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INSTITUTIONAL GAPS IN THE 2050 AFRICA'S INTEGRATED MARITIME (AIM) STRATEGY*

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Abstract

The article identifies some gaps in the institutional framework of the Africa's Integrated Maritime (AIM) Strategy, with regards to certain vital areas of concerns in the sea, such as maritime security enforcement, an African international judicial mechanism dealing with marine matters, the outer limits of the Continental Shelf and the deep seabed regime. It argues for a reconsideration of the AIM Strategy with regard to these important law of the sea issues and for the provision of a clearer plan on putting together appropriate institutions to engage with these key matters.

‘In the 21st century, capable, reliable and transparent institutions are the key to success ...Africa doesn't need strongmen, it needs strong institutions.’ President Obama (2009)¹

I. INTRODUCTION

The African Union (AU) Assembly, with an emphasis on the geostrategic importance of the seas and oceans in the socioeconomic development of Africa, adopted the Africa's Integrated Maritime (AIM) Strategy on the 31st January 2014 at its twenty-second ordinary session.² The

*The article is an updated version of a paper presented by the author at the 2014 Marine and Maritime Conference organized by the South African Research Chair in the Law of the Sea and Development in Africa, Nelson Mandela Metropolitan University, Port Elizabeth, South Africa in partnership with the South African branch of the International Law Association and Maritime Law Association of South Africa. The author conveys his thanks to Professor Patrick Vrancken, the incumbent South African Research Chair in the Law of the Sea and Development in Africa, for his kind invitation to speak at the Conference. He also thanks the anonymous reviewers for their helpful suggestions and comments. Furthermore, he expresses special thanks to Prince Emmanuel for his support and inspiration – indeed you are a friend who sticks closer than a brother does.

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¹ See REMARKS BY THE PRESIDENT [President Obama] TO THE GHANAIAN PARLIAMENT, Accra International Conference Center Accra, Ghana, July 11, 2009, (available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-the-Ghanaian-Parliament/, accessed on 8 September 2015)

² DECISION ON THE ADOPTION AND IMPLEMENTATION OF THE 2050 AFRICA'S INTEGRATED MARITIME STRATEGY (2050 AIM STRATEGY), Doc. Assembly/AU/16(XXII) Add.1, Assembly/AU/Dec.496(XXII) of 31 January 2014, (available at

AIM Strategy, which is an African driven long term and reasonably comprehensive vision crafted to better harness Africa's so-called 'blue economy,'³ with the vision of using this to promote development in the Continent, is undoubtedly a huge achievement. The Peace and Security Council of the AU had previously noted that: 'the future of Africa, among other sectors, resides in her blue economy, which is a new frontline of Africa's renaissance.'⁴ It is nonetheless, worth mentioning that this is not the first time that Africa has put forward a Continent wide strategy on marine matters. In 1974 the Declaration of the Organization of African Unity on the issues of the law of the sea was adopted by the Council of Ministers of the then Organization of African Unity (OAU) at its twenty-first ordinary session.⁵ In the preamble of this Declaration the OAU affirmed that it was its 'responsibility to harness the natural and human resources of [the African Continent] for the total advancement of [the African] peoples in all spheres of human endeavor' and that 'African countries have a right to exploit the marine resources around the African continent for the economic benefit of African peoples.'⁶ This Declaration then set out a strategy in respect of important areas of the law of the sea such as the territorial sea and straits, regime of islands, exclusive economic zone (EEZ) concept, including exclusive fishery zone, regional arrangements, fishing activities in the high seas, training and transfer of technology, scientific research, preservation of the marine environment, as well as the international regime and international machinery for the seabed and ocean floor and subsoil beyond the limits of national jurisdiction.⁷ Admittedly, this document put together by the OAU, in comparison to the AIM Strategy, was rather limited. First, it appeared to have been a strategy document limited merely to law of the sea issues, while the AIM Strategy not only explores law of the sea issues, but goes further to deal with what could be regarded as falling more into the category of what might technically be regarded as maritime law.⁸ Second, the OAU Declaration appeared to be focused more on the adoption

http://pages.au.int/sites/default/files/Decision%20on%20the%20Adoption%20of%20the%202050%20AIM%20Strategy_2.pdf, accessed on 8 September 2015)

³ The Small Island Developing States (SIDS) Action Platform notes that the Blue Economy is: "founded in line with the concept and principles of, and mutually supportive with the Green Economy, is a tool that offers specific mechanisms for Small Island Developing States (SIDS) and coastal countries to address their sustainable development challenges." (available at

<http://www.sids2014.org/index.php?page=view&type=13&nr=59&menu=1515> , accessed on 6 January 2016)

⁴ Communiqué of the Peace and Security Council of the African Union (AU), at its 387th meeting on the Conclusions of the Summit of Heads of State and Government of the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS) and the Commission of the Gulf of Guinea (CGG) on maritime safety and security in the Gulf of Guinea, held in Yaoundé, on 24 and 25 June 2013, (available at <http://www.peaceau.org/en/article/communique-of-the-peace-and-security-council-of-the-african-union-au-at-its-387th-meeting-on-the-conclusions-of-the-summit-of-heads-of-state-and-government-of-the-economic-community-of-central-african-states-eccas-the-economic-community-of-west-african#> , accessed on 8 September 2015)

⁵ Doc.A/CONF.62/33 of 19 July 1974, UNCLOS III, Official Records, Vol.3, pp.63-65

⁶ Preambles 1 and 9, Ibid at p.63

⁷ Ibid at pp.63-65

⁸ Encyclopedia Britannica points out: 'Although etymologically maritime law and "law of the sea" are identical, the former term is generally applied to private shipping law, whereas the latter, usually prefixed by "international," has come to signify the maritime segment of public international law.' (available at <http://www.britannica.com/topic/maritime-law> , accessed on 8 September 2015) However, see Philip Jessup, 'The united nations conference on the law of the sea', (1959)59 *Columbia Law Review*, 234 at 234 who appears not to agree that there is any such distinction.

of some kind of African strategy to espouse a common position on issues of the law of the sea with regard to UNCLOS III,⁹ unlike the AIM Strategy which is a more open-ended and long term strategy. Third, the OAU document was more of an out-looking document announcing Africa's common position to other States and regions of the world.¹⁰ The AIM Strategy, on the other hand, appears to be mainly inward looking dealing with the crucial question - how does Africa harness the full potential of its rich marine resources to promote African development?¹¹ Fourth, the OAU document was rather limited in terms of content - a mere 3 pages - unlike the AIM Strategy that is quite comprehensive, covering up to some thirty pages. In addition, the AIM Strategy comes across as a living document - meant to evolve and be improved on. With this in mind the article seeks to identify certain institutional gaps in the AIMS with regards to the following: maritime security enforcement; an African judicial institution dealing with marine issues; the outer limit of the continental shelf and deep seabed activities in the deep seabed beyond national jurisdiction (the Area), which may have an impact on the implementation of the vision of promoting an effective blue economy. Generally, the article would seek to promote a linkage between the AIMS and existing institutions in order to save costs that would be incurred by establishing brand new bespoke institutions, with proposals that the mandate and competence of these existing institutions be expanded. It is, however, apposite at this stage to note that for the purposes of this paper, the word – institution – is not used in any technical sense, but rather in a broad sense to refer to some sort of organization, body or organ that may take up the responsibility for coordinating the implementation of some key matters raised expressly or implicitly in the AIMS.¹²

II. SOME GAPS IN THE INSTITUTIONAL FRAMEWORK IN THE AIM STRATEGY

(a) Maritime security

The AIM Strategy deals with important maritime security issues, such as piracy and armed robbery at sea, maritime terrorism, human trafficking and human smuggling, illegal bunkering and crude oil theft, money laundering, illegal arms and drug trafficking as well as environmental crimes.¹³ However, presently, the African Union (AU) does not have an African joint naval task force and/or joint coast guard operations to deal with piracy and armed robbery

⁹ See the Preambles 5 and 6 of the Declaration which states: 'Aware that many African countries did not participate in the 1958 and 1960 Law of the Sea Conferences', 'Aware that Africa, on the basis of solidarity, needs to harmonize her position on various issues before the forthcoming United Nations Conference on the Law of the Sea due to be held at Caracas, Venezuela, in 1974, and to benefit therefrom.' (See n.5 above)

¹⁰ See Preamble 15, Ibid, which '...noted the positions and the views of other States and regions' and then goes on to declare the OAU's position on various issues on the law of the sea.

