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Article in African Journal of International and Comparative Law · September 2008

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THE MARITIME ZONES OF EAST AFRICAN STATES IN THE LAW OF THE SEA: BENEFITS GAINED, OPPORTUNITIES MISSED

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CATARINA GRILO

I. INTRODUCTION

The United Nations Convention on the Law of the Sea, 1982 (LOS Convention) has been in force since 16 November 1994 and on 10 December 2007, it will be a quarter century since its adoption in Montego Bay, Jamaica.¹ Many African coastal states were among the most active supporters of a new international law of the sea. Indeed, they pre-empted the adoption and entry into force of the LOS Convention by claiming the national maritime zones and jurisdictional benefits conferred by that instrument. For many of those states, the LOS Convention constituted an opportunity to break away from their colonial past and to engage in a new kind of regime-building expected to contribute to the economic and social advancement of all peoples, effectively a new international economic order. The ocean space and marine resources adjacent to the coastal state were perceived as constituting an opportunity to further national economic development. East African states, in particular Kenya and Tanzania, were among the most active in developing a new framework for national maritime zones and the type and extent of authority enjoyed therein by coastal states, and to a much lesser extent, by land-locked states.

Twenty-five years hence, it is appropriate to enquire how African states, and in particular East African states, have legislated the maritime zone claims permissible under the LOS Convention to maximise their entitlements while being compliant with the new legal framework. At the time the LOS Convention

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¹ United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, UN Doc. A/CONF.62/122, 7 October 1982 (hereafter the LOS Convention).

was adopted in 1982, there were several African coastal states having claims inconsistent with the new rules for national maritime zones and jurisdictions therein, and several others had not fully maximised the benefits conferred by the new law of the sea. It should be expected that in the long intervening period since then, African coastal states parties to the LOS Convention would have had an opportunity to review their maritime legislations to bring them into conformity while reaping the benefits conferred by the Convention.

This enquiry is timely because East African states, among others, are under a time-limited opportunity under the LOS Convention to claim extended continental shelves. East African states are also active in the designation of representative networks of marine protected areas (MPAs) in pursuit of commitments undertaken in the Convention on Biological Diversity, 1992 and Jakarta Mandate, the subsequent 2002 Johannesburg Summit and the 2003 World Parks Congress.² They are pursuing these commitments with the support of the international donor community and leading international non-governmental organizations. In addition to domestic MPAs, East African states are also embarking on the establishment of transboundary MPAs on a bilateral basis, a relatively new type of international cooperation in ocean management.³ Both domestic and transboundary MPAs require legitimate and authoritative exercise of various maritime jurisdictions enjoyed by coastal states within their maritime zones under the LOS Convention. The exercise of those jurisdictions is dependent to a considerable extent on the national maritime zones claimed, and insofar as transboundary MPAs are concerned, also on the state of maritime boundaries with immediate neighbours.

This article examines the contemporary maritime zone legislative practice of four East African states, namely Kenya, Mozambique, South Africa and Tanzania. The discussion intentionally excludes in-depth treatment of two otherwise relevant East African coastal states, Eritrea and Somalia, as they are not covered under the project study that generated this analysis. The principal aim of this study is to determine consistency with and the extent to which maritime zone benefits have been maximised under the legislation of the chosen four East African coastal

2 Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 142, art. 8 *re in situ* conservation; Conservation and Sustainable Use of Marine and Coastal Biological Diversity, Conference of the Parties to the Convention on Biological Diversity, COP 2 Dec. No. II/10, available at <http://www.cbd.int/decisions/cop-02.shtml?m=COP-02&id=7083&lg=0> (accessed 20 January 2008); Plan of Implementation of the World Summit on Sustainable Development, in Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002, UN Doc. A/CONF.199/20 (2002), para. 32(c), creation of a representative network of MPAs by the year 2012; Vth World Parks Congress, Durban, South Africa, 8–17 September 2003, Recommendations, WPC Rec 5.04, available at <http://www.iucn.org/themes/wcpa/wpc2003/english/outputs/intro.htm#key> (accessed 20 January 2008). See: S. Wells, N. Burgess & A. Ngusaru, 'Towards the 2012 Marine Protected Area Targets in Eastern Africa,' 50 *Ocean & Coastal Management* (2007): 67–83; J. Francis, A. Nilsson and D. Waruinge, 'Marine Protected Areas in the Eastern African Region: How Successful Are They?' 31 *Ambio* (2002): 503–11.

3 Decisions of the Fourth Meeting of the Contracting Parties to the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi Convention), CP4/4, available at http://www.icriforum.org/library/Annex_19_Nairobi_Convention.pdf (accessed 20 January 2008).

states. Set against the backdrop of the LOS Convention and regional practices, the article first highlights African states' contribution to the evolution and conclusion of the law of the sea regime codified under the Convention. Second, it examines in broad outline, the progress the coastal states have made in bringing their claims to maritime areas in conformity, or otherwise, with the limits prescribed by the LOS Convention. Following this is the more detailed examination of the legislation of the four East African states in terms of the extent to which their maritime zones statutes reflect, depart from, or are silent on the claims that they are entitled to make regarding the various maritime zones, from baseline delineation through to rights and jurisdictions in respect of all claimable maritime areas, and regarding their maritime boundary delimitation provisions. The article concludes by identifying legislative gaps which East African states might want to consider addressing in order to fully maximise maritime zone and jurisdictional benefits conferred by the LOS Convention on coastal states.

II. PREMISE: AFRICAN STATES AND THE LOS CONVENTION

A. Contributions of African states to the development of the LOS Convention

Today there are fifty three African states, fifteen of which are land-locked, on a continent which is flanked by the Mediterranean Sea in the north, the Atlantic Ocean to the west and the Red Sea, Horn of Africa and Indian Ocean to the east (Table 1). African states were important active contributors to the development of the modern law of the sea, both during the preparatory period 1968–1974 and throughout the Third United Nations Conference on the Law of the Sea (UNCLOS III), 1974–1982.⁴ Virtually all of the forty seven African states independent at the time of UNCLOS III participated in the conference, even though the vast majority had virtually no experience in law of the sea matters. Lack of experience during UNCLOS III did not, however, bar the extent, scope or quality of their participation. Most of these states had achieved their independence after the First

⁴ Although dated, the leading work on the African contribution to the development of the modern international law of the sea continues to be N. S. Rembe, *Africa and the International Law of the Sea*, Sijthoff & Noordhoff (1980). See also: P. S. Ferreira, 'The Role of African States in the Development of the Law of the Sea at the Third United Nations Conference,' 7 *Ocean Development & International Law* (1979): 89–129; J. O. Afolabi, 'The Impact of the African States on the Third Law of the Sea Conference: Its Ramifications for the Emerging World Order', PhD Dissertation, University of Miami, Coral Gables, Florida (July 1980); C. O. Okidi, 'The Role of the OAU Member States in the Evolution of the Concept of the Exclusive Economic Zone in the Law of the Sea: The First Phase,' 7 *Dalhousie Law Journal* (1982–83): 39–71; K. G. Adar, 'A Note on the Role of African States in Committee I of UNCLOS III,' 1 *Ocean Development & International Law* (1987): 665–61; M-C. D. Wembou, 'L'Afrique et le droit international de la mer,' 1 *African Yearbook of International Law* (1993): 147–76; T. O. Akintoba, *African States and Contemporary International Law: A Case Study of the 1982 Law of the Sea Convention and the Exclusive Economic Zone*, Martinus Nijhoff Publishers (1996).

