

AFRICA'S INTEGRATED MARITIME STRATEGY AND THE LAW OF THE SEA

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1 Introduction

The dawn of a new world, ushered in by the wave of decolonisation which swept across Africa in the 1960s, was accompanied by dwindling living marine resources and the sparkles of almost limitless non-living resources, begging to be harvested from the seabed and its subsoil. This conjunction revealed so starkly the limitations and injustices of the law of the sea — which had, to a certain extent, been codified less than a decade earlier — that one of the biggest diplomatic conferences ever convened, the Third United Nations Conference on the Law of the Sea (UNCLOS III), caused a sea change when it adopted the United Nations Convention on the Law of the Sea (LOSC) in 1982.¹ The transformative power of some of the provisions of the Convention, especially Part XI on the international seabed area and the exploitation of its mineral resources, delayed its coming into effect until 1994. Twenty years later, the highest organ of the African Union (AU) adopted the 2050 Africa's Integrated Maritime Strategy (AIMS).²

This paper begins by setting out the background and context of the adoption of AIMS. It then identifies and offers some preliminary thoughts on several facets of the impact that AIMS is meant to have on the law of the sea as it is applied in the waters surrounding the continent. A few concluding remarks are then offered.

2 Background and Context

2.1 *History and Geography*

Africa had no input in the development of the law of the sea during the first 400 years of its development. The continent continues to be negatively impacted by the pernicious effects of traditional international law. One such effect is the fragmentation of the African coasts during the colonisation process.

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¹ 1982 UN Convention on the Law of the Sea.

² The text of AIMS is reproduced in (2016) 1 *Ilwandle Zethu: Journal of Ocean Law and Governance in Africa* 202. It is also available at <http://pages.au.int/maritime/documents/2050-aim-strategy-0> (accessed 9 March 2016).

Indeed, at the height of colonial rule during the two decades preceding the First World War, the western seaboard of Africa belonged to France (along what is today the coast of Morocco), Spain (Western Sahara), France again (Mauritania and Senegal) with an enclave belonging to Great Britain (the Gambia), Portugal (Guinea-Bissau), France (Guinea), Great Britain (Sierra Leone), France (Côte d'Ivoire), Great Britain (Ghana), Germany (Togo), France (Benin), Great Britain (Nigeria), Germany (Cameroon), Spain (Equatorial Guinea), France (Gabon and Congo), Portugal (Cabinda), Belgium (DRC), Portugal (Angola), Germany (Namibia) with a British enclave in Walvis Bay and, finally, Great Britain (South Africa). Offshore, Madeira was a Portuguese territory and the Canary Islands were Spanish territories, while the Cape Verde and Sao Tome e Principe archipelagos gained their independence from Portugal.

The eastern seaboard of the continent belonged to Great Britain (South Africa), Portugal (Mozambique), Germany (Tanzania), Great Britain (Kenya), Italy (Somalia), Great Britain (Somalia), France (Djibouti), Italy (Eritrea), Great Britain (Sudan) and the Ottoman Empire (Egypt). Offshore, the islands were divided between France (Comoros, Madagascar, Reunion as well as a number of islets and reefs) and Great Britain (Mauritius and Seychelles).

Finally, the northern seaboard belonged to France (Morocco, Algeria and Tunisia), Italy (Libya) and the Ottoman Empire (Egypt). The only stretch of coast that did not belong to a colonial power was the 560 km-long coast of Liberia, which had declared its independence in 1847.

This fragmentation has prevented the consolidation, in the post-colonial era, of most parts of a coast which stretches more than 40 000 km around the continent, resulting in a number of coastal states with varying degrees of geographical disadvantage. The two mainland states with the longest coasts, over 3 000 km long, are the products of consolidation processes.³ They are Somalia, which is the product of the union of British Somaliland and Italian Somaliland in 1960, and South Africa, which is the product of the union in 1910 of four British colonies, including the Cape Colony and the Natal Colony along the coast. By contrast, 15 (or 38 per cent) of the 39 African coastal states⁴ have a coast of less than 500 km, with the shortest coasts being those of the Gambia (80 km), Togo (56 km) and the DRC (37 km), although the latter is the second largest state on the continent.⁵

³ Madagascar has the longest coast, which stretches close to 5 000 km.

⁴ For present purposes, Western Sahara is treated as an independent state on the ground that it is a member of the African Union.

⁵ CIA The World Factbook 'Gambia, The' available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ga.html> (accessed 1 March 2016); CIA

The consequences of this fragmentation are compounded by the vagaries of geography along the greater parts of the continent's coast, with the result that many coastal states have comparatively small maritime zones. On the northern seaboard, the African states' maritime zones are competing with those of European island and mainland states in the relatively narrow Mediterranean Sea. To the east, the Red Sea and the Gulf of Aden are even narrower. Further south, the island states are spread out in such a way that they often prevent the full extension of their respective maritime zones and those of their neighbouring mainland states. It is only at the southern tip of the continent and along its south-western coast that there is no obstacle to the extension of the maritime zones. Indeed, South Africa has the continent's largest maritime zones, thanks to the convex shape of its long mainland coast and the Prince Edward Islands.⁶ By contrast, the concave shape of the coast of the Gulf of Guinea and the islands which form part of the territory of Equatorial Guinea and Sao Tome e Principe combine to produce maritime zones greatly disproportionate to the size of the coastal states. Islands further limit the extension of the maritime zones off the west and north-west coast of the continent.

2.2 *Development of the Law of the Sea*

The colonial powers were well aware of the strategic imperative of retaining control of the seas and made no attempt to develop meaningful maritime expertise and industries in Africa. The state of subjugation in which most of the continent remained when UNCLOS I and UNCLOS II were convened, explains why few African voices were heard during those events⁷ and why comparatively few African states ratified the four 1958 Geneva conventions.⁸ By contrast, after the wave of decolonisation during the early 1960s, African diplomats and international law scholars immediately added their voices to those of former colonial territories on

The World Factbook 'Togo' available at <https://www.cia.gov/library/publications/the-world-factbook/geos/to.html> (accessed 1 March 2016); and CIA The World Factbook 'Congo, Democratic Republic of the' available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html> (accessed 1 March 2016).

⁶ The exclusive economic zone (EEZ) of South Africa is more than 1,5 million km², that is to say almost 12 per cent of the combined African EEZs.

⁷ On South Africa's input, see P Vrancken 'The International Law of the Sea in South Africa' in E de Wet, H Hestermeyer and R Wolfrum (eds) *The Implementation of International Law in Germany and South Africa* (2015) 144–147.

⁸ The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas; the 1958 Convention on the Continental Shelf; the 1958 Convention on the High Seas; and the 1958 Convention on the Territorial Sea and the Contiguous Zone.

other continents, who were calling for a reform of the international legal order.⁹ Those efforts continued during the decade of negotiations at UNCLOS III,¹⁰ despite the fact that, at domestic level, 'a good number of African states had started experiencing internal strife as the consensus that supported the struggle for independence was adrift in the face of socio-economic difficulties and unaccountable governance'.¹¹

No African state voted against or abstained from voting when LOSC was adopted. In the ensuing years, Africa made by far the greatest contribution to the coming into effect of LOSC in terms of ratifications. Indeed, by the end of 1992, 26 (or 48 per cent) of the then 54 African states had ratified LOSC,¹² and those states constituted 50 per cent of the 52 states¹³ which had ratified the Convention up to that date.¹⁴ Today, 47 (or 85 per cent) of the 55 African states are party to LOSC, of which 36 are coastal states¹⁵ and 11 are landlocked states,¹⁶ constituting 28 per cent of the 167 ratifications at the end of 2015 — a figure which corresponds exactly to the proportion of African states among the members of the UN.

The number of African states that have ratified the Agreement Relating to the Implementation of Part XI of LOSC¹⁷ is only marginally

⁹ See, eg, NS Rembe *Africa and the International Law of the Sea: A Study of the Contribution of the African States to the Third United Nations Conference on the Law of the Sea* (1980) 9. By the time the unsuccessful UNCLOS II was held from 17 March to 26 April 1960, two more African states had gained independence: Cameroon (1 January 1960) and Guinea (1958).

¹⁰ See, eg, KG Adar *African States in UNCLOS III: Interests, Prospects and Obstacles* (1983); TO Akintoba *African States and Contemporary International Law. A Case Study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone* (1996).

¹¹ M Tsamenyi & K-D Ali 'African States and the Law of the Sea Convention: Have the Benefits Been Realized?' (2012) 26 *Ocean Yearbook* 113 114.

¹² Angola, Botswana, Cameroon, Cape Verde, Côte d'Ivoire, the DRC, Djibouti, Egypt, the Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Mali, Namibia, Nigeria, Sao Tome e Principe, Senegal, Seychelles, Somalia, Sudan, Tanzania, Togo, Tunisia, Uganda and Zambia.

¹³ For present purposes, the term 'state' includes any entity entitled to become a party to LOSC in terms of art 306 of LOSC.

