232.

<sup>77</sup> David Aworawo, 'Decisive Thaw: The Changing Pattern of Relations between Nigeria and Equatorial Guinea, 1980-2005' JI&GS 99.

<sup>78</sup> Examples are Ghana and Cote d'Ivoire and Cameroon and Nigeria

<sup>79</sup> This happened in the case of Ghana and Cote d'Ivoire and eventually had to be settled by a Special Chamber of ITLOS in the *Ghana/Côte d'Ivoire* Case

<sup>80</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the Law of Maritime Delimitation*, (Oxford, UK Hart 2006)

In this regard, the objective of this chapter, is to explore how the states in the Gulf of Guinea can cooperate to fulfil their obligations under UNCLOS to delimit their maritime boundaries by agreement, taking into account the rules and principles developed by international courts and tribunals to guide the process. The chapter begins by discussing the obligation of states to cooperate under international law and UNCLOS in relation to maritime boundary delimitation. This process can be complicated and protracted due to issues like the method by which delimitation should be affected and which basepoints should be used in the delimitation. Thus, the current rules, principles and methods of maritime delimitation as provided by UNCLOS and the jurisprudence of International Courts and tribunals is also examined in this part . The second part focuses on an analysis of the existing maritime boundaries in the Gulf of Guinea to assess the extent to which UNCLOS and international jurisprudence were used in their delimitation. The third part examines and analyses the pending boundaries in the Gulf of Guinea and presents options for the delimitation and negotiation of these maritime boundaries. The fourth part sets out the conclusions reached.

## **1.2. Obligation to Cooperate in maritime boundary delimitation under International Law**

### **1.2.1. Cooperation under Articles 74 (1) and 83 (1) of UNCLOS**

UNCLOS under Articles 74 (1) and 83 (1) obliges states to delimit their maritime boundaries by agreement. The identical provisions of articles 74 (1) and 83 (1) regarding the Exclusive Economic Zone and the Continental Shelf respectively read, *“The delimitation of the exclusive economic zone/continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.”* This of necessity requires states to negotiate which means they are to cooperate. In so doing the Convention enjoins parties to act in good faith under Article 300 which provides, *“States Parties shall fulfil in good faith the obligations assumed under this Convention...”* In the *Guyana/ Suriname Arbitration*, the tribunal was of the view that the obligation is not merely a non-binding recommendation or encouragement but a mandatory rule whose breach would represent

a violation of international law.<sup>81</sup> In the more recent case of *Ghana/ Côte d'Ivoire*,<sup>82</sup> the Special Chamber noted that the obligation to negotiate in good faith occupies a prominent place in the Convention, as well as in general international law, and is especially important within the context of neighbouring States conducting maritime activities in close proximity.<sup>83</sup> However, the obligation according to the Chamber is one of conduct and not one of result and thus noted that, “...a violation of this obligation cannot be based only upon the result expected by one side not being achieved.”<sup>84</sup>

In the region, some the states have together set up joint committees which meet to negotiate their maritime boundaries. These are usually made up of high government officials and technical experts mandated to effect the delimitation of the boundaries by their respective governments. Ghana and Côte d'Ivoire started negotiations for the delimitation of their maritime boundaries, this way before proceeding to third party adjudication and even after having procured judgment from ITLOS, the two states have set up a Joint Commission to oversee the implementation of the judgment.<sup>85</sup> Ghana and Nigeria currently are in negotiation for the delimitation of the maritime boundary between them in the continental shelf. The other states in the region like Ghana and Togo, Togo and Benin, Nigeria and Benin and Equatorial Guinea, Nigeria and Cameroon are all in negotiations as discussed further in this chapter. The success of these negotiations depends to a large extent on the states understanding of the law governing maritime delimitation and acting in good faith. For instance, negotiations between Ghana and Côte d'Ivoire broke down largely due to disagreement on the method to be used in the delimitation. Whilst Ghana insisted on the equidistance method in line with current jurisprudence, Côte d'Ivoire vacillated first between advocating for the meridian method and then later angle bisector.<sup>86</sup> There was also disagreement on the basepoints to be used in the delimitation but both parties agreed on the use of BP55,

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<sup>81</sup> *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname (Guyana v Suriname)* (2006) XXX RIAA 130 para 460.

<sup>82</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23 2017)

<sup>83</sup> *Ibid* 604

<sup>84</sup> *ibid*

<sup>85</sup> 'Final Communiqué of First Meeting of the Committee in charge of Implementing the ruling of the Special Chamber of ITLOS on 23<sup>rd</sup> September 2017' (Abidjan, 15 May 2018).

<sup>86</sup> 'Memorial of Ghana Vol 1, 4 September 2015' *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23 2017) para. 1.13.

their land boundary terminus as the starting point and this appears to have been the main point of agreement .<sup>87</sup>

### **1.2.2. Cooperation under Articles 122 and 123 of UNCLOS**

A further legal basis for cooperation under UNCLOS has been set out in Part IX specifically Articles 122 and 123. Article 123 provides, “*states bordering an enclosed or semi-enclosed sea should cooperate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:*

*(a) to coordinate the management, conservation, exploration and exploitation of the living resources of the sea;*

*(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment... ”*

These obligations relate to states that border an enclosed or semi enclosed sea. The discussion is relevant to the Gulf of Guinea as it is considered a semi enclosed sea. An enclosed or semi - enclosed sea has been defined in article 122 of UNCLOS as “*a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.*” This definition has four aspects - the first two are that there must be a “gulf, basin or sea” and it must be “surrounded by two or more States”. A gulf has been defined by the Encyclopaedia Britannica as, “any large coastal indentation. More specifically, such a feature is the re-entrant of an ocean regardless of size, depth, configuration, and geologic structure.”<sup>88</sup> The Encyclopaedia names the Gulf of Guinea as one of the deepest gulfs being about a maximum depth of 6,363 meters.<sup>89</sup> Being surrounded by nine states, the Gulf of Guinea clearly fulfils both of these requirements. The third and fourth aspects are alternatives - either the gulf, basin or sea must be “connected to another sea or the ocean by a narrow outlet” or it must “consist . . . entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”.

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<sup>87</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23 2017) 56, para 177, 189.

<sup>88</sup> ‘Gulf’, *Encyclopedia Britannica* (2019) < <https://www.britannica.com/science/gulf-coastal-feature> > accessed 17 April 2020.

<sup>89</sup> *ibid*

These elements are fraught with ambiguity. For instance, regarding the third element, it is not clear how “narrow” the outlet to the sea or ocean has to be to qualify.<sup>90</sup> Also, regarding the area being “entirely” composed of the territorial seas and exclusive economic zones of States, the percentage of the composition is not specified.<sup>91</sup> However, the Gulf of Guinea again qualifies as it consists primarily of the territorial seas and EEZs of nine coastal states. The peculiar problems raised by the semi -enclosed seas including with regard to the management of their resources and the preservation of the marine environment was acknowledged during the conference that negotiated UNCLOS. The delegation of the former Socialist Federal Republic of Yugoslavia (SFRY) alluded to the growing danger of all types of pollution because of the small size and poor interchange of waters in semi enclosed and enclosed seas with adjacent seas.<sup>92</sup>

Also, the necessity of taking special precautionary measures in relation to the management, conservation and exploitation of the living resources of such seas was acknowledged as they are endangered by their natural characteristics and by pollution. Thus, the obligations in Article 123 require bilateral and regional cooperation for their implementation. Nevertheless, the first sentence of the provision is not mandatory as the phrase used is “should cooperate”. The beginning part of the second sentence of Article 123, which states, “...*To this end they shall...*” however is couched in more mandatory terms, but the obligation upon the coastal States which follows is, in three cases, only to “endeavour . . . to coordinate” activities relating to living resources, marine environment and scientific research, and in the fourth case to “endeavour . . . to invite” other interested States and organisations to cooperate.

Clearly these are as noted by Whomersley, obligations of conduct, rather than of result.<sup>93</sup> There is no requirement that there should be a completed delimitation of the various maritime zones between the coastal States surrounding the sea before the requirement to cooperate arises. It has been argued therefore that even in the absence of

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<sup>90</sup> Chris Whomersley, ‘The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique’ (2016) 15 *Chin. j. Int Law* 239.

<sup>91</sup> *ibid*

<sup>92</sup> Mitja Gbec, *The Extension of Coastal State Jurisdiction in Enclosed and Semi-Enclosed Seas: A Mediterranean and Adriatic Perspective* (Routledge 2014) 21

<sup>93</sup> Chris Whomersley, ‘The South China Sea: The Award of the Tribunal in the Case Brought by Philippines against China—A Critique’ (2016) 15 *Chin. j. Int Law*. 242

an agreed maritime boundary, it may still be important that coastal States cooperate for the purposes stated in Article 123.<sup>94</sup> Indeed their cooperation would be more meaningful if they had maritime boundaries in place as each state would be able to regulate its jurisdictional zone within the framework of regional cooperation. The GOG has also been referred to in the literature as one of the 23 seas that can be categorised as a semi – enclosed sea by a leading marine geographer.<sup>95</sup>

As discussed above, cooperation is important for states to be able to reach an agreement as required by articles 73 (1) and 84 (1). Even though states can negotiate whatever boundary is agreeable to them using any reasoning they deem fit, they would still benefit from having clarity of the legal principles and practical methods of maritime boundary delimitation to guide them in their negotiation process. This could ensure that jurisdictional allocations are settled in an equitable manner. The next section discusses the current law on maritime boundary delimitation and the jurisprudence developed by international courts and tribunals.

### **1.3 Legal Principles and Practical Methods of Maritime Boundary Delimitation**

#### **1.3.1. Maritime Boundary Delimitation under UNCLOS**

All the Gulf of Guinea states are party to the Convention and their internal laws make reference to it.<sup>96</sup> The Convention essentially divides the marine areas into three

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<sup>94</sup> *ibid*

<sup>95</sup> Lewis Alexander, 'Regionalism and the law of the sea: The case of semi-enclosed seas' [1974], 2 *Ocean Dev&IntlL* 164

<sup>96</sup> Cote d'Ivoire's Law No. 77-926 delimiting the Maritime Zones placed under the National Jurisdiction of the Republic of Ivory Coast of 17 November 1977 by which Cote d'Ivoire declares 12 M and 200M for Territorial Sea and EEZ respectively; Act No. 15/1984 of 12 November 1984 on the Territorial Sea and Exclusive Economic Zone of the Republic of Equatorial Guinea by which Equatorial Guinea declares 12 M and 200M for Territorial Sea and EEZ respectively; Maritime Zones (Delimitation) Law, 1986 by which Ghana declares 12 M and 200M for Territorial Sea and EEZ respectively; Sao Tome and Principe's Law No. 1/98 on delimitation of the territorial sea and the exclusive economic zone declares 12 M and 200M for Territorial Sea and EEZ respectively; Togo's Ordinance No. 24 delimiting the Territorial Waters and creating a protected Economic Maritime Zone of 16 August 1977 declares a 30 M Territory Sea and a 200 M EEZ; Benin's Decree No. 76-92 extending the territorial waters of the People's Republic of Benin to 200 M, 1976 makes provision for a 200 M Territorial Sea but no EEZ; Cameroon's Act No. 74/16 of 5 December 1974 fixing the Limit of the Territorial Waters of the United Republic of Cameroon provides for the Territorial Sea of 50M but no EEZ; Nigeria's Exclusive Economic Zone Decree No. 28 of 5 October 1978 declares a 200M EEZ

categories. One is the marine areas included in the territory of a state which is made up of the Internal Waters,<sup>97</sup> the Territorial Sea<sup>98</sup> and Archipelagic Waters.<sup>99</sup> A second category deals with marine areas which are not part of a state's territory and within which the state has limited jurisdiction and can only exercise sovereign rights. This includes the Exclusive Economic Zone (EEZ) which states can claim up to a distance of 200 M,<sup>100</sup> as well as the Continental Shelf (CS).<sup>101</sup> The third category which is the marine area beyond national jurisdiction, is made up of the High Seas and the deep seabed known as 'the Area'.<sup>102</sup> UNCLOS requires states to declare these zones and deposit charts with the coordinates with the Secretary General of the UN. However, four of the states namely Togo, Benin, Cameroon and Nigeria have not yet done so.

A zone which has become important to states, due to its potential for hydrocarbon and mineral deposits is the continental shelf beyond 200 M. The term 'continental shelf' is used in UNCLOS as a juridical term which according to Article 76<sup>103</sup> comprises the submerged prolongation of the land territory of a coastal state – the seabed and subsoil of the submarine areas that extend beyond its territorial sea to the outer edge of the continental margin or to a distance of 200nm where the outer edge of the continental margin does not extend up to that distance. The continental margin consists of the seabed and subsoil of the shelf, the slope and the rise.<sup>104</sup> It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.<sup>105</sup>

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and the Territorial Waters (Amendment) Decree 1998 amends Nigeria's initial 30 M Territorial Sea to 12 M.

<sup>97</sup> UNCLOS Part II

<sup>98</sup> *ibid*

<sup>99</sup> UNCLOS Part IV

<sup>100</sup> UNCLOS art 57

<sup>101</sup> UNCLOS Part V and VI

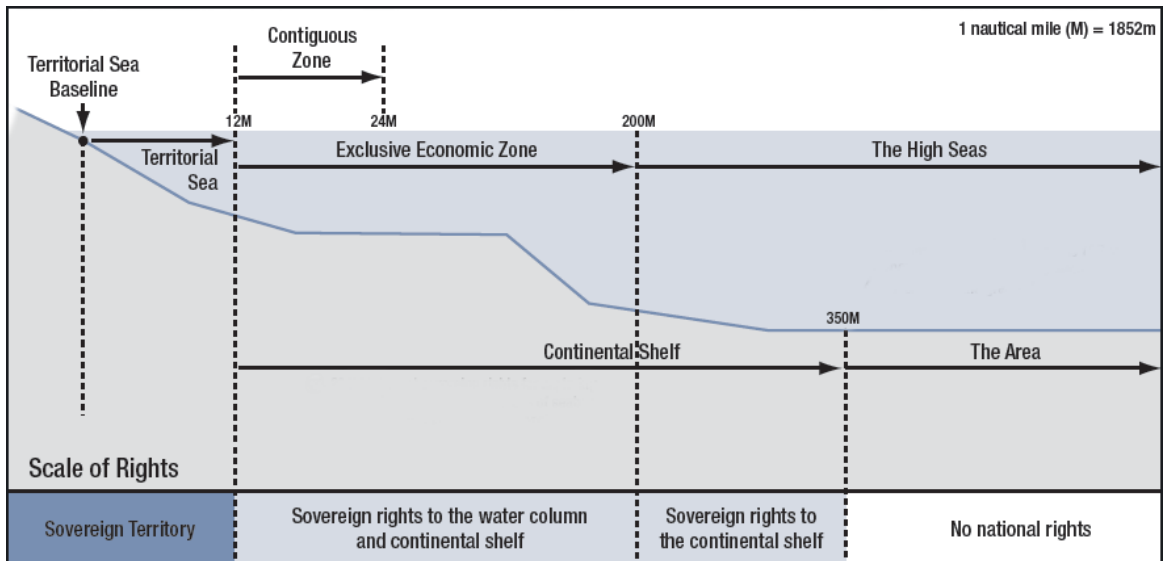
<sup>102</sup> UNCLOS Part XI

<sup>103</sup> UNCLOS art 76

<sup>104</sup> The continental rise is an underwater feature found between the continental slope and the abyssal plain. This feature can be found all around the world, and it represents the final stage in the boundary between continents and the deepest part of the ocean. At the bottom of the continental slope, one will find the continental rise, an underwater hill composed of tons of accumulated sediments. The general slope of the continental rise is between 0.5 degrees and 1.0 degrees. Beyond the continental rise stretches the abyssal plain, an extremely flat area of the sea floor which is also incredibly deep. See 'continental rise' (*Definitions.net STANDS4 LLC, 2020*) <<https://www.definitions.net/definition/continental++rise>> assessed on 22 May 2020

<sup>105</sup> UNCLOS art 76 (3)

Figure 2. Maritime zones under UNCLOS



Source: ‘The United Nations Law of the Sea PharmaSea Toolkit’

<<http://www.vliz.be/projects/marinegeneticresources/united-nations-convention-law-sea.html>> accessed May 17, 2020

Under Article 76 for states to extend their continental shelf beyond 200nm up to the 350nm limit<sup>106</sup> specified in the Convention, they are required make submissions in respect of their continental shelf beyond 200 nautical miles to the Commission on Limits of Continental Shelf (CLCS), a body of the United Nations established under the UNCLOS. This must be done within 10 years of the entry into force of the Convention for that state.<sup>107</sup> This involves the acquisition by the state of complex scientific and technical data concerning the outer limit of the state’s continental shelf, in areas where those limits extend beyond 200 nm.<sup>108</sup> The CLCS then considers the data and makes a recommendation based on the submission.<sup>109</sup> When a coastal state accepts the recommendations, it establishes the limits of the continental shelf beyond 200 M based on the recommendations which then become final and binding.<sup>110</sup> The recommendation of the CLCS is however without prejudice to the final delimitation of the continental shelf between opposite and adjacent coasts.<sup>111</sup> The implications of

<sup>106</sup> UNCLOS art 76 (6) S

<sup>107</sup> UNCLOS Annex II rt 4

<sup>108</sup> UNCLOS Annex II art 4

<sup>109</sup> UNCLOS art 76 (8)

<sup>110</sup> *ibid*

<sup>111</sup> UNCLOS art 76 (10)



this is the CLCS recommendation does not constitute a maritime boundary delimitation.

All the states in the region have managed to make formal submissions within the time limits pertaining to them. Five of them have submitted preliminary information pending full submission.<sup>112</sup> Three of them have made full submissions and are awaiting recommendations.<sup>113</sup> Currently Ghana is the only state in the region, which has received a recommendation from the CLCS on its submission.<sup>114</sup>

### **1.3.2. Rules and principles on maritime boundary delimitation developed by international courts and tribunals**

A major criticism of Articles 74 and 83 of UNCLOS is its lack of clarity in that it does not specify a definite method of delimitation but only emphasises the outcome or result of delimitation which is that it produces an equitable solution taking into account all the relevant circumstances of the case which are theoretically unlimited.<sup>115</sup> The vagueness of these two UNCLOS provisions reflected the conflicting positions of states during the third United Nations Conference on the Law of the Sea, which resulted in UNCLOS. One group of states favoured making equidistance, the method of delimitation whilst the other group was of the view that equity be made the guiding principle of delimitation.<sup>116</sup> Articles 74 on the exclusive economic zone and Article 83 on the continental shelf, are therefore a reflection of the compromise reached in the

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<sup>112</sup> These states are Benin, Togo, Cameroon, Equatorial Guinea, and Sao Tome and Principe. See 'Continental Shelf-General Description' (*Un.org*, 2020)

<[https://www.un.org/Depts/los/clcs\\_new/commission\\_preliminary.htm](https://www.un.org/Depts/los/clcs_new/commission_preliminary.htm)> accessed on 27 May 2020

<sup>113</sup> These are Gabon, Nigeria and Cote d'Ivoire. Gabon's Submission was made on 10 April 2012 (CLCS 78), Nigeria's submission was made on 7 May 2009 (CLCS/64) and Cote d'Ivoire's submission was made on 8<sup>th</sup> May 2009. See United Nations Commission on the Limits of the Continental Shelf 'Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to article 76, paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982' (2018) UN doc CLCS/64 & CLCS/95.

<sup>114</sup> United Nations Commission on the Limits of the Continental Shelf 'Progress of work in the Commission on the Limits of the Continental Shelf: Statement by the Chair' (24 September 2014) UN doc CLCS/85.

<sup>115</sup> Jonathan Charney, 'Progress in International Maritime Delimitation Law' (1994) 88 AJIL 277.

<sup>116</sup> R Platzoder, *Third United Nations Conference on the Law of the Sea: Documents*, Doc NG 7/2, 20 April 1978, Vol IX (New York, NY, Oceana, 1986) 392-93. Members of the NG 7/2 (pro –equidistance) group were: Bahamas, Barbados, Canada, Columbia, Cyprus, Democratic Yemen, Denmark, Gambia, Greece, Guyana, Italy, Japan, Kuwait, Malta, Norway, Spain, Sweden, The United Arab Emirates, The United Kingdom and Yugoslavia.

debate which resulted in a provision that has been described as an ‘*empty formula*.’<sup>117</sup> and “...*consciously designed to decide as little as possible*.”<sup>118</sup>

This indeterminacy was illustrated in the 1982 *Tunisia/Libya* case<sup>119</sup> in which the ICJ was of the view that it was bound to decide the case on the basis of equitable principle. However, according to the court, it was the result of equitableness that was predominant and the principles were subordinate to it and thus the principles have to be selected according to their being able to reach an equitable result.<sup>120</sup> However in the 1986 *Libya /Malta* case,<sup>121</sup> the court changed its stance in favour of predictability stating that “justice of which equity is an emanation, is not abstract justice but justice according to the rule of law”<sup>122</sup> The court was in favour of delimiting maritime boundaries according to some predictable set of rules.

Thereafter progressively, international courts and tribunals have as Judge Mensah, puts it, fleshed out “...*the bones of the provisions to the extent necessary in the circumstances of a particular case in order to attain the objects and purposes of the provisions in question*.”<sup>123</sup> This exercise by international courts and tribunals has infused some flexibility and predictability into the process of maritime delimitation by providing a practical method for the delimitation process.<sup>124</sup>

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<sup>117</sup> In his dissenting opinion, Judge Gros, in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Canada/United States of America)* (Judgment) [1984] I.C.J. Reports, p. 246, referred to Article 83 as providing an empty formula that had the effect of destroying all previous gains achieved through the 1958 Convention and the *North Sea Continental Shelf, (Judgment)*, [1969] I.C.J. Rep. 365). He criticized the Chamber’s reasoning in the matter, reasoning that the principles relied on by the chamber, the methods employed to put them into practice and the corrections made to the whole process, transform the entire operation into an exercise, which it will thereafter be open to each judge to decide at his discretion, what is equitable. (*Case concerning the Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada / United States)* Judgment, [1984] ICJ Rep. 365 paras 8. Tanaka is also of the view that the reference to Article 38 of the ICJ statute is quite meaningless especially with regard to the EEZ as it may be debatable whether the principles of law referred to in Article 38 exist in relation to maritime delimitation. See Yoshifumi Tanaka, *Predictability and flexibility in the law of maritime delimitation*, (Oxford, UK Hart 2006) 47-48.

<sup>118</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Canada/United States of America)* (Judgment) [1984] I.C.J. Reports, (dissenting opinion of Judge Gros para 70).

<sup>119</sup> *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), (Application to Intervene)*, [1981] I.C.J. Rep. 3.

<sup>120</sup> *ibid*

<sup>121</sup> *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, (Merits) [1985] I. C.J. Rep.

<sup>122</sup> *Ibid* para 45

<sup>123</sup> *Camouco (Panama v. France), Prompt Release*, (Judgment of 7 February 2000, Declaration of Judge Mensah) ITLOS Reports 2000,10 at para 4.

<sup>124</sup> Yoshifumi Tanaka, *Predictability and flexibility in the law of maritime delimitation*, (Oxford, UK Hart 2006) 47-48.

### 1.3.2.1. The three-stage approach to maritime boundary delimitation

Currently, international courts and tribunals have through the jurisprudence developed a three- stage approach to maritime boundary delimitation. Bringing together the case law on maritime boundary delimitation the ICJ extrapolated on this in the *Romania/ Ukraine* case. The Court noted that in the process of delimiting the continental shelf or exclusive economic zone or to draw a single delimitation line, the court proceeds in defined stages.<sup>125</sup>

Before beginning the process, the Court or tribunal considers in addition to jurisdictional issues some preliminary matters. These include whether there is a prior agreement between the parties, affecting maritime boundaries. Where there is partial agreement or treaty (e.g. as to the starting point or end point of a delimitation or initial relevant base points or baselines), the Court will take that agreement as the basis for the delimitation. The most notable example in the region is in the *Nigeria/ Cameroon* case.<sup>126</sup> The ICJ found that part of the maritime boundary had been established by treaty between Britain and Germany during the colonial era.<sup>127</sup> The Court saw its task on the basis of this treaty simply to “specify definitively” the course of the boundary as fixed by the relevant instruments and not to delimit the boundary *de novo* nor to demarcate it.<sup>128</sup> However,

as the ICJ in the *Nicaragua / Honduras*<sup>129</sup> case, observed, “the establishment of a permanent maritime boundary is a matter of grave importance and agreement is not to be easily presumed.”<sup>130</sup> Another preliminary issue for the court or tribunal is to identify the relevant area in which each party claims to have an equally legitimate claim. This according to Malcolm Evans, involves the relevant coastal lengths which is the distance from the land boundary terminus out to the most distant controlling points in each direction.<sup>131</sup> The ICJ in the *Romania/ Ukraine case* pointed out that the relevant coasts

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<sup>125</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, (Merits), [2009] I.C.J. Rep. 61

<sup>126</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, [2002] ICJ Rep. para 303.

<sup>127</sup> Ibid, Paras 261-268.

<sup>128</sup> Ibid p.2.

<sup>129</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)* (Merits) [2007] ICJ Rep 659.

<sup>130</sup> Ibid, para. 253.

<sup>131</sup> Malcolm Evans, ‘Maritime Boundary Delimitation: Where do we go from here?’ (4 February 2005 British Institute of International and comparative law, [www.biicl.org](http://www.biicl.org)).

are those coasts that generate overlapping claims.<sup>132</sup> Another issue the international courts and tribunal have to decide at the preliminary stage is whether it is being requested to delimit a single all-purpose boundary or a different boundary for each zone, using different criteria. The jurisprudence and state practice show that the single all-purpose maritime boundary is fast gaining popularity.<sup>133</sup>

After dealing with these preliminary issues, the court or tribunal moves on to the first stage of the process. In the *Romania/ Ukraine* case mentioned above, the ICJ noted that in the first stage of the process, the Court establishes a provisional delimitation line using “geometrically objective” methods which are appropriate for the geography of the area where the delimitation is to take place.<sup>134</sup> The Court identified that so far as between adjacent coasts, the equidistance method is used, unless there is reason to use another method.<sup>135</sup> Where it is opposite coasts the method is a median line between the two coasts.<sup>136</sup> The lines in both cases are to be constructed from the “most appropriate points on the coasts of the two states concerned”.<sup>137</sup> The Court pays attention in this process to those parts of the coasts jutting out, and the extent to which the court may deviate from the basepoints the parties selected for their territorial seas in the construction of a single -purpose delimitation line.<sup>138</sup> The court chooses its own basepoints having regard to the physical geography and the most seaward points of the

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<sup>132</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Merits) [2009] I.C.J. Rep para.77.

<sup>133</sup> In the *Gulf of Maine* case the parties requested the court to delimit a single maritime boundary dividing the Continental Shelf and fisheries zone of Canada and the USA in the Gulf of Maine area. In the *Guinea/ Guinea Bissau* case, the parties requested the Tribunal to delimit the EEZ and CS by a single line. The court noted that nothing prevented it in international law or customary law from doing so. The ICJ in the *Cameroon/Nigeria* case also drew a single boundary for the CS and EEZ as did the Tribunals in the recent cases of *Bangladesh/ Myanmar* and *Russia / Ukraine* to mention a few. Where the states have not requested the court or tribunal to draw a single boundary as in the *Greenland /Jan Mayen* case, the court nevertheless drew a provisional equidistance line for the two zones stating that the location of the CS stems from the 1958 Geneva Convention on the Continental Shelf whilst the location of the Fisheries zone stems from customary law but there was a convergence which allowed for the use of a single maritime for both zones. State practice also reveals that after the emergence of the concept of the EEZ states have been using the multipurpose single line as a convenient way to delimit their maritime boundaries. A few examples include the Agreement between Bulgaria and Turkey, Nigeria and Equatorial Guinea, Nigeria and Sao Tome and Principe.

<sup>134</sup>. Ibid para 116.

<sup>135</sup> Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v. Honduras*), (Merits), [2007] ICJ Rep 745 para 281.

<sup>136</sup> *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, (Merits), [2009] ICJ Rep para 116.

<sup>137</sup> ibid Para 117

<sup>138</sup> ibid

two coasts.<sup>139</sup> The court during this first stage is simply preoccupied with plotting a line based on a strictly geometric criteria on the basis of objective data.

Where the geography of the coasts of disputing states has made it impossible for the Court or tribunal to identify appropriate baselines to draw an equidistance line, the Court can use alternative methods like it did in the *Nicaragua and Honduras* case where it utilised the angle bisector method of delimitation for constructing the line stating that, “...bisecting the angle created by the linear approximations of coastlines has proved to be a viable substitute method in certain circumstances where equidistance is not possible or appropriate.”<sup>140</sup> The Court’s decision not to begin with a provisional equidistance line might be viewed as a departure from the trend in maritime boundary adjudications, and so was at pains to give cogent reasons why in this particular case, it had to depart from the standard approach.<sup>141</sup>

The second stage of the delimitation process involves a consideration by the Court or Tribunal of whether there are any factors that necessitate a shift or adjustment of the provisional equidistance line with the purpose of obtaining an equitable result.<sup>142</sup> What constitutes special or relevant circumstances has not been specifically defined. International courts and tribunals have therefore taken into consideration many factors pertinent to the case before them. The ICJ in the *Libya - Malta case* declared that although there is no closed list of considerations which a court may invoke, the only ones which will qualify for inclusion are those which are pertinent to the institution of the continental shelf as it has developed within the law, and to the application of

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<sup>139</sup> Ibid Para 117

<sup>140</sup> Ibid

<sup>141</sup> Martin Pratt, 'Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua /Honduras*)' [2007] 2(3) HJJ 37. In the *Gulf of Maine* case the Court stated, “...like equidistance, the bisector method is a geometrical approach that can be used to give legal effect to the criterion long held to be as equitable as it is simple, namely that in principle, while having regard to the special circumstances of the case, one should aim at an equal division of areas where the maritime projections of the coasts of the States...converge and overlap.” See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* Judgment, [1984] 1.C.J. Rep. para. 195. In the *Tunisia/ Libya* case, the bisector had to be used due to the impossibility of finding a point on the equidistance line. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* (Judgment) [1982] I.C.J. Rep.82 para 115. It can be concluded from this discussion that the bisector method is used only in situations where due to the geography of the coast it would be inequitable to draw an equidistance line or the drawing of the equidistance line would be impossible.

<sup>142</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, (*Merits*) [2002] 1CJ Rep142 para 288.

equitable principles to its delimitation.<sup>143</sup> The kinds of circumstances considered relevant are usually geographical and non-geographical<sup>144</sup> circumstances but the former

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<sup>143</sup> *Continental Shelf (Libyan Arab Jamahiriya v Malta) (Merits)* [1985] I C.J. Rep 40 para 48.

<sup>144</sup> There are non-geographical factors discussed in the jurisprudence. One of these is navigational interests which states have frequently cited as relevant circumstances. International courts and tribunals have generally not been favourably disposed to shifting the equidistance line on this basis due to the fact that all states enjoy the right of innocent passage in the territorial sea and freedom of navigation in the EEZ. For instance, in the *Qatar/Bahrain* case, the court found it unnecessary to shift the equidistance line on grounds of navigation. See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, (Merits) [2001] 1. C. J. Rep. 248.

Thus, it is only in a few cases that the equidistance line was adjusted to accommodate navigational interests. Two cases in this regard are the *Beagle Channel* case and the *Guyana/ Suriname* case. In the *Beagle Channel* case, the tribunal shifted the median line so that it could follow ‘the habitually used navigable track.’ See *Dispute between Argentina and Chile concerning the Beagle Channel*, (1977) XXI RIAA 53-264 at para. 110. The tribunal in the *Guyana/Suriname* case, held that the factors which related to Suriname’s navigation and security interests constituted special circumstances requiring significant adjustment of the equidistance line over the first 3 nm of the territorial sea. See *Guyana/ Suriname case*, paras 304, 306

In the delimitation of the EEZ and continental shelf however, navigational interests generally have not been such an important consideration. Fietta and Cleverly, note that, “to date no international court or Tribunal has delimited an EEZ or continental shelf boundary so as to accommodate navigational...interests.” See Stephen Fietta and Robin Cleverly, *A practitioner’s Guide to Maritime Boundary Delimitation*, (Oxford University press 2016)

The jurisprudence also shows that security interests have been considered a relevant circumstance in territorial sea delimitations. The tribunal in the *Guinea/ Guinea Bissau* case, stated as regarding security that it was to avoid that “either party should see rights exercised opposite its coast or in the immediate vicinity thereof which could compromise its security.” *Delimitation of the Maritime Boundary between Guinea and Guinea – Bissau (Guinea/ Guinea-Bissau)* (Arbitration Tribunal) (1985) XIX RIAA 148-196 at para. 124.

In the EEZ and continental shelf delimitations, security interests in principle can be considered relevant only in highly exceptional circumstances. In the *Nicaragua / Colombia* case, the court, recognised that legitimate security concerns might be a relevant consideration if a maritime delimitation was effected near to the coast. See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, (Judgment) [2012] I.C.J. Reports para 221-222. The ICJ in the *Libya /Malta and Greenland /Jan Mayen* cases also examined security considerations based on distance from the coast. See *Maritime Delimitation in the Area between Greenland and Jan Mayen, (Denmark v Norway)* (Judgment) [1993] I.C.J. Reports para 81. The conclusion can be drawn therefore that there is no predictable standard on how security should be taken into account as a relevant circumstance even though international courts and tribunals consider it important especially if the delimitation is near the coast. However, Tanaka notes, “there is no judgment which explicitly takes national security into account for establishing maritime delimitation.” Stephen Fietta and Robin Cleverly, *A practitioner’s Guide to Maritime Boundary Delimitation*, (Oxford University press 2016) 85

Access to natural resources in the area of delimitation is another non geographic consideration. In the *Jan Mayen* case, the court considered the question of access to fish stocks for vulnerable fishing communities in the area. The adoption of a median line would mean that Denmark could not be assured of equitable access to the fish and thus the Court adjusted the median line towards the Norwegian island of Jan Mayen. In the jurisprudence, this is the only case where the court has accepted access to fisheries resources as a relevant circumstance for the adjustment of the equidistance line. See Stephen Fietta and Robin Cleverly, *A practitioner’s Guide to Maritime Boundary Delimitation*, (Oxford University press 2016) 85.

In the case of *Barbados / Trinidad and Tobago*, the court did not consider fishing for flying fish off the coast of Tobago as a relevant circumstance requiring the shifting of the equidistance line. See *Arbitration between Barbados and The Republic of Trinidad and Tobago relating to the Delimitation of the Exclusive Economic Zone and Continental Shelf between them (Barbados/ Trinidad and Tobago)* (2006) 27 RIAA 147 Para 215. International courts and tribunals have however not completely rejected the fact that equitable access to fisheries is an important circumstance. They thus try to be creative by

are regarded as more important when evaluating the equitableness of the equidistance line.<sup>145</sup> Three categories of geographical circumstance would call for the courts or tribunals to adjust the line. One would be in situations of encroachment.<sup>146</sup> Another is where there is disparity in the lengths of the parties' coastlines<sup>147</sup> and a third is where features like islands, rocks and other promontories distort the geography of the area to be delimited.<sup>148</sup>

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using geographical factors to determine the boundary line whilst safeguarding the fisheries interest. See *Eritrea/ Yemen* case, where the court held that the "traditional fishing regime" that was already in use in the delimitation area should be respected and protected by law and must therefore be preserved by the parties for the benefit of fishermen of both states. See *Eritrea/ Yemen* case para 68

<sup>145</sup> Yoshifumi Tanaka, *Predictability and Flexibility in the Law of maritime Boundary Delimitation* (Hart Publishing 2006) 348; Stephen Fietta, Robin Cleverly, *A Practitioner's Guide to Maritime Delimitation* (Oxford University Press 2016) 65 – 93.

<sup>146</sup> Regarding situations of encroachment, the ICJ in *North Sea Continental Shelf* case had occasion to consider the issue. In that case, Germany was compressed between the Dutch and Danish areas and virtually cut -off due to the marked concavity of its coast, when the equidistance line was used. The court decided that the delimitation should be undertaken in such a way as to leave as much as possible to each Party those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other. According to the court, cut-off effects were to be avoided as much as possible. See *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] I.C.J. Rep. 3

This approach was adopted in the Bay of Bengal cases (*Bangladesh/ Myanmar and Bangladesh/ India*) where the coastal geography bore a similarity with that of the North Sea case. In the *Bangladesh/ Myanmar* case, the Tribunal found that if the strict equidistance were applied, Bangladesh's access to the continental shelf would be cut -off leaving it a disproportionately small EEZ relative to the length of its coastline. The Arbitral Tribunal, in the *Bangladesh/ India* case also noted that the common view in international jurisprudence is that concavity as such does not necessarily constitute a relevant circumstance requiring the adjustment of a provisional equidistance line. It is only when a cut-off effect is produced by the equidistance line which prevents a state from extending its maritime boundary as far seaward as international law permits and prevents the achievement of an equitable solution, that it can be considered a relevant circumstance. See *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment of 14 March 2012) ITLOS Rep. 2012, 81 para 291; *In the Matter of the Bay of Bengal Maritime Boundary Arbitration (Bangladesh v India)* (Award) (Arbitral Tribunal) Case No 16 (2014) < <https://pcacases.com/web/sendAttach/383> > accessed 12 May 2020.

<sup>147</sup> Another factor the courts consider is whether there is any disparity in the lengths of the relevant coastlines of the parties especially in the case of opposite coasts. In the *Libya / Malta* case, the court took into consideration the geographical context of Malta, a small island state, with a very short coastal segment, facing the very long continental coastline of Libya. See *Continental Shelf (Libyan Arab Jamahiriya v Malta)*, (Merits) [1985] I. C.J. Rep. In the *Jan Mayen* case, the Court found that there was a disparity of coastal lengths and therefore the median line should be adjusted or shifted in such a way as to effect a delimitation closer to the coast of Jan Mayen. See *Maritime Delimitation in the Area between Greenland and Jan Mayen*, (Judgment,) [1993] I.C.J. Rep. para. 69. The court in all these cases adjusted the line in favour of the state with the longer coastline.

<sup>148</sup> The third factor international courts and tribunals consider is the effect of islands, rocks and other promontories or small features on the equidistance line. This is especially so when they produce a distorting effect on the geography of the delimitation area. In the jurisprudence islands are the most noteworthy. See Stephen Fietta and Robin Cleverly, *A Practitioner's Guide to Maritime Delimitation* (Oxford University press 2016) 73. Article 121 (1) of the UNCLOS defines an island as a naturally formed area of land, surrounded by water, which is above water at high tide." Under the Convention, islands are treated as land territory in the delimitation of the territorial sea, contiguous zone, EEZ and Continental shelf. However, when an island is determined a relevant or special circumstance, the effect to be given to it, have not been detailed out in the Convention. It has therefore been left to international courts and tribunals as well as the practice of states to provide the guiding principles in this regard.

The final stage of the delimitation process, provides the court with the opportunity to verify that the line arrived at, does not lead to an inequitable result due to 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”.<sup>149</sup> The court needs to confirm through a comparison of the ratio of coastal lengths that no great disproportionality of marine areas has occurred.<sup>150</sup> The ICJ put in a caveat though, that this does not imply that the areas appertaining to the states should be proportionate to the coastal lengths.<sup>151</sup> It recalled its judgment in the *Denmark / Norway* case<sup>152</sup> where it was stated “the sharing out of the area is ... the consequence of the delimitation not vice versa”. In the *Nicaragua /Columbia* case, the court ruled that for an equidistance line to be adjusted at this final stage, there must be a “significant disproportionality” that is so gross that it would taint the result and render it inequitable.<sup>153</sup>

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The jurisprudence shows that in situations where small islands belonging to one party to a dispute are located off the mainland coast of the other party, the ICJ has held that this constitutes a relevant circumstance meriting the adjustment of the equidistance line. In the case of *Nicaragua/Columbia* where this was the case, the court found that a median line between a group of small Colombian islands had a cut -off effect on Nicaragua to the extent that it affected three quarters of its maritime area. The line was therefore adjusted in favour of Nicaragua. However only cut -off effects that occur within the area to be delimited without reference to coasts of any third states would be considered relevant. See *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Merits) [2012] I.C.J. Rep. 624.

Islands are also treated differently depending on the maritime zone they are found in. This was discussed by the Tribunal in the *Bangladesh/Myanmar* case where the court drew a clear distinction between the effect of islands in the delimitation of the territorial sea from the effect of islands in the delimitation of the exclusive economic zone and continental shelf. In that case, the court in the territorial sea delimitation gave full effect to the St Martins island, which belonged to Bangladesh but was located opposite Myanmar’s mainland. However, in the delimitation of the EEZ and the continental shelf, considerations of the equitableness of the equidistance line, determines whether they would be given full, partial or even no effect. The courts have dealt with it on a case by case basis. In the *Anglo-French Continental shelf* case, different islands at different locations belonging to the two parties were given different effects. The tribunal decided that giving the Channel Islands, belonging to Britain but located off the French coast of Normandy, full effect in the continental shelf boundary delimitation between the two states would produce an inequitable result. It therefore created a 12-mile enclave to the west and north of the islands. With respect to the Scilly islands, also belonging to Britain in the same case, the court decided to give them half effect to abate their distorting effect. However, the Tribunal decided that the Ushant island, located at the south-western end of the English Channel but which belonged to France, be given full effect. Sometimes an island’s effect is very substantial, but it is uninhabited and located well offshore in an adjacent coast situation. The Court in such a case would likely discount it altogether as it did in the case of *Qatar/ Bahrain* with Fasht al Jarim island to produce an equitable result. See Stephen Fietta and Robin Cleverly, *A Practitioner’s Guide to Maritime Delimitation* (Oxford University press 2016) 67.

<sup>149</sup> *Romania /Ukraine* Para 122

<sup>150</sup> *ibid*

<sup>151</sup> *ibid*

<sup>152</sup> *Greenland and Jan Mayen* case para 64

<sup>153</sup> *Nicaragua v. Colombia* para 242



This approach which is also called in the literature the equidistance/relevant circumstances method was adopted in subsequent cases by the ICJ, ITLOS and Annex VII arbitral tribunals.<sup>154</sup> The main advantage of the approach lies in its predictability by the incorporation of specific method of delimitation which is the equidistance method.

### **1.3.2.2. Delimitation of the continental shelf beyond 200 M and grey areas**

The jurisprudence discussed above relates mainly to the delimitation of the territorial sea up to the continental shelf within 200 M. However special mention must be made of the delimitation of the continental shelf beyond 200 M, due to the unanswered questions regarding delimitation in this zone and the sparse reference to it in the jurisprudence on maritime delimitation. The delimitation of the continental shelf beyond 200 M is as with the continental shelf within 200 M, governed by Article 83 of UNCLOS which does not make a distinction between the inner and outer continental shelf. However, there is a relation of this provision to Article 76, as a preliminary issue would be whether there is in existence a shelf to delimit. Additionally, the process at the Commission on the Limits of the Continental Shelf is a protracted one and it may take years before the states receive a recommendation due to the heavy workload of the Commission which has been a long standing issue.<sup>155</sup> In the meantime, the issue is what the legal status of the CS beyond 200 nm is, in the absence of a CLCS recommendation and whether an international court or tribunal can delimit its boundaries. The Special Chamber in the *Ghana/ Cote d'Ivoire* case ruled that it had the jurisdiction so to do.<sup>156</sup> It reasoned that there is only a single continental shelf in law and that there is no

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<sup>154</sup> The approach was used in the 2012 *Bangladesh / Myanmar* and *Nicaragua / Colombia* cases; the 2014 the *Chile | Peru* and *Bangladesh / India* cases; in 2017 in the *Croatia / Slovenia* and *Ghana / Cote d'Ivoire* and in 2018 the *Costa Rica and Nicaragua case*. The main advantage of the approach lies in its predictability by the incorporation of specific method of delimitation which is the equidistance method.

<sup>155</sup> By Letter dated 5 April 2019 from the Chair of the Commission on the Limits of the Continental Shelf addressed to the President of the twenty-ninth Meeting of States Parties the Chair of the Commission revealed that the actual workload of the Commission far surpasses earlier initial projections. He stated that as at 26 March 2019, 71 States parties had made submissions either individually or jointly. Overall, he disclosed that the Commission has received 89 submissions, including individual, joint and revised or partially revised submissions. He expected that there would be a lot more to be received in the coming years. In addition, he was of the view that the scientific and technical components of the submissions far exceed the complexity originally envisaged due in part to evolving knowledge and technologies and, in part, to the efforts of coastal States to support the proposed delineation with comprehensive data and information. He stated that 45 submissions are still pending consideration. He forecasted that at the current stage, the waiting time between the making of a submission and the establishment of a sub commission is approximately 10 years and is expected to increase even further. Given the workload, the remaining work of the Commission may last several more decades. See CLCSC 'Progress of work in the Commission on the Limits of the Continental Shelf - Statement by the Chair - Fifty -first session' (13 December 2019) CLCS/51/1.

<sup>156</sup> *Ghana v Cote d'Ivoire* Para 495.

distinction between an inner continental shelf and an extended or outer continental shelf.<sup>157</sup> It was therefore of the opinion that the Special Chamber can delimit the continental shelf beyond 200 M but only if such a continental shelf exists.<sup>158</sup> The Chamber was of the belief that such a continental shelf existed for both parties up to 350 M as required by Article 76. The Chamber was of the view that as Ghana had already received a recommendation showing the validity to claim a continental shelf beyond 200nm and Cote d'Ivoire's geological situation is identical to that of Ghana, it is also likely to have a recommendation from the CLCS to that effect.<sup>159</sup>

An issue that also arises is whether a decision by an international court or tribunal would interfere with the competence of the CLCS. In this regard the Special Chamber in the *Ghana Cote d'Ivoire* case emphasised that the functions of the CLCS and of the Special Chamber differ and referring to the Judgment of the Tribunal in *Delimitation of the maritime boundary in the Bay of Bengal (Bangladesh/Myanmar)*, came to the conclusion that there is nothing in the Convention or in the Rules of Procedure of the Commission or in its practice to indicate that delimitation of the continental shelf constitutes an impediment to the performance by the Commission of its functions.<sup>160</sup> Article 76, (10) of UNCLOS states clearly that the work of the CLCS is without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts". Article 9 of Annex II, to the Convention, also states that the "actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts".

Regarding the methodology for delimitation of the continental shelf beyond 200 M, the jurisprudence shows that the continental shelf has been considered as a single continental shelf.<sup>161</sup> Therefore, there is no distinction made between the continental shelf within and beyond 200 M. Consequently, the equidistance/relevant circumstances methodology for the delimitation of the exclusive economic zone and the continental

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<sup>157</sup> The Special Chamber cited the *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*, (2006) XXVII RIAA, 147, at pp. 208-209, para. 213, quoted by the Tribunal in its Judgment in the dispute concerning *Bangladesh/Myanmar case p. 4*, at pp. 96-97, para. 362). See also *Ghana/Côte d'Ivoire* case Para 490

<sup>158</sup> *Ghana/ Cote d'Ivoire* case para. 491.

<sup>159</sup> *ibid*

<sup>160</sup> *Ibid* 378

<sup>161</sup> *ibid* para 526

shelf, have been used as evidenced in the *Ghana /Cote d'Ivoire* case. The Special Chamber in that case saw no special circumstances that merited a deviation from that default position in the continental shelf beyond 200 M

A potential complexity arises in the delimitation of this zone which requires that states cooperate in its delimitation. Under the UNCLOS, the Continental Shelf and the Exclusive Economic Zone have been provided for as related, but distinct maritime zones although the rights which the exclusive economic zone entails over the sea-bed of the zone are defined by reference to the regime laid down for the continental shelf.<sup>162</sup> However, the distinctiveness of these zones poses some technical problems when it results in a situation where a state's jurisdiction over its continental shelf extends into an area that is within 200 M of another state. In such a case, the former state will not have jurisdiction over the water column and a situation would be created whereby there would be split jurisdiction and this has been referred to by Judge ad hoc Arechaga, in the *Libya/Tunisia* case as "a vertical superimposition of rights".<sup>163</sup> UNCLOS however does not provide for this problem of different coastal States exercising continental shelf rights and EEZ rights over the same area. This has been referred to in the jurisprudence as a "grey area".<sup>164</sup>

In both the cases of *Bangladesh and Myanmar* and *Bangladesh and India*, this situation arose. In the case of *Bangladesh and Myanmar* the tribunal found that the delimitation of the continental shelf beyond 200 M gave rise to a grey area located beyond 200 nautical miles from the coast of Bangladesh but within 200 M from the coast of Myanmar, yet on the Bangladesh side of the delimitation line. In the case between Bangladesh and India, the delimitation line of the Arbitral Tribunal also created a grey area beyond 200 M from the coasts of Bangladesh but within the 200 M of India. This meant that Bangladesh has sovereign rights to explore the continental shelf and exploit 'mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species,' as provided by Article 77 (4) of UNCLOS, east of the dividing line in the grey area whilst India, has sovereign

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<sup>162</sup> This was acknowledged in the *Libya / Malta Continental Shelf* case, where the ICJ indicated that the institutions of the continental shelf and the exclusive economic zone are different and distinct

<sup>163</sup> *Continental shelf (Tunisia/ Libyan Arab Jamahiriya)* (Judgment) [1982] ICJ Rep 18 (Sep Op of Judge Jiménez De Aréchaga) para 99.

<sup>164</sup> *Bangladesh/ Myanmar* case para 464.

rights over the EEZ regarding the superjacent waters. Similarly, in the *Bangladesh /Myanmar* case, Myanmar has rights over the EEZ whilst Bangladesh has rights over the continental shelf beyond 200 M.

Under UNCLOS, a coastal state can exercise complete jurisdiction over its resources from the water column, seabed and subsoil within its EEZ. In the Extended Continental Shelf, it can only explore resources from the seabed and subsoil. The tribunal's dilemma was that allowing Myanmar to claim its entitlement to the seabed in the grey area would cut Bangladesh off from a much larger section of its own continental shelf. In seeking to do equity the grey area was created. The tribunal however noted that UNCLOS recognises to a greater or lesser degree the rights of one State within the maritime zones of another. Within the provisions of the Convention relating to the exclusive economic zone and continental shelf, articles 56, 58, 78, and 79 all require States to exercise their rights and perform their duties with due regard to the rights and duties of other States. This definitely requires a degree of cooperation between the states. And the tribunal left it for the individual states to determine the measures they consider appropriate in this respect, including through the conclusion of further agreements or the creation of a cooperative arrangement. The Tribunal could only express confidence that Bangladesh and Myanmar would act, both jointly and individually, to ensure that each is able to exercise its rights and perform its duties within the grey area.<sup>165</sup> In almost similar words the tribunal in the *Bangladesh / India* case expressed the same views on cooperation as the ITLOS tribunal, before it, in the *Bangladesh /Myanmar* case.<sup>166</sup>

#### **1.4. Analysis of settled maritime boundaries in the Gulf of Guinea**

There are five fully or partially settled maritime boundaries in the Gulf of Guinea area under discussion namely the respective maritime boundaries between Nigeria and Equatorial Guinea, Nigeria and Cameroon, Ghana and Cote d'Ivoire, Sao Tome and Principe and Equatorial Guinea, and Sao Tome and Principe and Gabon. These are discussed below.

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<sup>165</sup> *Bangladesh/Myanmar* para. 475, 476.

<sup>166</sup> *Bangladesh/ India* para 504-508

### 1.4.1. Settled maritime boundaries

#### I. Cameroon and Nigeria

The Cameroon /Nigeria maritime boundary is one of the two maritime boundaries in the region to be settled by recourse to third party dispute settlement. Cameroon and Nigeria are adjacent states situated on the West coast of Africa. They share a land boundary extending from Lake Chad in the North to the Bakassi Peninsula, situated in the hollow of the Gulf of Guinea, in the south and their coasts in the Gulf of Guinea is concave in character.<sup>167</sup> The two states also share boundaries with other states in the region particularly Equatorial Guinea whose island, Bioko, is situated opposite their coastlines.<sup>168</sup> In 1994, Cameroon filed an application to the ICJ requesting the determination of the land and maritime boundary between the two states. The court after analysing the arguments of the parties on the prior existence of a maritime boundary, held that there was already an agreed maritime boundary, based on historical treaties, dividing the territorial seas of the two states.<sup>169</sup> The boundary to be delimited was therefore an EEZ and continental shelf boundary. The Parties requested the court to draw a single line for the maritime zones in the area to be delimited.<sup>170</sup>

At the time the court had not yet formulated the three stage approach and so in line with jurisprudence at the time specifically the *Jan Mayen*, the court begun the process by drawing a provisional equidistance line as the first step of a two-stage process- drawing an equidistance line and then examining any factors that would necessitate a shift in the equidistance line.<sup>171</sup> To draw the provisional equidistance line, the court first identified the relevant coastline of the parties, for the determination of the base points for use in the drawing of the equidistance line. In so doing, the court decided on points on the coastlines of only the two states rejecting Cameroons submissions on the relevant coast which encompassed the entire coastline of the Gulf of Guinea.<sup>172</sup> The court though observed that the equidistance line it had used could not “extend very far” because of

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<sup>167</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment*, [2002] ICJ Rep 330 para 30

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid* para. 268.

<sup>170</sup> *Ibid* para286

<sup>171</sup> *Ibid* para290

<sup>172</sup> *Ibid* para 272

the presence of Equatorial Guinea which was not party to the proceedings even though it had been allowed to intervene.<sup>173</sup>

Among the relevant circumstances necessitating the adjustment of the equidistance line which Nigeria cited but which the court did not endorse was the oil practice line which the parties had respected for many years.<sup>174</sup> The court held, noting earlier jurisprudence, that it would not normally consider oil practice absent evidence of a *modus vivendi* or tacit agreement and that oil and gas wells were not in themselves to be considered as relevant circumstances justifying a shift of the equidistance line. The court did not find in the present case evidence of such tacit agreement and therefore declined to take the oil practice into consideration as a relevant circumstance.<sup>175</sup>

Another significant relevant circumstance cited by Cameroon, was the cut-off effect of the island of Bioko on Cameroon which the latter argued should not be given its full effect.<sup>176</sup> The court acknowledged that islands could sometimes be taken into account as relevant circumstances but only when they belonged to one of the parties to the dispute which was not the case as Equatorial Guinea was not party to the dispute.<sup>177</sup> Further Cameroon's argument on the concavity of the coastline was held not to be a relevant circumstance as the relevant coastline of the two parties used by the court in the delimitation, did not exhibit any particular concavity.<sup>178</sup> Further the Court did not see the need for any further adjustment of the equidistance line on the basis of proportionality as it found that the relevant coastline of Cameroon was not longer than that of Nigeria, though it acknowledged that a substantial difference in the lengths of the parties' coastlines may be a relevant factor to be considered.<sup>179</sup> After these analysis, the court concluded that the equidistance line represented an equitable solution and drew the line up to where Equatorial Guinea, became involved and no further.<sup>180</sup>

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<sup>173</sup> Ibid para 307

<sup>174</sup> Ibid para 282

<sup>175</sup> Ibid para 304

<sup>176</sup> Ibid para 274

<sup>177</sup> Ibid para.238.

<sup>178</sup> Ibid para. 297

<sup>179</sup> The Court cited the *Gulf of Maine* and the *Jan Mayen* cases.

<sup>180</sup> *Nigeria/ Cameroon* para 306

In drawing the equidistance line, the court took into consideration the prior Maroua Declaration of 1975 in the near shore area and drew an equidistance line up to a point 'G' which did not correspond to the equidistance line.<sup>181</sup> Thereafter, further offshore from point 'G' the court decided that the line directly join the equidistance line at a point they called 'X' and continue southward along the equidistance line. However, the court stopped at point 'X' where it determined that Equatorial Guinea's interest might be affected and considered that it could do no more than indicate the general direction of the equidistance line from point 'X'.<sup>182</sup>

After the judgment the two parties set up a Commission named Cameroon - Nigeria Mixed Commission to facilitate the implementation of the ICJ judgment as well as undertake the demarcation of the land and maritime boundary according to the judgment of the court.<sup>183</sup> The main achievement of the Commission has been to facilitate the peaceful transfer of authority over Bakassi to Cameroon through the Greentree Agreement, in conformity with the ICJ judgment.<sup>184</sup> The Commission has also made considerable progress in the maritime demarcation exercise and is currently still working with the parties to resolve and conclude the outstanding demarcation disagreements between them.<sup>185</sup>

This judgment has implications for maritime boundary delimitations in the Gulf of Guinea. The court did not extend the delimitation of the boundary between the two states into the territory of third states namely Equatorial Guinea and Sao Tome and Principe. Interestingly it allowed Equatorial Guinea to intervene in the proceedings stating that Article 59 of UNCLOS did not provide it enough protection and therefore meticulously delimited the boundary so as not to encroach on its rights.<sup>186</sup> This means that Nigeria and Cameroon can only complete their maritime boundary with the full cooperation of Equatorial Guinea and Sao Tome and Principe. Due to the complexity of their coastal geography this has proved rather difficult as evidenced by the fact that

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<sup>181</sup> Ibid para 307

<sup>182</sup> Ibid

<sup>183</sup> 'The Cameroon-Nigeria Mixed Commission: A Success in the Resolution of Boundary Dispute' (UNOWAS, 2019) <<https://unowas.unmissions.org/cameroon-nigeria-mixed-commission-success-resolution-boundary-dispute>> accessed 18 May 2020.

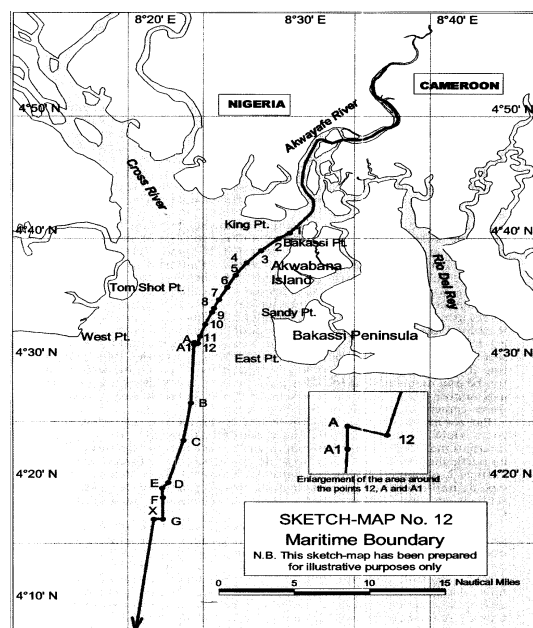
<sup>184</sup> *ibid*

<sup>185</sup> *ibid*

<sup>186</sup> Ibid para 238

since the judgment in 2002, the states still have not completed the boundary.<sup>187</sup> This case was also about the allocation of resources and Cameroon wanted a share of the rich resources in the region. The court however stated that its task was not to compensate Cameroon for any disadvantages it must contend with due to the geographical circumstances of the region.<sup>188</sup>

Figure 3: Judgment *Cameroon and Nigeria Case*



Source: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, [2002] ICJ Rep para 449.

The judgment of the ICJ in the *Cameroon / Nigeria* case, was not the end of the matter. In order to implement the judgment, the parties needed to cooperate hence they set up a joint commission - the Cameroon-Nigeria Mixed Commission (CNMC) - in November 2002.<sup>189</sup> This Commission was established under the auspices of the United Nations Secretary General at the request of the presidents of the two countries, then Presidents Paul Biya and Olusegun Obasanjo of Cameroon and Nigeria respectively.<sup>190</sup> The Special Representative of the Secretary General for West Africa and the Sahel serves as Chairman of the Mixed Commission.<sup>191</sup> The main goal of the

<sup>187</sup> Authors personal communication with an official from Nigeria.

<sup>188</sup> *Cameroon / Nigeria* case para 296, see also the Counter-Memorial of Nigeria 575 -581 para 21.14 - 21.23.

<sup>189</sup> 'Cameroon-Nigeria Mixed Commission' (UNOWAS, 2020)

<<https://unowas.unmissions.org/cameroon-nigeria-mixed-commission>> accessed 18 May 2020.