¹¹ The AIM Strategy however does have a minor part that appears to have an outward perspective. Paragraph 98 of the Strategy states that the '... AU shall push for a right-sized representation of the African continent in the various organs of marine related international institutions, so as to ensure that the voices of Africa are properly heard in relevant international forums.'

¹² See for instance, Martha Finnemore and Kathryn Sikkink, 'International norm dynamics and political change', (1998)52(4) *International Organization*, 887 at 891 and Beth Simmons and Lisa Martin, 'International organizations and institutions' in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds), *Handbook of International Relations* (2001) 2nd ed. 192 at 192-194

¹³ See Christian Bueger, 'What is maritime security?' (2015) 53 MP 259-164 for an interesting analysis on what constitutes maritime security.

at sea and other maritime security issues occurring in the African Maritime Domain (AMD). It is noted that with the East African region piracy, though this is occurring, metaphorically, in the 'backyard' of Africa, there has been no African joint naval task force to engage with this issue. This is in sharp contrast to several coalition military forces outside the African continent that were set up and are actually engaged in counter-piracy efforts in the East African 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.¹⁴ Although, there are undeniably actions being taken by certain individual African states' naval force to seek to provide maritime security in East Africa, as well as at the 'new' maritime insecurity hotspot, the Gulf of Guinea, there is no doubt that having a joint AU naval task force would be more effective, especially with the AIMS, a strategy which appears to seek to achieve an 'African solution to African problems' as regard to maritime security around the AMD.¹⁵ A joint AU naval task force would allow for a pooling of naval military assets and personnel, a sharing of cost thereby reducing the financial burden on individual states and this would obviously enable such task force to cover and secure a wider area of the AMD.¹⁶ It would also have the advantage of providing a platform for the various participating African naval forces to learn and share best practices with each other. Further, it would help to assuage the concerns by certain African coastal States of the expansionist tendencies of other states engaged in unilateral naval operations, especially in regions outside their immediate sphere of influence. For instance, in response to a news report that the South African navy intends to deploy warships to deal with maritime security issues in the Gulf of Guinea, one of the commentaries, indicates such concern by stating that it: '...is best if (sic) South Africa stays in SADC and Nigeria stays in ECOWAS, because the moment SA comes to ECOWAS, Nigeria will also move to SADC. Don't do to others what you don't want for yourself.'¹⁷ In addition, it would allow the AU to engage effectively with maritime security issues in the AMD that international naval coalition are, for one reason or the other, unwilling or unable to engage with. In 2011, Commander Baker of the US navy, after identifying various multinational counter-piracy naval operations involved in curbing piracy in the Somalia area pointed out that:

'While these [International] task forces bring the benefit of nonstop maritime patrols, they do not involve Africans in their operations, and they do not address crimes that are of high importance to Africa, namely, illegal fishing and illegal dumping. As a result, they do not forge trust and partnerships; rather, they are viewed with indifference in many parts of

¹⁴ Edwin Egede, 'Piracy and the East African Region,' in Panos Koutrakos and Achilles Skordas(eds.), *The Law and Practice of Piracy at Sea: European and International Perspectives*, (2014) 249 at 258-259

¹⁵ See Deane-Peter Baker, 'The South African Navy and African Maritime Security', (2012) 65(2) *Naval War College Review* 145 at 150-152; Lisa Otto, 'South Africa's engagement in Counter-Piracy', November 2014, *Maritime Executive*, (available at <http://www.maritime-executive.com/article/South-Africas-Engagement-in-CounterPiracy-2014-11-08>, accessed on 8 September 2015) and Ali Kamal-Deen, 'The Anatomy of Gulf of Guinea Piracy', (2015) 68(1) *Naval War College Review*, 93 at 107

¹⁶ See Kamal-Deen, *Ibid* at p.167 expressing concerns about the limited capabilities of the Navy of individual coastal States in the Gulf of Guinea to effectively patrol their extensive maritime zones.

¹⁷ DefenceWeb, 'Africa's west coast is next Navy anti-piracy deployment', 25 September 2014, (available at http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=36370:africas-west-coast-is-next-navy-anti-piracy-deployment&catid=108:maritime-security , accessed on 30 December 2014)

Africa, where governments and communities are very reluctant to take action against African pirates.’¹⁸

In fairness, the AIM Strategy does recognise this vacuum created by the absence of an African naval task force and advocates the need to take steps:

‘...toward promoting inter-agency and transnational cooperation and coordination on maritime safety and security shall include 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 efforts between Navies/Coast Guards of the AU Member states and international partners.’¹⁹

Although, the ASF is not fully operational, the Eastern ASF attained full operational capacity by the end of December 2014, a full year ahead of the ASF target of December 2015.²⁰ However, there is no indication that it has actually developed maritime operational capability. Certain scholars, such as Wambua and Engel, have criticised the stance of African states and the AU in operationalising its maritime security capacity. Wambua points to the lack of vessels, aircrafts, communications systems, appropriately trained personnel or appropriate legal framework, as well as African states fixation on national interests rather than ‘regional common good’ as obstacles to effective regional cooperation in dealing with maritime security issues.²¹ While this is no doubt correct, it is important to point out that generally with regional cooperation as regard maritime security it is not necessarily all states in the region that are able to make tangible contributions. The important thing is to have certain key states with the capacity to act as drivers of such regional cooperation arrangements. States, such as Nigeria and South Africa, have the requisite capacity to drive and make such regional maritime security institution workable. Furthermore, there is nothing unusual about states having a fixation on national interest, as this is the reality of international politics.²² The way around this is to frame the call for regional maritime security cooperation in such a way that individuals states are able to locate their national interest in such cooperative arrangement, for instance, through the understanding that there would be benefits in the institutionalisation of regional maritime security cooperation, such as shared security costs, improvement of maritime trade that would have a positive knock on effect on each states’ economy etc. Engel, amongst other things, identified an absence of political leadership both on the Continent and the AU, as being

¹⁸ Michael Baker, ‘Towards an African Maritime Economy: Empowering the African Union to Revolutionize the African Maritime Sector,’ (2011) 64(2) *Naval War College Review*, 39 at 51

¹⁹ Para.31

²⁰ (available at <http://www.africareview.com/News/East-African-Standby-Force-ready-for-peacekeeping/-/979180/2533358/-/nrvi8u/-/index.html>, accessed on 8 September 2015)

²¹ Paul Musili Wambua, ‘Enhancing Regional Maritime Cooperation in Africa: The Planned End State’ (2009) 18(3) *African Security Review*, 45 at 54

²² See generally Hans J. Morgenthau (Revised by Kenneth W. Thompson), *Politics Among Nations: The Struggle for Power and Peace* (1985) 6 ed.

responsible for the ‘lack of institutional and political support’ for the AIMS, especially with regard to maritime security.²³ Potgieter and Walker, in a more recent publication, while agreeing that more conversations need to be had on how to give the AIMS more prominence in the ‘construction and institutionalization’ of the African Peace and Security Architecture (APSA), however, point to the encouraging signs of various the Regional Economic Communities (RECs) embracing the ideals of AIMS with bodies like as the Economic Community of West African States (ECOWAS), South African Development Community (SADC), Economic Community of Central African States (ECCAS) formulating their own maritime security strategies.²⁴