Table 1. The States of Africa.

	Coastal states			Island and archipelagic states		
	North Africa (Mediterranean Sea)	West Africa (Atlantic Ocean)	East Africa (Red Sea, Horn & Indian Ocean)	South Africa (Atlantic and Indian Oceans)	Atlantic Ocean	Indian Ocean
Algeria	Angola	Djibouti	South Africa	Cape Verde	Comoros	Botswana
Egypt	Benin	Eritrea	South Africa	Sao Tome et Principe	Madagascar	Burkina Faso
Libya	Cameroon	Kenya	South Africa		Mauritius	Burundi
Morocco	Congo	Mozambique	South Africa		Seychelles	Central African Rep.
(incl. <i>Western Sahara</i>)	Côte d'Ivoire	Somalia				Chad
Tunisia	Dem. Rep. of Congo (Zaire)	Sudan				Ethiopia
	Equatorial Guinea	Tanzania				Lesotho
						Malawi
						Mali
	Gabon					Niger
	Gambia					Rwanda
	Guinea					Swaziland
	Guinea Bissau					Uganda
						Zambia
	Liberia					Zimbabwe
	Mauritania					
	Namibia					
	Nigeria					
	Senegal					
	Sierra Leone					
	Togo					
5 states	19 states	7 states	1 state	2 states	4 states	15 states

United Nations Conference on the Law of the Sea of 1958 (UNCLOS I), and although some participated in the Second United Nations Conference on the Law of the Sea in 1960 (UNCLOS II), they took on the challenge of re-negotiating the law of the sea with political and diplomatic determination. The general African perception of the law of the sea as codified and further developed in the Geneva Conventions was that it had little or no African contribution, and reflected the interests of former colonial powers to whom they had recently bid farewell.⁵ That law was perceived as reflecting the trade and military interests of maritime powers, particularly through the doctrines of the freedoms of the sea.⁶ The international law at the time also contained doctrines that had similarly facilitated colonialism, such as the doctrine of occupation by virtue of which a state could claim new sovereign territory. The freedoms of the sea facilitated trade, but also contributed to colonization and resource exploitation at the expense of the now newly independent states.

UNCLOS III presented an opportunity to review the underlying values and consequential inequities in the international law of the sea. African states, and especially East African states, participated eagerly and left numerous enduring imprints on the LOS Convention. They used various institutions for this purpose, including fora such as: the Organization of African Unity (now the African Union); the Group of 77 and Afro-Asian Legal Consultative Committee; conference circuits such as the meetings of the Seabed Committee preparing for UNCLOS III and non-governmental circuits, like the Pacem in Maribus conferences of the International Ocean Institute; and conference institutions and procedures, including the numerous UNCLOS III negotiating committees, sub-committees and informal working groups. African states, especially Cameroon, Kenya, Nigeria, Senegal, Tanzania, Zambia and Uganda often played high profile roles.⁷ Several African delegation heads and members were highly respected intellectual leaders at UNCLOS III.⁸ The intellectual calibre and stature of several of the African UNCLOS III veterans was truly remarkable. Their contributions related both to international community interests in the LOS Convention, such as Part XI (international seabed area and the institutional framework for deep seabed mining) and Part XV (dispute settlement), and to individual state benefits such as

5 Convention on the Continental Shelf, Geneva, 29 April 1958, 499 U.N.T.S. 312; Convention on the High Seas, 29 April 1958, 450 U.N.T.S. 82; Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, 559 U.N.T.S. 285; Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, 516 U.N.T.S. 205. See Akintoba, *supra* note 4, p. 141.

6 Akintoba, *ibid.*, pp. 40–5, 139–43.

7 See: Afolabi, *supra* note 4, pp. 210–13 on African leadership; Rembe, *supra* note 4, pp. 203–06 on achievements.

8 E.g., Paul Bamela Engo (Cameroon), Chair of Committee I, Frank Njenga and A. O. Adede (Kenya), and Joseph Sinde Warioba (Tanzania) during UNCLOS III. Some eventually achieved senior international judicial positions, e.g.: Warioba and Engo, together with UNCLOS III veterans Thomas Mensah (Ghana), José Luis Jesus (Cape Verde) and James Kateka (Tanzania) were elected judges on the International Tribunal for the Law of the Sea, and Mohammed Bedjaoui (Algeria) and Abdul Koroma (Sierra Leone) became judges of the International Court of Justice.

Part V (EEZ), Part X (rights of access to the sea and freedom of transit of land-locked states), Part XII (protection and preservation of the marine environment), Part XIII (marine scientific research) and Part XIV (development and transfer of marine technology). For example, the leading role of Kenya in the development of the concept and brokering of the regime of the EEZ was particularly noteworthy.⁹

With the exception of states that were not independent at the time (for example, Eritrea and Namibia), all other African states voted in favour of the LOS Convention when a vote on that instrument became unavoidable at the end of UNCLOS III in 1982, illustrating a very high level of regional support.¹⁰ Subsequently, 27 out of the 60 ratifications needed to bring the LOS Convention into force belonged to African states, possibly demonstrating the most widespread support for the Convention from any one region during the difficult years following its adoption.¹¹ Today, 41 out of 53 African states are parties to the LOS Convention. However, to date, not all coastal states have become parties. Congo and Eritrea are not parties possibly because after periods of conflict these two young states can now be expected to focus on national reconstruction and other priorities. In any case, there do not appear to be grounds for Congo and Eritrea not becoming parties to the LOS Convention. Libya is not a party possibly because its claim to the 300 km wide Gulf of Sidra as internal waters cannot be maintained under the LOS Convention and has been objected to by other states.¹²

Despite their widespread support for the LOS Convention, not all African states were necessarily pleased with the outcome of UNCLOS III. The continent's land-locked states did not benefit as much as they had hoped, and in fact to date, only

9 On the evolution of this regime from an African point of view and Kenya's role in the process, see Rembe, *supra* note 4, pp. 116–54.