<sup>190</sup> *ibid*

<sup>191</sup> *ibid*



Commission is to facilitate the implementation of the 10 October 2002 judgment of the International Court of Justice (ICJ) on the Cameroon-Nigeria boundary dispute. Among its achievements is the fact that the full implementation of the Court's ruling in respect of the maritime boundary has been completed including all technicalities pertaining to the delineation of the maritime boundary, including the maritime charts which have been approved by both Parties, in compliance with the judgment.<sup>192</sup>

## II. Ghana and Cote d'Ivoire

Ghana and Cote d'Ivoire have adjacent coasts in the Gulf of Guinea. In September 2014, Ghana initiated arbitral proceedings against Cote d'Ivoire requesting the establishment of a single maritime boundary between Ghana and Cote d'Ivoire delimiting the territorial sea, exclusive economic zone and continental shelf including the continental shelf beyond 200M.<sup>193</sup> In its submissions to the Special Chamber of ITLOS, Ghana forcefully argued that the parties have tacitly agreed a boundary line that generally follows an equidistance line. This line according to Ghana has been respected for many years as exhibited by both parties' oil practice and by their cordial conduct respecting the line.<sup>194</sup> Cote d'Ivoire disagreed with this assertion and argued that the boundary had never been agreed as evidenced by the fact that the parties have been in protracted negotiations over the years to determine it.<sup>195</sup>

The Special Chamber rejected Ghana's argument stating that evidence relating solely to the specific purpose of oil activities in the seabed and subsoil is of limited value in proving the existence of an all-purpose boundary which delimits not only the seabed and subsoil but also superjacent water columns.<sup>196</sup> On the issue of the relevant coast to be used in the delimitation, the parties differed completely. Ghana was of the view that the relevant coast would be the coast appertaining to the two parties only and it is this coast that should be used to draw an equidistance line.<sup>197</sup> Cote d'Ivoire on the other hand, related the relevant coast to its preferred method of delimitation which is the

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<sup>192</sup> *ibid*

<sup>193</sup> *Ibid* p. 1

<sup>194</sup> *Ibid* Para 1.22

<sup>195</sup> *Ghana v Côte d'Ivoire* (Counter - Memorial of Cote d'Ivoire) Para. 4.3.

<sup>196</sup> *Ghana v Côte d'Ivoire* Para 226

<sup>197</sup> *Ibid* Memorial of Ghana Para 5.80 -5.81, Ghana Reply Vol 1 para 1.19, 3.21, 3.101, Ghana Memorial Vol. 1 para 4.56 and 5.87.

bisector method. It noted that the jurisprudence distinguishes between coasts useful for drawing the bisector and coasts relevant for the equidistance/relevant circumstances method. It quoted the court in *Bangladesh / India* which stated that, "...the identification of the relevant coasts for the delimitation in general and the depiction of the general management of the coast when applying the angle-bisector method are two distinctly different operations."<sup>198</sup> Cote d'Ivoire's view was that there should be a regional approach that takes into consideration the entire coast of the Gulf of Guinea being the area between Senegal and Gabon which they argue may be divided into three segments, illustrating both directions of the African west coast.<sup>199</sup> The Special Chamber however rejected Cote d'Ivoire's arguments and identified the relevant area as the area in which the projections of the coasts of the two Parties overlap, extending to the outer limits of the area to be delimited.<sup>200</sup>

Regarding the method of delimitation, Cote d'Ivoire advocated the bisector method putting emphasis on an equitable solution.<sup>201</sup> Côte d'Ivoire, drew the attention of the Chamber to the particular geographical context of the dispute, which it alleged justified the application of the bisector method. They cited the *Nicaragua v. Honduras case*<sup>202</sup> and claimed that the basepoints to be used for the delimitation are situated on a portion of the coastlines that are unstable and therefore justifies the use of an alternative method to that of equidistance.<sup>203</sup> Ghana argued that the starting point of the delimitation is the land boundary terminus (known as Boundary Pillar 55 or BP 55) and that there has been no suggestion that base points in the vicinity of the land boundary terminus at BP 55 would have to be placed on unstable features, or that an active geomorphology would make them "uncertain within a short (or, indeed, any) period of time."<sup>204</sup> To the contrary, according to Ghana's arguments, the relevant coasts in this case consist entirely of dry land and are remarkably stable.<sup>205</sup>

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<sup>198</sup> *ibid.* Para 277 quoted by Cote d'Ivoire in the Rejoinder at p. 72 para.3.10.

<sup>199</sup> Cote d'Ivoire Rejoinder para 3.29 – 3.32, 2.37.

<sup>200</sup> *Ghana v. Côte d'Ivoire* para. 381

<sup>201</sup> Cote d'Ivoire Counter Memorial para 25 -26.

<sup>202</sup> *Ibid* Vol 1 para. 6.32

<sup>203</sup> *Ibid*

<sup>204</sup> *Ghana v Côte d'Ivoire* Reply of Ghana Vol 1 25 July 2016 p. 88 para. 3.26

<sup>205</sup> *Ibid*

The Special Chamber found that the international jurisprudence concerning the delimitation of maritime spaces favoured the equidistance/relevant circumstances methodology. It observed that the international decisions which adopted the angle bisector methodology were due to particular circumstances in each of the cases concerned. According to the Chamber, this international jurisprudence confirms that, in the absence of any compelling reasons that make it impossible or inappropriate to draw a provisional equidistance line, the equidistance/relevant circumstances methodology should be chosen for maritime delimitation.

On the relevant circumstances requiring a shift in the equidistance line, Cote d'Ivoire's argument in case the chamber decided to use the equidistance method, was that there are several circumstances which call for the adjustment of the provisional equidistance line, a key one being the instability of the Ivorian coast in the vicinity of the land boundary terminus (Boundary Pillar 55.) Another relevant circumstance that Cote d'Ivoire alluded to was the exceptional concentration of hydrocarbons in the area to be delimited.<sup>206</sup> It cited the *Libya / Malta* case, where the Court held that: "*the actual resources contained in the continental shelf subject to delimitation, as far as is known or can easily be determined, could effectively constitute relevant circumstances which might reasonably be taken into account in a delimitation.*"<sup>207</sup> According to Cote d'Ivoire, these resources effectively represent the essential objective which the States have in mind by advancing claims on the seabed that contains them, and should therefore be considered as relevant circumstances in the delimitation process.<sup>208</sup> Cote d'Ivoire requested the Chamber to ensure equitable access to these resources by Côte d'Ivoire, especially when they are particularly concentrated in the area in question.<sup>209</sup> Ghana's argument on this point was that the location of hydrocarbons in the disputed area could not, per se, constitute a relevant circumstance.<sup>210</sup>

According to Ghana, access to resources has been taken into account by the case-law as a relevant circumstance, only where necessary to avoid "*catastrophic repercussions for the subsistence and economic development of the populations of the countries*

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<sup>206</sup> *Ghana v Côte d'Ivoire* para 11

<sup>207</sup> *Continental Shelf (Libyan Arab Jamahiriya / Malta)* (Judgment) [1985] ICJ Rep. para. 50.

<sup>208</sup> *Ghana v Côte d'Ivoire*, Cote d'Ivoire Rejoinder para 2.62.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ghana v Côte d'Ivoire* Ghana Reply p. 108-110.

*concerned.*”<sup>211</sup> Ghana submitted further that Côte d'Ivoire is not under the threat of such repercussions since it does not currently derive any economic benefit from this zone as it had never had access to it in the past.<sup>212</sup> The Special chamber did not agree that there were relevant circumstances to warrant an adjustment of the equidistance line.<sup>213</sup> At the final stage, the Special Chamber carried out the disproportionality test and decided that the ratio of the allocated areas is approximately 1:2.02 in favour of Cote d'Ivoire and that this ratio does not lead to any significant disproportion in the allocation of maritime areas to the parties in relation to the lengths of their respective coasts.<sup>214</sup> The Special Chamber also specified the course of the delimitation line in the continental shelf beyond 200M reasoning that, “there is in law only a single continental shelf.”<sup>215</sup> The Court however did not specify the endpoint of the boundary line.

The parties like in the Cameroon /Nigeria situation have set up a committee made up of members of both states to assist in the implementation of the judgment. Both parties also agreed to abide strictly by and cooperate to implement the ruling of the Special Chamber of ITLOS and to further collaborate within the framework of a bilateral Strategic Partnership Agreement (SPA) executed by the Heads of States of the two states on 17 October 2017.<sup>216</sup> This delimitation like the other cases in the Gulf of Guinea concerns the sharing of resources and as discussed in the beginning of this chapter, delimitation of the maritime boundary is a necessary first step in the process. It would give certainty of title to enable concessions to be granted for oil exploration and exploitation. However, the ruling emphasised geographical factors to the exclusion of resource related criteria like the location of oil wells. Nevertheless, it appears that the boundary arrived at by the Special Chamber is advantageous to Ghana as all its important oil blocks remain within its boundaries.

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<sup>211</sup> Ibid.

<sup>212</sup> Ibid p.109.

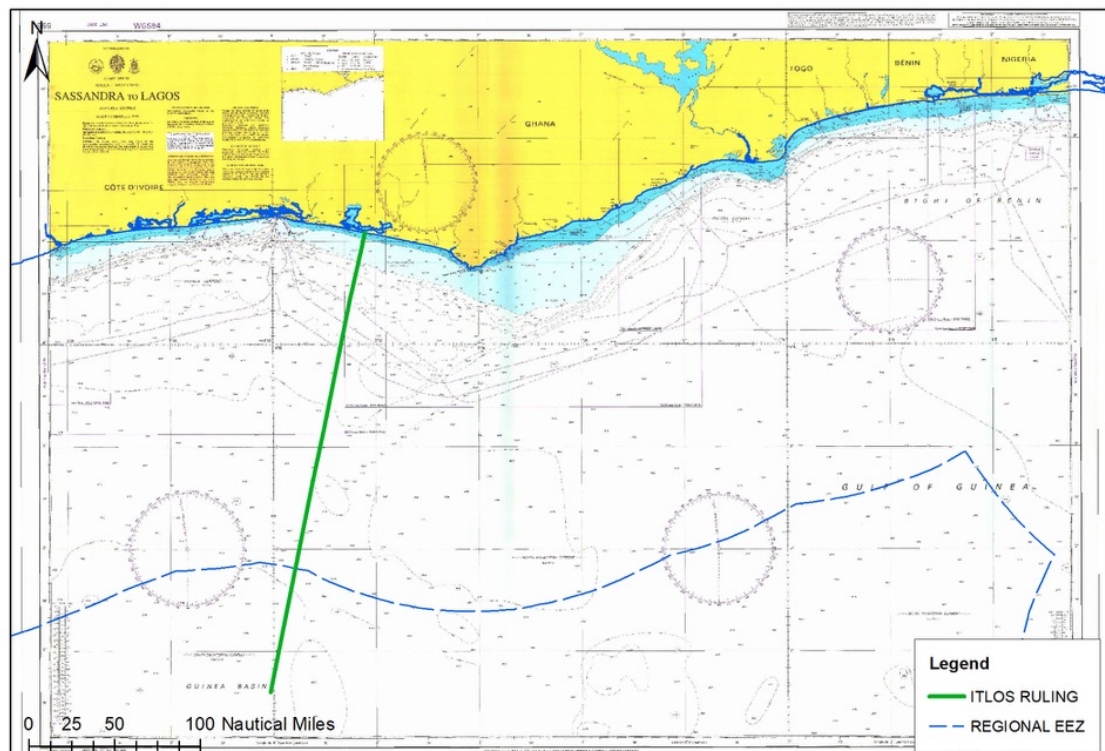
<sup>213</sup> *ibid* para 480

<sup>214</sup> Ibid para 537

<sup>215</sup> Ibid para 490

<sup>216</sup> Outcome of the Meeting with the Ivorian Counterpart on the Implementation of the ITLOS Decision Concerning the Ghana/Cote d'Ivoire Maritime Boundary Case, Abidjan, 14th -15th May 2018

Figure 4: ITLOS ruling



Source: Reproduced by Nana Adusei Poku, Lead Geomatic Engineer for Ghana National Petroleum Company

#### 1.4.2. Partially settled maritime boundaries

##### I. Nigeria and Equatorial Guinea

Equatorial Guinea consists of a mainland territory Rio Muni and five small islands - Bioko, Corisco, Annobon, Elobey Chico and Elobey Grande. Bioko the site of the capital Malabo lies 40 km off the coast of Cameroon. Annobon island is 350 km west-south-west of Cape Lopez in Gabon. Corisco and the two Elobey islands are in Corisco bay on the border of Rio Muni and Gabon. Equatorial Guinea has overlapping maritime boundaries with Cameroon and Nigeria and during the pendency of the ICJ case between Nigeria and Cameroon, Nigeria started negotiations with Equatorial Guinea for a single maritime boundary between the two states in their exclusive economic zones. The motivation for the delimitation was oil and gas activities which were becoming a very important economic activity for both states.<sup>217</sup> During bilateral

<sup>217</sup> B Mc Sherry, 'The Political Economy of Oil in Equatorial Guinea' (2006) 8 Africa Studies Quarterly 245

negotiations Equatorial Guinea proposed a median line boundary whilst Nigeria proposed an adjusted median line solution which took account of the relative lengths of their coastlines which favoured Nigeria.<sup>218</sup>

A compromise between the two positions was reached in a treaty signed on 23<sup>rd</sup> September 2000 which came into force in April 2002. The line the parties agreed upon ran from a point slightly due south of the notional Nigeria – Cameroon – Equatorial Guinea tripoint to its south-western limit on the median line between Equatorial Guinea and Sao Tome and Principe.<sup>219</sup> It was agreed that each party would confine itself to its side of the boundary.<sup>220</sup> The parties considered the oil fields belonging to the two states relevant circumstances in the delimitation. They therefore shifted the equidistance line to accommodate an oil field licensed by Nigeria so that the field was untouched by the delimitation and ensured that each party kept its oil interests.<sup>221</sup> The equidistance line was further adjusted in favour of Nigeria due to its longer coastline.<sup>222</sup> To solve the problem of the straddling oil fields on the maritime boundary arrived at, the parties agreed to make the appropriate unitisation arrangements for the area to be developed in a commercially feasible manner.<sup>223</sup> This will be discussed more fully in the next chapter dealing with joint development agreements. It is clear that the parties being free to negotiate managed to procure a line that ensured that the oil fields that were so important to them were taken into consideration in the delimitation. This could only have been achieved by the excellent cooperation between the two states. The Agreement covered only part of the maritime boundary as the ICJ was at the time, in the process of hearing the dispute between Cameroon and Nigeria. Due to the fact that the results of that case were likely to affect the other maritime boundaries in the Gulf of Guinea, the parties

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<sup>218</sup> Tim Daniels, 'Maritime Boundaries in the Gulf of Guinea' (*legacy.iho.int*) <[https://legacy.iho.int/mtg\\_docs/com\\_wg/ABLOS/ABLOS\\_Conf2/DANIEL.PDF](https://legacy.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf2/DANIEL.PDF)> accessed 29 May 2020.

<sup>219</sup> *ibid*

<sup>220</sup> Treaty between the Federal Republic of Nigeria and the Republic of Equatorial Guinea Concerning their Maritime Boundary (adopted 23 September 2000, entered into force in April 2002) (Nigeria - Equatorial Guinea Treaty) art 4 <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/NGA-GNQ2000MB.PDF>> assessed on 12 May 2012

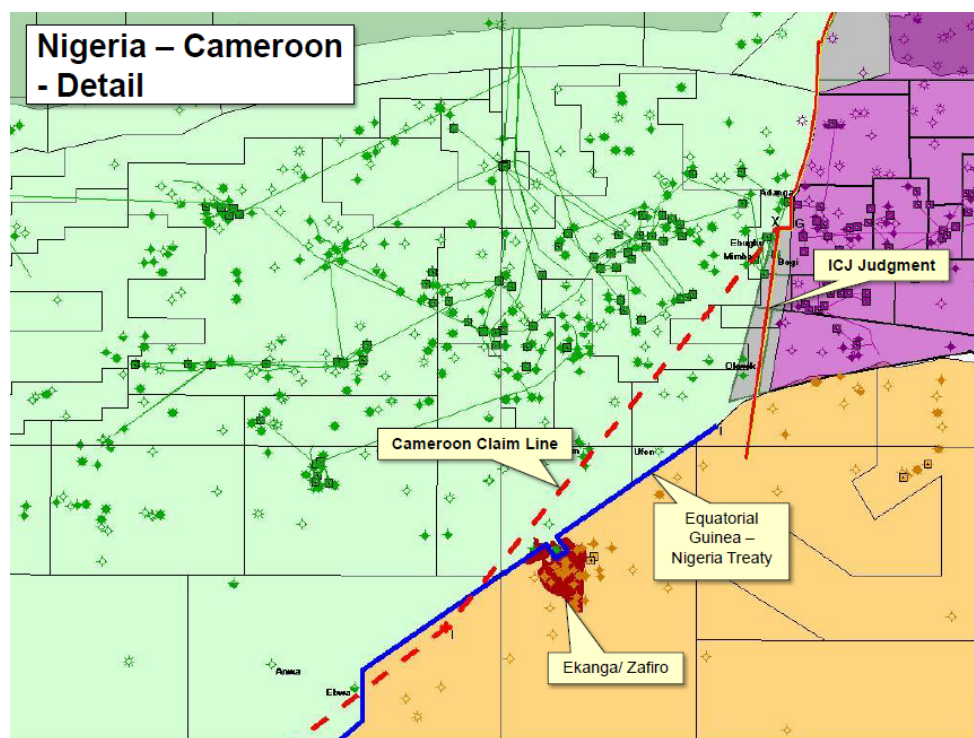
<sup>221</sup> Tim Daniels, 'Maritime Boundaries in the Gulf of Guinea' (*legacy.iho.int*) <[https://legacy.iho.int/mtg\\_docs/com\\_wg/ABLOS/ABLOS\\_Conf2/DANIEL.PDF](https://legacy.iho.int/mtg_docs/com_wg/ABLOS/ABLOS_Conf2/DANIEL.PDF)> accessed 29 May 2020

<sup>222</sup> *Cameroon /Nigeria Judgment* para.301.

<sup>223</sup> Nigeria and Equatorial Guinea Treaty

agreed therefore to complete the delimitation after the ICJ case was concluded.<sup>224</sup> This is some evidence that states in the region are not disposed to delimiting their maritime boundary in such way as to affect third parties. To date however Cameroon, Nigeria and Equatorial Guinea, have not completed this boundary.<sup>225</sup> Figure 5 below shows the Equatorial Guinea and Nigeria Treaty line depicted by the blue line.

Figure 5: Map of Nigeria-Cameroon Treaty



Source: UK Hydrographic Office

## II. Equatorial Guinea, and Sao Tome and Principe

Sao Tome and Principe is an archipelagic state with overlapping maritime boundaries with Equatorial Guinea and the two states' coasts are opposite each other. On 26 June 1999, Equatorial Guinea and the island of Sao Tome and Principe, signed a treaty in Malabo, delimiting their maritime boundary.<sup>226</sup> The preamble to the agreement stated that the delimitation was to be done in an equitable manner using equidistance as the general criterion for delimitation. This criterion had been incorporated in the national

<sup>224</sup> Ibid Article 3.

<sup>225</sup> This was communicated to the author through personal communication with an official in Nigeria.

<sup>226</sup> Treaty Regarding the Delimitation of the Maritime Boundary between the Republic of Equatorial Guinea and the Democratic Republic of Sao Tome and Principe, (adopted on 26 June 1999, entered into force in 1999) <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/GNQ-STP1999MB.PDF>> assessed on 12 May 2012

legislation of both states and so there was no dispute regarding its use. Sao Tome and Principe by its Act No.1/98 adopted on 23 March 1998 provided for the establishment of a 200 M EEZ using the “median equidistance line” as between states with opposite coasts.<sup>227</sup> Equatorial Guinea on 6 March 1999 also designated the median line as the maritime boundary of Equatorial Guinea which contains a list of geographical coordinates of points for drawing the outer limit lines of the territorial sea and the EEZ off the island of Bioko and the coast of Rio Muni to the north and the outer limits lines of the EEZ off the island of Annobon in the south.<sup>228</sup>

The boundary set out by the text of the treaty consists of two parts. The first part separates Annobón Island (belonging to Equatorial Guinea) and São Tomé Island and there is an approximate equidistance line between the two islands.<sup>229</sup> The second part of the boundary which is also an approximate equidistance line, separates the mainland Equatorial Guinea (Río Muni) from Príncipe Island.<sup>230</sup> The resulting boundary represents a compromise agreeable to these two island states. However there is no reference to the continental shelf boundaries though the two states have submitted ‘Preliminary Information Indicative of the Outer Limits of the Continental Shelf and Description of the Status of Preparation of Making a Submission’ to the CLCS.<sup>231</sup> It can be assumed that once they have completed the procedures under Article 76, the boundary would follow the one established for the EEZ. Figures 6 below show the maritime boundary agreed by the two states

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<sup>227</sup> Law of the Sea Bulletin No. 37

<sup>228</sup> Ibid No. 40

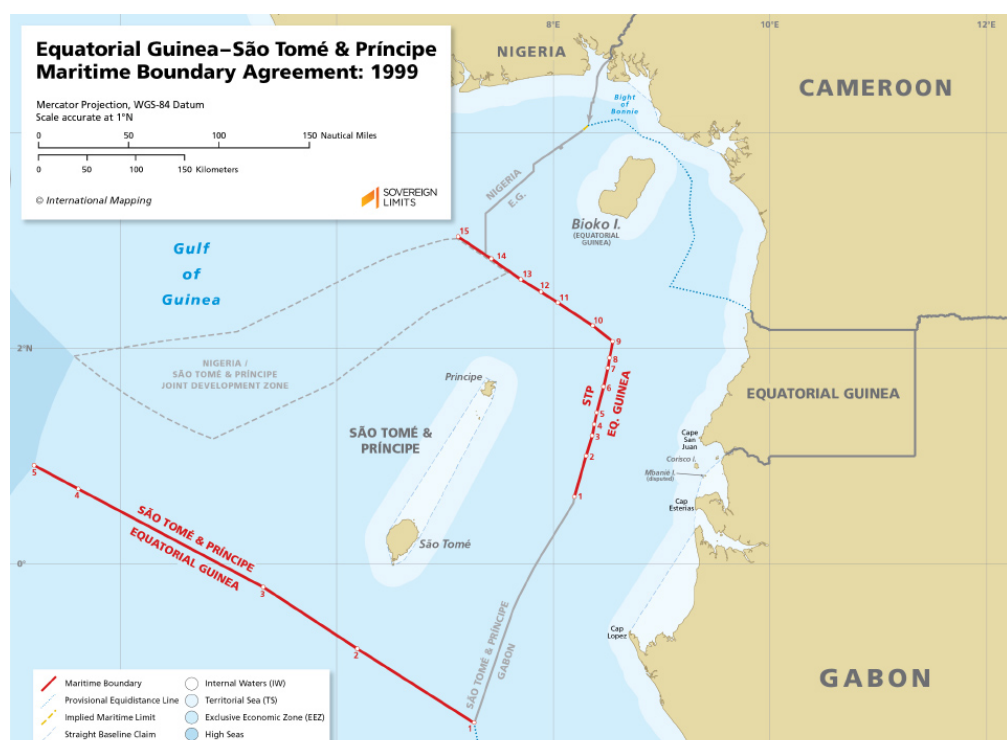
<sup>229</sup> David Colson and Robert Smith, (eds) *International Maritime Boundaries* (Martinus Nijhoff Publishers Leiden/ Boston 2005) p. 3247.

<sup>230</sup> *ibid*

<sup>231</sup> ‘1982 United Nations Convention on the Law of the Sea, Preliminary Information Submitted by the Republic of Equatorial Guinea on the Outer Limits of the Continental Shelf’ (7 May 2009) [https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/preliminary/gnq2009preliminaryinformation.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/gnq2009preliminaryinformation.pdf) assessed on 12 May 2012; ‘Preliminary Information Indicative of the outer limits of the continental shelf and Description of the status of preparation of making a submission To the Commission on the Limits of the Continental Shelf for the Democratic Republic of São Tomé and Príncipe’ (13 May 2009) <[https://www.un.org/Depts/los/clcs\\_new/commission\\_preliminary.htm](https://www.un.org/Depts/los/clcs_new/commission_preliminary.htm)> assessed on 12 May 2012



Figure 6 Equatorial Guinea and Sao Tome and Principe Maritime Boundary Agreement



Source: 'Equatorial Guinea–São Tomé & Príncipe Maritime Boundary Agreement' (*Sovereign Limits*, 2020) <<https://sovereignlimits.com/boundaries/equatorial-guinea-sao-tome-and-principe>> accessed 29 May 2020.

### III. Gabon and Sao Tome and Principe

São Tomé and Príncipe islands are about 250 km west of northern Gabon. They are 140 km apart and form the southwestern end of a chain of mountains and islands. Sao Tome and Principe and Gabon are states with opposite coasts in the Gulf of Guinea. In 2001, they negotiated an agreement for their maritime Boundary.<sup>232</sup> The line of delimitation was drawn equidistant from the baselines from which the territorial sea of each State is measured. Sao Tome and Principe used a system of archipelagic baselines and Gabon a straight baseline system as declared in their respective legislations.<sup>233</sup> The method of

<sup>232</sup> Agreement on the Delimitation of the Maritime Border between the Gabonese Republic and the Democratic Republic of Sao Tome and Principe, (adopted on 26 April 2001, not in force) <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/GAB-STP2001MB.PDF>>

<sup>233</sup> Sao Tome and Principe revoked its earlier maritime legislation and replaced it with Law No. 1/98 which delimited the outer limits of its EEZ. Gabon claimed a 12-nm territorial sea and EEZ of 200 nm under Act No. 9 of 1984.

delimitation used was equidistance between the two baseline systems.<sup>234</sup> It appears that proportionality did not play a part in arriving at the agreed boundary line notwithstanding the fact that Sao Tome and Principe is a group of islands whose relevant coastline is shorter than that of Gabon. The equidistance line however could not be completed in the treaty due to the fact that in both the north and the south, the maritime boundary with Equatorial Guinea had not yet been fixed. This pending boundary is discussed in the section on pending boundaries below.

Figure 7: Gabon -Sao Tome and Principe maritime Boundary Agreement



Source: 'Gabon-São Tomé And Príncipe' <[https://sovereignlimits.com/wp-content/uploads/sites/2/2019/04/GAB\\_STP\\_web.jpg](https://sovereignlimits.com/wp-content/uploads/sites/2/2019/04/GAB_STP_web.jpg)> accessed 23 May 2020

Even though Articles 74 and 83 of UNCLOS do not specify the method of maritime delimitation, states are free to use any method they choose to arrive at a maritime

<sup>234</sup> Agreement on the Delimitation of the Maritime Border between the Gabonese Republic and the Democratic Republic of Sao Tome and Principe, (adopted on 26 April 2001, not in force) <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/GAB-STP2001MB.PDF>> art 2.

boundary between them. However, in these delimitations the states chose to apply international law principles.

### **1.4.3. Pending Maritime boundaries in the Gulf of Guinea**

The maritime zones of most of the states in the Gulf of Guinea overlap and remain to be determined. The unique geography of the region shows bilateral and trilateral maritime boundary relationships. In the discussions that follow these bilateral and trilateral relationships will first be identified and then analysed using the principles and methods discussed in the first part as developed in international jurisprudence.

#### **I. Nigeria and Benin**

Benin is located on the Gulf of Guinea, has a coastal length of approximately 125 km and is adjacent to Nigeria to the east and Togo to the west. It has a concave coast and would have to delimit maritime boundaries with Togo and Nigeria and has indicated that it shares a continental shelf with Ghana and Cote d'Ivoire as well.<sup>235</sup> Negotiations begun in 1968 for an agreement on the maritime boundary between the Benin and Nigeria, following Nigeria's protest against Benin granting an exploration license in the area. Negotiations stalled many times and in August 2006, Benin and Nigeria signed a maritime boundary treaty which has not yet been ratified by Benin but has been ratified by Nigeria.<sup>236</sup> The maritime boundary is a single all-purpose boundary.<sup>237</sup>

The coastline between Nigeria and Benin, taking the other neighbours like Togo and Ghana into account, make the use of the strict equidistance method difficult.<sup>238</sup> This is

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<sup>235</sup> Republic of Benin, 'Informations Préliminaires Indicatives sur les Limites Extérieures du Plateau Continental du Benin', (May 2009)

<[https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/preliminary/ben\\_2009preliminaryinformati on\\_update.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/ben_2009preliminaryinformati on_update.pdf)> Accessed 12 May 2020

<sup>236</sup> Kamal-Deen Ali and Martin Tsamenyi, 'Fault Lines in Maritime Security' (2013) 22 African Security Review 7; Republic of Benin, 'Informations Préliminaires Indicatives sur les Limites Extérieures du Plateau Continental du Benin', (May 2009)

<[https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/preliminary/ben\\_2009preliminaryinformati on\\_update.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/ben_2009preliminaryinformati on_update.pdf)> Accessed 12 May 2020

Nigeria First (Abuja), 'Nigeria: FEC Ratifies New Maritime Boundary with Benin Republic, Approves 2 Gas Turbine Plants, Others' (2006)

<<https://allafrica.com/stories/200610091346.html>> accessed 29 May 2020.

<sup>237</sup> Treaty on the Maritime Boundary and Memorandum of Understanding (MOU) (Benin/Nigeria) (signed 4 August 2006, not in force). Reproduced with a full discussion in David Colson and Robert Smith (eds), *International Maritime Boundaries* (The American Society of International Law 2011) 4256–4269. Article 5 of the Treaty shows that the boundary covers the airspace, waters, seabed or subsoil. Nigeria has the western side whilst Benin has the eastern side of the boundary.

<sup>238</sup> *ibid*

due to the protrusions in the Nigerian and Ghanaian coastline. The equidistance line takes a sharp turn away from Nigeria's coastline and then back towards Ghana thereby cutting off a big chunk of the maritime space in front of Benin's coastline. The line as it progresses is intercepted by the Togo/Ghana line where Togo is then cut off and the line continues with only Nigeria and Ghana featuring on it at the last 12 M and towards the outer limits of both parties EEZ.<sup>239</sup> These were obviously the relevant circumstances that called for the parties to adjust the equidistance line more towards Benin's side of the boundary whilst compensating Nigeria to the northern section.<sup>240</sup> The line then looked like a meridian drawn as a perpendicular from the coastline. Benin thus got a full 200 M EEZ but the endpoint of the boundary has not been determined as Ghana was involved at that point creating a trilateral relationship between them.<sup>241</sup> In its preamble, the treaty refers to UNCLOS and reiterates that the parties have agreed the treaty in a spirit of brotherhood and goodwill.<sup>242</sup>

The agreement is generally regarded as favouring Benin because it departs from a strict application of the equidistance method which would have meant that Benin would have a much more limited maritime space (Figure 7 shows the treaty line).<sup>243</sup> It would be recalled that Benin has submitted preliminary information to the Commission on the Limits of the Continental Shelf for an extended continental shelf (which it subsequently updated), showing that it is using the meridian method for delimitation with its neighbours.<sup>244</sup> This makes unclear the status of the treaty with Nigeria where equidistance was used especially as Benin's parliament has declined to ratify the treaty.<sup>245</sup> The parties may have to re-negotiate the treaty.

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<sup>239</sup> *ibid*

<sup>240</sup> *ibid*

<sup>241</sup> *ibid*

<sup>242</sup> *ibid*

<sup>243</sup> David Colson and Robert Smith (eds), *International Maritime Boundaries* (The American Society of International Law 2011) 4261

<sup>244</sup> Republic of Benin, 'Informations Préliminaires Indicatives sur les Limites Extérieures du Plateau Continental du Bénin', (May 2009)

<[https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/preliminary/ben\\_2009preliminaryinformati on\\_update.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/preliminary/ben_2009preliminaryinformati on_update.pdf)> Accessed 12 May 2020

<sup>245</sup> 'Le Parlement Du Bénin Rejette Un Traité Sur La Délimitation De Frontière Maritime Avec Le Nigeria-Le Quotidien Du Peuple En Ligne' (*French.peopledaily.com.cn*, 2011)

<<http://french.peopledaily.com.cn/96852/7679175.html>> accessed 19 April 2020.

Figure 8: Benin-Nigeria Maritime Boundary Agreement



Source: Benin-Nigeria' <[https://sovereignlimits.com/wp-content/uploads/sites/2/2019/04/BEN\\_NGA\\_web.jpg](https://sovereignlimits.com/wp-content/uploads/sites/2/2019/04/BEN_NGA_web.jpg)> accessed 23 May 2020

## II. Nigeria and Sao Tome and Principe

Nigeria and Sao Tome and Principe are opposite each other. Whilst Nigeria was negotiating with Equatorial Guinea, it was also negotiating with Sao Tome and Principe. The latter claimed a 200-mile exclusive economic zone, limited in the north-east by the median line negotiated with Equatorial Guinea and in the north - west by what Sao Tome and Principe perceived as the median line between it and Nigeria. Nigeria, on the other hand, under its 200-mile EEZ legislation, claimed an area which overlapped very considerably with Sao Tome and Principe's exclusive economic zone. The negotiations which had been difficult resulted in the setting up of a Joint Development Zone for the

exploitation of resources.<sup>246</sup> This will be discussed in more detail in the next chapter. The settlement of the maritime boundary having been suspended the parties would have to finish the delimitation at a later date. In this delimitation, the huge disparity in the length of the respective coastlines of the two countries may be a relevant factor to be considered in any decision to shift the equidistance line.

### **III. Ghana, Togo and Benin**

Like in the Bay of Bengal, the likely of grey areas in the GOG is high. One such is likely between Ghana and Togo. Using the equidistance line Togo is likely to be cut off about 70 M into its EEZ due to a protrusion near the eastern boundary at Cape St Paul. To avoid this cut off and accord Togo its full EEZ of 200 M there may be the need to adjust the equidistance line. Once that happens it is likely that the sort of situation between Bangladesh and Myanmar would be created where Ghana's extended continental shelf would then be situated within Togo's EEZ so that Togo would have sovereign rights over the superadjacent waters whilst Ghana has rights over the extended continental shelf. The only way the two states can coexist in this situation is by finding creative ways of cooperating as recommended by the tribunals in the Bay of Bengal cases.

Ghana, Togo and Benin are adjacent states whose geographical situation is such that the coasts of Togo and Benin are concave but that of Ghana is not. The length of their coastlines is also unequal as Ghana has a coastal façade of about 500 kilometres, whereas Benin and Togo have one which is ten times shorter, and therefore their maritime zones are enclaved by the maritime zones of Ghana and Nigeria. Regarding the maritime boundary between Ghana and Togo, one expert<sup>247</sup> suggests that the relevant coast could be from Achowa point (on Cape Three Points in Ghana) to Anecho (Togo/Benin boundary) whose northern limit is in the 12M limit of the territorial sea and southern limit is the 200 M EEZ limit.<sup>248</sup> The western limit is the median line boundary with Ivory Coast and the eastern limit is the median line boundary between Togo / Benin, and Ghana / Nigeria. The coastal fronts are Newtown to Aflao to Anecho

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<sup>246</sup> David Colson and Robert Smith, *International maritime boundaries* (Martinus Nijhoff Publishers 2005) Leiden/Boston Vol V 3433

<sup>247</sup> J.C.E White, 'Maritime Boundaries: Report on the Report on the Technical Aspects of the Delimitation of Ghana's Maritime Boundaries' (The Commonwealth Secretariat Marlborough House Pall Mall London 1987).

<sup>248</sup> *ibid*

(Togo). These direct coastal fronts are more likely to be considered by a Court or tribunal because they could be regarded as the relevant area for the delimitation in a delimitation between Ghana and Togo.<sup>249</sup> In considering only the Ghana /Togo area, Togo's area would lie partly east of the Togo/ Benin median line and partly west of the Ghana /Togo median line.<sup>250</sup>

The area east of the Togo / Benin line would have to be settled between Togo and Benin. This scenario, as noted by Tim Daniels, puts Ghana, Togo and Benin in an interesting juxtaposition.<sup>251</sup> He observes that if a pure equidistance is used, for delimitation of the three states maritime boundaries, Togo would be cut-off like Germany was in the North Sea whilst Ghana would be afforded a disproportionate offshore area,<sup>252</sup> This is due to the protrusion at Cape Saint Paul on the eastern boundary, which causes the equidistance line to deflect outwards. Togo could therefore argue that there are special or relevant circumstances to shift the equidistance line. Beazley makes suggestions for such situations when he stated that "...by employing a general direction or general directions of the coast and a series of perpendiculars to form the maritime boundaries, many of the anomalies which might result from using strict or modified equidistance could be avoided."<sup>253</sup> The likely disadvantage of this method is that it is often impracticable to establish any general direction of the coast as it would depend on the scale of the charts used and how much coast is used to determine any general direction.<sup>254</sup> In the *Guinea / Guinea - Bissau Arbitration*,<sup>255</sup> where this method was used, the coasts were partly adjacent and partly opposite as well as concave whilst the rest of the west African coast was convex. The Tribunal took these facts into account

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<sup>249</sup> Ibid.

<sup>250</sup> Ibid

<sup>251</sup> David Colson and Robert Smith, *International Maritime Boundaries* (Vol 5) (Martinus Nijhoff publishers 2005) 3432

<sup>252</sup> ibid

<sup>253</sup> P.B. Beazley, 'Half-Effect Applied to Equidistance Lines' (1979) LVI (1) *International Hydrographic Review* 153-160

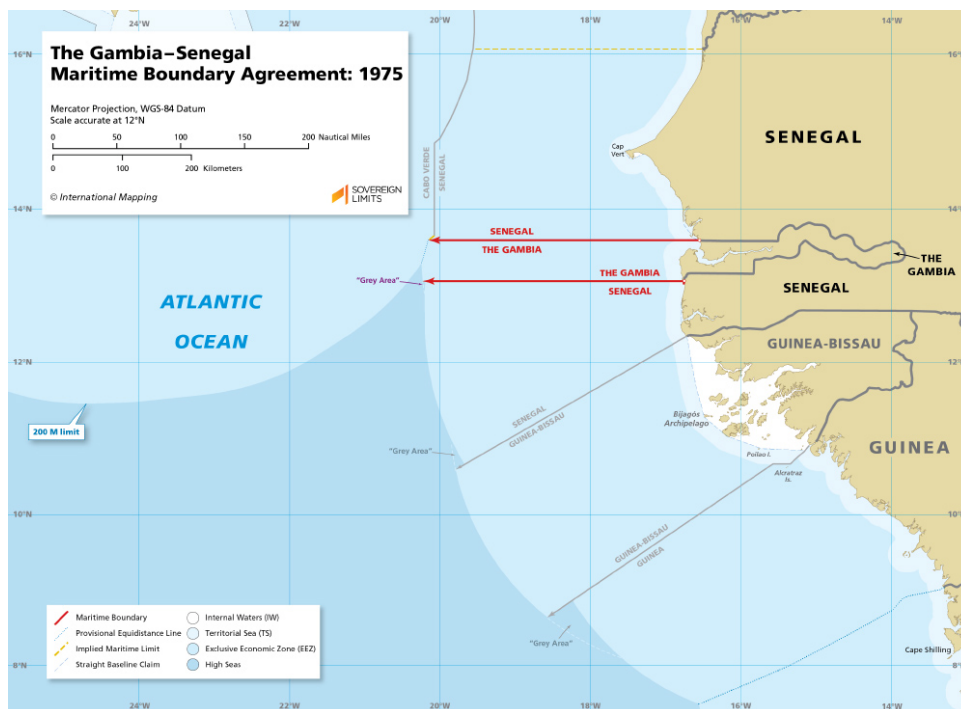
<sup>254</sup> It was noted in 1956 by the International Law Commission in its deliberation on the method to be used to delimit the territorial sea. During discussions, the Norwegian and Swedish Governments drew attention to the arbitral award of 23 October 1909 in a dispute between Norway and Sweden, where the Tribunal stated that "the delimitation should be made...by drawing a line perpendicular to the general direction of the coast, taking careful account of the need to indicate the boundary in a clear and unequivocal manner, and of making its observation as easy as possible for the interested parties; Whereas, in order to ascertain what this direction is, we must equally take into account the direction of the coast situated on both sides of the boundary;" See ILC, 'Report of the International Law Commission to the General Assembly' (1956) II Yearbook of the International Law Commission 272.

<sup>255</sup> *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau*, RIAA, Vol. XIX.

and to avoid a cut-off effect took into consideration the general direction of the coastline of West Africa and drew a straight-line perpendicular to it.<sup>256</sup>

In the larger region states have occasionally used other methods like parallels of latitude or meridians of longitude in situations of cut off. For example, Gambia/ Senegal have used the parallels of latitude solution to avoid a cut-off for the Gambia as figure 9 below shows.

Figure 9: The Gambia-Senegal Maritime Boundary Agreement <sup>257</sup>



Source: 'The Senegal-Gambia' <[https://sovereignlimits.com/wp-content/uploads/sites/2/2019/04/GMB\\_SEN\\_web.jpg](https://sovereignlimits.com/wp-content/uploads/sites/2/2019/04/GMB_SEN_web.jpg)> accessed 23 May 2020.

Togo has prescribed that the method of delimitation with Ghana and Benin would be by meridians.<sup>258</sup> These methods are rarely used in the region and current jurisprudence does not support it. In line with the jurisprudence, the states have to first draw a provisional equidistance line and then adjust it as necessary to take account of special circumstances like cut-offs to arrive at an equitable solution. Thereafter, there should

<sup>256</sup>Ibid para 108

<sup>257</sup> 'The Senegal-Gambia' <[https://sovereignlimits.com/wp-content/uploads/sites/2/2019/04/GMB\\_SEN\\_web.jpg](https://sovereignlimits.com/wp-content/uploads/sites/2/2019/04/GMB_SEN_web.jpg)> accessed 23 May 2020.

<sup>258</sup> See Transcript of Hearing ITLOS/PV.17/C23/5/Rev.1.(Pitron)



be a check to determine whether any disproportionality has been created by the line. The parties would need to consider cases like the *Tunisia/Libya Continental Shelf* case where the court modified the equidistance line so that it was not so close to the Tunisian coast as to encroach on Tunisia's seaward extension.<sup>259</sup> Another case to consider would be the *Gulf of Fonseca case (El Salvador / Honduras) Nicaragua intervening*, the court adjusting the equidistance line prevented a serious cut off for Honduras which would otherwise have been left with a narrow corridor between El Salvador and Nicaragua.<sup>260</sup> A more recent case which can further be considered is the *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*<sup>261</sup> where it was determined that, in order to warrant an adjustment of a provisional equidistance line, such cut-off effect must, first, prevent the State from extending its maritime boundary as far as international law permits and, second, prevent an equitable solution from being reached. These two conditions can be said to exist in the delimitation between Ghana, Togo and Benin as illustrated by Figure 10 below.

Figure 10 showing Togo's cut off if a pure equidistance line is used



Source: Redrawn from J.C.E White, 'Maritime Boundaries: Report on the Report on the Technical Aspects of the Delimitation of Ghana's Maritime Boundaries' (The Commonwealth Secretariat Marlborough House Pall Mall London 1987) by Nana Adusei Poku

<sup>259</sup> *Case concerning the Continental Shelf Delimitation (Tunisia v. Libyan Arab Jamahiriya)*, [1982], I.C.J. Rep 18.

<sup>260</sup> *Land, Island and Maritime Frontier Dispute, El Salvador and Nicaragua (intervening) v Honduras, Judgment, Merits*, ICJ GL No 75, [1992] ICJ Rep 351,

<sup>261</sup> *Bangladesh and India*, case para. 417

A solution for the states would be for them to agree on the relevant coasts and basepoints and then according to the jurisprudence construct a provisional equidistance line. As there are clearly geographical factors that merit an adjustment, the countries can agree to modify the line by deflecting it after the point where Togo would have cut off by a strict equidistance in such a way as to allow Togo its 200M EEZ. This would have to be done with the cooperation of both Benin and Nigeria in order for any maritime boundary agreed on to be equitable.

This negotiation could be achieved through the facilitation of the already existing Ghana - Togo Permanent Joint Commission for Co-operation. This body is made up of high-level officials of both states and initially served as a framework for discussing issues of importance to the states like cooperation in the sectors of security, immigration, agriculture and environment among others.<sup>262</sup> However, in recent times maritime boundary delimitation has featured highly on the agenda of the Commission's meetings. This has been prompted by some incidents of Togolese authorities challenging Ghanaian vessels in waters Ghana believed to be its waters.<sup>263</sup> Subsequently at a meeting between the presidents of the two states, the Ghanaian president gave an indication that Ghana might be more favourably disposed to cooperative measures rather than third party dispute settlement in the delimitation of the maritime boundary between the two states.<sup>264</sup>

Togo also appears to favour negotiation above third-party dispute settlement. Its cabinet has adopted legislation dated 6 July 2011, regarding, the, "delimitation of the maritime boundaries of the Togolese Republic with the Republic of Benin to the east and the Republic of Ghana to the west by the meridians of the boundary posts located on the baselines of the territorial sea of the Togolese Republic".<sup>265</sup> This decree, it is reported, provides the legal framework for the delimitation of the maritime boundaries between

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<sup>262</sup> Communications Bureau, 'Ghana, Togo Resolve to Deepen Co-Operation & Bilateral Ties' (*Presidency.gov.gh*, 2017) <<http://presidency.gov.gh/briefing-room/news-style-2/230-ghana-togo-resolve-to-deepen-co-operation-bilateral-ties>> accessed 18 May 2020.

<sup>263</sup> Republic of Ghana and Republic of Togo, 'Outcome of Meeting Between Ghana and Togo on the Delimitation of the Maritime Boundary Held at the Accra International Conference Centre' (5 June 2018) This document which is not publicly available is in the author's possession.

<sup>264</sup> *Ibid.*

<sup>265</sup> 'Togo To Demarcate Maritime Borders with Ghana, Benin - People's Daily Online' (*En.people.cn*, 2011) <<http://en.people.cn/90001/90777/90855/7433628.html>> accessed 20 April 2020.

Togo and its neighbours to the east and west.<sup>266</sup> Negotiations have begun in earnest between the two countries. A survey team made up of officials from Ghana and Togo met at the border between Ghana and Togo to adopt a common methodology for the conduct of field work to determine the land boundary terminus from where the maritime boundary would be delimited.<sup>267</sup>

Regarding Togo and Benin, a Joint Commission is in active negotiation to settle the maritime boundary between them.<sup>268</sup> Some preliminary work in this regard has been carried out jointly by the two countries including the reconstruction of four boundary markers at their land boundary terminus which were washed away by coastal erosion; developing and editing, of a 1: 10,000 scale map of the coastal section necessary for the delimitation of the Benin-Togolese maritime boundary.<sup>269</sup> As evidence of their cooperation, a joint Preliminary Information has been submitted to the CLCS for an extended continental Shelf in May 2009. Both countries have decided to adopt the meridian method for the delimitation of their maritime boundary.<sup>270</sup> On September 24 and 25, 2019 in Cotonou, in the Republic of Benin, the ninth session of the Benin-Togo Joint Commission for the delimitation of the maritime boundary was held. It addressed especially the submission of their continental shelf beyond 200M and the parties were satisfied with the significant strides made so far. In making these decisions, these two states have had no regard to Nigeria and Ghana, their closest neighbours, which would be affected by the outcome of this negotiation. There may well be challenges if all the states along that stretch of coast do not concur to the adoption of this method. This Commission would therefore have to further cooperate with Ghana and Nigeria in this negotiation for a successful outcome.

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<sup>266</sup> Ibid.

<sup>267</sup> 'Fifth Meeting on Ghana/Togo Maritime Boundary Negotiations Opens in Accra' (*Ghanaweb.com*, 2019) <<https://www.ghanaweb.com/GhanaHomePage/business/Fifth-meeting-on-Ghana-Togo-Maritime-Boundary-Negotiations-opens-in-Accra-775145>> accessed 20 April 2020.

<sup>268</sup> 'Réunion De La Commission Mixte Togo-Bénin De Délimitation Des Frontières - Le Hub Rural' (*Hubrural.org*, 2020) <<http://hubrural.org/Reunion-de-la-Commission-mixte.html?lang=fr>> accessed 20 April 2020.

<sup>269</sup> Agence Ecofin, 'Le Togo Protège Ses Frontières Maritimes' (*Agence Ecofin*, 2011) <<https://www.agenceecofin.com/gestion-publique/0408-760-le-togo-protège-ses-frontières-maritimes>> accessed 18 May 2020.

<sup>270</sup> Republic of Benin, 'Informations Préliminaires Indicatives sur les Limites Extérieures du Plateau Continental du Bénin', (May 2009) <[https://www.un.org/Depts/los/cles\\_new/submissions\\_files/preliminary/ben\\_2009preliminaryinformati on\\_update.pdf](https://www.un.org/Depts/los/cles_new/submissions_files/preliminary/ben_2009preliminaryinformati on_update.pdf)> Accessed 12 May 2020

#### IV. Ghana, Benin and Nigeria

Regarding the Ghana, Benin and Nigeria maritime boundary, the configuration of the Ghana and Nigeria coastline shows protrusions of the Niger Delta in Nigeria and Cape Three points in Ghana. The configuration of Nigeria's coastline to the east of the Nigeria/Benin equidistance line is a stretch of line which goes out to the full 200 miles where Nigeria and Ghana likely have a common maritime boundary.<sup>271</sup> Nigeria and Benin have already agreed a maritime boundary in 2006, using the equidistance method, albeit not yet in force.<sup>272</sup> Nigeria is currently in negotiations with Ghana to delimit the two parties' maritime boundary.<sup>273</sup> The parties have agreed to use the same median rule they used in the preparations of the Extended Continental Shelf submissions and to finalise the base points and establish the contributing points to the Exclusive Economic Zone (EEZ) outer limits;<sup>274</sup> They decided to set up a Joint Committee to collate relevant data and construct the maritime boundary using an appropriate software and to draft a maritime boundary treaty for discussion by the parties.<sup>275</sup>

The boundary between Nigeria and Ghana results in a tripoint which includes Benin. Therefore, the three countries in their negotiations would have to cooperate to agree on the tripoint to complete the maritime boundary. If this does not happen then Ghana and Nigeria would have to delimit the boundary in such a way as not to prejudice Benin's right to its maritime boundary which would be difficult. This would be in line with the international law principle *pacta tertiis nec nocent nec prosunt* whereby agreements are only binding on states which are party to it.<sup>276</sup> It would also accord with other examples in the region, where in their maritime boundary treaties states have left the section of the boundaries where third states become involved, undelimited. In view of the indications by Benin's legislation not to ratify the Treaty with Nigeria, it is likely that

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<sup>271</sup> J.C.E White, 'Maritime Boundaries: Report on the Report on the Technical Aspects of the Delimitation of Ghana's Maritime Boundaries' (The Commonwealth Secretariat Marlborough House Pall Mall London 1987)

<sup>272</sup> Treaty on the Maritime Boundary and Memorandum of Understanding (MOU) (Benin/Nigeria) (signed 4 August 2006, not in force)

<sup>273</sup> 5 meetings of the Negotiation of Maritime Boundary between Nigeria and Ghana have held since 2008

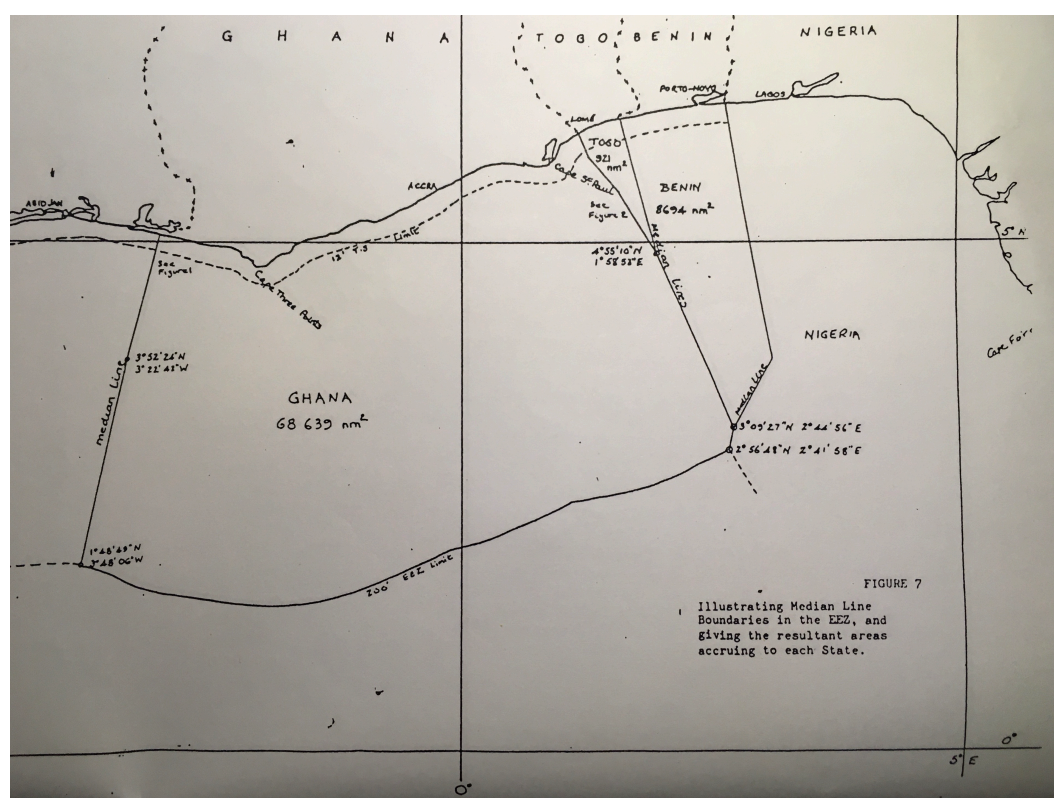
<sup>274</sup> 'Ghana-Nigeria Maritime Boundary delimitation Within 200 nautical Miles' (6<sup>th</sup> Meeting held in Accra on 10 January 2012).

<sup>275</sup> *ibid*

<sup>276</sup> Latin: a treaty binds the parties and only the parties; it does not create obligations for a third states. See Graham Gooch and Michael Williams, *A Dictionary of Law Enforcement* (Oxford University Press 2007)

the parties may have to renegotiate the boundary and Benin is very likely to press for the meridian method.<sup>277</sup> This would complicate the settlement of the maritime boundary and would also not be in accordance with the current principles and practical methods of maritime boundary delimitation as developed by international courts and tribunals.

Figure 11: Map demonstrating the median line boundaries in the EEZ of Ghana, Togo, Benin and Nigeria



**Source:** J.C.E White, 'Maritime Boundaries: Report on the Report on the Technical Aspects of the Delimitation of Ghana's Maritime Boundaries' (The Commonwealth Secretariat Marlborough House Pall Mall London 1987)

## V. Cameroon, Equatorial Guinea and Nigeria

As discussed above, the ICJ in the Nigeria / Cameroon case, noted that the equidistance line it had adopted for the delimitation between Nigeria and Cameroon could not be

<sup>277</sup> In the Preliminary Information Benin, has presented to the Commission on the Limits of the Continental Shelf, after its agreement with Nigeria, it has indicated a preference for the meridian method. Republic of Benin, 'Informations Préliminaires Indicatives sur les Limites Extérieures du Plateau Continental du Benin', (May 2009) <[https://www.un.org/Depts/los/cles\\_new/submissions\\_files/preliminary/ben\\_2009preliminaryinformati on\\_update.pdf](https://www.un.org/Depts/los/cles_new/submissions_files/preliminary/ben_2009preliminaryinformati on_update.pdf)> Accessed 12 May 2020

extended very far.<sup>278</sup> This was because the court held that it did not have the jurisdiction to take a decision which might affect the rights of Equatorial Guinea whose island, Bioko is situated less than 24 M from Cameroon's coast.<sup>279</sup> Additionally, Nigeria already had a partial maritime boundary agreement with Equatorial Guinea. Therefore, the maritime boundary can only be completed between the three states if they come together to determine their tripoint boundary. The most likely method to be used would be the equidistance method since the ICJ had already shown the direction the line would go leaving the endpoint to the parties.<sup>280</sup> Further, the respective parties' maritime legislations specify equidistance as the method of delimitation.<sup>281</sup> The geography of the area would require a decision to be taken on the treatment to be given to the island of Bioko which can be said to constitute a relevant circumstance due to its closeness to the outer limit of the territorial seas of both Cameroon and Nigeria.

In the *Cameroon/Nigeria* case Equatorial Guinea emphasised two important facts about the island of Bioko. First, that it is an island of "substantial size and importance" being about 2000 sq. kilometres with a population representing a quarter of Equatorial Guinea's population. It is also home to Equatorial Guinea's capital Malabo. This island, Equatorial Guinea emphasized cannot be ignored or enclaved as advocated by

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<sup>278</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, [2002] ICJ Rep para 307.

<sup>279</sup> *Ibid*

<sup>280</sup> *Nigeria/Cameroon* case para. 307.

<sup>281</sup> Article 10 of the Act No. 15/1984 of 12 November 1984 on the Territorial Sea and Exclusive Economic Zone of the Republic of Equatorial Guinea (1) states that "The exclusive economic zone is an area beyond and adjacent to the territorial sea. The exclusive economic zone of the Republic of Equatorial Guinea extends from the outer limit of the territorial sea of the Republic of Equatorial Guinea up to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Article 11 (1) of the Act dealing with the EEZ state that, "Except where otherwise provided in international treaties concluded with States whose coastlines are opposite or adjacent to those of Equatorial Guinea, the outer limit of the exclusive economic zone of Equatorial Guinea shall not extend beyond the equidistant median line. (2). Equidistant line means that line every point of which is at an equal distance from the nearest points on the line of passage drawn from each State in accordance with international law. By Article 4 of Act No.1/1999 of 6 March 1999 designating the median line as the maritime boundary of the Republic of Equatorial Guinea, it was provided that the boundaries of the maritime jurisdiction of the Republic of Equatorial Guinea, as designated in articles 1, 2 and 3 of this Act, (which clearly sets out the coordinates for the respective maritime boundaries) are intended to be without prejudice to any other decision which the Government may take in the future in relation to each of its neighbouring Governments regarding the boundaries of the aforementioned maritime jurisdiction in the areas in question. The Nigerian legislation on maritime boundaries - Exclusive Economic Zone Decree No. 28 of 5 October 1978 provides that the provisions of any treaty or other written agreement between Nigeria and any neighbouring littoral State, the delimitation of the Exclusive Zone between Nigeria and any such State shall be the median or equidistance line. Cameroon for its part has by its legislation (Act No 74/16 of 5 December 1974 Fixing the Limit of the Territorial Waters of the United Republic of Cameroon) fixed its territorial sea at 50 nm but has not claimed any EEZ.

Cameroon.<sup>282</sup> Nigeria in support of Equatorial Guinea's position, was of the view that Bioko is a substantial island in terms of area and population and also the seat of Equatorial Guinea's capital and therefore cannot be totally ignored or simply treated as a relevant circumstance but be accorded partial effect.<sup>283</sup> It appears that a potential solution would be to give Bioko a corridor as was done in the *Saint Pierre and Miquelon* Case where a corridor running north to south of about 188-nautical-mile (348 km) south of the islands was awarded to France, presumably to allow France access to its EEZ from international waters without having to pass through the Canadian EEZ.<sup>284</sup> This delimitation of the maritime boundary between the three states is further complicated by a sovereignty dispute between Equatorial Guinea and Cameroon over an island at the mouth of the Ntem River. The states are obliged under international law to cooperate in this situation in order to produce an equitable solution.

## **VI. Equatorial Guinea, Gabon and Sao Tome and Principe.**

Sao Tome and Principe as described above is an archipelago opposite Equatorial Guinea and Gabon. The situation with the potential maritime boundary between Equatorial Guinea, Gabon and Sao Tome and Principe, is that though Sao Tome and Principe has delimited boundaries with both Equatorial Guinea and Gabon there are overlapping endpoints.<sup>285</sup> The Gabon / Sao Tome and Principe endpoint is approximately 7 M north of and beyond the Equatorial Guinea – Sao Tome and Principe endpoint.<sup>286</sup> In the south Gabon and Equatorial Guinea must agree on the effect of the tiny island Annobon which belongs to Equatorial Guinea. The eastern and southern sectors of Sao Tome and Principe's EEZ are also affected by the Equatorial Guinean mainland, Rio Muni and the Annobon island belonging to Equatorial Guinea, and Gabon.<sup>287</sup>

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<sup>282</sup> 'Written Statement of the Republic of Equatorial Guinea,' *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2001] ICJ Pleadings 197-232.