Fortunately, Africa may learn from experiences of organizations, such as the European Union (EU), on how they have operationalised their maritime security capabilities. It must, however, be stressed at this point that the utilisation of these EU institutions, as examples, is not to suggest the flawlessness of the EU models. Neither does the author seek to advocate a wholesale adoption of these models. Rather, the idea is to use EU models as institutional templates that the AIMS could use to develop maritime security capabilities through learning not only from the successes, but also from the failures of these EU bodies. While, there are lessons there are no doubt lessons to be learnt from the EU, such institutional templates would obviously need to be adapted to suit Africa’s peculiar needs and situation. An example of such institutions is the European Union Naval Force (EU NAVFOR), which was launched by the EU on 8 December 2008 within the framework of its Common Security and Defence Policy (CSDP) and in response to relevant UN Security Council Resolutions (UNSCR) calling for global action to deal with the rising levels of piracy and armed robbery off the Horn of Africa and in the Western Indian Ocean.²⁵ The EU NAVFOR is a joint naval operation involving EU member States and some non-EU European States - Norway, Ukraine, Montenegro and Serbia – who make contributions such as navy vessels (surface combat vessels and auxiliary ships, including embarked helicopters); maritime patrol and reconnaissance aircraft (MPRA); vessel protection detachment (VPD) teams and the provision of military and civilian staff to work at the operations headquarters (OHQ) in Northwood, United Kingdom, or onboard units. The military assets and personnel are provided by the contributing states with running cost and personnel cost being met on a national basis. Although, the composition of the EU NAVFOR may vary, it typically consists of approximately 1200 personnel, 4 – 7 surface combat vessels

²³ Ulf Engel, *The African Union, the African Peace and Security Architecture, and Maritime Security*, Friedrich Ebert Stiftung(FES) Peace and Security Series No.13, (2014), 15-18 and 20-24, (available at <http://library.fes.de/pdf-files/bueros/aethiopien/10878.pdf> , accessed on 8 September, 2015)

²⁴ Johan Potgieter and Timothy Walker, ‘The 2050 African Integrated Maritime Strategy(AIMS); Content and Progress’ in Francois Very and Thomas Mandrup (eds.), *Towards Good Order at Sea: African Experiences*, (2015) 108

²⁵ See United Nations Security Council resolutions S/RES/1816 of 2 June 2008; S/RES/1838 of 7 October 2008; S/RES/1849 of 2 December 2008; S/RES/1851 of 16 December 2008; S/RES/1897 of 30 November 2009; S/RES/1918 of 27 April 2010; S/RES/1950 of 23 November 2010; S/RES/1976 of 11 April 2011; S/RES/2015 of 24 October 2011; S/RES/2077 of 21 November 2012 and S/RES/2125 of 18 November 2013, available at <http://www.un.org/en/sc/documents/resolutions/> accessed on 20 January 2016.

and 2 – 4 maritime patrol and reconnaissance aircraft.²⁶ The AIMS provision for a representative continental working group of chiefs of African navies could serve as a basis to develop an EU NAVFOR type operation for Africa to be involved in dealing with illegal activities occurring at sea in the AMD, including the piracy in East Africa and the Gulf of Guinea.

Also, there are lessons that could be learnt from another EU Agency, FRONTEX, set up to promote, coordinate and develop European border management, including the border at sea.²⁷ For instance, FRONTEX launched joint operation Triton on the November 1, 2014 to coordinate the deployment of three open sea patrol vessels, two coastal patrol boats, two aircraft and one helicopter in the Central Mediterranean, with contributions to this joint operation by the EU members.²⁸ However, it is important to note that the FRONTEX is more of a European border agency rather than a Coast guard type arrangement. Thus, whatever lessons could be learnt from this European agency, the African version would need to also incorporate coast guard capabilities, as well.²⁹

Alternatively, instead of a continent wide naval and coastal guard operation, which may be logistically challenging, another option could be to devolve the joint naval and coast guard operations to the RECs, such as the ECOWAS, SADC, ECCAS etc. This may have the advantage of allowing such RECs to establish joint maritime security operations that would prioritise maritime security issues, which are particularly important to them. For instance, Commander Kamal-Deen of the Ghanaian navy after identifying that maritime security cooperation in the Gulf of Guinea was increasing cautioned that: ‘...it is crucial that [such] initiatives be tailored to meet the needs of the region.’³⁰

Apart from some sort of joint task force to deal with the maritime threats in the AMD there is a need for an effective strategy to ensure that all African states have the necessary legal framework for the effective prosecution of pirates and other maritime criminals arrested by either the naval or coast guard operations. Drawing from the lessons of the Somali piracy in the Gulf of Arden it is clear that an arrest of pirates and other maritime criminals that is not complemented by an effective judicial prosecution of offenders would be inadequate.³¹

²⁶ (Available at <http://eunavfor.eu/home/about-us/>, accessed on 8 September, 2015)

²⁷ (Available at <http://frontex.europa.eu/about-frontex/origin>, accessed on 8 September 2015)

²⁸ (Available at <http://frontex.europa.eu/news/frontex-launches-joint-operation-triton-JSYpL7><http://frontex.europa.eu/news/frontex-launches-joint-operation-triton-JSYpL7>, accessed on 8 September 2015)

²⁹ COUNCIL REGULATION (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, (Available at http://frontex.europa.eu/assets/About_Frontex/frontex_regulation_en.pdf, accessed on 13 January, 2014)

³⁰ Kamal-Deen, op.cit. note 15 at 109.

³¹ Egede, op.cit. note 14 at 257-263

Although, certain African states have already enacted, or are currently in the process of enacting the requisite legislation, there needs to be a clear strategy in developing model legislation for all African states to deal with all the maritime crimes indicated in the AIMS which should be made available to all African states.³² Consequently, there is a need for an African inter-governmental platform to coordinate the building up of domestic capacity of African states, especially with regard to enacting up-to-date legislation to effectually prosecute arrested offenders in their courts.

(b) Institutional framework for an African international court to deal with African marine issues

To adequately emphasise the high profile nature of maritime issues under the AIMS an African judicial institution with jurisdiction to settle African maritime disputes, as well as having complementary jurisdiction with domestic courts to prosecute maritime crimes, would be appropriate. However, unfortunately, the idea of such an African court is not currently embedded in the AIMS. Whilst, the Strategy states that the AU through its African Union (AU) Border Programme should make an assertive call for peaceful settlement of existing maritime boundary issues it does not provide any strategy for the use of some sort of judicial mechanism to do so.³³ No doubt, the AU Border Programme has had some success in getting certain African States to negotiate and sign Agreements to settle maritime boundary delimitation issues.³⁴ However, there would be occasions where such amicable agreement would not be achievable. There are instances where African states have had to resort to judicial mechanism to settle maritime disputes. For example, in the past there have been maritime dispute cases between African States decided by the International Court of Justice (ICJ), such as the *Case Concerning the Continental Shelf (Tunisia v. Libya)*³⁵ and *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*.³⁶ The possibility of maritime disputes between African states that would require judicial settlement is certainly not conscribed to just the past as we see from the recent case of the *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, a dispute concerning maritime delimitation in the Indian Ocean.³⁷ In its application Somalia pointed out as follows: ‘The inability of the Parties to

³² Ibid. at pp.261-262. For instance, Nigeria which is on the frontline in the fight against piracy and other maritime crimes in the Gulf of Guinea has recently drafted the Piracy and Other Unlawful Acts at Sea (and Other Related Offences) Bill which is now before the National Assembly.