10 J-P. Quénedec, 'L'Afrique et le nouveau droit de la mer', in *L'Etat moderne: Horizon 2000: Aspects internes et externes, Mélanges offerts à P.F. Gonidec*, Librairie Générale de Droit et de Jurisprudence (1985), pp. 523–28 at 528; Wembou, *supra* note 4, p. 153.

11 In chronological order of ratification among the first 60 states: (2) Zambia (1983); (5) Namibia (1983); (6) Ghana (1983); (9) Egypt (1983); (10) Côte d'Ivoire (1984); (12) The Gambia (1984); (14) Senegal (1984); (15) Sudan (1985); (17) Togo (1985); (18) Tunisia (1985); (21) Mali (1985); (23) Guinea (1985); (24) United Republic of Tanzania (1985); (25) Cameroon (1985); (29) Nigeria (1986); Guinea-Bissau (1986); (33) Cape Verde (1987); (34) Sao Tome and Principe (1987); (38) Democratic Republic of Congo (1989); (39) Kenya (1989); (40) Somalia (1989); (42) Botswana (1990); (43) Uganda (1990); (44) Angola (1990); (48) Seychelles (1991); (49) Djibouti (1991); (54) Zimbabwe (1993). After the sixtieth ratification and to date, the following African states also ratified the Convention: Comoros (1994); Sierra Leone (1994); Mauritius (1994); Algeria (1996); Mauritania (1996); Mozambique (1997); Equatorial Guinea (1997); Benin (1997); South Africa (1997); Gabon (1998); Madagascar (2001); Burkina Faso (2005); Morocco (2007); and Lesotho (2007). Compiled from Division for Ocean Affairs and the Law of the Sea, 'Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 1 February 2008', available at http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#, (last update 1 February 2008; accessed 6 February 2008) (hereafter DOALOS, Ratifications & Accessions).

12 For analysis of the illegitimacy of the Libyan claim in light of its own national practice, the international law of the sea and the reactions of several states to the claim, see Y. Z. Blum, 'The Gulf of Sidra Incident,' 80 *American Journal of International Law* (1986): 668–77. See also C. R. Symmons, *Historic Waters in the Law of the Sea: A Modern Re-appraisal*, Martinus Nijhoff Publishers (2008), at pp. 103–04, 147, 166, 230, 244–45 & 252.

seven African landlocked states have become parties to the LOS Convention.¹³ There is no question they maximised their efforts throughout the conference to play an important role in shaping the LOS Convention's provisions for landlocked and geographically disadvantaged states. However, the final package deal fell far short of their aspirations on the sharing of marine resources in marine areas adjacent to their coastal state neighbours.¹⁴ Indeed, only a coast can generate maritime zones where sovereignty, sovereign rights and spatially-defined jurisdictions may be claimed and exercised by a state. Landlocked states won fairly limited rights in neighbouring maritime zones, namely, in relation to surplus fisheries (if any) in the EEZ and maritime transit.¹⁵ African landlocked states' right of maritime transit has, for instance, been formally recognised under the regional economic integration community treaty of the central African states.¹⁶ The recognition is meant to facilitate and expand their access to the sea as part of the overall development of fisheries and transportation facilities utilizing the river and lake systems which bind the coastal and landlocked states of the region together, and under the umbrella of regional socio-economic development and integration.¹⁷ More generally, land-locked African states' right to participate in marine fisheries exploitation in the seas of their coastal neighbours has been recognised in treaty,¹⁸ and reaffirmed in policy declarations.¹⁹ However, the former have not established any habitual fishing interests or practices in neighbouring coastal states' waters. Besides, African coastal states' fisheries have for decades been fully and even overexploited by long-distance foreign fishing states and entities and through the efforts of their own nationals.²⁰ Thus, the prospect of practical realization of landlocked African states' exploitation interests in neighbouring coastal state fisheries is remote.

13 Only Botswana, Burkina Faso, Lesotho, Mali, Uganda, Zambia and Zimbabwe are parties. DOALOS, *Ratifications & Accessions*, *ibid.*

14 Rembe, *supra* note 4, pp. 145–50; see also T. Maluwa, 'Southern African Land-Locked States and Rights of Access under the New Law of the Sea,' 10 *International Journal of Marine & Coastal Law* (1995): 529–42.

15 LOS Convention, 1982, *supra* note 1, arts. 69, 124–32.

16 Treaty for the Establishment of the Economic Community of Central African States, Libreville, Gabon, 19 October 1983, 23 *International Legal Materials* (1984): 945.

17 *Ibid.*, arts. 43, 47–8, 71–4; Annex IX at arts. 3 & 7; Annex XI at arts. 3–4, 6–10; and Annex XVIII at art. 3.

18 See e.g., Convention on Fisheries Co-operation Among African States Bordering the Atlantic Ocean, Dakar, Senegal, 5 July 1991, in force 11 August 1995, 19 *Law of the Sea Bulletin* (1991): 33–40, art. 16.

19 See e.g., Rabat and Conakry Ministerial Declarations of 1989 and 1999, respectively, of the parties to the Dakar Fisheries Convention, *supra* note 18, available at <http://www.comhafat.org> (accessed 20 January 2008). See also B. Kwiatkowska, 'Ocean Affairs and the Law of the Sea in Africa: Towards the 21st Century', 17 *Marine Policy* (1993): 11–43 at 20–7.

20 See e.g., *Review of the State of World Marine Fishery Resources*, FAO Fisheries Technical Paper No. 457 (FAO, 2005), Sections A, B4–B8 & C1–C2.

B. The maritime claims of African states

Considering the wide African support for the LOS Convention and in particular the benefits conferred on coastal states, it is appropriate to briefly examine the maritime claims of African states and how they have sought to reap the zonal and jurisdictional benefits conferred. African states have very diverse coastal geography and continental margins and consequently their claims will either be facilitated or constrained by their physical context. There are major beneficiaries, such as continental Namibia and South Africa, which are able to claim the full range of maritime zones including the extended continental shelf under Article 76 of the LOS Convention. The island states of Africa are also major beneficiaries because they are either able to claim archipelagic waters and use archipelagic baselines for the determination of the seaward limits of their maritime zones (namely Cape Verde, Comoros, Mauritius, Sao Tome and Principe and Seychelles), or have long coastlines with the potential of extensive claims (that is the large island of Madagascar). Several west coast states are located within the concavity of the Gulf of Guinea, and although some are still able to claim significant marine areas (for example Nigeria), others have more limited claims constrained by similar claims from neighbouring states (for example Benin, Cameroon, Equatorial Guinea and Togo). Among the minor beneficiaries are the geographically disadvantaged states, such as the Democratic Republic of Congo (Zaire until 1997) and the Gambia, whose narrow coastlines permit discrete maritime zones in the form of corridors. At the extreme end of the continuum lie the landlocked states which, without coastal frontage of their own, are unable to claim any maritime zone.