<sup>283</sup> *Nigeria/Cameroon* case Para 279

<sup>284</sup> *Case concerning the delimitation of maritime areas between Canada and France* (1992) XXI RIAA para.

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<sup>285</sup> Jonathan Charney and Robert Smith R (eds) *International Maritime Boundaries* (Martinus Nijhoff Publishers Leiden/Boston 2002) Vol 4 Report No. 4-8; 4-11.

<sup>286</sup> *Ibid.*

<sup>287</sup> David Colson and Robert Smith, *International maritime boundaries* (Martinus Nijhoff Publishers 2005) Leiden/Boston Vol V 3643.

Gabon and Equatorial Guinea are adjacent states but because of the islands of Annobon and Rio Muni belonging to Equatorial Guinea, they are also in a position of oppositeness. The two states dispute sovereignty of the islands in Corisco Bay. The bay covers about 2,700 sq.km and the Corisco island which has an area of 14 sq.km is part of Equatorial Guinea and is at the mouth of Corisco Bay off the coast of West Africa.<sup>288</sup> Within the Corisco Bay are the Equatorial Guinean islands namely Corisco island, Elobey Grande and Elobey Chico which are inhabited. There are also several small uninhabited islands in the bay – Mbanie, Coctotiers and Congas and it these, that the states are disputing because of the high likelihood that the area has a rich deposit of oil.<sup>289</sup> This may account for the delay in finding a solution to the maritime boundary dispute between the two states. The dispute surfaced in 1972 and relates to the interpretation of Article 7 of the Franco-Spanish Convention of 27 June 1900. The disagreement has been relatively latent, but there are occasional skirmishes, such as in October 1995, when Equatorial Guinean authorities seized Gabonese fishing boats near Corisco Island.<sup>290</sup>

Currently, however, good progress has been made towards resolving the Equatorial Guinea and Gabon dispute with the help of the former UN Secretary-General, Ban Ki-moo.<sup>291</sup> In 2016 the parties signed an agreement to submit their dispute to the ICJ.<sup>292</sup> Until the issue of the sovereignty of the islands is settled, Equatorial Guinea and Gabon are unlikely to delimit their territorial sea and EEZ boundary in the Gulf of Guinea.<sup>293</sup> The dispute could also hamper settlement of their maritime boundary opposite Annobon.

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<sup>288</sup> Rongxing Guo, *Territorial Disputes and Resource Management: A Global Handbook* (Nova Science publishers, Inc New York 2007) 88

<sup>289</sup> Ibid

<sup>290</sup> Daniel Dzurek, 'Gulf of Guinea Boundary Disputes' (1999) IBRU Boundary and Security Bulletin 98

<sup>291</sup> EIU Solutions, 'The End of a Border Dispute is Possible' (*Country.eiu.com*, 2020)

<[http://country.eiu.com/article.aspx?articleid=1227890107&Country=Equatorial%20Guinea&topic=Politi\\_9](http://country.eiu.com/article.aspx?articleid=1227890107&Country=Equatorial%20Guinea&topic=Politi_9)> accessed 19 April 2020

<sup>292</sup> 'UN to Intervene in Border Dispute Between Gabon and Equatorial Guinea' (*Africanews*, 2020)

<<https://www.africanews.com/2016/11/16/un-to-intervene-in-border-dispute-between-gabon-and-equ-guinea>> accessed 19 April 2020.

<sup>293</sup> Daniel Dzurek, 'Gulf of Guinea Boundary Disputes' (1999) IBRU Boundary and Security Bulletin 98.



In the south of Sao Tome Island, Gabon claimed a 12M territorial sea and EEZ out to a maximum of 200nm (370km), under Act No. 9 of 1984. According to Article 11 of that law, overlapping claims are to be resolved according to generally recognised principles of international law –equidistance is not mentioned. Gabon ratified the 1982 Convention on 11 March 1998. Eventually Gabon must delimit the territorial sea and exclusive economic zone boundaries with Equatorial Guinea and EEZ boundaries with the opposite state of Sao Tome and Principe. The equidistance line appears to be the method likely to be used by the states as in delimiting its EEZ limit, Sao Tome and Principe explicitly designated the coordinates of its equidistance line with Equatorial Guinea, Gabon, and Nigeria.<sup>294</sup> The islands of Sao Tome and Principe are likely to be accorded effect as they also form an archipelagic state which is very relevant to maritime delimitation in terms of the use of archipelagic basepoints for the drawing of the delimitation line. However the outcome of the sovereignty dispute between Equatorial guinea and Gabon could have an effect on the location of the tripoint, but the trilateral relationship will still exist among the three states.<sup>295</sup> The solution can only be effected through cooperation between the states as they are obligated under international law to do.

### **1.5. Regional Cooperation in maritime boundary delimitation in the Gulf of Guinea**

One way to deal with overlapping claims to maritime zones may be through regional solutions, as provided by Article 123 of UNCLOS especially in the case of enclosed or semi-enclosed seas like the Gulf of Guinea. This provision encourages states “cooperate with each other in the exercise of their duties” and one such duty is to cooperate in the delimitation of their maritime boundaries as provided by Articles 74 (1) and 83(1) of UNCLOS. Significantly, the states in the Gulf of Guinea met in Gabon on 19 November 1999 and decided to create a body called the Gulf of Guinea Commission (GGC) which is expected to serve as a “framework for consultation, coordination, harmonisation and cooperation in the subregion, particularly as regards exploitation of natural wealth in

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<sup>294</sup> Ibid.

<sup>295</sup>Coalter G. Lathrop, ‘Tripoint Issues in Maritime Boundary Delimitation’ in David Colson and Robert Smith (eds) *International Maritime Boundaries* (Vol V) (Martinus Nijhoff Publishers 2005) 3339.

the Gulf of Guinea.”<sup>296</sup> The Heads of State in the Final Communiqué of the meeting emphasised support for agreements on the delimitation of maritime boundaries between certain member States, and encouraged the inclusion of others, in order to put an end to actual or potential territorial disputes.<sup>297</sup>

The Commission was subsequently established by Treaty signed in Libreville Gabon on 3 July 2001. Its member states include Nigeria, Angola, Gabon, Congo, Sao Tome and Principe,<sup>298</sup> Cameroon, Democratic Republic of Congo and Equatorial Guinea<sup>299</sup> and recently Ghana. Cote d’Ivoire, Togo and Benin were represented at the 3<sup>rd</sup> Summit held in Malabo.<sup>300</sup> The membership of the Commission is limited to states bordering the Gulf of Guinea region.<sup>301</sup> At the establishment of the Commission, land and maritime boundary disputes among member states were rife. The Nigeria Cameroon dispute over the Bakassi in the International Court of Justice was ongoing and its ruling of 10 October 2002 was given wide publicity. Also, sovereignty claims over the Mbanie Peninsula between Equatorial Guinea and Gabon had reached a critical point with Gabon making claims to the Corisco Bay islands of the Peninsula in 2003.

Due to many factors including lack of political will and inadequate funding, the Commission remained in an inactive state till 2006 when the first summit of Heads of State and Governments was held in Gabon.<sup>302</sup> During the next summit two years after, the leaders recommended that the Gulf of Guinea be transformed into a ‘peace and security priority zone’. Subsequently due to the threat posed by crimes at sea like piracy, armed robbery and illicit activities at sea, the third summit in August 2013 saw the

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<sup>296</sup> United Nations, *Handbook on the Delimitation of Maritime Boundaries* (Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, New York 2000).

<sup>297</sup> *ibid*

<sup>298</sup> Nigeria, Angola, Gabon, Congo, Sao Tome and Principe were original signatories in 2001.

<sup>299</sup> Cameroon and the DRC acceded to the Treaty in 2008.

<sup>300</sup> Gulf of Guinea Commission, ‘Final Communiqué of the 3<sup>rd</sup> Summit of Heads of State and Governments of the Gulf of Guinea Commission’ (Malabo, 10 August 2013) available at <<https://cggrps.com/wp-content/uploads/Comunicado-Malabo10AGO2013-EN.pdf>>

<sup>301</sup> Treaty Establishing the Gulf of Guinea Commission (adopted 3 July 2001, not in force) available at <<https://cggrps.com/en/institutionalizing-the-date-os-the-sign-if-the-ggc-treaty/>> assessed on 17 May 2020.

<sup>302</sup> Gulf of Guinea Commission, ‘Final Communiqué first Summit of Heads of State and Governments of the Commission of the Gulf of Guinea’ (Libreville, 25 August 2006) available at <<https://cggrps.com/wp-content/uploads/Comunicado-Libreville25AGO2006-EN.pdf>> assessed on 22 May 2020

leaders endorsing a decision to revitalise the Commission and make it operational.<sup>303</sup> From July 2015 to February 2017, the Executive Secretariat carried out various activities to revitalize the GGC in order to make it more relevant in regional affairs.<sup>304</sup> However the activities of the commission regarding the revitalisation do not reflect its earlier decision to settle potential maritime boundaries in the region.<sup>305</sup> From the work of the Commission so far, it can be concluded that it has not distinguished itself in the area of maritime boundary delimitation as evidenced by the fact that so far it has been more preoccupied with maritime security matters.<sup>306</sup> Cooperation in maritime boundary delimitation issues would no doubt need to be brought back into the agenda of the Commission to assist states begin delimiting their maritime boundaries including the extended continental shelf boundaries. In the section that follows, the states' compliance with Articles 74 (1) and 83 (1) to settle their boundaries by agreement which entails negotiations are examined.

## 1.6. Conclusions

The above discussions demonstrate the importance of cooperation in maritime boundary delimitation in the Gulf of Guinea. This is mandated by Articles 74(1) and 83(1) of UNCLOS. However, in order to fully comply with this obligation, the states must also apply the rules and principles established by international courts and tribunals to facilitate the settlement of their maritime boundaries. This would make the process more predictable. The Gulf of Guinea region as a semi enclosed sea according to Articles 122 and 123 of UNCLOS has an obligation albeit not a mandatory one to cooperate in the performance of their duties under this Convention which include delimiting their maritime boundaries as well as protecting and preserving the marine environment and managing the fisheries. These duties are better performed in a region with clear jurisdictional boundaries. Within the context of these obligations the many undelimited maritime boundaries in the region are an issue of concern. These must be agreed in a

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<sup>303</sup> Gulf of Guinea Commission, 'Final Communiqué 3<sup>rd</sup> Summit of Heads of State and Governments of the Commission of the Gulf of Guinea' (Malabo, 10 August 2013) available at <<https://cggrps.com/wp-content/uploads/Comunicado-Malabo10AGO2013-EN.pdf>> assessed on 22 May 2020.

<sup>304</sup> 'The Gulf of Guinea Commission – 'Actividades do Secretariado Executivo' (CGG-GGC, 2020) <<https://cggrps.com/en/actividades-do-secretariado-executivo/>> accessed 18 April 2020

<sup>305</sup> *ibid*

<sup>306</sup> See the Final communiqués of the First and Third Summits of the Heads of State and Governments of the Commission of the Gulf of Guinea.

spirit of cooperation to facilitate regional cooperation under Article 123 of UNCLOS. States therefore need to be aware of and utilise the relevant rules and principles for delimiting maritime boundaries, found mainly in the UN Convention on the Law of the Sea (UNCLOS), and the jurisprudence of international courts and tribunals as has been discussed.

Negotiation appears to be the states' preferred means of settling their maritime boundary disputes. Currently, the states have been cooperating, through joint commissions, which among others have a mandate to settle maritime boundary disputes regarding the territorial sea, exclusive economic zone and continental shelf within 200 nm. Several instances have been cited and discussed above. However, due to the geography of the area, negotiations between one set of states is likely to affect other states and so the boundary cannot be fully settled without the involvement of third states. This is the case with the settlement of the maritime boundary between Ghana, Togo, Benin and Nigeria as well as Nigeria, Cameroon, Equatorial Guinea, Sao Tome and Principe and Gabon. The relevant states therefore need to be part of the negotiations in order for the boundary to be completely determined. Negotiation appears to be appropriate for the states in question as it is a cost-effective method. Though endowed with natural resources the states have struggling economies. Negotiation therefore would save them from paying for protracted and expensive international litigation. Further it would strengthen the bonds of friendship between the states and lead to further cooperation in the exploitation of the resources in the area.

The conclusions that can be drawn from the way these maritime boundaries have been settled in the Gulf of Guinea show that where in their negotiations, the equidistance method was used and adjusted by relevant or special considerations like oil practice and economic factors, the parties were successful. On the other hand, in the case between Ghana and Cote d'Ivoire, the latter was not agreeable to the use of the equidistance and this contributed to the breakdown in negotiations.

The Gulf of Guinea Commission has an important role to play in this regard. As the only body in the region with a mandate to facilitate cooperation in maritime boundary delimitation. The Commission needs to awaken from its comatose state and fulfil its

mandate of providing the states in the Gulf of Guinea with the forum for consultation in the agreement of their maritime boundaries.

Admittedly it is not an easy matter to delimit maritime boundaries as ultimately the predominant reason for such delimitation may be states' desire to have jurisdiction over the non-living resources of the area. This has heightened tensions between the states in the region. As in the case of Cameroon and Nigeria and Ghana and Cote d'Ivoire, the parties may have used oil concession lines for many years and may have worked fields on their side of the *defacto* boundary and are thereby reluctant to negotiate any other line that would deprive them of the oil fields. The parties may out of political expediency be reluctant to shift their position based on these oil activities. The negative effect this has on the exploitation and management of the non-living resources in the region means that states must settle their maritime boundary disputes and also make some interim arrangements pending the settlement of the maritime boundaries, or in situations where resources straddle a maritime boundary. In this regard, states are obligated under UNCLOS to cooperate in the making of provisional arrangements of a practical nature and this is the subject of the next chapter.

## CHAPTER TWO

### OBLIGATION TO COOPERATE IN THE SETTLEMENT OF MARITIME BOUNDARY DISPUTES AND EXPLOITATION OF NON-LIVING RESOURCES IN THE GULF OF GUINEA

#### 2.1. Introduction

As discussed in the preceding chapter, the Gulf of Guinea is an area replete with conflicting and overlapping maritime boundary claims due to the different approaches to maritime boundary delimitation. UNCLOS provides mechanisms for dispute settlement and the states in the region have used different means for the settlement of these disputes which are often protracted and take many years to complete. For instance, the dispute between Nigeria and Cameroon in the International Court of Justice (ICJ) took about eight years to complete.<sup>307</sup> In some situations the states have been negotiating for years as happened between Ghana and Cote d'Ivoire.<sup>308</sup>

Whilst maritime boundary delimitation is pending, the states' need to explore and exploit oil and gas resources for much needed development remains an important and urgent issue for them. This may not be environmentally sound given the climate change emergency the world faces currently. However due to the discoveries of these hydrocarbon resources in the region, tensions have escalated between adjacent and opposite coastal states in the region, over which state has the sovereign right to exploit the resources in a disputed area. In such circumstances it is common for states to contest the validity of boundaries already in existence, usually for oil practice, and respected by them for many years.<sup>309</sup> In some cases, petroleum companies already licensed by the states in dispute, continue to explore and exploit the resources sometimes leading to escalating tensions between the disputing states.<sup>310</sup> Some other states as a practical

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<sup>307</sup> Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), (Judgment) [2002] ICJ Rep 330.

<sup>308</sup> Negotiations took place between Ghana and Côte d'Ivoire over six years, with 10 meetings between 2008 and 2014.

<sup>309</sup> This was the case between Ghana and Cote d'Ivoire. The two states respected a maritime boundary for over fifty years for their oil practice even though there had been no formal agreement. This corresponded to the equidistance boundary between the states, but Cote d'Ivoire decided to contest the boundary which led to a protracted ITLOS arbitration.

<sup>310</sup> This happened in the Ghana Cote d'Ivoire case.

solution, have decided to cooperate in the management of the oil and gas resources, by having Joint Development Arrangements (JDAs) for their exploitation. This raises the pertinent issue of what rights and obligations under international law the states have while maritime boundary disputes are pending. In this regard Articles 74 (3) and 83 (3) as well as Article 123 of UNCLOS emphasize self-restraint and cooperation as vital components of an inter-State regulatory framework, for stability and security in the allocation, exploitation and management of the living and nonliving resources.

Cooperation under this framework discussed in this and the ensuing chapters take different forms for the exploitation of these shared transboundary resources. In this chapter which deals with the exploitation of non-living resources, cooperation is mainly in the form of joint development arrangements which have been used in two ways in the region. One is as an alternative to maritime delimitation,<sup>311</sup> and the other in cases where there is an agreed maritime boundary, but the resources straddle the boundary.<sup>312</sup> The latter is necessitated by the very nature of these resources, being fluid and fugacious so that one state would be unable to exploit them, without putting the other state's access in jeopardy.<sup>313</sup> However for cooperation regarding the exploitation of the shared living marine resources, and highly migratory and straddling fish stocks, UNCLOS and the Fish Stocks Agreement provide for states to cooperate either directly or through sub regional or regional organisations.<sup>314</sup> This is discussed in the fourth chapter of the thesis.

This chapter discusses the settlement of maritime boundary disputes in the region and cooperation in the exploitation of oil and gas resources. The first part presents a discussion of the obligation of states under international law, in undelimited areas. It analyses the legal basis for cooperation in the management of non-living marine resources. This leads into a discussion on joint development arrangements as arrangements of a practical nature and the joint development agreements in the Gulf of

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<sup>311</sup> This was done in the case of Nigeria and Sao Tome and Principe See Section 2.2.2.

<sup>312</sup> Nigeria and Equatorial Guinea decided to jointly exploit the oil field that straddled their agreed boundary See Section 2.2.2.

<sup>313</sup> Gerald Blake and Richard Swarbrick, 'Hydrocarbons and International Boundaries: A Global Overview,' in G. Blake et al (eds.) *Boundaries and Energy: Problems and Prospects* (Kluwer Law International, 1998) 3.

<sup>314</sup> UNCLOS art 63 (1), 63 (2), 116; Fish Stocks Agreement art7, 8

Guinea. The second part presents an overview of the obligations under UNCLOS to settle maritime boundary disputes peacefully. Within this context the options available to the states in the Gulf of Guinea are discussed as well as the settlement of disputes related to the continental shelf beyond 200M. The third part deals with regional cooperation for promoting joint development and settlement of maritime boundary disputes and makes recommendations on how the states can further strengthen cooperation to exploit oil and gas taking into consideration the peculiarities of the region. The fourth part presents the conclusions of the chapter.

## **2.2. Obligations under international law of states in undelimited areas to make provisional arrangements and obligation not to jeopardise or hamper the reaching of final agreement**

Under UNCLOS, coastal states have the sovereign right in their exclusive economic zones and continental shelves to exploit the living and non-living resources of the waters superjacent to the seabed and of the seabed and its subsoil.<sup>315</sup> The Convention further enjoins states in articles 63-67 to cooperate for the management and conservation specifically of the living marine resources in the EEZ, but does not provide in the same manner for the non-living resources. Article 56 (3) which deals with the resources in the EEZ specifically removes non-living resources of the seabed from the EEZ regime and puts it under the continental shelf regime. It expressly provides for the living resources and the protection of the marine environment as well as cooperation for the purposes of scientific research. Therefore, it is argued that there is no legal obligation for states to cooperate to conserve and manage the non-living resources.<sup>316</sup> As to whether there is a customary law obligation to cooperate there is a debate as there are no established rules of customary international law regarding the issue.<sup>317</sup> However, Article 123 of UNCLOS acknowledges that states in semi enclosed seas need to cooperate in the management and conservation of the shared resources in the area having regard to the close proximity the activities regarding such resources are conducted. Therefore, by analogy the obligation to cooperate in the management of the

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<sup>315</sup> UNCLOS art 56 (1) (a)

<sup>316</sup> David Ong, 'Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?' (1999) 93:4 AJIL 803

<sup>317</sup> Ibid 802



non-living resources can be presumed.<sup>318</sup> Therefore as a practical measure states cooperate to jointly exploit the resources even though they are not mandated to do so under UNCLOS.

Nevertheless, there is evidence that states are favourably disposed to having such cooperation. For instance, states have shown in General Assembly resolutions their support for cooperation regarding shared natural resources.<sup>319</sup> The General Assembly adopted by an overwhelming majority, the Charter of Economic Rights and Duties of States<sup>320</sup>. Article 3 of this Charter, provides that, “...in the exploitation of natural resources by two or more countries, each state must cooperate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interests of others”. Applied to hydrocarbon resources, though not authoritative this could form a legitimate basis for states to cooperate through joint development. UNEP also has guidelines for states to cooperate in the conservation and utilisation of shared natural resources and in the protection of the environment from damage arising out of such exploitation.<sup>321</sup> The jurisprudence of international courts and tribunals also favours states having joint exploitation of resources that straddle maritime boundaries. In the *Guyana /Suriname* case, the Tribunal supported the opinion of the arbitral tribunal in the *Eritrea/Yemen* arbitration,<sup>322</sup> when it stated that the parties “should give every consideration to the shared or joint or unitised exploitation of any such resources.”<sup>323</sup> The ICJ in the *North Sea Continental Shelf* cases, was also of the opinion that there was state practice to show that in dealing with deposits straddling a boundary line states have entered into undertakings with a view to ensuring the most efficient exploitation or apportionment of the products extracted.<sup>324</sup> Where the method of delimitation results in the deposits straddling the

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<sup>318</sup> Ibid 781

<sup>319</sup> David Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?’ (1999) 93:4 AJIL 781

<sup>320</sup> Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) (adopted by 115 votes to 6; 10 abstentions)

<sup>321</sup> UNEP Principles of Conduct in the field of the Environment for the Guidance of states in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States (adopted by UNEP Governing Council 19 May 1978) (1978) 17 ILM 1097 (UNEP Principles).

<sup>322</sup> *Arbitration regarding the Delimitation of the Maritime Boundary between Guyana and Suriname (Guyana v Suriname)* (2006) XXX RIAA 130

<sup>323</sup> Ibid para 463

<sup>324</sup> *North Sea Continental Shelf* (Merits) [1969] I.C.J. Rep. 3, para. 97.

boundary created, the Court stated that agreements for joint exploitation were particularly appropriate in order to preserve the unity of deposits.<sup>325</sup>

States also have obligations to cooperate and exercise restraint under Articles 74 (3) and 83(3). These identical provisions on the EEZ and Continental Shelf state that pending agreement of the maritime boundary, “the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement.” Such arrangements are to be without prejudice to the final delimitation. The provisions impose two obligations on states - one positive which is “to make every effort to conclude provisional arrangements of a practical nature pending agreement on delimitation,”<sup>326</sup> and the other negative which is “during this transitional period not to jeopardise or hamper the reaching of final agreement.”<sup>327</sup> Article 100 further provides that states are obliged to fulfil in good faith the obligations assumed under the Convention and exercise the rights, jurisdictions and freedoms in the convention without abuse of right. In this regard the provisions emphasize that these obligations are to take place in a “spirit of understanding and cooperation.”<sup>328</sup> These obligations are discussed below in further detail.

### **I. Obligation to make provisional arrangements under Articles 74(3) and 83(3)**

States have an obligation under UNCLOS to delimit their maritime boundaries by agreement. During the period the maritime boundary remains unsettled the states are further under obligation to exercise self-restraint and cooperate in the exploitation of the resources in the undelimited area. The purpose of this obligation was set out by the arbitral tribunal in the *Guyana v Suriname* case,<sup>329</sup> as the promotion of interim regimes and practical measures that could pave the way for provisional utilisation of disputed

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<sup>325</sup> Ibid para. 99

<sup>326</sup> UNCLOS art 83, 74

<sup>327</sup> ibid

<sup>328</sup> *Award in the Arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname, (Guyana v Suriname) (2007) XXX RIAA para 460-461.*

<sup>329</sup> ibid

areas pending delimitation.<sup>330</sup> The Tribunal, was of the view that this obligation acknowledges the importance of avoiding the suspension of economic development in a disputed maritime area, as long as such activities do not affect the reaching of a final agreement.<sup>331</sup> The obligation to make every effort to conclude provisional arrangements, according to the Tribunal in *Suriname / Guyana case*, entails the states preparedness to approach the negotiations for the settlement of the maritime boundary in a conciliatory manner and be prepared to make concessions in the pursuit of provisional arrangement.<sup>332</sup> Such approach according to the tribunal, is expected of the parties as any provisional arrangement arrived at, are temporary and without prejudice to the maritime delimitation.<sup>333</sup>

The case between *Ghana and Cote d'Ivoire*<sup>334</sup> is a good example of an international tribunal's view of how states can fulfil the obligation to make every effort to conclude provisional arrangements. The Special Chamber pointed out that negotiations to establish a maritime boundary cannot automatically be taken as negotiations to make provisional arrangements.<sup>335</sup> This, according to the chamber is a separate issue the states could pursue alongside their negotiations for a maritime boundary especially as the wording of the obligation, "clearly indicates that it does not amount to an obligation to reach an agreement on provisional arrangements."<sup>336</sup> It is therefore an obligation of conduct not an obligation of result. In the view of the Special Chamber, it would have been for Côte d'Ivoire to make the requisite proposals for the establishment of "provisional arrangements of a practical nature" and thus to trigger the requisite negotiations.<sup>337</sup> The Special Chamber was of the view that this was important as Ghana's hydrocarbon activities had continued over several years.<sup>338</sup> Although the tribunal did not find that this oil practice was acquiesced to by Côte d'Ivoire, it is nevertheless took this fact into account when assessing the relationship between the two

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<sup>330</sup> Ibid para 473.

<sup>331</sup> Ibid para 460.

<sup>332</sup> ibid

<sup>333</sup> ibid

<sup>334</sup>. *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23, 2017)

<sup>335</sup> Ibid para 628.

<sup>336</sup> Ibid para. 627.

<sup>337</sup> Ibid para. 628.

<sup>338</sup> ibid

Parties.<sup>339</sup> Therefore, Cote d'Ivoire not having requested Ghana to enter into negotiations on provisional arrangements of a practical nature bars it from claiming that Ghana has violated its obligations to negotiate on such arrangements.

## **II. Obligation not to jeopardise or hamper the reaching of final agreement under Articles 74(3) and 83(3)**

The second obligation imposed by Articles 74 (3) and 83 (3) mandates that during the transitional period, when the maritime boundary is in the process of being settled, the parties are not to “jeopardise or hamper the reaching of final agreement.”<sup>340</sup> The tribunal in the *Guyana / Suriname case*<sup>341</sup> noted that the obligation is not intended to preclude all activities in a disputed maritime area.<sup>342</sup> In the Tribunal’s view the activities that could jeopardise or hamper the reaching of the final agreement, are those that have the effect of prejudicing the final agreement.<sup>343</sup> These are acts that have permanency or that involve physical damage to the seabed, examples of which are drilling for oil and gas, without an agreement to that effect between the parties.<sup>344</sup> However, the tribunal gave two classes of activities surrounding hydrocarbon exploration and exploitation that are permissible - one being any activities the parties pursue pursuant to provisional arrangements and the second any acts, even if unilateral, which do not have the effect of jeopardizing or hampering the reaching of final agreement on the maritime boundary.<sup>345</sup> The latter activities, according to the Tribunal, are those that do not lead to a physical change to the marine environment, an example of which is seismic studies.<sup>346</sup>

In the *Ghana/ Cote d’Ivoire* case, the Special Chamber took this interpretation a bit further. It held that Ghana’s exploitation activities which were already in place could

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<sup>339</sup> *ibid*

<sup>340</sup> *ibid*

<sup>341</sup> *ibid*

<sup>342</sup> *ibid*

<sup>343</sup> *ibid*

<sup>344</sup> *ibid*

<sup>345</sup> *ibid*

<sup>346</sup> *ibid*

not be an activity to be prohibited.<sup>347</sup> In the view of the Special Chamber, the consequences are that maritime activities undertaken by a State in an area of the continental shelf which has been attributed to another State by an international judgment cannot be considered to be in violation of the sovereign rights of the latter if those activities were carried out before the judgment was delivered and if the area concerned was the subject of claims made in good faith by both States.<sup>348</sup> On this basis, the Special Chamber found the argument advanced by Côte d'Ivoire that the hydrocarbon activities carried out by Ghana in the disputed area constituted a violation of the sovereign rights of Côte d'Ivoire not sustainable.<sup>349</sup> This would be so even if some of those activities took place in areas attributed to Côte d'Ivoire by the Judgment of the Special Chamber.<sup>350</sup> The Chamber therefore found that Ghana had not violated the sovereign rights of Côte d'Ivoire.<sup>351</sup> The Special Chamber in keeping with *Guyana/ suriname* indicated what would constitute jeopardizing or hampering when it ordered Ghana in the context of a provisional measures application by Cote d'Ivoire, not to start any new drilling or break new ground as this would amount to such jeopardizing or hampering.<sup>352</sup> The conclusion that can be drawn therefore is that if the activity was already in place before the dispute, it could not be said to be jeopardizing or hampering the reaching of an agreement. The Special Chamber further acknowledged the importance of avoiding suspension of economic activity in a disputed maritime area so long as such activities do not affect the reaching of a final agreement.<sup>353</sup>

This is significant for the undelimited areas of the region, like the Ghana – Togo maritime area, where the Ghanaian government awarded an exploration block in the region to a joint venture of Blue Star Exploration, Ghana's state-owned oil company GNPC, and Heritage E & P. The Togolese authorities are against this attempt by Ghana to exploit the resources claiming that the maritime boundary covering the oil concession granted is in Togolese territory. The Togolese coast guard therefore are preventing the

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<sup>347</sup> *Dispute Concerning Delimitation of the Maritime Boundary Between Ghana and Cote d'Ivoire in the Atlantic Ocean (Ghana –Cote d'Ivoire)* ITLOS, 2017 para 592, 594.

<sup>348</sup> *ibid*

<sup>349</sup> *ibid*

<sup>350</sup> *ibid*

<sup>351</sup> *ibid*

<sup>352</sup> *Ibid* para 102

<sup>353</sup> *ibid*

joint venture from going into execution.<sup>354</sup> This is a practical example of states which need to cooperate to make provisional arrangements of a practical nature. This may have to be initiated by one of the parties as the Special Chamber in the *Ghana Cote d'Ivoire* case opined. In the meantime, as drilling may have a permanency to it, Ghana may not unilaterally begin drilling without incurring international liability according to the jurisprudence discussed above. This is also the case with the other states which are yet to delimit their boundaries but have to exploit their resources. These include Equatorial Guinea and Gabon as well as Benin and Togo. Nevertheless, the parties can undertake seismic surveys in the areas being disputed as these would not permanently harm the marine environment.

### **2.2.1. Joint Development Agreements as provisional arrangements of a practical nature**

In the literature Joint Development Agreements (JDA) are recognised as a type of provisional arrangement of a practical nature which are commonly used arrangements for overlapping claim areas.<sup>355</sup> This has been demonstrated through state practice as already stated above to be an effective means for cooperation in the exploration and exploitation of non-living resources.<sup>356</sup> Thus many bilateral joint development agreements can be found in many regions of the world.<sup>357</sup> The term 'Joint Development Agreements' has been variously defined by different scholars. David M. Ong defines it as a generic term given to international agreements between states whose main function is to provide for the cooperative exploitation of hydrocarbon resources that come under the jurisdiction of two states.<sup>358</sup> Vasco Becker- Weinberg views it as, "a cooperative

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<sup>354</sup> Mozambique Resources Post, 'Africa Oil & Gas: Ghana And Togo Could Battle Over Keta East Block' (Mozambiqueminingpost.com, 2018) <<https://mozambiqueminingpost.com/2018/07/19/africa-oil-gas-ghana-and-togo-could-battle-over-keta-east-block/>> accessed 27 April 2020.

<sup>355</sup> Robert Beckman and Leonardo Bernard, 'Framework for the Joint Development of Hydrocarbon Resources' (*cil.nus.edu.sg*) <<https://cil.nus.edu.sg/wp-content/uploads/2010/08/BECKMAN-AND-BERNARD-FRAMEWORK-FOR-THE-JOINT-DEVELOPMENT-OF-HYDROCARBON-RESOURCES.pdf>> assessed 17 May 2020.

<sup>356</sup> Dennis Rodin, 'Offshore Transboundary Petroleum Deposits: Cooperation as a Customary Obligation' (Masters, University of Tromsø 2011) 25.

<sup>357</sup> *ibid*

<sup>358</sup> Robert Beckman and others, *Beyond Territorial Disputes in the South China Sea: Legal Frameworks for the Joint Development of Hydrocarbon Resources*, (Edward Elgar Publishing Ltd 2013) 154.

effort between two or more states for the exploration and exploitation of mineral resources that straddle a maritime boundary or are found in areas of overlapping claims.”<sup>359</sup> According to Shihata and Onorato, JDAs are, “a procedure under which boundary disputes are set aside, without prejudice to the validity of the conflicting claims, and the interested states agree, instead, to jointly explore and exploit and to share any hydrocarbons found in the area subject to overlapping claims.”<sup>360</sup> Lagoni’s definition of JDA is, “the cooperation between states with regard to the exploration for and exploitation of certain deposits, fields or accumulation of non-living resources which either extend across a boundary or lie in an area of overlapping claims.”

Though not exhaustive of the definitions in the literature, these definitions show that joint development agreements relate to exploration and exploitation of non-living resources notably hydrocarbons in areas of overlapping claims or where the resources straddle a boundary, and further that cooperation between states is key. Joint development is therefore used broadly to refer to cooperation in two forms. One is when states exploit a single resource straddling an international boundary and the other is situations where states that have not agreed a maritime boundary, put on hold the delimitation of their maritime boundary and jointly exploit the resources in the overlapping claim area for their mutual benefit. The parties to such arrangements could choose to make it a more permanent arrangement.<sup>361</sup> Some states which have agreed boundaries still have joint development regimes incorporated in them in anticipation of sharing resources that are subsequently found straddling the boundary.<sup>362</sup> The 1965 treaty between England and Norway in the North Sea is one such example.<sup>363</sup> The UK also used this approach with a number of oil fields that straddle the UK -Netherlands Maritime boundary.<sup>364</sup> Countries bordering the North Sea and in the Middle East, South

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<sup>359</sup> Vasco Becker -Weinberg, ‘Theory and Practice of Joint Development in International Law,’ in: Zhiguo Gao, Yu Jia, Haiwen Zhang and Jilu Wu (eds) *Cooperation and Development in the South China Sea*, (China Democracy and Legal System Publishing House: Beijing, 2013) 85.

<sup>360</sup> Ibrahim Shihata and William Onorato, 'The Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (1996) 11 ICSID Review 299-317.

<sup>361</sup> Ibid p. 317

<sup>362</sup> Igor Karaman, *Dispute Resolution in the Law of the Sea* (, Martinus Nijhoff Publishers, 2011) p.197; Ibrahim Shihata and William Onorato, 'The Joint Development of International Petroleum Resources in Undefined and Disputed Areas' (1996) 11 ICSID Review 299-317.

<sup>363</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the delimitation of the continental shelf between the two countries (adopted 10 March 1965, entered into force 29 June 1965) 551 UNTS 213.

<sup>364</sup> Ana Bastida, Adaeze Ifesi-Okoye, Salim Mahmud, James Ross, Thomas Walde, ‘Cross. Border. Unitisation and Joint Development Agreements: An International Law Perspective’ [2007] *Houst. J. Int. Law* 393-6.

and South East Asia usually include common deposit clauses demanding such cooperation in their delimitation agreements.<sup>365</sup>

### **2.2.1.1. Models of Joint Development Agreements**

Joint development agreements have been categorised into three broad models in the literature.<sup>366</sup> The first Model is a ‘compulsory’ joint operating venture between the interested states and their nationals or nominated oil companies in designated zones.<sup>367</sup> The Agreement that inspired the identification of the model is the 1974 Japan/ South Korea Agreement.<sup>368</sup> In that Agreement, the Parties set aside the disputed area as the joint development zone and agreed to postpone issues of delimiting their maritime boundary for at least fifty years.<sup>369</sup> The zone was split into subzones with each state authorising its concessionaires, or entities to whom they have granted concessions to explore and exploit the subzone under a joint operating agreement with the concessionaires of the other state.<sup>370</sup>

In this model, the states retain control of the development and jointly approve the Joint Operating Agreement between the concessionaires. The Agreement usually includes extensive resource management provisions.<sup>371</sup> For the performance of this function the parties created a joint commission – the Japan/South Korea Joint Commission to act in a supervisory capacity. Each state’s concessionaires share the resource equally with the concessionaires of the other state and are answerable to the authorising state in respect of tax and disposal of revenue issues.<sup>372</sup> The main advantage of this system is that each state is free to use the benefits of the development as it chooses without being saddled

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<sup>365</sup> Terrence Daintith, *Finders Keepers? How the Law of Capture Shaped the World Oil Industry*, (RFF Press 2010).

<sup>366</sup> See Hazel Fox, (ed) *Joint Development of Offshore Oil and Gas. A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law 1989) 115 see also David Ong, ‘Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?’ (1999) 93 AJIL 787-789.

<sup>367</sup> Hazel Fox, (ed) *Joint Development of Offshore Oil and Gas. A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law 1989) 115

<sup>368</sup> Ibid p.116

<sup>369</sup> ibid

<sup>370</sup> ibid

<sup>371</sup> ibid

<sup>372</sup> Ibid



with the laws and taxation system of the other state. A disadvantage seen from the working of this agreement is that the Joint Commission also appears to be involved less in the operation of the joint development zone and is more a forum for enquiry and implementing cooperation between the states.<sup>373</sup> Alternatively, the agreement provides for the compulsory utilisation of transboundary deposits. A single operator then exploits the straddling deposits lying across a previously agreed maritime boundary. This is mainly found in the North Sea region.<sup>374</sup>

The second Model makes use of a joint authority to develop the joint zone. This involves the creation of a supra-national authority through an agreement between the states to establish an international joint authority or commission which has the necessary legal personality, licensing and regulatory powers.<sup>375</sup> The states also give it the mandate to manage the joint development zone on their behalf. A good example is the 1979 Thailand /Malaysia Memorandum of Understanding aimed at solving the problem of jointly developing a disputed continental shelf area.<sup>376</sup> In this Agreement unlike the Japan/ South Korea one, the states do not retain control but have ceded their powers of licensing or approval of joint operations to a joint authority in which each state is equally represented. This authority is accorded all rights and responsibilities relating to exploration and exploitation of the joint zone and has direct licensing power over the area which unlike the Japan /South Korea situation has not been split into subzones and does not have direct licensing power.<sup>377</sup> The main disadvantages of the model are that it does not address the issue of preexisting rights and this can lead to great controversy especially if the rights offered under the new agreement are substantially different from what was already existing.<sup>378</sup> There is also the problem of which jurisdiction and

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<sup>373</sup> Ibid p.116

<sup>374</sup> Robert Beckman and Leonardo Bernard, 'Framework for the Joint Development of Hydrocarbon Resources' (*cil.nus.edu.sg*) < <https://cil.nus.edu.sg/wp-content/uploads/2010/08/BECKMAN-AND-BERNARD-FRAMEWORK-FOR-THE-JOINT-DEVELOPMENT-OF-HYDROCARBON-RESOURCES.pdf> > assessed 17 May 2020

<sup>375</sup> Hazel Fox, (ed) *Joint Development of Offshore Oil and Gas. A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law 1989) 133

<sup>376</sup> Ibid

<sup>377</sup> ibid

<sup>378</sup> Ibid p.138

applicable law is to be used by the authority in the joint zone.<sup>379</sup> States are also reluctant to divest wide powers to the authority.<sup>380</sup>

The third Model is a single state managing the joint development zone and paying one share of the revenue thereby realised to the other State Party.”<sup>381</sup> In its simplest form, one state manages or administers the resources in the disputed area on behalf of both states. This model can be used where there is an agreed maritime boundary in place. The managing state applies its own licensing and regulatory procedures. The other state has monitoring and inspection powers and receives the agreed share of the revenues accruing from the exploitation.<sup>382</sup> Thus the managing state becomes the agent of both states. This model has the advantage of simplicity and is cost effective as it uses existing administrative machinery thereby also avoiding delays.<sup>383</sup> A variant of this model, the researchers’ call the checkerboard variant is best used in larger areas with many blocs. The states allot the area to themselves in a checkerboard fashion and each state shares the revenue it generates with the other. This puts the states on an equal footing and thereby solves some of the problems inherent in this model of one state being perceived as having the upper hand.<sup>384</sup> The obvious difficulty would be how states would agree on the criteria for allocating the areas to be exploited.<sup>385</sup>

Some “imperfect examples” of this model in practice have been highlighted in the literature.<sup>386</sup> One is the Agreement between Qatar/ Abu Dhabi<sup>387</sup> which involved the Al Bunduq field discovered in 1965.<sup>388</sup> The parties agreed to an equal sharing of the

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<sup>379</sup> Ibid p.143

<sup>380</sup> Ibid p. 146

<sup>381</sup> Ibid p. 10

<sup>382</sup> Hazel Fox, (ed) Joint Development of Offshore Oil and Gas. A Model Agreement for States for Joint Development with Explanatory Commentary (British Institute of International and Comparative Law 1989)148-153

<sup>383</sup> ibid

<sup>384</sup> ibid

<sup>385</sup> ibid

<sup>386</sup> ibid p.151

<sup>387</sup> Agreement between Qatar and Abu Dhabi on the Settlement of Maritime Boundaries and Ownership of Islands (adopted 1 Muharram A.H 1389, corresponding to 20 March 1969)

<<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/QAT-ARE1969MB.PDF>>assessed on 12 May 2020

<sup>388</sup> 'Qatar Renews Al-Bunduq Oil Deal with Abu Dhabi' (*Aljazeera.com*, 2018)

<<https://www.aljazeera.com/news/2018/03/qatar-renews-al-bunduq-oildeal-abu-dhabi-180313112948433.html>> accessed 18 May 2020.

revenue from the joint agreement involving the field which was exploited from Abu Dhabi using a company which operates and manages the field.<sup>389</sup> The Agreement provided that ownership of the field “shall be divided equally between the two parties.”<sup>390</sup> Recently the parties have signed a new concession agreement to replace the expired one and have every intention to continue their joint development.<sup>391</sup> This is a sign that their relationship is working and the simplicity of the arrangement may be its big advantage.

Another example can be found in the 1958 Saudi Arabia / Bahrain Agreement by which Saudi Arabia with the consent of Bahrain agreed to develop the oil resources in the disputed area, the ‘Fasht bu Saafa Hexagon’ which is on the Saudi Arabian side of the boundary.<sup>392</sup> This is on condition that half of the net income derived therefrom would be paid to Bahrain which also has inspection rights.<sup>393</sup> Despite the advantages of this model it appears not to be suited to large areas but may work best in small areas where setting up a complex machinery to exploit the resources would be counterproductive. The Nigeria/Equatorial Guinea Joint Development Agreement<sup>394</sup> follows this model. The already existing machinery for exploitation in Equatorial Guinea was used to manage the field in dispute for the benefit of both countries.<sup>395</sup> A more recent example is the Brunei -Malaysia joint development in 2009.<sup>396</sup> Under the Agreement the two countries agreed to establish a maritime boundary to settle overlapping claims which included concession blocks awarded by both states and situated near areas where substantial oil discoveries were made. The parties agreed that the area now belongs to Brunei, but Malaysia was allowed to participate in the exploitation on a commercial

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<sup>389</sup> Agreement between Qatar and Abu Dhabi art 7

<sup>390</sup> Agreement between Qatar and Abu Dhabi art 6

<sup>391</sup> 'Qatar Renews Al-Bunduq Oil Deal with Abu Dhabi' (Aljazeera.com, 2018)  
<<https://www.aljazeera.com/news/2018/03/qatar-renews-al-bunduq-oildeal-abu-dhabi-180313112948433.html>> accessed 18 May 2020

<sup>392</sup> Bahrain-Saudi Arabia Boundary Agreement (adopted February 22, 1958, entered into force February 22, 1958) Preamble and Article 2 (7) available at  
<<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/BHR.htm>> assessed on 12 May 2020.

<sup>393</sup> *ibid*

<sup>394</sup> See Section 2.2.2.

<sup>395</sup> *ibid*

<sup>396</sup> Statement on the Exchange of Letters between Malaysia and Brunei Daussalam, dated 16 March 2009 (PUTRAJAYA 30 April 2010) available at  
<[http://www.marinerregions.org/documents/https\\_\\_\\_www.kln.gov.my\\_archive\\_content.pdf](http://www.marinerregions.org/documents/https___www.kln.gov.my_archive_content.pdf)>

basis and there was to be joint development for 40 years.<sup>397</sup> This was the result of long and hard negotiations which progressed through 39 rounds of talks since 1979.<sup>398</sup>

### **2.2.2. Joint Development Agreements in the Gulf of Guinea**

There are four instances of joint development arrangements regarding bilateral cooperation in the exploitation of hydrocarbons in the Gulf of Guinea, two of which are not active. It is interesting to note that they are mainly between Nigeria and its immediate neighbours Sao Tome and Principe, Equatorial Guinea and Cameroon. The need for exploitation of oil reserves in the area may be a motivating factor for the states' wiliness to have these arrangements. These are discussed below.

#### **I. Nigeria and Sao Tome Joint Development Agreement**

Nigeria and Sao Tome and Principe's agreement signed in 2001<sup>399</sup> was negotiated in the context

the delimitation of the maritime boundary on hold as the two countries differences were irreconcilable.<sup>400</sup> The Joint Development Zone (JDZ) covers an area of 34,540 Km<sup>2</sup> and includes the seabed, subsoil and the super adjacent waters.<sup>401</sup>

To allow for secure investment for the various oil companies interested in the zone, the parties decided that the JDZ would be a long term arrangement with a minimum period of forty-five years.<sup>402</sup> It is only after this period that the parties would then seek to agree a definitive maritime boundary if they so wished.<sup>403</sup> In the meantime the parties provisionally agreed that the areas to the south of the JDZ would form part of Sao Tome

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<sup>397</sup> *ibid*

<sup>398</sup> 'Border Issues Between Malaysia, Brunei Solved: Official - People's Daily Online' (*En.people.cn*, 2010) <<http://en.people.cn/90001/90777/90851/6971863.html>> accessed 18 May 2020.

<sup>399</sup> Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of the Two States (adopted 21 February 2001, entered into force 16 January 2003) (hereinafter Nigeria/ Sao Tome JDA) available at <<https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/STP-NGA2001.PDF>> assessed 12 May 2020. See also Wu Shicun and Nong Hong (eds), *Recent Developments in the South China Sea Dispute: The Prospect of a Joint Development Regime* (Routledge, 2014) 87, Footnote 54.

<sup>400</sup> *ibid*

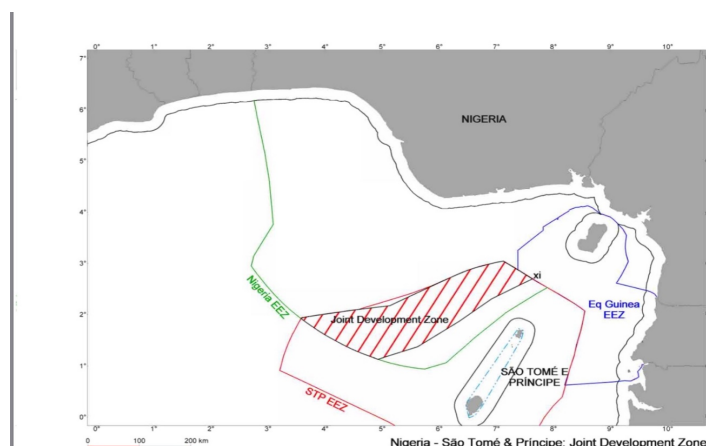
<sup>401</sup> *ibid* art 2

<sup>402</sup> *ibid* art 51

<sup>403</sup> *Ibid* art 51.1

and Principe's EEZ and the areas to the west part of Nigeria's EEZ.<sup>404</sup> The treaty provided for revenues realised from the joint exploitation to be shared on the basis of 60 percent to Nigeria and 40 percent to Sao Tome and Principe.<sup>405</sup> This unequal sharing may have been motivated by among others the location of the oil resources and the potential maritime boundary as well as other political considerations.

Figure 12: Nigeria-Sao Tome and Principe Joint Development Zone



Source: David Colson and Robert Smith (ed), *International Maritime Boundaries*, (Martinus Nijhoff Publishers, Leiden 2005) vol V, p.3648

The Joint Development Treaty between Nigeria and Sao Tome and Principe has been touted as having achieved important political and economic strides.<sup>406</sup> Politically, the fact that two disputing countries with different cultural background have been able to come together to create a development zone to solve a dispute that had the potential of escalating is a great achievement. Economically, the two countries have reportedly achieved a total of \$300 million through signature bonuses that were shared in the relevant proportion by the two countries. Six petroleum blocks were awarded, and the companies invested about \$415 million and exploitation is ongoing. It has been claimed

<sup>404</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, (Judgment) [2002] ICJ Rep, Rejoinder of the Federal Republic of Nigeria January 2001 para. 10.48

<sup>405</sup> Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of the Two States (adopted 21 February 2001, entered into force 16 January 2003) art. 3.1.

<sup>406</sup> 'Sao Tome and Principe – Maximising Oil Wealth for Equitable Growth and Sustainable Socio-Economic Development, African Development fund' (*Afdb.org*) para 4.2 <<https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Sao%20Tome%20and%20Principe%20-%20Maximizing%20oil%20wealth%20for%20equitable%20growth%20and%20sustainable%20socio-economic%20development.pdf>> accessed 18 May 2020.

that through the cordial atmosphere the JDA has created, Nigerians are more willing to invest in Sao Tome and Principe notable among them being NICON Insurance and Energy Bank.<sup>407</sup>

However, the JDA has not been presented as a very successful one in the literature and its very structure and management style has been criticized. The JDA uses Model II which is the Joint Authority type management option. The structure is hierarchical, at the top of which is the Joint Ministerial Council made up of four appointees of the heads of state of the two countries who may be ministers or persons of equivalent rank.<sup>408</sup> This body has overall responsibility for all matters relating to the exploration for and exploitation of the resources in the zone. These include supervisory powers over the Joint Authority, including approval of its functioning regulations, its budgets and audited accounts, as well as approve development contracts entered into by the Authority.<sup>409</sup> It also has the responsibility of settling disputes in the Authority through consultation.<sup>410</sup> At the level below is the Joint Authority which is responsible for the management of activities relating to exploration and exploitation activities in the zone but is responsible to the Council.<sup>411</sup> It is the body that deals directly with the contractors – awarding contracts for the various contract areas and generally playing a supervisory role regarding their activities but all with the approval of the Joint Ministerial Council.<sup>412</sup>

This structure of the Nigeria /Sao Tome JDA has been criticised in the literature. Some authors are of the view that its role can best be described as consultative and administrative and not as strong as the Thai – Malaysian Joint Authority which inspired this model.<sup>413</sup> The latter has full rights and responsibilities under the Agreement. The

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<sup>407</sup> Fidelis Mac-Leva, 'Why Nigeria -Sao Tome JDA needs Restructuring' *Daily Trust* (Nigeria, July 22 2017) < <https://www.dailytrust.com.ng/why-nigeria-sao-tome-jda-needs-restructuring-luis-prazeres.html> > assessed 22 May 2020.

<sup>408</sup> Treaty between the Federal Republic of Nigeria and the Democratic Republic of Sao Tome and Principe on the Joint Development of Petroleum and other Resources, in respect of Areas of the Exclusive Economic Zone of the Two States (adopted 21 February 2001, entered into force 16 January 2003) art 6.

<sup>409</sup> Ibid art 8

<sup>410</sup> Ibid art 8 (1)

<sup>411</sup> Ibid art 9

<sup>412</sup> Ibid

<sup>413</sup> Hazel Fox and others, *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law, 1989)

Authority is comprised of two joint chairmen, one from each country and an equal number of members from each country. From the current composition these are high government officials from the two countries Ministries of Foreign Affairs, Attorney General's Chambers, Ministry of Energy, and Office of the Council of State among others. These work with a board and management staff through three departments- Exploration and Production, Finance /Account & Production Sharing Contractors (PSC), and Business Support and Legal Services.<sup>414</sup> The rotation concept between Malaysia and Thailand officers and their secondment from certain departments and national oil and gas company is for a four-year term. This arrangement gives some certainty of tenure and appears more transparent and less prone to corruption than the Nigeria /Sao Tome one. The Authority also has power to directly grant licenses and generally given a free hand to manage the exploration and exploitation on behalf of the states unlike the Nigeria / Sao Tome one.<sup>415</sup>

The Nigeria – Sao Tome JDZ has also been criticised for having, “a weak supervision mechanism and bedeviled by corruption”.<sup>416</sup> Huang Wen –bo suggests that the membership of the Joint Ministerial Council which is not less than two and not more than four members with the same level designated by each country's president appears to confer on the two presidents, power to wield considerable control and influence over the council, with the attendant risk of the power being used for private gain and stifling the Authority in the performance of its role.<sup>417</sup>

The award of oil exploration and exploitation contracts has also not been free of criticism. Since 2003, the Joint Development Authority (JDA) has launched several licensing rounds and awarded blocks in the JDZ to several oil companies. Human Rights Watch raised issues about corruption and lack of transparency in these awards.<sup>418</sup> It is further alleged that Nigeria's share of the signature bonuses received from the second

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<sup>414</sup> 'Malaysia-Thailand Joint Authority (MTJA)' (*Mtja.org*, 2018) <<https://www.mtja.org/>> accessed 24 May 2020.

<sup>415</sup> Hazel Fox, et al., *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law, 1989) 134.

<sup>416</sup> Huang Wen-bo, 'Analysis of Nigeria-Sao Tome and Principe Joint Development and Suggestions for China' (2014) 4 *Int. J. Electr. Power Energy Syst* 126

<sup>417</sup> *ibid*

<sup>418</sup> John Emerson, 'An Uncertain Future: Oil Contracts and Stalled Reform in São Tomé e Príncipe' (*Human Rights Watch*, 2010) <<https://www.hrw.org/report/2010/08/24/uncertain-future/oil-contracts-and-stalled-reform-sao-tome-e-principe>> accessed 18 May 2020.

licensing round was largely mismanaged.<sup>419</sup> In addition to corruption, mismanagement and undue political influence, the JDA has suffered from a serious lack of funds which has negatively impacted its ability to perform its functions.<sup>420</sup> It appears therefore that the JDA is not performing at its optimum. Additionally, after all their investment, oil companies have not discovered oil in commercially viable quantities.<sup>421</sup>

## **II. Nigeria /Equatorial Guinea cross- border unitisation**

Nigeria and Equatorial Guinea have a maritime boundary, but major oil resources straddle the boundary- the Ekanga oil field on the Nigerian side of the line and the Zafiro field, the larger of the two, on the Equatorial Guinean side of the boundary. The parties decided to jointly exploit these two fields for their mutual benefit hence Article 6.2 of the Treaty provides that the parties authorise, “the relevant government entities in association with the relevant concession holders to establish appropriate unitization and other arrangements” to enable the area specified in the treaty to be exploited in a commercially feasible manner.<sup>422</sup> The two oilfields were at varying degrees of development with the larger Zafiro field already in active production. The Agreement created the legal framework for the implementation of four confidential associated commercial agreements, which have been signed by the respective concessionaires on each side of the boundary and has been approved by the two governments.<sup>423</sup> The area of unitisation lies entirely on the Nigerian side of the maritime boundary which makes it all the more unique.<sup>424</sup>

As between Nigeria and Equatorial Guinea, the relevant offshore oil activity has been with regard to the authorisation and enforcement of oil and gas exploration and

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<sup>419</sup> *ibid*

<sup>420</sup> *ibid*

<sup>421</sup> 'São Tomé And Príncipe' (*Extractive Industries Transparency Initiative*, 2020) <<https://eiti.org/sao-tome-principe>> accessed 18 May 2020.

<sup>422</sup> Treaty between the Federal Republic of Nigeria and the Republic of Equatorial Guinea Concerning their

Maritime Boundary (adopted 23 September 2000, entered into force in April 2002). art 6.2

<sup>423</sup> *ibid*

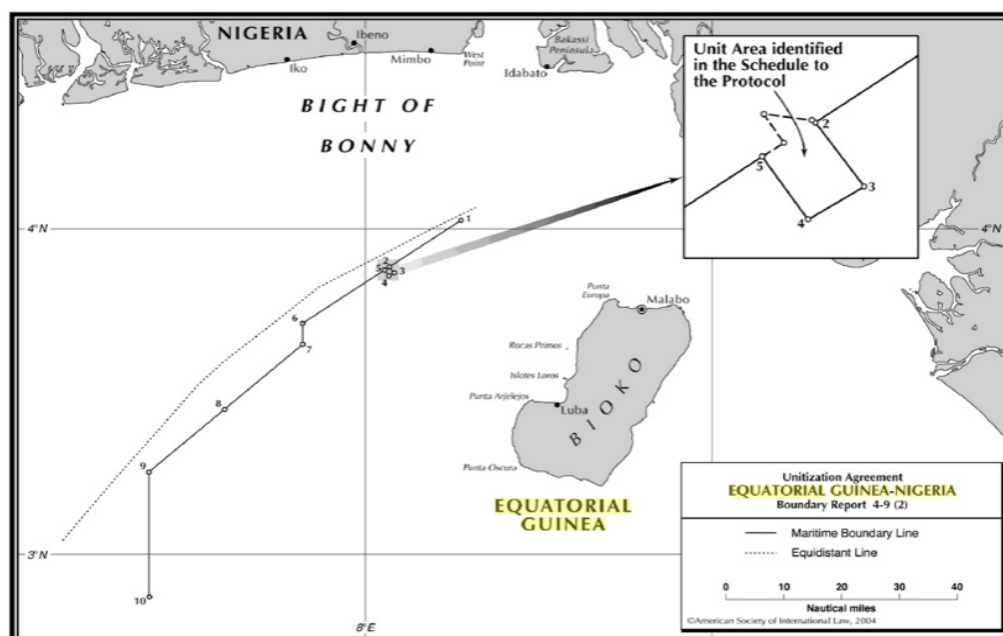
<sup>424</sup> David Colson and Robert Smith, *International maritime boundaries* (Martinus Nijhoff Publishers, 2005) Vol V 3626



exploitation activities.<sup>425</sup> The practice of the parties, namely Nigeria, Cameroon and Equatorial Guinea, in this regard has been to use the median line boundary.<sup>426</sup> These lines formed a *defacto* maritime boundary that the states have adhered to for over 35 years of oil practice.<sup>427</sup> The two states were well aware that they had a converging point near the Equatorial Guinean island of Bioko (the tripoint) with Nigeria which they needed to determine amongst themselves.<sup>428</sup> Thus for Nigeria and Equatorial Guinea the boundary negotiations was mainly a formalisation of the status quo.<sup>429</sup>

Figure 13

Map of the Nigeria and Equatorial Guinea Cross Border Agreement. The figure in the little box shows how the boundary cuts through the Ekanga oil field.



Source: David Colson and Robert Smith, *International maritime boundaries* (Martinus Nijhoff Publishers, 2005) Vol V 3626

<sup>425</sup> 'Written Statement of the Republic of Equatorial Guinea,' *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2001] ICJ Pleadings 197-232.

<sup>426</sup> *ibid*

<sup>427</sup> *ibid*.

<sup>428</sup> *Ibid* para. 32

<sup>429</sup> David Colson and Robert Smith, *International maritime boundaries* (Martinus Nijhoff Publishers, 2005) Vol V 3626

The parties followed the Model III of Joint Development Agreements in which one state is responsible for the exploitation for the benefit of both states. This Agreement is unique in that the resources in the Nigerian Ekanga fields had not been exploited before the agreement and the quantity of oil it could produce was relatively limited when compared to Equatorial Guinea's Zafiro field. This appears to be the reason why Nigeria agreed to Equatorial Guinea taking control. Additionally, the Zafiro field had extensive production facilities. The unitisation therefore permitted the effective development of the Ekanga field by using the existing Zafiro installation under the management of the operator of the Zafiro field.<sup>430</sup>

Another unique arrangement of the agreement is that the applicable law is Equatorial Guinean law even though the activities of the oil company acting as operator take place on the Nigerian side.<sup>431</sup> This has the advantage of the unit operator avoiding the difficulties and complications of having two sets of laws apply to a single operation.<sup>432</sup> Moreover, the agreement enjoins Equatorial Guinea to ensure that Nigeria's interests relating to the Unit area are protected. The roles of the respective governments were clearly spelt out in the Protocol.<sup>433</sup> Equatorial Guinea has legal authority for the unit operations regarding matters to do with safety, environment and other standards. Nigeria has the right to inspect unit installations and also to be consulted on a number of issues including the location of wells.<sup>434</sup> The Agreement also provides for the two governments to conduct a redetermination of the amount of the reserves in the Unit Reservoirs.<sup>435</sup> The shares the two states are to have of the resources and the existing

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<sup>430</sup> Ibid

<sup>431</sup> Protocol in Implementation of Article 6.2 of the Treaty between the Federal Republic of Nigeria and the

Republic of Equatorial Guinea Concerning their Maritime Boundary (adopted 3 April 2002, entered into force

on 29 June 2002) 2220 UNTS 410 art 4.