¹⁴ This compares with 14 Latin American and Caribbean states (or 27 per cent), 11 Asian states (or 21 per cent), 1 Western European state (or 2 per cent) and no Eastern European state. Yugoslavia was the 29th state to ratify, but has since ceased to exist.

¹⁵ Or 93 per cent of all African coastal states. Eritrea, Libya and Western Sahara are not party to LOSC.

¹⁶ Or 69 per cent of all African landlocked states. Burundi, the Central African Republic, Ethiopia, Rwanda and South Sudan are not party to LOSC.

¹⁷ 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982.

lower than in the case of LOSC,¹⁸ but much higher than with regard to the 1995 Fish Stocks Agreement.¹⁹ African states' support for other ocean-related international instruments is also generally lower than in the case of states located on other continents.²⁰

2.3 *The OAU and the Law of the Sea*

At continental level, article II(1) of the Charter of the Organisation of African Unity (OAU),²¹ which stated the purposes of the organisation, made no reference to maritime matters. That is not to say that the OAU was entirely unconcerned by maritime matters during the first four decades of its existence. For instance, the Council of Ministers adopted a resolution on the law of the sea just before UNCLOS III began,²² in which it was lamented that the law of the sea in force at the time did 'not take into account the interests of the African countries'.²³ It was also recommended that an African declaration reflecting the harmonised viewpoints of the member states be drafted.²⁴ Two years later, the Council adopted the 1965 Declaration of the Organisation of African Unity on the Issues of the Law of the Sea,²⁵ which set out the position of African states on a wide range of issues, including the following: the exclusive-economic-zone (EEZ) concept;²⁶ the right of access to and from the sea by landlocked states²⁷ and the latter's right to a share of the living resources of neighbouring states' EEZs;²⁸ the baselines of archipelagic

¹⁸ Thirty-six African states are party to the Agreement (that is to say 24 per cent of all state parties). It is therefore debatable whether the number of African ratifications is low and possibly 'indicative of the fact that most African states prefer the original regime of Part XI for the seabed set out when LOSC was adopted in 1982 to the modified version'. See, in this regard, Tsamenyi & Ali (note 11 above) 130.

¹⁹ 1995 Agreement for the Implementation of the Provisions of UNCLOS Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Only Mauritius and Senegal ratified in 1997; Namibia and the Seychelles in 1998; South Africa in 2003; Kenya in 2004; Guinea and Liberia in 2005; Mozambique in 2008; Nigeria in 2009; and Morocco in 2012.

²⁰ See, further, P Vrancken 'UNCLOS at 30: Africa at 50' in G Xue & A White (eds) *30 Years of UNCLOS (1982–2012): Progress and Prospects* (2013) 107.

²¹ 1963 Charter of the Organisation of African Unity.

²² OAU Doc CM/Res 289 (XIX) 1972 available at http://www.au.int/en/sites/default/files/COUNCIL_EN_5_12_JUNE_1972_COUNCIL_MINISTERS_NINETEENTH_ORDINARY_SESSION.pdf (accessed 1 March 2016).

²³ Id preamble para 3.

²⁴ Ibid.

²⁵ OAU Doc A/CONF62/33 1974 (UN *UNCLOS III Official Records* (1974) III 63–65).

²⁶ Id paras 6–10.

²⁷ Id para 2.

²⁸ Id para 9.

states;²⁹ a regional approach to the development, management and protection of marine resources;³⁰ fishing activities in the high seas;³¹ the training and assistance of African personnel in all aspects of marine science and technology;³² the right to carry out scientific research;³³ the obligation to prevent and control pollution of the marine environment;³⁴ as well as the principle of the common heritage of humankind and its application to the seabed, ocean floor and subsoil beyond the coastal states' continental shelves.³⁵

A meeting of the African Intergovernmental Group of Experts on Aspects of Application of LOSC was convened two years after the adoption of LOSC in 1984. However, progress within the continent was relatively slow and 'closely related to the pace of economic and democratic change'.³⁶ It is only in 1991 that the Treaty Establishing the African Economic Community³⁷ acknowledged maritime matters in three instances when, in a short chapter covering the broad scope of transport, communications and tourism, it placed a duty on member states to harmonise their policies on maritime transport;³⁸ to undertake to progressively harmonise their rules and regulations relating to maritime transport;³⁹ and to encourage the establishment of community and African multinational enterprises in that field.⁴⁰ Three years later,

²⁹ Id paras 4–5.

³⁰ Id para 11.

³¹ Id para 12.

³² Id para 13.

³³ Id para 14.

³⁴ Id para 15.

³⁵ Id paras 18–22.

³⁶ B Kwiatkowska 'Ocean Affairs and the Law of the Sea in Africa: Towards the 21st Century' (1993) 17 *Marine Policy* 11 12.

³⁷ (1991) 30 ILM 1241. The Community was 'an integral part of the OAU' (art 98(1) of the Treaty). The AU Constitutive Act does not clarify the relationship between the AEC and the AU. The only provision that directly deals with the AEC is art 33(2), which provides that the provisions of the Constitutive Act 'shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community'. Nevertheless, there is no doubt that the AEC 'today forms the economic wing of the African Union'. See, in this regard, RN Kouassi 'The Itinerary of the African Integration Process: An Overview of the Historical Landmarks' (2007) 1 *African Integration Review* 1 6. Moreover, 'the functions of the AEC institutions have been taken over by the coordinate organs of the AU'. See RF Oppong *Legal Aspects of Economic Integration in Africa* (2011) 22.

³⁸ Treaty Establishing the African Economic Community, art 61(2)(c)(i).

³⁹ Id art 61(1)(c).

⁴⁰ Id art 62(1). In terms of art 62(2), '[t]he expression "Community and multinational enterprises" and the legal status thereof [are] as defined in the' 1996 Protocol on Transport, Communications and Meteorology to the SADC Treaty, in accordance

African states adopted the 1994 African Maritime Transport Charter,⁴¹ which, however, has not yet come into effect.⁴²

2.4 *The AU and the Law of the Sea*

The Constitutive Act of the AU,⁴³ adopted in 2000, does not refer directly to maritime matters. What the Constitutive Act does, is to lament the fact that the scourge of colonialism had, by the turn of the millennium, too often been replaced by that of internal conflicts that constituted 'a major impediment to the socio-economic development of the continent' and made it a priority 'to promote peace, security and stability as a prerequisite for the implementation of [Africa's] development and integration agenda'.⁴⁴ Some of the reasons for this state of affairs is that state structures are too often either privatised by small ruling elites, are dysfunctional or even sometimes inexistent *de facto*.⁴⁵ The resulting power vacuums are filled by foreign states relying either on their own armies or on mercenaries, as well as predatory foreign economic actors and criminal groups of varying degrees of sophistication.⁴⁶

This is not to say that the AU institutions do not have competences in ocean-related matters. In practice, their ocean-related activities have focussed primarily, but not exclusively, on maritime security issues. For instance, the Assembly of the Union has repeatedly, since 2009, 'expresse[d] its serious concern at the mounting insecurity in the maritime spaces around Africa, and Somalia in particular, and strongly condemne[d] all illegal activities in these regions, including piracy, illegal fishing and dumping of toxic waste'.⁴⁷ The Assembly also

with the provisions of which the member states undertake to co-operate in terms of art 66.

⁴¹ See L Savadogo 'La Charte Africaine des Transports Maritimes: Principes, Règles et Techniques' in TM Ndiaye & R Wolfrum (eds) *Law of the Sea, Environmental Law and Settlement of Disputes* (2007) 545.

⁴² By the end of its existence, the OAU placed coastal and marine issues higher on its agenda. See, for example, the decision on an African process for the development and protection of the marine and coastal environment in Africa (OAU Doc AHG/Dec. 181 (XXXVIII) 2001) available at http://www.au2002.gov.za/docs/summit_council/oaudec1.htm#181 (accessed 1 March 2016)).

⁴³ 2000 Constitutive Act of the African Union.

⁴⁴ Id preamble para 9.

⁴⁵ See HA Strydom 'Peace and Security under the African Union' (2003) 28 *South African Yearbook of International Law* 59 79–81.

⁴⁶ See M Schoeman & B Haefele 'Organised Crime at Sea: Lessons Learned from the Choizil Hijacking' (2012) 25 *Acta Criminologica: Southern African Journal of Criminology* 25–36; HA Strydom & S du Toit 'Transnational Crime: The Southern African Response' (1998) 23 *South African Yearbook of International Law* 116.