Curiously, not all African coastal states maximised their maritime claims as permitted by the LOS Convention (Table B). In fact, less than half of Africa's current coastal states have fully utilised the LOS Convention to maximise permissible maritime zones.²¹ At least three states (namely Benin, Congo and the Democratic Republic of Congo) have no provision in their legislation for the delineation of baselines. Congo is not a party to the Convention. In the case of the Democratic Republic of Congo, it is possible that this is not significant given the short length of its coastline. Even so, baseline delineation provides a firm legal basis for the precise determination of seaward limits of distance-based maritime zones.

In the case of the territorial sea, there is widespread compliance with the permissible limits in the LOS Convention. This has not always been the case. In the past, several African states had claimed territorial sea limits in excess of the 12nm permitted by the LOS Convention and had to revise their original claims to comply.²² However, today there are still states that are not compliant, namely Benin,

21 These are Angola, Cape Verde, Djibouti, Gabon, Ghana, Madagascar, Mauritania, Mozambique, Namibia, Senegal, Seychelles, Sierra Leone and South Africa.

22 E.g., the following past territorial sea claims: Angola (20nm); Nigeria (30nm); Cape Verde, Gambia Madagascar and Tanzania (50nm); Mauritania (70nm); Gabon (100nm); Senegal (150nm); Ghana, Guinea and Sierra Leone (200nm). See Akintoba, *supra* note 4, p. 105.

Table 2. Status of the LOS Convention in Africa. Source: adapted from DOALOS, Maritime Claims, infra note 23; as of May 2007.

State	LOS Convention		Archipelagic Waters		Territorial Sea		Contiguous Zone		Exclusive Economic Zone		Fisheries Zone		Continental Shelf	
	party	Yes/No	Baseline (legislation)	(claim)	Sea	Zone	Zone	Zone	Zone	Zone	Zone	Zone	Shelf	
Algeria	Yes	Yes	Yes	N/A	12	24	0	32 or 52						
Angola	Yes	Yes	Yes	N/A	12	24	200						N/A	
Benin	Yes				200								N/A	
Botswana	Yes													
Burkina Faso	Yes													
Burundi	No													
Cameroon	Yes				12				Delimited by ICJ judgment in the dispute with Nigeria, 10 Oct. 2002	200			CM/200	
Cape Verde	Yes	Yes	Yes		12	24							200	
Central African Rep.	No													
Chad	No													
Comoros	Yes	Yes	Yes		12				200				N/A	
Congo	No				200								N/A	
Cote d'Ivoire	Yes				12				200				N/A	
Dem. Rep. of Congo (Zaire)	Yes				12				DLM				N/A	
Djibouti	Yes	Yes	Yes		12	24			200				N/A	
Egypt	Yes	Yes	Yes		12	24			Delimitation agreement with Cyprus, March 2003				N/A	

	Yes	No	12	200	200/EXPL
Nigeria	Yes				
Rwanda	No				
Sao Tome et Principe	Yes	Yes	12	200	N/A
Senegal	Yes	Yes	12	200	CM/200
Seychelles	Yes	Yes	12	200	CM/200
Sierra Leone	Yes		12	200	200
Somalia	Yes	Yes	200		N/A
South Africa	Yes	Yes	12	200	CM/200
Sudan	Yes	Yes	12	18	200 m/EXPL
Swaziland	No				
Togo	Yes		30	200	N/A
Tunisia	Yes	Yes	12	24	DLM Up to 50 M isobath off the Gulf of Gabes
Tanzania	Yes			200	N/A
Uganda	Yes				
Zambia	Yes				
Zimbabwe	Yes				

Total number of African states: 53

Coastal states: 38

Landlocked states (shaded areas): 15

Coastal state parties to LOS Convention: 34

Landlocked states parties to LOS Convention: 7

LEGEND

CM/200 – outer edge of the continental margin, or up to 200 nautical miles where the outer edge does not extend that far.

DLM – national legislation provides for limit of zone by reference to delimitation of the boundary with adjacent or opposite states or to a median equidistant line in the absence of a delimitation agreement

200m/EXPL – depth of exploitability up to 200 metres

N/A – no information available regarding current legislation

Somalia and non-parties Congo and Liberia, which claim a 200nm territorial sea, and Togo, which claims a 30nm territorial sea.²³ There are relatively few other non-compliant states around the world, mostly Latin American.²⁴ The regime of the EEZ is now so widely established and generally accepted that there is little if any justification left for a 200nm territorial sea claim instead of the 200nm EEZ, or for that matter any territorial sea claim in excess of 12nm, especially for state parties to the LOS Convention.

For some reason, possibly relating to a lack of understanding or appreciation of the utility of the powers enjoyed therein, perhaps as many as half of the coastal states around the world have not claimed contiguous zones. More than half of the African coastal states, parties and non-parties to the LOS Convention, have similarly not claimed a contiguous zone: Benin, Cameroon, Comoros, Congo, Côte d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Eritrea, Guinea, Guinea-Bissau, Kenya, Liberia, Libya, Nigeria, Sao Tome and Principe, Somalia, Togo and Tanzania.²⁵ States with excessive territorial sea claims identified above may not see much reason to claim the contiguous zone. The Gambia and Sudan claim only an 18nm contiguous zone, when they are entitled to 24nm.²⁶ The relative lack of importance given to the contiguous zone may be explained in part by the overwhelming emphasis African states placed on marine resource issues at UNCLOS III. However, the contiguous zone is potentially significant for these states because of the enforcement jurisdictions permitted for the purposes of immigration, customs, health and sanitary matters.²⁷ Coastal states are able to exercise preventative or enforcement jurisdiction where they are doing so to prevent or punish the infringement of their national laws in their land territory or territorial sea in those subject areas. Customs and health jurisdiction could be particularly helpful in combating the illegal transboundary movement of hazardous wastes, a significant issue for several African states,²⁸ and drug trafficking. With their rich wildlife and constant combating of poaching, African states have an interest in using the expanded legislative and enforcement

23 Department for Ocean Affairs and the Law of the Sea, Table of Claims to Maritime Jurisdiction (as at 28 May 2008), available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/Table_Summary_claims.pdf (hereafter DOALOS, Maritime Claims).