³³ Para.58

³⁴ One of the justifications for establishing the AU Border Programme is ‘[t]o address the problems posed by the lack of delimitation and demarcation, which gives rise to “undefined zones”, within which the application of national sovereignty poses problems, and constitutes a real obstacle to the deepening of the integration process.’ (available at <http://www.peaceau.org/en/page/27-au-border-programme-aubp>, accessed on 9 September 2015) See for example the role of the AU Border Programme in the signing by Seychelles, The Comoros and Tanzania of Agreements on the Delimitation of their Maritime Borders. (available at <http://au.int/en/content/african-union-welcomes-signing-seychelles-comoros-and-tanzania-agreements-delimitation-their>, accessed on 9 September 2015) For a detailed study of the AU Border Programme see Gbenga Oduntan, ‘Repartitioning of Africa: Imperatives of the African Union Boundary Programme within Contemporary International Law and Practice’ (2011) 1(1) *African Journal of Law and Criminology* 140-203

³⁵ [1985] ICJ Reports p.14

³⁶ [2002] ICJ Reports p.303

³⁷ Available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=00&case=161&code=SK&p3=0>, accessed on 9 September 2015)

narrow the differences between them, and the failure of the Kenyan delegation to attend the final meeting, have made manifest the need for judicial resolution of this dispute.’³⁸ Furthermore, there is the *Dispute Concerning Delimitation of the Maritime Boundary between the Republic of Ghana and the Republic of Cote d’Ivoire (Ghana v. Cote d’Ivoire)* submitted to a Special Chamber of the International Tribunal for the Law of the Sea (ITLOS).³⁹ While these cases attest to the fact that there are already possible international judicial mechanisms, such as the ICJ and ITLOS, to deal with such disputes, it is imperative, in this writer’s view, with regard to maritime disputes between African States, that there should be provision for some type of African court that African states may choose to submit such disputes, if they so wish. After all, the 1982 United Nations Convention on the Law of the Sea (LOSC) does encourage a wide variety of choice for state parties in settling their maritime disputes.⁴⁰ Section 280 of Part XV of the LOSC states: ‘Nothing in this Part 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.’

While section 282 of the LOSC affirms the possibility of a regional means of settling disputes by stating:

‘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.’ (Italics included for emphasis)

This ‘buffet’ like approach of ‘picking and choosing’ whatever dispute settlement procedure a State Party to the LOSC may prefer to employ to settle disputes has been criticised. It is said to contribute to the proliferation of international tribunals and to raise the possibility of fragmentation of both substantive law and procedural law in the law of the sea.⁴¹ However, there is actually no realistic evidence that a diversity of international courts/tribunals and arbitral bodies dealing with the Law of the Sea has actually led to any fragmentation. Judge Mensah, a former Judge of ITLOS, had argued that the view that a proliferation of tribunals would lead to a danger of fragmentation of jurisprudence or conflicting decisions was based

³⁸ Para.32 of the Application Instituting Proceedings filed in the Registry of the ICJ on 28 August 2018, (available at <http://www.icj-cij.org/docket/files/161/18362.pdf>, accessed on 9 September 2015)

³⁹ See ITLOS Order 2015/1 of 12 January 2015, (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.23/C23_Ord_202015-1_12.01.15.pdf, accessed on 9 September 2015)

⁴⁰ [1833 UNTS 3, (1982) 21 ILM 1245]

⁴¹ See Alan Boyle, ‘Dispute Settlement and Law of the Sea Convention: Problems of Fragmentation and Jurisdiction’, (1997) 46(1) ICLQ 37-54.

on mere speculation without any real empirical evidence in support.⁴² It may yet be argued that the ‘buffet’ type approach in the LOSC is indeed an advantage because such multiplicity of dispute settlement mechanisms provides the necessary flexibility that would essentially encourage states parties to have recourse to peaceful settlement of disputes, rather than the alternative of the use of force.⁴³ Providing states with a diversity of peaceful settlement of disputes options is very important because states' willingness to have recourse to international peaceful settlement mechanisms is largely founded on their trust of a particular procedure. Charney puts it this way:

‘...I am not troubled by the multiplicity of dispute settlement systems established by the LOS Convention. I encourage all to embrace and nurture them so that they may fulfill their laudable objectives. We should celebrate the increased number of forums for third-party settlement found in the Convention and other international agreements because it means that international third-party settlement procedures, especially adjudication and arbitration, are becoming more acceptable. This development will promote the evolution of public international law and its broader acceptance by the public as a true system of law.’⁴⁴

Therefore strategically, in order to encourage states to employ peaceful settlement options rather than self-help, it is best to provide a wide variety of choices, both at the global and regional levels, with states having the option to pick whatever option they are comfortable with. Moreover, having a number of Courts with identical jurisdiction would actually result in shared workload, as no single Court would be able to cope with the sheer number of cases if a number of states decide to use that Court to settle their disputes. Besides, the concern about fragmentation of the law is simply not convincing. As long as the different courts are manned by judges with expertise in the particular field of international law there would generally be consistency as the judges would mostly rely on established principles in the area of law, including those determined by other courts in the field. An example of this is with regard to the first boundary delimitation case before the International Tribunal for the Law of the Sea (ITLOS), the *Dispute Concerning the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*, where the ITLOS relied heavily on decisions of other international courts, such as the International Court of Justice (ICJ).⁴⁵

⁴² Thomas Mensah, ‘The Role of Peaceful Settlement in Contemporary Ocean Policy and Law’ in Vidas D and Ostreng, W., (eds.), *Order for the Oceans at the Turn of the Century*, (1999), 81 at 92

⁴³ See Art. 279 of LOSC which places a general obligation on States Parties to resolve their disputes through peaceful means. Also see Article 33(1) of the United Nations Charter. See also Thomas Mensah, ‘The Dispute Settlement Regime of the 1982 United Nations Convention on the Law of the Sea’, (1998)2 *Max Planck Yearbook of United Nations Law* 307 at 323.

⁴⁴ Jonathan Charney, ‘Implications of Expanding International Dispute Settlement Systems: the 1982 Convention on the Law of the Sea’, (1996) 90(1) *AJIL* 69 at 73-74

⁴⁵ Case No.16, Judgement of 14 March 2012, (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/C16_Judgment_14_03_2012_rev.pdf., accessed on 10 September 2015) See Robin Churchill, “The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation,” (2012) 1(1) *Cambridge Journal of International and Comparative Law*, 137-152 for an analysis of the case.

If the AIMS is intended to provide an African flavor to engaging with maritime issues it is pertinent that African states should be given the opportunity to choose, if they so wish, to submit maritime disputes amongst themselves to an African court or tribunal that is conferred with jurisdiction to settle such maritime disputes and also able to deal with other key marine issues addressed by the AIMS. Presently, there is no provision in the AIMS for such a judicial body. Clearly, in the course of the negotiation and drafting of the AIMS no consideration was given to this very important issue. However, it is argued, rather than embarking on the obviously expensive venture of setting up another brand new court, a practical way to go about this is to link the AIMS strategy with the anticipated African Court of Justice and Human Rights. It is proposed that the Strategy incorporates the yet to be established African Court of Justice and Human Rights with the further need to amend the protocol establishing this court to provide for it to have specific jurisdiction to deal with maritime and law of the sea issues.

The African Court of Justice and Human Rights, which is intended to be a merger between two African Courts, namely the yet to be established African Court of Justice and the already functioning African Court of Human and Peoples' Rights, was initiated due to concerns by African Heads of State about the cost of running two separate African Union Courts.⁴⁶ A protocol on the merger has been adopted by the AU Assembly of Heads of States and Governments in July 2008, which was amended in November 2010 and May 2014 respectively.⁴⁷ The 2008 protocol established two chambers - the General Affairs and the Human Rights chambers.⁴⁸ While the 2010 Amendment added to the General Affairs and Human Rights sections, a new International Criminal Law section.⁴⁹ Additionally, the 2014 Amendment under a heading 'Assignment of matters to sections of the court' states:

'1. The General Affairs section shall be competent to hear all cases submitted under Article 28 of the Statute [such as the interpretation and application of the AU Constitutive Act and other AU treaties, as well as acts, decisions, regulations and directives of the organs of the

⁴⁶ See DECISION ON THE MERGER OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS AND THE COURT OF JUSTICE OF THE AFRICAN UNION – ASSEMBLY/AU/6(V), Decision no. Assembly/AU/Dec.83(V), Assembly of the African Union, Fifth Ordinary Session 4-5 July 2005 and Sonya Sceats, "Africa's New Human Rights Court: Whistling in the Wind?", Chatham House briefing paper, March 2009, (available at <https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp0309sceats.pdf>, accessed on 10 September 2015)

⁴⁷ See Protocol on the Statute of the African Court of Justice and Human Rights, July 2008; Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Legal/ACJHR-PAP/4(II) Rev.2 of November 2010 and Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, STC/Legal/Min/7(I) Rev. 1 of May, 2014, (available at http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=18&Itemid=27&lang=en and https://www.iccnw.org/documents/African_Court_Protocol_-_July_2014.pdf, accessed on 10 September 2015)

⁴⁸ See Art.19 of the Annex Statute of the African Court of Justice and Human Rights.