<sup>432</sup> David Colson and Robert Smith, *International maritime boundaries* (Martinus Nijhoff Publishers, 2005) vol

V 3626

<sup>433</sup> Protocol in Implementation of Article 6.2 of the Treaty between the Federal Republic of Nigeria and the

Republic of Equatorial Guinea Concerning their Maritime Boundary (adopted 3 April 2002, entered into force

on 29 June 2002) 2220 UNTS 410 art 4.

<sup>434</sup> Ibid Art 5

<sup>435</sup> Ibid Art 3, 5

relationship the governments have with their concession holders is to continue unaltered.<sup>436</sup>

The Equatorial Guinea / Nigeria unitisation agreement appears to be effective and performing well as it has been reported that production from the Ekanga field started a year after the agreement came into force and has continued without incident.<sup>437</sup>

### **2.2.2.1. Joint Development Agreements signed but not implemented**

#### **I. Nigeria and Cameroon Agreement**

Nigeria and Cameroon signed an Agreement on 11 March 2010 to develop jointly the oil and gas fields that straddle their maritime boundary south of the Bakassi Peninsula.<sup>438</sup> The maritime boundary passes through prospective oil and gas fields and the same oil exploration company (Addax Petroleum) holds licenses for the Iroko concession area on the Cameroon side of the boundary and the concession block OML 123 on the Nigerian side.<sup>439</sup> However, implementation has not begun and some experts have suggested that it is likely that the petroleum company would be designated the sole operator for the joint exploitation of the resources.<sup>440</sup> This shows that the parties are likely to have a unitisation agreement along the lines of the Nigeria – Equatorial Guinean one. In this case the fields would have developed as one field by the operator on behalf of the two states which would have to agree on a sharing formula. They would also have to agree on which side of the boundary to operate from as well as which law to use. These are weighty matters and no doubt the reason why a 2014 newspaper report alleges that in spite of the optimism expressed in March 2011 by the Nigerian representative at the negotiations that, “exploration of the oil wells would start this

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<sup>436</sup> Tim Daniel, ‘Africa’ in David Colson and Robert Smith (eds.), *International Maritime Boundaries*, (Martinus Nijhoff Publishers 2005) vol. V 3627

<sup>437</sup> Ibid

<sup>438</sup> Chika Amanze-Nwachuku, ‘Nigeria: Hope dims for Nigeria, Cameroon Cross Border Oil Wells Exploration’

(*All Africa*, 2014) <<https://allafrica.com/stories/201402100251.html>>

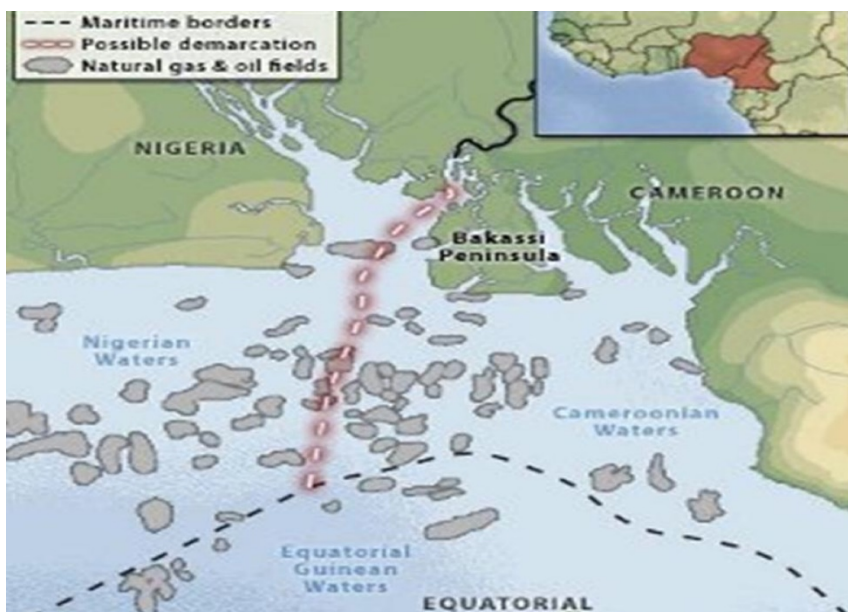
<sup>439</sup> Cameroon And Nigeria Agree Joint Development Along Part of their Maritime Boundary - Durham University' (Dur.ac.uk, 2011)

<[https://www.dur.ac.uk/ibru/news/boundary\\_news/?itemno=11734&rehref=%2Fibru%2Fnews%2F&re subj=Boundary+news+Headlines](https://www.dur.ac.uk/ibru/news/boundary_news/?itemno=11734&rehref=%2Fibru%2Fnews%2F&re subj=Boundary+news+Headlines)> accessed 24 May 2020.

<sup>440</sup> 'Nigeria, Cameroon Proposes to Set Up Combined Oil Exploration Activities in Bakassi. - Cameroon Today - Breaking News | Daily News Updates' (*Cameroon Today - Breaking News | Daily News Updates*, 2011) <<http://news.cameroon-today.com/nigeria-cameroon-proposes-to-set-up-combined-oil-exploration-activities-in-bakassi/4787/>> accessed 24 May 2020.

year”<sup>441</sup> (2011), this has not materialized. From all indications the region is rich in hydrocarbons and both countries would benefit greatly from jointly exploiting the resources. It would be important however for them to take note of the Sao Tome and Principe and Nigerian Joint Development Agreement and avoid the pitfalls of corruption and lack of transparency associated with it. Security concerns need to be addressed well in advance. Plans also need to be made for the management of the marine environment to prevent any incidents of oil spill as well as prepare for cleaning up in the event of a spill.

Figure 14: Unofficial map showing the maritime boundary which passes through prospective oil and gas fields



Source: Menas Borders, 'Cameroon And Nigeria Agree on Joint Oil Exploration in Bakassi Region' (*Menasborders.blogspot.com*, 2011) <<http://menasborders.blogspot.com/2011/03/cameroon-and-nigeria-agree-on-joint-oil.html>> accessed 31 May 2020.

## II. Equatorial Guinea and Cameroon Agreement

Equatorial Guinea and Cameroon have officially agreed that two contiguous gas discoveries near their maritime boundary area would be jointly developed.<sup>442</sup> The two discoveries –the Yolanda gas discovery located approximately 50 km east of Bioko

<sup>441</sup> Ibid

<sup>442</sup> 'Equatorial Guinea and Cameroon To Develop Offshore Gasfields' (*Offshore Technology | Oil and Gas News and Market Analysis*, 2017) <<https://www.offshore-technology.com/news/newsequatorial-guinea-cameroon-to-jointly-develop-offshore-gas-fields-5873605/>> accessed 24 May 2020.

island in Equatorial Guinea and Cameroon's Yoyo gas discovery is located east of the Yolanda discovery. These two fields which straddle the areas being claimed by both states were found in 2007 and are operated respectively by Noble Energy Equatorial Guinea Ltd and Noble Energy Cameroon Ltd. A Memorandum of Understanding has been signed by the two states on 10 July 2017, in which they recognise the gas fields as one resource for joint development.<sup>443</sup> The parties had earlier signed a Data Exchange Agreement for these discoveries and the MOU was the next step towards unitisation of the gas discoveries.<sup>444</sup>

### **III. Ghana and Cote d'Ivoire Strategic Partnership Agreement**

This judgment means that most of the important oil wells Ghana was exploiting are still on Ghana's side of the boundary. However, there are some wells situated very close to the boundary on either side. This is depicted by figure....

An Agreement for joint development has been signed between Ghana and Cote d'Ivoire in October 2017, named, 'Strategic Partnership Agreement between Ghana and Cote d'Ivoire.'<sup>445</sup> The Parties by this Agreement are seeking to cooperate in a variety of areas among which is the joint exploitation and management of transboundary oil and gas and other resources. The cooperation also involves oil research, hydrocarbon exploration, development and management and sharing of information.<sup>446</sup> This is after the two countries have been through third party dispute settlement for the delimitation of the maritime boundary between them.<sup>447</sup> The oil fields that Ghana laid claim to remained on its side of the boundary. However, there are indications that some oil fields may be located very close to or straddle the maritime boundary. This is an indication that the states in the region have the political will to cooperate in exploiting and managing the non-living resources of the area. When implemented, it would augment the state

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<sup>443</sup> 'Cameroon, Eq. Guinea to Jointly Develop Gas Fields' (*Africa Oil & Power*, 2017) <<https://www.africaoilandpower.com/2017/07/17/cameroon-eq-guinea-to-jointly-develop-gas-fields/>> accessed 24 May 2020.

<sup>444</sup> *ibid*

<sup>445</sup> Strategic Partnership Agreement (SPA) between the Government of the Ghana and the Government of Cote d'Ivoire (Signed on 17 October 2017) Document in author's possession

<sup>446</sup> *Ibid* art 3 (b)

<sup>447</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23 2017)

practice in the region and promote cooperation between states in the management of the nonliving marine resources even when there is a maritime boundary.

#### **2.2.2.2. Areas of potential Joint Development for the exploitation of hydrocarbons in the Gulf of Guinea**

There are many areas in the Gulf of Guinea where joint development can be applied for the exploitation of their non - living resources. The geography of the area shows how interconnected the states are and the likelihood that there would be oil discoveries that straddle their boundaries is very high. Coupled with this is the fact the states are usually not in agreement on the method of delimitation. It is suggested that the states would benefit from jointly developing the disputed areas and postponing maritime boundary delimitation. Negotiations for some of these boundaries have been ongoing for years without the states showing any commitment to settle the boundary. This section explores potential areas in the region where the states could benefit from cooperation in the exploitation and management of non-living resources.

#### **I. Ghana, Togo and Benin**

Ghana and Togo have not yet agreed their maritime boundary and currently the states have begun negotiations as discussed above. The basin the two states occupy, is part of the Ghana Keta, Togo, and Benin Basin which stretches across offshore and onshore Nigeria, Ghana, Togo and Benin.<sup>448</sup> Discoveries in Ghana have heightened expectation for the exploratory potential of Togo's offshore acreage and Italian oil company, ENI has acquired blocks which are located in the Dahomey Basin offshore Togo.<sup>449</sup> Benin however does not have a vibrant oil and gas industry. It has been reported that it started producing oil in the 1970s, but output remained low and stopped by the end of the 1990s when funds for operations dried up.<sup>450</sup>

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<sup>448</sup> Ghana Keta - Togo-Benin Exploration Basin' (*Woodmac.com*, 2018)  
<<https://www.woodmac.com/reports/oil-and-gas-exploration-ghana-keta-togo-benin-exploration-basin-22951982>> accessed 24 May 2020.

<sup>449</sup>David Brown, 'Africa's Booming Oil and Natural Gas Exploration and Production: National Security Implications for the United States and China' (United States Army War College Press 2013) 15

<sup>450</sup> 'Benin Exploration Drilling Planned' (*Offshore Engineer Magazine*, 2014)  
<<https://www.oedigital.com/energy/item/6241-agr-secures-well-management-contract>> accessed 24 May 2020.

In 2013, a Nigerian Oil firm SAPETRO made a discovery of a field with the potential of producing 87 million barrels of oil in offshore Benin.<sup>451</sup> All this is taking place in the absence of an established maritime boundary. It is submitted that it would be in the interest of the three countries to start negotiations for joint development of any resources in the area. This is due to the complexity of attempting to delimit their maritime boundaries. If there is no agreement there is likely to be a protracted dispute, which could delay exploration and exploitation of resources in the area. Benin and Togo with their relatively small economies would benefit from cooperating with Ghana instead of wasting resources on determining a maritime boundary by third party dispute settlement. Depending on where the oil is found the three states could decide on using the joint venture model as this likely to give them more control of how the resources are exploited.

## **II. Sao Tome and Principe and Equatorial Guinea**

Regarding Sao Tome and Principe and Equatorial Guinea which still have a pending maritime boundary dispute with Gabon, it appears from the sparse information available that even though in the past joint development was not high on their agenda, currently they have expressed a desire to cooperate in the development of hydrocarbons. In 2008, the president of Equatorial Guinea mentioned the possibility of the two countries, in the future having joint exploration of an oil bloc.<sup>452</sup> In 2012, it was reported that, the two states have agreed on the establishment of a special zone for joint exploration to explore and develop cross border oil and gas reserves which the parties believe straddles the two states maritime area. The two states in their discussions were reported to have expectations for starting operations in October 2020. Equatorial Guinea is expected to bring its experience with Nigeria to bear on this Joint Development Arrangement. According to the report Equatorial Guinea has agreed to train students from Sao Tome and Principe in oil related courses relating to offshore oil and gas exploration,

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<sup>451</sup> Victoria Njoku, 'Danjuma's Firm, SAPETROL, Discovers Oil in Benin Republic - Vanguard News' (Vanguard News, 2013) <<https://www.vanguardngr.com/2013/10/danjumas-firm-sapetrol-discovers-oil-benin-republic/>> accessed 24 May 2020.

<sup>452</sup> 'Sao Tome and Principe: Agreement with Equatorial Guinea Excludes Joint Oil Exploration – Macauhub' (*Macauhub.com.mo*, 2008) <<https://macauhub.com.mo/2008/03/06/4668/>> accessed 24 May 2020.

production and monetization in Equatorial Guinea. The Country has also started becoming a player in the hydrocarbon industry as several international companies have started acquiring blocks and some have announced that they would start drilling in 2020.<sup>453</sup>

The parties also have to confront the issue of what to do with the several blocks straddling the maritime boundary that have already been awarded to exploration companies.<sup>454</sup> This could cause complications. However, the parties could adopt the approach taken in the Equatorial Guinea and Cameroon Joint Development Agreement or the model 1 where each state concessionaires would have its own concessionaire and the concessionaires of the two states would then sign a joint operating agreement to manage the area. The states would have control by having to jointly approve the joint operating agreement. The challenge for these two states is that they both have serious internal financial constraints and would have to pursue this joint development in as cost effective a manner as possible. The Economist therefore gave a bleak forecast stating that it expected the establishment of the zone to be a slow process and for Sao Tome and Principe, it expected investment in oil exploration to be low and any hydrocarbon production to be far off.<sup>455</sup>

### **III. Equatorial Guinea and Gabon**

Equatorial Guinea and Gabon signed an agreement in July 2004 to draw up an accord on joint oil exploration in their disputed waters.<sup>456</sup> Even though Equatorial Guinea is the third largest oil producer in sub-Saharan Africa, the dispute over islands with Gabon has prevented the effective exploration of the area which is believed to have commercially exploitable reserves.<sup>457</sup> Therefore this is a development in the absence of a maritime agreement. The July 2004 Agreement stated that “the parties will abstain from all behaviour and all acts that could compromise, impede, or endanger the

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<sup>453</sup> 'São Tomé And Príncipe and Equatorial Guinea Lead Energy Cooperation in the Gulf of Guinea | Africanews' (*Africanews*) <<https://www.africanews.com/2020/03/18/sao-tome-and-principe-and-equatorial-guinea-lead-energy-cooperation-in-the-gulf-of-guinea/>> accessed 24 May 2020.

<sup>454</sup> *ibid*

<sup>455</sup> *ibid*

<sup>456</sup> Anna Khalfauoui and Constantinos Yiallourides, 'Maritime Disputes and Disputed Seabed Resources in the African Continent' in Tina Soliman Hunter and others (eds) *Routledge Handbook of Energy Law* (1<sup>st</sup> Edition, Routledge 2020)

<sup>457</sup> *ibid*



negotiation and execution of the accord.”<sup>458</sup> The dispute between the two states had been reportedly simmering since 1972, when Gabon's army chased Equatorial Guinean fighters from the island of Mbanie but in recent times it had lain dormant until the prospect of oil rekindled interest in their maritime boundary.<sup>459</sup> The then presidents of Equatorial Guinea and Gabon pledged in the accord to hold formal negotiations on a joint development zone. It was provided in the document that, "the maritime area in question as well as the terms and conditions of its joint development will be determined."<sup>460</sup> It has been reported<sup>461</sup> that Shell (Gabon) has rights to prospect the Mbanie zone according to its contract with the Gabonese authorities, but has put the project on hold because of the territorial dispute. Mbanie, and the nearby Corisco islands are small islands inhabited by people from the Benga ethnic group, present in both Equatorial Guinea and Gabon.<sup>462</sup>

It would be beneficial if the parties considered establishing the zone in dispute as a joint development zone and use the Joint Authority model of joint development. In this regard the parties could set up a Joint Development Authority to oversee the exploitation of the resources in the JDZ.

### **2.3. Obligation under UNCLOS to settle maritime boundary disputes peacefully**

States generally have an obligation under international law to settle disputes using peaceful means and without the use of force. Regarding maritime boundary disputes, Part XV of UNCLOS provides a dispute settlement regime which sets out compulsory dispute settlement procedures which are binding on a state once it becomes a party to the Convention.<sup>463</sup> However, states have to first fulfil the requirements of peacefully settling the disputes through the means set out in Article 33 of the Statute of the ICJ. In this regard states can only invoke the compulsory jurisdiction provisions after fulfilling two obligations set out in Articles 281 and 282 as well as 283 namely the obligation to exchange views and the obligation to use existing agreements which they have adopted to settle the dispute.

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<sup>458</sup> *ibid*

<sup>459</sup> *ibid*

<sup>460</sup> *ibid*

<sup>461</sup> *ibid*

<sup>462</sup> *Ibid*

<sup>463</sup> UNCLOS, Section 2 part XV

### **2.3.1. Obligation to exchange views**

One obligation is under Article 283 which provides that the parties expeditiously proceed to an exchange of views regarding the settlement of the dispute by negotiation or other peaceful means. The parties would again have to exchange views where such negotiations break down or where there is a settlement, but the circumstances require such an exchange of views regarding its implementation.<sup>464</sup> The extent of this obligation was considered in the *Malaysia v Singapore* case, where the Tribunal was of the view that there was no obligation on Malaysia to continue with an exchange of views when it concluded that this exchange could not yield a positive result.<sup>465</sup> So also the Tribunal in the *Mox plant case*<sup>466</sup> was of the opinion that a state party is not obliged to continue with an exchange of views when it has come to the conclusion that the possibilities of reaching agreement are exhausted.<sup>467</sup>

### **2.3.2. Obligation to use existing agreements on maritime delimitation dispute settlement**

The other obligation provided for under Articles 281 and 282 is to use the dispute settlement mechanism options which the parties have adopted in binding agreement which also provides for a binding outcome. This provision allows parties to use means of settlement outside the UNCLOS mechanism. The international court or tribunal has first of all to determine whether the parties have in fact agreed to seek settlement of the dispute through peaceful means of their choice and whether the agreement provides for a binding outcome. It is also necessary to determine whether the agreement covers the disputes concerning the interpretation and application of maritime delimitation disputes. In the *Southern Bluefin Tuna case*<sup>468</sup> the Annex VII Tribunal viewed a prior agreement of the parties as a bar to its jurisdiction. In its view the Agreement excluded further procedures even though this was not explicitly stated in the relevant provision. In the

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<sup>464</sup> UNCLOS art 283 (2)

<sup>465</sup> *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Report 2003, 48.

<sup>466</sup> *MOX Plant (Ireland v. United Kingdom)*, (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001.

<sup>467</sup> *Ibid* 60

<sup>468</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 280

*Mox plant* case after this, Judge Wolfrum, also stated that any agreement excluding Part XV must be expressed explicitly in the agreement.<sup>469</sup> It is likely that this reasoning would be applied to future cases raising similar issues.

Article 282 also takes into account states obligations under any general, bilateral or regional agreements when they entail a binding decision. It provides, “*If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.*”

Some authors have concluded that the word ‘otherwise’ after ‘bilateral agreement’ was put there to include the acceptance of the jurisdiction of the ICJ by declaration made under Article 36 (2) which provides, that the states parties may at any time make a declaration that they accept ICJ jurisdiction on all legal disputes concerning international law.<sup>470</sup> Therefore accepting ICJ compulsory jurisdiction can be considered an Agreement mentioned in Article 282.

### **2.3.3. Compulsory procedures under section 2**

If the parties use the means stated in section 1 but fail to reach a settlement, they are obliged to use the compulsory procedures set out in Section 2. Regarding the forum for dispute resolution Article 287 provides states with four options for formal adjudication which states are free to choose from by means of a written declaration.<sup>471</sup> These are the ITLOS, the ICJ, arbitration under Annex VII of UNCLOS or, in the cases of fisheries, protection of the marine environment, marine scientific research and navigation, special arbitration before panels of experts constituted in accordance with Annex VIII of UNCLOS.<sup>472</sup> If however the parties to a dispute have chosen different fora, or not chosen any fora, then the default position is arbitration under Annex VII of UNCLOS.<sup>473</sup>

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<sup>469</sup> *MOX Plant (Ireland v. United Kingdom)*, (Provisional Measures, Order of 3 December 2001, Sep. op. Wolfrum) ITLOS 2001.

<sup>470</sup> Anne Sheehan, ‘Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes’

[2005] UQLawJl 7

<sup>471</sup> UNCLOS Art 287

<sup>472</sup> UNCLOS Art 287

<sup>473</sup> UNCLOS Art 287(3)

There are however several exceptions to compulsory jurisdiction provided by Article 298. One is where a state has made a declaration in writing that it does not accept any one or more of the forums provided under section two referred to above, respecting maritime boundary delimitation.<sup>474</sup> However such a declaration does not mean that a party is no longer obliged to settle maritime delimitation disputes. The parties are still required to comply with section 1 as well as with the obligations under Article 298. In this regard Article 298 (1) (a) (i) provides that where the parties' negotiations have failed to yield a settlement within a reasonable time, either one of them may institute conciliation proceedings using the procedure under Annex V section 2. This presumes a specific obligation to negotiate which in turn implies that the states cooperate.<sup>475</sup> If the parties still cannot reach agreement, through conciliation, the parties have a further obligation to reach an agreement to select one of the procedures under section 2. The negotiation must be done in good faith but can only come into effect by mutual consent.

The relationship between this provision and the acceptance of ICJ compulsory jurisdiction is worthy of comment. If all the parties to a dispute accept the jurisdiction of the ICJ under Article 36 (2) of the Statute of the ICJ, then notwithstanding the optional exclusion declaration a state may have made under article 298 (1) (a), the ICJ may proceed to have jurisdiction over a maritime delimitation case, unless the party which made the optional declaration has made a declaration excluding the dispute from ICJ jurisdiction also.<sup>476</sup>

#### **2.3.4. Provisional measures under Article 290 of UNCLOS and Article 41 of the ICJ statute**

Where the parties have submitted their dispute to a court or tribunal, which determines that it has the requisite jurisdiction, the court or tribunal may prescribe provisional measures to “preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.”<sup>477</sup> The relevant

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<sup>474</sup> UNCLOS Art 298 (1)

<sup>475</sup> Anne Sheehan, 'Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes' [2005] UQ Law JI 7

<sup>476</sup> *ibid*

<sup>477</sup> UNCLOS art 290

provision, Article 290 (1) states, “If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part or Part XI, section 5, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision.” The ICJ Statute also makes provision for the Court to, “indicate if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.” The Statute unlike the UNCLOS provision does not make the protection of the marine environment one of the objectives for the indication of provisional measures. Judge Wolfrum is of the view that where the two provisions conflict, Article 290 would prevail under the principle of *lex specialis*.<sup>478</sup> It can be concluded that as UNCLOS recognises the ICJ as a forum for Law of the Sea disputes the Court’s rules including Article 41 of the statute of the ICJ can be applied in Law of the Sea disputes alongside the UNCLOS provisions on the subject.

The language used in Article 41 of the ICJ statute specifically that the Court can ‘indicate’ not order interim measures is unlike the mandatory nature of the language used in Article 25 of the ITLOS Statute which states that, “the Tribunal and its Seabed Disputes Chamber shall have the power to prescribe provisional measures.” This calls into question the binding nature of the ICJ provision. The Court addressed the issue in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*,<sup>479</sup> where Bosnia filed two requests for interim measures. The court indicated measures the first time on 8 April 1993 and when they were not complied with Bosnia filed another request.<sup>480</sup> Regarding the second request the Court did not find the need to make measures additional to those earlier indicated but was of the view that the measures already prescribed be immediately and effectively implemented.<sup>481</sup> Due to its failure to comply with the orders for provisional measures, the Court found Serbia and Montenegro in breach of its international obligations and therefore obliged to pay

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<sup>478</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 280

<sup>479</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43.

<sup>480</sup> *Ibid* paras 4 and 7

<sup>481</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Further Requests for the Indication of Provisional Measure, Order) [1993] ICJ Rep 325

compensation to Bosnia and Herzegovina.<sup>482</sup> Also in the case of *LaGrand*,<sup>483</sup> Germany argued that the provisional measures ordered were binding whilst the United States argued that they were not due to the language and history of Article 41 and 94 of the Charter.<sup>484</sup> The Court reasoned that the object and purpose of the Statute was that such measures should be binding. According to the Court, its order “was not a mere exhortation” but “created a legal obligation for the United States” which the court found the latter had not fulfilled.<sup>485</sup> This question does not arise under UNCLOS, as Article 290 (6) of UNCLOS states, “the parties to the dispute shall comply promptly with any provisional measures prescribed under this article.” It is therefore logical to conclude that provisional measures under Article 290 are binding on the states to whom it is directed.

An important feature of provisional measures under UNCLOS can be found in the difference between provisional measures ordered under Article 290 (1) and that ordered under Article 290 (5) which provides, “Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Law of the Sea, or with respect to activities in the Area, the Seabed Disputes Chamber, may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires...” Article 290 (1) is used when a dispute has been submitted to a court or tribunal and the tribunal has jurisdiction. Paragraph 5 however, is used when the constitution of the arbitral tribunal is pending which is only until the setting up of an Annex VII Tribunal is complete. Under Article 290 (5) two conditions have to be present- one that the tribunal to be constituted would have jurisdiction and the other that the urgency of the situation so requires the prescription of such measures.

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<sup>482</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] ICJ Rep para 7.

<sup>483</sup> *LaGrand (Germany v. United States of America)*, (Merits) [2001] ICJ Rep 466

<sup>484</sup> *Ibid* para 33.

<sup>485</sup> *Ibid* para 110

On jurisdiction generally, ITLOS jurisprudence indicates that the obligation to “exchange views” required by Article 283 if not fulfilled by the disputing states is a bar to the tribunal assuming jurisdiction. It is a necessary precondition and the tribunal would make a determination on whether or not the condition has been fulfilled before proceeding further. It is important to note that under general international law states are not obliged to negotiate prior to the submission of their dispute to third party dispute settlement.<sup>486</sup> However, where there exists a special rule in a convention requiring them to do so, this takes precedence. Article 283 of LOSC is one such special rule and is regarded as an “exception to general international law”.<sup>487</sup> In the *Southern Bluefin Tuna case*,<sup>488</sup> the Tribunal found that negotiations and consultations had taken place between the parties and from the records both Australia and New Zealand considered these as being under the LOSC and the parties had stated that the negotiations had terminated.<sup>489</sup> It concluded that the negotiations should not be continued as the possibility of reaching an agreement had been exhausted and both sides in the dispute were in agreement about the situation.

The Tribunal maintained a similar position in both the *Mox Plant*<sup>490</sup> and *Land Reclamation*<sup>491</sup> cases. In the former case, the Tribunal acknowledged that both Ireland and the United Kingdom had sought an exchange of views and that there had been a negotiation in which the LOSC was discussed.<sup>492</sup> In the latter case, the Tribunal found among others that as both parties met and negotiated in a bid to settle the matter amicably but were not able to settle the dispute or agree on a means to settle it, the condition had been met.<sup>493</sup> These three cases showed that the tribunal did not leave it in the hands of the parties to determine whether the condition had been met but went ahead to itself declare that consultations or negotiations had taken place, the parties had

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<sup>486</sup> *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (provisional measures Order of 10 September 2003, Sep. Op. Jesus) ITLOS Reports 2003, 53.

<sup>487</sup> *M/V “Louisa” (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Order of 23 December 2010, diss. Op. Treves) ITLOS Reports 2008-2010, 3.

<sup>488</sup> *Southern Bluefin Tuna (New Zealand -Japan, Australia-Japan)* (Award on Jurisdiction and Admissibility) (2000) XXIII RIAA 29.

<sup>489</sup> *ibid*

<sup>490</sup> *MOX Plant (Ireland v. United Kingdom)*, (Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001.

<sup>491</sup> *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (provisional measures Order of 10 September 2003) ITLOS Reports 2003.

<sup>492</sup> *Ibid* p.107

<sup>493</sup> *ibid*

discussed the dispute and both parties were unable to settle the dispute. The Tribunal however took a slightly different view in the *Louisa*<sup>494</sup> case where the evidence of the exchange of views consisted of two *notes verbale* sent by the Saint Vincent and the Grenadines to Spain which simply requested information without making any reference to an international dispute under LOSC or even asking for an exchange of views.<sup>495</sup> Even though it found that Spain did not answer the *notes verbale* and Spain contended that there was no exchange of views, the tribunal still found that the condition had been met.<sup>496</sup>

The Tribunal on the word of one party could still find that the condition had been met as was the case in the *Ara Libertad* case,<sup>497</sup> where the Tribunal found that Ghana and Argentina had engaged in at least three undisputed exchanges of views.<sup>498</sup> However, it was only on the word of Argentina that such exchange of views and negotiations had failed to resolve the dispute that the Tribunal held that the conditions had been met.<sup>499</sup> So also did the Tribunal consider the Netherlands view that the possibility of settlement was exhausted in the *Arctic Sunrise* case,<sup>500</sup> to make a determination that there had been an exchange of views. It can be concluded that the tribunal has always demanded an exchange of views or negotiations or consultation and would use even a minimum expression of these to make a determination for the assumption of jurisdiction. However, it must be emphasised that the obligation must be discharged in good faith and the Tribunal is duty bound to determine whether this has been done.

Other issues the Tribunal takes into account is the existence of alternative dispute settlement procedures that are to be utilized in lieu of those in LOSC, and whether the exclusions and limitations in Section 3 of Part XV of UNCLOS apply. If the latter is the case, it appears that the court or tribunal cannot make a *prima facie* finding of jurisdiction in respect of maritime boundary disputes, as a state may have issued a

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<sup>494</sup> *M/V "Louisa" (Saint Vincent and the Grenadines v. Kingdom of Spain)* (Order of 23 December 2010) ITLOS Reports 2008-2010, 3

<sup>495</sup> *Ibid* p. 67,68

<sup>496</sup> *ibid*

<sup>497</sup> *"ARA Libertad" (Argentina v. Ghana)* (Provisional Measures, Order of 15 December 2012) ITLOS Reports 2012, 344-345

<sup>498</sup> *ibid*

<sup>499</sup> *ibid*

<sup>500</sup> *The "Arctic Sunrise" Case (Kingdom of The Netherlands V. Russian Federation)* (Provisional Measures, Order of 22 November 2013) ITLOS Reports 2013, 246-247



declaration under Article 298 excluding disputes concerning the delimitation of territorial seas, continental shelf or EEZ from compulsory procedures entailing a binding decision.

On the requirement for urgency, under Article 290 (5) Judge Mensah emphasised that, the Tribunal must make the conclusion, not just that there is the possibility of prejudice to the rights of one or other of the parties (or serious damage to the marine environment) but also that the prejudice or damage would occur before the arbitral tribunal is constituted.<sup>501</sup> This according to Judge Mensah, means that ITLOS may not prescribe provisional measures unless it is satisfied that some prejudice of rights or harm to the marine environment might occur prior to the constitution of the Annex VII arbitral tribunal, not prior to a final determination of the case.<sup>502</sup>

The main purpose of provisional measures is as stated in Article 41 of the ICJ statute, “to preserve the respective rights of either party” in the case, pending the final decision on the merits. In this quest the court is concerned with the rights of both parties to the case. Judge Mensah argues that in considering whether to grant provisional measures, a court or tribunal is of necessity faced with conflicting rights and it is obliged to weigh the different rights of the parties against each other.<sup>503</sup> In addition to this reason, the other important reason for the prescription of provision measures can be found under Article 290 of UNCLOS which provides for provisional measures to prevent serious harm to the marine environment. Courts and tribunals have held that provisional measures protect the parties against irreparable prejudice to the rights in dispute and this was pointed out by the court in the *Fisheries jurisdiction* case.<sup>504</sup> In this regard, the jurisprudence and practice have developed conditions and requirements that need to be satisfied before provisional measures are ordered. Some of these principles are that provisional measures are ordered only in cases where they are considered necessary and appropriate at the discretion of a court or tribunal which considers whether on the peculiar facts of the case, such measures are needed to achieve results that cannot

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<sup>501</sup> Thomas A. Mensah, ‘Provisional Measures in the International Tribunal for the Law of the Sea’ (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 44.

<sup>502</sup> *Ibid* p. 47.

<sup>503</sup> *Ibid* p. 43.

<sup>504</sup> *Fisheries Jurisdiction cases, (United Kingdom of Great Britain and Northern Ireland v Iceland)* (Request for the Indication of Interim Measures of Protection: Order) [1972] ICJ Rep 16

otherwise be achieved.<sup>505</sup> It is also important that courts and tribunals do not order provisional measures unless they are convinced that prima facie they would have jurisdiction deal to with the merits of the dispute.<sup>506</sup> Since the aim of the measures is to preserve the rights of the parties the courts or tribunals endeavour to use equity and justice to ensure that no party suffers any prejudice to their rights and interests.<sup>507</sup> Importantly provisional measures are only appropriate for cases where there is a matter of urgency in that serious and irreversible damage would be caused if provisional measures were not ordered.

Where reparation is possible as in the *Aegean Sea* case,<sup>508</sup> the ICJ is inclined to decline to order provisional measures. ITLOS and Annex VII tribunals also apply the test of a real and imminent risk that irreparable prejudice may be caused to the rights of the parties in dispute. In the *Ghana / Cote d'Ivoire* case, the Special Chamber determined that whatever prejudice was caused to Cote d'Ivoire by Ghana's oil and gas activities could cause a risk of prejudice to Cote d'Ivoire sovereign rights.<sup>509</sup> It further considered whether such damages could be easily remedied and decided that it would not, as the activities Cote d'Ivoire complained of are capable of resulting in, "significant and permanent modification of the physical character of the area in dispute."<sup>510</sup> However, the Special Chamber found that Cote d'Ivoire had not provided enough evidence to substantiate its request or harm to the marine environment but nevertheless issued a general direction that the parties should act with prudence and caution to prevent such harm and imposed a duty to cooperate with each other to achieve that aim.<sup>511</sup> The Chamber therefore ordered Ghana, "to carry out strict and continuous monitoring of all activities undertaken by itself or with its authorisation with a view to ensuring the prevention of serious harm to the marine environment."<sup>512</sup> In compliance the parties had

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<sup>505</sup> Ibid para 21

<sup>506</sup> Ibid para 15

<sup>507</sup> Thomas A. Mensah, 'Provisional Measures in the International Tribunal for the Law of the Sea' (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 44.

<sup>508</sup> *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection Order) [1976] ICJ Rep 3

<sup>509</sup> *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (ITLOS, Sept 23 2017)

<sup>510</sup> Ibid para 88.

<sup>511</sup> Ibid para 72

<sup>512</sup> Ibid para 108 (c)

several meetings where such cooperation was discussed in accordance with the order of the Chamber.<sup>513</sup>

In the *Aegean Sea Continental Shelf* case between Greece and Turkey in the ICJ, Greece requested the Court to order Turkey to “refrain from all exploration activity or any scientific research with respect to the continental shelf areas within which turkey has granted such licenses and permits or adjacent to the islands or otherwise in dispute in the present case” and an order that both states “refrain from taking further military measures nor actions which may endanger their peaceful relations.”<sup>514</sup> The ICJ held that it was not necessary for it to order provisional measures for two reasons: one was that the alleged breach by Turkey if it was established, could be remedied by reparation by appropriate means. The second was that the UN Security Council was already seized of the matter and had “ordered the parties to do everything in their power to reduce the present tensions in the area so that the negotiation process may be facilitated.”<sup>515</sup> Both parties were urged to avoid activities that would further aggravate the situation. Regarding provisional measures by ITLOS the most recent case is that between *Ghana and Cote d’Ivoire* where the Special Chamber citing the *M/V “Louisa”* considered whether there was a real and imminent risk that irreparable prejudice may be caused to the region of the parties in dispute and also whether there was any urgency. This is according to the Tribunal, because proof of urgency is required in order for the chamber to exercise the power to prescribe provisional measures. This must be a real and immediate risk that irreparable prejudice may be caused to rights at issue before final decision is delivered.<sup>516</sup> To make such a determination the court used the plausibility test which meant that the rights being sought by Cote d’Ivoire should be plausible. The court found that they were plausible and thus proceeded to order that no new drilling either by Ghana or under its control be undertaken in the disputed area pending the decision on the merits of the case.<sup>517</sup>

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<sup>513</sup> Emelia Ennin Abbey, 'Ghana, Cote D'Ivoire Meet Over ITLOS Ruling Implementation' (*Graphic Online*, 2018) <<https://www.graphic.com.gh/news/general-news/ghana-cote-d-ivoire-meet-over-itlos-ruling-implementation.html>> accessed 25 May 2020.

<sup>514</sup> *Aegean Sea Continental Shelf (Greece v Turkey)* (Interim Protection Order) [1976] ICJ Rep 3

<sup>515</sup> *Ibid* para 41

<sup>516</sup> *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)* (Provisional Measures, Order of 25 April 2015) ITLOS Reports 2015 para 42.

<sup>517</sup> *Ibid* para 108 (a)

The Chamber however did not suspend drilling in areas where drilling had already taken place as in its opinion this would entail the risk of considerable financial loss to Ghana and its concessionaires.”<sup>518</sup> The Special Chamber also took into account the risk of harm to the marine environment stating that a complete suspension of activities would pose, “a serious danger to the marine environment resulting in particular from the deteriorating of equipment.”<sup>519</sup> It can be concluded that the Special Chamber determined more specific standards or criteria in addition to the Convention requirements that must be met in this regard, though largely dependent on the facts of the case. The ability of a court or tribunal to be quite creative in ordering provisional measures to be put in place between the parties pending a maritime boundary delimitation is underscored by the fact that the court or tribunal is not constrained to order only the measures requested by the parties, but may vary the requests, or devise new measures, as that court or tribunal sees fit.<sup>520</sup> In addition to prescribing specific measures, ITLOS has determined that its power under Article 290 incorporates the authority to make recommendations as well as issue orders to parties.<sup>521</sup> It is noteworthy that once the Annex VII Tribunal is constituted, any provisional measures previously made may be modified or revoked if the circumstances justifying their prescription have been changed or cease to exist.<sup>522</sup> As such, the possibility exists that an appropriate order prescribed by a court or tribunal could be used as a basis for the parties to renew attempts at negotiating their own temporary arrangement and this agreement could then be grounds for revoking the order.<sup>523</sup>

It can be concluded therefore that the powers given to a court or tribunal under Article 290 and the obligation on states to “make every effort to enter into provisional arrangements” under Articles 74 and 83 converge when proceedings for maritime boundary delimitation are instituted under Part XV of LOSC and the states in dispute have been unable to establish their own provisional arrangements.

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<sup>518</sup> Ibid para 85

<sup>519</sup> Ibid

<sup>520</sup> Thomas A. Mensah, ‘Provisional Measures in the International Tribunal for the Law of the Sea’ (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 44.

<sup>521</sup> Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea*, (Cambridge University Press 2004) 79

<sup>522</sup> Ibid.

<sup>523</sup> Giorgio Gaja, ‘Requesting the ICJ to Revoke or Modify Provisional Measures’ (2015) 14 *Law & Prac Int’l Cts & Tribunals* 3-4.

#### 2.4. Third party maritime boundary dispute settlement in the Gulf of Guinea

Where negotiations fail to achieve an agreement, judicial settlement of maritime boundaries would have to be considered. In the region, there are only two instances of third-party dispute settlement of maritime boundaries namely between Cameroon and Nigeria and Ghana and Cote d'Ivoire. Regarding the Cameroon and Nigeria case, Cameroon unilaterally instituted proceedings against Nigeria requesting among others that the court determine the course of the maritime boundary between them.<sup>524</sup> The two states had made declarations accepting the compulsory jurisdiction of the ICJ under Article 36 (2) of the Statute of the Court and this formed the basis of the court's jurisdiction. The court however used the provisions of UNCLOS in adjudicating the matter as can be seen from the judgment.<sup>525</sup>

As between Ghana and Cote d'Ivoire, Ghana unilaterally initiated proceedings by transmitting to the President of ITLOS a notification and statement of claim instituting arbitral proceedings under Annex VII of UNCLOS.<sup>526</sup> During consultations held by the President of ITLOS, with the two states, a special agreement was concluded to submit the dispute to a special chamber of the Tribunal formed pursuant to Article 15 (2) of the statute of the Tribunal.<sup>527</sup> This provision provides for the ITLOS to form a chamber of three or more elected members to deal with particular categories of disputes. Ghana had hitherto declared that it did not accept any of the procedures provided for in section 2 of part XV of UNCLOS in matters related to maritime boundary delimitation in accordance with Article 298 (1) of UNCLOS.<sup>528</sup> However, in 2014 before its case with Cote d'Ivoire, Ghana withdrew the declaration. Cote d'Ivoire had filed a declaration recognising the jurisdiction of the ICJ as compulsory on 29 August 2001.<sup>529</sup> Thus with Ghana not having specified any forum and Cote d'Ivoire having chosen the ICJ, Ghana had to initiate arbitration proceedings under ITLOS.

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<sup>524</sup> 'Written Statement of the Republic of Equatorial Guinea,' *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* [2001] ICJ Pleadings para. 200

<sup>525</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, [2002] ICJ Rep. Para. 244

<sup>526</sup> *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Provisional Measures, Order of 25 April 2015) ITLOS Reports 2015 para.1

<sup>527</sup> Ibid para 4

<sup>528</sup> Ibid para. 80

<sup>529</sup> Cote d'Ivoire had declarations recognising the jurisdiction of the ICJ as compulsory

It is noteworthy that even after third party settlement proceedings, the states still had to negotiate and cooperate in the implementation of the judgment of the Court or tribunal. In the Ghana and Cote d'Ivoire case after the ruling of the Special Chamber, the parties established a joint committee to implement the ruling and develop a document that shows the plotted maritime boundary according to the ruling.<sup>530</sup> In the *Nigeria/Cameroon* case after the judgment the parties established a commission called the Cameroon – Nigeria mixed Commission which with the support of the United Nations was able to implement the Judgment.<sup>531</sup>

#### **2.4.1. Third party dispute settlement options for pending maritime boundary delimitation disputes in the Gulf of Guinea**

Regarding pending maritime boundary disputes, if negotiations fail, there are many different options available to the states depending on which forum they have chosen. In the case of Ghana Togo and Benin, the latter two have both opted for the ICJ. Ghana has not done so and so the default option of arbitration would have to be used. This applies also to the Ghana, Nigeria and Benin situation as they also have not chosen the same forum.

Like the Ghana, Togo and Benin's position, Nigeria and Cameroon have both accepted the ICJ as their preferred forum, whilst Equatorial Guinea has not opted for any forum. They would therefore also have to use arbitration. Regarding Equatorial Guinea and Gabon, as has been discussed above, they have been in conflict over Corisco Bay to the extent that it has brought them almost to the brink of war on several occasions.<sup>532</sup> In 2004 both parties agreed to a UN mediation to peacefully resolve their sovereignty dispute which would facilitate the settlement of the maritime boundary between

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<sup>530</sup> Mu Xuequan (ed), 'Ghana, Cote d'Ivoire Agree to Implement Tribunal Ruling on Maritime Dispute - Xinhua | English.News.Cn' (*Xinhuanet.com*, 2017) <[http://www.xinhuanet.com/english/2017-10/18/c\\_136687211.htm](http://www.xinhuanet.com/english/2017-10/18/c_136687211.htm)> accessed 25 May 2020.

<sup>531</sup> Agreement between the Republic and the Federal Republic of Nigeria Concerning the Modalities of withdrawal and transfer of Authority in Bakassi Peninsula (adopted on 12 June 2006, not in force) available at 'PA-X: Peace Agreements Database' (*Peaceagreements.org*, 2017) <<https://www.peaceagreements.org/view/240/Agreement%20between%20the%20Republic%20of%20Cameroon%20and%20the%20Federal%20Republic%20of%20Nigeria%20concerning%20the%20Modalities%20of%20Withdrawal%20and%20Transfer%20of%20Authority%20in%20the%20Bakassi%20Peninsula>> accessed 25 May 2020.

<sup>532</sup> Rongxing Guo, *Territorial Disputes and Resource Management: A Global Handbook* (Nova Science publishers, Inc New York 2007) 87.

them.<sup>533</sup> As the dispute had as its underlying cause access to resources in the oil rich region, the parties also decided to jointly exploit the resources as they continue to work on the border problem.<sup>534</sup> The parties with the help of the UN have been in negotiations and in November 2016, signed a special agreement to resolve their differences peacefully by submitting to the ICJ, their sovereignty and maritime boundary dispute.<sup>535</sup> However it appears this has not yet been done.<sup>536</sup> It is likely that if submitted to the Court, Sao Tome and Principe would join the matter as it has made a declaration recognising the jurisdiction of the ICJ.

#### **2.4.2. Settlement of maritime boundary disputes related to the Continental Shelf beyond 200 nm in the Gulf of Guinea**

Settlement of maritime disputes related to the continental shelf beyond 200 M is subject to the same regime as the EEZ and continental shelf within 200 M. One of the main issues which confronts parties during negotiation and in deliberations of international courts and tribunals is whether the maritime boundary in the continental shelf beyond 200M can be delimited in the absence of a recommendation by the CLCS. The Special Chamber in the *Ghana /Cote d'Ivoire case*, was of the opinion that the recommendations of the CLCS are without prejudice to the lateral delimitation of the continental shelf between Ghana and Côte d'Ivoire.<sup>537</sup> This is clearly set out in the recommendations of the CLCS to Ghana, which do not address the outer limit fixed point of the Continental Shelf (OL-GHA-9) as originally submitted by Ghana.<sup>538</sup> The CLCS thereby acknowledges the right of the parties to settle the continental shelf beyond 200M by agreement. As pointed out by the Special Chamber, in the *Ghana/Cote d'Ivoire case*, the CLCS and the Special Chamber have different roles to play.<sup>539</sup> Whereas delineation of the continental shelf beyond 200 M, is within the remit of the

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<sup>533</sup> Ibid p.88.

<sup>534</sup> UNGA 'Report of Secretary General on the Work of the Organisation' UN GAOR 59<sup>th</sup> Session Supp No.1 UN DOC A/59/1 (2004)

<sup>535</sup> 'Gabon, Equatorial Guinea Agree to End Territorial Dispute Over Islands' (*Africa Times*, 2016) <<https://africatimes.com/2016/11/17/gabon-equatorial-guinea-agree-to-end-territorial-dispute-over-islands/>> accessed 25 May 2020.

<sup>536</sup> The ICJ website does not show that the parties have submitted a dispute to the Court.

<sup>537</sup> *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d'Ivoire)* (Provisional Measures, Order of 25 April 2015) ITLOS Reports 2015 para. 519.

<sup>538</sup> *ibid*

<sup>539</sup> *Ibid* para 493.

CLCS, the Special Chamber decides on the course of the lateral limits.<sup>540</sup> Further, although those lateral limits have to intersect the outer limit, whatever decision is arrived at, would be without prejudice to the recommendations of the CLCS.<sup>541</sup> The *Ghana/Cote d'Ivoire* case was the first in which a state has had a recommendation from the CLCS prior to the case being decided.<sup>542</sup> However it does not appear that the position would have been different even if there had not been a recommendation.

All the states in the region have made submissions to the Commission on the Limits of the Continental Shelf (CLCS) for an extended continental shelf. This is likely to put on hold the delimitation in the continental shelf beyond 200 nm until the Commission has made recommendations on the states' submissions. There is therefore a clear distinction between the delimitation of the continental shelf under Article 83 and the delineation of its outer limits under article 76. Under the latter Article, the Commission is assigned the function of making recommendations to coastal States on matters relating to the establishment of the outer limits of the continental shelf, but it does so without prejudice to the delimitation of maritime boundaries. The function of settling disputes with respect to delimitation of maritime boundaries is entrusted to dispute settlement procedures under article 83 and Part XV of the Convention, which include international courts and tribunals.

### **2.5. Regional cooperation in the Gulf of Guinea for the promotion of joint arrangements pending maritime boundary delimitation and the peaceful settlement of maritime boundary disputes**

It is clear from the preceding discussion that due to the many overlapping maritime boundaries in the EEZ, Continental shelf and potentially the Continental shelf beyond 200 nm, as well as the lack of a uniform dispute resolution mechanism, it would be more beneficial for the states to cooperate in the exploitation of the oil resources than to lay undue emphasis on delimiting the maritime boundaries appertaining to them. It is commendable that some effort has been made by some states on a bilateral basis to have joint arrangements for the exploitation of the resources. However, cooperation to

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<sup>540</sup> *ibid*

<sup>541</sup> *ibid*

<sup>542</sup> *Ibid* Para 501.



exploit disputed oil and gas resources is problematic both political and legally. Politically it is not expedient for states to cede what they perceive as their entitlement to another state. Legally UNCLOS does not make provision requiring states to cooperate in the management of oil and gas as it does for fisheries. At best it envisages bilateral provisional arrangements. However, in the region some boundaries especially those found in the continental shelf often involve more than two states. This is the case between Ghana, Togo, Benin and Nigeria as well as Cameroon and Nigeria. Entitlements to islands and the effect to be given to them as well as the cut off effect they produce, have also been one of the causes of maritime boundary disputes between Equatorial Guinea, Sao Tome and Principe and Gabon. Significantly there is no successful case of provisional arrangements involving three or more states in the region. Even those that involve two states are few as can be seen from the above discussion and have not generally been as successful as envisaged by the parties.

These challenges could be solved by the creation of a regional body that could coordinate cooperation efforts. Currently the only regional body which makes provision for all the states in the Gulf of Guinea to become members and which has some mandate involving the management of oil and gas resources is the Gulf of Guinea Commission. This is a body that was established by Treaty<sup>543</sup> signed in Libreville, Gabon, on 3 July 2001. Its member states include Nigeria, Angola, Gabon, Congo, São Tomé and Principe,<sup>544</sup>Cameroon, Democratic Republic of Congo, and Equatorial Guinea<sup>545</sup>and recently Ghana. Togo and Benin are taking steps to join. The Membership of GGC is limited to states bordering the Gulf of Guinea region.<sup>546</sup> Its objectives include overseeing the exploitation of the natural resources of the Gulf of Guinea for the economic development and wellbeing of its peoples through cooperation.<sup>547</sup> Commitment to other international and regional bodies which are relevant to the achievement of these objectives is encouraged. Some of these are the Economic

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<sup>543</sup> Treaty Establishing the Gulf of Guinea Commission (adopted 3 July 2001) (*Cggrps.com*) <<https://cggrps.com/wp-content/uploads/Tratado-EN1.pdf>> accessed 25 May 2020;

Additional Protocol to the Treaty Establishing the Gulf of Guinea Commission (GGC) Relating to the Ad Hoc Arbitration Mechanism (adopted July 2013) (*Cggrps.com*) <<https://cggrps.com/wp-content/uploads/Tratado-EN1.pdf>> accessed 25 May 2020.

<sup>544</sup> Angola, Congo, Gabon, Nigeria and Sao Tome and Principe were the original signatories in 2001.

<sup>545</sup> Cameroon and the Democratic Republic of Congo acceded to the Treaty in 2008.

<sup>546</sup> Treaty Establishing the Gulf of Guinea Commission Art 2

<sup>547</sup> Treaty Establishing the Gulf of Guinea Commission Art 3 (c)

Community of West Africa States (ECOWAS), the African Union, (AU) as well as the Economic Community of Central African States. These bodies have signed a Memorandum of Understanding with the aim of promoting cooperation especially regarding maritime security. These areas of cooperation include technical cooperation, training and capacity building, coordination of joint activities and management of sea borders.<sup>548</sup>

The parties of the GCC believe that dialogue and negotiation remain the best ways of resolving permanently any dispute in accordance with the provisions of the UN Charter and African Union Charter and therefore propose to put in place an appropriate dialogue and consultation mechanism for the prevention, management and resolution of conflicts connected to the delimitation of borders, to the economic and commercial exploitation of the natural resources within the territorial boundaries, particularly in the overlapping Exclusive Economic Zones (EEZ) of the parties.<sup>549</sup> It is clear from this objective that the states acknowledge that the offshore resources especially the oil fields are so interconnected that they can only be effectively exploited when there is cooperation between the states in the area.<sup>550</sup>

The Treaty of the Commission also contains dispute resolution provisions which states could utilise for their mutual benefit. The treaty of the Gulf of Guinea Commission and its Additional Protocol provides for the establishment of an Ad Hoc Arbitration Mechanism of the Commission.<sup>551</sup> The adhoc mechanism was created for the prevention, management and resolution of conflicts arising from delineation of borders and the economic and commercial exploitation of common natural resources of Member States of the GGC.<sup>552</sup> By the Treaty and the Protocol the parties are obliged to undertake to settle all disputes amicably. Where this fails, they are to refer the matter to the ad hoc

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<sup>548</sup> Memorandum of Understanding Among the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS) and the Gulf of Guinea Commission on Maritime Safety and Security in Central and West Africa (signed 25 June 2013) art 4. Available at (*Cggrps.com*) <<https://cggrps.com/wp-content/uploads/Tratado-EN1.pdf>> accessed 25 May 2020.

<sup>549</sup> Gulf of Guinea Treaty Preamble

<sup>550</sup> Gbenga Oduntan, 'The Emergent Legal Regime for Exploration of Hydrocarbons in the Gulf of Guinea: Imperative Considerations for Participating States and Multinationals,' (2008) 57 *Int.Comp.Law Quart.* 261

<sup>551</sup> Additional Protocol to the Treaty Establishing the Gulf of Guinea Commission (GGC) Relating to the Ad Hoc Arbitration Mechanism, art 18

<sup>552</sup> *ibid*

Arbitration Mechanism or any other mechanism for the peaceful resolution of conflicts provided for in the United Nations Charter and the Treaty of the African Union.<sup>553</sup> Recourse to the Mechanism may be by interested parties, by one of the parties to a conflict, by the Council of Ministers or by the Assembly of Heads of State and Government.<sup>554</sup> The Protocol provides that conflict between member states may be resolved through mediation, conciliation or arbitration.<sup>555</sup> So far this provision has not been used and so its effectiveness cannot be evaluated.

Information sharing is another important area where the Commission can be relevant. The states in the region could benefit from data on issues that pertain to oil and gas exploitation in the region. These include information on the petroleum and energy industry in the member states. A good example to follow would be the work of the Secretariat of the Organisation of Arab Petroleum Exporting Countries (OAPEC)<sup>556</sup> which compiles a data bank by using information from member countries and literature on oil and gas.<sup>557</sup> This would be beneficial to the Gulf of Guinea states so that they do not have to duplicate efforts in their exploitation and management of the hydrocarbon resources of the region.

The Commission could also act in an advisory and consultative capacity for the states. It could be resourced with the technical expertise so that it can advise the JDAs in terms of best practice and offer up to date scientific advice. It could also offer the member states legal advice on dispute settlement and joint development. Specifically, it could assist in drafting maritime dispute settlement agreements and work with the joint commissions to draw up the best agreements for the states depending on their peculiar circumstances. The states could also empower the Commission with the capacity to provide them with the administrative machinery for their joint development zones. This

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<sup>553</sup> Ibid art 1(2) and art 20

<sup>554</sup> Ibid Art 9

<sup>555</sup> Ibid Art 12-18

<sup>556</sup> The Organisation of Arab Petroleum Exporting Countries (OAPEC) is a regional intergovernmental organization establishing by an agreement signed in Beirut on January 9 1968 by Kuwait, Libya and Saudi Arabia as the founding members. The membership was increased currently to eleven members all Arab oil exporting countries. y

<sup>557</sup> Gbenga Oduntan, 'The Emergent Legal Regime for Exploration of Hydrocarbons in the Gulf of Guinea: Imperative Considerations for Participating States and Multinationals,' (2008) 57 Int.Comp.Law Quart. p.264

could include supervising joint developments and collecting information on how they are performing so as to use lessons learned in one JDZ for another with similar problems. This would make it more cost effective for states to have joint developments Agreements.

However, one of the biggest challenges that may prevent the Commission from being empowered or enhanced to perform the functions, discussed above is inadequate funding. Member states do not currently fulfill their financial obligations to the Commission.<sup>558</sup> There is generally a problem of a lack of political will to make the Commission work as it currently is. However the strategic importance of the Gulf of Guinea, which produces 5.4 million barrels of oil a day, cannot be underestimated in the socio economic development of the countries of the region.<sup>559</sup> For the Commission to make the required impact it necessary for it to resolve the challenges enumerated above that impede its progress and for the states parties to recognize its ability to become a vehicle for cooperation in the exploitation of the non-living resources of the region.

## **2.6. Conclusions**

This chapter has demonstrated how states can settle their maritime boundary disputes by using the dispute settlement provisions under UNCLOS. The discussion above has shown that many of the states in the region have not made declarations opting for any of the dispute settlement mechanism in Section 2 of Part XV of UNCLOS. Those that have done so have opted for different fora. Therefore, in the event of a dispute they each cannot use their preferred forum but have to use the default forum of an Annex VII tribunal. It would be prudent therefore for the states that anticipate going into third party dispute settlement to agree on a forum agreeable to them in advance, perhaps as part of their maritime boundary negotiations.

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<sup>558</sup> *ibid*

<sup>559</sup> 'Angola and the Gulf of Guinea: Towards an Integrated Maritime Strategy', *Report of the Angola Forum conference aboard HMS Dauntless in Luanda, Angola in Luanda, Angola, 29 June 2012* (Chatham House 2012).

Also important is the making of provisional arrangements of a practical nature pending the settlement of their disputes as provided by Articles 74 (3) and 83 (3) of UNCLOS. In this regard states can choose to make their own arrangements in the form of joint development pending the establishment of the maritime boundary. However, if the states are pursuing third party dispute settlement an international court or tribunal, can also prescribe provisional measures pending the hearing of the case. Also, in the region there are examples of states which already have a boundary but have decided to have joint development arrangements to exploit the resources that straddle the boundary. It has been found from the above discussion that there are too few such arrangements in the region and in view of the many pending maritime boundaries the states would benefit from well-structured joint development arrangements.

In this regard they would need a center for technical consultation and support in setting up joint development arrangements and ongoing support to ensure that the joint development arrangements work. In this connection, it has been suggested that the Gulf of Guinea Commission or any other body the states may set up could act as a regional forum for the states to discuss joint development as well as settle issues related to joint development. This would need a high level of political will and commitment. In this connection, Gulf of Guinea Commission can be an important institution for cooperation for the states in the Gulf of Guinea. Even though it currently has its challenges, it has the potential given the necessary powers by states to serve as a body that provides the member states with the forum needed to cooperate in the exploitation of the non-living resources of the region. The Commission can act in a consultative and advisory role in the administration of the joint development efforts that are ongoing and can advise on those yet to be negotiated. This may prove more useful than setting up a completely new body which would require more resources.

However, one of the consequences of exploitation of hydrocarbons is pollution of the marine environment and the liability for damages arising out of such pollution which is the focus of the next chapter.