⁴⁷ 'Decision to Combat the Payment of Ransom to Terrorist Groups' (AU Doc

underscore[d] the need for Africa to have an effective instrument to help countries of the continent to protect its own regional waters and economies and to put an end to the illegal exploitation of the resources and organizing the process of its exploitation for the interest of its own inhabitants.⁴⁸

As far as the AU is concerned, the Executive Council had already, in 2003, adopted its first decision on maritime security in Africa.⁴⁹ Four years later, the first AU conference of ministers responsible for maritime transport agreed that the 1994 African Maritime Transport Charter required revision and updating. As a result, the Revised African Maritime Transport Charter was adopted in Durban in 2009.⁵⁰ The same year, the AU Assembly called upon the AU Commission 'to develop a comprehensive and coherent [ocean] strategy'.⁵¹ AIMS was subsequently adopted, first at the end of 2012 by the African ministers responsible for maritime-related affairs,⁵² and then at the beginning of 2014 by the Assembly of

Assembly/AU/Dec.256 (XIII) 2009) available at http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf (accessed 1 March 2016) para 18.

⁴⁸ 'Decision on the Establishment of the African Agency for the Protection of Territorial and Economic Waters of African Countries' (AU Doc Assembly/AU/Dec.259 (XIII) 2009) available at http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf (accessed 1 March 2016) para 2. In para 3, the Assembly decided, in response to a proposal by Libya, to include the functions of the African Agency in the functions of the African Union Authority, in order to protect regional waters and the economies of African countries. The African Union Authority is to succeed to the AU Commission (see 'Decision on the Transformation of the African Union Commission into the African Union Authority' (AU Doc Assembly/AU/Dec.263 (XIII) 2009) available at http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf (accessed 1 March 2016).

⁴⁹ AU Doc EX/CL/Dec.60 (III) 2003 available at http://www.au.int/en/sites/default/files/decisions/9642-ex_cl_dec_20_-74_iii_e_0.pdf (accessed 4 March 2016).

⁵⁰ The text of the Charter, which has not yet come into effect, is available at http://www.au.int/en/sites/default/files/treaties/7797-file-revised_maritime_transport_en_original.pdf (accessed 1 March 2016).

⁵¹ Para 18 of Decision 252 (XIII) (AU Doc Assembly/AU/Dec.252(XIII) 2009) available at http://www.au.int/en/sites/default/files/decisions/9560-assembly_en_1_3_july_2009_auc_thirteenth_ordinary_session_decisions_declarations_message_congratulations_motion_0.pdf (accessed 20 January 2016).

⁵² Addis Ababa Declaration on the 2050 Africa's Integrated Maritime Strategy (AU Doc DECL/M/II/CAMRMRA/2012 2012) available at [http://pages.au.int/sites/default/files/Declaration%20\(Eng\).pdf](http://pages.au.int/sites/default/files/Declaration%20(Eng).pdf) (accessed 10 October 2013).

the AU.⁵³

The adoption of AIMS marks a sea change in the AU and its member states' collective relationship with the marine spaces that surround the continent and that AIMS refers to as 'Africa's maritime domain' (AMD).⁵⁴ The major impact of AIMS on the continent's development is illustrated by the fact that 'over 90% of Africa's imports and exports [are] conducted by sea'.⁵⁵ The network of sea lanes around the continent is therefore of enormous importance for the security and prosperity of African states.⁵⁶ In addition, 'fish makes a vital contribution to the food and nutritional security of over 200 million Africans and provides income for over 10 million',⁵⁷ over and above 'the numerous vessels, ports, shipyards, and support industries [which also] provide thousands of jobs for Africans'.⁵⁸

In this context, AIMS is 'a tool to address Africa's maritime challenges for sustainable development and competitiveness'⁵⁹ and, in particular, to urgently 'develop a sustainable "blue economy" initiative...that improves [the] well-being [of African citizens] while significantly reducing marine environmental risks as well as ecological and biodiversity deficiencies'.⁶⁰ Unfortunately, the vision of 'developing a sustainable thriving blue economy in a secure and environmentally sustainable manner'⁶¹ is impaired by 'a broad array of real and potential threats' and vulnerabilities,⁶² among which AIMS mentions violent transnational-organised environmental and fisheries crimes;⁶³ natural disasters, marine environmental degradation and climate change;⁶⁴ the maintenance and protection of strategic communications systems;⁶⁵ the '[l]ack of and/or poorly maintained aids to navigation and modern hydrographic surveys,

⁵³ 'Decision on the Adoption and Implementation of the 2050 Africa's Integrated Maritime Strategy' (2050 AIM Strategy) (AU Doc Assembly/AU/Dec.496(XXII) 2014) available at <http://www.au.int/en/decisions/decisions-and-recommendation-twenty-fourth-ordinary-session-executive-council> (accessed 1 March 2016).

⁵⁴ See para 1 of AIMS' executive summary.

⁵⁵ Para 2 of AIMS.

⁵⁶ Id para 3.

⁵⁷ Id para 2.

⁵⁸ Id para 3.

⁵⁹ Id para 11.

⁶⁰ Id para 8.

⁶¹ Id para 18.

⁶² Id para 15.

⁶³ Id para 16(i)–(ii).

⁶⁴ Id para 16(iii).

⁶⁵ Id para 16(iv).

up-to-date nautical charts and maritime safety information in a number of AU Member states';⁶⁶ and a '[v]ulnerable legal framework'.⁶⁷

3 The Impact of AIMS

3.1 Introduction

One way in which AIMS has an impact on LOSC, is that AIMS assumes that 'all related binding legal instruments are ratified (or under consideration for ratification)'.⁶⁸ This increases the pressure on the few African states that are not yet party to LOSC (and its related instruments),⁶⁹ to take the necessary steps to ratify LOSC and other relevant instruments. AIMS goes one step further when it assumes that the relevant international instruments are not only ratified, but domesticated,⁷⁰ a process during which AIMS expects member states to harmonise their legal and regulatory regimes in a co-ordinated manner.⁷¹ There is undoubtedly room for harmonisation in the way in which the provisions of LOSC are incorporated into the legal systems of African states. Indeed, there are wide differences between national legislation such as, on the one hand, the Maritime Zones Act, 1999 (Act 2 of 1999) of Seychelles and, on the other hand, the Maritime Zones Act 15 of 1994 of South Africa read with the Marine Traffic Act 2 of 1981.

In fact, AIMS goes as far as to point out that 'innovative solutions and careful management systems' are required to ensure 'the implementation of national and international regulations and instruments'.⁷² This is no easy task. For instance, several African states have not yet complied with their obligation under article 16(2) of LOSC to deposit with the UN Secretary-General a copy of their chart(s) showing the baselines for measuring the breadth of their territorial sea as determined in accordance with articles 7, 9 and 10 (or the limits derived therefrom) or, alternatively, their list(s) of geographical coordinates of points, specifying the geodetic datum. Likewise, the delimitation of maritime zones between adjacent and opposite states in terms of articles 15, 74 and 83 of LOSC is still outstanding in the majority of cases.⁷³ AIMS indicates the AU Border

⁶⁶ Id para 16(vi).

⁶⁷ Id para 16(v).

⁶⁸ Id para 12.

⁶⁹ See notes 13 and 14 above for states that are party to LOSC.

⁷⁰ Para 12 of AIMS.

⁷¹ Id para 24(e); see, also, para 60.

⁷² Id para 4.

⁷³ As far as Africa's eastern seaboard is concerned, see SY Ntola & P Vrancken 'The Delimitation of Maritime Boundaries on Africa's Eastern Seaboard' (2016) 1 *Ilwandle Zethu: Journal of Ocean Law and Governance in Africa* 54.

Programme as the continent's vehicle to address these issues.⁷⁴ The latter was implemented by the 2009 Pan African Conference on Maritime Boundaries and the Continental Shelf, which resolved that member states should expedite the delimitation of maritime boundaries and co-operate with each other to acquire up-to-date data to facilitate the accurate delimitation of their maritime spaces.⁷⁵

The need to delimit maritime boundaries between African states would be lessened to some extent by the establishment of a Combined Exclusive Maritime Zone of Africa (CEMZA), which is one of the strategic objectives of AIMS.⁷⁶ AIMS defines CEMZA as 'a common African maritime space without barriers'.⁷⁷ It is not entirely clear what this concept entails from a legal perspective. There is no indication in AIMS that CEMZA is meant to replace the existing maritime zones of the mainland and island states, or to have any impact on the limits of those zones. The limits of CEMZA are themselves still to be defined by 'a dedicated Strategic Special Task Force'.⁷⁸ Unfortunately, AIMS provides little guidance in undertaking that task.