24 Namely Ecuador, El Salvador and Peru. The Philippines maintains a claim based on the Treaty of Paris and which exceeds the 12nm territorial sea. DOALOS, Maritime Claims, *ibid.*

25 DOALOS, Maritime Claims, *ibid.*

26 The Gambia: Territorial Sea and Contiguous Zone Act, 1968, as amended by the Territorial Sea and Contiguous Zone (Amendment) Act, 1969, s. 3, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/GMB_1969_Act.pdf (accessed 20 January 2008); Sudan: Territorial Waters and Continental Shelf Act, 1970, s. 9, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/SDN_1970_Act.pdf (accessed 20 January 2008). The Act originally provided for a six nautical mile territorial sea.

27 LOS Convention, *supra* note 1, art. 33.

28 African states adopted a regional convention to address the illegal transboundary movement of hazardous wastes: Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, Bamako, Mali, adopted 30 January 1991, in force 22 April 1998. Text and updated list of parties available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.

jurisdiction in the contiguous zone, because they would expand their legal ability to enforce illegal trafficking of marine species protected by the Convention on the International Trade of Endangered Species of Wild Fauna and Flora, 1973.²⁹ Immigration problems are not a major concern for African states as for other states at this time. However, contiguous zone jurisdiction potentially provides additional enforcement capability where ship-borne illegal immigration is concerned. This is important, particularly as it is fairly common that large numbers of African men and women are illegally smuggled, including by sea to, *inter alia*, other African states and exploited as virtual slaves for their labour and for sex.³⁰

Considering the contributions of African states to the EEZ as a new maritime zone in the law of the sea, it is remarkable that several states do not appear to have legislated this maritime zone, although they may have simply declared it or even delimited the EEZ boundary with a neighbouring state. These include Cameroon, the Democratic Republic of Congo, Egypt, Eritrea, the Gambia, Libya, Sudan and Tunisia. Cameroon, the Democratic Republic of Congo, Egypt and Eritrea have maritime boundary delimitation treaties with neighbours, but have not necessarily legislated their EEZs.³¹ Algeria, the Gambia, Libya and Tunisia have fishery zone or fishery protection zone claims to different extents.³² Three other African states alluded to earlier have preferred 200nm territorial seas in lieu of EEZs.

Many African states have claimed continental shelf rights in addition to EEZs. Relatively few states have specifically incorporated the text of Article 76 of the LOS Convention to permit an extended continental shelf claim beyond 200nm to the outer limit of the continental margin.³³ For those states with a narrow continental margin (not exceeding 200nm), there may be no cogent need to legislate the continental shelf if they have legislated the EEZ, since the seabed and subsoil would obviously be included. With more scientific attention being

Notwithstanding its strong provisions and potential instrumentality to help deal with this concern, the Convention has been in virtual limbo in terms of active implementation, including practical activation of its Secretariat. On this, see C. N. Eze, 'The Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa: A Milestone in Environmental Protection?' 15 *African Journal of International & Comparative Law* (2007): 208–29 at 225–29.

29 Convention on International Trade in Endangered Species of Wild Fauna and Flora (as amended), 3 March 1973, in force, 1 July 1975, 993 U.N.T.S. 243. Angola is the only African state that is not party to this treaty. Information available at <http://www.cites.org/eng/disc/parties/index.shtml>.

30 In response to international pressure and the provision of material and other help, some of the African states are making fledgling efforts to combat the problem by developing appropriate legislation and training personnel for the purpose. Accounts of these activities are available at the website of the UN Office for the Coordination of Humanitarian Affairs, <http://www.irinnews.org/report.aspx?reportid=51407> (accessed 20 January 2008). African national reports on 'Human Trafficking & Modern-day Slavery' are also available at <http://www.gvnet.com/humantrafficking/index.html> (accessed 20 January 2008).

31 DOALOS, Maritime Claims, *supra* note 23.

32 Algeria has a variable zone of 32 or 52nm. Libya has a fisheries protection zone. Tunisia has a longstanding fisheries zone defined by the 50m isobath in the Gulf of Gabes. Gambia claims a 200nm fisheries zone. See DOALOS, Maritime Claims, *ibid*.

33 For example: Cameroon, Mauritania, Mozambique, Namibia and South Africa. DOALOS, Maritime Claims, *ibid*.

placed on the region's continental margins, there appears to be a growing number of African states that may well have a continental margin that extends beyond the EEZ.³⁴ Thus the legislations of African states which do not embrace Article 76 could be reflective of the actual or perceived attributes of their continental margins (that is, they do not extend beyond 200nm), or possibly because they may not necessarily be aware that they do have attributes that could permit extended continental shelf claims. They may not have undertaken the minimum desktop study to be certain of the lack of entitlement as to rule on the possibility of an Article 76 submission. There seem to be a number of African coastal states, likely broad margin states, that do not have the legislation needed to support an extended continental shelf claim. Nigeria, one such state and reportedly preparing a submission to the Commission on the Limits of the Continental Shelf established under Annex II of the LOS Convention (CLCS or Commission), still retains dated legislation defining its continental shelf on the basis of Article 1 of the Geneva Convention on the Continental Shelf.³⁵ Clearly, Nigeria will need to amend its legislation to provide good legal foundation for an extended continental shelf claim under Article 76 and to administer its offshore petroleum licensing system in regard to that area. Morocco and Sudan similarly retain a definition of the continental shelf based on the 200 meter isobath *cum* depth of exploitability criterion in the Geneva Convention.³⁶ It is likely that the largest African beneficiary of an extended continental shelf claim will be South Africa. South Africa is in the ideal position of being able to claim an extended continental shelf off its lengthy and largely convex continental coastline without being significantly elbowed by neighbouring states. It is also able to claim a potentially very wide extended shelf around its Prince Edward Islands in the sub-Antarctic Indian Ocean.

III. THE MARITIME ZONES OF EAST AFRICAN STATES

As already discussed in Part II, the East African coastal states made common cause with other African states to contribute to the conclusion of the LOS Convention. In the context of this analysis, however, the potential gains and relevant roles of the four East African states studied must be reiterated to presage the assessment of the extent of their legislative absorption of the

34 For a discussion of the demands of art. 76 of the LOS Convention, and a cartographical representation of possibilities for African coastal states to claim extended maritime areas on the basis of scientific study and proof, see G. Carrera, 'Wide Continental Margins of the World: A Survey of Marine Scientific Requirements Posed by the Implementation of Article 76 of the United Nations Convention on the Law of the Sea,' available at <http://www.gmat.unsw.edu.au/ablos/ABLOS99Folder/GCMonaco1.PDF> (accessed 20 January 2008), at Figure 7.

35 Petroleum Decree No. 51 of 1969, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NGA_1969_Decree.pdf (accessed 20 January 2008). Morocco and Sudan have similarly retained this Geneva Convention on the Continental Shelf definition. See DOALOS, *Maritime Claims*, *supra* note 23.