## CHAPTER THREE

### REGIONAL COOPERATION FOR PROTECTING THE MARINE ENVIRONMENT FROM POLLUTION ARISING OUT OF EXPLOITATION OF HYDROCARBONS IN THE GULF OF GUINEA

#### 3.1 Introduction

Despite challenges with maritime boundary delimitation and joint development agreements for the exploitation of hydrocarbons, the states in Gulf of Guinea region (GOG) are actively involved in the hydrocarbon industry. The region's oil reserves account for about 3% of the global total.<sup>560</sup> Additionally the crude oil from the region is known to be of better quality by international standards, when compared to that from Latin America.<sup>561</sup> The states in the region are either oil producers or have made economic discoveries of oil and gas but a few like Nigeria, Cameroon, Gabon and recently Ghana are net exporters.<sup>562</sup>

Consequently, there is an increase in the number of offshore oil rigs, pipelines and various export and import oil terminals which exposes the entire GOG region to the devastating effects of oil pollution.<sup>563</sup> In the midst of all the euphoria about oil finds and exploitation activities, it has been found that the quality of the marine environment is being insidiously degraded.<sup>564</sup> Indeed, it has been estimated that 4 million tons of waste oil is discharged into the Gulf of Guinea marine environment annually.<sup>565</sup> These incidents of pollution are related to actual exploration and production activity, including

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<sup>560</sup> Chika Ukwe and Chidi Ibe, 'A regional Collaborative Approach to Transboundary Pollution management in the Guinea Current Region of Western Africa' (2010) 53 *Ocean and Coastal Management* 498

<sup>561</sup> *ibid*

<sup>562</sup> *Ibid*

<sup>563</sup> *Ibid* p. 499

<sup>564</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) p.89

<sup>565</sup> *ibid*

product pipeline operations, marine and terminal operations as well as blowouts and oil spills.<sup>566</sup> The devastating effects of this pollution is being felt across the whole region.<sup>567</sup>

However, the regional and national frameworks for protecting the marine environment from pollution arising out of offshore drilling activities in the region and compensating victims of pollution are inadequate.<sup>568</sup> Globally more attention has been given to vessel-source pollution than other types of environmental pollution hazards to the marine environment. Hence there is no global convention dealing specifically with pollution from offshore drilling and compensation for victims of such pollution.<sup>569</sup> Discussions at the international level specifically the International Maritime Organisation point to regional cooperation as the solution. In this regard the Abidjan Convention which is the region's main framework to address offshore oil pollution and compensation has made provision for this through its recently adopted Protocol on Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (the Offshore protocol).<sup>570</sup> However, among the problems of the region, is the fact that there is generally noncompliance with global and regional conventions and protocols and this makes cooperative management of spills a challenge.<sup>571</sup>

This raises the issue of how the states can cooperate to take preventive and contingency measures, to prevent such pollution, and to deal promptly with incidents of major spills especially as the impact of these discharges is a transboundary problem. Also important is the issue of liability and compensation for damages arising out of exploration and exploitation activities. The states in the region being developing states cannot on their

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<sup>566</sup> Peter Scheren and Chidi Ibe, 'Environmental Pollution in the Gulf of Guinea: A Regional Approach' in Jacqueline McGlade, Philippe Cury, Kwame Koranteng, and Nicholas Hardman-Mountford, (eds) *The Gulf of Guinea Large marine Ecosystem: Environmental Forcing and Sustainable Development of Marine Resources* (Elsevier Science 2002) 303

<sup>567</sup> *ibid*

<sup>568</sup> Carlos Moreno, 'Oil and Gas Exploration and Production in the Gulf of Guinea: Can the New Gulf be Green?' (2009) 31 *Houst. J. Int Law* 420.

<sup>569</sup> Boleshaw Boczek, 'Global and Regional Approaches to the Protection and Preservation of the Marine Environment', (1984) 16 *Case W. Res. J. Int'l L.*39

<sup>570</sup> Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (adopted 3 July 2019, not yet in force)

<sup>571</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) p.124

own deal with any major liabilities that may arise out of pollution from oil exploitation. Best practice shows that it is only through cooperation in accordance with international law, that states can deal with such liability and also protect the marine environment. Even though there is some effort being made in the region in this regard, it is not adequate.

This chapter discusses how the Gulf of Guinea states can cooperate to protect the marine environment from pollution arising from exploitation of the non-living resources. The first part presents an overview of the international law obligations states have to protect the marine environment from pollution arising from hydrocarbon exploitation. Within that framework there is an assessment of the regional and national regulation on oil pollution from exploitation in the Gulf of Guinea. The second part proffers proposals for regional cooperation in the protection of the environment in the Gulf of Guinea from pollution arising out of exploitation and liability and compensation for damages and conclusions are drawn in the last part.

## **3.2. Protection of the marine environment from pollution arising from hydrocarbon exploitation in the Gulf of Guinea**

### **3.2.1. Overview of obligations arising out of international Instruments**

Pollution of the marine environment from exploration and exploitation activities on the seabed, is caused by the release of harmful substances resulting directly from the exploration, exploitation and processing of seabed materials.<sup>572</sup> The impact of this pollution on the marine environment includes mainly, operative pollution derived from daily activities relating to oil exploitation such as discharge of substances and accidental pollution.<sup>573</sup> It also includes the less discussed impacts like impact on fish stocks and marine mammals during seismic surveys and emissions through gas flaring.<sup>574</sup> Pollution

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<sup>572</sup> Philippe Sands, Jacqueline Peel, Adriana Fabra, Ruth Mackenzie, *Principles of International Environmental Law* (3<sup>rd</sup> Edition Cambridge University Press New York 2012) 387

<sup>573</sup> Ibid

<sup>574</sup> Violeta Radovich, 'Oil and Gas in the Ocean- International Environmental Law and Policy', *Oil and Gas in the Oceans - International Environmental Law and Policy* (IEEE 2016).



from exploitation of oil has been down played in the literature as constituting an insignificant amount of pollution of the marine environment. According to Sands and Peel,<sup>575</sup> it accounts for just 1% of marine pollution from oil.<sup>576</sup> The major oil pollution comes from shipping activity which is not the focus of this work and therefore would not be addressed. However, the consequences of even small oil spills and waste from oil exploitation installations and activities are extremely devastating for the marine environment. This is due to the toxicity, even in low concentrations, of oil to marine living resources and other ocean wildlife.<sup>577</sup> For instance, in the Niger Delta of Nigeria, widespread spills occur, resulting in ecological and public health problems especially for women and children and the socio-economic impacts of oil spills are enormous.<sup>578</sup>

Under international law, the means by which the environment is protected are by adopting standards to prevent and control pollution, by establishing liability regimes which facilitate compensation claims and where large scale pollution occurs coordinating emergency response.<sup>579</sup> States are required by international law to protect the marine environment and are obliged to prevent and remedy the effects of pollution on the marine environment and this is well established even at customary law.<sup>580</sup> Treaties between states and national laws have been developed to deal with the issue. Also international organisations and commissions have been involved in setting standards and measures.<sup>581</sup> Under UNCLOS coastal states are required to adopt laws and regulations to prevent, reduce and control the pollution of the marine environment in connection with seabed activities subject to their jurisdiction and from among others, installations under their jurisdiction using the best practicable means at their disposal

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<sup>575</sup> Philippe Sands, Jacqueline Peel, Adriana Fabra, Ruth Mackenzie, *Principles of International Environmental Law* (3<sup>rd</sup> Edition Cambridge University Press New York 2012) 387

<sup>576</sup> Ibid

<sup>577</sup> Chika Ukwe and Chidi Ibe, 'A regional Collaborative Approach to Transboundary Pollution management in the Guinea Current Region of Western Africa' (2010) 53 *Ocean and Coastal Management* 499

<sup>578</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) 71

<sup>579</sup> Hazel Fox and others, *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint*

*Development with Explanatory Commentary* (British Institute of International and Comparative Law 1989) 355

<sup>580</sup> Patricia Birnie, 'Protection of the Marine Environment' in Hazel Fox and others, *Joint Development of Offshore Oil and Gas, A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law 1989) vol 2, 202.

<sup>581</sup> *ibid*

and according to their capabilities.<sup>582</sup> These installations may be referring to drilling structures and fixed and mobile platforms for oil activities. These laws are to be no less effective than international rules, standards and best practice.<sup>583</sup> States are further enjoined to enforce these laws.<sup>584</sup> Most importantly UNCLOS emphasises cooperation by obliging states to harmonise their individual policies at the regional level and establish global and regional rules, standards and practices to prevent such pollution.<sup>585</sup> Thus, UNCLOS in general terms establishes the framework for later protocols and instruments dealing with control of marine pollution.<sup>586</sup> However, rather than lay out detailed provisions UNCLOS lays more emphasis on regional harmonisation and standards, as well as assigning and allocating responsibility among states.<sup>587</sup>

To deal with the eventuality of large scale damage to the marine environment through an accidental oil spillage, UNCLOS provides for global or regional cooperation.<sup>588</sup> It provides for states upon becoming aware of a pollution incident or the danger of one, to immediately notify any other state which might become affected and also any competent international organization.<sup>589</sup> This kind of cooperation has been exhibited by several regional conventions like the 1969 Agreement for Co-operation in dealing with Pollution of the North Sea by oil. Some states have bilateral agreements to deal with issues of large-scale pollution. A good example is the 1983 Canada /Denmark Agreement for Cooperation Relating to the Marine Environment.<sup>590</sup>

These obligations were already reflected in the environmental principles formulated at the United Nations Conference on the Human Environment held in Stockholm in 1972. The Declaration at the end of the conference consists of a preamble featuring seven introductory proclamations and 26 principles. Subsequently, another conference held in

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<sup>582</sup> UNCLOS art 208, 214

<sup>583</sup> UNCLOS art 208 (3)

<sup>584</sup> UNCLOS art 214

<sup>585</sup> UNCLOS art 208 (4)

<sup>586</sup> Carlos Moreno, 'Oil and Gas Exploration and Production in the Gulf of Guinea: Can the New Gulf be Green?' (2009) 31 *Houst. J. Int Law* 436.

<sup>587</sup> *ibid*

<sup>588</sup> UNCLOS arts 197, 198, 199 and 200

<sup>589</sup> *ibid*

<sup>590</sup> Agreement Between the Government of the Kingdom of Denmark and the Government of Canada for Cooperation Relating to the Marine Environment (signed 1 February 1984, entered into force 1 February 1984) 1348 UNTS 122

Rio de Janeiro built on the Stockholm Declarations and features a preamble and 27 principles.<sup>591</sup> These two Declarations are non-binding but the provisions negotiated in both documents reflected customary international law at the time or were envisaged as being the foundation for future standards and norms.<sup>592</sup> Both instruments provide that states have sovereignty over their natural resources and have the responsibility not to cause transboundary environmental damage.<sup>593</sup> Other principles include the principles of cooperation, preventive action, sustainable development, as well as the precautionary principle, polluter pays principle and the principle of common but differentiated responsibility.<sup>594</sup> These principles have garnered broad support among states and are reflected in state practice on exploitation of marine resources and the protection of the marine environment through international legal instruments like UNCLOS discussed above and soft law instruments discussed below<sup>595</sup>

The United Nations Environmental Programme (UNEP) is the United Nations programme for addressing environmental issues at the global and regional level. Its mandate is to coordinate the development of environmental policy consensus by regularly reviewing the global environment and bringing emerging issues to the attention of governments and the international community for necessary action.<sup>596</sup> UNEP's Division of Environmental Policy Implementation in conjunction with its international and national partners provide technical assistance and advice governments in the implementation of environmental policy and strengthens capacity of developing countries.

UNEP's Regional Seas Programme launched in 1974, is an important tool to address the degradation of the world's oceans and coastal areas through cooperation by states

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<sup>591</sup> Günther Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (*Legal.un.org*, 2012) <[https://legal.un.org/avl/pdf/ha/dunche/dunche\\_e.pdf](https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf)> accessed 25 May 2020.

<sup>592</sup> Ibid p. 3

<sup>593</sup> Ibid p.4

<sup>594</sup> Svitlana Kravchenko and other, 'Principles of International Environmental law' in Shawkat Alam and others, *Routledge Handbook of International Environmental Law* (Routledge, 2012) Accessed on 29 May 2020 <<https://www.routledgehandbooks.com/doi/10.4324/9780203093474.ch3>>

<sup>595</sup> Philippe Sands, *Principles of International Environmental Law* (2<sup>nd</sup> edn Cambridge University Press, 2003) 41-43

<sup>596</sup> Ibid

sharing a common body of water.<sup>597</sup> Currently there are about eighteen regional seas programmes established by UNEP facilitation. These function through a Regional Action Plan which in most cases is backed by a regional convention as a general legal framework but with more detailed provisions in protocols associated with the convention.<sup>598</sup> To oversee implementation of the programmes and aspects of the Regional Action Plan, like marine emergencies, information management and pollution monitoring, Regional Coordinating Units (RCU) have been established aided by Regional Activity Centers (RACs).<sup>599</sup>

Concerning offshore pollution of the marine environment from offshore mining, UNEP was one of the first institutions to develop guidelines for offshore mining and drilling within the limits of national jurisdiction.<sup>600</sup> This was a result of a study it commissioned in 1977 on the 'Legal Aspects Concerning the Environment Related to Offshore Mining and Drilling.' A Working Group of Experts prepared a report which was endorsed in 1982 by the Governing Council of UNEP. Subsequently the General Assembly recommended these Guidelines to states in the formulation of national legislation.<sup>601</sup> These guidelines described as the most "comprehensive and specific measures on record at the global international level,"<sup>602</sup> relate directly to the need to protect the marine environment in the context of offshore mining and drilling. They follow Principle 21 of the Stockholm Declaration and recognise the significance of the offshore oil industry to the economies of both developed and developing states and aim to facilitate the formulation of national, regional and global regimes based on best practice.<sup>603</sup> It lays down basic standards that states need to incorporate in national and

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<sup>597</sup> 'UN Environment Regional Seas Program - CLME+ HUB' (*CLME+ HUB*, 2020) <<https://clmeplus.org/un-environment-regional-seas-program/>> accessed 12 May 2020.

<sup>598</sup> *ibid*

<sup>599</sup> Charles Ehler, 'Global Strategic Review: Regional Seas Programme, United Nations Environmental Programme' (Ocean Visions, September 2016) 29

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<sup>601</sup> UNEP, Environmental Law Guidelines and Principles No 4: Offshore Mining and Drilling (1982) (Conclusions of the Study of Legal Aspects Concerning the Environment related to Offshore Mining and Drilling Within Limits of National Jurisdiction) Decision 10/14/VI of the Governing Council of UNEP, 31 May 1982

<sup>601</sup> United Nations General Assembly, 'International Cooperation in the Field of the Environment' (20 December 1982) UNDoc 37/217

<sup>602</sup> *ibid*

<sup>603</sup> Peter Sand (ed), *The Effectiveness of International Environmental Agreements: A survey of Existing Legal Instruments* (Cambridge Grotius Publications Limited 1992) 165

regional rules, regulations, and practices so as to ensure that environmental considerations are reflected in the various national and international systems dealing with authorisation, environmental assessment, environmental monitoring, contingency planning as well as the important issue of liability and compensation.<sup>604</sup>

It therefore recommends that offshore operations like the building of installations should be authorised by the competent national authorities following an environmental impact assessment. Authorisation should contain provisions requiring the necessary measures to ensure public health and protect against spillage and leakage waste. It also provides for post exploitation issues like the removal of installations and the restoration of the environment. Importantly the guidelines provide that national laws and regulations should be no less effective than international rules, standards and recommended practice and procedures. This provision is also found in UNCLOS and may have been influenced by the work of the 3<sup>rd</sup> UN Conference on the Law of the Sea which it coincided with.<sup>605</sup> However though they are global in scope, they have no binding force and are at best soft law.<sup>606</sup> Also no dispute resolution mechanisms are included in the guidelines.<sup>607</sup>

Another multilateral effort that deals with pollution arising out of exploitation is the International Convention on Oil Pollution Preparedness, Response and Co-operation (OPRC).<sup>608</sup> This very important initiative of the International Maritime Organisation (IMO), was the result of a conference of leading industrial nations (known as G7) in Paris in July 1990.<sup>609</sup> This was necessitated by major oil spill pollution incidents like the 1978, Amoco Cadiz oil spill when 220,000 tonnes of crude oil was accidentally

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<sup>604</sup> *ibid*

<sup>605</sup> Zhigno Gao and Chih-Kuo Kao, *Environmental Regulation of Oil and Gas* (Kluwer Law International B.V, 1998) 114

<sup>606</sup> *ibid*

<sup>607</sup> *ibid*

<sup>608</sup> International Convention on Oil Pollution Preparedness, Response and Cooperation (with annex and procès- verbal of rectification) (adopted 30 November 1990, entered into force 13 May 1995) 1891 UNTS 78

<sup>609</sup> 'International Convention on Oil Pollution Preparedness, Response and Co-Operation' (*Imo.org*, 2020) <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-\(OPRC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx)> accessed 28 April 2020.

spilled near to the Brittany coastline and the 1989 Exxon Valdez spill of 40,000 tonnes of oil into Prince William Sound, Alaska. The purpose of the Convention, therefore is to provide a global framework for international co-operation in combating major oil spill incidents or threats of marine pollution.<sup>610</sup> Contracting states nationally or in cooperation are obliged to formulate effective responses to such threats and to minimise the damage caused by oil spills.<sup>611</sup> Operators of offshore units, under the jurisdiction of the States Parties, are required to have oil pollution emergency plans.<sup>612</sup> The Convention is relevant to oil exploration and exploitation as “Offshore unit” has been defined to mean, “any fixed or floating offshore installation or structure engaged in gas or oil exploration, exploitation or production activities, or loading or unloading of oil”<sup>613</sup> and the Convention acknowledges the serious threat posed to the marine environment by such offshore units.<sup>614</sup>

A significant feature of the OPRC Convention is the prospect of states receiving assistance and support from the International Maritime Organisation to identify sources of provisional financing of the costs for which the parties agree that, “subject to their capabilities and the availability of relevant resources, they will co-operate and provide advisory services, technical support and equipment for the purpose of responding to an oil pollution incident, when the severity of such incident so justifies, upon the request of any Party affected or likely to be affected”.<sup>615</sup> This is subject to the reimbursement of costs of assistance set out in the Annex to the Convention.<sup>616</sup>

States parties are also to require masters or other persons having charge of offshore units to report without delay any event involving a discharge or probable discharge of oil, to the coastal State to whose jurisdiction the unit is subject.<sup>617</sup> The Convention further

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<sup>610</sup> International Convention on Oil Pollution Preparedness, Response and Cooperation (with annex and procès- verbal of rectification) (adopted 30 November 1990, entered into force 13 May 1995) 1891 UNTS 78 preamble

<sup>611</sup> Ibid art 1

<sup>612</sup> Ibid art 3

<sup>613</sup> Ibid art 2 (4)

<sup>614</sup> Ibid preamble

<sup>615</sup> International Convention on Oil Pollution Preparedness, Response and Cooperation (with annex and procès- verbal of rectification) art 7

<sup>616</sup> Ibid Annex (1)

<sup>617</sup> Ibid art 4

promotes bilateral and multilateral co-operation in preparedness and response by providing that parties endeavour to conclude bilateral or multilateral agreements for oil pollution preparedness and response.<sup>618</sup> Copies of such agreements shall be communicated to the Organisation which should make them available on request to Parties.<sup>619</sup> The Convention provides for IMO to play an important co-ordinating role.<sup>620</sup> In the Gulf of Guinea only two states – Sao Tome and Principe and Equatorial Guinea are not party to the Convention.<sup>621</sup>

### **3.3. Regional Framework for the protection of the marine environment from pollution arising out of exploitation of oil and gas**

#### **3.3.1. Abidjan Convention**

In the Gulf of Guinea, UNEP has since 1995 spearheaded projects on the protection and conservation of the marine environment..<sup>622</sup> Under its Regional Seas Programme, the states in the region in cooperation with other states in West and Central Africa, adopted the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention) together with its Protocol Concerning Cooperation in Combating Pollution in Cases of Emergency (Abidjan Convention).<sup>623</sup> This has become the main regional legal framework in West and Central Africa for cooperation in the protection and of the marine environment from pollution arising out of exploitation of oil and gas. The Convention area extends across the marine environment, coastal zones and related inland waters fully within the jurisdiction of the states of West and Central Africa region

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<sup>618</sup> Ibid art 6(2)

<sup>619</sup> Ibid art 10

<sup>620</sup> Ibid art 2(6)

<sup>621</sup> 'International Convention on Oil Pollution Preparedness, Response and Co-Operation' (*Ecolex.org*) <<https://www.ecolex.org/details/treaty/international-convention-on-oil-pollution-preparedness-response-and-co-operation-tre-001109/>> accessed 26 May 2020.

<sup>622</sup> Chidi Ibe and Kenneth Sherman, 'The Gulf of Guinea Large Marine Ecosystem Project: Turning Challenges into Achievements' in Jacqueline McGlade and others (eds), *The Gulf of Guinea Large Marine Ecosystem: Environmental Forcing & Sustainable Development of Marine Resources* (Elsevier Science 2002)

<sup>623</sup> Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region and Protocol concerning Cooperation in Combating Pollution in Cases of Emergency (adopted 23 March 1981, entered into force 5 August 1984) (Abidjan Convention) Available at 'Home | Abidjan Convention' (*Abidjanconvention.org*, 2019) <<http://abidjanconvention.org/>> accessed 26 May 2020.

from Mauritania to Namibia.<sup>624</sup> There are 22 signatories to the Convention, 19 of whom have ratified.<sup>625</sup> This area is wider than the area being studied in this research and all the states in the Gulf of Guinea with the exception of Sao Tome and Principe have ratified the Convention. This kind of cooperation is arguably in a non - mandatory way required of the Gulf of Guinea as a semi - enclosed sea under Article 123 of UNCLOS which provides that states bordering an enclosed or semi enclosed sea should cooperate with each other by endeavouring directly or through a regional organisation to among others coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.<sup>626</sup>

One of the sources of pollution the Convention is concerned with, include exploration and exploitation of the sea bed and pollution from and through the atmosphere.<sup>627</sup> Regarding preventive measures, Article 8 of the Convention enjoins the parties to take appropriate measures to prevent, reduce, combat and control pollution resulting from or in connection with exploration and exploitation of oil.<sup>628</sup> The Convention provides that states as part of their environmental management policies, develop technical and other guidelines to assist the planning of the development projects in such a way as to minimise any harmful impact on the marine environment.<sup>629</sup> The Convention further provides that each contracting party shall endeavor to include any planning activity entailing projects within its territory, particularly in the coastal areas, that may cause substantial pollution or significant harmful changes to the marine environment.<sup>630</sup>

The Abidjan Convention stresses cooperation of all the states to deal with accidental discharges.<sup>631</sup> The parties are obliged to cooperate in taking all necessary measures to deal with pollution emergencies in the area whatever the cause and to reduce or

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<sup>624</sup> Abidjan Convention art 1

<sup>625</sup> The parties to the Abidjan Convention are Republic of Congo, the Democratic Republic of Congo, Gambia, Guinea, Liberia, Senegal, Sierra Leone, South Africa, Angola, Cape Verde, Guinea Bissau, Mauritania Namibia, Cote d'Ivoire, Ghana, Togo, Benin, Nigeria, Equatorial Guinea, Cameroon, Sao Tome and Principe, and Gabon

<sup>626</sup> UNCLOS art 123 (b)

<sup>627</sup> Abidjan Convention art 8, 9

<sup>628</sup> Ibid art 8

<sup>629</sup> Ibid art 13

<sup>630</sup> ibid

<sup>631</sup> Ibid art12



eliminate damage resulting therefrom.<sup>632</sup> In this regard, the Convention makes provision for any contracting party which becomes aware of a pollution emergency in the area covered by the Convention to notify the organisation or any other contracting party likely to be affected by such an emergency.<sup>633</sup> Additional detail is provided in the Protocol Concerning Cooperation in Combating Pollution in Cases of Emergency<sup>634</sup> which requires that each contracting party act in accordance with the following principles in an emergency situation: make an assessment of the nature and extent of the marine emergency and transmit the results of the assessment to any other contracting party concerned; determine the necessary and appropriate action to be taken with respect to the emergency in consultation with the other contracting parties; make the necessary reports and request for assistance under the protocol and take appropriate and practical measures to reduce the effect of the pollution including surveillance and monitoring of the emergency situation.<sup>635</sup> In carrying out all these responses, states are enjoined to act in conformity with international law and with international conventions applicable to the marine emergency response as well as inform the Organisation.<sup>636</sup>

Regarding the pollution of the marine environment from pollution arising out of exploitation, the parties to the Convention have been slow at adopting the relevant protocol and have only recently in 2019 adopted the Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (the Offshore Protocol)<sup>637</sup> This Protocol is the first environmental standard in Africa setting regional standards to regulate offshore oil and gas activities. It aims to prevent, reduce or eliminate pollution or damage to the marine and coastal environment resulting from offshore oil and gas exploration and exploitation.<sup>638</sup> The Contracting Parties are mandated to individually or as part of

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<sup>632</sup> *ibid*

<sup>633</sup> *Ibid* art 12 (2)

<sup>634</sup> Protocol Concerning Co-Operation in Combating Pollution in Cases of Emergency (adopted 23 March 1981, entered into force 5 August 1984) Available at 'Home | Abidjan Convention' (*Abidjanconvention.org*, 2019) <<http://abidjanconvention.org/>> accessed 26 May 2020.

<sup>635</sup> *Ibid* art 10

<sup>636</sup> *Ibid*

<sup>637</sup> Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (adopted 3 July 2019, not yet in force)

<sup>638</sup> *Ibid* art 2

bilateral or regional cooperation, take all appropriate measures to prevent, mitigate, combat and control pollution in the Protocol Area resulting from offshore exploration and exploitation, and ensure, in particular, that the best available, environmentally effective and economically appropriate techniques are implemented.<sup>639</sup>

The provisions of the Offshore Protocol are based on three principles – the precautionary principle that emphasises preventive measures; the ‘polluter pays principle’ which ensures that the costs of preventing, mitigating and control of pollution is to be borne by the polluter; and the principle of public participation, whereby every person has the right to participate in the making of public decisions that affect the environment. To effectively implement the Protocol, the Contracting Parties are mandated to harmonise their policies and strategies and formulate and adopt programmes and measures that contain, as necessary, deadlines for implementation.<sup>640</sup> There are also provisions on the formation of Emergency Response Plans and mutual assistance in the event of oil spill harmonise legislation.<sup>641</sup>

This Protocol is a positive development in the region. However, for it to be successful the states must ensure that it is implemented and enforced. Nevertheless, implementation has not been a strong point of the Abidjan Convention. A recent assessment of the Convention implementation found significant challenges with funding, coordination, and limited human resources.<sup>642</sup>

### **3.3.2. The Interim Guinea Current Commission (IGCC) and LME concept as a management and also cooperative tool**

To better promote cooperation, the Abidjan Convention is making efforts at using the Large Marine Ecosystem (LME) approach as a management tool, for the protection of

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<sup>639</sup> Ibid art 4

<sup>640</sup> Ibid art 5

<sup>641</sup> Ibid arts 18, 20

<sup>642</sup> Harry Barnes-Dabban and Sylvia Karlsson-Vinkhuyzen, ‘The influence of the Regional Coordinating Unit of the Abidjan Convention: implementing multilateral environmental agreements to prevent shipping pollution in West and Central Africa.’ (2018) 18 Int Environ Agreements 469.

the marine environment.<sup>643</sup> LMEs are wide areas of ocean space along the Earth's continental margins, linked by estuaries and river basins seaward toward the outer margins of major currents or the edge of continental shelves. They are productive areas of the ocean, which support a rich diversity of marine living resources.<sup>644</sup> The large marine ecosystem approach is science based and scientists have played leading roles in the international effort to establish a worldwide network of 66 Large Marine Ecosystems (LMEs).<sup>645</sup> The countries that are part of these units have a shared stake in the coastal waters that make up these units. The Gulf of Guinea is part of the LME known as the Guinea Current Large Marine Ecosystem (GCLME).<sup>646</sup> The Guinea Current is an eastward flowing water mass sourced from the North Equatorial counter current off the coast of Liberia, and the Canary Current, extending from the Strait of Gibraltar to Bissagos Islands in South Guinea Bissau. It encompasses the EEZ of sixteen coastal states – those inside the hollow Gulf of Guinea which is the study area of this research – and those outside this Gulf area namely Guinea Bissau, Guinea, Liberia, Sierra Leone, Congo Brazzaville, Congo and Angola.<sup>647</sup> These states are all parties to the Abidjan Convention and have a shared stake in the protection of the marine environment from pollution which has been identified as one of the factors degrading the marine environment. One of the sources of pollution in the area is as a result of the exploitation of non-living resources in the continental shelf.<sup>648</sup>

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<sup>643</sup> 'Decision-/CP.10/8. Environmental Standards for the Offshore Exploration and Exploitation Activities of Mining and Mineral Resources Off the Coasts of the States Parties', *Decisions adopted by the 10th Meeting of the Contracting Parties to the Convention for Cooperation in the Protection, the Management and the Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern African Region* (Pointe Noire, Republic of the Congo, 2012).

<sup>644</sup> 'LME Initiatives' (IUCN, 2020) <<https://www.iucn.org/theme/marine-and-polar/our-work/international-ocean-governance/large-marine-ecosystems/lme-initiatives>> accessed 30 May 2020.

<sup>645</sup> Carlisle K.M., 'The Large Marine Ecosystem approach: Application of an integrated, modular strategy in projects supported by the Global Environment Facility' (2014) 11 *Environmental Development* 19–42.

<sup>646</sup> 'Large Marine Ecosystems Hub' (Lmehub.net, 2020) <<http://www.lmehub.net/>> accessed 26 May 2020

<sup>647</sup> GCLME, 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) 71

<sup>648</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006)

Figure 15: The Guinea Current Large Marine Ecosystem



Source: 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006)

There are two other LMEs in the Abidjan Convention area namely the Benguela and Canary Currents. The Benguela current is situated along the coast of south-western Africa, stretching from east of the Cape of Good Hope in the south equatorward to the Angola Front, near the northern geopolitical boundary of Angola. It encompasses one of the four major coastal upwelling ecosystems of the world which lie at the eastern boundaries of the oceans.<sup>649</sup> The Canary Current Large Marine Ecosystem (CCLME) is situated in the Atlantic Ocean on the north-western coast of Africa. Its boundaries extend from the northern Atlantic coast of Morocco (36°N, 5°W at the Strait of Gibraltar), south to the Bijagos archipelago of Guinea-Bissau (11°N, 16°W) and west to the Canary Islands (Spain). The countries within the recognized limits of the CCLME

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<sup>649</sup> BCLME, 'Benguela Current Large Marine Ecosystem Programme (BCLME) Transboundary Diagnostic Analysis' (November 1999) <  
<https://iwlearn.net/resolveuid/ccace4ef8c3d78021c69050a349d653e> > assessed on 22 September 2019

include Spain (Canary Islands), Morocco, Mauritania, Senegal, the Gambia and Guinea-Bissau. Both Cape Verde and the waters of Guinea are considered adjacent waters within the zone of influence of the CCLME.<sup>650</sup> The parties to the Abidjan Convention have been cooperating with these three Large Marine Ecosystems (LMEs), discussed above, so as to make them the framework for marine environmental conservation projects funded by the Global Environmental Fund (GEF).<sup>651</sup>

Under the framework of the Abidjan Convention, the sixteen countries of the Guinea Current LME ultimately came together to form the Interim Guinea Commission (IGCC) one of whose objective is the sustainable management of the Guinea Current large marine ecosystem through regional cooperation.<sup>652</sup> This is the culmination of a process which began in 1995 to develop for the Gulf of Guinea Large Marine Ecosystem (GOGLME) and Guinea Current Large Marine Ecosystem (GCLME), a Strategic Action Plan (SAP) for the improvement of the coastal and marine environment of Western Africa which was identified as becoming heavily polluted due to human activity.<sup>653</sup> Currently, the states that make up the Guinea current LME are committed to regional cooperation using the ecosystem approach to management of the GCLME. By their agreement at two meetings, they have decided to transition the Interim Commission to a fully-fledged commission by 2020.<sup>654</sup> Since its creation, the IGCC as a technical Committee has entered into agreements and forged partnerships with a number of institutions and bodies including the IMO for oil spill contingency planning.<sup>655</sup> It also has a joint program with the International Petroleum Industry

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<sup>650</sup> CCLME, 'Canary Current Large Marine Ecosystem (CCLME) Transboundary Diagnostic Analysis (TDA)' (CCLME Project Coordination Unit, Dakar, Senegal 2015) 140

<sup>651</sup> The Global Environment Facility was established on the eve of the 1992 Rio Earth Summit to help tackle the most pressing environmental problems. Since then, the GEF has provided over \$18.1 billion in

grants and mobilized an additional \$94.2 billion in co-financing for more than 4500 projects in 170 countries including the Guinea Current Large Marine Ecosystem. See 'About Us' (*Global Environment Facility*, 2020) <<https://www.thegef.org/about-us>> accessed 26 May 2020.

<sup>652</sup> GCLME, 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006)

<sup>653</sup> *ibid*

<sup>654</sup> Twelfth Conference of the Contracting Parties to the Convention on Cooperation for the Protection Management and Development of the Marine Environment and Coastal Areas of the Atlantic Coast of the West, Central and Southern African Region (Abidjan Convention) (2017) <<http://cop12.abidjanconvention.org/>> accessed 26 May 2020.

<sup>655</sup> Sarah Humphrey and Christopher Gordon, 'Terminal Evaluation of the UNDP-UNEP GEF Project: Combating Living Resources Depletion and Coastal Area Degradation in the Guinea Current LME through Ecosystem-based Regional Actions (GCLME)' (UNEP November 2012) 88

Environmental Conservation Association (IPIECA) on oil spill prevention and response.<sup>656</sup>

The importance of the work of this Commission, when it is formally established, as well as the efforts of the Abidjan Convention, cannot be underestimated as the Gulf of Guinea region has major oil producers including Nigeria, Angola, Equatorial Guinea, and Gabon and other countries, such as Ghana, which have recently joined this list. Thus, oil spill and pollution risks from exploitation activities to coastal GCLME countries make it increasingly imperative for the countries to be prepared for emergency responses to accidental oil spills and make provision for compensating victims of such pollution. In this regard, the 1995 Gulf of Guinea Pilot Project, referred to above, began this process by mainly dealing with training incorporating issues of major oil spills from among others offshore oil exploration and platform explosions.<sup>657</sup> The training also involved emergency response and contingency planning at the national and regional level and thus promoted cooperation among governmental authorities through these interactions. The project also focused on the standardisation of analytical methods for data collection on such risks throughout the region.<sup>658</sup> Coordination in case of oil spills in GCLME waters was also enhanced through the formulation of Terms of Reference for a Centre of Excellence to coordinate intervention actions in case of oil spills in GCLME waters.<sup>659</sup>

By way of further cooperation, at the Ninth Conference of Parties meeting of the Interim Guinea Current Commission, the parties adopted a Regional Oil Spill Contingency Plan, and created a Regional Centre for Coordination in Cases of Emergency.<sup>660</sup> Under this framework, the states developed National Strategic Action Plans (NAPs) for the protection of the environment.<sup>661</sup> The IGCC has coordinated the preparation and implementation of an Oil Pollution Contingency Plan by all major oil producing member states of the GCLME in collaboration with the International Maritime

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<sup>656</sup> Ibid p. 93.

<sup>657</sup> *ibid*

<sup>658</sup> Towards Ecosystem-based Management of the Guinea Current Large Marine Ecosystem. (United Nations Development Programme 2013) p.17

<sup>659</sup> *ibid*

<sup>660</sup> Chika Ukwé and Chidi Ibe, 'A regional Collaborative Approach to Transboundary Pollution management in the Guinea Current Region of Western Africa' (2010) 53 *Ocean and Coastal Management* 503.

<sup>661</sup> *Ibid* 502

Organization (IMO).<sup>662</sup> It also assisted the countries in harmonising action plans and developing mechanisms for sharing technology and expertise including assistance during actual spill event (including sharing of clean-up equipment and provision of expert advice).<sup>663</sup> In addition, a regional policy to minimize transboundary impacts of oil pollution from activities in the Exclusive Economic Zones (EEZs) of IGCC member states, in partnership with the organised oil operators (including multinationals) in the region have been developed and adopted by the countries. Several of the countries are currently internalising the regional policy which reflects the provisions of the OPRC 90, through the adoption of corresponding national policies and oil spill contingency plans.<sup>664</sup>

Laudable as these initiatives are, the IGCC which envisaged to be the vehicle of implementation has not yet been fully established into a commission as noted above. One of the issues hindering the parties is how to legally establish it as a Commission. The parties have not made a decision whether to establish the Commission by Protocol under the Abidjan Convention or as a separate legal entity.<sup>665</sup> However without a legally binding mandate, the Commission cannot be effective in its efforts at regional cooperation.

### **3.3.3. The Gulf of Guinea Commission**

The Gulf of Guinea Commission (GGC) which was discussed in the last chapter may also have a role to play in the regulation of oil pollution from exploitation and is a good development for the region. However, it does not currently have the requisite capacity to deal with pollution from offshore activities even though it has the biggest oil producers as members. It provides in its treaty one of its main objectives which is cooperation with the objective of transforming the sub region into a Zone of Peace and Security.”<sup>666</sup> Even though it mentions areas of cooperation to include exploitation of

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<sup>662</sup> *ibid*

<sup>663</sup> *ibid*

<sup>664</sup> *ibid*

<sup>665</sup> Report of Ninth Meeting of the Regional Steering Committee of the IGCC / GCLME Abidjan Cote d’Ivoire 9-10 May 2012 p. 4 para 3.

<sup>666</sup> Treaty Establishing the Gulf of Guinea Commission (adopted 3 July 2001) (*Cggrps.com*) <<https://cggrps.com/wp-content/uploads/Tratado-EN1.pdf>> accessed 25 May 2020; Article 5

hydrocarbons and protection of the marine environment, the Commission's focus appears to be security issues and not oil pollution from exploitation. This may be influenced by the impact of crimes at sea on international shipping and navigation.<sup>667</sup>

Regarding the management of the marine environment, the treaty is not detailed. There is just a brief mention in the objectives of the treaty, "to protect, preserve and improve the natural environment of the Gulf of Guinea and cooperate in the event of a natural disaster."<sup>668</sup> Since the exploitation of hydrocarbons is also mentioned as one of the areas of cooperation,<sup>669</sup> it can be assumed that the treaty envisages the risks and potential hazards associated with exploitation of hydrocarbons like shipping accidents and oil spill which could be attributable to multinational oil companies operating in the region. The GGC could play a consultative and advisory role in the protection of the marine environment by providing expert advice to states on national regulations and generally supporting them in the preparation of their national response plans to combat pollution. This can be done in collaboration with other relevant regional bodies like the Abidjan Convention already discussed. Given the required expertise, it could also play a role in the implementation of the Offshore Protocol referred to above by for instance assisting states to harmonise their laws as required under the Protocol and providing a forum for states to consult with each other in the implementation of the Protocol.

### **3.4. National framework**

As already noted above, majority of the states in the region are parties to the OPRC 90 which deals with oil spill responses of states. By Article 6 the Convention obliges each state party to establish a national system for responding promptly and effectively to oil pollution incidents. At the minimum this shall include the competent national authority or authorities with responsibility for oil pollution preparedness and response; a national contingency plan for preparedness and response which includes the organisational relationship of the various bodies involved, whether public; or private, taking into

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<sup>667</sup> Kamal-Deen Ali and Martin Tsamenyi, 'Fault Lines in Maritime Security' (2013) 22 African Security Review.

<sup>668</sup> Treaty Establishing the Gulf of Guinea Commission (adopted 3 July 2001) (*Cggrps.com*) <<https://cggrps.com/wp-content/uploads/Tratado-EN1.pdf>> accessed 25 May 2020; Article 3

<sup>669</sup> *Ibid* Article 5



account guidelines developed by the International Maritime Organisation. To facilitate the implementation of this obligation, the Global Initiative for West, Central and Southern Africa (GI WACAF) Project which is a collaboration between the International Maritime Organization (IMO) and IPIECA<sup>670</sup> was launched in 2006. Its objective is to enhance the capacity of 22 West, Central and Southern African states to prepare for and respond to marine oil spills in accordance with the OPRC 90. It accomplishes this by organising and delivering workshops, seminars and exercises, that aim to communicate good practice in all aspect of spill preparedness and response, drawing on expertise and experience from within governments, industry and other organisations working in this specialised field. It executes this through dedicated government and industry focal points. The project's major objective during these exercises is to promote cooperation amongst all relevant government agencies, oil industry business units and stakeholders both nationally, regionally and internationally. Major contributors to GI WACAF for these purposes are the IMO and seven oil company members of IPIECA, namely BP, Chevron, ExxonMobil, Eni, Shell, Total and Woodside.

### **3.4.1. Designation of competent national authority and laws on oil pollution**

In compliance with the OPRC 90, some of the states<sup>671</sup> in the GOG that are party to the Convention have established national systems for responding promptly and efficiently to oil pollution incidents. They have competent authorities and National Spill Contingency Plans. Prominent examples include Nigeria, where the competent authority is the National Oil Spill Detection and Response Agency (NOSDRA) which was set up by statute. It is responsible for preparedness, detection and response to all oil spillages in Nigeria. The Statute also established the advisory, monitoring, evaluating, mediating and co-ordinating arm of NOSDRA known as the National Control and Response Centre (NCRC) The NOSDRA Act acknowledges that issues of protection of the marine

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<sup>670</sup> IPIECA, at the request of UNEP, was set up on 13 March 1974, (as the International Petroleum Industry Environmental Conservation Association) with its headquarters in London, with the objective of developing a shared industry response to environmental and social issues and remains the global oil and gas industry's principal channel of engagement with the UN and has strong links with the IMO.

<sup>671</sup> Sao Tome and Principe and Equatorial Guinea

environment from pollution are multi-sectoral and therefore provides for NOSDRA to co-ordinate and implement the National Oil Spill Contingency Plan for Nigeria. Also, in Ghana the competent authority is the Environmental Protection Agency (EPA) designated as such by the Environmental Protection Agency (EPA) Act 490 of 1994. The Agency is responsible for controlling pollution into the environment and enforcement of relevant laws relating to protection of the environment and is the Ministerial body responsible to Government for matters connected to the NOSCP. In Benin it is the Ministry of Transport National Oil Spill Response Centre of the Department of the Merchant Navy is the responsible authority.

The two states with the most comprehensive regulatory frameworks in the region are Ghana and Nigeria. Ghana's Maritime Pollution Act, incorporates most of the marine pollution conventions ratified by Ghana.<sup>672</sup> It provides for the prevention, regulation and control of pollution arising from maritime activities in areas within Ghana's maritime jurisdiction and other related matters.<sup>673</sup> Even though the Act applies mainly to pollution from ships, it also applies to offshore oil installations.<sup>674</sup> The Act provides special requirements for drilling rigs, other platforms and offshore installations which include floating production storage offloading facilities used for production and storage of oil and floating storage units used for storage of the oil that is produced in these installations.<sup>675</sup> The Act further mandates operators of installations for oil exploitation to comply with requirements on equipment and the keeping of records on discharges as specified under the Act.<sup>676</sup> The Act further provides administrative penalties for contraventions.<sup>677</sup>

However, the Act has been criticised for not having specific provisions that require that companies have particular preventive or combative equipment during actual drilling.<sup>678</sup> These include containment booms, containment chambers, chemical dispersants or

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<sup>672</sup> Ghana's Maritime Pollution Act 2016, (Act 932)

<sup>673</sup> Ibid preamble

<sup>674</sup> Ibid section 1 (iii)

<sup>675</sup> Ibid section 72

<sup>676</sup> Ibid

<sup>677</sup> Ibid

<sup>678</sup> John Baker Amissah Glover, 'Prevention and Combat of a Spillage after Ghana's Oil and Gas Discovery: Is Ghana Ready to Face an Environmental Threat?' (Master of Science, World Maritime University, Malmo, Sweden 2017).

other such combating equipment. They are also not required by law to have testing or effectiveness of safety measures and equipment or to have actual “safety drills” on site to ensure that all crew concerned know what to do and are able to effectively perform their various roles in the event of a spillage.<sup>679</sup> There is only a weak requirement for them to cooperate with the National Coordinator in preparing the National Contingency Plan for preparedness and contingency.<sup>680</sup> This gap has been filled by the Ghana National Oil Spill Contingency Plan, 2015, which requires operators to develop tactical oil spill contingency plans at their facilities and among the risks identified are blowouts which is an “out of control gas and / or pressure erupting from a well being drilled...”<sup>681</sup> However due to lack of capacity, the enforcement of these requirements is difficult.

Nigeria like Ghana also has laws on oil pollution and by its Oil Pollution Act<sup>682</sup> provides for measures on prevention of oil pollution, mitigation, clean-up and liability.<sup>683</sup> The law further creates a comprehensive scheme ensuring sufficient financial resources are made available for oil spill clean-up and compensation.<sup>684</sup> Under the Petroleum (Drilling and Production) Regulation,<sup>685</sup> it is mandatory for oil companies to take precautionary steps to prevent oil pollution and when it does occur to take steps in controlling and stopping the pollution.<sup>686</sup> Nigeria also has a law that requires oil companies to produce an Environmental Impact Assessment for proposed projects or activities that are likely to alter the environment.<sup>687</sup>

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<sup>679</sup> Ibid p. 43

<sup>680</sup> Ibid p. 43

<sup>681</sup> James Speight, *Handbook of Offshore Oil and Gas Operations* (1st edn, Elsevier Inc 1994).

<sup>682</sup> Nigeria Oil Pollution Act 1990

<sup>683</sup> Petroleum (Drilling and Production) Regulations 1969. Section 25, Laws of the Federation of Nigeria (1990 revised edition), Vol. 19, pp. 12768-12806 (INFORM) Nigeria - Petroleum (Drilling and Production) Regulations (L.N. 69 Of 1969).'*(Ilo.org, 2020)*  
<[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=52886&p\\_country=NGA&p\\_count=255](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=52886&p_country=NGA&p_count=255)> accessed 26 May 2020.

<sup>684</sup> Nigeria Oil Pollution Act 1990

<sup>685</sup> Petroleum (Drilling and Production) Regulations 1969. Section 25, Laws of the Federation of Nigeria (1990 revised edition), Vol. 19, pp. 12768-12806 (INFORM) Nigeria - Petroleum (Drilling and Production) Regulations (L.N. 69 Of 1969).'*(Ilo.org, 2020)*  
<[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=52886&p\\_country=NGA&p\\_count=255](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=52886&p_country=NGA&p_count=255)> accessed 26 May 2020.

<sup>686</sup> Ibid

<sup>687</sup> Environmental Impact Assessment Act 1992 Available at 'Environmental Impact Assessment Act, No. 86 1992' (*Natural Resource Governance Institute, 2020*)  
<<https://www.resourcedata.org/dataset/rgi-environmental-impact-assessment-act-no-86-1992/resource/89af17b4-b492-4761-97ff-f4330f73151d>> accessed 26 May 2020.

### 3.4.2. National Contingency Plans for Preparedness and Response

The states' National Spill Contingency Plans (the Plan) are in various stages of development. Some are fully developed as in Ghana and Nigeria whilst others are in the process of being formulated or not yet formulated like the situation in Equatorial Guinea and Sao Tome and Principe.<sup>688</sup> In States like Benin, Cameroon and Gabon, Togo and Sao Tome and Principe, there have been no major spills reported. However, they are also the states with inadequate response capabilities. At best the oil companies and the military are likely to assist during an emergency.<sup>689</sup> Some of the states have also experienced a few considerable spills but do not have adequate capacity. Cote d'Ivoire is one such state but due to political turmoil in 2011, it is currently struggling to rebuild its capabilities.<sup>690</sup> In the event of an incident, it is likely to rely on private resources. The Oil companies which have contingency plans would have to be involved. The Ivorian Refining Company (Société Ivoirienne de Raffinage (SIR)) operate spill response equipment and worked with CEDRE in updating their contingency plan in 2011. Total's Ivory Coast subsidiary (TEPCI) started to develop its exploration and production activity in 2010 and also contracted Cedre to produce their own oil spill contingency plan.<sup>691</sup>

Regarding accidental spills from the exploitation of oil, some of the states in the region have national contingency plans for oil spills. Per the internationally recognised system employed for categorizing and structuring levels of oil spill preparedness and response, Ghana and Nigeria's National Oil Spill Contingency plans,<sup>692</sup> are based on a three-tiered approach to all aspects of oil spill preparedness and response. In Ghana Tier 1 spills are small spills of up to 10 tonnes handled locally by the Combat Agency which would clean up a spill utilising its own resources.<sup>693</sup> Tier 2 spills between 10 and 1000 tonnes

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<sup>688</sup> 'Sao Tome and Principe GI WACAF' (*GI WACAF*, 2020)

<<https://www.giwacaf.net/en/countries/sao-tome-and-principe>> accessed 26 May 2020.; 'Equatorial Guinea | GI WACAF' (*GI WACAF*, 2020) <<https://www.giwacaf.net/en/countries/equatorial-guinea>> accessed 26 May 2020.

<sup>689</sup> See <https://www.giwacaf.net/>

<sup>690</sup> 'Côte d'Ivoire | GI WACAF' (*GI WACAF*, 2020) <<https://www.giwacaf.net/en/countries/cote-divoire>> accessed 26 May 2020.

<sup>691</sup> *ibid*

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<sup>693</sup> EPA (2010), "Ghana's National Contingency Plan to Combat Pollution by Oil and Other Noxious and Hazardous Substances; Final Draft", Environmental Protection Agency, Accra

which is a medium spill requires regional and/or national assistance. The contingency plan provides for the resources of the Combat Agency to be supplemented by other resources from adjacent regions, or from adjacent industry operators under mutual aid arrangements.<sup>694</sup> Large spills are Tier 3 spills above 1000 tonnes and these require national, regional, and possibly international assistance facilitated by the Environmental Protection Agency of Ghana.

Similarly, in Nigeria, tier 1 spills are operational type spills, less than or equal to 7 metric tonnes (50 barrels), that may occur at or near a company's own facility, as a consequence of its own activities.<sup>695</sup> In such a case the individual company would have to provide resources to respond to the spill under national law.<sup>696</sup> A tier 2 spill is any spill greater than 7 metric tonnes (50 barrels) but less than 700 metric tonnes (5000 barrels). In this case, in addition to the company involved, resources from another company, industry and even government response agencies in the area can be called in, on a mutual aid basis. The company is required to participate in local co-operatives such as the Clean Nigeria Associates (CNA) where each member pools its Tier 1 resources and has access to any equipment which have been jointly procured for the co-operation.<sup>697</sup> The large spill, greater than 700 metric tonnes (5000 barrels), would require substantial resources and support from a National (Tier 3) or International Co-operative Stockpile, like the Oil Spill Response Limited (OSRL).<sup>698</sup> Such an operation is subject to government control and direction. It is important to recognize that a spill which receives a Tier 3 response may be close to, or remote from company facilities.<sup>699</sup>

In spite of their comprehensive legislation and national plans, implementation is weak in both states. In Nigeria for instance, the NOSDRA Act provides for multi-agency response to oil spill incidents in Nigeria. However, lack of expertise, vital technology and inadequate funding are impediments that prevent NOSDRA from performing its

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<sup>694</sup> *ibid*

<sup>695</sup> Adati Kadafa, Pauzi Zakaria and Fadhilah Otuman 'Oil spillage and pollution in Nigeria organizational management and institutional framework' 2012) 2 *Journal of Environment and Earth Science* 25.

<sup>696</sup> International Convention on oil pollution preparedness, response and cooperation, 1990 (with annex and procès- verbal of rectification) (adopted 30 November 1990,

<sup>697</sup> *ibid*

<sup>698</sup> 'International Convention on Oil Pollution Preparedness, Response and Co-Operation' (*Imo.org*, 2020) <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-\(OPRC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Oil-Pollution-Preparedness,-Response-and-Co-operation-(OPRC).aspx)> accessed 28 April 2020.

<sup>699</sup> *ibid*

duties.<sup>700</sup> Amnesty International reports that oil spill investigations are usually led by oil company personnel, not NOSDRA and it is they that provide the logistics for personnel of NOSDRA and generally take the lead.<sup>701</sup> Thus these companies usurp NOSDRA's functions due to its lack of resources. Regulatory response has therefore been tested due to numerous spills from pipelines, terminals and oil platforms.<sup>702</sup> Instances include, the FUNIWA-5 (1980) oil well blow-out involved the release of over 54,000 tonnes of crude oil which caused extensive damage to mangroves.<sup>703</sup> In 1998, 14,300 tonnes of oil was spilt from a ruptured pipeline operated by Mobil and 2,900 tonnes from a Shell pumping station at Warri.<sup>704</sup> In other parts of the region, it is clear from the above analysis of that there is no adequate preparation made to respond to any oil spill.

### **3.5. Framework for Liability and compensation for damage arising out of oil exploration and exploitation in the Gulf of Guinea**

#### **3.5.1. Global framework**

There are currently no global mechanisms regulating liability and compensation for damage arising out of pollution to the marine environment from oil and gas activities. The only global convention on compensation for damage arising out of oil pollution concerns oil spillage from ships. This is the 1992 Civil Liability Convention<sup>705</sup> which governs the liability of ship owners for oil pollution damage. This gap is clearly manifested by major incidents like the oil spill in 2010 from the Deepwater Horizon oil rig located in the Gulf of Mexico which discharged about 60,000 barrels of oil per day

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<sup>700</sup> Ayobami Olaniyan, 'The Multi-Agency Response Approach to the Management of Oil Spill Incidents: Legal Framework for Effective Implementation in Nigeria' (2015) 6:1 Afe Babalola University: J. of Sust. Dev. Law & Policy 109

<sup>701</sup> Ibid 114

<sup>702</sup> ibid

<sup>703</sup> Nigeria - ITOPF' (*Itopf.org*, 2020) <<https://www.itopf.org/knowledge-resources/countries-territories-regions/countries/nigeria/>> accessed 26 May 2020.

<sup>704</sup> ibid

<sup>705</sup> International Convention on Civil Liability for Oil Pollution Damage (CLC) (adopted 29 November 1969, entry into force 19 June 1975); Being replaced by 1992 Protocol: (adopted 27 November 1992, entry into force 30 May 1996) 'International Convention on Civil Liability for Oil Pollution Damage (CLC)' (*Imo.org*, 2020) <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-\(CLC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx)> accessed 26 May 2020.

into the Gulf and heavily polluting it.<sup>706</sup> Another instance is the effect of the 2009 Montara accident in Australia.<sup>707</sup> This latter incident involved an oil installation which suffered a blowout during the drilling of a well. The effects of this pollution were felt in Indonesian waters and Indonesia claimed that the oil slick had caused damage to its marine environment, and socio-economic hardship to communities that depended on it for their livelihood.<sup>708</sup> Indonesia argued at the International Maritime Organization that there needed to be a uniform international standard which could be applied to such incidents as national measures alone would not suffice.<sup>709</sup>

The matter had earlier been discussed at the IMO and had stalled but at its 99<sup>th</sup> session in 2012 the Legal Committee at the IMO Council's request, revisited the issue of liability and compensation connected with transboundary pollution damage from offshore oil exploration and exploitation activities.<sup>710</sup> It decided that bilateral and regional arrangements are the most appropriate ways to address the matter and agreed that there was no compelling need to develop an international regime on the subject.<sup>711</sup> The Committee decided to further analyse the liability and compensation issues, but only with the aim of developing guidance to assist States interested in pursuing bilateral or regional arrangements.

Indonesia and Denmark provided the document, entitled 'Guidance for Bilateral/Regional Arrangements or Agreements on Liability and Compensation Issues Connected with Transboundary Oil Pollution Damage Resulting from Offshore Exploration and Exploitation Activities' and at its 104<sup>th</sup> session, the Committee encouraged Member States and observer delegations to take the guidance into consideration when negotiating bilateral/regional arrangements or agreements connected with transboundary pollution damage from offshore exploration and exploitation activities.<sup>712</sup> The Guidance is based on UNCLOS obligations on states to

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<sup>706</sup> Richard Pallardy, 'Deepwater Horizon oil spill' (Encyclopædia Britannica, 13 April 2020) <<https://www.britannica.com/event/Deepwater-Horizon-oil-spill>> assessed 11 May 2020

<sup>707</sup> International Maritime Authority, Legal Committee (LEG) – 99<sup>th</sup> session, 16 - 20 April 2012

<sup>708</sup> *ibid*

<sup>709</sup> *ibid*

<sup>710</sup> *ibid*

<sup>711</sup> *ibid*

<sup>712</sup> International Maritime Organisation, Legal Committee (LEG) – 104<sup>th</sup> session, 26 - 28 April 2017

make efforts to implement national laws and standards regulating seabed activities,<sup>713</sup> cooperate at the global and regional level to formulate rules and standards,<sup>714</sup> and enforce these standards.<sup>715</sup> UNCLOS also provides for states to ensure that there is in their legal systems the opportunity for prompt and adequate compensation to be paid and for states to cooperate in the implementation of existing international law and further, international law relating to responsibility and liability for the assessment of damage and the payment of adequate compensation.<sup>716</sup>

The Guidance provides a list of elements that states could consider when negotiating a bilateral/regional arrangement on the issue. They include clearly specifying the facilities to be covered and defining the damage that is to be covered. The regulation should also specify the type of claims covered, deal with pollution prevention and emergency planning. There should be provision for reporting and cooperation in emergency situations. The Guidance also provides that states have reciprocity provisions that enable residents in the participating states to have access to the same rights. The polluter pays principle should be followed and issues of liability and limitation of liability should be addressed. Importantly also the guidance provides that states should specify how claims should be settled and recognition of judgments by courts in the contracting Parties and by courts of other States. The guidance should also provide for how an offshore facility is submitted to the jurisdiction of the State issuing the operating license and to Courts of other States covered by the agreement.<sup>717</sup>

### **3.5.2. Regional framework: The Offshore Protocol of the Abidjan Convention**

In the region, the Abidjan Convention provides for states to co-operate to formulate and adopt rules and procedures for determining liability and the payment of compensation for pollution damage.<sup>718</sup> However, the Convention did not provide for a protocol dedicated to dealing with liability from pollution from oil exploration and exploitation

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<sup>713</sup> UNCLOS art 208

<sup>714</sup> UNCLOS art 197

<sup>715</sup> UNCLOS art 214, 215

<sup>716</sup> UNCLOS art 235

<sup>717</sup> International Maritime Organisation, Legal Committee 104th session Agenda item 14

<sup>718</sup> Abidjan Convention Article 15



activities. When the subject was dealt with at the Tenth Meeting of States Parties, to the Abidjan Convention in 2012, it was proposed that instead of having such a protocol, contracting states are to enact their own laws for compensation and reparation and the setting up of National Trust Funds to deal with such issues.<sup>719</sup> The states decided that national laws should also define different types of compensatory or compensable damage as well as conditions with respect to civil liability and compensation for damages arising out of exploitation.<sup>720</sup> The reason for this may be that most oil pollution arises from vessels. Additionally, offshore operations take place in areas that fall to national jurisdictions and therefore it stands to reason that national laws should be used to regulate liability and compensation issues.