⁷⁴ Para 58 of AIMS. Following a 2007 decision of the AU Assembly of Heads of State and Government encouraging the AU Commission to pursue its efforts towards the structural prevention of conflicts, especially through the implementation of the AU Border Programme, the Conference of African Ministers in Charge of Border Issues then adopted the 2007 Declaration on the African Union Border Programme and its Implementation Modalities. The Declaration was endorsed by the AU Executive Council in 2009. For the 2007 decision, see the 'Decision on the Activities of the Peace and Security Council of the African Union and the State of Peace and Security in Africa' (AU Doc AU/Dec.145(VIII) (2007)) available at http://www.au.int/en/sites/default/files/decisions/9556-assembly_en_29_30_january_2007_auc_the_african_union_eighth_ordinary_session.pdf (accessed 20 January 2016) 18. For the 2007 Declaration, see the AU's 'Declaration on the African Union Border Programme and its Implementation Modalities as adopted by the Conference of African Ministers in Charge of Border Issues' (7 June 2007, Addis Ababa, Ethiopia) available at <http://www.peaceau.org/uploads/border-issues.pdf> (accessed 20 January 2016). For the 2009 decision, see the 'Decision on the Report of the Commission on the Second Conference of African Ministers in Charge of Border Issues' (AU Doc EX.CL/585(XVIII) (2009)) available at http://www.au.int/en/sites/default/files/decisions/9631-council_en_26_30_january_2009_executive_council_fourteenth_ordinary_session.pdf (accessed 20 January 2016) 2.

⁷⁵ See AU 'Conclusion: Pan-African Conference on Maritime Boundaries and the Continental Shelf for the Implementation of the African Union Border Programme' (November 2009) available at <http://www.peaceau.org/uploads/conclusions-accra-eng.pdf> (accessed 4 March 2016).

⁷⁶ Para 21(i) of AIMS.

⁷⁷ Id para 30.

⁷⁸ Id para 29.

3.2 *Intra-African Trade*

One of the aims of CEMZA is to boost intra-African trade by ‘eliminating or simplifying administrative procedures in intra-AU maritime transport’, thereby making trade more attractive, more efficient and more competitive.⁷⁹ Any developments in this regard will have to take into account the launch in June 2015 of the Tripartite Free Trade Area between the Common Market for Eastern and Southern Africa, the Southern African Development Community and the East African Community, as well as the outcome of the negotiations for the establishment of a Continental Free Trade Area, which was also launched in June 2015.⁸⁰

To achieve this goal, it is not necessary to interfere with the existing maritime zones and the applicable legal regimes any more so than with the land territories and the legal regimes applicable to them. In other words, the maritime zones and borders would remain, but they would be deemed not to exist for trade purposes. As a result, from an administrative point of view, there would be no difference between the movement of goods from one port to another within the same state, and the movement of goods from a port in one African state to a port in another African state.

3.3 *Internal Market for Maritime Transport and Other Services*

A related aim of CEMZA is to ‘contribute to the integration of the internal market for intra-AU maritime transport and services’.⁸¹ Once again, in order to establish an internal market for land transport and other services, it is not necessary to interfere with the existing maritime zones and the applicable legal regimes. In other words, the maritime zones and borders would remain, but they would be deemed not to exist for the purposes of providing the services. As a result, maritime transport and other service providers would be free to provide their services anywhere within the AU. This raises the question of what is meant by ‘intra-AU maritime transport and services’.

A narrow interpretation of ‘intra-AU’ would limit the geographical component of the AU territory to the internal, archipelagic and territorial waters of the member states. In that case, the freedom of maritime transport and other services would be limited to services provided

⁷⁹ Id para 30.

⁸⁰ See para 3 of the 2015 AU Assembly ‘Decision on the Launch of Continental Free Trade Area Negotiations’ (AU Doc Assembly/AU/Dec.569 (XXV) (2015)) available at <http://www.au.int/en/decisions/decisions-declarations-and-resolution-assembly-union-twenty-fifth-ordinary-session> (accessed 4 March 2016).

⁸¹ Para 30 of AIMS.

landward of the outer limits of the member states' territorial seas, because it is at those limits that the coastal states' territories end as far as international law is concerned. That would mean, for instance, that the carriage of goods or passengers would be open to any African service provider only when the journey takes place entirely within the internal, archipelagic and/or territorial waters of one or more member states.⁸²

In contrast, a broader interpretation of the term would expand the geographical component of the AU territory to include — over and above the internal, archipelagic and territorial waters of the member states — their EEZs and outer continental shelves. Such an extension would be based on the fact that, although the EEZ and any outer continental shelf of a coastal state are not part of its territory, that state nevertheless has sovereign rights and jurisdiction as well as other rights and duties in those areas.⁸³ In that case, the freedom of maritime transport and other services would extend to services provided up to 200 nautical miles (nm) from the baselines of the member states, and even further with regard to the seabed and subsoil when the coastal state has a valid title to an outer continental shelf. That would mean, for instance, that the carriage of goods or passengers would be open to any African service provider when the journey takes place entirely within the internal waters, archipelagic waters, territorial waters and/or EEZ of one or more member states.⁸⁴ Furthermore, the provision of services related to the prospecting, exploration and exploitation of marine resources within the EEZ or outer continental shelf of an African coastal state would be open to any African service provider.

3.4 *Protection of the Marine Environment*

Another aim of CEMZA is to 'do more to protect the environment'.⁸⁵ To that extent, AIMS should also have a positive impact on the fulfilment by African states of their obligations with regard to the protection and preservation of the marine environment in terms of Part XII of LOSC.⁸⁶ The extent of that impact would depend on whether a narrow or broad approach of the geographical extent of the zone is adopted.

It would make little sense for a narrow approach to be adopted in the light of the fact that the coastal states' environmental threats and vulnerabilities, as well as their international obligations, extend far beyond the outer limits of the territorial seas into the high seas and the

⁸² Art 2(1) of LOSC.

⁸³ Id arts 56(1) and 77(1).

⁸⁴ Id art 2(1).

⁸⁵ Para 30 of AIMS.

⁸⁶ Arts 192–237 of LOSC.

International Seabed Area.⁸⁷ There is certainly no indication that AIMS' recognition that 'Africa depends on environmentally friendly maritime domain and self-sustaining biological systems that include many kinds of organisms',⁸⁸ relates only to the internal, archipelagic and territorial waters of the member states. In addition, the 1992 Convention on Biological Diversity,⁸⁹ of which almost all the AU member states are party,⁹⁰ does apply beyond the territorial sea.⁹¹

A broad approach is also called for with regard to the development of mechanisms 'to detect and prosecute cases of dumping of toxic waste in the AMD' and to 'support the NEPAD Joint Implementation Mechanism of the Nairobi⁹² and Abidjan⁹³ Conventions in the implementation of the marine and coastal environment component of the NEPAD'.⁹⁴ Both instruments do indeed apply beyond the outer limits of the territorial seas of the parties.⁹⁵ In addition, 'toxic waste dumping and [the] discharge of oil' are highlighted by AIMS as one of the major challenges that Africa is confronted with.⁹⁶ As a result, one of AIMS' strategic objectives is to protect the population as well as the 'AMD heritage, assets and critical infrastructure from [the] dumping of toxic and nuclear waste'.⁹⁷ To 'allow

⁸⁷ See, for example, id art 142(3).

⁸⁸ Para 82 of AIMS.

⁸⁹ The 1992 UN Convention on Biological Diversity.

⁹⁰ The exceptions are South Sudan and Western Sahara.

⁹¹ Art 4 of the 1992 Convention on Biological Diversity.

⁹² The Convention was adopted in 1985 and renamed in 2010. The text of the 2010 Amended Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean (Formerly the Eastern African Region) and related protocols are available at http://www.unep.org/NairobiConvention/docs/English_Nairobi_Convention_Text.pdf (accessed 20 January 2016). For purposes of this paper this convention is referred to as the Amended Nairobi Convention.

⁹³ The text of the 1981 Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region is available at http://abidjanconvention.org/index.php?option=com_content&view=article&id=100&Itemid=200&lang=en (accessed 20 January 2016). For purposes of this paper, this convention is referred to as the Abidjan Convention.

⁹⁴ Para 65 of AIMS. See UN Environment Programme 'Introducing the Joint Conference of Parties for the Abidjan and Nairobi Conventions' (September 2007) available at http://www.unep.org/NairobiConvention/docs/ANNEX1_INTRODUCTION_JOINTCOP.pdf (accessed 4 March 2016).

⁹⁵ See art 1 of the Abidjan Convention (note 93 above) and art 1 of the Amended Nairobi Convention (note 92 above).

⁹⁶ Paras 7(i) and 16(ii) of AIMS.

⁹⁷ Id para 21(viii). AIMS insists, in para 57, that '[t]he handling and shipment of hazardous materials and dangerous goods...requires [sic] AU Member States' compliance with regulatory requirements, especially the International Maritime Dangerous Goods (IMDG) Code'. See chap VII of the 1974 International

for the convergence of existing and future monitoring and tracking systems used for' the protection of the marine environment, including fulfilment by African states of their obligations in terms of articles 210 and 216 of LOSC, AIMS foresees the AU 'set[ting] out guiding principles for the development of a common information sharing environment for the CEMZA'.⁹⁸

3.5 *Conservation and Utilisation of Living Resources*

For the purposes of 'fisheries control', CEMZA also aims for the sharing of information to a greater extent.⁹⁹ As indicated above, the exploitation of marine living resources plays a critical role in the lives of millions of Africans and the economy of the African coastal states. The fulfilment by African states of their obligations to conserve marine living resources in terms of article 61 of LOSC is therefore as important as fulfilling their obligations to optimally utilise those resources in terms of article 62.