36 DOALOS, *Maritime Claims*, *ibid.*

changes that they helped bring about in the current law of the sea regime. Kenya, Mozambique, South Africa and Tanzania are major beneficiaries of the LOS Convention. They are in a position to claim most of the maritime zone benefits possible for states with their coastal geographical situation and seabed attributes. As noted earlier, Kenya and Tanzania played significant leadership roles during UNCLOS III, frequently exercising moral leadership among developing countries. Again, as noted earlier, Kenya was instrumental in the development of the EEZ regime. In comparison, and for different but interrelated reasons, Mozambique and South Africa did not play roles as significant as those of Kenya and Tanzania. Throughout the period commencing with Seabed Committee deliberations in 1968 (until 1973), the UNCLOS III (1973–1982) period and, for a further ten years when the Preparatory Committee was laying the groundwork for institutionalizing the international seabed regime, South Africa was shunned for its apartheid policies by much of the international community and African states in particular. Although a participant at UNCLOS III, it lacked the moral stature to exercise a leadership role at that conference, and was excluded from key informal consultative processes and arenas where many of the new ideas arose and deals were made. This was in sharp contrast to post-apartheid South Africa, which has played a regional leadership role ever since the presidency of Nelson Mandela. Mozambique was engulfed in conflict since independence and subsequently suffered a prolonged low intensity civil war in which the apartheid regime of South Africa played a role over the UNCLOS III period and beyond. As a result, Mozambique was not able to play a meaningful role at UNCLOS III. Since the end of apartheid for South Africa and the end of the civil war in Mozambique, both states have returned to the diplomatic and law of the sea arenas with modern approaches. As in the case of Kenya and Tanzania, Mozambique and South Africa's pursuit of coastal state entitlements in the law of the sea have featured prominently in their ocean and foreign policy agendas. How well do these policy goals show up in their current maritime zones legislations?

A. Baselines

All four East African states have legislation concerning baselines for the determination of the breadth of the various maritime zones, but their approaches differ. South Africa uses both normal and straight baselines.³⁷ It has defined its normal baseline more precisely than other East African states and specifically legislated the inclusion of low tide elevations.³⁸ The geographical coordinates of

37 Maritime Zones Act, No. 15 of 1994, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/ZAF_1994_Act.pdf (accessed 20 January 2008) (hereafter SA Maritime Zones Act), s. 2 and Schedule 2.

38 The low water line is defined as 'the intersection of the low-water tidal plane with the land and includes the low-water line on a low-tide elevation,' and 'low-water' is defined as 'the mean height of low water for a tidal cycle of 18,6 years.' SA Maritime Zones Act, *supra* note 37, s. 1(iv) and (v). Low tide elevation is defined consistently with the text of the LOS Convention. *Ibid.*, s. 1(iii).

the straight baselines used are set out in a schedule to the Maritime Zones Act.³⁹ It is unclear whether South Africa has used any closing lines for bays, but all harbours are considered internal waters.⁴⁰

Mozambique has used both the normal baseline and the straight baseline method.⁴¹ Straight baseline coordinates are set out in a provision in the main text of the *Lei do Mar* (Sea Law).⁴² In 1967, when Mozambique was still a colony, straight baselines were delineated by Portugal for two long stretches of coastline starting from an area close to the land boundary with Tanzania and going south, and these were re-affirmed by Mozambique in 1976 and re-enacted in 1996.⁴³ Using the straight baseline method, Mozambique has closed one bay in the south near the boundary with South Africa (Point north of Padjini point and Cape Inhaca). It appears this was also done under the Legislative Decree of Portugal of 1967.

Tanzania has legislated the normal baseline, but without defining the low waterline like South Africa.⁴⁴ Although the main text of the Territorial Sea and Exclusive Economic Zone Act does not provide for the delineation of straight, as distinct from normal baselines, the Act incorporates many provisions from the LOS Convention, including those for straight baseline delineation. The Act defines internal waters as including any areas of sea that are on the landward side of the baseline. Unless parts of the Tanzanian coast permit the use of the normal baseline so as to generate internal waters (for example certain reef configurations), it is conceivable that Tanzanian legislation at this time does not contain appropriate provision for the delineation of straight baselines, which would in turn generate internal waters. Under the former Government Notice 209 of August 1973 through which Tanzania claimed a 50nm territorial sea at the time, it may have used straight baselines prepared by the Department of Survey and Mapping of the Ministry of Lands.⁴⁵ In its 1976 maritime boundary agreement with Kenya, straight baselines were included as part of the agreement,

39 SA Maritime Zones Act, supra note 37, Schedule 2.

40 *Ibid.*, s. 3.

41 The normal and straight baselines are defined consistently with the text of the LOS Convention. *Lei do Mar*, Lei n.º 4/96 de 4 de Janeiro, Boletim da República No. 1 (I Series), 4 January 1996, 4 (10–15), available at <http://faolex.fao.org/docs/pdf/moz22054.pdf> (accessed 20 January 2008) (hereafter MZ Sea Law), art. 1(e) and (f). This legislation does not specify the type of low water line employed.

42 MZ Sea Law, supra note 41, art. 4(4).

43 Legislative Decree of Portugal No. 47771 of 27 June 1967, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MOZ_1967_Decree.pdf (accessed 20 January 2008), art. 1. Mozambique: Council of Ministers, Decree Law No. 31/76 of 19 August 1976, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MOZ_1976_Law.pdf (accessed 20 January 2008); MZ Sea Law, supra note 41, art. 4.

44 Territorial Sea and Exclusive Economic Zone Act, 1989, available at: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TZA_1989_Act.pdf (accessed 20 January 2008) (hereafter TZ Territorial Sea & EEZ Act), s. 5.