However, the states subsequently saw the need to have a regional mechanism and therefore adopted the Offshore Protocol. The Protocol obliges Parties to cooperate directly or through the Organisation, in order to develop and adopt appropriate rules, and procedures, as well as guidelines in accordance with international practices and procedures regarding the assigning of liability and fast, adequate reparation or compensation for damage resulting from activities in the Protocol Area, pursuant to Article 15 of the Abidjan Convention. Further the provision provides that pending development of such procedures and guidelines, each Contracting Party shall take all necessary measures to ensure that operators are liable for damage caused by their activities and are required to pay prompt and proportionally adequate compensation.<sup>721</sup> The states shall further ensure that operators are and remain covered by insurance or other adequate financial guarantees, whose nature and conditions shall be specified by the states so as to ensure compensation for damage caused by activities covered by the Protocol.<sup>722</sup> Thus the states have the burden to ensure that liability is provided for, when they procure oil exploration and exploitation contracts. The Annex to the Protocol further gives guidelines on what state legislation is to cover. It provides for what the

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<sup>719</sup> Tenth Meeting of Contracting Parties to the Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region Pointe Noire, Republic of the Congo, 12-16 November 2012, Report on the Proposed Revised Text of the Abidjan Convention

<sup>720</sup> *ibid*

<sup>721</sup> Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (adopted 3 July 2019, not yet in force) art 28

<sup>722</sup> *ibid*

legislation of the contracting states should include. These are specifically provisions to compensate for both traditional and environmental damage resulting from pollution of the marine and coastal environment.<sup>723</sup> Traditional damage includes loss of life or personal injury and loss or damage to property as well as loss of profit as a direct consequence of harm.<sup>724</sup> Environmental damage means a measurable loss to a natural resource or measurable harm caused to a natural resource service which may occur directly or indirectly.<sup>725</sup>

Annex VIII (7) of the Offshore Protocol is a rather controversial guideline which obliges the Contracting Parties to require that certain measures referred to in the Annex are taken by the operator. If the operator does not take such measures or cannot be identified or is not liable under these Guidelines, the Contracting Parties should themselves take such measures and charge the operator where applicable. This is likely to put excess financial burden on states. However, the Protocol, provides for compensation to be based on the ‘polluter pays principle’<sup>726</sup> which is one of the core principles of sustainable development. The principle is often applied as a liability and compensation mechanism by which it is accepted that those who produce pollution should bear the cost of managing it to prevent damage to the environment.<sup>727</sup>

Annex VIII of the Offshore Protocol deals with guidelines on liability and compensation for damage resulting from pollution of the marine and coastal environment in the convention area. It encourages the Contracting Parties to study the possibility of setting up a compensation fund in the Abidjan Convention area to provide compensation when the damage exceeds the liability of the operator or when the operator is not known.<sup>728</sup> In the event the state is not able to bear the cost of the damage and is not covered by a financial security, or when the State takes preventive measures in emergency situations and is not reimbursed for the cost of such measures the fund comes into play.<sup>729</sup> Additionally the Annex provides for financing of The Fund which should, if necessary,

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<sup>723</sup> Ibid Annex VIII

<sup>724</sup> Ibid Annex VII (D)

<sup>725</sup> ibid

<sup>726</sup> Ibid Annex VIII (A)

<sup>727</sup> 'The Polluter Pays Principle: What Is It? | Clear Seas' (*Clear Seas*, 2018)

<<https://clearseas.org/en/blog/polluter-pays-principle/>> accessed 26 May 2020.

<sup>728</sup> Annex VIII (19)

<sup>729</sup> ibid

be by regular contributions from Contracting Parties and the operators.<sup>730</sup> There seems to be a reflection of the some of the provisions of the Civil Liability Convention in this provision.

The provisions of the Offshore Protocol are generally progressive but parts of it are rather weak and would depend on a high level of political will by the parties as they are just encouragements to the states and are also non-binding. This applies mainly to the provisions dealing with compensation. In Annex VIII (D) (18) it is provided that the “...Contracting Parties should take measures to encourage the establishment of a compulsory insurance scheme or other instruments and financial security markets in order to allow operators to cover, through the financial guarantees, their liabilities under these Guidelines, and to require actual commitment” Also according to Annex VIII (D) (25), it is only after an assessment of the implementation of the Guidelines after three years from the date of adoption that the parties could decide to adopt a legally binding instrument. However, this may have some positive aspects to it by giving the states the time to work out the impact of the provisions on the states. Further the added burden of having to contribute to the Fund is also disincentive for the states bearing in mind the amount of financial burdens they already have regarding other cooperation obligations in the region.

### **3.5.3. Provisions for the protection of the marine environment in Joint Development Agreements**

The lack of adequate regulations and weak implementation of existing regulation in the states is reflected in the joint development agreements discussed in the preceding chapter. The example of the Nigeria and Sao Tome Joint Development Agreement is instructive. Article 9 of the Agreement provides for the Joint Authority to be responsible for regulating marine scientific research and preserving the marine environment within the zone including preventing and remedying pollution of the marine environment.<sup>731</sup> Article 38 specifies the Joint Authority’s duties in more detail in this regard. It provides, for the Joint Authority to take all reasonable steps to ensure that, “development activities in the Zone do not cause or create any appreciable risk of causing pollution or

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<sup>730</sup> Ibid 21

<sup>731</sup> Article 9.6 (k) (o), (r) (iii)

other harm to the marine environment.”<sup>732</sup> To undertake this responsibility the Authority is to recommend, and the states parties shall agree necessary measures and procedures to prevent and remedy pollution of the marine environment resulting from development activities in the Zone.<sup>733</sup> This includes the parties regularly providing the Authority with such relevant information they obtain from contractors or inspectors concerning levels of petroleum discharge and contamination. Major events of pollution and emergencies in the exploitation of the oil and gas are to be immediately communicated to the JDA.<sup>734</sup> In addition to the Authority’s role the Treaty does not prohibit the states individually or jointly from jointly taking measures in the Zone proportionate to the actual or threatened damage to protect their coastline or exclusive maritime areas from pollution or the threat thereof.<sup>735</sup>

These provisions do not clearly detail what the Authority should do to remedy the pollution of the marine environment. It is limited to monitoring and being notified of events of pollution. It is ultimately up to the states to act. This makes the protection of the marine environment dependent on the parties to the treaty which can have dire adverse consequences for the entire region, if the states refuse or are slow to act. Also liability from exploitation is not addressed as it has been done in the Japan/ South Korean Agreement which has provisions for the nationals of both states to sue in the courts of either states for compensation.<sup>736</sup> Nationals of third states affected by any pollution in the Nigeria – Sao Tome and Principe situation have to rely on provisions of international law and customary international law.<sup>737</sup> The situation in both countries as regards their preparedness in the event of a pollution arising out of exploitation, does not present a good picture. There are no government agencies in Sao Tome and Principe which have direct responsibility for oil pollution and no national contingency plan in such an eventuality.<sup>738</sup> The principal port of Sao Tome operates a radio station although

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<sup>732</sup> Nigeria and Sao Tome Treaty Art 38 (1)

<sup>733</sup> *ibid* art 38 (2)

<sup>734</sup> *ibid* art 38 (3) (a) – (d)

<sup>735</sup> *ibid* art 38 (4)

<sup>736</sup> Hazel Fox, et al., *Joint Development of Offshore Oil and Gas: A Model Agreement for States for Joint Development with Explanatory Commentary* (British Institute of International and Comparative Law 1989) 362

<sup>737</sup> Nigeria and Sao Tome Treaty Article 38

<sup>738</sup> Sao Tome & Principe - ITOPF' (*Itopf.org*, 2018) <<https://www.itopf.org/knowledge-resources/countries-territories-regions/countries/sao-tome-principe/>> accessed 17 May 2020.

it is irregularly manned and partially inoperative. In any case the country has had just a few spills from passing tankers.<sup>739</sup>

Nigeria on the other hand, has a response plan in place as already discussed above. However, several challenges hinder its work. There is lack of adequate funding, requisite technology and manpower of its supervising agency NOSDRA.<sup>740</sup> Additionally the oil companies have a lot of control deciding when investigation should take place and providing technical expertise. Thus, the spills detection and prevention responsibility of the agency is to a large extent weak.

Regarding the Nigeria Equatorial Guinea cross border unitisation agreement,<sup>741</sup> there is also no detailed provision for the protection of the marine environment from pollution or even providing for liability and compensation. The provision that deals with pollution provides that , “ ... the Government of the Republic of Equatorial Guinea shall make every endeavour to ensure that operations carried out under the Agreements shall not cause pollution of the marine environment or damage by pollution to the coastline, shore facilities or amenities, or vessels or fishing gear of any country, and shall regularly consult with the Government of the Federal Republic of Nigeria for these purposes. As has already been noted Equatorial Guinea does not have any strong contingency plans for pollution from exploitation. This leaves the parties to the Agreement in a precarious position in the event of a pollution incident.

### **3.6. Proposals on the way forward - Regional Cooperation in the protection of the marine environment from pollution arising out of exploitation activities**

#### **I. Proposals on institutional framework for the protection of the marine environment**

The region's oil and gas exploration and exploitation activities are expanding as new offshore oil fields are being developed on a regular basis. This involves drilling,

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<sup>739</sup> *ibid*

<sup>740</sup> Adati Kadafa, Pauzi Zakaria and Fadhilah Otuman 'Oil spillage and pollution in Nigeria organizational management and institutional framework' 2012) 2 *Journal of Environment and Earth Science* 25

<sup>741</sup> Treaty between the Federal Republic of Nigeria and the Republic of Equatorial Guinea Concerning their

Maritime Boundary (adopted 23 September 2000, entered into force in April 2002). art 6.2

dredging and seismic studies as well as the installation of oil rigs with the attendant risks of oil spills which have a negative impact on the marine environment. However, the legal framework for dealing with pollution from exploitation of oil and gas and the liability that arises is inadequate. The region therefore needs a robust mechanism to combat this kind of pollution as the effects are transboundary and have an impact on the entire ecosystem including living marine resources.

The first step to having a successful framework for the prevention of pollution from offshore oil and gas activities in the Gulf of Guinea is for the states to decide on the institutional arrangement to use for such protection. The new Interim Guinea Current Commission discussed above, appears to fit the bill. It has the advantage of having an ecosystem approach which promotes cooperation. Currently the parties have not decided on how to set up the Commission which has already begun some important initiatives to protect the marine environment from offshore oil and gas activities through cooperation as discussed above. There are two options to choose from – one is establishing an independent GCC through a separate legal agreement and the other establishing a GCC through a protocol to the Abidjan Convention.<sup>742</sup> The experts that debated the issue could not reach a consensus. Majority - experts from 12 of the countries recommended establishing the Commission by a protocol to the Abidjan Convention. They argued that it would save costs and ensure financial sustainability as well as avoiding duplication of activities.<sup>743</sup> The experts in the minority from 2 states recommended the option of establishing the GCC by a separate legal agreement reasoning that there would be operational independence and effective service delivery.<sup>744</sup>

The background to the debate is that the parties in 2006, established the Guinea Current Commission on an interim basis by a declaration they refer to as the ‘Abuja Declaration establishing the Interim Guinea Current Commission.’ The member states by this Declaration agreed, “...*To institutionalize regional cooperation at the technical level*

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<sup>742</sup> Interim Guinea Current Commission, ‘Report of the 9<sup>th</sup> Meeting of the Regional Steering Committee of the Interim Guinea Commission/Guinea Current Large Marine Ecosystem’ ( 2014)

<sup>743</sup> *ibid*

<sup>744</sup> *ibid*

*through the creation of an Interim Guinea Current Commission (IGCC) in the framework of the Abidjan Convention (1981) as provided in paragraph 37 of the approved Guinea Current LME Project Document signed by all the participating countries;*<sup>745</sup> They further decided that a permanent Guinea Current Commission (GCC) would be constituted and adopted by the countries by 2009 to serve as the highest decision making organ for implementing the Strategic Action Plan which the parties had earlier negotiated to deal with the marine environmental challenges of the Guinea Current region.<sup>746</sup>

Subsequently in 2010, the parties decided to establish the Guinea Current Commission, “in principle and in line with the Abuja Declaration.”<sup>747</sup> The states by that declaration also took into account the industrial and ecological disaster that befell the Gulf of Mexico. The states and their partners therefore decided that they must put in place effective national and regional systems for response to major pollution incidents as soon as possible.<sup>748</sup> It would be prudent therefore for the states to carry out their intention to adopt the Additional Protocol and establish the Guinea Current Commission to implement it. Meanwhile the same parties were part of the Abidjan Convention discussing the draft of an Additional Protocol on the Environmental Norms and Standards for offshore oil and Gas Activities. What is important is that there is a need in the region for a strong body that can coordinate all the efforts of the states to protect the marine environment.

However, what would make the Commission more effective is for it have the power to make decisions that are binding. The example of the Convention for the Protection of the Marine Environment of the North-East Atlantic (the OSPAR Convention) is worth emulating. The Convention established the OSPAR Commission, which issues binding decisions and detailed technical recommendations in accordance with Article 10 of the Convention. The Commission is mandated to collect information about substances which are used in offshore activities and, on the basis of that information, to agree lists

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<sup>745</sup> Kristen Honey and Sandra Elvin, ‘Towards Ecosystem-based Management of the Guinea Current Large Marine Ecosystem’ (United Nations Development Programme 2013)

<sup>746</sup> *ibid*

<sup>747</sup> Interim Guinea Current Commission, ‘Second Meeting of the Committee of West and Central African Ministers of the Guinea Current Large Marine Ecosystem Project: The Osu Declaration’ (2010) (*Diktas.iwlearn.org*, 2020) <<http://diktas.iwlearn.org/gclme-ac/publications/rappports/2010/2010-osu-declaration-english-version>> accessed 26 May 2020.

<sup>748</sup> *ibid*

of substances for the purposes of making decisions, recommendations and all other agreements adopted under the Convention.<sup>749</sup> It is also to list substances which are toxic, persistent and liable to bioaccumulate and to draw up plans for the reduction and phasing out of their use on, or discharge from, offshore sources.

Further it also draws up criteria, guidelines and procedures for the prevention of pollution from dumping of disused offshore installations and of disused offshore pipelines, and the leaving in place of offshore installations, in the maritime area. Such disused installation can only be left in the marine environment under authorisation or regulation by the competent authority of the relevant Contracting party. Interestingly it provides that any Contracting Party which intends to take the decision to issue a permit for the dumping of a disused offshore installation or a disused offshore pipeline placed in the maritime area after 1st January 1998 shall, through the medium of the Commission, inform the other Contracting Parties of its reasons for accepting such dumping, in order to make consultation possible. This promotes transparency and would ensure that states have good reason for their actions.

These recommendations detail very specific technical requirements for the parties. The Commission is currently playing a supporting role for the Abidjan Convention. However, OSPAR has been successful because the Commission acts as a strong central body to issue the recommendations and technical requirements and enforce them. The Gulf of Guinea states on the other hand have no such body. Perhaps the Gulf of Guinea Commission when it is set up could perform this critical role. OSPAR'S approach which has been praised in the literature as being successful can be used by the IGCC instead of the soft approach of encouraging states in non – binding provisions of the Abidjan Convention.

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<sup>749</sup>The Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) (the 'OSPAR Convention') available at :Convention OSPAR Commission' (*OSPAR Commission*, 2020) <<https://www.ospar.org/convention>> accessed 26 May 2020.



## **II. Proposals for enhancing the regional and national frameworks for liability and compensation for pollution arising out of exploitation**

Regarding liability and compensation for pollution arising out of exploitation and in line with the IMO guidelines the states in the region have been working towards enhancing both their regional and national frameworks in this regard. The regional framework which is the recently adopted offshore Protocol is a positive development which can be further enhanced. There are elements of the Civil Liability Convention in the Protocol like the principle of strict liability and the establishment of a fund<sup>750</sup> as a second level of protection for victims. It is important as a matter of urgency for the states in the region to enact laws for developing the process for compensation which sets out how individuals can seek redress when they have suffered from pollution damage. These laws need to be harmonised so as to provide equal levels of protection for all citizens in the region.

## **III. Proposals for protecting environment in JDAs**

One of the two main types of marine pollution likely to be encountered in a joint development is escape from the installations on the continental shelf of oil gas or other substance causing pollution effects. The other type is discharges from ships. In the Gulf of Guinea, the JDA as discussed above has paid minimal attention to the pollution of the marine environment from exploitation. However, since pollution is one of the risks associated with exploration and exploitation of hydrocarbons and it is not known when such a risk could materialise, it is prudent for the states involved in the joint agreements to make provision for it. They also need to have a regime for liability and compensation in case of an incident within the joint development zone. These should be uniform throughout the zone to ensure that it effectively protects the marine environment. As the parties are party to the Abidjan Convention, they need to implement the provisions of the Offshore Protocol by having a bilateral agreement incorporating the provisions into the Agreement and into national legislation.

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<sup>750</sup> International Convention on Civil Liability for Oil Pollution Damage (CLC)

#### **IV. Proposals on coordinating activities of the various organisations with a mandate to protect the marine environment in the Gulf of Guinea**

As already discussed, in addition to the Abidjan Convention and the Interim Guinea Current Commission, the Gulf of Guinea Commission which generally deals with cooperation in the exploitation of natural resources, also has some mandate to cooperate to protect the marine environment.<sup>751</sup> These bodies should be consolidated so as not to duplicate efforts and finances. The role of each organisation should be clearly clarified so that they come together to complement each other instead of working at cross purposes. The states in the region should also pool their resources and work with one strong implementing body. It is a good development to note that the IGCC is to initiate consultation with the Gulf of Guinea Commission with the aim to concluding an MoU to ensure complementarity of actions especially during the Strategic Action Plan implementation project.<sup>752</sup>

The states need to find ways to pool resources. There are already several marine ecology projects underway in the region under the auspices of UNEP, as well as Commissions set up for each of the three LMEs affiliated to the Abidjan Convention - the Benguela Current, Canary Current and Guinea Current LME discussed above. Coordinating these ongoing activities with the knowledge and personnel, would assure optimal benefits for all the LMEs involved. These efforts could also help alleviate the current need for marine pollution monitoring and enforcement by pooling available resources.

A positive development is that the states are making efforts to take transfer the Secretariat of the Abidjan Convention to Cote d'Ivoire. Currently UNEP fulfils the role of Secretariat. This step towards independence is commendable. However, UNEP can still play a significant role in the implementation of the Offshore Protocol through gathering and analysing environmental data and providing training for state environmental officials. It could also assist in implementation and enforcement by

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<sup>751</sup> Treaty establishing the Gulf of Guinea Commission art 3 (f)

<sup>752</sup> Interim Guinea Current Commission, Seventh Regional Steering Committee Meeting (2010) (*Diktas.iwlearn.org*, 2010) <[http://diktas.iwlearn.org/gclme-ac/meetings-workshops/img\\_0/7th\\_scm\\_report\\_final.pdf](http://diktas.iwlearn.org/gclme-ac/meetings-workshops/img_0/7th_scm_report_final.pdf)> accessed 26 May 2020.

assisting states with enacting national laws that complement the offshore protocol, monitoring ongoing operations, and enforcing laws against repeat offenders.<sup>753</sup>

The Offshore Protocol is a good starting point for dealing with pollution from offshore oil and gas activities. However due to the challenges associated with it as discussed above, it needs to be fine-tuned to serve the needs of the region as regards oil and gas pollution. Regarding licensing of operators and requirements for environment impact assessment, the Offshore Protocol has progressive provisions which require that the legislation of each Contracting Party should mandate a Competent National Authority (CNA) (or authorities) to undertake the Environmental and Social Assessment (ESA) process for all phases from exploration to production and decommissioning, including for appeals. It even takes cognisance of the fact that there may not be adequate capacity in the state. In such a case, the national authorities should have adequate capacity or alternate arrangements in place while their capacity is being enhanced.<sup>754</sup> Annex IV of the Protocol sets out in detail matters which at the minimum should be addressed in environmental assessments.<sup>755</sup>

The Annex commendably provides that before the CNA gives a decision on an activity for which an environmental (including social, health and fisheries) impact assessment has been conducted, the CNA shall give opportunity to government agencies, members of the public, experts in any relevant discipline and interest groups to comment on the environmental impact assessment of the activity.<sup>756</sup> This though assisting with transparency could still benefit from the example of the Kuwait Protocol which provides that whenever a Competent State Authority has called for and received an environmental impact statement, it shall send to the Organization a summary of the potential environmental effects referred to in that statement. The Organization in turn is to send the summary to all the other Contracting States for their comments and take

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<sup>753</sup> 'Inputs to the Secretary-General's Annual Report to the General Assembly On the Ocean and Law of the Sea' (*Un.org*, 2015) <[https://www.un.org/depts/los/general\\_assembly/contributions\\_2015\\_2/UNEP\\_Contribution.pdf](https://www.un.org/depts/los/general_assembly/contributions_2015_2/UNEP_Contribution.pdf)> accessed 26 May 2020.

<sup>754</sup> Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (adopted 3 July 2019, not yet in force) Annex IV

<sup>755</sup> Ibid Annex IV (B)

<sup>756</sup> Additional Protocol to the Abidjan Convention on Environmental Norms and Standards for Offshore Oil and Gas Exploration and Exploitation Activities (adopted 3 July 2019, not yet in force) Annex IV (B) (3)

into consideration those comments before issuing a license. This is however subject the right of the state to withhold information which might prejudice its national security.<sup>757</sup> The advantage of including this kind of provision is to ensure that all the states know what is happening in each other's EEZ or continental shelf which would be likely to adversely affect the marine environment and take early measures to curtail it. There should be provisions however requiring the reasonable use of such a provision in the Offshore Protocol in order for states not to interfere in another's legitimate economic activities or domestic affairs.

## V. Proposals for addressing noise pollution

Seismic Surveys also need to be better addressed in the Protocol. Oil and gas explorers use seismic surveys to produce detailed images of the various rock types and their location and use this information to determine where to find oil and gas reservoirs.<sup>758</sup> Marine seismic surveys use intense sound impulses to explore the ocean bottom for hydrocarbon deposits. With the exploitation of oil comes an expansion of seismic survey in the region which is the source of another kind of pollution -noise- to the marine environment. The harmful effect of such noise on marine mammals has been documented and thus any protocol dealing with pollution from oil and gas activities needs to incorporate measures minimising the impact of seismic surveys.<sup>759</sup> The Offshore Protocol has listed Seismic surveys as one of the activities that trigger the requirement for the Environmental and Social Assessment process in the offshore oil and gas sector.<sup>760</sup> Annex V 1(d) also provides that the types and magnitudes of seismic surveys shall be taken into consideration in the issuance of authorisations in the form of permits. The Offshore Protocol also requires the Contracting Parties to take special

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<sup>757</sup> Protocol Concerning Marine Pollution Resulting from Exploration and Exploitation of the Continental Shelf (adopted 29 March 1989, entered into force 2001) (Kuwait Protocol) Article IV (1) (c) - available at (*Ropme.org*)

<[http://www.ropme.org/Uploads/Protocols/Continental\\_Shelf\\_Protocol.pdf](http://www.ropme.org/Uploads/Protocols/Continental_Shelf_Protocol.pdf)> accessed 26 May 2020.

<sup>758</sup> 'Seismic Survey | Description, Methods, & Facts' (*Encyclopedia Britannica*, 2020)

<<https://www.britannica.com/science/seismic-survey>> accessed 26 May 2020.

<sup>759</sup> Douglas Nowacek and others, 'Marine seismic surveys and ocean noise time for coordinated and prudent planning front' (2015) 13 *Ecol Environ* 378.

<sup>760</sup> Annex IV (C) of Kuwait Protocol

measures with regard to sensitive areas and migration corridors of species in order to prevent the harmful effects of seismic surveys on the marine environment.

An interesting innovation is the use of marine mammal observers that look out for marine mammals in areas of seismic surveys and if observed the survey should be delayed until they have moved out of the area.

## **VI. Proposals for addressing gas flaring**

Gas flaring is a major source of pollution in the region particularly in the Niger Delta. It is reported that gas flares in the Niger Delta are even visible from space. This contributes to dangerous greenhouse emissions which seriously affects the health of the community. The Offshore Protocol at Annex V provides that for the issuance of permits during the exploration phase, one of the factors to be considered are the main source of air emissions including greenhouse gases. The Offshore protocol could require that produced gas be either sold to the market or reinjected into the underground formation.<sup>761</sup> Flaring and venting should be permitted only in emergency venting and operational safety. Any continuous flaring or venting should require prior government approval.<sup>762</sup>

### **3.7. Conclusions**

The importance of regional cooperation in the protection of the marine environment has been highlighted in the chapter. This is necessitated by the fact that the region's oil and gas exploration and exploitation activities are expanding with new discoveries being made which has made the region a beehive of activities ranging from drilling, dredging and oil rig installation. This comes with the obvious risks of oil spills and the issue of liability from damage as a result of such pollution.

In the Gulf of Guinea, the national framework for addressing every stage of the exploitation process is inadequate. States legislation are not comprehensive and

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<sup>761</sup> Carlos Moreno, 'Oil and Gas Exploration and Production in the Gulf of Guinea: Can the New Gulf be Green?' (2009) 31 *Houst. J. Int Law* 455.

<sup>762</sup> *ibid*

harmonised and so makes it a challenge to deal with issues of pollution in the region in a coherent manner. However, the effects of pollution are transboundary and therefore require a regional framework. This is especially so with regard to liability for damage arising out of exploitation of oil and gas. However, on the latter issue, the current global environmental law framework has significant gaps and as discussed in this chapter, it appears to be the global consensus that these gaps must be filled by regional, multinational, and national legal frameworks.

In the region the Abidjan Convention is the main framework for dealing with pollution from exploitation. Nonetheless the Convention has significant challenges with funding, coordination and limited human resource. Currently it has managed to adopt a Protocol for dealing with offshore oil pollution which also addresses the issues of liability. The Protocol has made provision for states to develop standards and guidelines regarding the assignment of liability. However, as this has not yet been done, states have to take the necessary measures to ensure operators are made liable for damage caused by their operations. Taking into account the length of time it took to formulate and adopt the Protocol, the states may not have any such guidelines for long to come unless there is some urgency attached to the issue in view of the threats of oil spills looming over the region.

It has been suggested that the states need an institutional framework to coordinate oil pollution activities. There are two potential bodies – one already set up which is the Gulf of Guinea Commission, and the other which is still in the process of being set up which is the Guinea Current Commission. Both these bodies have as part of their mandate the protection of the marine environment from oil pollution. However, these two bodies need strengthening in terms of technical, financial and human resource. They also need to complement each other instead of working at cross purposes.

## CHAPTER FOUR

### MANAGING FISHERIES AND CONSERVING THE MARINE ECOSYSTEM IN THE GULF OF GUINEA

#### 4.1. Introduction

Conservation and management of marine living resources is another major concern in the Gulf of Guinea. The marine species in the region are declining rapidly due to over exploitation of commercially valuable fish stocks and destruction of critical habitats.<sup>763</sup> This is mainly due to illegal or harmful fishing activities involving artisanal and industrial fishers, including from the European Union, Eastern Europe, Korea and Japan, which exploit species ranging from demersal fish species like croakers, *Ariomma bondi* (Silver-rag drift fish), found especially in Cameroon and Nigeria, to penaeid shrimps.<sup>764</sup> The latter species pose a particular challenge due to their being amphibiotic<sup>765</sup>. They are caught as juveniles in the lagoons by artisanal fishers and as adults at sea by industrial fishers. This in addition to damage to mangroves, their nursery grounds, has led to the collapse of this particular stock in the region.<sup>766</sup> Other marine resources on the decline are cetaceans like whales and dolphins found mainly in Gabon, Cameroon, Benin, and Nigeria, and four species of marine turtles, classified as endangered,<sup>767</sup> which have their spawning grounds in Cameroon (Ebodje), Equatorial Guinea (Corisco Bay and Ureka) and Congo (Conkouati).<sup>768</sup> These are often caught as bycatches as a result of illegal, unreported and unregulated (IUU) fishing in the region.<sup>769</sup> However due to lack of adequate legislation and monitoring and enforcement

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<sup>763</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) 35

<sup>764</sup> Ibid p.39

<sup>765</sup> Juveniles in the lagoons and adults at sea

<sup>766</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) 39.

<sup>767</sup> International Union for the Conservation of Nature (IUCN) red list of endangered species.

<sup>768</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) 40

<sup>769</sup> Ibid p.127.

capacities of the states in the region, these problems have exacerbated in recent times causing considerable concern to the coastal states in the region.

Nonetheless, these fisheries resources are important sources of food and livelihood for the region's populations and generate income for the states as well as contribute to the general viability of the marine ecosystem. Attempts have therefore been made by the states in the region, to regulate harvesting, in national legislation and policies and by regional regulatory mechanisms. However, these have been largely unsuccessful.

Against this background, the focus of this chapter is cooperation in the sustainable management of the transboundary marine living resources specifically fisheries in the Gulf of Guinea region.

The first part presents an overview of the global rules relating to the conservation and management of fisheries which shows an emphasis on regional cooperation and the recognition of the ecosystem approach. The second part assesses the existing regional and national legal regimes for conservation and management of fisheries in the region in the light of the global rules. In so doing the challenges to management and conservation as well as the inadequacies to the regulatory framework, are identified and discussed. The third part then attempts to proffer solutions to these challenges within the framework of regional cooperation based on the ecosystem approach to the management and conservation of fisheries.

## **4.2. Global framework for the conservation and management of living marine resources**

### **4.2.1 UNCLOS and the Fish Stocks Agreement**

UNCLOS and the Fish Stocks Agreement<sup>770</sup> constitute the main global framework for the conservation and management of fisheries. Articles 63 and 64 of UNCLOS, place an obligation on coastal states to cooperate, either directly or through a sub-regional or

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<sup>770</sup>Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (Fish Stocks Agreement).



regional organisation, in relation to the conservation and management of stocks straddling their EEZs.<sup>771</sup> They are under the same obligations regarding the fish stocks that straddle the outer limit of their EEZs and the high seas. However, in that case, all states whose nationals fish in that area are also required to cooperate with the coastal states.<sup>772</sup> In similar vein Article 64 which deals with the highly migratory species also mandates cooperation between the coastal States and other States whose nationals fish in the region for the highly migratory species the list of which have been provided in Annex I of UNCLOS. The object of such cooperation which is either directly between the states or through appropriate international organisations, is to ensure the conservation of these fish stocks and promoting their optimum utilisation throughout the region, both within and beyond the exclusive economic zone.<sup>773</sup> Indeed international organisations are so important to these arrangements, that where none exists, the provision requires the coastal States and other States whose nationals harvest these species in the region to cooperate to establish them and participate in their work.<sup>774</sup> Article 118 relating to the High Seas also contains identical provisions.

These provisions have been implemented by the Fish Stocks Agreement which uses the main approach of regional cooperation. Article 8 provides the main mechanisms for international cooperation for the conservation and management of straddling and highly migratory fish stocks. It specifically provides in mandatory terms for such cooperation in Article 8 (3) as follows: “...where a sub-regional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor

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<sup>771</sup> UNCLOS art 63 (1)

<sup>772</sup> UNCLOS art 63 (2)

<sup>773</sup> UNCLOS art 64

<sup>774</sup> *ibid*

*shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.”*

This provision is an acknowledgment of the fact that by the biology and the ecology of these fish stocks they are no respecter of boundaries and are essentially shared resources and therefore no single state can on its own manage them. As the above provisions are legal obligations, all states parties must comply with them. However, in the region four of the states are not party to the Agreement namely Togo, Cameroon, Sao Tome and Principe and Equatorial Guinea.<sup>775</sup> It is not clear therefore how well the Agreement can be implemented by the Gulf of Guinea States. However, it appears that if the states are parties to the RFMOS set up in region, they may still be complying with the Agreement without being party to it

#### **4.2.2. Supplementary International Agreements and other Soft law means to protect and preserve living marine resources**

Aside from UNCLOS and the Fish Stocks Agreement, there are other legally binding and non - binding international Agreements adopted by states. These include the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement).<sup>776</sup> This is an Agreement to combat the practice of reflagging of vessels which is usually done to circumvent compliance with national or international fisheries conservation and management measures.<sup>777</sup> It obliges the State parties to take all necessary measures to ensure that fishing vessels entitled to fly their flag do not engage in any activity that

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<sup>775</sup> 'Chronological Lists of Ratifications' (*Un.org*, 2017)

<[https://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm#Agreement%20for%20the%20implementation%20of%20the%20provisions%20of%20the%20Convention%20of%2010%20December%201982%20relating%20to%20the%20conservation%20and%20management%20of%20straddling%20fish%20stocks%20and%20highly%20migratory%20fish%20stocks](https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#Agreement%20for%20the%20implementation%20of%20the%20provisions%20of%20the%20Convention%20of%2010%20December%201982%20relating%20to%20the%20conservation%20and%20management%20of%20straddling%20fish%20stocks%20and%20highly%20migratory%20fish%20stocks)> accessed 27 May 2020.

<sup>776</sup> 'The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas' (adopted November 1993, entered into force 24 April 2003) 2221 UNTS 19. (*Fao.org*, 1995) <<http://www.fao.org/3/X3130M/x3130m.pdf>> accessed 27 May 2020.

<sup>777</sup>Ibid

undermines the effectiveness of international conservation and management measures.<sup>778</sup> In the region, this convention has been ratified by only Ghana and Benin.<sup>779</sup>

To address concerns about pressure on high seas fisheries, the FAO Committee of Fisheries in 1991 requested that the FAO hold an international conference for responsible fishing which held in Cancún, Mexico from 6–8 May 1992. This resulted in a non-binding agreement—the FAO Code of Conduct for Responsible Fisheries, 1995.<sup>780</sup> Parts of the Code are based on relevant rules of international law, reflected through UNCLOS. To address issues raised in the Code of Conduct, the FAO introduced four International Plan of Actions (IPOA)<sup>781</sup> including one dealing with fishing capacity and one on Illegal Unreported and Unregulated fishing (IUU). These are also non-legally binding instruments that incorporate measures to address the pressing issues regarding fisheries. Implementation of each IPOA is voluntary and left to the states for adoption of specific measures and address issues arising both in EEZ and on the high seas.

Regarding the ecosystem approach the international community recognised its importance and sought through the Reykjavik Declaration on Responsible Fisheries in

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<sup>778</sup> Ibid

<sup>779</sup> 'UNTC' (*Treaties.un.org*, 2020)

<<https://treaties.un.org/pages/showDetails.aspx?objid=080000028007be1a>> accessed 30 May 2020.

<sup>780</sup>FAO, *Code of Conduct for Responsible Fisheries* (FAO Rome, 1995) 41

<sup>781</sup> FAO, 'International Plan of Action for reducing incidental catch of seabirds in longline fisheries; International Plan of Action for the conservation and management of sharks; International Plan of Action for the management of fishing capacity' (FAO Rome, 1999). Available at

< <http://www.fao.org/3/X3170E/X3170E00.htm> >accessed on 27 May 2

The International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries (IPOA Seabirds) is designed to reduce the incidental catch of seabirds in longline fishing. All States whose fishers engage in longline fishing are expected to take a number of actions to reduce the incidental bycatch of seabirds.

1999. The International Plan of Action for the Conservation and Management of Sharks (IPOA-Sharks) is designed to ensure the conservation and management of sharks and their long-term sustainable use. The objective of the International Plan of Action for the Management of Fishing Capacity (IPOA-Capacity) 1999 is to reduce excess fishing capacity in world fisheries. This is to be achieved through assessment plans to reduce capacity and the strengthening of national and regional organizations to better manage capacity issues. Priority is to be given to those fisheries and fleets which show the effects of over- capacity and over-fishing.

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, 2001

the Marine Ecosystem, 2001 to encourage states to have regard to the sustainable management of fisheries incorporating ecosystem considerations which entails taking into account the impacts of fisheries on the marine ecosystem and the impacts of the marine ecosystem on fisheries.<sup>782</sup> The Conference represented an important opportunity for all fisheries stakeholders to jointly assess the means for including ecosystem considerations in fisheries management.<sup>783</sup>

To deal with IUU fishing, the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing,<sup>784</sup> was adopted by the FAO Conference in 2009. This Agreement seeks to address illegal, unreported and unregulated (IUU) fishing through the implementation of stringent port state measures. State parties to the Agreement, in their capacity as port states, are required to prevent fish caught by foreign fishing vessels engaged in IUU fishing activities from being landed and entering international markets. The Agreement provides for minimum port states measures and is binding on State parties.<sup>785</sup> In the region, five states have ratified the convention namely Cote d'Ivoire, Gabon, Ghana, Sao Tome and Principe and Togo.

Some International Environmental Law Instruments also have a bearing on fisheries management notable among which are the Stockholm and Rio Declarations of 1972 and 1992 respectively. The Stockholm Declaration, sets out the duty to safeguard the natural resources and natural ecosystems through carefully designed management plans and maintain, restore and improve the capacity of the earth to produce vital renewable resources.<sup>786</sup> The Rio Declaration emphasises the principles of the Stockholm

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<sup>782</sup> FAO, 'Report of the Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem, Reykjavik, Iceland, 1-4 October 2001. FAO Fisheries Report' (FAO 2002) <<http://www.fao.org/3/y2198t/y2198t01.htm>> accessed 27 May 2020.

The Reykjavik Conference on Responsible Fisheries in the Marine Ecosystem was held in Reykjavik, Iceland, from 1 to 4 October 2001. The Conference adopted the Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem, which is given in Appendix I to this report.

<sup>783</sup> *ibid*

<sup>784</sup> 'Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing' (adopted 22 November 2009, entered into force 2016) (*Fao.org*, 2020) <[http://www.fao.org/fileadmin/user\\_upload/legal/docs/037t-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/037t-e.pdf)> accessed 27 May 2020.

<sup>785</sup> *Ibid*.

<sup>786</sup> Declaration on the Human Environment in the Report of the United Nations Conference on the Human Environment, (16 June 1972) U.N. Doc. A/CONF. 48/14 Rev.1

Declaration pertaining to safeguarding the environment and the ecosystems. It also deals with the protection of the oceans and coastal areas including the protection, rational use and development of their living resources including fisheries.<sup>787</sup> A key problem associated with voluntary instruments is their non-binding nature, which can and does significantly impede the effectiveness of the instruments due the lack of legal force they carry.<sup>788</sup> If these instruments are to be successful there must be some enforcement mechanism mainly at the domestic level. However, the implementation of such mechanisms can be facilitated through the regional institutions that promote the harmonisation of laws and policies on fisheries conservation and management.

### **4.3. Regional legal framework for conservation and management of living marine resources in the Gulf of Guinea**

The Gulf of Guinea region abounds with efforts at cooperation. Cooperation for fisheries conservation and management takes the form of Regional Fisheries Bodies (RFB) which are intergovernmental bodies through which states cooperate to manage fisheries in specific regions.<sup>789</sup> Some of these have mandates to adopt legally binding measures and are referred to as Regional Fisheries Management Organisations or Arrangements (RFMO/A).<sup>790</sup> When it is an arrangement, states cooperate to adopt conservation and management measures that does not provide for the establishment of an organisation.<sup>791</sup> RFMOs fulfil two conditions. One is having competence under international law to adopt legally binding conservation and management measures regarding fisheries.<sup>792</sup> The second is the area to which this legal competence applies

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<sup>787</sup> *ibid*

<sup>788</sup> Martin Tsamenyi, Lara Manarangi-Trott and Shilpa Rajkumar, 'The International Legal Regime for Fisheries Management' <<https://unep.ch/etu/Fisheries%20Meeting/submittedPapers/MartinTsamenyiLaraManarangiTrottShilpaRajkumar.pdf>> accessed on 27 May 2020

<sup>789</sup> 'Regional Fishery Bodies | Vulnerable Marine Ecosystems | Food and Agriculture Organization of the United Nations' (*Fao.org*, 2020) <<http://www.fao.org/in-action/vulnerable-marine-ecosystems/background/regional-fishery-bodies/en/>> accessed 27 May 2020.

<sup>790</sup> *Ibid*

<sup>791</sup> *Ibid*

<sup>792</sup> Stefán Ásmundsson, 'Regional Fisheries Management Organisations (Rfmos): Who Are They, What Is Their Geographic Coverage on the High Seas and which Ones Should Be Considered As General Rfmos, Tuna Rfmos and Specialised Rfmos?' (*Cbd.int*, 2020) <<https://www.cbd.int/doc/meetings/mar/soiom-2016-01/other/soiom-2016-01-fao-19-en.pdf>> accessed 27 May 2020.

includes a part of the high seas.<sup>793</sup> Such RFMOs are therefore organisations that provide a medium for states to fulfil their duty to cooperate regarding fisheries in the high seas, as set out in the 1982 UN Law of the Sea Convention and described further in the 1995 UN Fish Stocks Agreement.<sup>794</sup> There are three types described in the literature. One type are General RFMOs like the North Pacific Fisheries Commission which has competence for “all fish, mollusks, crustaceans and other marine species caught by fishing vessels within the Convention Area”.<sup>795</sup> Another type are the Tuna RFMOs that have a narrower mandate that relates to “tunas and tuna-like species” as well as “highly migratory fish stocks”<sup>796</sup>. The third type are the Specialised RFMOs which have a much narrower mandate related to specific types of fisheries expressly stated in their mandates.<sup>797</sup>

In the Gulf of Guinea, six regional fisheries bodies including one tuna RFMO are active, namely the Fishery Committee for the Eastern Central Atlantic (CECAF); International Commission for the Conservation of Atlantic Tunas (ICCAT); Ministerial Conference on Fisheries Cooperation among African States bordering the Atlantic Ocean (ATLAFCO); Regional Fisheries Commission of the Gulf of Guinea (COREP), and the Fishery Committee of the West Central Gulf of Guinea (FCWC).

### **I. International Commission for the Conservation of Atlantic Tunas (ICCAT)<sup>798</sup>**

The International Commission for the Conservation of Atlantic Tunas (ICCAT) is a regional fisheries management organization (RFMO) established by the Convention for the Conservation of Atlantic Tunas, (Tuna Convention) which entered into force in 1969. It has 53 members, six of which are from the Gulf of Guinea.<sup>799</sup> Three states are not parties namely Togo, Benin and Cameroon. In order to encourage them to become

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<sup>793</sup> *ibid*

<sup>794</sup> *ibid*

<sup>795</sup> *ibid*

<sup>796</sup> Examples are International Commission for the Conservation of Atlantic Tunas (ICCAT), Agreement on the International Dolphin Conservation Programme (AIDCP) (sister organisation to IATTC) Commission for the Conservation of Southern Bluefin Tuna (CCSBT)

<sup>797</sup> The North Atlantic Salmon Conservation Organization (NASCO) and the North Pacific Anadromous Fish Commission (NPAFC) are examples of Specialised RFMOs.

<sup>798</sup> 'ICCAT·CICTA·CICAA' (*Iccat.int*, 2020) <<https://www.iccat.int/en/>> accessed 27 May 2020.

<sup>799</sup> Cote d'Ivoire, Ghana, Nigeria, Equatorial Guinea, Sao Tome and Principe and Gabon

parties, they were invited by the Commission to its 2016 annual meeting.<sup>800</sup> Cameroon since 2012 has been attending as an observer.<sup>801</sup>

The Tuna Convention's area of competence is both high seas and areas within national jurisdiction.<sup>802</sup> Its mandate is the conservation of tunas and tuna-like species in the Atlantic Ocean and adjacent waters with the aim of maintaining tuna populations at levels which permit the maximum sustainable catch for food and other purposes and ensure their effective exploitation.<sup>803</sup> In order to carry out the objectives of the Convention, ICCAT monitors and studies the populations of approximately thirty tuna species, including the Atlantic bluefin, skipjack, yellowfin, albacore, bigeye tuna, swordfish, blue marlin, various mackerels and Atlantic bonito.<sup>804</sup> This function of ICCAT necessitates that it oversees and coordinates scientific research on various aspects of Atlantic tuna fisheries in line with the provisions of the Convention.<sup>805</sup> It does this by making recommendations, based on such scientific evidence, on the maintenance of the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch.<sup>806</sup> Its recommendations especially the ones dealing with tuna conservation are binding but a few are not, like its recommendation Res 15-12, concerning the use of a precautionary approach in implementing ICCAT conservation and management, are non-binding<sup>807</sup>

ICCAT has taken some management and conservation measures regarding overfishing which are worthy of note. As the major tuna stocks are in a depleted state, it has adopted multiyear management and conservation plans for several stocks like Big Eye Tuna, Swordfish, Blue Fin tuna, Blue Marlin and White Marlin.<sup>808</sup> The Commission has made efforts to reduce by catch to protect target fishes and protect biodiversity by adopting minimum size limits and time and area closures for several tuna species and

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<sup>800</sup> ICCAT, 'International Commission for the Conservation of Atlantic Tunas: Report of the Independent Performance Review of ICCAT (ICCAT Madrid, 2016).

<sup>801</sup> *ibid*

<sup>802</sup> 'ICCAT·CICTA·CICAA' (*Iccat.int*, 2020) <<https://www.iccat.int/en/>> accessed 27 May 2020.

<sup>803</sup> *ibid*

<sup>804</sup> *ibid*

<sup>805</sup> *ibid*

<sup>806</sup> *ibid*

<sup>807</sup> ICCAT, 'International Commission for the Conservation of Atlantic Tunas: Report of the Independent Performance Review of ICCAT (ICCAT Madrid, 2016) 34

<sup>808</sup> ICCAT, "Recommendation by ICCAT on a Multi-year Conservation and Management Program for Big -Eye Tuna," Recommendation 04-01, in *ICCAT, Compendium of ICCAT Management Recommendations and Resolutions*, (Vigo: ICCAT 2007) 4-6

Swordfish.<sup>809</sup> It also has measures to encourage the release of live discards of billfish and bluefin tuna.<sup>810</sup> Measures to protect sea turtle have also been put in place.<sup>811</sup> Scientific studies designed to understand the bluefin tuna species and to assist in the identification of their spawning grounds and critical habitats for protection has been initiated.<sup>812</sup>

In keeping with Article 18 of the Fish Stocks agreement on duties of flag states, ICCAT has made recommendations to combat IUU fishing by its members who are flag states.<sup>813</sup> These include a recommendation concerning the establishment of an ICCAT record of vessels over 24 meters authorised to operate in the convention area obliges parties to send a list of such vessels to assist ICCAT in developing a list of vessels authorised to fish in the convention area (the white list).<sup>814</sup> This means that all vessels not on the list can be classified as IUU vessels. Under the recommendation concerning the recording of catch by fishing vessels over 24 meters authorised to fish ICCAT stocks in the convention area, ICCAT has a manual for states which specifies data the members are to mandatorily submit which includes data on catch and effort, size sampling, catch by size and fleet size.<sup>815</sup> To improve the capacity of the states to detect violations,

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<sup>809</sup> *ibid*

<sup>810</sup> UNGA, 'Impact of Fishing on Vulnerable Marine Ecosystems: Actions by States and Regional Fisheries Management Organisations and Arrangements to give effect to paragraphs 66 to 69 of General Assembly Resolution 59/25 on sustainable fisheries, Regarding the impacts of fishing on Vulnerable Marine Ecosystem,' *Report of the Secretary - General*, Sixty-first session, Item 69(b) of the Preliminary List, Oceans and Law of the Sea (2006) A/61/50  
[https://www.un.org/Depts/los/general\\_assembly/documents/impact\\_of\\_fishing.pdf](https://www.un.org/Depts/los/general_assembly/documents/impact_of_fishing.pdf) accessed on 27 May 2020.

<sup>811</sup> ICCAT, "Resolution by ICCAT on Sea Turtles," Resolution 03-11 <<https://www.bmis-bycatch.org/sites/default/files/2016-12/2003-11-e.pdf>>

<sup>812</sup> ICCAT, Biennial Report, 2004-2005, (I) pp. 104-106 and (II) p. 28. Online: <[http://www.iccat.int/Documents/BienRep/REP\\_EN-04-05\\_1-1.pdf](http://www.iccat.int/Documents/BienRep/REP_EN-04-05_1-1.pdf) and [http://www.iccat.int/Documents/BienRep/REP\\_EN\\_04-05\\_II-I.pdf](http://www.iccat.int/Documents/BienRep/REP_EN_04-05_II-I.pdf)>

<sup>813</sup> ICCAT, 'International Commission for the Conservation of Atlantic Tunas: Report of the Independent Performance Review of ICCAT (ICCAT Madrid, 2016) 50

<sup>814</sup> As established by the "Recommendation by ICCAT Further Amending Recommendation 09-10 Establishing a List of Vessels Presumed to Have Carried out Illegal, Unreported, and Unregulated Fishing Activities in the ICCAT Convention Area" [Rec. 11-18], and the Resolution Establishing Guidelines for the Cross-Listing of Vessels Contained on IUU Vessel Lists of Other Tuna RFMOs on the ICCAT IUU Vessel List in Accordance with Recommendation 11-18 [Res. 14-11] the ICCAT Secretariat ensures publicity of the IUU vessels list adopted by ICCAT at its annual meeting by placing it on the ICCAT web site.

<sup>815</sup> ICCAT, '2006-2016 ICCAT Manual International Commission for the Conservation of Atlantic Tuna' in: *ICCAT Publications* ISBN (Electronic Edition): 978-92-990055-0-7  
<<https://www.iccat.int/en/iccatmanual.html>> accessed 27 May 2020



ICCAT has put in place a compulsory vessel monitoring system for members for commercial vessels over 20 meters in length.<sup>816</sup>

In spite of these measures the species protected by ICCAT has not seen much improvement. This is mainly due to non-compliance by states of ICCAT recommendations. For instance regarding vessel monitoring systems, violations occur on a regular basis due to the ineffectiveness of the inspections, as evident by the large number of vessels still engaged in illegal fishing for tuna in the Atlantic.<sup>817</sup> The reliance on inspectors from the member states on fishing vessels, also contributes to this lack of effectiveness as the states themselves lack the capacity.<sup>818</sup> Admittedly, there is a scheme for joint at - sea boarding and inspection of the states' EEZ, but the scheme is limited to the high seas and then only for ICCAT species and if the vessel is suspected to be stateless.<sup>819</sup>

Another area in which the ICCAT has not been effective is the fact that it does not expressly incorporate the ecosystem approach in that it does not take account of multispecies. Efforts are being made to develop a pilot ecosystem plan for one ecoregion within the ICCAT convention area to, “progress on how best to provide advice at an ecosystem level”.<sup>820</sup> However, the challenges of using the ecosystem approach were acknowledged as there is very little knowledge of the food web dynamics and species interactions in the ecosystem selected. It was concluded that the ecosystem approach to fisheries management looks ambitious on paper and hard to put into practice.<sup>821</sup>

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<sup>816</sup>Recommendation by ICCAT Concerning the Establishment of an ICCAT Record of Vessels 20 Meters in Length Overall or Greater Authorized to Operate in the Convention Area (entered in force June 1 2010) <<https://www.iccat.int/Documents/Recs/compendiopdf-e/2009-09-e.pdf>>accessed 27 May 2020

<sup>817</sup> Kwame Agyekum, George Wiafe and Francis Nunoo, 'A Novel Approach in Regional Tuna Fisheries Management Using Low Resolution Satellite Data: A Case Study for the Gulf of Guinea', *IEEE International Geoscience and Remote Sensing Symposium* (IEEE 2012) <[https://www.researchgate.net/publication/278288749\\_A\\_NOVEL\\_APPROACH\\_IN\\_REGIONAL\\_TUNA\\_FISHERIES\\_MANAGEMENT\\_USING\\_LOW\\_RESOLUTION\\_SATELLITE\\_DATA\\_A\\_CASE\\_STUDY\\_FOR\\_THE\\_GULF\\_OF\\_GUINEA](https://www.researchgate.net/publication/278288749_A_NOVEL_APPROACH_IN_REGIONAL_TUNA_FISHERIES_MANAGEMENT_USING_LOW_RESOLUTION_SATELLITE_DATA_A_CASE_STUDY_FOR_THE_GULF_OF_GUINEA)> accessed 27 May 2020.

<sup>818</sup> ICCAT, 'International Commission for the Conservation of Atlantic Tunas: Report of the Independent Performance Review of ICCAT (ICCAT Madrid, 2016) 83

<sup>819</sup>Peter D. Szigeti, Gail Lugten, 'The Implementation of Performance Review Reports by Regional Fisheries Bodies 2004-2014' (FAO 2015) 28

<sup>820</sup> *ibid*

<sup>821</sup> *Ibid* p. 4

Concerning ICCAT's effort at replenishing depleted stocks, the Performance Review Report of 2008 shows that it has not been altogether successful as some species have not shown improvement.<sup>822</sup> Its scientific research programs are limited by lack of information as states do not comply with its recommendations to supply data as well as have misreporting issues.<sup>823</sup> The ICCAT has been criticised for being too slow to modernise by its continued use of the single species management approach instead of adopting the ecosystem approach.<sup>824</sup> It has also been suggested that the objectives of ICCAT is at variance with the precautionary approach.<sup>825</sup> An instance can be seen in the stock assessment for blue and white Marlin which showed that it was difficult to determine if conservation measures were working due to inconsistent results. The Commission instead of providing precautionary advice recommended that the existing measures be continued.<sup>826</sup> This was against the advice of the Standing Committee on Research and Statistics (SCRS) which were of the opinion that fishing mortality of these stocks be reduced as a precautionary measure.<sup>827</sup>

ICCAT's slowness at implementing the ecosystem and precautionary approaches may be due to its main challenges of non-compliance and lack of enforcement by member states of the management and conservation measures recommended. Compliance among the member states in the Gulf of Guinea is inadequate due to lack of resources for monitoring and enforcement. Meanwhile the amended ICCAT Convention, does not provide for the necessary competence regarding MCS, IUU fishing, compliance, enforcement or implementation, in contrast to other RFMOs like the South Pacific Regional Fisheries Management Organisation (SPRFMO) and the North Pacific Fisheries Commission (NPFC).<sup>828</sup> There is clearly a lack of commitment by the states in the Convention area including the states of the GOG to implement an ecosystem-based approach to fisheries management as well as the objectives of ICCAT.

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<sup>822</sup> Glen Hurry, Moritaka Hayashi, Jean-Jacques Maguire, 'Report of the Independent Review, International Commission for the Conservation of Atlantic Tuna,' (PLE-106/2008)

<sup>823</sup> Dawn Russell and David VanderZwaag (eds), *Legal Aspects of Sustainable Development: Recasting Transboundary Fisheries Management Arrangements in Light of Sustainable Principles Canadian and International Perspectives* (Martinus Nijhoff Publishers 2010) 56

<sup>824</sup> *ibid*

<sup>825</sup> *ibid*

<sup>826</sup> Glen Hurry, Moritaka Hayashi, Jean-Jacques Maguire, 'Report of the Independent Review, International Commission for the Conservation of Atlantic Tuna,' (PLE-106/2008).

<sup>827</sup> *ibid*

<sup>828</sup> ICCAT, 'International Commission for the Conservation of Atlantic Tunas: Report of the Independent Performance Review of ICCAT (ICCAT Madrid, 2016) 44

## II. Fishery Committee for the Eastern Central Atlantic (CECAF)<sup>829</sup>

Another RFB active in the region is the Fishery Committee for the Eastern Central Atlantic (CECAF). It was established in 1967 to develop and use the fishery resources of the region, a large part of which includes the high seas.<sup>830</sup> CECAF's area of competence stretches from Cape Spartel (in Morocco, close to the Straits of Gibraltar) to the mouth of the Congo River, and into the middle of the Atlantic Ocean.<sup>831</sup> Among its 34 members are all the GOG states being studied in this work as well as other African Countries – Cape Verde, the Democratic Republic of Congo, Guinea, Guinea Bissau, Liberia, Mauritania, Morocco, Senegal and Sierra Leone. Developed fishing states, which fish in the GOG namely the EU United States of America, France, Greece, Italy, the Netherlands, Poland, Romania and Spain are also members.<sup>832</sup>

Since its establishment, numerous events with implications for fisheries management have taken place in the region. The states in the region were decolonised, long distance fishing fleet had started to deploy in the region and changes in the Law of the Sea had occurred as well as an awareness of the importance of regulating fishing in the region.<sup>833</sup> To adapt to these changes the Committees created four bodies respectively to deal with regulatory measures for demersal stocks, implementation of management measures of resources within the limits of national jurisdiction, and fisheries statistics.<sup>834</sup>

Unlike ICCAT, CECAF is a consultative body under Article VI of the FAO Constitution and has no regulatory powers. Its recommendations are not binding on Committee Members. It operates under a Main Committee and a Scientific Sub-committee, which

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<sup>829</sup> 'FAO Fisheries & Aquaculture - Regional Fishery Bodies (RFB)' (*Fao.org*, 2020)  
<<http://www.fao.org/fishery/rfb/cecaf/en>> accessed 27 May 2020

<sup>830</sup> Resolution 1/48 adopted by the FAO Council under Article VI (2) of the FAO Constitution FAO Council, 'Report of the Council of FAO Forty-Eighth Session' (FAO 1968)  
<<http://www.fao.org/3/68977E/68977E00.htm#TOC>> accessed 27 May 2020.

<sup>831</sup> Ibid

<sup>832</sup> Membership of CECAF is Angola, Benin, Cameroon, Cabo Verde, Dem. Rep. of the Congo, Congo, Côte d'Ivoire, Cuba, Equatorial Guinea, European Union, France, Gabon, Gambia, Ghana, Greece, Guinea, Guinea-Bissau, Italy, Japan, Republic of Korea, Liberia, Mauritania, Morocco, Netherlands, Nigeria, Norway, Poland, Romania, Sao Tome and Principe, Senegal, Sierra Leone, Spain, Togo, United States of America.

<sup>833</sup> Garcia and Poinard, 'The Committee for the Eastern Central Atlantic Fisheries (CECAF) and the Management of West African Resources: Critical Review and Implications of Extended Jurisdiction' in Edward Miles (ed), *Management of World Fisheries: Implications of Extended Coastal State Jurisdiction* (University of Washington Press, 1989) 121.

<sup>834</sup> ibid

provides scientific advice.<sup>835</sup> This is a rather large organisation whose objective is to promote the sustainable utilisation of the living marine resources within the Atlantic region by the proper management and development of the fisheries and fishing operations.<sup>836</sup> Some of the functions the Committee performs are to review the state of the resources and industries based on them, coordinating research into the living resources, collection of information on marine fishery information and to establish the scientific basis for regulatory measures leading to the conservation and management of marine fishery resources. They also make recommendations and advice on measures for the adoption and implementation of these measures.<sup>837</sup> The Committee is also to provide advice in the area of monitoring, control and surveillance as well as fishing craft, gear and techniques. It also has the mandate to prompt cooperation with other regional organisations.<sup>838</sup>

The achievements of CECAF can best be appreciated by examining its background. The body was formed at a time when there was little scientific knowledge of the marine fisheries it sought to protect.<sup>839</sup> The data available was inadequate and was not broken down by geographic area, and species. It was generally not suitable for assessing resources and estimating levels of exploitation.<sup>840</sup> This was exacerbated by the lack of cooperation by foreign countries who had the data, to share it.<sup>841</sup> Thus, the need to accelerate the acquisition of knowledge, and to transfer this expertise from foreign laboratories to those in the region was pursued. This was with the aim of regulating fishing effort on the most appropriate basis and thus a Working Group on Resource Evaluation dealing with statistics and the state of the stocks was set up, at its third session in December 1972.<sup>842</sup> Over the years, with the coming into force of UNCLOS, CECAF has attempted to modernise and incorporate the provisions of UNCLOS in its

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<sup>835</sup> *ibid*

<sup>836</sup> 'FAO Fisheries & Aquaculture - Regional Fishery Bodies (RFB)' (*Fao.org*, 2020) <<http://www.fao.org/fishery/rfb/cecaf/en>> accessed 27 May 2020

<sup>837</sup> *ibid*

<sup>838</sup> *ibid*

<sup>839</sup> Garcia and Poinard, 'The Committee for the Eastern Central Atlantic Fisheries (CECAF) and the Management of West African Resources: Critical Review and Implications of Extended Jurisdiction' in Edward Miles (ed), *Management of World Fisheries: Implications of Extended Coastal State Jurisdiction* (University of Washington Press, 1989) 121

<sup>840</sup> *ibid*

<sup>841</sup> *ibid*

<sup>842</sup> Peter D. Szigeti, Gail Lugten, 'The Implementation of Performance Review Reports by Regional Fisheries Bodies 2004-2014' (FAO 2015)

terms of reference.<sup>843</sup> Within its advisory role, it has continued to carry out scientific assessments of the fisheries in the region and currently about 90 species are being assessed or monitored. These include 26 small pelagic species and 78 demersal species. Most of these species are shared by two or more states in the region and recommendations for research and management have been made to members.<sup>844</sup> Importantly, CECAF has given member states a forum for the exchange of experience and knowledge on a range of issues which has promoted scientific collaboration through discussions and sharing lessons-learned in fisheries management, on the ecosystem approach to fisheries and Illegal, Unreported and Unregulated (IUU) fishing, among others.<sup>845</sup>

However, the Performance Review of CECAF conducted in 2015 has not shown much progress in solving the region's fisheries management problems. The main challenge of the Committee is that it has been severely underfunded and undermanaged. The members are not committed to the work of the Committee. For instance, out of CECAF's 34 member States, only 13–24 member States actually attended the last five biannual Committee Meetings.<sup>846</sup> At a number of meetings at which decisions were taken, there was no quorum contrary to the rules governing the CECAF meetings.<sup>847</sup> This calls in question the legality of the organization's decisions. Additionally, though the Committee is headquartered in Accra, Ghana with offices provided by the FAO Regional Office for Africa but it has no Secretary and is practically inactive.<sup>848</sup> This lack of commitment can be seen from the fact that its members have never had to contribute to its work including the important work of fisheries scientists across the region. This has been left to FAO and international development projects. Also the states do not implement the Committee's recommendations.<sup>849</sup> Regarding issues that are of importance to GOG states like assessment of IUU fishing or catch certification and documentation there have been no activities.<sup>850</sup>

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<sup>843</sup> Ibid

<sup>844</sup> Ibid

<sup>845</sup> Ibid

<sup>846</sup> Ibid

<sup>847</sup> Ibid p.18

<sup>848</sup> Ibid

<sup>849</sup> Ibid

<sup>850</sup> 'II. REGIONAL FISHERY BODIES IN THE ATLANTIC OCEAN AND ADJACENT SEAS' (*Fao.org*) <<http://www.fao.org/3/Y4455E/y4455e04.htm>> accessed 27 May 2020.