One way in which CEMZA aims to contribute to the monitoring, compliance and enforcement of fisheries activities, is to remove the maritime borders between adjacent and opposite states concerning all aspects of the performance of these activities. To achieve this goal, it is clear that a narrow geographical definition of CEMZA would be inadequate. CEMZA would have to include the EEZs of the member states where the bulk of the living resources are located. It could even be argued that CEMZA should extend further than 200 nm, at least in those areas where it is necessary to be extended for the purpose of African states fulfilling their obligations regarding straddling fish stocks in terms of articles 63, 64, 117 and 118 of LOSC.¹⁰⁰

Convention for the Safety of Life at Sea. In addition, AIMS expects that all workers handling hazardous materials or dangerous goods will follow the relevant regulatory requirements in line with the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal; the 1996 Bamako Convention on the Ban of the Import to Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa; and the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, although the latter is not yet in force. Finally, AIMS commits the AU to 'encourag[ing] Member States to ensure, through appropriate legislation in collaboration with relevant stakeholders, the safe handling and transport of hazardous goods and materials' (para 57).

⁹⁸ Para 30 of AIMS.

⁹⁹ Ibid.

¹⁰⁰ It is stressed in para 37 of AIMS that '[t]he effective implementation of the universal duty to cooperate in the conservation of marine living resources is required. This necessitates coordinated action by [the] AU Member States, [the regional economic communities/regional mechanisms] and Regional Fisheries

With regard to these duties, CEMZA could be helpful at least at two levels. First, CEMZA could increase the impact of the 2009 FAO Port State Measures Agreement to Prevent, Deter and Eliminate IUU Fishing,¹⁰¹ which the AU is expected to support by 'work[ing] towards ensuring that Members States accede to' the Agreement.¹⁰² CEMZA would do so by confirming that the maritime zones of the member states must be seen as constituting a single area for the purpose of fisheries port-state control. Secondly, CEMZA could systematically remove legal obstacles to the movement of vessels responsible for these duties for the entire continent. This would go some way towards encouraging the financial and logistical arrangements required for pooling the limited resources available to the member states for fisheries-control purposes.

3.6 *Border Control*

The establishment of CEMZA is also aimed at improving border control.¹⁰³ This would increase the ability of the member states to address a number of maritime governance challenges. Some of those challenges relate to money laundering, as well as arms and drug trafficking. In this regard, AIMS stresses that '[g]reater and stronger development is needed across all [the regional economic communities and regional mechanisms] so as to provide [a] legal framework of prevention'.¹⁰⁴ AIMS also calls for '[i]nformation-sharing [to] be promoted among affected countries in order to disrupt trafficking networks', such as through a trans-Saharan crime monitoring network. This network would also aim to 'monitor suspicious activities, exchange evidence, facilitate legal cooperation, and strengthen national and regional efforts against these organized crimes'.¹⁰⁵

Such steps would undoubtedly increase the ability of African states to fulfil their obligations in terms of article 108 of LOSC regarding the illicit traffic in narcotic drugs or psychotropic substances. Other border-control challenges relate to human trafficking, human smuggling and asylum seekers travelling by sea. In this regard, AIMS stresses that these activities are targeted by instruments such as the 2000 UN Convention

Management Organizations (RFMOs) to ensure that the provisions of Articles 62, 63, 64, 117 and 118 of the UNCLOS are promoted and essentially met'.

¹⁰¹ The text of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing is available at http://www.fao.org/fileadmin/user_upload/legal/docs/2_037t-e.pdf (accessed 20 January 2016).

¹⁰² Para 67 of AIMS.

¹⁰³ Id para 30.

¹⁰⁴ Id para 31.

¹⁰⁵ Id para 63.

against Transnational Organized Crime and its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,¹⁰⁶ as well as the 2006 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children.¹⁰⁷

The case for a broad approach to the geographical extent of the application of CEMZA is not as strong with regard to border control as it is in other respects. It has already been mentioned above that the territories of the coastal states extend only up to the outer limits of the territorial seas. However, in terms of article 33 of LOSC, border-control activities may be carried out up to the outer limit of the contiguous zone if such a zone has been proclaimed by the relevant coastal state. Therefore, from a border-control perspective, CEMZA could extend to up to 24 nm from the baselines of the AU member states.

3.7 *Maritime Safety*

Another aim of CEMZA is to improve maritime safety.¹⁰⁸ To this extent, CEMZA has the potential of making a positive contribution to African states fulfilling their duties as flag states in terms of article 94 of LOSC.

The safety of life and property at sea within the AMD is indeed one of the major challenges identified by AIMS.¹⁰⁹ One of the strategic objectives of AIMS is to ensure the 'safety of maritime transportation systems'.¹¹⁰ In this regard, AIMS anticipates the establishment of a navigation forum by the AU Commission of Africa Safety. This forum 'will provide a platform for the advancement of the implementation, compliance with, and sustainability of [s]afety of [n]avigation as provided for in Chapter V of the International Convention on the Safety of Life at Sea (SOLAS) 1974'.¹¹¹ Another important step in that direction was the adoption of the Revised African Maritime Transport Charter, referred to explicitly by AIMS.¹¹² The Charter will, once it comes into effect, apply also in the EEZs of the parties, a factor which supports the broad approach to the geographical definition of CEMZA.

Moreover, AIMS commits the AU to 'work towards complementing [the

¹⁰⁶ 2000 UN Convention against Transnational Organized Crime and its 2006 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

¹⁰⁷ The text of the Plan is available at https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/ouagadougou_action_plan_to_combat_trafficking_en_1.pdf (accessed 20 January 2016).

¹⁰⁸ Para 30 of AIMS.

¹⁰⁹ Id para 7(ii).

¹¹⁰ Id para 21(v).

¹¹¹ Id para 102.

¹¹² Id para 27(ix).

regional economic communities/regional mechanisms] and [f]lag States towards eradicating the operation of sub-standard shipping practices',¹¹³ by building on existing initiatives, such as the 1997 Memorandum of Understanding on Port State Control in the Mediterranean Region,¹¹⁴ the 1998 Memorandum of Understanding on Port State Control for the Indian Ocean,¹¹⁵ and the 1999 West and Central African Memorandum of Understanding on Port State Control.¹¹⁶ In addition, AIMS expects the AU Commission to 'make an assertive call for concerned member states to the International Association of Marine Aids to Navigation and Lighthouse Authorities' to take a range of measures to advance maritime safety. These include, for example, those required of African States in terms of article 22(4) of LOSC.¹¹⁷

3.8 *Maritime Security*

A final aim of CEMZA is to improve maritime security around the continent.¹¹⁸ The main challenges in this regard, apart from illegal oil bunkering and crude-oil theft — especially in the Gulf of Guinea¹¹⁹ — are undoubtedly piracy and armed robbery at sea.¹²⁰ African states have already gone some way towards complying with their duty to cooperate in the repression of piracy in terms of article 100 of LOSC. AIMS further encourages them 'to put in place the necessary legal frameworks for the prosecution of perpetrators engaged in' piracy and robbery at sea.¹²¹

These efforts must be seen in the context of the wider African Peace and Security Architecture (APSA),¹²² of which a fundamental element is the 2002 Protocol Relating to the Establishment of the Peace and

¹¹³ Id para 67.

¹¹⁴ The text of the Memorandum is available at http://iea.uoregon.edu/pages/view_treaty.php?t=1997-MediterraneanMemorandumUnderstandingPortStateControl.EN.txt&par=view_treaty_html (accessed 3 March 2016).

¹¹⁵ The text of the Memorandum is available at <http://www.iomou.org/moumain.htm> (accessed 4 March 2016).

¹¹⁶ The text of the Memorandum is available at <http://www.abujamou.org/post/90.pdf> (accessed 4 March 2016).

¹¹⁷ Para 69(iii) of AIMS.

¹¹⁸ Id para 30.

¹¹⁹ See id paras 61–62.

¹²⁰ Id para 7(i). See, also, id para 16(i).

¹²¹ Id para 60.

¹²² See 'Report of the Chairperson of the Commission on the Establishment of a Continental Peace and Security Architecture and the Status of Peace Processes in Africa' (AU Doc PSC/AHG/3(IX) (2004)) available at <http://www.peaceau.org/uploads/report-9th-en.pdf> (accessed 4 March 2016). See, also, U Engel & JG Porto (eds) *Africa's New Peace and Security Architecture: Promoting Norms, Institutionalizing Solutions* (2010).