⁴⁹ See Art.10 of the Annex of the Statute of the African Court of Justice and Human & Peoples' Rights

AU, any question of international law etc.] except those assigned to the Human and Peoples Rights section and the International Criminal Law section as specified in this Article;

2. The Human and Peoples Rights section shall be competent to hear all cases relating to human and people's rights.

3. The International Criminal Law section shall be competent to hear all cases relating to the crimes specified in this Statute.⁵⁰

It would seem, that the General Affairs section as it is framed, has a wide enough jurisdiction to have the competence to adjudicate on law of the sea cases, since it may consider cases on any question of international law, which would obviously include international law of the sea, a branch of international law.⁵¹ Notwithstanding, it would be preferable to have a separate section on the international law of the sea to drive home the significance of the so-called 'blue economy' to Africa. Due to the rather technical and specialised nature of this branch of international law this separate section should be constituted by judges who are acknowledged international law of sea experts. This could actually be done without a formal amendment of the protocol as the 2014 Amendment allows for the creation of additional chambers (or sections) apart from the three ones that are specifically mentioned.⁵² Furthermore, it is worth noting that the International Criminal Law section of the African Court of Justice and Human Rights, amongst its competence, has criminal jurisdiction over some of the criminal and illegal activities mentioned in the AIMS such as piracy, terrorism, and trafficking in persons, drugs and hazardous wastes and the illicit exploitation of natural resources. It is recommended that the competence of this section be further amended to take account of other maritime crimes listed in the AIMS that are not currently included in the protocol.⁵³

Currently, there are only 5 ratifications - Benin, Burkina Faso, Congo, Libya and Mali – of the Protocol on the Statute of the African Court of Justice and Human Rights,⁵⁴ and it would only enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States.⁵⁵ There is therefore a need to encourage other AU Member States to hasten progress on the ratification of the protocol.

The Strategy needs to be more explicit on a regional judicial arrangement for dealing with African marine issues. The proposal in this section of the article argues for an African peaceful settlement judicial mechanism to settle strictly African maritime disputes, as well as other marine issues arising from the AIMS. Further, it is expected that this African international

⁵⁰ See Art.7 of the Annex of the Statute of the African Court of Justice and Human & Peoples' Rights

⁵¹ Art.28 of the Annex

⁵² See Art.9 of the Annex of the Statute

⁵³ See for instance, armed robbery, money laundering and illegal arms trafficking. See para. 63 of AIM Strategy.

⁵⁴ Available at <http://au.int/en/treaties> , accessed on 10 September 2015

⁵⁵ Art.9

judicial structure would complement the domestic courts in prosecuting maritime crimes committed with the AMD.

(c) **Institutional framework for the outer limit of the continental shelf**

The outer limit of the continental shelf (or the extended CS) is mentioned in passing in the AIMS.⁵⁶ It however provides no strategy as to how to secure and harness this part of the sea for African coastal states and also how to help the States to fulfil their obligations under the LOSC. Under the LOSC broad shelf coastal states may claim for an extended CS by making submissions to a body set up for this purpose, the United Nations Commission on the Limits of the Continental Shelf (CLSC).⁵⁷ Although, it is not clear the exact number of states in Africa that actually have extended CS, a number of African coastal states have already made submissions, as well as preliminary information indicative of the outer limits of the continental shelf beyond 200 nautical miles to the CLCS.⁵⁸ This part of the CS, which contains tremendous natural resources that could generate wealth for African states blessed with such extended CS and potentially provide necessary funds to promote development in such states, has been described rather dramatically as creating the ‘potential to gain new territory... without going to war.’⁵⁹ In 2008, the African Union Assembly at its tenth ordinary session, engaged with the issue of the extended CS of African coastal states and adopted a decision that was stated to be made with the consciousness of: ‘the major geopolitical and strategic stakes linked to the African continental shelf and of its abundant mineral and biological resources, which constitute an important source of foreign currency earnings for the economic development of the continent.’⁶⁰ The task therefore before African coastal states with extended CS is to first secure their extended CS in line with LOSC. Presently, a number of African broad shelf states who were due to make their submissions by May 2009 cutoff date were unable to do so due to the complexities and technicalities involved in the preparation of submissions, as well as the cost implications.⁶¹ The States Parties to the United Nations Convention on the Law of the Sea

⁵⁶ See Para.59 of AIM Strategy which states: ‘Member States shall be encouraged to claim their respective maritime limits, including their extended continental shelf where applicable’ and urges member States to accept and fulfil all responsibilities and obligations that arise from the establishment of maritime zones as required by the LOSC and the IMO SOLAS Conventions.

⁵⁷ Art.76(4)-(9) of LOSC

⁵⁸ (available at http://www.un.org/depts/los/clcs_new/commission_submissions.htm and http://www.un.org/depts/los/clcs_new/commission_preliminary.htm respectively, access on 10 September 2015). See also

E. Egede, ‘The outer limits of the continental shelf: African states and the 1982 Law of the Sea Convention’, (2004)35(2) ODIL, 157-178.

⁵⁹ A statement attributed to Ian McLachlan, the project leader of South Africa’s extended CS claim. See Irma Venter, ‘Australia will be first to excel at mining the Ocean floor – Canadian Prof’, Mining Weekly Online, 14 March 2008, cited in Edwin Egede, ‘Africa and Extended Continental Shelf under the Law of the Sea Convention(LOSC) 1982’, (2012) *Journal Jurisprudence* 173 at 179-180.

⁶⁰ Decision on Extension of the African Continental Shelf and Climate Change, Doc.EX.CL/391 (XII), Decisions and Declarations of the 10th Ordinary Session of the Assembly of the AU, 31 January-2 February 2008, available at

http://www.au.int/en/sites/default/files/ASSEMBLY_EN_31_JANUARY_2_FEBRUARY_2008_AUC_TENTH_ORDINARY_SESSION_DECISIONS_AND_DECLARATIONS.pdf , accessed on 10 September 2015)

⁶¹ See Egede, op.cit. note 58 and note 59 at 181-192. See also Chris Carleton, ‘Article 76 of the UN Convention on the Law of the Sea – Implementation Problems from the Technical Perspective’, (2006) 21(3) IJMCL 287 at

(SPLOS), in response to the concerns of certain developing states, including some in Africa, that they would be unable to meet the May 2009 deadline, decided that a coastal state could meet this cutoff date by merely submitting to the United Nations Secretary-General before the deadline a preliminary information indicative of the extended continental shelf, along with a description of the status of preparation and the intended date of making the actual submission. This decision is, however, clear that pending the receipt of the actual submission the CLCS would not consider such preliminary information.⁶² A number of African coastal states fall within the category of states that have merely submitted their preliminary information, which as mentioned above does not amount to an actual submission to the CLCS, but may allow them to progress to such actual submission. It must be noted that under the LOSC only limits of the extended CS established on the basis of the recommendations of the CLCS would be regarded as ‘final and binding.’⁶³ It is therefore necessary to have some type of institutional framework that would co-ordinate the efforts to ensure that all African broad-shelf states are able to secure their extended CS by making the appropriate submissions to the CLCS. Although, the LOSC currently allows the CLCS to provide scientific and technical advice on such submissions, there is a need for a body under the auspices of the AU to provide a forum to advise and assist African broad shelf states in a manner that meets the peculiar needs of Africa.⁶⁴ This institutional role may be carried out under the auspices of the African Union (AU) Border Project which has as one of its aims the need: ‘to address the problems posed by the lack of delimitation and demarcation, which gives rise to “undefined zones”...’ and has as one of its crucial strategic objectives the aspiration of ‘[f]acilitating and supporting the delimitation and demarcation of African boundaries where such exercise has not yet taken place,’ and has had some, though rather limited experience, in this area.⁶⁵ As an African wide institution it could provide coordinated assistance to such states that need to secure their extended CS by making submissions to the CLCS. Its’ role would be advisory and consultative since issues with regard to the CS are a matter within coastal states’ competence.⁶⁶ It would also serve as a platform to bring together all the African members of the CLCS, as well as African experts in relevant disciplines such as geology, geophysics, hydrology or international law of sea, who have