As with ICCAT, although the CECAF mandates were updated in 1992 and 2003, they do not contain the Ecosystem Based Approach to Fisheries or the precautionary principle.<sup>851</sup> It has also been criticised for lack of transparency and not being open to the special needs and requirements of developing countries.<sup>852</sup> Additionally it does not have dispute resolution mechanisms.<sup>853</sup> CECAF also does not address questions of fishing capacity among its members and there has been very little work on Monitoring, Control and Surveillance of fishing ships, and on capacity building among member States' fisheries officers and fisherfolk.<sup>854</sup> An issue of concern raised at the eighth session of the scientific subcommittee is the continued expansion of the fishmeal industry.<sup>855</sup> Large amounts of small pelagics in the region are being caught for fishmeal factories abroad. This could have a negative impact on access to fish by millions of the region's populations.<sup>856</sup>

Another constraint CECAF has is its status as an Article VI body under the FAO Constitution. This means it does not have an autonomous budget and states are not expected to make regular contributions to it.<sup>857</sup> Members have so far preferred to keep it that way even though they have discussed transforming it into an Article XIV body with increased decision-making powers and an autonomous budget. So far CECAF is financed by FAO and donors and it is increasingly becoming difficult to keep it running smoothly.

In addition to the above challenges, there is also the fact that there are four other regional fisheries bodies with an area of competence that overlaps that of CECAF – ATLAFCO, FCWC, COREP, SRFC and ICCAT.<sup>858</sup> This duplication of effort is perhaps another factor that has made CECAF ineffective in the region. Even though the committee has

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<sup>851</sup> *ibid*

<sup>852</sup> *ibid*

<sup>853</sup> *ibid*

<sup>854</sup> *ibid*

<sup>855</sup> FAO, 'Fishery Committee for the Eastern Central Atlantic: Report of the Eighth Session of the Scientific Sub-Committee Abidjan, Côte d'Ivoire 23–26 October 2018' (FAO 2019).

<sup>856</sup> 'Cooperation Urgently Required To Ensure A Future For West African Fisheries - Greenpeace Africa' (*Greenpeace Africa*, 2016) <<https://www.greenpeace.org/africa/en/blogs/1565/cooperation-urgently-required-to-ensure-a-future-for-west-african-fisheries/>> accessed 27 May 2020.

<sup>857</sup> CECAF, 'Fishery Committee for the Eastern Central Atlantic- First Session for Improved Functioning of CECAF, and Collaboration with other Regional and Sub-Regional Organizations' (FAO 2016) 5.

<sup>858</sup> *ibid*

been discussing how to improve its work for almost 20 years there is no indication that it is able to solve the region's fisheries conservation and management problems.

### **III. Regional Fisheries Commission of the Gulf of Guinea (COREP)<sup>859</sup>**

The Regional Commission of Fisheries of Gulf of Guinea (COREP) was founded in 1984 to co-ordinate, harmonise and develop the sustainable exploitation of fisheries resources with regard to shared stocks found within the Exclusive Economic Zones of its Member States (Angola, Cameroon, Gabon, Congo, Congo DR, Sao Tome and Principe and Equatorial Guinea) within the waters of the Gulf of Guinea situated between Cameroon and Angola.<sup>860</sup> It is an intergovernmental organization and a specialized agency of the Economic Community of Central African States (ECCAS).<sup>861</sup> The Convention was revised in 2010 to take account of developments in the international law concerning fisheries and the fact that the organisation was not having the desired impact. It also needed to take account of its new status as a specialised agency of EECAS.<sup>862</sup> The COREP's mandate like those of CECAF discussed above, involves collecting, analysing and making available scientific data as well as information and techniques for fisheries and aquaculture.<sup>863</sup> Additionally it is to harmonise members' national regulations with a view to having a unified regulation fixing the conditions of fishing and the control of fishing operations in the area covered by the Convention as well as harmonise fisheries policy and legal frameworks of parties.<sup>864</sup> It is also to assess the stocks of shared and transboundary fisheries.<sup>865</sup> It also provides for the involvement of other landlocked States Parties in fisheries conservation

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<sup>859</sup> Comité régional des pêches du Golfe de Guinée (COREP) 'FAO Fisheries & Aquaculture - Regional Fishery Bodies (RFB)' (*Fao.org*, 2020) <<http://www.fao.org/fishery/rfb/corep/en>> accessed 27 May 2020.

<sup>860</sup>

It was created by the Convention on Regional Fisheries Development in the Gulf of Guinea signed June 21, 1984 in Libreville at Gabon. ENVIREP-CAM, 'Overview of Management and Exploitation of the Fisheries Resources of Cameroon, Central West Africa' <<http://hdl.handle.net/1834/5228>> accessed 27 May 2020.

<sup>861</sup> *ibid*

<sup>862</sup> The Economic Community of Central African States derives from the Lagos Plan of Action of April 1980, the Organization becoming functional a year later. At its creation in December 1981 ECCAS had eleven (11) States that are: the Republic of Angola, the Republic of Burundi, Rwanda, the Republic of Cameroon, the Central African Republic, the Republic of Congo, the Democratic Republic of Congo, the Gabonese Republic, the Republic of Equatorial Guinea, the Democratic Republic of Sao Tome & Principe and the Republic of Chad. Its headquarters are based in Libreville.

<sup>863</sup> *ibid*

<sup>864</sup> *ibid*

<sup>865</sup> *ibid*

and management measures in the Gulf of Guinea.<sup>866</sup> The organisation's functions are performed through four bodies which are the Council of Ministers, Technical Committee, Executive Secretariat and Scientific Subcommittee.<sup>867</sup>

Among the positive contributions COREP has made to fisheries management in the region, is in the areas of MCS. It has a training programme for officers of members states involved in MCS operations.<sup>868</sup> It has also developed a manual for operational procedures for monitoring and control of fisheries. Like ICCAT, COREP has also promoted the development of a national and regional registers of industrial fishing vessels to assist in the identification of fishing vessels operating in the convention area and the monitoring of such vessels.<sup>869</sup>

The organisation has adopted a Strategic Action Plan for the period 2016-2020.<sup>870</sup> The objective is to strengthen the institution and to allow better management of fisheries in the Gulf of Guinea area. This action plan includes among others a plan to combat illegal fishing, and a protocol for the establishment and management of an information system on fisheries and aquaculture in Central Africa. To achieve this goal, the Member States would have to mobilize the necessary resources for its operation, and this is the real challenge. The organisation as with the other bodies in the Gulf of Guinea also does not appear to have any clear approach and can be said to be only a consultative one and has not been as effective as envisaged.

#### **IV. The Fishery Committee of the West Central Gulf of Guinea (FCWC)<sup>871</sup>**

The Fisheries committee for the West Central Gulf of Guinea (FCWC) was established in 2006 to facilitate cooperation in fisheries management between the member countries – Liberia, Cote d'Ivoire, Ghana, Togo, Benin and Nigeria.<sup>872</sup> These countries have

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<sup>866</sup> *ibid*

<sup>867</sup> *ibid*

<sup>868</sup> *ibid*

<sup>869</sup> Aboubacar Sidibe and others (eds), 'Evaluation de la performance des Organisations Régionales des Pêches en Afrique De l'ouest. AU-IBAR Reports' (AU-IBAR 2015)

<sup>870</sup> Gulf of Guinea Commission of Fisheries: Experts Fine-Tune Strategic Document' (*Cameroon-tribune.cm*, 2016) <[https://www.cameroon-tribune.cm/article.html/1469/en.html/details\\_2](https://www.cameroon-tribune.cm/article.html/1469/en.html/details_2)> accessed 27 May 2020.

<sup>871</sup> 'Fisheries Committee for the West Central Gulf of Guinea' (*Fisheries Committee for the West Central Gulf of Guinea*, 2020) <<https://fcwc-fish.org>> accessed 27 May 2020.

<sup>872</sup> *ibid*



several shared fish stocks. Its mandate is quite similar to that of the COREP and is to provide a forum for discussion on fishery-related matters, to improve the livelihoods of small-scale fishers and processors, including the devising of appropriate measures to deal with migrant fishers. It is also like COREP mandated to harmonise fisheries legislation and regulations among the Contracting Parties and enhance cooperation in their relations with distant water fishing countries. It is also to strengthen sub-regional cooperation in monitoring, control, surveillance and enforcement, including the progressive development of common procedures.<sup>873</sup> It is also to promote the development of fisheries research capabilities; promote the development of standards for the collection, exchange and reporting of fisheries data; develop and promote common policies and strategies, as appropriate, in the sub-region to enhance sub-regional standing in international meetings; and promote sub-regional cooperation in the marketing and trading of fish and fish products.<sup>874</sup>

The Committee's area of competence is all marine waters under national jurisdiction of the Contracting Parties as well as to all living marine resources, without prejudice to the management responsibilities and authorities of other competent fisheries management organizations or arrangements in the area. The Convention acknowledges the existing frameworks for fisheries cooperation in the West African region, with particular reference to the Fishery Committee for the Eastern Central Atlantic (CECAF), the Ministerial Conference on Fisheries Cooperation among African States bordering the Atlantic Ocean (ATLAFCO), the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the African Continental Fisheries and Aquaculture Committee (CFAC).<sup>875</sup> To strengthen governance and increase cooperation across the six member States, the FCWC has put in place several conventions and plans of action including the 2009 FCWC Regional Plan of Action on IUU fishing; the 2013 Convention on Minimum Requirements for Access to the Fishery Resources of the Area of the FCWC and the 2014 Convention on the Pooling and Sharing of Information and Data on Fisheries in the Zone of the FCWC.

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<sup>873</sup> *ibid*

<sup>874</sup> *ibid*

<sup>875</sup> *ibid*

One of the most significant contributions to fisheries management that the organisation has achieved is the established a West Africa Task Force (WATF) in 2015.<sup>876</sup> This is to provide a regional approach to fisheries enforcement to tackle the problem of illegal fishers operating in the region.<sup>877</sup> This is in recognition of the fact that the migratory nature of the shared resources needs a regional cooperative effort. The West Africa Task Force thus identifies, tracks, gathers evidence and mounts enforcement and prosecution actions against illegal fishing operators. It would in the end be the foundation for long term regional and sustainable MCS structure in the region.<sup>878</sup> The Task Force model was based on lessons learned from the Task Force in the Western Indian Ocean region – ‘FISH-i Africa’.

One of the achievements of the task force is that, it has assessed how the states have domesticated the FCWC Conventions and plans of action referred to above, into the legal frameworks within each FCWC country and assessed the strengths and weaknesses in national legislation to combat IUU fishing.<sup>879</sup> The review, conclusions and recommendations include a plan of action for completing the domestication of FCWC provisions within national frameworks. The assessment identified the most common violations of fisheries legislation in the FCWC region as a means to evaluate the provisions of the existing legal frameworks so as to be able to propose changes.<sup>880</sup>

Some positive results have been recorded in the area as there is increased awareness when flagging and licensing vessels. More attention has been drawn to illegal fishing and the trade in illegal fish in the region which is leading to new approaches, activities and priorities with the involvement of relevant agencies in the region.<sup>881</sup> The Task force has a communication platform that has been instrumental in dealing with issues of information sharing and has worked with the Sub-Regional Fisheries Commission (SRFC) member States through their MCS Unit.<sup>882</sup> It has provided alerts on high-risk

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<sup>876</sup> *ibid*

<sup>877</sup> *ibid*

<sup>878</sup> *ibid*

<sup>879</sup> The results of the assessment are contained in a report ‘*A review of FCWC countries’ legal frameworks for fisheries – Focus on progress with domestication of FCWC provisions and capacity to combat IUU fishing.*’

<sup>880</sup> *ibid*

<sup>881</sup> West Africa Task Force Cooperation Collaboration Communication.' (*Stopillegalfishing.com*) <[https://stopillegalfishing.com/wpcontent/uploads/2017/06/WATF\\_Cooperation\\_Report\\_FINAL\\_Web\\_DPS.pdf](https://stopillegalfishing.com/wpcontent/uploads/2017/06/WATF_Cooperation_Report_FINAL_Web_DPS.pdf)> accessed 27 May 2020.

<sup>882</sup> *ibid*

vessels operating or present in West Africa and verified information on licences, flagging and inspections. For example, its enquiries in April 2016 into the registration and activities of the British flagged vessel, 'Blue Gate' revealed inconsistencies in the vessel documents and information.<sup>883</sup> Another example was in December 2015 regarding the JU YUAN 1, a Côte d'Ivoire flagged fishing vessel sending distress signals, which was given port access in Benin after claiming to have been hijacked. Benin conducted a vessel inspection and found purse seine nets and fish aggregating devices (FADs) on board along with 16 tunas in the hold.<sup>884</sup> Benin used the WATF Communications Platform to inform and share images with the flag state Côte d'Ivoire on the inspection, particularly the fact that the vessel's fishing licence was to target sardines, but tuna were found in the hold.

Côte d'Ivoire found another ship with similar gear belonging to the same operator and was of the opinion that the presence of FADs on board indicated that the vessel was deliberately targeting tuna. This led to the vessel Operator being fined 10 million CFA (15 000 EUR) per vessel, the tuna purse seine gear was seized, and the vessels' fishing licences were suspended for a period of six months.<sup>885</sup>

The work of this task force shows just how much the states can achieve with a high level of commitment to the cause of conserving and managing fisheries in the region. However, in spite of its vigilance and operations in the region, IUU fishing is still rampant as well as the other challenges to fisheries conservation and management identified above. At its eighth meeting in May 2019, it was stressed by an official of the host country, Cote d'Ivoire, that illegal, unreported and unregulated fishing is still one of the major challenges for sustainable fisheries in the Gulf of Guinea due to weak systems and lack of good governance.<sup>886</sup>

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<sup>883</sup> *ibid*

<sup>884</sup> *ibid*

<sup>885</sup> *ibid*

<sup>886</sup> 'Eighth Meeting of the West Africa Task Force - Stop Illegal Fishing' (*Stop Illegal Fishing*, 2019) <<https://stopillegal fishing.com/news-articles/eighth-meeting-of-the-west-africa-task-force/>> accessed 27 May 2020.

## **V. The Ministerial Conference on Fisheries Cooperation among African States bordering the Atlantic Ocean (ATLAFCO)<sup>887</sup>**

The Ministerial Conference on Fisheries Cooperation among African States bordering the Atlantic Ocean (ATLAFCO)<sup>888</sup> is an intergovernmental organisation established in 1989 by the Convention on Fisheries Cooperation among States bordering the Atlantic Ocean. It has 22 members made up of coastal states from Morocco to Namibia.<sup>889</sup> Its main objectives are the promotion and strengthening of regional cooperation on fisheries development and the coordination and harmonization of efforts and capacities of stakeholders for the conservation and exploitation of fisheries resources. Its principal mandate like the other fisheries bodies is promotion of cooperation in the field of fisheries management. Its specific objectives are promoting cooperation in fisheries management and development; develop, coordinate and harmonise Member States' efforts and capabilities to preserve, exploit, develop and commercialise fisheries resources; strengthen solidarity with landlocked African States and geographically disadvantaged countries in the region. Its action points include the development of fisheries research and marine sciences and implementation of laws and regulations on responsible fishing.

The Organisation appears to be mainly an advisory body that encourages its members to consult each other and cooperate in MCS activities.<sup>890</sup> It also encourages its members to develop marine scientific research and share this research through the coordination of their institutes. Additionally, it urges its members to intensify their efforts to ensure the protection and preservation of the marine environment as well as seeking to strengthen the bilateral, sub regional and international cooperation mechanisms related to the management of coastal areas in the region. Regarding the harmonisation of policies, it encourages member states to harmonize their legislation, exchange

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<sup>887</sup> MEDASYS Solutions, 'COMHAFAT | Bienvenue' (*Comhafat.org*, 2020) <<https://www.comhafat.org/fr/>> accessed 27 May 2020.

<sup>888</sup> Better known by its French acronym, COMHAFAT, Conférence ministérielle sur la coopération haléutique des États Africains riverains de l'Océan Atlantique)

<sup>889</sup> Angola, Benin, Cabo Verde, Cameroon, Congo, Côte d'Ivoire, Dem. Rep. of the Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mauritania, Morocco, Namibia, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone, Togo.

<sup>890</sup> MEDASYS Solutions, 'COMHAFAT | Bienvenue' (*Comhafat.org*, 2020) <<https://www.comhafat.org/fr/>> accessed 27 May 2020.

information on their regulations, and collaborate with international institutions in order to adopt common policies and positions in fisheries negotiations.<sup>891</sup>

It can be concluded that the last three bodies discussed above are simply to bring the states together to consult and advice each other on fisheries issues. They have no binding powers and are largely cash strapped and so cannot be effective.

#### **4.4. Other regional organisations**

##### **I. The Abidjan Convention**

The Abidjan Convention discussed in the preceding chapter is an important regional organisation with a broad mandate which includes some aspects of fisheries management. The Convention though mainly concerned with cooperation in the area of environmental pollution issues, is also concerned with cooperation in the management of marine living resources as it seeks to consolidate cooperation between three Large Marine Ecosystems (LMEs) in the region, namely the Guinea Current LME, the Benguela Current LME, and the Canary Currents Large Marine Ecosystems (LME). These LMEs have been granted special status as advisors to the Abidjan Convention Secretariat.<sup>892</sup> The Convention's role is therefore envisaged as coordinating and monitoring the activities of the LMEs, two of which already have Commissions in place.<sup>893</sup> However the states realised that fisheries management was becoming a major issue in light of the growing illegal, unregulated and unreported fishing adversely affecting the maritime economic areas of Contracting States and that the Abidjan Convention was deficient in this area. They therefore decided at the tenth meeting that it is important to adopt more stringent measures under the Convention against IUU fishing.<sup>894</sup>

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<sup>891</sup> *ibid*

<sup>892</sup> *ibid*

<sup>893</sup> The Benguela and Guinea Currents LMEs already have Commissions in place. The Canary Current LME currently does not have a Commission and the Sub-Regional Fisheries Commission (composed of Cape Verde, Gambia, Guinea-Bissau, Mauritania, Senegal, Guinea, and Sierra Leone) supports the implementation of the Abidjan Convention in the Canary Current LME area.

<sup>894</sup> 'A supplementary provision on fisheries management in national areas and marine areas beyond national jurisdiction', *Tenth Meeting of Contracting Parties to the Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic*

These measures may include, among others, the harmonisation of fishing quotas, the implementation of mechanisms to combat illegal, unregulated and unreported fishing, the maintenance of common identification lists of fishing vessels operating in the jurisdiction area of the Convention, the harmonisation and coordination of regulations relating to fishing licenses, seizure of offending vessels and finally the adoption of sanctions against offending vessels (restricted access to fishing areas of all Contracting States – payment of surety - confiscation of fishery products - payment of damages, etc.). It was decided further that the parties should take measures to ensure the conservation of biodiversity, including the management and conservation of offshore fisheries, through cooperation aimed at identifying marine protected areas beyond areas under their jurisdiction by adopting plans whose coverage would be binding on the Contracting States. It is noteworthy that this decision has not yet been implemented.

An important feature of the Convention is the strengthening of already existing National Focal Points, in each state. These would be responsible for working with government agencies which are involved in conservation and management projects as well as with the Convention and the LMEs.<sup>895</sup> It was each member state's responsibility to set up multi-sector national committees for this coordinating purpose by providing reports on the national, coastal and marine environment and on the status of implementation of the relevant Abidjan Convention work programs to the Secretariat of the Convention.<sup>896</sup> The coordinating role of the Secretariat is complemented by the Regional Coordinating Unit ("RCU") located in Cote d'Ivoire, a body that oversees the implementation of the Action Plan and works in cooperation with the Abidjan Convention Secretariat.<sup>897</sup> It was envisaged as one of the objectives of the programme to transfer the secretariat from Nairobi Kenya to Abidjan in Cote d'Ivoire.<sup>898</sup>

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*Coast of the West, Central and Southern Africa Region* (Pointe Noire, Republic of the Congo, 12-16 November 2012) Para .7 UNEP(DEPI)/WACAF/COP.10/12

<sup>895</sup> David Dzidzornu, 'Marine Environmental Protection under the Nairobi and Abidjan Regimes: Working Toward Functional Revitalisation?' (2012) 26 *Ocean Yearbook* 26 38

<sup>896</sup> Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region and Protocol concerning Cooperation in Combating Pollution in Cases of Emergency (Abidjan Convention) Article 16

<sup>897</sup> *ibid*

<sup>898</sup> David Dzidzornu, 'Marine Environmental Protection under the Nairobi and Abidjan Regimes: Working Toward Functional Revitalisation?' (2012) 26 *Ocean Yearbook* 26 38

The Abidjan Convention relies on pre-existing capabilities already available throughout the region and on the support of other regional and international organizations. The FAO, the Fishery Commission for the Eastern Central Atlantic, the International Commission for the Conservation of Atlantic Tunas, and the International Union for the Conservation of Nature (IUCN) have all partnered with the Abidjan Convention to develop a regional networking mechanism to monitor and manage fisheries mangroves and their ecosystems.<sup>899</sup> This partnership also assists with stock assessment and the conservation of endangered species and promotes sustainable fisheries policies and legislation.<sup>900</sup> Regional and international cooperation is promoted in order to implement joint programmes to protect coastal and marine habitats.<sup>901</sup>

There are many challenges that undermine the Convention's effectiveness. For instance, under the Convention various studies were done on the legal resourcefulness of the states to implement the convention and the action plan as well as scientific information gathering. However, the implementation of the projects at the local level was not prioritised.<sup>902</sup> Thus the general populace is not well informed of the work the Convention is doing in order to give it their full support. The parties also have not taken ownership of the initiatives under the Convention but view them more as UNEP undertakings.<sup>903</sup> The Convention deals mainly with pollution and related matters and does not have clear mandate to deal with fisheries issues apart from coordinating the three LME which have fisheries related mandates. Further the Convention articulates various aspirations, but members do not seem to have the political will to be committed to them. With regard to funding, the work of the Abidjan Convention is too heavily dependent on donor funds.<sup>904</sup> The states frequently fail to pay up their contributions.<sup>905</sup>

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<sup>899</sup> 'IW:LEARN | Documents -> Legal Frameworks -> Abidjan Convention' (*Iwlearn.net*, 2020) <<https://iwlearn.net/documents/legal-frameworks/abidjan-convention>> accessed 27 May 2020.

<sup>900</sup> *ibid*

<sup>901</sup> Twelfth meeting of the Contracting Parties to the Convention on Cooperation for the Protection, Management and Development of the Marine Environment and Coastal Areas of the West, Central and Southern African Region (Abidjan Convention) Additional Protocol to the Abidjan Convention on Integrated Coastal Zone Management (Abidjan, 27 to 31 March 2017) <[http://www.abidjanconvention.org/themes/critai/documents/meetings/partnersmeeting2019/Working%20Documents/Anglais/ABC-WACAF-COP12%20-%20ICZM%20Protocol%20final%20version%20\(05.06.18\).pdf](http://www.abidjanconvention.org/themes/critai/documents/meetings/partnersmeeting2019/Working%20Documents/Anglais/ABC-WACAF-COP12%20-%20ICZM%20Protocol%20final%20version%20(05.06.18).pdf)>

<sup>902</sup> David Dzidzornu, 'Marine Environmental Protection under the Nairobi and Abidjan Regimes: Working Toward Functional Revitalisation?' (2012) 26 *Ocean Yearbook* 359.

<sup>903</sup> *ibid*

<sup>904</sup> Abidjan Convention, <<https://iwlearn.net/documents/legal-frameworks/abidjan-convention>>

<sup>905</sup> *ibid*

For instance contributions to the Abidjan Convention Trust Fund from states was supposed to amount to US\$ 1 million, but from 2004-2007 contributions amounted to only US \$112,500 and in 2008, US \$18,600.<sup>906</sup> This is perhaps due to the fact that they do not view the convention obligations as priority or just cannot afford to pay their contributions. However, the wide reach of the convention would have provided the platform for cooperation for monitoring the marine area from one end to the other to solve at least the problem of illegal fishing and take steps to slow down the decline in fish stocks.

**Figure 16: Membership of Gulf of Guinea States in Regional Fisheries Bodies**

Table showing fragmentation of regional regimes for the management of fisheries					
MEMBERSHIP OF GOG STATES IN THIS STUDY	ATLAFCO 22 MEMBER STATES	CECAF 34 MEMBER STATES	ICCAT 53 MEMBER STATES	COREP 7 MEMBER STATES	FCWC 6 MEMBER STATES
Benin	➔	➔			➔
Cameroon	➔	➔		➔	
Côte d'Ivoire	➔	➔	➔		➔
Equatorial Guinea	➔	➔	➔	➔	
Gabon	➔	➔	➔	➔	
Ghana	➔	➔	➔		➔
Nigeria	➔	➔	➔		➔
Sao Tome / Principe	➔	➔	➔	➔	
Togo	➔	➔		➔	➔

Source: Author

#### **4.5. National legal frameworks for the conservation and management of fisheries in the Gulf of Guinea: assessment and challenges**

These international instruments are all soft law thus there is the need for states to implement the provisions in them through national policies, laws, & institutions. Thus, all the states in the region have adopted legislation in line with the international instruments discussed above dealing with the conservation and management of marine living resources. These legislations reflect the UNCLOS and the 1995 Fish Stocks

<sup>906</sup> ibid



Agreement as well as other non-binding instruments.<sup>907</sup> There are however some variations depending on the level of emphasis placed on the various aspects of fisheries management and conservation that the states determine should be made a priority. The following subsections discuss the key tools used by the states in order to assess their adequacy to solve conservation and management problems as well as to identify any challenges.

### **I. Regulation on licensing and setting Total Allowable Catch (TAC)**

Under UNCLOS<sup>908</sup> coastal states are to determine the allowable catch of the living resources in their respective EEZs. These measures are designed to maintain or restore populations of harvested species at levels which promote the maximum sustainable yield (MSY) taking into account any relevant environmental and economic factors.<sup>909</sup> These include the special economic needs of the fishing communities and developing states, fishing patterns, the interdependence of fisheries stocks and any accepted minimum standards determined at the sub regional, regional or global level. Though there are some arguments against it, the MSY objective for fisheries management, is that however large the catch, it should be sustainable in the long term.<sup>910</sup> This involves setting the harvest rate to a level that produces a catch of MSY and not anything more or less.<sup>911</sup> This entails the exchange of scientific data through international organisations as well as states' nationals allowed to fish in the EEZ.<sup>912</sup> It also require national laws on licensing, species caught, catch quotas and data collection among others as provided by Article 62 of UNCLOS.

However, there is a dearth of national regulation or management plans regarding the setting of TACs by GOG states in their agreements with third states fishing in the region. The notable exception is Sao Tome and Principe which has taken steps to set TACs in its fishing agreements. In that country, between 1983 and 1986, the fishery

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<sup>907</sup> Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (Fish Stocks Agreement).

<sup>908</sup> Ibid Article 61(1)

<sup>909</sup> Ibid Article 61 (3)

<sup>910</sup> Andre Punt and Anthony Smith, 'The Gospel of Maximum Sustainable Yield in Fisheries Management: Birth, Crucifixion and Reincarnation' in John Reynolds and others, *Conservation of Exploited Species* (Cambridge University Press 2001) 41.

<sup>911</sup> *ibid*

<sup>912</sup> Article 61 (5)

potential for coastal pelagic species was determined to be about 8,500 tons a year and for demersal species, it was 3,500 tons a year.<sup>913</sup> To conserve the fisheries, the state limited the TAC to 6,000 tons a year for both species.<sup>914</sup> Sao Tome has fishing agreements with the EU and the TAC beyond 12 NM is fixed at 8,500 tons a year.<sup>915</sup> This is significant, as being an island state, they have an EEZ that is larger than land mass and depend greatly on fishery resources.<sup>916</sup>

It is noteworthy that the majority of states in the region, have not emulated this example. They do not incorporate TACS in their fisheries access agreements with third states. For example, Gabon has fisheries agreements focusing on tuna with Japan and the EU which have paid for access to the fishing grounds.<sup>917</sup> Regarding its agreement with the EU<sup>918</sup>, nothing is said about a TAC. Article 3 of the said Agreement, however, cedes collection of data on catch to the EU, whilst Gabon itself has not put in place any procedure under the Agreement to set a limit on how much or which species is caught. There is also nothing in the agreement requiring the EU to make available the data on the fisheries caught to Gabon, which hinders effective management. Cote d'Ivoire also has a fisheries partnership agreement with the EU for which it is paid 682,000 Euros yearly including 352,000 a year for two years and 407,000 a year to support the fisheries sector.<sup>919</sup> This amount it is submitted hardly compensates for the amount of fish that the EU vessels haul out of Ivorian waters. It appears with the exception of Tuna species, for which ICCAT has set the TACs, the states do not have the political will to set TACs for other fish species. This means once the third states have paid for fishing access, they can fish without regard to any TAC.

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<sup>913</sup> Helen Davies (eds) *The Fisheries of the Gulf of Guinea Current: An Overview and Country Reports* (GCLME/UNIDO, 2012) 292.

<sup>914</sup> *ibid*

<sup>915</sup> *Ibid* p. 299

<sup>916</sup> Mé-Chinhô Costa Alegre, 'Towards A National Ocean Policy In Sao Tome And Principe' (Fellowship, The United Nations-Nippon Foundation Fellowship Programme 2009).

<sup>917</sup> *Ibid* 331

<sup>918</sup> Council Regulation (EC) No. 450/2007 of 16 April 2007 on the Conclusion of the Fisheries Partnership Agreement between the Gabonese Republic and the European Community [2007] OJ L 109/3.

<sup>919</sup> Council Regulation (EU) 2018/1095 of 26 July 2018 on the allocation of fishing opportunities under the Protocol on the implementation of the Fisheries Partnership Agreement between the European Union and the Republic of Côte d'Ivoire (2018-2024) [2018] OJ L 197/1.

Admittedly setting TACs can be very difficult especially for the developing states of the Gulf of Guinea. This is due to the fact that adequate scientific data is required to set quotas that would ensure sustainability. This is an expensive exercise for any state especially in view of the fact that the fisheries of the region are multi species and multiple types of gear are used to capture them. Additionally, in the Gulf of Guinea states do not conduct surveys frequently to update the situation of fisheries. Outdated statistics indicate that the Maximum Sustainable Yield (MSY) of coastal demersal resources, in western and central GOG was within the range of 64,000 and 104,000 metric tonnes while annual landing was about 105,000.<sup>920</sup> In the northern GOG, MSY ranged between 18,000 and 95000 metric tonnes with annual landings in this range<sup>921</sup> meaning the demersal resources were being exploited at their maximum. Marine biologist thus concluded at the time, that, “coastal demersal resources in the whole of the Gulf of Guinea are either fully exploited or over exploited. This state of affairs appears not to have changed judging from the state of the fisheries in the Gulf of Guinea.”<sup>922</sup> Thus, the access agreements currently signed with third states including landlocked states as provided for under Article 69 of UNCLOS are not based on solid scientific evidence of stock levels which is a problem for management and conservation in the region.

Vessels that fish in the region are subject to licensing regimes as provided for under UNCLOS. The legislation in the region, takes into consideration two main types of fishers - artisanal and industrial (including semi-industrial). Artisanal fishers usually referred to as, “small scale, traditional, inshore, subsistence or municipal fishers” are the regions local fishers who mainly live along the coast and fish for a living or for subsistence.<sup>923</sup> They exploit both pelagic and demersal fish stocks<sup>924</sup> using small vessels. The industrial fishers which have had a long tradition in the region, are made up mainly of the foreign fishing fleets from the EU, Eastern Europe, Korea and

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<sup>920</sup> Martin Mensah and Samuel Quaatey, ‘An Overview of the Fishery Resources and Fishery Research in the Gulf of Guinea’ in Jacqueline McGlade and others (eds) *The Gulf of Guinea Large marine Ecosystem* (Elsevier Science 2002) vol. II 227-239.

<sup>921</sup> Jacqueline McGlade and others (eds) *The Gulf of Guinea Large marine Ecosystem* (Elsevier Science 2002) vol. II 232

<sup>922</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006).

<sup>923</sup> Ibid p. 38

<sup>924</sup> ibid

Japan.<sup>925</sup> These use sophisticated fishing gear including industrial trawlers and purse-seiners. The fisheries legislation in the region make provision for the licensing of these artisanal and commercial fishing vessels as well as reefer vessels operating in their respective waters. The states have various criteria for granting, refusing or cancelling permits. In Nigeria, the law accords licensing officers the wide discretion to cancel a license or suspend it.<sup>926</sup> Appeals are to the Minister who also has the discretion to take any decision he deems fit and such decision shall be final.<sup>927</sup> The challenge with this is that it is likely to breed corruption and not be effective. This is unlike the situation in Ghana which has a Fisheries Commission that deals with applications for licenses and appeals are made to a Fisheries Appeal Board with further right of appeal to the courts.<sup>928</sup> This is more transparent and therefore more effective. In Cameroon, the Fisheries law<sup>929</sup> provides for authorisation and license for fishing rights at the industrial level, and for a permit or authorization for semi-industrial and artisanal fishing.<sup>930</sup> However the country does not have control over licensing of fishing vessels and many vessels operate without licenses for all or part of the year.<sup>931</sup> The regulations are also silent on false declarations made in relation to fishing activities.<sup>932</sup> Between 2004 to 2007, Cameroon did not license any vessels in 2006, but there were vessels operating in its waters.<sup>933</sup> In 2007, operators were issued their licenses late in May which meant that they had operated for five months without licenses.<sup>934</sup> This is a situation that continues to happen and thus is a setback for conserving and managing the fishery resources in that country. The reason for this is not immediately clear from the literature and as the catches are not reported, determining how much fish have been caught is impossible. Also, there could be lost revenue from licensing fees.

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<sup>925</sup> Ibid p. 39

<sup>926</sup> Ibid section 4 (5)

<sup>927</sup> Ibid section 7

<sup>928</sup> Ghana Fisheries Act 2002, Act 625 Sections 69 and 78

<sup>929</sup> Decree n° 95/413/PM of 20 June 1995, providing the conditions for access to fishing. see ENVIREP-CAM, 'Overview of Management and Exploitation of the Fisheries Resources of Cameroon, Central West Africa' <<http://hdl.handle.net/1834/5228>> accessed 27 May 2020.>

<sup>930</sup> *ibid*

<sup>931</sup> ENVIREP-CAM, 'Overview of Management and Exploitation of the Fisheries Resources of Cameroon, Central West Africa' <<http://hdl.handle.net/1834/5228>> accessed 27 May 2020.>

<sup>932</sup> *ibid*.

<sup>933</sup> *ibid*

<sup>934</sup> *Ibid*

The presence of foreign fishing vessels in EEZ waters have been known to cause maritime insecurity and conflict. In the region, domestic fishing fleets tend to be small-scale and artisanal, using small boats and gear. Foreign vessels, especially those from distant-water fleets that have travelled thousands of miles to fish, are larger, faster, and use larger sets of gear. This can cause direct conflict between domestic and foreign vessels. In some African countries, foreign vessels have been accused of destroying artisanal gear, crowding out smaller boats, destroying marine habitat, and depleting fisheries resources.<sup>935</sup> An example is the illegal practice known as ‘saiku’ which is carried on by trawlers in Ghanaian waters.<sup>936</sup> These trawlers, mostly of Chinese origin, fish illegally by targeting juvenile and small pelagic fish which are reserved for local fishers. This illegally caught fish is then transhipped at sea to local fishers, in specially adapted canoes called ‘Saiku’.<sup>937</sup> These are forced to buy it, because as a direct result of ‘saiko’, they are struggling to catch enough fish to sustain their livelihoods. This has contributed to the rapid deterioration of Ghana’s fisheries resources.<sup>938</sup>

Some of the states do not permit foreign interests to engage in the industrial fishing sector by way of joint ventures. An example is Ghana where this restriction applies to all local (i.e. Ghana-flagged) industrial and semi-industrial vessels, with the exception of tuna vessels.<sup>939</sup> The restriction ensures that the financial benefits of the trawl sector are retained in Ghana. However, this regulation is circumvented by Chinese companies operating through Ghanaian “front” companies to import their vessels into the Ghanaian fleet register and obtain a licence to fish.<sup>940</sup>

Thus the legislation of the states in the region make provision for regulating fishing by foreign fishing vessels and protecting artisanal fishers. However, the legislation in the

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<sup>935</sup> (Fao.org, 2020) <<http://www.fao.org/3/k7480b/k7480b06.pdf>> accessed 27 May 2020.

<sup>936</sup> ‘Stolen at Sea: How Illegal ‘Saiko’ Fishing Is Fuelling the Collapse Of Ghana’s Fisheries’ (EJF and Hen Mpoano 2019).

<sup>937</sup> *ibid*

<sup>938</sup> *ibid*

<sup>939</sup> Isabella Kaminski and others, ‘Ghana’s Fish Stocks Decimated by Illegal Fishing’ (*chinadialogue ocean*, 2018) <<https://chinadialogueocean.net/4731-ghanas-fish-stocks-decimated-by-illegal-fishing/>> accessed 27 May 2020.

<sup>940</sup> *ibid*

region is not uniform. Some legislation is liberal whilst others are restrictive. The foreign vessels therefore operate where they know the regulation is weakest.<sup>941</sup>

## II. Regulation of fishing zones and fishing gear

The states in the region have used restrictions on fishing gear within specified zones or define limits near the coast to control fish catch. In Cameroon for instance, the law prohibits the use of trawlers or fishing vessels with trawling gear “within a 3 nautical mile zone of the basic line fixed by decree”.<sup>942</sup> The other states have different limits within 5 nautical miles from the coast. The reason for this restriction may be the large-scale destruction that such trawling gear could cause to the seabed and its effect on marine living resources on the seabed. Mesh size for fishing nets are also regulated. These measures especially those concerning mesh size are important to protect the nursery grounds of the fish stock. It is also to protect the small pelagics, which are more heavily distributed in Benin, Togo, Ghana and Cote d’Ivoire.<sup>943</sup> The main objective is to allow juvenile and young fish to escape.<sup>944</sup> Regulation becomes necessary due to the fact that the beach seine,<sup>945</sup> one of the dominant marine artisanal gears used along the coast of West Africa is highly destructive to juvenile fish and the ecosystem.<sup>946</sup> It is one of the main contributory factors to the reduction of the spawning potential of small pelagic stocks shared by countries in the region.<sup>947</sup>

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<sup>941</sup> *ibid*

<sup>942</sup> Section 127 Cameroon law No. 94/01

<sup>943</sup> A. Aziabile and others, ‘Distribution and abundance of the main pelagic fish stocks in the Western Gulf of Guinea (Benin, Togo, Ghana and Côte d’Ivoire)’ in Serge Garcia and others (eds.) *Science and Management of Small Pelagics: Symposium on Science and the Challenge of Managing Small Pelagic Fisheries on Shared Stocks in Northwest Africa, 11–14 March 2008, Casablanca, Morocco* (FAO, 2012) 493–502.

<sup>944</sup> Njomou Pandong Achile and others, ‘Assessment of the Selective Properties and Optimization of Mesh Size of Pelagic Trawl Codends, Used for Fishing Mackerel (*Trachurus* Spp) in the Gulf of Guinea’ (2013) 3 *Open Journal of Marine Science* 103-111.

<sup>945</sup> A beach seine is a seine net operated from the shore. It is composed of a bag and long wings often lengthened with long ropes for towing the seine to the beach. The headrope with floats is on the surface, while the footrope is in permanent contact with the bottom and the seine is therefore a barrier which prevent the fish from escaping from the area enclosed by the net. See ‘FAO Fisheries & Aquaculture - Fishing Gear Type’ (*Fao.org*, 2020) <<http://www.fao.org/fishery/geartype/202/en>> accessed 28 May 2020.

<sup>946</sup> Francis Nunoo, and others, ‘Abundance, biomass and species composition of nearshore fish assemblages in Ghana, West Africa,’ (2006) 28 *African Journal of Marine Science* 3.

<sup>947</sup> *ibid*

In Ghana, for example, the Fisheries Law<sup>948</sup> and Fisheries Regulations<sup>949</sup> contain provisions that seek to regulate beach seining.<sup>950</sup> These laws prohibit the use of seine nets in inland waters,<sup>951</sup> and the use, sale manufacture and importation of seine nets, the mesh size of which is less than 25 mm in stretched diagonal length in coastal waters.<sup>952</sup> The use of seine nets for tuna fishing is also prohibited.<sup>953</sup> Additionally the law prohibits the use of beach seine nets in estuaries and areas designated as marine protected areas by the Ghana Fisheries Commission.<sup>954</sup> However, managing beach seine fisheries in West Africa is a formidable task as artisanal fishers depend on it and multispecies are caught through this method.<sup>955</sup> Management is also challenged by the lack of integrated strategies and law enforcement.<sup>956</sup> Across the region, the mesh size of the bag of the beach seine nets range between 5 and 25 mm and 25 mm is rare.<sup>957</sup> The methods used to measure meshes also varies.<sup>958</sup> The states also have legislation regarding the weight and size limits of certain specific fisheries.<sup>959</sup> However, these vary from one law to another and the unit of measurements may also vary.<sup>960</sup>

### III. Regulation of fishing techniques

The states' legislation prohibits harmful fishing methods such as the use of explosives, chemicals, poisons, electrical currents and any device likely to destroy aquatic fauna and the aquatic environment.<sup>961</sup> These are not even allowed on board vessels under some of the legislation like the Ghana Fisheries Act.<sup>962</sup> Despite these laws some of the

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<sup>948</sup> Fisheries Act, 2002 Act 625

<sup>949</sup> Fisheries Regulations L.I. 1968 (2010)

<sup>950</sup> Fisheries Act, 2002 Act 625 and Fisheries regulations L.I. 1968 (2010)

<sup>951</sup> Ghana Fisheries regulations L.I. 1968 (2010) Section 6

<sup>952</sup> Ibid Sections 10 and 12 (4)

<sup>953</sup> Ibid Section 2010

<sup>954</sup> Ibid Section 9

<sup>955</sup> Francis Nunoo and Dogbeda Azumah, 'Selectivity Studies on Beach Seine Deployed in Nearshore Waters near Accra, Ghana' (2015) 7 Int. J. Fish. Aquac. 112.

<sup>956</sup> *ibid*

<sup>957</sup> *Ibid*

<sup>958</sup> *ibid*

<sup>959</sup> FAO, 'Regional Compendium of West African Fisheries' (CECAF Region, 1983) 7

<sup>960</sup> *ibid*

<sup>961</sup> Nigeria Sea fisheries Act, Ghana Fisheries Regulations (L.I 1968), Cote d'Ivoire's Law No. 86-468 of 01/07/1986 on fishing are examples.

<sup>962</sup> Ghana Fisheries Act section 88.

states still record high rates of poisonous chemical use in fishing. In Cote d'Ivoire some fishermen use poisonous products as a means to catch fish.<sup>963</sup>

#### IV. Regulation on conservation of fisheries

##### i) Area-based management – Marine Protected Areas

“Marine Protected Areas” (MPA) have been discussed in the literature and used in practice to describe “any area of intertidal or subtidal terrain, together with its overlying waters and associated fauna, flora, historical and cultural features, which has been reserved by legislation to protect part or all of the enclosed environment”<sup>964</sup> According to the World Wide Fund (WWF) it is, “*an area designated and effectively managed to protect marine ecosystems, processes, habitats, and species, which can contribute to the restoration and replenishment of resources for social, economic, and cultural enrichment*”.<sup>965</sup> An MPA thus provides an integrated approach to the protection of the environment as it takes into account the whole ecosystem. MPAs take various forms and include spatial limits on fishing areas, no take areas where entry is prohibited and areas with ocean zoning schemes among others.<sup>966</sup> The levels of protection, and the range of activities allowed or prohibited within these protected areas varies from area to area.<sup>967</sup> However in the literature, no-take reserves have been identified as the strongest form of conservation for fisheries, but these are not well distributed across the globe.<sup>968</sup> They are also not popular with states that depend on commercial fishing and therefore it is to be expected that throughout the world, the fishing industry is the most powerful opponent of no-take zones.<sup>969</sup>

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<sup>963</sup> Angaman Konan and Gabin Kponhassia, 'The Traditional Management of Artisanal Fisheries in Cote d'Ivoire: The Case of Aby Lagoon', *Fisheries Co- Management in Africa: Proceedings from a Regional Workshop on Fisheries Co-Management Research* (Institute for Fisheries Management and Coastal Community Development 1997) 288.

<sup>964</sup> Graeme Kelleher and Richard Kenchington, 'Guidelines for Establishing Marine Protected Areas A Marine Conservation and Development Report' (IUCN 1992).

<sup>965</sup> Emilie Reuchlin-Hugenholtz and Emily Mckenzie, 'Marine Protected Areas: Smart Investments in Ocean Health' (WWF, Gland, Switzerland, 2015) (*Wwf.panda.org*) <[https://wwf.panda.org/our\\_work/oceans/solutions/protection/protected\\_areas/](https://wwf.panda.org/our_work/oceans/solutions/protection/protected_areas/)> accessed 28 May 2020.

<sup>966</sup> FAO, Report and Documentation of the Expert Workshop on Marine Protected Areas and Fisheries Management: Review of Issues and Considerations, Rome, 12-14 June 2006 (Fisheries Report No. 825 FAO 2007) 307-309.

<sup>967</sup> *ibid*

<sup>968</sup> 'Marine Protected Areas' (*Marine Conservation Institute*, 2020) <<https://marine-conservation.org/what-we-do/program-areas/mpas/>> accessed 28 May 2020.

<sup>969</sup> National Society, 'No-Take Zone' (*National Geographic Society*, 2020) <<https://www.nationalgeographic.org/encyclopedia/no-take-zone/>> accessed 28 May 2020.



There are two outstanding no-take reserves: the UK's Pitcairn Marine reserves and the Pacific Remote Islands Marine National Monuments. The Pitcairn Islands Marine Reserve was established by the UK government in March 2015. It has been touted as the largest single reserve in the world.<sup>970</sup> The islands are administered by the UK as a territory. The island residents requested the UK government to create the reserve due to illegal foreign fleet fishing there and degrading the area.<sup>971</sup> The British government signed legislation on its establishment.<sup>972</sup> By section 8 of the Ordinance fishing is among the activities that is prohibited in the area. There is however an exception made for residents of the island to fish. Further Section 9 provides that they can fish provided that such fishing is conducted while in transit to or from other islands in or outside the Pitcairn Islands Marine Protected Area, for consumption during that trip. The method of fishing is by an attended line (whether or not with a rod); and conducted in accordance with any Marine Conservation Regulations and Fisheries Management Plan.<sup>973</sup> Fishing for scientific research is also provided for under permit provided for under the Ordinance and marine conservation regulations.<sup>974</sup> The area is so protected that the law even prohibits diving, anchoring, discharging of ballast water and other like activities which are regulated.<sup>975</sup>

The Pacific Remote Islands Marine National Monument is within the central Pacific Ocean from Wake Atoll in the Northwest to Jarvis Island in the Southeast. Under US jurisdiction they have been said to represent one of the most widespread collection of marine living resources protected area on the planet under a single state's jurisdiction. Fisheries related activity seaward from the 12 nm refuge boundary out to the 50 nm in monument boundary are managed by the National Oceanic and Atmospheric Administration (NOAA). This area is a refugia for fish and wildlife species that are being destroyed. These include pearl oysters, giant clams, and coconut crabs among others. The refugia includes dots of land in the midst of the ocean which are vital nesting

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<sup>970</sup> *ibid*

<sup>971</sup> *ibid*

<sup>972</sup> Pitcairn Islands Marine Protected Area Ordinance 2016 Cap 48 2017 Rev. Ed.

<sup>973</sup> *Ibid* Section 9

<sup>974</sup> *ibid*

<sup>975</sup> *ibid*

habitats for millions of marine living resources. This unique refugia was established by presidential proclamation.<sup>976</sup>

This in line with the Convention on Biodiversity (CBD) which obliges states to adopt MPAs to protect biodiversity as provided for in the CBD and the Aichi Biodiversity Targets.<sup>977</sup> This is to be done through effective, equitably managed and well-connected systems of protected areas and other effective area-based conservation measures. Additionally, by 2020 the extinction of threatened species should have been prevented, their conservation status improved and sustained. Also, traditional knowledge and practices of indigenous communities that are relevant for conservation and sustainable use of biodiversity is to be promoted, as well as the full participation of local communities in such conservation at all levels.<sup>978</sup> With these plans as a framework parties are to develop their own national targets using the Aichi Biodiversity Targets but with some flexibility depending on national priorities and capacities.<sup>979</sup>

The Convention on Biodiversity has been ratified by all the states of the Gulf of Guinea. However apart from Ghana which has submitted its national report on these targets, none of the other states have been actively working at achieving these targets.

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<sup>976</sup> Proclamation 8336 established the Pacific Remote Islands Marine National Monument in 2009 and it was subsequently expanded in 2014 by presidential proclamation 9173 see NOAA Fisheries Pacific islands Fisheries Science Center) Presidential Document Federal Register Vol. 74 No.7 Monday January 12 2009

Proclamation 8336 of January 6, 2009 Establishment of the Pacific Remote Islands Marine National Monument 58646 Federal Register/ Vol.49, No.188/ Monday September 29 2014/ Presidential Document.

<sup>977</sup> It has been recognised that the protection of biodiversity is essential for the achievement of the Millennium Development Goals and therefore the parties to the Convention on Biodiversity, in 2010 in Nagoya, Japan adopted a ten-year plan specifically for biodiversity – the Strategic Plan for Biodiversity 2011-2020. This constitutes a framework for action by all countries and stakeholders to save biodiversity and under it, five strategic goals, were set which includes safeguarding ecosystems, species, and genetic diversity. According to the Strategic Goal C, by 2020, at least 10% of coastal and marine areas especially those of particular importance for biodiversity and ecosystems services are to be conserved.

<sup>978</sup> Aichi Biodiversity Targets - Target 11 states that by 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes. (Wedocs.unep.org, 2020)

<[https://wedocs.unep.org/bitstream/handle/20.500.11822/11106/swio\\_wg1\\_pre%20%285%29.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/11106/swio_wg1_pre%20%285%29.pdf?sequence=1&isAllowed=y)> accessed 28 May 2020.

<sup>979</sup> *ibid*

Nevertheless the states are well aware of the importance of conserving the ecosystem and biodiversity especially mangroves which are important in the region's fisheries management and conservation.<sup>980</sup> These mangroves perform the important function of providing nursery and spawning areas for commercially important fish and shell fish species as well as providing 'stopover' sites for migratory species.<sup>981</sup> Nigeria has over 35% of the mangroves in the region especially in the Niger Delta area (about 9.7 million hectares) whilst Cameroon and Gabon have about 300,000 hectares each. There are also numerous deltas like the Volta River in Ghana that has a complex lagoon system surrounded by mangroves which are important to migrant fish.<sup>982</sup> However, these mangroves are mostly polluted and degraded. In recognition of this, the legislation in the region make provision for their preservation.<sup>983</sup> In 1995, Benin, Cameroon, Cote d'Ivoire, Ghana, Nigeria and Togo participated in a project<sup>984</sup> to adopt a common approach in solving the problems of marine environmental degradation.<sup>985</sup> The project conducted a study on mangroves in the region. Using remote sensing and geographic information systems the study mapped out the actual area of the mangrove forests, determined the levels of degradation of the ecosystem and developed criteria for selection of potential sites for restoration.<sup>986</sup> Various degrees of degradation, were identified in each country due to over-cutting to domestic and industrial pollution or combination of these factors.<sup>987</sup>

Since the study was conducted, there has been no clear-cut policies on MPAs as part of a fisheries conservation programme in the region. There are some coastal protected

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<sup>980</sup>UNIDO/UNDP/UNEP/GEF/NOAA. (2003). Guinea Current Large Marine Ecosystem Transboundary Diagnostic Analysis. Regional Project Coordinating Centre, Abidjan, Côte d'Ivoire

<sup>981</sup> Ivan Valiela, Jennifer Bowen, and Joanna York, 'Mangrove Forests: One of the world's Threatened Major Tropical Environments' (2001) 51 *Bioscience* 807 at 811.

<sup>982</sup> Chika Ukwe and others, 'Achieving a Paradigm Shift in Environmental and Living Resources Management in the Gulf of Guinea: The Large Marine Ecosystem Approach' (2003) 47 *Marine Pollution Bulletin* 219

<sup>983</sup> *ibid*

<sup>984</sup>This was a pilot project, named, 'Water Pollution Control and Biodiversity Conservation in the Gulf of Guinea Large Marine Ecosystem' See 'IW:LEARN | Projects - Water Pollution Control And Biodiversity Conservation In The Gulf Of Guinea Large Marine Ecosystem (GOGLME)' (*Iwlearn.net*, 2020) <<https://iwlearn.net/iw-projects/393>> accessed 28 May 2020.

<sup>985</sup> *ibid*

<sup>986</sup> Chika Ukwe and others, 'Achieving a Paradigm Shift in Environmental and Living Resources Management in the Gulf of Guinea: The Large Marine Ecosystem Approach' (2003) 47 *Marine Pollution Bulletin* 219 –225

<sup>987</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) 13-14.

areas in the region but many of them do not have specified boundaries.<sup>988</sup> In spite of the fact that the states have legislation providing for the establishment of MPAs, there are no known marine or coastal protected areas in some of the states namely, Benin, Ghana, Nigeria and Togo.<sup>989</sup> For instance, Ghana's law on fisheries makes provision for the Minister of Fisheries to declare any area of the fishery waters and the sea bed underlying the waters to be a marine reserve.<sup>990</sup> There is however no evidence that this has been done. One challenge is that mangrove forest policies in the region are often located under forest and wildlife management policies and there is not enough emphasis on fisheries.<sup>991</sup>

Across the region there is a paucity of legislation specifically targeted at MPAs.<sup>992</sup> The legislation in the region shows the duplication of efforts in the institutions that have as part of their mandate to deal with mangroves. These are usually not resourced and do not always deliver on their wide mandates.<sup>993</sup> The most notable effort in the areas of marine protected areas in the region is Gabon which has recently designated the largest network of marine protected zones which will protect 26% of the country's seas and cover more than 50,000 square kilometres.<sup>994</sup> This is in compliance with their Fisheries law.<sup>995</sup> They did not need to pass any new law but simply enforced the existing law on fisheries which provided for the preservation of the breeding area of marine living

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<sup>988</sup> *ibid* p. 42

<sup>989</sup> *ibid*

<sup>990</sup> Ghana Fisheries Act 2002, Act 625 Section 91

<sup>991</sup> For instance, in Cameroon under Law No. 94/01 of 20 January 1994 on Forestry and Wildlife Regulations Law no. 96/12 of 05 August 1996 on management of environmental resources; in Cote d'Ivoire by 1965 Loi n° 65-425 du 20 décembre 1965 portant Code Forestier. <http://faolex.fao.org/docs/pdf/ivc2229.pdf> (accessed 5 April 2019) and 1995. Loi n° 95-553 de 17 Juillet 1995 portant Code Minier. (Mining Code; in French). [http://www.droit-afrique.com/images/textes/Cote\\_d'Ivoire/RCI%20-%20Code%20minier.pdf](http://www.droit-afrique.com/images/textes/Cote_d'Ivoire/RCI%20-%20Code%20minier.pdf) (accessed 5 April 2019) and 1996a. Décret n° 96-634 du 09 August 1996 déterminant les modalités d'application de la loi du 18 juillet, 1995 portant Code minier. (Decree on Implementing Regulation, Mining Code; in French). [http://www.cepici.gouv.ci/userfiles/file/DECRET\\_code\\_minieer.pdf](http://www.cepici.gouv.ci/userfiles/file/DECRET_code_minieer.pdf) (accessed 5 April 2019); in Ghana by The Forest and Wildlife Policy of 1994, Forest & Plantation Development Act of 2000 (Act 583), Timber Resource Management Act, 1997 (Act 547), Ghana Timber Resources Management Regulations, 1998

<sup>992</sup> Zebedee Feka, 'Sustainable Management of Mangrove Forests in West Africa: A New Policy Perspective?' (2015) 116 *Ocean & Coastal Management* 341 at 352.

<sup>993</sup> *ibid*

<sup>994</sup> Gabon Announces Vast Marine Protected Area Network at UN Ocean Conference > Newsroom' (*Newsroom.wcs.org*, 2017) <<https://newsroom.wcs.org/News-Releases/articleType/ArticleView/articleId/10114/Gabon-Announces-Vast-Marine-Protected-Area-Network-at-UN-Ocean-Conference.aspx>> accessed 28 May 2020.

<sup>995</sup> *Ibid*

resources.<sup>996</sup> Scientist have called this the most sustainable fisheries management plan in the region which should be emulated by other states in the region.<sup>997</sup> However, in the greater part of the region, the management of important habitats of fisheries like mangroves, has been neglected and inadequate legislation and policies are contributing factors to their rapid degradation.

### **ii). Closed seasons for spawning**

Closed seasons to allow fishery to spawn is becoming a feature of the legislation in the region. Ghana is one of the countries that has such legislation. Under section 84 of the Fisheries Act, 2002 Act 625, the Fisheries Commission of Ghana may declare by gazette, closed seasons for fishing, including their duration. This is for fishing in specified areas of the coastal waters. In Nigeria also a commissioner of fisheries may at his discretion, declare as closed for fishing within the jurisdiction of a state, any area or season as he may deem fit under section 9 of the Inland Fisheries Act, of 28 December 1992. Where resources are shared between two federal states in Nigeria, then it is the minister who may at his discretion declare a body of water shared by such two states as closed.<sup>998</sup> Closed seasons for spawning is an important management tool especially to manage over exploited species. This due to the fact that all fish that survive until the start of the spawning period would likely be able to spawn and thus increase the size of the stock.<sup>999</sup> However for closed seasons to make an impact on fisheries management, it must be based on scientific data in order for the law to regulate the process. For instance, they must reduce fishing of older fish stock that are most valuable in the reproductive process, to avoid the negative effects of fishing on spawning habitats.<sup>1000</sup>

### **iii). Illegal, unregulated and Unreported fishing**

Illegal, unreported and unregulated (IUU) fishing is used in the literature as a broad term that captures a wide variety of fishing activity occurring both in the EEZ and on the high seas. It is often associated with organized crime and involves all aspects of the

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<sup>996</sup> Gabon Code of Fisheries and Aquaculture Law No. 015/2005

<sup>997</sup> Chris Symth and Quentin Hanich, 'Large Scale Marine Protected Areas Current Status and Consideration Of Socio-Economic Dimensions' (Pew Charitable Trusts 2019) <<https://ro.uow.edu.au/cgi/viewcontent.cgi?article=4850&context=lhapapers>> accessed 28 May 2020

<sup>998</sup> *ibid*

<sup>999</sup> Harriet Overzee and Adrian Rijnsdorp, 'Effects of Fishing During the Spawning Period: Implications for Sustainable Management' in *Reviews in Fish Biology and Fisheries*, (Springer International Publishing Switzerland, 2014) 12

<sup>1000</sup> *Ibid* p. 14-15

capture and utilisation of fisheries.<sup>1001</sup> Edeson<sup>1002</sup> is of the view that the terms “illegal”, “unreported” and “unregulated” have not been used in a precise way but, used to identify in a general way the nature of a continuing problem in the area of fisheries. He was referring to the definition in the FAO’s International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, (IPOA -IUU). This is a voluntary non-binding instrument, within the framework of the FAO Code of Conduct for Responsible Fisheries. The instrument defines ‘illegal fishing’ as referring to activities conducted by national or foreign vessels in waters under a state’s jurisdiction without its permission or in violation of its laws and regulations.<sup>1003</sup> It also refers to fishing activities engaged in by vessels flying the flag of States parties to a regional fisheries management body but operating in violation to that organisation’s conservation and management measures or relevant provisions of the applicable international law. Included also are activities in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant regional fisheries management organization.