Security Council of the African Union.¹²³ The Council is expected to operate in conformity with the 2004 Common African Defence and Security Policy,¹²⁴ which, although not including piracy in the non-exhaustive list of areas of activity that it is meant to address,¹²⁵ stresses that the concept of 'security' must be understood as encompassing simultaneously 'the traditional, state-centric, notion of the survival of the state and its protection by military means from external aggression, as well as the non-military notion which is informed by the new international environment and the high incidence of intra-state conflict'.¹²⁶ This necessitates a broad approach that focuses on a variety of issues which, if left unaddressed, create a fertile environment on land for piracy at sea.¹²⁷

The Common Defence Policy is complemented by the AU's 2005 Non-Aggression and Common Defence Pact,¹²⁸ in terms of which the parties undertake 'to intensify collaboration and co-operation in all aspects related to combating international terrorism and any other form of organized trans-national crime';¹²⁹ 'to extend mutual legal and all other assistance in the event of threats of...organized international crimes';¹³⁰ and 'to arrest and prosecute any irregular armed group(s), mercenaries

¹²³ The text of the Protocol, which came into effect in 2003, is available at <http://www.au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union> (accessed 3 March 2016). See, further, HA Strydom (note 45 above) 59.

¹²⁴ The text of the Policy is available at <http://www.peaceau.org/uploads/declaration-cadsp-en.pdf> (accessed 4 March 2016).

¹²⁵ Id para 10 mentions the 'promotion of the spirit of collective defence and a culture of peace; small arms and light weapons; peace-building and peacekeeping as well as post-conflict rehabilitation and reconstruction, including demobilization, disarmament and reintegration; landmines; child soldiers; nuclear and other weapons of mass destruction; chemical weapons; HIV/AIDS, tuberculosis, malaria and other infectious diseases; terrorism; humanitarian issues; and environmental matters'.

¹²⁶ Para 6 of AIMS.

¹²⁷ Among these issues, the Policy identifies 'human rights; the right to participate fully in the process of governance; the right to equal development as well as the right to have access to resources and the basic necessities of life; the right to protection against poverty; the right to conducive education and health conditions; the right to protection against marginalization on the basis of gender; protection against natural disasters, as well as ecological and environmental degradation'.

¹²⁸ See 'Decision on the Draft African Union Non-Aggression and Common Defence Pact' (AU Doc Assembly/AU/Dec. 71 (IV) (2005)), available at http://www.au.int/en/sites/default/files/decisions/9551-assembly_en_30_31_january_2005_auc_fourth_ordinary_session.pdf (accessed 4 March 2016).

¹²⁹ Id art 5(a).

¹³⁰ Id art 6(a).

or terrorist(s) that pose a threat to any Member State'.¹³¹ The Council only started concerning itself with piracy when the maritime security situation degenerated around the Horn of Africa. It then

stressed the need to promote holistic approaches to address the issue of piracy, including off the coast of Somalia. It reiterated that such approaches should be informed by a proper understanding of this phenomenon and the context in which it is taking place, and involve both security measures at sea and efforts to promote land-based initiatives, including the enhancement of structures of governance and protection of the livelihoods of coastal populations, through effective measures to combat illegal fishing and dumping of toxic wastes.¹³²

For these reasons, the AU Peace and Security Council in 2010 urged the UN Security Council and the international community in general to adopt a holistic approach to combating piracy.¹³³ Three years later, in 2013, the Council conceded that '[m]aritime piracy off the coast of Somalia and the Gulf of Guinea continue[d] to pose a serious threat to regional security and to undermine socio-economic development efforts'.¹³⁴ As a result, it called upon member states to 'intensify their efforts to address this scourge, including by enhancing co-ordination among various initiatives in this area'.¹³⁵

The AU Peace and Security Council further requested the AU Commission 'to establish a framework of collaboration with the' Coordination Centre while elaborating 'modalities for the integration of the Code of Conduct...for it to become one of the AU relevant legal instruments on maritime safety and security'.¹³⁶

¹³¹ Id art 6(b).

¹³² 'Press Statement of the 242nd meeting of the Peace and Security Council' (AU Doc PSC/PR/BR. (CCXXXII) (2010)) available at <http://www.peaceau.org/uploads/communiquy-eng-final.pdf> (accessed 4 March 2016) 1.

¹³³ Ibid.

¹³⁴ 'Report of the Peace and Security Council on its Activities and the State of Peace and Security in Africa' (AU Doc ASSEMBLY/AU/3 (XX) (2013)) available at <http://www.peaceau.org/uploads/assemblyAU-3-xx-e.pdf> (accessed 4 March 2016) 160.

¹³⁵ Ibid. See, also, C Kirongozi-Ichalinga 'Perspectives from Central and West Africa' in CH Norchi & G Proutière-Maulion (eds) *Piracy in Comparative Perspective: Problems, Strategies, Law* (2012) 189; A Murdoch 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in CR Symmons (ed) *Selected Contemporary Issues in the Law of the Sea* (2011) 139; M Murphy 'Concerns, Consequences, and Resolutions to Somali Piracy' in Norchi & Proutière-Maulion (above) 73.

¹³⁶ Communiqué (AU Doc PSC/MIN/COMM. 2(CCCLXXXVII)-Rev. 1 (2013)) available at <http://www.peaceau.org/uploads/psc-387-com-yaounde-summit29-07-2013.pdf> (accessed 4 March 2016).

APSA makes provision for an African Standby Force,¹³⁷ to which the states party to the Non-Aggression and Common Defence Pact undertook 'to provide all possible assistance'.¹³⁸ The 2003 Policy Framework for the Establishment of the African Standby Force and the Military Staff Committee¹³⁹ does not provide for a maritime component.¹⁴⁰ Nevertheless, in 2011 the Executive Council requested the ministers of defence of the member states to 'explore the possibility of establishing a Standby Force to fight piracy on Africa's coasts including [the] Indian Ocean, the Gulf of Guinea [and] the Horn of Africa'.¹⁴¹ Such a capability is still unavailable at continental level.¹⁴² This is, as noted by Egede,

in sharp contrast to several coalition military forces outside the African continent that were set up and were actually engaged in counter-piracy efforts in the region, such as the EU NAVFOR's Operation Atalanta, the NATO's Operation Open Shield and the Combined Maritime Forces, a US-led international naval coalition of twenty-seven states.¹⁴³

AIMS acknowledges this state of affairs and, in consequence, calls for the development of an inter-agency approach, a Naval Component capacity within the framework of the African Standby Force (ASF), and the establishment of a representative continental working group of Chiefs of African Navies and/or Coast Guards (CHANS) to scrutinize issues of situational awareness and collaborate towards the enhancement of Africa's Maritime Domain Awareness (MDA), and to uphold cooperative

¹³⁷ Art 13 of the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union (note 123 above).

¹³⁸ Art 10(a) of the Non-Aggression and Common Defence Pact (note 128 above).

¹³⁹ AU Doc Exp/ASF-MS/2 (1) (2003) available at <http://www.peaceau.org/uploads/asf-policy-framework-en.pdf> (accessed 4 March 2016).

¹⁴⁰ See H Fouché 'Policing of Piracy and Armed Robbery Perpetrated against Ships: The Role of Interstate Partnerships in Africa' (2007) 20 *Acta Criminologica: Southern African Journal of Criminology* 110 112–113.

¹⁴¹ 'Decision on the Report of the Fourth Ordinary Meeting of the Specialized Technical Committee on Defence, Security and Safety' (AU Doc EX. CL/Dec. 626 (XVIII) (2011)) available at <http://www.peaceau.org/uploads/ex-cl-dec-626-xviii-e.pdf> (accessed 4 March 2016) para 6(ii). See, also, 'Key Elements of the Policy Documents of the African Standby Force' (unnumbered AU document) available at <http://www.acoc-africa.org/docs/Dec2010KeyElemPolDoc.pdf> (accessed 4 March 2016).

¹⁴² However, AIMS does refer to '[t]he Zone "D" Multinational Center [sic] of Coordination of Regional Centre for the Maritime Security of Central African States (CRESMAC)'. See para 27(viii) of AIMS.

¹⁴³ E Egede 'Institutional Gaps in the 2050 Africa's Integrated Maritime Strategy' (2016) 1 *Ilwandle Zethu: Journal of Ocean Law and Governance in Africa* 1 4–5.

efforts between Navies/Coast Guards of the AU Member States and international partners.¹⁴⁴

However, AIMS is short on details regarding the institutional aspects of such an initiative.¹⁴⁵

From a maritime-security perspective, African states would probably wish to define CEMZA as large as possible.¹⁴⁶ With the exception of piracy¹⁴⁷ and unauthorised broadcasting,¹⁴⁸ over which all states have jurisdiction on the high seas, LOSC 'does not contemplate international cooperation in combating terrorism or other threats to maritime security'.¹⁴⁹ That gap is filled by a number of instruments. At continental level, the 1999 OAU Convention on the Prevention and Combating of Terrorism (PCTC)¹⁵⁰ reflects the continent's approach when it insists that, while '[p]olitical, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act',¹⁵¹ 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts'.¹⁵² From this perspective, the member states undertake to 'consider, as a matter of priority, the signing or ratification of, or accession to, [relevant] international instruments...which they have not yet signed, ratified or acceded to'.¹⁵³

¹⁴⁴ Para 31 of AIMS.