288, 306. Further, for e.g. Mauritius and Seychelles, had explicitly stated in their submission to the CLCS that they faced significant challenges “posed by geographical isolation, technical capacity and financial resources” (See Para.1.11 of Executive Summary) and also Ghana pointed out that their submission was prepared “notwithstanding significant challenges posed by technical capacity and financial resources.”(See Para. 1.6 of the Executive Summary), (available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_musc.htm , accessed on 10 September 2015)

⁶² Para 1(a) and (b) of SPLOS/183 of 24 June 2008

⁶³ See Art.76(8) of LOSC

⁶⁴ See Annex 3(1)(b) of Annex II of LOSC. It is interesting to note that so far the CLCS Subcommittee dealing with this is yet to receive any request from a Coastal State for Scientific and Technical Advice. See Para.59, CLCS/88 of 20 April 2015, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N15/112/55/PDF/N1511255.pdf?OpenElement> , accessed on 13 January 2016

⁶⁵ Available at <http://www.aubis.peaceau.org/fr/about-us> , accessed on 10 September 2015. See Para. 7 of the Pan-African Conference on Maritime Boundaries and the Continental Shelf for the Implementation of the African Union Border Programme Conclusions, Accra, Ghana, 9-10 November 2009, (available at <http://www.peaceau.org/uploads/conclusions-accra-eng-.pdf>, accessed on 9 September 2015) and Gbenga Oduntan, *International Law and Boundary Disputes in Africa*, (2015) 112-113

⁶⁶ See Art.78 of LOSC

expertise in this area, to provide expert advice to African coastal states who need assistance with respect to their submissions to the CLCS.⁶⁷ Although, there are adequate information in the public domain on bodies in the international sphere that could provide such expert technical advice and information on possible sources of finance with regard to submissions to the CLCS, the AUBP could act as a one-stop shop to point African coastal states who need such information in the right direction.⁶⁸

Clearly, securing the extended CS is merely part, albeit a crucial part, of the process, as there would also be a need for such coastal states to actually exploit this part of the sea and to comply with their obligations under LOSC, especially with regard to Article 82. Under Article 82 the coastal states are to make annual payments or contributions in kind to the International Seabed Authority (ISA) in respect of exploitation of non-living resources in this part of the CS for distribution amongst states parties to the convention.⁶⁹ This obligation begins in the sixth year of production at 1% of the value of volume of all production in the site (except the resources used in connection with exploitation). It would increase by one per cent every year until the twelfth year where it hits the ceiling of 7% and it thereafter remains at 7%.⁷⁰ The only states that are exempt from making this payment or contribution in kind are developing states that are net importers of a mineral resource produced from its continental shelf.⁷¹ The AU Border Programme could also be given the remit, working closely with the AU's office of the legal counsel, to assist African states in putting in place the appropriate legislative framework to comply with their Article 82 obligation and any other obligation with regard to the extended CS, through for example, designing model legislation and model agreements between a state and potential multinational corporations (MNCs).⁷²

In essence, there is need to have a more detailed and coherent institutional framework provisions in the AIMS to coordinate and provide a more Continent wide strategic approach in assisting broad shelf African coastal states to secure and harness the extended CS, as well as to comply with obligations imposed by LOSC as regards this resource rich part of the sea.

⁶⁷ There are five African members of the CLCS, currently, E. Kaingui (Cameroon), I.O. Oduro (Ghana), S. Njuguna(Kenya), E.S. Mahanjane (Mozambique) and L.F. Awosika (Nigeria), (available at http://www.un.org/depts/los/clcs_new/commission_members.htm#Members , accessed on 10 September 2015)

⁶⁸ On information available in public domain on this, see for instance, the advice and assistance section of the CLCS website, (available at http://www.un.org/depts/los/clcs_new/clcs_home.htm , accessed on 10 September 2015) and Egede, op.cit note 59 at 184-192.

⁶⁹ Art.82(1) and (4)

⁷⁰ Art.82 (2)

⁷¹ Art.82(3)

⁷² See International Seabed Authority (ISA), *Implementation of Article 82 of the United Nations Convention on the Law of the Sea*, ISA Technical Study No.12, (2013), (available at <https://www.isa.org.jm/sites/default/files/files/documents/ts12-web.pdf> , accessed on 10 September 2015)

(d) An institutional framework for deep seabed mining activities.

Interestingly, the AIMS does not in any way engage with the issue of the deep seabed beyond national jurisdiction (the Area), which is the common heritage of mankind (CHM), even though African states played a prominent role in pushing for this relatively new regime.⁷³ In this section, it is argued that the omission of the AIMS to engage with this part of the sea is a major flaw which needs to be remedied, especially since it is intended to be a long-lasting strategy. Furthermore, it is argued that there is a need for a strategy for an appropriate institutional framework to enable Africa engage with this important part of the sea. The AIMS' failure to engage with the Area could probably be due to a rather narrow perception of what constitutes the African Maritime Domain (AMD). The Strategy, in its main body, appears to give the impression that it is more concerned with activities with regard to the maritime zones within national jurisdiction of African coastal States (i.e. the internal waters, territorial seas, exclusive economic zones and continental shelves etc.). However, a close scrutiny of the definition of the AMD as provided in Annex B of the Strategy would reveal that the AMD is not necessarily limited to only the maritime zones within national jurisdiction. It maintains that the AMD:

... refers to all areas and resources of, on, under, relating to, adjacent to, or bordering on an African sea, ocean, or African lakes, intra-coastal and inland navigable waterways, including all African maritime-related activities, infrastructure, cargo, vessels and other means of conveyance. It also includes the air above the African seas, oceans, lakes, intra-coastal and inland navigable waterways and to the oceans' electromagnetic spectrum as well.

Although, this definition of the AMD is rather convoluted, it would appear to suggest that for the purposes of the Strategy, the AMD could extend to 'areas and resources' that are adjacent to the so-called African seas, which, arguably, could be said to include parts of the deep seabed Area contiguous to maritime zones of African states. Besides, it is argued that even if it is accepted that the AMD under the Strategy is limited to maritime zones within national jurisdiction such an approach is a rather restricted and narrow one. For instance, the European Union (EU) blue growth Strategy, an integral part of the EU Integrated maritime policy, is broadly framed to also include deep seabed mining in the Area.⁷⁴ Thus, it is argued that the AIMS should similarly adopt a more broad-based approach, which would include a position with regard to the deep seabed Area. This is all the more so as the preamble of the LOSC rightly identifies 'that the problems of ocean space are closely interrelated and need to be considered as a whole.'⁷⁵ For instance, in the case of the deep seabed Area, there is a strong linkage between the continental shelf (CS) and the Area, the latter being the CHM. Hence, the outer limit of the CS of coastal States is what is used to delineate the Area as the latter is defined as:

⁷³ Edwin Egede, *Africa and the Deep Seabed Regime: Politics and International Law of the Common Heritage of Mankind*, (2011), ch 1.

⁷⁴ Available at http://ec.europa.eu/maritimeaffairs/policy/blue_growth/index_en.htm, accessed on 10 September 2015.

⁷⁵ Preamble 3.