‘Unreported fishing’ has to do with not reporting or misreporting fisheries activities. This may be to the relevant national authority when undertaken within its jurisdiction or to an Regional Fisheries Management Organisation (RFMO) when undertaken in its area of competence.<sup>1004</sup> ‘Unregulated fishing’ is mainly conducted in areas beyond national jurisdiction and within the area of competence of a relevant RFMO by stateless vessels or vessels flying the flag of third states or by a fishing entity in a manner that contravenes the conservation and management measures of that organisation. RFMOs usually operate in the majority of high seas areas that have major deep-sea fisheries. They are usually tasked with collecting fisheries statistics, assessing resources, making management decisions and monitoring activities. However, not all unregulated fishing is a violation of the relevant international law.<sup>1005</sup>

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<sup>1001</sup>FAO, Report of the Expert Workshop to Estimate the Magnitude of Illegal, Unreported and Unregulated Fishing Globally, Rome, 2–4 February 2015’ (FAO Fisheries and Aquaculture Report No. 1106 Rome, 2015) 53

<sup>1002</sup> William Edeson, ‘Tools to Address IUU Fishing: The Current Legal Situation Document’ (FAO, 2000) 13

<sup>1003</sup> FAO, Code of Conduct for Responsible Fisheries (FAO Rome, 1995) paras 3.1 and 3.1.1

<sup>1004</sup> Ibid

<sup>1005</sup> Ibid

IUU fishing anywhere it occurs undermines national and regional efforts to conserve and manage fisheries making it difficult or almost impossible to achieve the goals of long-term sustainability and responsibility. It threatens marine biodiversity and food security for communities that depend on fisheries for food and livelihood. In the Gulf of Guinea, it has put additional pressure on stocks that are already being fished at unsustainable levels, complicating stock management. While most IUU fishing is done by foreign industrial fleets (usually from Asian countries), vessels from the West African countries are also part of the problem as neighbouring countries often cross each other's EEZs or venture inside the five nautical mile coastal zone reserved for artisanal fishing.<sup>1006</sup> It is thus a major contributory factor to the depletion of fish stocks.

The IPOA-IUU referred to above, is a collective solution by states to combat the problem of IUU fishing. It applies to all states and entities and to all fishers. The measures emphasize the responsibilities of all states, flag State responsibilities, coastal State measures, port State measures, internationally agreed market-related measures, research and regional fisheries management organizations. The special requirements of developing countries are also considered.<sup>1007</sup> Specifically the Agreement requires states parties to deny port access (landing, transshipping and processing of fish) and port services (refuelling, resupplying and repair) to foreign vessels which may have engaged in, or supported, IUU fishing. 'Vessels' are defined broadly to include both fishing vessels and support vessels (such as supply and freezer vessels). Even though Parties are required to apply the provisions of the Agreement to foreign-flagged vessels, they must also ensure that equally effective measures are in place regarding their own vessels.

The IPOA stresses that the success of the implementation of the measures depends mainly on all States cooperating with other States, or indirectly through relevant regional fisheries management organizations or through FAO and other appropriate international organizations. There would also need to be close and effective coordination and consultation, and information sharing to reduce the incidence of IUU

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<sup>1006</sup> Alfonso Daniels, and others, 'Western Africa's Missing Fish: The Impacts of Illegal, Unreported and Unregulated Fishing and Under-Reporting Catches by Foreign Fleets' June 2016.<  
<https://www.odi.org/sites/odi.org.uk/files/resource-documents/10665.pdf>> accessed 12 May 2020

<sup>1007</sup> FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. (FAO Rome 2001)

fishing, among States and relevant regional and global organizations. States would also need to address the issue in their national legislation. These should contain appropriate deterrent sanctions.<sup>1008</sup>

All the states in the region are parties to the Agreement and as part of their obligations they are to adopt within three years of ratification of the IPOA, national plans of action to further achieve the objectives of the IPOA and give full effect to its provisions as an integral part of their fisheries management programmes and budgets.<sup>1009</sup> Ghana is one of the states that has developed its national plan of action in accordance with the terms of the Agreement.<sup>1010</sup> It has also put into statute, powers that will enable the revocation of licenses for non-compliance. However, a number of gaps currently exist in Ghana's fisheries legislation and management practices which require improvement to enable Ghana to adequately combat IUU fishing. These include the lack of specific legal measures to prevent, deter or eliminate IUU fishing activities committed by vessels flying the flag of Ghana, fisheries management and monitoring, control and surveillance (MCS). The main challenge as with the other countries in the region that have similar legislation is implementation.

Another Agreement dealing with IUU fishing is the Agreement on Port State Measures (PSMA) which is the first binding international agreement to specifically target illegal, unreported and unregulated (IUU) fishing. Its objective is to prevent, deter and eliminate IUU fishing by preventing vessels engaged in IUU fishing from using ports and landing their catches. The provisions of the PSMA apply to fishing vessels seeking entry into a designated port of a State which is different to their flag State. The Agreement further requires parties to designate the ports which may be accessed by foreign- flagged fishing vessels. These vessels are required to request permission for port access ahead of time and transmit information on their activities and the fish they have on board. This will give port State authorities an opportunity to identify in advance vessels of potential concern. The Agreement commits parties to conduct regular inspections of vessels accessing their ports and outlines a set of standards that will be used during those inspections. This includes reviews of ship papers, surveys of fishing

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<sup>1008</sup> *ibid*

<sup>1009</sup> *ibid*

<sup>1010</sup> Ghana National Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (May 2014)



gear, examining catches and checking a ship's records to reveal if it has engaged in IUU fishing. All vessels may be subject to inspection by port States under the proposed Agreement, and States are required to take follow-up action in response to any inspection reports indicating that a vessel flying their flag has engaged in IUU fishing. Gabon, Ghana, Sao Tome and Principe and Togo are the only states in the region that are parties to the Agreement.’ The implementation of these measure all over the region is rather weak.<sup>1011</sup>

#### **iv). Bycatches**

In the region large amounts of bycatches are made both shore wards and offshore of the continental shelf at considerable distances from fishing ports where fish is landed.<sup>1012</sup> Fisheries bycatches result when fish which is not the target of fishers is accidentally caught during fishing expeditions.<sup>1013</sup> This is a key threat to especially cetacean species in the Gulf of Guinea like dolphins, marine turtles and sea birds. Some of the states in the region like Ghana have provisions in their legislation on incidental catches. Regulation 31 of the Ghana Fisheries Regulation prohibits the taking of gravid (pregnant) lobsters, crustacea as well as juvenile fish during fishing.<sup>1014</sup> Any such fish accidentally caught is to be returned to the sea immediately.<sup>1015</sup> This is to ensure sustainability of the fish stocks. This also applies to sea mammals which have long lifespans and low rates of reproduction.<sup>1016</sup> Other legislation prohibit the taking or offering for sale, lobsters or crabs less than 7 cm or 6 cm respectively as well as any berried crab or lobster <sup>1017</sup> caught by whatever means to be returned to the waters.<sup>1018</sup> Further, to avoid accidentally catching rare sea turtles, the Ghanaian Fisheries regulation makes provision for shrimp fishers to use a Turtle Excluder Device and to

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<sup>1011</sup> Tanga Biang, ‘The Joint Development Zone Between Nigeria and Sao Tome and Principe: A Case of Provisional Arrangement in the Gulf of Guinea International Law, State Practice And Prospects for Regional Integration’ The United Nations – The Nippon Foundation of Japan Fellowship Programme 2009-2010

<sup>1012</sup> Rikas K., ‘An overview of fisheries and sea turtle bycatch along the Atlantic coast of Africa.’ (2013) 1 Munibe Monographs Nature Series 71-82

<sup>1013</sup> *ibid*

<sup>1014</sup> Fisheries Act, 2002 Act 625 Section 89

<sup>1015</sup> *Ibid*

<sup>1016</sup> *Ibid*

<sup>1017</sup> Berried crabs are crabs carrying eggs see <https://en.oxforddictionaries.com/definition/berried>

<sup>1018</sup> Nigeria Sea Fisheries (Fishing) Regulations [S.1. 19 of L992.] Undersection 14 (17th December 1992)

immediately release any turtle caught accidentally.<sup>1019</sup> However, IUU fishers do not have regard to these laws and fisheries management plans regarding these categories of fish and thereby pose the greatest danger for sustainability. This state of affairs has been blamed on “weak governance system, corrupt practices by fisheries’ officials, lack of cooperation between countries across the region and a perceived sense of lack of maritime domain awareness.”<sup>1020</sup>

The challenges discussed above stem from the fact that the states lack effective mechanisms for fisheries monitoring, surveillance, control and enforcement to ensure compliance with their conservation and management measures as well as those adopted by sub regional or regional organizations or arrangements.<sup>1021</sup> The FAO Code of Conduct for Responsible Fishing, requires states to have such mechanisms.<sup>1022</sup> Monitoring is used to measure the capacity of fishing fleet.<sup>1023</sup> Control deals with regulatory conditions contained in national fisheries laws, as well as other provisions agreed at the national, sub-regional and regional levels, under which the fishery resources may be exploited.<sup>1024</sup> Surveillance concerns the regulation and monitoring of fishing activities to ensure that national legislation, the terms and conditions of access to fishing, and management measures are enforced. The MCS system involves regulatory measures for access to fishery resources, the obligation to provide information on fishing activities, the boarding of observers and seafarers, the control and monitoring of transshipments, the register of fishing vessels, the marking of vessels, the strengthening of fisheries research and the declaration of entry and exit from the waters under national jurisdiction.<sup>1025</sup>

Some of the states in the region have in their legislation made provision for all the above. Some have had to review their laws or make new ones to bring them in

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<sup>1019</sup> Regulation 16 of the Ghana Fisheries regulation.

<sup>1020</sup> Ifesinachi Okafor-Yarwoo, ‘Illegal, Unreported and Unregulated Fishing, and the Complexities of the Sustainable Development Goals (SDGs) for countries in the Gulf of Guinea,’ (2019) 99 Marine Policy 414-422.

<sup>1021</sup> FAO Code of Conduct for Responsible Fisheries Article 7.1.7

<sup>1022</sup> *ibid*

<sup>1023</sup> *Ibid* Article 7.6.3

<sup>1024</sup> Erik Bergh and Sandy Davies, ‘Fishery Monitoring, Control and Surveillance’ in Kevern Cochrane (ed), *A Fishery Manager's Guidebook - Management Measures and Their Application*, (FAO 2002) 424

<sup>1025</sup> For instance, Equatorial Guinea as part of its MCS obligation passed a law in 2004 regulating fishing activities in its waters and adopted a national plan of surveillance of fisheries activities. In Togo the MCS system can be found in its law of 1998.

compliance with UNCLOS and the FAO Code of Conduct.<sup>1026</sup> Most of the legislation make provision for inspection and boarding of any foreign fishing vessels for the purpose of ensuring compliance with national laws.<sup>1027</sup> Powers are accorded to authorised officials by their fishery or other laws to inspect vessels to determine whether offences have been committed, to stop and board vessels, make arrests and detain them in their ports on suspicion of an offence having been committed.<sup>1028</sup> In such a case, the laws make the presumption that all fish on board have been caught illegally. What is done with these seizures varies in the countries. In Cameroon the law allows for the sale of the catch and holding of the proceeds pending trial.<sup>1029</sup> Some other countries allow release of the vessel on payment of a bond or other security pending judgment of a court.<sup>1030</sup> Some legislation empowers the court to order the confiscation of the vessel, fishing gear and the catch taken as the Ghanaian and Nigerian provisions have.<sup>1031</sup> The states have penalties for illegal fishing involving foreign vessels and local fleet and these are specified in foreign currency for foreign vessels and local currency for local fleet.<sup>1032</sup> Ghana law has a noteworthy provision which rewards any Ghanaian registered vessel for reporting the sighting of an apparently unlicensed or unregistered vessel fishing in the EEZ of Ghana if such a sighting leads to arrest prosecution and conviction of illegal fishers.<sup>1033</sup> However the literature does not show that this law has made any meaningful impact on fisheries management.

#### **4.6. The way forward – Proposals for the effective conservation and management of living marine resources in the Gulf of Guinea**

The solution to the kind of challenges encountered in the Gulf of Guinea region regarding fisheries conservation and management, should be looked at from two perspectives- within national legal framework and within the regional cooperative

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<sup>1026</sup> Gabon is one such country in the region that has recently revised its fisheries legislation with a significant component of the MCS. Others Benin and Côte d'Ivoire drafted new laws. In Gabon MCS policy is implemented by the Directorate General of fisheries and its technical services.

<sup>1027</sup> Fisheries Regulation of Ghana Section 37

<sup>1028</sup> FAO, 'Regional Compendium of West African Fisheries' (CECAF Region)' p.11

<sup>1029</sup> Ordinance 63-72 dated 29 August 1972 Article 7 of

<sup>1030</sup> FAO, 'Regional Compendium of West African Fisheries (CECAF Region)' p.11

<sup>1031</sup> Ghana Fisheries Act, 2002 Act 625, Nigeria Sea Fisheries Act, [1992 No. 71] Section 10

<sup>1032</sup> FAO, 'Regional Compendium of West African Fisheries (CECAF Region)'

<sup>1033</sup> Ghana Fisheries Regulations 2010 (L.I 1968) Section 34

framework. This is important as the national legal framework is important for the successful implementation of the regional framework which is indispensable to conservation and management of the fisheries as a shared resource. This section attempts to proffer solutions to the challenges of the national regulatory framework and those associated with the regional regulatory framework.

## **I. Proposals regarding challenges with national regulatory frameworks for fisheries conservation and management in the Gulf of Guinea**

### **i). Harmonisation of national laws**

Harmonisation of the national fisheries laws and regulations in the region is a prerequisite for the effective conservation and management of the marine living resources of the region. It would be counterproductive if the efforts of some of the states in conservation and management is undermined by the lack of regulation by other states in the region. Harmonisation is needed in the area of sharing fisheries data specifically data on fleet, industrial fish landings and gear. It is also important that all the states have similar laws on fisheries conservation measures. In this regard pair trawling should be banned by the laws of all the countries. Laws on transshipment at sea is also another area of harmonisation states should consider. Trawl cod-end and mesh sizes should be harmonised to conserve fisheries. This harmonisation should be done through the establishment of regional instruments. Even though this has been on the agenda of the regional organisations discussed above, the states have not taken steps to pursue such harmonisation perhaps due to lack of commitment to these organisations.

Harmonisation is indispensable for countries sharing the same stocks, not only for substantive conservation and management measures, but also in the case of methods of implementation and enforcement. The penalty regimes should also be harmonised to prevent illegal fishers from operating in areas with the lowest penalties as well as laws requiring vessel monitoring systems to be installed on fishing vessels. If sub-regional surveillance and enforcement schemes are adopted, it would be advisable to harmonise enforcement and reporting procedures and powers as well.

The states of the region themselves must also collectively have laws that prohibit IUU fishing or support for it by their nationals. They must comply with IPOA-IUU which

requires states to ensure that their nationals do not support or engage in IUU fishing.<sup>1034</sup> Sometimes nationals of member states are masters and crew of vessels which trade in illegally caught fish. These have to be dealt with by states adopting similar laws and also by the RFMO ensuring that its members take appropriate action. State action can be informed by the example of the USA's Lacey Act which makes it unlawful for any person to "import, export, transport, sell, receive, acquire, or purchase ... any fish or wildlife taken, possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law".<sup>1035</sup> This law was used to prosecute many cases of illegal trade in fish in violation of the laws of some Pacific island states.<sup>1036</sup> In the region few states have such laws. Ghana's Fisheries law for example gives the police the power to deal with offences concerning illegally caught fish. However, the provision is not as comprehensive as the USA one and not as effective.<sup>1037</sup> If all the states in the region have similar legislation, it would be difficult for offenders to slip through. In the case of foreign fishing activities, it will no doubt be seen as desirable to harmonise regulatory policies and regulations on a regional and sub-regional level, both in the interests of the coastal countries, with a view to easier enforcement.

Harmonisation of legislation is always a delicate matter insofar as it affects the exercise of sovereign rights of states. Nevertheless, due to recent changes in the law of the sea, it is apparent that several coastal states of the area have decided to make changes in their legislation, to deal with issues of enforcement among other emerging issues in fisheries management. The time seems particularly favourable for harmonisation efforts. The CECAF Project and the Regional Fishery Law Advisory Programme (CECAF region) are ready to offer their assistance to those states in the area who make such a request.

## **ii). Laws on marine protected areas (MPAs)**

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<sup>1034</sup> International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (FAO Rome, 2001) para 18,19

<sup>1035</sup> Lacey Act 18 USC 42-43 16 USC 3371-3378

<sup>1036</sup> Michael Lodge and others, 'Recommended Best Practices for Regional Fisheries Management Organisations: Report of an independent panel to develop a model for improved governance by Regional Fisheries Management Organizations' (Chatham House 2007) 65.

<sup>1037</sup> Section 96 of the Ghana Fisheries Act.

As already discussed, even though UNCLOS and the Fish Stocks Agreement reserves to coastal states, the right to exploit and conserve the marine living resources, states are to cooperate in their protection. With respect to highly migratory and straddling fish stocks, UNFSA Article 7.3 provides that, “In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.” UNFSA Article 7.4 further provides that “If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII.” In determining compatible conservation and management measures, under UNFSA Article 7.4. States are among others to take into account the biological unity and other biological characteristics of the stocks, the respective dependence of the coastal States and States fishing the stocks concerned on the high seas and ensure that measures do not result in harmful impact on the living marine resources as a whole. Additionally, Article 8 of the Convention on Biodiversity (CBD) provides for the establishment of protected areas where special measures need to be taken to conserve biological diversity.

To fulfil the above obligation depends on the appropriate planning and management of fishing activities, within states EEZ and areas beyond. Area-based management tools (ABMTs), such as marine protected areas, and fisheries closures, have been recognized as effective management tools to ensure the sustainability of fish stocks.<sup>1038</sup> The Pacific Remote Islands Marine National Monument discussed above is a good example of conservation and management that has an ecosystem approach that is exemplary. The states in the region need to have an approach that reserves some of the resources in such no-take zone even though they need to exploit the fisheries today, there is room to protect a part of it for future generations and to avoid a complete extinction of some species and others not yet discovered. Legislation in this direction would be important.

In the GOG region, studies have already been conducted on where the mangroves, and other such areas that need protection are.<sup>1039</sup> All that is left is for the states to collectively

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<sup>1038</sup> Area-Based Management - Ocean Governance for Sustainability' (*Ocean Governance for Sustainability*, 2020) <[https://www.oceangov.eu/working\\_groups/area-based-management/](https://www.oceangov.eu/working_groups/area-based-management/)> accessed 28 May 2020.

<sup>1039</sup> Chidi Ibe and Kenneth Sherman, 'Gulf of Guinea Large Marine ecosystem Project: Turning Challenges into Achievements' in Jacqueline Mc Glade and others, *The Gulf of Guinea Large Marine Ecosystem* (Elsevier Science 2002) 33.

decide that they would set them up if their laws provide for it. If not, they need to pass laws that allow for the setting up of such areas to conserve and manage the living resources. It would also be necessary to not only to clearly define the agency responsible for mangrove or other marine protected area management and enforcement, but to also engage them in the strategic planning stage of the process.

The Gulf of Guinea needs to develop MPAs as a tool for conservation and management of living marine resources by making a deliberate effort to establish these MPAs by law in a coordinated fashion both at the national and regional levels. Nationally the states need to have management plans for marine protected areas. The MPAs should be identified and properly demarcated like US and UK areas discussed above. If possible or if there is the need for it some can be designated no -take reserves as part of the general plan for an ecosystem approach to management. Special attention needs to be given in the law to the criteria for designating a site as an MPA like the fact that it is a breeding ground or is on the migratory path of certain species. It would also be necessary to give the MPAs their own specific legal identity and designate a particular national body responsible for overseeing their management. This body should be coordinated with the body overseeing fisheries resources and managed in an integrated way.

It is also important that the fisherfolk be involved in the creation and management of MPAs to ensure success. In this regard, it would be beneficial for the GOG to look to the examples of Tanzania and Kenya respectively where Collaborative Fisheries Management Areas (CFMAs) or Community Conservation Areas (CCAs) are an emerging approach to fisheries management and marine conservation.<sup>1040</sup> This approach was inspired by the concept of Locally Managed Marine Areas (LMMAs) that has developed in the Pacific. This is unique because these two states took the concept and adapted it to their needs. In Kenya the CCAs and in Tanzania the CFMAs connect a network of villages which co-operate through their Beach Management Units (BMUs).<sup>1041</sup> They identify a shared management area, develop and implement a management plan and set of bylaws to improve fisheries sustainability and reef

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<sup>1040</sup> Steve Rocliffe and others, 'Towards A Network of Locally Managed Marine Areas (LMMAs) in the Western Indian Ocean' (2014) 9 PLoS ONE

<sup>1040</sup> *ibid*

<sup>1041</sup> *ibid*

conservation. They used a combination of management tools like permanent, temporary or seasonal closures thereby combining spatial management with other fisheries management.<sup>1042</sup> This kind of cooperation is necessary for the states in the GOG region so as to ensure that they establish an ecologically coherent network of well-managed Marine Protected Areas (MPAs) as envisaged under the Convention on Biological Diversity to which all the states in the region are parties.<sup>1043</sup> The states should have identical laws on MPAs in the region and eventually network them and create a regional management agency for supervising the management of all the MPAs in the region.

A critical component in conservation through the establishment of MPAs is the establishment of a regular source of funding and this should be explored. The Convention on Biological Diversity provides that states “cooperate in providing financial and other support for *in-situ* conservation outlined in subparagraphs (a) to (1) above, particularly to developing countries.”<sup>1044</sup> The GOG may not have to wait for external support. They can find creative ways to ensure funding. Suggestions could be a trust fund for MPAs. The oil and gas sector could be charged to pay into this fund. This is because they are stakeholders as they use the oceans for exploitation of oil and gas and this has an effect on fisheries. Additionally, fishing licenses fees could also be put into the fund.

### **iii). Integrating informal traditional community management rules on conservation and management of fisheries into the formal legal framework**

In most of the Gulf of Guinea, there are informal traditional community management rules on conservation and management of fisheries.<sup>1045</sup> The states in the region usually have customary laws that regulate small scale fisheries in the lagoons, rivers and estuaries. Ghana, Benin, Togo and Cote d’Ivoire are examples. These customary law rules refer to conservation practices such as closed seasons or times around the

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<sup>1042</sup> *ibid*

<sup>1043</sup> Convention on Biological Diversity (adopted 5 June 1992, entry into force 29 December 1993) 1760 UNTS 79 (CBD) art 8

<sup>1044</sup> *Ibid* Article 8 (m).

<sup>1045</sup> Benedict Satia and Alhaji Jallow, ‘West African Coastal Capture Fisheries,’ in Ray Hilborn, Dale Squires, Meryl Williams, Maree Tait (eds), *Handbook of Marine Fisheries Conservation and Management* (Oxford University Press 2010) 262



spawning times of the fishes. During that time the fishers concentrate on other jobs like farming and repairing their nets. The main feature of the customary rules of management is that it is communal based, and a group of people manage the resources on behalf of the whole community.<sup>1046</sup>

These customary rules and practices also include the prohibition of the capture of immature or juvenile fish, restriction of the use of particular fishing gear for example monofilament nets, and prohibition of fishing in some areas considered sacred or identified as spawning breeding or nursery grounds. There is also the observance of a non-fishing day each week which permits fishers to maintain their gear and equipment as well as to rest and undertake social activities. Also included are a total ban on fishing activities for various periods prior to and during annual festivals, ban on the capture of certain species for a period before certain festivals prohibition of the use of chemicals as a means of catching fish, prohibition of the use of magical power in harvesting fish, taboos against eating certain fish species, closed seasons, offering certain fish species a relatively protected environment for breeding spawning and feeding.<sup>1047</sup>

In most of the states in the region, the artisanal fishers do not see themselves as part of the fishers to be regulated and thus one way to enlist their cooperation is to improve management at the community level. In this regard the example of Ghana is pertinent. There has over the years been established unique Community-Based Fisheries Management Committees, that act as the linking mechanism between the traditional and the modern system.<sup>1048</sup> The Committees have constitutions which obligate them to ensure adherence to fisheries laws and develop a management plan for sustainable exploitation of fisheries resources among others. The committees are to draw up a list of by-laws governing fishing activity on their beaches and landing sites and submitting them to their local government structures for ratification.<sup>1049</sup> The by-laws usually contain sections on conservation of the fish stock, sanitation, restriction of children in fishing activities, conduct at the beach, conflicts and their resolution and safety at

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<sup>1046</sup> *ibid*

<sup>1047</sup> *ibid*

<sup>1048</sup> UK Department for International Development, *'Analytical Appendix 2, The Challenges of managing small scale fisheries in West Africa'* (Final Technical Report, Analytical the DFID regarding The Management of Conflict in Tropical Fisheries project R7334, 2004) 249

<sup>1049</sup> *ibid*

sea.<sup>1050</sup> These by-laws are a reflection of the traditional rules in use in the community and thus formalising them provides them with the necessary legitimacy.<sup>1051</sup> The states in the region can emulate this and eventually these community based bodies can cooperate for a more efficient management especially of artisanal fishing.

## **II. Proposals for effective regional cooperation in the conservation and management of fisheries resources**

To solve the challenges of fisheries conservation and management in the region it would necessitate a change in the approach from that which has been used hitherto. It is commendable to note that, there has been a gradual support in the region for the approach of large marine ecosystems (LME) as a tool to manage marine living resources. Currently the Committee of Ministers of the Guinea Current LME project have decided to create an Interim Guinea Current Commission within the framework of the Abidjan Convention, to serve as the legal framework for this ecosystem approach.<sup>1052</sup> The parties are currently in the process of making this Interim Commission permanent. This Commission is envisaged as the implementation vehicle for the strategic actions identified to solve the transboundary challenges of fisheries management in the region.<sup>1053</sup> Meanwhile the Regional Fisheries Bodies and Regional Fisheries Management Organisation discussed in the last section operate in the GCLME without any reference to the Interim Commission. Nevertheless, it is possible that the Commission when fully formed may well hold the key to the effective management of the living resources of the region as discussed below.

## **III. Proposals for the proliferation of RFMOs and RFBs leading to duplication of efforts and resources**

There are several fisheries organisations operating in the region with overlapping mandates to which the states in the region belong, but which have not been effective. One way of dealing with the challenge is establishing one body that has general

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<sup>1050</sup> *ibid*

<sup>1051</sup> *ibid*

<sup>1052</sup> First meeting of the Committee of West and Central African Ministers of the Guinea Current Large Marine Ecosystem Project: The Abuja Declaration 22<sup>nd</sup> September 2006.

<sup>1053</sup> 'Guinea Current Large Marine Ecosystem (GCLME) Transboundary Diagnostic Analysis' (GCLME Regional Coordinating Unit 2006) 76

regulatory power to manage fisheries in the region using the ecosystem approach as a management tool. It also needs to have the power to make binding decisions. This is especially so as there is only one RFMO in the region – ICCAT-and this manages only one species of fish stock-tuna.

Currently, the Interim Guinea Current Commission appears to have the potential to be transformed into a formidable RFMO due to several attributes it intrinsically possesses. One is that all the states in the Gulf of Guinea were one way or the other participants in the projects that finally culminated in its creation. Another is the fact that a great deal of work has already been done in identifying the challenges of fisheries management in the region and its causes as well as the strategic actions that are necessary to remedy these challenges. The foundation has therefore been built for a Fisheries Management body which has an ecosystem focus and involves all the states in the region. The only outstanding action is the political will of the states to take ownership of it, provide funding for its running and make it work to solve the fisheries management problems of the region.

The first step in this process is to properly set it up by law. Currently the legal documents on the transition of the Interim Guinea Current Commission to the Guinea Current Commission have been drafted. These comprise of the draft Founding Treaty, Financial Regulations, Headquarters Agreement, Rules of procedure as well as a Draft Memorandum of Understanding with the Abidjan Convention. The Draft Treaty on the Establishment of the Guinea Current Commission<sup>1054</sup> sets out the Commission's mandate as follows:

*“(a) Providing the institutional framework for the integrated assessment, protection and sustainable use of the marine and coastal environmental and living resources of the Guinea Current Large Marine Ecosystem;*

*(b) Capacity building for the effective implementation of the Abidjan Convention and its Protocol, of the Accra Declaration of 1998 and of the Abuja Declaration of 2006; (c) Serving as a platform for the execution of the NEPAD*

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<sup>1054</sup> See Draft Treaty on the Establishment of the Guinea Current Commission Interim Guinea Current Commission, (Seventh Regional Steering Committee Meeting 30<sup>th</sup> June -1<sup>st</sup> July 2010)

*plan of action concerning the protection and sustainable use of the coastal and marine resource systems of the Guinea Current Large Marine Ecosystem, thereby contributing to the regional realization of the objectives of the World Summit on Sustainable Development;*

*(d) Enhancing the capacity of the Guinea Current coastal countries for the assessment and monitoring of environmental change, resource depletion and for the sustainable use of the shared trans-boundary resource systems;*

*(e) Adopting and implementing regional and sub-regional strategic development and resource use plans based on the integration of the pluri-sectoral interdependencies of land-, water- and marine resource systems at national and regional levels in the Guinea Current coastal region;*

*(f) Enhancing the capacity for effective trans-boundary cooperation in the prevention of and response to natural and man-made disasters affecting the Guinea Current Large Marine Ecosystem;*

*(g) Fostering the cooperation of the Commission and its members with regional and international institutions of technical cooperation, providing for their participation in appropriate programmes of deliberation and in the implementation of national and regional activities in the Guinea Current Large Marine Ecosystem;*

*(h) Promoting and assuring the coherence and harmonization of sectoral and inter-sectoral national policies of development and sustainable use of marine and related natural resources, including with regard to the required legal and other normative instruments;*

*(i) Developing and promoting a regional data processing, information and communication system provided to state and non-state partners including the citizenship of the member countries on the use and management of the marine ecosystem;*

*(j) Establishing and further developing close cooperation with African and other international organizations engaged in the sustainable use of marine and coastal resource systems.*"<sup>1055</sup>

These mandates envisage that the marine resources of the region would be viewed in relation to the ecosystem as a whole. It also addresses one of the challenges of the lack of capacity in the region for assessing stocks. Judging from the various projects and surveys on fisheries that have been implemented, the region has experience in this regard, and this would only be a continuation of what is already underway. With regard to its mandate of fostering cooperation of the Commission and its members with regional and international institutions of technical cooperation, the LME projects already has experience of working with these technical partners and so this mandate also would not pose too much of a challenge. The Commission also envisages its role in the harmonisation of regulations and policies in the region, on fisheries.<sup>1056</sup>

An important part of its mandate which is not emphasised in the other organisations is the dissemination of information on fisheries management to the citizenry in the region.<sup>1057</sup> This is more likely to contribute to the success of management programmes as citizens being more knowledgeable would be more likely to obey fisheries laws and regulations. Cooperation is also further emphasised as it also has the mandate of establishing and further developing close cooperation with African and other international organizations engaged in the sustainable use of marine and coastal resource systems. This may include other fisheries management organisations and bodies as well as other regional organisations with a concern for fisheries like the African Union (AU-IBAR) and ECOWAS. It includes the other LMEs in close proximity with the region namely the Benguela and Canary Current LMEs.

Nevertheless, the proposed Commission's mandates appear too general and lack the necessary focus to deal with the challenges that necessitated its creation in the first

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<sup>1055</sup> Interim Guinea Current Commission Seventh Regional Steering Committee Meeting Accra, Ghana, 30th June- 1st July 2010 Annex 6: Draft Legal Documents on the Transition of IGCC To GCC Co-operation in the Protection and Development of the Guinea Current Large Marine Ecosystem Treaty on the Establishment of the Guinea Current Commission

<sup>1056</sup> *ibid*

<sup>1057</sup> Draft Treaty on the Establishment of the Guinea Current Commission art 2

place. As discussed above the Commission was the culmination of many GOG projects and was envisaged to be the vehicle to implement the strategic action plan to solve the challenges of the region regarding the depletion of fish stocks, habitat destruction and lack of enforcement of fisheries regulations. This can be seen when its mandates are compared with that of the Benguela Current Commission whose mandates are more specific and include, a provision for states to agree on setting harvest levels and sharing arrangements concerning transboundary fishery resources.<sup>1058</sup> It also includes promoting collaboration on monitoring, control and surveillance, including joint activities in the Southern African Development Community region. The Treaty of the proposed Commission would benefit from similar provisions as these are the gaps in conservation and management of fisheries in the region.

Another RFMO, the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean is worthy of emulation. It has a section on procedures for the establishment and implementation of a total allowable catch or total allowable fishing effort for a straddling fishery resource when applied throughout its range.<sup>1059</sup> To facilitate this the Convention makes provision for a Scientific Committee which assesses the status of the straddling resource throughout its range and provides advice to the Commission on setting a total allowable catch.<sup>1060</sup> The IGCC could also emulate this so as to be able to set TACs in the region. To monitor that these quotas are being adhered to by fishers, the IGCC can have an observer programme like the one in the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean.<sup>1061</sup> Under that Convention, the observer programme has independent and impartial observers that are sourced from programmes or service providers accredited by the Commission.<sup>1062</sup> The Convention provides for the programme to be coordinated, to the maximum extent possible, with other regional, sub-

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<sup>1058</sup> The Benguela Current Convention between the Government of the Republic of Angola and the Government of the Republic of Namibia and the Government of South Africa (adopted 18 March 2013 ) art 8 (e) Benguela Current Convention | International Environmental Agreements (IEA) Database Project' (*Iea.uoregon.edu*, 2020) <<https://iea.uoregon.edu/treaty-text/2013-benguelacurrententxt>> accessed 28 May 2020.

<sup>1059</sup> Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean Article (adopted 14 November 2009, entered into force 24 August 2012) 'South Pacific Regional Management Organisation' (*Sprfmo.int*, 2020) <<http://www.sprfmo.int/about/docs/article-36-ratification/>> accessed 28 May 2020 Annex III

<sup>1060</sup> *ibid*

<sup>1061</sup> *Ibid* art 28

<sup>1062</sup> *ibid*

regional and national observer programmes.<sup>1063</sup> If this provision is included in the IGCC draft Treaty, it would be important for ensuring compliance with quotas and preventing bycatch in the region.

The draft treaty makes provision for a platform for fisheries which appears to be a platform to bring together other fisheries organisations and bodies namely: (a) the Atlantic Africa Fisheries Conference,(AAFC) (b) the International Commission for the Conservation of Atlantic Tunas, (ICCAT) (c) the Fishery Committee for the Eastern Central Atlantic,(FCECA) (d) the Fishery Committee of the West Central Gulf of Guinea,(FCWC) (e) the Southeast Atlantic Fisheries Organization, and (f) the Sub-regional Fisheries Commission. This according to the draft treaty is to contribute to regional and sub-regional policies and programmes of action related to the exploitation of fishery and other marine resources by providing an international and inter-institutional deliberative forum for the exchange of information and experience and for addressing policy and operational challenges with regard to fishery and marine resources faced by the Contracting Parties of the Commission, other regional economic and resource-related organizations and by the various sub-regional bodies dealing with fisheries.<sup>1064</sup>

Generally, the platform's main role is to enhance the capacity of the member states in priority areas like stock assessment and fisheries management.<sup>1065</sup> It is also to carry out regular regional assessment surveys for data on fisheries which would provide the scientific basis for management decisions on fisheries as well as keeping under permanent review the state of exploitation of the fisheries resources of the region. The Platform also has the role of promoting, and coordinating research focused at the conservation of marine and coastal living resources and drawing up programmes required for this purpose.<sup>1066</sup> Additionally, it is to establish the scientific basis for regulatory measures leading to the conservation and management of marine living resources. This is by formulating such measures through subsidiary bodies, as required, making appropriate recommendations for the adoption and implementation of these

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<sup>1063</sup> Ibid

<sup>1064</sup> Draft Treaty on the GCC art 10

<sup>1065</sup> Draft Treaty on the GCC Article 2(i)

<sup>1066</sup> Draft Guinea Current Commission Rules of Procedure Rule 19

measures and providing advice for the adoption of regulatory measures by member Governments, or sub-regional arrangements, as appropriate.<sup>1067</sup>

An important aspect of the draft Treaty is that it establishes a Council of Ministers with the power to make legally binding decisions with respect to any matter within the competence of the Commission and make recommendations to the Contracting Parties concerning such instruments which are binding.<sup>1068</sup> This is commendable, but the states might well look to the example of the South Pacific Regional Fisheries Management Organisation (SPRFMO) for the development of their conservation and management measures (CMM). These define the regulatory framework for the SPRFMO fisheries in the High Seas areas of the South Pacific Ocean and are regularly revised.<sup>1069</sup> These measures to be effective must be binding on the parties. The SPRFMO has in place twenty binding CMMs, detailing various provisions such as the application of technical measures or output and input controls, requirements for data collection and reporting, as well as regulations for monitoring, control, surveillance and enforcement.<sup>1070</sup>

Regarding the issue of avoiding duplicity and overlapping functions, it is proposed that since the members of the FCWC and COREP together make up the parties of the Interim Guinea Current Commission, and their mandates are similar to the proposed GCC, it would be more efficient to merge these bodies with the Commission and use their already established capacities to the advantage of the Commission. For instance, the West Africa Task Force set up under FCWC for monitoring can be brought under the Commission for more effective monitoring, control and surveillance activities. Thus, instead of them participating in the platform on fisheries and having only an advisory capacity they can have a more useful role. The resources of these bodies can then be put at the disposal of the Commission and by so doing avoid duplicity and the need to resources too many organisations dealing with the same issues. This approach may depend heavily on the political will of states for its successful implementation. This will require some negotiation between these organisations which in turn would need additional funding. The states in pursuing this objective can assess support from the

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<sup>1067</sup> *ibid*

<sup>1068</sup> Draft Treaty on the GCC Article 8

<sup>1069</sup> 'South Pacific Regional Management Organisation' (*Sprfmo.int*, 2020)

<<http://www.sprfmo.int/measures>> accessed 28 May 2020.

<sup>1070</sup> *ibid*



Assistance fund set up under the Fish stocks Agreement and administered by FAO.<sup>1071</sup> This fund is for ongoing and future negotiations to establish new related organisations and renegotiating founding agreements among others.<sup>1072</sup> The problem is the fund lacks visibility and the procedure to access it is also complex.<sup>1073</sup>

On the important issue of financing the proposed GCC, the draft Financial Regulations<sup>1074</sup> provide that the scale of contributions shall be based on four basic criteria: (a) Size and proportional share of the Exclusive Economic Zone (EEZ) of a Party in relation to the total EEZ of the entire GCLME; (b) Size and proportional share of the population of each Party; (c) Level of GNP of each Party and its proportional share of the gross regional product of the Parties; (d) The Principle of “sovereign equality” which allocates to each sovereign state an equal set of rights and obligations;<sup>1075</sup> A few safeguards have been put in to ensure the payment of contributions by members. Thus, if a member state is twenty- four months in arrears with its contributions it would not be entitled to vote unless it has not paid up due to circumstances beyond its control.<sup>1076</sup> The Commission is to be financed by contributions from its members as well as voluntary contributions from donors. It is envisaged that the full responsibility for the budget of the commission would be incrementally transferred to the member states.<sup>1077</sup> So far funding for the projects leading up to the setting up of the interim commission have been provided by GEF and other development partners. It is envisaged that this would continue at least for a period, as the Financial regulations make provision for payments received by the Commission from international programmes and organisations under the transitional scheme of contributions to be deposited and managed by the Commission in a trust fund.<sup>1078</sup>

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<sup>1071</sup> Agreement Fish stocks Assistance fund part VII

<sup>1072</sup> *ibid*

<sup>1073</sup> Michael Lodge and others, ‘Recommended Best Practices for Regional Fisheries Management Organisations: Report of an independent panel to develop a model for improved governance by Regional Fisheries Management Organizations’ (Chatham House 2007) 98

<sup>1074</sup> Draft Financial Regulations of the GCC art 6

<sup>1075</sup> *ibid*

<sup>1076</sup> Guinea Current Commission Rules of procedure Rule 16

<sup>1077</sup> Draft Financial Regulations of the GCC art 8

<sup>1078</sup> Draft Financial Regulations of the GCC art 9

#### **IV. Proposals to combat lack of compliance and enforcement**

Achieving long term sustainability of fisheries resources depends to a large extent on member states implementing measures agreed by regional fisheries management organisations. Commendably ICCAT has put in place measures for conservation and management albeit those measures concern tuna and tuna like species. For any organisation set up by the states they would have to have similar measures. However, the problem that has plagued ICCAT – that of non-compliance-should be avoided especially if IUU fishing is to be avoided. In this regard the proposed Commission could emulate the example of the SPRFMO, which provides for identifying vessels engaging in IUU fishing activities, and adopting appropriate measures to prevent, deter and eliminate IUU fishing, such as the development of an IUU vessels list, so that owners and operators of vessels engaging in such activities are deprived of the benefits accruing from those activities.<sup>1079</sup>

Regarding compliance it would be prudent to regularly review the performance of the states in complying with measures of the proposed Commission. The examples of NAFO, CCAMLR and WCPFC are important. These have developed systems for evaluating compliance.<sup>1080</sup> Additionally, states can agree on the kind of sanctions to be applied if there is any wilful non-compliance by a member state detected. In this regard the example of SPRFMO is important. The Convention contains a bold provision that provides for sanctions to be applied to discourage violations and deprive offenders of the benefits from illegal activities.<sup>1081</sup>

#### **V. Cooperative non-members**

One way is to bring on board non-members who are cooperative and give them certain rights that bring them benefits to encourage positive action. The example of the WCPFC and the SEAFO Convention are instructive. Both these conventions provide that,

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<sup>1079</sup> Ibid Article 27 (f)

<sup>1080</sup> Lacey Act 18 USC 42-43 16 USC 3371-3378

<sup>1080</sup> Michael Lodge and others, 'Recommended Best Practices for Regional Fisheries Management Organisations: Report of an independent panel to develop a model for improved governance by Regional Fisheries Management Organizations' (Chatham House 2007) 49.

<sup>1081</sup> Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean Article (adopted 14 November 2009, entered into force 24 August 2012) 'South Pacific Regional Management Organisation' (*Sprfmo.int*, 2020) <<http://www.sprfmo.int/about/docs/article-36-ratification/>> accessed 28 May 2020 art 3 (ix)

cooperating members “shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with ... conservation and management measures in respect of the relevant stocks”.<sup>1082</sup> Thus it would be prudent for the states to involve distant water states that fish in the area as well as other African states whose nationals fish in the area. If any of these states’ nationals are involved in IUU fishing diplomatic means can be used to bring to the state’s attention the management measures in place and offer them the opportunity to have benefits as cooperating states.

## VI. Dispute resolution

Regarding the settlement of disputes, the draft treaty of the IGCC provides that in case of a dispute between the states parties as to the interpretation or application of the Treaty, they shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.<sup>1083</sup> If the disputing parties are unable to settle their dispute, an arbitration procedure has been provided for and annexed to the treaty.<sup>1084</sup> Arbitration may be by request addressed by one Contracting Party to another Contracting Party, after which an ad-hoc Dispute Settlement Committee consisting of three members shall be constituted.<sup>1085</sup> This dispute settlement provisions would take precedence over the UNCLOS regime.<sup>1086</sup> They are also very important as disputes regarding fisheries in the EEZ are excluded from the compulsory jurisdiction scope of Part XV.<sup>1087</sup> The language of the draft provides for the Arbitration procedure under the treaty as the only resort where other peaceful means like negotiation has failed. It does not take account of Part XV of UNCLOS and Part VII of the UNFSA on dispute settlement. Other RFMOs make such provisions. The SPRFMO for instance provides that in any case where a dispute is not resolved amicably including referring it to an adhoc expert panel, “the provisions relating to the settlement of disputes set out in Part VIII of the 1995 Agreement shall apply, mutatis mutandis, to any dispute between the Contracting Parties.”<sup>1088</sup> It is made clear that the dispute resolution clause does not

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<sup>1082</sup> *ibid*

<sup>1083</sup> Draft Treaty of IGCC art 18

<sup>1084</sup> Draft Annex to Draft Treaty Establishing the Guinea Current Commission

<sup>1085</sup> *Ibid* art 1

<sup>1086</sup> UNCLOS art 282

<sup>1087</sup> UNCLOS art 297 (3)

<sup>1088</sup> Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean Article (adopted 14 November 2009, entered into force 24 August 2012) 'South Pacific Regional Management Organisation' (*Sprfmo.int*, 2020) <<http://www.sprfmo.int/about/docs/article-36-ratification/>> accessed 28 May 2020.

affect the status of any Contracting Party in relation to the Fish Stock Agreement or UNCLOS.<sup>1089</sup>

There are international standards for settling dispute in RFMOs that the GCC can consider. Under Article 30 (2) of the Fish Stocks Agreement, it is provided that the provisions relating to the settlement of disputes set out in Part XV of the UNCLOS apply *mutatis mutandis* to any dispute between States Parties to the Fish Stocks Agreement. These disputes could concern the “interpretation or application of a sub-regional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention”.<sup>1090</sup>

Another example can be found in the NAFO Convention which provides for disputes concerning adopted measures or objections to them to be considered first by a non-binding ad hoc panel as a matter of urgency. If its recommendations are accepted, they are to be implemented without delay but if not, any party may refer the dispute to a binding settlement procedure, as provided for in paragraph 5. This paragraph applies the binding procedures set out in Part XV of the LOS Convention and Part VIII of UNFSA to disputes in NAFO.<sup>1091</sup> This is a provision to be emulated so that the provisions of UNCLOS and the UNFSA on dispute settlement would still apply to states in the Gulf of Guinea. The treaty of the GCC could also make provision for seeking advisory opinions through the FAO from international courts and tribunals on legal questions in fisheries matters. This is provided for under ITLOS rules which states, “...*The Tribunal may give an advisory opinion on a legal question if an international agreement related to the purposes of the Convention specifically provides for the submission to the Tribunal of a request for such an opinion. 2. A request for an advisory opinion shall be transmitted to the Tribunal by whatever body is authorized by or in accordance with the agreement to make the request to the Tribunal.*”<sup>1092</sup>

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<sup>1089</sup> *ibid* art 34 (3)

<sup>1090</sup> Fish Stocks Agreement art 30 (2)

<sup>1091</sup> Michael Lodge and others, ‘Recommended Best Practices for Regional Fisheries Management Organisations: Report of an independent panel to develop a model for improved governance by Regional Fisheries Management Organizations’ (Chatham House 2007) 80

<sup>1092</sup> ITLOS Rules of the Tribunal (adopted 28 October 1997, amended on 15 March and 21 September 2001 and on 17 March 2009) art 138.

The jurisprudence shows that where there is conflicting jurisdiction, international courts and tribunals would decline jurisdiction in favour of the dispute resolution provisions of the relevant convention. This was the situation in the *Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Award on Jurisdiction and Admissibility*,<sup>1093</sup> where Japan argued that recourse to the arbitral tribunal is excluded because the 1993 Convention on the conservation of Bluefin Tuna provides for a dispute settlement procedure. At the preliminary stage, the International Tribunal on the Law of the Sea (ITLOS) prescribed provisional measures, including catch limits on all three parties. However, an arbitral tribunal which heard the merits, held that it did not have jurisdiction considering the terms of the dispute settlement provisions in the Convention on the Conservation of Southern Bluefin Tuna (CCSBT) agreement.<sup>1094</sup>

## **4.7. Conclusions**

### **4.7.1. Conclusions on challenges of regional fisheries bodies active in the region**

It can be concluded from the above, that all these fisheries organisations active in the region have similar mandates with a few variations. They all seek to solve the problems of the region's fisheries management and conservation issues, but they are each plagued with challenges that prevent them from realising their aims. These include lack of political commitment, resource constraints and states unwillingness or slowness to implement recommendations. The states members of these organisations or bodies do not have the political will nor the resources to implement the mandate of these bodies. Also, the area of competence of some of the organisations include some of the states who choose not to be members thereby undermining coordination efforts of that organisation. This is also coupled with the fact that apart from ICCAT, the organisations are consultative in nature and simply create a forum for state discussions on fisheries matters and do not have the power to take binding decisions.

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<sup>1093</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures, Order of 27 August 1999) ITLOS Reports 1999, 280

<sup>1094</sup> Michael Lodge and others, 'Recommended Best Practices for Regional Fisheries Management Organisations: Report of an independent panel to develop a model for improved governance by Regional Fisheries Management Organizations' (Chatham House 2007) 79

However, the main challenge to conservation and management in the region is Monitoring, Control and Surveillance. It has been established that IUU fishing is one of the major sources of depletion of fish stocks in the area. However, measures that curb this menace are not implemented effectively by the states. There are some efforts but key states like China, EU states and other distant fishing states which operate in the region are not participants in those efforts which then undermine the work of those state willing to deal with the issue. Importantly also, the bodies discussed above, do not incorporate the ecosystem and precautionary approaches adequately. The following section attempts to make recommendations on the way forward drawing on examples from other regions which have had a measure of success in the regulation of marine living resources.

#### **4.7.2. Conclusions on the challenges of fisheries management at the national level in the Gulf of Guinea**

The above discussions show that the main challenges facing the region in terms of fisheries management at the state level are as follows:

- a) There is generally a lack of legislation on fisheries management in some states and even where there is legislation, there are violations which include vessels fishing without a licence/authorisation or with an expired licence/authorisation; fishing with unauthorised or illegal gear (including small mesh size) or methods; fishing in prohibited areas (including in areas reserved to artisanal fisheries); the use of forged documentation in relation to fishing activities; provision of false, inaccurate or incomplete information on catch and fishing activities (knowingly with the intent to deceive); Illegal transshipment of catch (including of by-catch into canoes and sale of fish at sea); trading in illegal fish (knowingly purchasing, selling, importing or exporting fish caught illegally); targeting of unauthorised species (e.g. below minimum size/immature or valuable by-catch) and damage to artisanal gear by industrial fishing vessels or merchant vessels.
- b) There is no harmonisation of measures across the region.
- c) The states also do not have an integrated approach to combat IUU fishing which is rife in the region fuelled by corruption and lack of MCS and enforcement capabilities

- d) There is no coherent approach to effective enforcement and implementation of regulations on fisheries conservation and management where they exist.
- e) Regarding compliance with international obligations the states have generally been unable to fulfil their obligations.
- f) Licensing regimes in the GOG are not efficient enough to regulate fisheries. Corruption and lack of resources to monitor and enforce the law is a factor. This coupled with the fact that TACS are not set to determine sustainable catch levels for vessels that have been licensed to fish in the region.
- g) Regulating the use of destructive fishing gear is a challenge as there is no integrated strategies on law enforcement to identify and punish the use of such gear. There is no harmonisation of legislation regarding what type of gear to be used. Again, there is lack of enforcement capacity to ensure poisonous chemicals are not used in fishing.
- h) Areas - based management measures are not used extensively in the region though they are so important. The legislation does not specify protected areas. They simply give the authorities the general power to declare marine protected areas with no dedicated institutional framework to manage them. The local community is also not involved in their setting up and management. Regarding closed seasons, their effectiveness is undermined by lack of scientific data.

It can be concluded that national legislation in the region covers to a large extent the major aspects of fisheries conservation and management. Nevertheless, these have not solved the regions numerous fisheries management problems as the states do not have robust systems of surveillance for their coast to ensure that fisheries activities are being pursued according to law. None of the states in the region on their own can solve these problems and therefore regional solutions have been attempted in the region. Notable among them is the Interim Guinea Current Commission. What is attractive about this Commission is its ecosystem approach to management. This is an approach that takes account of the region as a whole and fosters cooperation which is indispensable in the management of the resources. At this stage the states need to find focus and instead of participating in too many organisations, decide to set up one strong fisheries management organisation and if possible, merge the others with it and focus on making it work. It would be useful for the states to realise the potential of a strong RFMO and use it to their advantage. It is submitted that there is an urgency about fisheries

management in the region and it is time the states became committed because there is a lot of work to be done, as the fish are being depleted at a fast rate, whilst there is inaction.



## CONCLUSIONS

This thesis has demonstrated the need for the states in the Gulf of Guinea, a semi – enclosed sea, to cooperate at the regional level as required by the international law of the sea. It has explained how this general obligation to cooperate at the regional level has been reflected in the Gulf of Guinea for maritime delimitation, exploitation of non-living marine resources, the protection and preservation of the marine environment from pollution arising out of exploitation and the sustainable management of the marine living resources.

### **I. Summary of findings**

#### **i). Lack of cooperation in the delimitation of maritime boundaries**

The first chapter analysed maritime boundary delimitation in the Gulf of Guinea and demonstrated the importance of cooperation in maritime boundary delimitation in the Gulf of Guinea as mandated by Articles 74(1) and 83(1) of UNCLOS. It emphasised the importance of applying the rules and principles established by international courts and tribunals to facilitate the settlement of their maritime boundaries. It concluded that there is the need for the states to cooperate in the delimitation of their boundaries particularly as the Gulf of Guinea region is a semi enclosed sea according to Articles 122 and 123 of UNCLOS and therefore the states are encouraged to cooperate in the performance of their duties under this Convention which include delimiting their maritime boundaries as well as protecting and preserving the marine environment and managing the fisheries. These duties are better performed in a region with clear jurisdictional boundaries.

It also concluded that the Gulf of Guinea Commission has an important role to play in facilitating cooperation in the region as a forum for consultation in the agreement of their maritime boundaries. However, the states need to resource it to be able to play this role.

#### **ii). Inadequate utilisation of the dispute settlement procedures under UNCLOS and lack of cooperation in the joint exploitation of non-living marine resources**

Chapter Two of the thesis demonstrates how states can cooperate to settle their maritime boundary disputes by using the dispute settlement provisions under UNCLOS. It also found that the obligation of states under Articles 74 (3) and 83 (3) of UNCLOS to make provisional arrangements of a practical nature pending the settlement of their disputes has not been widely implemented in the region and there are too few arrangements of a practical nature in the region in view of the many pending maritime boundaries. Of the two existing joint development agreements in the region, one has been criticised as being corrupt and its main implementing institution unfunded and ineffective. In this regard it was concluded that the Gulf of Guinea Commission could be transformed into a center for technical consultation and support in setting up joint development arrangements and assisting states with ongoing support to ensure that the joint development arrangements work.

### **iii). Inadequate National and Regional Framework for the Protection of the Marine Environment from Pollution arising out of the Exploitation of Oil and Gas**

Regarding the protection of the marine environment from the inevitable risk of pollution due to exploration and exploitation activities, it has been found from the discussion in chapter three that the national framework for addressing every stage of the exploitation process is inadequate. States legislation are not comprehensive and harmonised and so makes it a challenge to deal with issues of pollution in the region in a coherent manner. Due to the transboundary nature of the effects of oil pollution damage to the marine environment, a regional solution is essential. However, the regional framework is inadequate. The Abidjan Convention is the main framework for dealing with pollution from exploitation. Nonetheless the Convention has significant challenges with funding, coordination and limited human resource. Currently it has managed to adopt a Protocol for dealing with offshore oil pollution which also addresses the issues of liability. The Protocol has made provision for states to develop standards and guidelines regarding the assignment of liability. However, this has not yet been done. This puts the region in a precarious position in case of oil pollution events from exploitation activities.

#### **iv). Fragmentation of regional fisheries bodies**

Regarding the exploitation and conservation of the marine living resources, the discussion in chapter four reveals that commendable effort has been made at cooperation and there are many fisheries bodies active in the region with many different mandates with varying degrees of power. An example is ICCAT which can make binding recommendations but others like COREP only act as information sharing bodies. Regarding marine living resources, specifically the management of fisheries, the states have commendably shown a commitment to regional cooperation. However, the main challenge is that this cooperation has so far been conducted in a fragmented fashion. There are several regional bodies with overlapping mandates and regulations operating in the region. This has resulted in the states participating in many regional cooperation efforts in an uncoordinated fashion leading to duplication of efforts and resources.

## **II. Recommendations on the way forward**

International law on exploitation of marine resources has in unequivocal terms promoted the regional approach as important and this thesis has supported this approach by emphasising in each chapter the importance of the regional perspective in dealing with the transboundary challenges of resource management. The recommendation made in this thesis is for the states to allocate, exploit and manage the non-living and living resources of the region in a comprehensive manner through a regional approach which utilises the ecosystem approach as a management tool.

In order for the states in the Gulf of Guinea to derive the maximum benefit from the rich resources of the region, there must be a comprehensive regime of cooperation which takes into account the following: a) the delimitation of the maritime boundaries in the area, in an equitable manner in order for the resources in the region to be allocated; b) disputes must be settled expeditiously and interim arrangements like joint development of the non-living resources actively pursued in a spirit of cooperation ; c) the marine environment should be protected from pollution arising out of exploitation and liability for damage and payment of compensation to victims properly streamlined in a regional instrument; d) the conservation and management of fisheries resources

using the ecosystem approach within a regional cooperative framework using an ecosystem approach.

Regarding delimitation of maritime boundaries, the states are encouraged to use the UNCLOS and the rules and principles developed by international courts and tribunals in the delimitation of the maritime boundaries. In view of the disruptive effect that maritime boundary disputes can have on exploitation of the resources, it has been recommended in chapter two that the states need to shift excessive focus from delimitation to joint exploitation. It has been suggested that more joint development arrangements for the exploitation of hydrocarbons in areas of overlapping claims should be pursued.

Chapter three highlights regional cooperation as imperative for the protection of the marine environment from oil pollution and liability for damage arising therefrom. This requires the development and strengthening of regional agreements on oil pollution from exploitation. It also requires states in the region to have a coherent framework that can implement and enforce the agreements. This means the states need to build capacity in terms of technical, financial and human resource. There is also the need for the states to adopt a comprehensive regional convention on regulating liability and compensation for pollution damage resulting from offshore drilling activities. Already the first steps in this direction have been taken with the adoption of the Offshore Optional Protocol under the Abidjan Convention. It has also been suggested that the states need an institutional framework to coordinate oil pollution activities. Despite all these efforts at the regional level, to adopt rules and regulations regarding liability and compensation for pollution arising out of oil exploitation, these have not been implemented at the national level and there is therefore the need for states to have a harmonised legal framework to address this.

Regarding the challenges with the management of fisheries identified in chapter four, some suggestions have been made to the effect that it is important that the states have one regime to oversee the entire process and to act as an umbrella body to coordinate

the activities of all the relevant organisations in the region. Currently the body that appears to stand in good stead is the Interim Guinea Current Commission. Its potential to perform this function in the region has been highlighted and the only outstanding issue is that the states have the political will to fully establish it and empower it to sustainably manage the fisheries resources of the region.

It has been suggested in chapters two to four that the states in the region need to either set up a new body to perform these cooperative functions or utilise already existing bodies. In this regard the two bodies that have the potential to coordinate these issues in the region are the Gulf of Guinea Commission and the Guinea Current Commission. Whilst the Gulf of Guinea Commission is made up solely of the states in the region, the GCC has a broader base being made up of states beyond the Gulf of Guinea which exploit the fisheries resources in the region. This body is suited to become the umbrella body for the regulation of the exploitation of the resources of the region. It would need to cooperate with the other bodies in the region managing fisheries. The mandates and roles of these bodies need to be renegotiated to avoid overlaps and duplications. Harmonisation of national laws would need to be implemented within this framework for more effectiveness. The protection of fragile habitats that support fisheries is also important and should be done in a framework of cooperation

### **III. Need for further research**

This study has shown the need for regional cooperation in the Gulf of Guinea regarding the allocation, and sustainable exploitation of the resources of the Gulf of Guinea. It has also highlighted the need for the states to strengthen this cooperation through a comprehensive framework for regional cooperation. In this regard the role of two bodies has been explored. These are the Gulf of Guinea Commission and the Guinea Current Commission. The former could be subsumed under the latter and could be more a consultative, administrative and information sharing body especially regarding maritime boundary delimitation and hydrocarbon exploitation. The latter could play a more managerial and coordinating role especially with regard to fisheries management and conservation. With all the efforts being made in the region at cooperation especially regarding the setting up of the Guinea Current Commission, there would be the need to

monitor the future development of these bodies. This could form the basis of future research to assess its conformity with international law and how it is working to fulfil its objective of implementing the strategic action plan for the management of the resources and the protection of the marine environment and fragile ecosystems of the Gulf of Guinea.

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