¹⁴⁵ See, further, Egede (note 143 above) 10.

¹⁴⁶ With regard to the waters landward of the outer limits of the territorial sea, para 34 of AIMS confirms that, in accordance with art 111 of LOSC, 'Member States' intent for operations to deter or disrupt acts of piracy and armed robbery against ships in the [waters] of another Member State shall be subject to the approval and authority of that Member State, including in the case of hot pursuit. To increase the ability to deliver successful outcomes, all AU Member States are encouraged to establish cross-border hot pursuit arrangements. Further, due cognizance shall be given to the IMO Recommendations on Regional Agreements on Cooperation on Preventing and Suppressing Acts of Piracy and armed Robbery Against Ships (IMO MSC 1/ Circ 1333)'.

¹⁴⁷ See arts 100–107 and 110(1)(a) of LOSC.

¹⁴⁸ Id arts 109 and 110(1)(c).

¹⁴⁹ LB Sohn et al *The Law of the Sea in a Nutshell* 2 ed (2010) 455.

¹⁵⁰ The 1999 OAU Convention on the Prevention and Combating of Terrorism.

¹⁵¹ Id art 3(2).

¹⁵² Id art 3(1). For a general discussion of the Convention, see H Boukrif 'Quelques Commentaires et Observations sur la Convention de l'Organisation de l'Unité Africaine sur la Prevention et la Lutte Contre le Terrorisme' (1999) 11 *African Journal of International and Comparative Law* 753.

¹⁵³ Art 2(b) of the OAU Convention on the Prevention and Combating of Terrorism (note 150 above).

These instruments include the 1979 International Convention against the Taking of Hostages,¹⁵⁴ which requires that member states establish their jurisdiction on board those ships that they have registered, wherever those ships are.¹⁵⁵ Another instrument is the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation,¹⁵⁶ as revised by its 2005 Protocol,¹⁵⁷ which applies 'if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State'.¹⁵⁸ The 1988 Convention is complemented by its 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf,¹⁵⁹ as amended by its own 2005 Protocol,¹⁶⁰ which, as its name indicates, applies to offences 'committed on board or against fixed platforms located on the continental shelf'.¹⁶¹ A further instrument is the 1997 International Convention for the Suppression of Terrorist Bombings,¹⁶² which, like the 1979 Hostages Convention mentioned above, requires that member states establish their jurisdiction on board the ships that they have registered, wherever those ships are.¹⁶³

After the launch of the Container Security Initiative in 2002¹⁶⁴ and

¹⁵⁴ The 1979 International Convention against the Taking of Hostages.

¹⁵⁵ Id art 5(1)(a).

¹⁵⁶ The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

¹⁵⁷ IMO Doc LEG/CONF.15/21 (1 November 2005) available at http://www.unodc.org%2Ftldb%2Fpdf%2FProtocol_2005_Convention_Maritime_navigation.pdf&usg=AFQjCNF-M2wBrAi8P6nrCkx1guA_Y6mADg&bvm=bv.115339255,d.ZWU (accessed 4 March 2016).

¹⁵⁸ Id art 4(1).

¹⁵⁹ The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

¹⁶⁰ The text of the 2005 Protocol is available at <http://www.unodc.org%2Ftldb%2Fpdf%2FProtocol%2520Fixed%2520Platforms%2520EN.pdf&usg=AFQjCNFvI9ENdOYSfUUXyO8dA1hHTjOIQ&bvm=bv.115339255,d.ZWU> (accessed 4 March 2016).

¹⁶¹ Id art 1.

¹⁶² The 1997 International Convention for the Suppression of Terrorist Bombings.

¹⁶³ Id art 6(1)(b).

¹⁶⁴ Para 66 of AIMS indicates that, '[i]n order to prevent arms, drug trafficking and other illicit activities, the AU shall work towards the establishment of effective container security and control programme[s] in coastal States all around Africa'. On the Initiative and other similar mechanisms, see CH Allen 'The International Supply Chain Security Regime and the Role of Competent International Organizations' in MH Nordquist et al (eds) *Legal Challenges in Maritime Security* (2008) 165; E Maspero, E van Dyk & H Ittmann 'Maritime Supply Chain Security: Navigating through a Sea of Compliance Requirements' (2008) 2 *Journal of Transport and Supply Chain Management* 12; J Romero 'Prevention of Maritime Terrorism: The Container Security Initiative' (2003) 4 *Chicago Journal of International Law* 597.

the Proliferation Security Initiative a year later,¹⁶⁵ African states adopted the 2004 Protocol to the OAU Convention on Prevention and Combating of Terrorism,¹⁶⁶ the main purpose of which is to enhance the effective implementation of the OAU Terrorism Convention and to address the need identified in article 3(d) of the instrument 'to coordinate and harmonize continental efforts in the prevention and combating of terrorism in all its aspects, as well as the implementation of other relevant international instruments'.¹⁶⁷ To that end, the Protocol to the OAU Terrorism Convention makes the AU Peace and Security Council 'responsible for harmonizing and coordinating continental efforts in the prevention and combating of terrorism'.¹⁶⁸ It also entrusts the AU Commissioner in Charge of Peace and Security 'with the task of following-up on matters relating to the prevention and combating of terrorism'¹⁶⁹ with the assistance of not only the Terrorism Unit of the AU Commission's Peace and Security Department, but also the African Centre for the Study and Research on Terrorism.¹⁷⁰ Regional mechanisms are to play a complementary

¹⁶⁵ For literature on the Proliferation Security Initiative, see CH Allen 'Cargoes of Doom: National Strategies of the US to Combat the Illicit Transport of Weapons of Mass Destruction by Sea' in DD Caron & HN Scheiber (eds) *The Oceans and the Nuclear Age: Legacies and Risks* (2010) 315; MA Becker 'The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea' (2005) 46 *Harvard International Law Journal* 131; M Byers 'Policing the High Seas: The Proliferation Security Initiative' (2004) 98 *American Journal of International Law* 526; DH Joyner 'The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law' (2005) 30 *Yale Journal of International Law* 507; S Kaye 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in D Freestone, R Barnes & D Ong (eds) *The Law of the Sea: Progress and Prospects* (2006) 356; TC Perry 'Blurring the Ocean Zones: The Effect of the Proliferation Security Initiative on the Customary International Law of the Sea' (2006) 37 *Ocean Development and International Law* 33; JA Roach 'Proliferation Security Initiative (PSI): Countering Proliferation by Sea' in MH Nordquist, JN Moore & K-C Fu (eds) *Recent Developments in the Law of the Sea and China* (2005) 351; DR Rothwell 'The Proliferation Security Initiative: Amending the Convention on the Law of the Sea by Stealth?' in Caron & Scheiber (above) 285; Y-H Song 'The US-led Proliferation Security Initiative and UNCLOS: Legality, Implementation, and an Assessment' (2007) 38 *Ocean Development and International Law* 101; AM Syrigos 'Developments on the Interdiction of Vessels on the High Seas' in A Strati, M Gavouneli & N Skourtos (eds) *Unresolved Issues and New Challenges to the Law of the Sea* (2006) 186.

¹⁶⁶ The text of the 2004 Protocol to the OAU Convention on the Prevention and Combatting of Terrorism is available at http://www.au.int/en/sites/default/files/treaties/7787-file-protocol_oau_convention_on_the_prevention_combating_terrorism.pdf (accessed 4 March 2016).

¹⁶⁷ Id art 2(2).

¹⁶⁸ Id art 4.

¹⁶⁹ Id art 5(1).

¹⁷⁰ Id art 5(2).

role.¹⁷¹ As far as AIMS is concerned, it stresses that the 'AU member states that have not yet implemented the [2002 International Code for the Security of Ships and of Port Facilities (ISPS)]¹⁷² should move quickly to do so, and introduce other maritime [domain awareness] and security measures'.¹⁷³

3.9 *Adjudicative Jurisdiction*

AIMS overlooks the fact that the establishment of CEMZA would have to be accompanied by the adoption and implementation of a comprehensive regime governing adjudicative jurisdiction over matters arising in the AMD. That does not mean that the AU is not aware that the present jurisdictional architecture needs to be improved.

For instance, the 2014 Protocol on Amendments to the 2008 Protocol on the Statute of the African Court of Justice and Human Rights¹⁷⁴ vests the African Court, now called the African Court of Justice and Human and Peoples' Rights,¹⁷⁵ with international criminal jurisdiction.¹⁷⁶ In particular, the International Criminal-Law Section of the Court would have the jurisdiction to try persons for the crime of piracy,¹⁷⁷ which is defined in the amended Statute in exactly the same way as it is defined in UNCLOS.¹⁷⁸ However, the grounds of responsibility are broader in terms of the Statute in the sense that an offence is committed by any person who: (i) instigates, organises, directs, finances, aids or abets the commission of an act of piracy; (ii) is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit an act of piracy; or (iii) attempts to commit an act of piracy.¹⁷⁹ The same applies with regard to the crimes of terrorism, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and the

¹⁷¹ Id art 6.