45 Government Notice 209 of August 1973. One study reproduces a map of the straight baselines without indicating the source as the Government Notice 209. See E. M. Mrema, 'Africa and Its Maritime Boundaries: A Study of Maritime Delimitation Problems in Africa,' LL.M. Thesis, Dalhousie University, Halifax, Nova Scotia, Canada (August 1990), p. 298.

but clearly a bilateral agreement is not the equivalent of national legislation on baselines.⁴⁶ With the revocation of Notice 209 by the 1989 Act, it appears that those straight baselines may not have survived. According to a subsequent US Department of State publication, Tanzania has only the low water line as a baseline.⁴⁷ Also, Tanzania has not legislated closing lines. In terms of evidence for the ascertainment of its maritime areas, presumably beginning from the baselines, the Act only authorises the Minister to cause EEZ boundaries to be marked on a sealed map or chart of which judicial notice shall be taken. The Director of Land Surveying in the Ministry responsible for lands is the custodian of the map or chart which shall also be available for public inspection or purchase.⁴⁸

Kenya has used both the normal and straight baseline methods. It has not defined its baselines or legislated any of the provisions on baselines in the LOS Convention, as many other states have done. Rather, it has simply implemented those provisions in a schedule in its Maritime Zones Act and reproduced in an exchange of notes with Tanzania the baselines used for delimiting the maritime boundary with that neighbour.⁴⁹ Further, the baselines are not described in terms of coordinates of longitude and latitude, which would provide the greatest degree of precision, but rather as general descriptions of directions and containing approximate distances for straight baselines. This approach lacks precision and could encounter difficulties in interpreting the precise limits of Kenya's maritime zones in situations where the coastline (and consequently the low water line used as the normal baseline) changes over time.⁵⁰ Kenya also continues to claim Ungwana Bay (formerly known as Formosa Bay) as a historic bay, thus excluding the application of the LOS Convention on rules for bay closing lines.⁵¹

46 The baselines were first proposed by Kenya on 17 December 1975 in a diplomatic note. See the comments by the US Geographer's Office in *Limits in the Seas* No. 92 – Maritime Boundary: Kenya–Tanzania, Geographer's Office, United States Department of State (23 June 1981).

47 *Limits in the Seas* No. 36: National Claims to Maritime Jurisdictions, 8th Revision, Office of Ocean Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, United States Department of State, (25 May 2000), p. 152.

48 TZ Territorial Sea & EEZ Act, *supra* note 44, s. 8.

49 *Maritime Zones Act*, 1989, Chap. 371, available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/KEN_1989_Maritime.pdf (accessed 20 January 2008) (hereafter KA Maritime Zones Act), First Schedule; Kenya–Tanzania, *infra* note 95.

50 But see KA Maritime Zones Act, *ibid.*, s. 10, providing a rule on evidence in the determination of locale for civil and criminal proceedings, discussed further below.

51 KA Maritime Zones Act, *ibid.*; s. 3(3). The Minister is further empowered to declare other bays or waters as historic bays or waters by notice in the Government Gazette. On 11 April 2006, the Permanent Mission of the Republic of Kenya to the United Nations transmitted, through *note verbale* addressed to the UN Secretary–General, the text of the Presidential Proclamation containing a chart with geographical coordinates of points specifying the straight baselines from which the breadth of the territorial sea is measured, and the outer limits of the exclusive economic zone of Kenya. The text of the Proclamation by the President of the Republic of Kenya of 9 June 2005, Legal Notice No. 82 (Legislative Supplement No. 34) was published in *Government Gazette* No. 55, 22 July 2005, reprinted in 61 *Law of the Sea Bulletin* (2006): 96–7. See also LOS Convention, *supra* note 1, art. 10(6).

Mozambique and Tanzania define their internal waters and baseline respectively with reference to officially recognised charts by those states.⁵² However, it is not clear whether Mozambique and Tanzania have formally designated ‘officially recognised charts’. To comply with this requirement, states do not need to produce their own charts, but may designate existing charts for official purposes (for example United Kingdom Admiralty charts). As noted earlier, Tanzanian legislation authorises the Minister to ‘cause the boundary lines of the Zone to be marked on a sealed map or chart, and that map or that chart shall be judicially noticed’, suggesting that this has important evidentiary value in legal proceedings. The Director of Land Surveying is the depositary for these documents.⁵³ South Africa has produced its own charts and in its legislation defines ‘officially recognised large-scale charts or maps’ as ‘large-scale charts or maps supplied by the Hydrographer of the South African Navy and the Chief Surveyor-General, respectively.’⁵⁴ Kenya has made no reference to officially recognised charts in its Maritime Zones Act. Baseline delineation on officially recognised charts constitutes a message to all other states as to the coastal state’s official position on its baseline.

B. Territorial sea

All four East African states have claimed 12nm territorial seas.⁵⁵ As noted earlier, Tanzania formerly had a territorial sea claim in excess of the limit permitted in the LOS Convention, but in 1989 it revised the territorial sea breadth to bring it into conformity. In modernizing its law of the sea legislation, South Africa repealed earlier legislation from the apartheid years that included territorial waters for the much criticised homelands (Bantustans), two of which had been allocated a territorial sea.⁵⁶

There are significant differences in relation to the regime of innocent passage in the legislation of the four East African states. South Africa addresses the right of innocent passage both in its Maritime Zones Act and the earlier Marine Traffic Act.⁵⁷ Mozambique has limited reference to innocent passage in its Sea Law, but does not define it to clarify its application to commercial vessels generally.⁵⁸ In fact, its provisions on this point do no more than implement provisions

52 MZ Sea Law, supra note 41, art. 1; TZ Territorial Sea & EEZ Act, supra note 44, s. 5.

53 Supra note 48.

54 SA Maritime Zones Act, supra note 37, s. 1.

55 KA Maritime Zones Act, supra note 49, s. 3; MZ Sea Law, supra note 41, art. 4; SA Maritime Zones Act, supra note 37, s. 4; TZ Territorial Sea & EEZ Act, supra note 44, s. 3.

56 The acts repealed included: Territorial Waters Act, Act No. 87 of 1963; Territorial Waters Amendment Act, Act No. 98 of 1977; Territorial Waters Act, 1978, Act No. 8 of 1978 (Transkei); Territorial Waters Act, 1986, Act No. 12 of 1986 (Ciskei). Both Transkei and Ciskei were reincorporated into South Africa after a short period of statehood which was recognised only by South Africa. Other Bantustans with coastal frontage (KwaZulu) were not given independence and therefore were not granted a territorial sea zone by statute.

57 SA Maritime Zones Act, supra note 37, s. 1(x) and s. 4(3); Marine Traffic Act, 1981, Act No. 2 of 1981, s. 2.

58 MZ Sea Law, supra note 41, arts. 6 and 7.

for warships and other government ships in the LOS Convention.⁵⁹ Kenya and Tanzania have not addressed the regime of innocent passage in their maritime zones legislation. In practice, none of the four states appear to have taken a position on innocent passage which has provoked a reaction from other states.⁶⁰

C. Contiguous zone

The East African states' contiguous zone practice is variable. Mozambique claims 24nm for the purposes permissible in Article 33 of the LOS Convention, but also for the purposes of preventing and punishing the infringement of its marine environment protection laws in force in its territory (presumably both land territory and territorial sea).⁶¹ It is unclear how the enforcement power claimed for marine environment protection in the contiguous zone relates to that permissible in the EEZ, which in any case includes the contiguous zone area, and the significance of this for international navigation, if any. A point to consider here is that the marine environmental jurisdiction permitted to a coastal state in its EEZ is not exclusive, whereas the jurisdictions exercised over land territory and territorial sea (areas of sovereignty) are exclusive.⁶² South Africa claims a 24nm contiguous zone for both immigration and emigration, as well as fiscal, customs, and sanitary laws.⁶³ In addition, South Africa considers the contiguous zone as a Maritime Cultural Zone in relation to objects of an archaeological or historical nature.⁶⁴ In setting out its intentions in this zone, South Africa has implemented Article

⁵⁹ LOS Convention, supra note 1, arts. 30 and 31.