“...the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.”⁷⁶ In addition, there is the possibility that resources may actually straddle between the Area and national jurisdictions of nearby states, including certain African coastal states.⁷⁷ Furthermore, any mining activities in the Area close to the African continent would certainly have some environmental impact on the maritime zones of adjacent African states and may potentially impact economic activities within the maritime zones of African states, such as fisheries activities etc. Bearing this in mind, it is important to note that Article 194 of LOSC imposes a general obligation on states to protect the marine environment both within and outside national jurisdiction. Moreover, it is in the vital strategic interest of African states to participate in deep seabed mining activities, which potentially, with the increasing development of marine technology, may end up being an alternative source for key mineral resources such as copper, cobalt, gold, silver, manganese, lithium and manganese, and thereby compete with similar resources produced by certain African states either within their terrestrial or maritime territories. For instance, African states, such as Zambia, Botswana, Morocco, South Africa, Namibia, Democratic Republic of Congo and Zimbabwe are land-based producers of copper and cobalt. While African states, such as South Africa, are major producers of gold. In addition, there is the potential, though rather slim, of locating petroleum resources in the Area, which could compete with such resources located in African states.⁷⁸ Furthermore, there is the possibility of locating methane (gas) hydrates, which are ice-like crystalline compounds consisting of gas (usually methane) and water molecules located both on continental margins and in the Area.⁷⁹ It is believed that methane hydrates would provide one of the most important energy sources in the future.⁸⁰ Thus, significant African oil and gas producers, such as Angola, Gabon and Nigeria, should have an interest in this possibility of locating oil and gas, as well as methane hydrates, as the latter could be an alternative source of energy.⁸¹ The EU, for instance, has evinced an appreciation of the strategic importance of this evolving industry. For

⁷⁶ Art.1(1) of LOSC

⁷⁷ See Art.142 of LOSC

⁷⁸ V.I Vysotsky and A.I. Gloumov, ‘Petroleum Potential and Development Prospects in Deep –Sea Areas of the World’, in International Seabed Authority (ed.), *Minerals other than Polymetallic Nodules in the Seabed: Proceedings of the International Seabed Authority Workshop held on 26-30 June 2000 in Kingston, Jamaica*, (2004) 484-516, (available at <https://www.isa.org.jm/sites/default/files/files/documents/2000-othermins.pdf> , accessed on 10 September 2015)

⁷⁹ See International Seabed Authority (ISA) Press Release SB/6/21 of 5 July 2000 where Indonesia, commenting on the ISA Secretary-General’s report, suggested that the ISA gives more attention to methane hydrates.

⁸⁰ See Erhlich, Desa, ‘Submarine Methane Hydrates – Potential Fuel Resources of the 21st Century’, in International Seabed Authority (ed.), op.cit. note 78 at 517-558. Currently, certain States like the USA, are carrying out ongoing research to identify, explore, assess and develop methane hydrates as an alternative source of energy, (available at <http://energy.gov/fe/science-innovation/oil-gas-research/methane-hydrate> , accessed on 10 September 2015)

⁸¹ See Egede, op.cit. note 73 at ch 7 and ‘African States and Participation in Deep Seabed Mining: Problems and Prospects’, (2009) 24(4) IJMCL 683-712, where the author argues for participation of Africa in seabed mining activities and suggests certain ways to go about this. See also EU Blue growth Strategy, (available at http://ec.europa.eu/maritimeaffairs/policy/seabed_mining/index_en.htm , accessed on 10 September 2015) and the Ecorys Study to investigate the State of Knowledge of deep-sea mining, Final Report under FWC MARE/2012/06 - SC E1/2013/04 (Commissioned by the European Commission – DG Maritime Affairs and Fisheries) of 28 August 2014, (available at https://webgate.ec.europa.eu/maritimeforum/sites/maritimeforum/files/FGP96656_DSM_Final_report.pdf , accessed on 10 September 2015)

instance, a recent study commissioned by the EU on deep seabed mining identified that: ‘[b]ringing in a new source for metal supply, particularly located in international waters, may alleviate the price competition and provide more security for Europe.’⁸² This of course is at variance with the interest of African States producing similar minerals and thus indicates a need to have a clear strategy reflecting some kind of African position with regard to deep seabed mining activities.

Furthermore, the Secretariat of the Pacific Community in a report prepared in 2012, recognised that potentially there could be huge economic benefits which could accrue to African Caribbean and Pacific (ACP) states that sponsor deep seabed mining exploitation in the Area.⁸³ The report pointed out that potentially this could benefit such states in the following ways: by contributing to its government revenues through taxes and/or royalties, by creating jobs and training opportunities, as well as strengthening the domestic private sector, encouraging foreign investment, the funding of public service improvements, contributing to infrastructure development and supporting other economic sectors.⁸⁴ Further, the EU has identified probable benefits and opportunities for EU based companies that may engage in deep seabed mining exploitation. For instance, in a communication from the EU Commission to the European Parliament, as well as some other bodies of the EU, the Commission stated: ‘If this expansion in extracting minerals from the [deep] seafloor does take place, European companies, with their long experience in specialized ships and underwater handling, are currently well positioned to provide high-quality products and services.’⁸⁵ It is thus astonishing that the AIMS with its central aim of improving the blue economy does not in any way engage with this maritime industry that conceivably may be a central part of mineral exploitation in the future.

In addition, despite the various ongoing activities in preparation for eventual commercial exploitation of Area, as well as the sensitization seminar on the work of the International Seabed Authority (ISA), and the secretary-general of the ISA’s presentation to the Commission of the African Union,⁸⁶ it is rather remarkable that the drafters of the AIMS did not touch on this regime nor develop any strategy on this. Recently, the deputy to the secretary-general of

⁸² Ecorys Study, Ibid at 24

⁸³ Secretariat of the Pacific Community, Pacific-ACP States Regional Legislative and Regulatory Framework for Deep Sea Minerals Exploration and Exploitation: Prepared under the SPC-EU EDF10 Deep Sea Minerals Project, (July 2012), 1st ed (available at <http://www.smenet.org/docs/public/FinalDeepSeaMineralsProjectReport.pdf> , accessed on 10 September 2015)

⁸⁴ Ibid, Para. 4.2 at 6

⁸⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Blue Growth: Opportunities for Marine and Maritime Sustainable growth, COM(2012) 494 final of 13 September 2012

⁸⁶ Sensitization seminar held in Abuja, Nigeria, from 24 to 26 March 2009 ISBA/15/A/4 of 6 May 2009 and The S-G of the ISA’s presentation, titled: ‘Under Seabed Wealth in Africa’s maritime domain: The role and functions of the International Seabed Authority,’ 19th of April 2012, (available at <http://www.isa.org.jm/files/documents/EN/15Sess/Ass/ISBA-15A-4.pdf> and <http://pages.au.int/sites/default/files/International%20Seabed%20Authority.ppt>, respectively and accessed on 10 September 2015)

the ISA at a seminar held in South Africa expressed concerns over the lack of participation by African states in the deep seabed regime.⁸⁷ This is even more so since the LOSC, after declaring the Area and its resources as CHM, goes on to explicitly encourage the participation of developing states in deep seabed activities by stating:

The effective participation of developing States in activities in the Area shall be promoted as specifically provided for in this Part, having due regard to their special interests and needs, and in particular to the special need of the land-locked and geographically disadvantaged among them to overcome obstacles arising from their disadvantaged location, including remoteness from the Area and difficulty of access to and from it.⁸⁸

To date the ISA has issued Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (adopted 13 July 2000), which was later updated and adopted on 25 July 2013; the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area (adopted 7 May 2010) and the Regulations on Prospecting and Exploration for Cobalt-Rich Crusts (adopted 27 July 2012).⁸⁹ Currently, the ISA is working on draft Regulations with regard to exploitation of mineral resources in the Area.⁹⁰ With improving technology there is a growing interest in the Area and presently there are twenty six contractors, both state owned and private enterprises, which have engaged with activities in the Area by obtaining exploration contracts from the ISA. Out of all the regional groupings, only Africa is not represented amongst this contractors.⁹¹ With the expected increase in global demand for natural resources, and the gradual depletion of onshore and near offshore resources due to such demand, it is likely that more and more attention would be directed towards exploiting the Area. It is therefore imperative for Africa to have, as part of the AIMS, some sort of strategy towards promoting Africa's engagement with this future mineral rich 'frontier'. A well-thought out strategy on deep seabed mining would ensure that, at some point, African states and their nationals, both natural and juridical, would have the opportunity to engage in deep seabed mining activities in this part of the sea. Also, it would facilitate the development of appropriate institutions that

⁸⁷ See SADC Seminar on Exploration and Exploitation of Deep Seabed Minerals Resources in the Area : Challenges for Africa, held in South Africa from 17-19 March 2015, (available at <https://www.isa.org.jm/seminar/sensitization-seminar-17-19-march-2015-south-africa> , accessed on 10 September 2015)

⁸⁸ See Arts. 136 and 148 of LOSC 82. See Paras. 156 and 157 of the *Advisory Opinion of the Seabed Disputes Chambers on Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), ITLOS case no.17 of 1 February 2011, (available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/17_adv_op_010211_en.pdf, accessed on 10 September 2015), which explored this provision.