¹⁷² The 2003 edition is available at <https://law.resource.org/pub/us/cfr/ibr/004/imo.isps.2003.pdf> (accessed 20 January 2016).

¹⁷³ Para 72 of AIMS.

¹⁷⁴ AU Doc STC/Legal/Min/7(I) Rev. 1 (2014) available at http://www.iccnw.org%2Fdocuments%2FAfrican_Court_Protocol_-_July_2014.pdf&usg=AFQjCNHTartGdrm3csSuDDH2TQVuxawRiw&bvm=bv.115339255,d.ZWU (accessed 4 March 2016). The Protocol has not yet come into force.

¹⁷⁵ Art 1 of the 2008 Protocol as substituted by chap 1 of the 2014 Protocol.

¹⁷⁶ Art 3(1) of the 2008 Protocol as substituted by chap 1 of the 2014 Protocol.

¹⁷⁷ Art 28A(1)(5) of the Statute of the Court inserted in terms of art 14 of the Annex to the 2014 Protocol.

¹⁷⁸ Compare art 28F of the Statute of the Court, inserted in terms of art 14 of the Annex to the 2014 Protocol, with art 101 of LOSC.

¹⁷⁹ Art 28N of the Statute of the Court inserted in terms of art 14 of the Annex to the 2014 Protocol.

illicit exploitation of natural resources,¹⁸⁰ but not with regard to armed robbery, arms trafficking and unauthorised broadcasting.

In general, the Court has more jurisdiction regarding cases and disputes that concern 'any question of international law'.¹⁸¹ Cases and disputes that involve the application of the law of the sea, obviously falls into this category and will be heard by the Court's General-Affairs Section.¹⁸² '[I]n the light of the rather technical and specialised nature of this branch of international law', those cases and disputes should probably be heard by a dedicated chamber composed of judges, who are preferably 'acknowledged international-law-of-the-sea experts'.¹⁸³ A systematic recourse to such a chamber by African states will certainly not be in conflict with LOSC. Indeed, article 280 of LOSC stresses that nothing in Part XV of the Convention 'impairs the right of any states parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Convention by any peaceful means of their own choice'. In addition, article 282 gives precedence to regional dispute-settlement mechanisms, thereby providing an incentive for the development of an African, law-of-the-sea jurisprudence. This will, however, only be possible if the required knowledge and expertise are developed.

3.10 *Marine Science and Technology*

Indigenous knowledge and expertise need to be developed, not only in the legal field, but across all disciplines.¹⁸⁴ LOSC places a duty on all member states to

promote the development of the marine scientific and technological capacity of States which may need and request technical assistance in this field, particularly developing States, including land-locked and geographically disadvantaged States, with regard to the exploration, exploitation, conservation and management of marine resources, the

¹⁸⁰ Art 28A(1)(6), (10), (11), (12) and (13) of the Statute of the Court respectively, inserted in terms of art 14 of the Annex to the 2014 Protocol.

¹⁸¹ Art 28(d) of the Statute of the Court.

¹⁸² See art 17(1) of the Statute of the Court as replaced in terms of art 7 of the Annex to the 2014 Protocol.

¹⁸³ Egede (note 143 above) 15.

¹⁸⁴ 'Research, innovation and development' are identified as major issues in para 7(iii). See, also, para 13 of the AU Assembly 'Decision on the Report of the Commission on Development of the African Union Agenda 2063 and the Report of the Ministerial Follow-up Committee on the Bahr Dar Retreat' (AU Doc Assembly/AU/Dec.565 (XXIV) (2015)) available at http://www.au.int/en/sites/default/files/decisions/9665-assembly_au_dec_546_-_568_xxiv_e.pdf (accessed 4 April 2016).

protection and preservation of the marine environment, marine scientific research and other activities in the marine environment compatible with th[e] Convention, with a view to accelerating the social and economic development of the developing States.¹⁸⁵

To this end, member states must, 'in coordination with the competent international organisations, the [International Seabed] Authority and national marine scientific and technological research institutions', promote the establishment of, and co-operate with, 'regional marine scientific and technological research centres, particularly in developing states, in order to stimulate and advance the conduct of marine scientific research by developing states and foster the transfer of marine technology'.¹⁸⁶

AIMS provides guidance in this regard by committing the AU to the establishment, '[i]n cooperation with relevant stakeholders such as the UNESCO's Intergovernmental Oceanographic Commission', of 'a continental wide dynamic and multidisciplinary Oceans and Seas Research Institute of Africa'.¹⁸⁷ AIMS succinctly describes the functions of the Institute as undertaking scientific research throughout the entire AMD and promoting an understanding of the marine environment for protection, economic and conservation purposes.¹⁸⁸

This brief description must surely be read with article 277 of LOSC, which provides a more detailed (yet not exhaustive) list of functions to be performed by regional centres. It must, moreover, be read taking into account that AIMS also commits the AU to 'spearhead[ing] the development of concepts for [the] assessment of [the] conservation status of [the] AMD's biodiversity, including species and habitats and impacts of various human activities', by means of 'an innovative monitoring and assessment approach based on [a] joint set of marine biodiversity indicators as well as testing in practice the monitoring and assessment techniques'.¹⁸⁹ In addition, the activities of the Institute must be geared towards providing the sound scientific foundation on which the AU, regional economic communities and member states can base the marine spatial-planning processes required 'to better determine how

¹⁸⁵ Art 266(2) of LOSC.

¹⁸⁶ Id art 276.

¹⁸⁷ Para 86 of AIMS. AIMS expects the AU to 'make an assertive call to concerned member states to become members of the International Hydrographic Organization (IHO), World Meteorology Organisation (WMO) and UNESCO Intergovernmental Oceanography Commission (IOC)' (para 68).

¹⁸⁸ Id para 86.

¹⁸⁹ Id para 82. See, also, id para 41.

maritime zones are sustainably used and protected — now and for future African generations'.¹⁹⁰

More generally, AIMS expects of the AU, regional economic communities and member states to facilitate collaborations among research entities, to provide funding, to develop expertise and to disseminate innovative practices.¹⁹¹ It does so, because '[a]dopting state-of-the-art technologies is very important for the competitiveness of the African maritime sector in the global market, through initiatives on research and development, including [the] pooling of knowledge into an African marine data centre'.¹⁹² In this regard, AIMS commits the AU to 'work towards the establishment of a nodal point where a database accommodating cross-sector maritime data can be warehoused', for the purpose of 'integrat[ing] existing, but fragmented initiatives in order to facilitate access to primary data for public authorities, maritime services, related industries and researchers'.¹⁹³

4 Conclusion

AIMS does not have any direct legal effect on the law of the sea. To the extent that it has an indirect impact on the legal regime governing the AMD, AIMS insists that such impact has to 'be compatible with extant African and internationally agreed maritime instruments and legal frameworks',¹⁹⁴ which obviously include LOSC. When they adopted AIMS, the AU member states were clearly aware not only of the existence of many of those instruments and frameworks, but also of the importance of an appropriate legal environment within which stakeholders are to operate regarding all the facets of human activity at sea. As indicated earlier, the member states were evidently also aware of how 'vulnerable' the legal framework is in its current state.¹⁹⁵

No study has apparently been undertaken to establish all the reasons for this state of affairs. A study of this nature should focus on the comparatively low participation rate of African states in international instruments and frameworks; the often out-dated, patchy and uncoordinated domestic legislation and case law; as well as the serious impediments encountered at monitoring, compliance and enforcement levels.

¹⁹⁰ Id para 82.

¹⁹¹ Id para 40.

¹⁹² Ibid.

¹⁹³ Id para 45.

¹⁹⁴ Id para 26(iv).

¹⁹⁵ Id para 16(v).

In order to overcome most of these obstacles, AIMS envisions a brave new maritime world in which CEMZA will play a crucial role. It is easy to see the benefits of what would amount to some form of federalisation of the AMD, bearing in mind the financial, human and logistical challenges to which many African states are confronted in their individual efforts at exercising their rights and fulfilling their obligations within their respective maritime zones. However, there is no basis in the AU Constitutive Act for such a top-down approach. In addition, AIMS stresses that nothing in it should 'be construed or applied contrary to the sovereignty of any of the AU member states in accordance with the principles of international law'.¹⁹⁶

That does not mean that the idea of CEMZA and most of the other aspects of AIMS should be dismissed as legally irrelevant. The adoption of AIMS was a major political event and should be fully utilised for the purpose of much-needed law reform. At the same time, CEMZA has the potential to influence the development of the law of the sea as it is applied in the AMD and will represent the collective approach required for African states in order to secure their substantive equality with other states in the world's oceans.

¹⁹⁶ Id para 12.