⁸⁹ See International Seabed Authority website, (available at <https://www.isa.org.jm/> and accessed on 10 September 2015)

⁹⁰ See ISBA/17/C/21 of 21 July 2011, Para.20 and ISBA/20/A/2 of 4 June 2014, Paras 66-68.

⁹¹ See International Seabed Authority website, (available at <https://www.isa.org.jm/> and accessed on 10 September 2015) for a current update on activities in the Area and the current list on contractors. Also, see Egede, op.cit note 73 at ch 6 and 7, who as far back as 2011 had raised concerns about the lack of effective participation by African States in this regime.

would enable Africa to actively participate in this vital regime of the sea. Although, deep seabed mining is a capital intensive industry, which may be burdensome to single African states to embark upon on their own, this may be overcome by African states pooling resources together, under the auspices of the AU, in order to engage in seabed mining activities in the Area, and thus climb on the deep seabed mining ‘ladder’.⁹² It is pertinent here to mention that the idea of an African institution to engage in deep seabed mining was actually proposed as far back as 1988, during the third regional minerals conference held at Kampala, where the idea of forming an African deep seabed mining corporation was put forward. However, nothing came out of this.⁹³ While it is appreciated that this did not come to fruition in 1988 when the possibility of deep seabed exploitation was remote, it is incomprehensible that there is currently no strategy for the establishment of such an institution under the AIMS, especially with the imminence of deep seabed exploitation and since states, corporations and other entities in other regional groupings in the world are already engaging with what promises to be a major source of mineral wealth for the future.⁹⁴ Africa needs to have a strategy to put in place some type of African deep seabed mining corporation that would participate in the exploitation of this part of the sea. On the other hand, a more short-term strategy option to engage in deep seabed mining, pending the establishment of such African corporation, is the approach adopted by certain Pacific states. For instance, Nautilus Minerals Inc., an MNC, incorporated local subsidiaries, namely Nauru Ocean Resources Inc. and Tonga Offshore Mining Limited, in the Republic of Nauru and the Kingdom of Tonga respectively, and the local companies were sponsored by the state where they have been incorporated for work plans for explorations in the part of the Area reserved by the ISA for developing countries.⁹⁵ This could be an option available to African states, with the possibility of such states acquiring some equity interest in such subsidiary corporations and also encouraging their nationals to do so, if they wish.

One of the key issues that states would have to engage with in regard to deep seabed mining is the impact such mining activities in the Area would have on the protection of the environment. For instance recently the G7 identified that one of the key priorities with this regime is: 'enhancing the effective protection of the marine environment from harmful effects that may arise from deep sea mining' and therefore they committed themselves: 'to taking a precautionary approach in deep sea mining activities, and to conducting environmental impact assessments and scientific research.'⁹⁶ As would be recalled, the ITLOS Seabed Disputes Chambers in its *advisory opinion on Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion*

⁹² See Egede, *Ibid*, at ch 7 where the author proposes different strategic alliances and cooperative efforts that Africa may employ to achieve this.

⁹³ See Barbara Kwiatkowska, 'Ocean Affairs and the Law of the Sea: Towards the 21st Century' (1993) 17(1) MP 11 at 29

⁹⁴ The ISA is currently working on a Draft Regulation on Exploitation. (See note 89 above)

⁹⁵ Available at <http://www.isa.org.jm/files/documents/EN/Press/Press11/SB-17-11.pdf>, accessed on 10 September 2015.

⁹⁶ Leaders Declaration G7 Summit, 7-8 June 2015, Schloss Elmau, Germany, (available at https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf, accessed on 10 September 2015)

submitted to the Seabed Disputes Chamber), pointed out that state laws and regulations governing seabed mining should be 'no less effective than international rules, regulations and procedures' such as the LOSC and the ISA Mining Codes. It also declared that states, both developed and developing, have a direct obligation to ensure that seabed mining activities are carried out in accordance with the precautionary approach, while employing best environmental practice and conducting effective prior environmental impact assessment. The Chambers made it clear that with regard to the responsibilities and liabilities of sponsoring States under the LOSC there would be no preferential treatment given to sponsoring States that are developing states.⁹⁷ Therefore, all African states would need to adopt appropriate national legislative framework that would ensure that any entity located within their territory complies with best environmental practice and actually conducts appropriate environmental impact assessment and generally complies with all relevant international obligations.⁹⁸ In addition to environmental protection, such legislation would have to deal with other pertinent issues, such as foreign investment and fiscal management of deep seabed mining, as well as seek to regulate possible tensions between deep seabed mining activities and other competing activities, for e.g. fisheries, maritime transport, conservation of marine species, research, laying down of submarine telecommunications cables etc.,⁹⁹ which may impact the domestic economy. Thus, there would be need for a coordinating body, perhaps in liaison with the African Union office of the legal counsel, to develop model deep seabed legislation and seek to encourage interested African states to get their legislature to enact appropriate legislation on this. Although, there are potentially several bodies that could take up this role if their mandate is expanded,¹⁰⁰ the recently launched African Minerals Development Centre (AMDC), established to strategically coordinate the implementation of the African Mining Vision (AMV), provided with a specific expanded mandate with regard to deep seabed mining, could be an appropriate coordinating institution.¹⁰¹

III. CONCLUSION

Undoubtedly, the AIM Strategy is a momentous achievement that charts new 'waters' with regard to African marine policy. It introduces a number of innovative and intriguing institutions such as the Oceans and Seas Research Institute of Africa (OSERIA), a Strategic Foresight Marine Task Force (SEMTE), and the Compensation Fund etc. However, this article has sought to identify some gaps in the institutional framework of the Strategy, with regards to certain

⁹⁷ ITLOS case no.17 of 1 February 2011, Paras 158 and 159 (see note 88 above). See Hui Zhang, 'The Sponsoring State's 'Obligation to Ensure' in the Development of the International Seabed Area,' (2013) 28 *IJMCL* 681-699

⁹⁸ Under section 209 of LOSC the requirements of such national legislation '...shall be no less effective than the international rules, regulations and procedures ...'

⁹⁹ Secretariat of the Pacific Community, Pacific-ACP, op.cit. note 83 at 6-8 and 14-15. For examples of domestic legislation see Singapore Deep Seabed Mining Act no.6 of 2015; The Kingdom of Tonga Seabed Minerals Act no.10 of 2014 and the UK Deep Sea Mining Act 2015, ch 15, which amended the Deep Sea Mining (Temporary Provisions Act) 1981.

¹⁰⁰ See Egede, op.cit. note 73 at 229-232, for e.g. the African Energy Commission (AFREC) with an expanded mandate.

¹⁰¹ The AMDC was launched in 2013 and co-sponsored by the United Nations Development Programme (UNEP), Economic Commission for Africa (UNECA), the African Union Commission (AUC) and the African Development Bank (AfDB), available at <http://www.uneca.org/pages/about-amdc>, accessed on 20 January 2016.

important areas of concerns in the sea, such as maritime security enforcement, an African international judicial mechanism dealing with marine matters, the outer limits of the continental shelf and deep seabed regime. It argues for a reconsideration of the AIM Strategy with regard to these important issues and a provision of a clearer strategy on the appropriate institutional framework to engage with these key matters. There is no doubt that appropriate and effective institutions are what drives the implementation of any policy vision. There must therefore be clear political will to operationalise the relevant institutions, both those already covered by the Strategy and those proposed in this article, for the vision of harnessing the African blue economy to be achieved. Without a clear strategy with regard to putting in place such institutions, it is likely that the AIM Strategy could end up being a hollow shell having no real impact on Africa's engagement with its adjoining seas.