⁶⁰ The US Department of Defense has undertaken so-called Freedom of Navigation assertions to challenge what the US regards as excessive claims in the law of the sea. On perceived violations of innocent passage, including requirements for warships, none of the protests involving African states seem to have concerned Kenya, Mozambique, South Africa and Tanzania. See *Limits in the Seas* No. 36, supra note 47. However, in 1998 the US did challenge Kenya's baselines and the historic bay claim (Ungwana Bay) as excessive. See William S. Cohen, Secretary of Defense, Annual Report to the President and the Congress (1999), available at http://www.fas.org/man/docs/adr_00/index.html (accessed 20 January 2008), Appendix I.

⁶¹ MZ Sea Law, supra note 41, art. 8.

⁶² This point was made clear to Cape Verde through diplomatic protest after Cape Verde claimed exclusive marine environmental jurisdiction in its EEZ. See Department for Ocean Affairs and the Law of the Sea, available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/africa.htm> (accessed 20 January 2008).

⁶³ SA Maritime Zones Act, supra note 37, s. 5.

⁶⁴ SA Maritime Zones Act, supra note 37, s. 6. Mauritius has emulated this approach. Maritime Zones Act, Act no. 2 of 2005, s. 25, available at <http://faolex.fao.org/docs/texts/mat62130.doc> (accessed 20 January 2008). Mauritius has gone even further than South Africa by extending protection for the underwater cultural protection as follows: 'The Prime Minister may, notwithstanding any other enactment, make regulations to prohibit or authorise any activity directed at underwater cultural heritage in the EEZ or the continental shelf to prevent interference with the sovereign rights and jurisdiction of Mauritius.' *Ibid.*, s. 26. There is no obvious LOS Convention provision that supports this assertion of legislative jurisdiction. Mauritius may be thinking of the reference to other economic uses of the EEZ in art. 56 of the LOS Convention, a reading by some states which has not received wide support. It is unlikely that Mauritius will be able to assert enforcement jurisdiction without attracting protest from other states.

303 of the LOS Convention concerning archaeological or historical objects found at sea,⁶⁵ thus embracing the additional legislative and enforcement jurisdiction provided in the contiguous zone. This is significant because a presumption is created to the effect that the removal of archaeological or historical objects from the contiguous zone is deemed to be removal from its territory or territorial sea, thus constituting the basis for an enforceable offense. Kenya and Tanzania have not claimed contiguous zones and are thus missing the benefits of a potentially significant maritime zone. Together with Mozambique, to date it appears that none of the three states have legislated the additional enforcement power for the protection of archaeological or historical objects found in the contiguous zone. Commercial marine treasure hunting is a growing, sophisticated and well-financed use of the oceans, and states unequipped with the legal authority necessary to protect the cultural heritage in marine areas adjacent to their coast are ill-prepared to protect their interests in regard to this subject-matter.

D. EEZ

All four East African states have claimed EEZs, generally in compliance with the LOS Convention.⁶⁶ Mozambique and Tanzania have followed the practice of many other states by closely conforming to the text of Part V provisions of the LOS Convention in claiming permissible sovereign rights and jurisdictions.⁶⁷ Kenya's approach is different. In addition to claiming the EEZ, it defines its limits with reference to the existing maritime boundary with Tanzania and a future boundary with Somalia.⁶⁸ The Kenyan legislation appears archaic and does not seem to distinguish between sovereign rights and jurisdictions in the EEZ.⁶⁹ Article 56(1)(a) of the LOS Convention provides sovereign rights for resource

⁶⁵ The relevant provision in this article states:

'In order to control traffic in sea objects [archaeological and historical objects found at sea], the coastal State may, in applying article 33 [on the contiguous zone], presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.' LOS Convention, *supra* note 1, art. 303(2).

⁶⁶ KA Maritime Zones Act, *supra* note 49, ss. 4–8; MZ Sea Law, *supra* note 41, arts. 9–17; SA Maritime Zones Act, *supra* note 37, s. 7; TZ Territorial Sea & EEZ Act, *supra* note 44, ss. 7–12.

⁶⁷ MZ Sea Law, *supra* note 41, art. 11; TZ Territorial Sea & EEZ Act, *supra* note 44, s. 10.

⁶⁸ KA Maritime Zones Act, *supra* note 49, s. 4.

⁶⁹ The relevant provision on this point is as follows:

5. Kenya shall, within the exclusive economic zone, exercise sovereign rights with respect to the exploration and exploitation and conservation and management of the natural resources of the zone and without prejudice to the generality of the foregoing, the exercise of the sovereign rights shall be in respect of –

- (a) exploration and exploitation of the zone for the production of energy from tides, water currents and winds;
- (b) regulation, control and preservation of the marine environment;
- (c) establishment and use of artificial islands and off-shore terminals, installations, structures and other devices; and

and economic use purposes, whereas 56(1)(b) lists specific jurisdictions that are enjoyed with reference to other provisions of the Convention. Whereas sovereign rights are exclusive, not all the listed jurisdictions are. While the jurisdiction over artificial islands, installations and structures is clearly exclusive,⁷⁰ jurisdiction over the protection and preservation of the marine environment is not, so that the flag state continues to enjoy jurisdiction over its ships in foreign EEZs.⁷¹

In addition to setting out the sovereign rights and jurisdictions enjoyed, Kenya and Mozambique have also legislated the rights of other states (including landlocked states) in the EEZ, namely, the freedoms of navigation and the laying of submarine pipelines and cables, and other internationally lawful uses related to them.⁷² Tanzania has included a similar provision, but in referring to other internationally lawful uses, it described these as other sea uses relating to 'navigation and communication, such as are recognised under international law or embodied in a bilateral agreement.'⁷³

The approach taken by South Africa in implementing the EEZ in its Maritime Zones Act can be described as minimalist. Unlike the three other East African states, South Africa has not legislated the EEZ in detail, nor has it simply restated the text of Article 56 of the LOS Convention. Insofar as sovereign rights over natural resources are concerned, South Africa has equated those rights to the rights enjoyed over natural resources in the territorial sea.⁷⁴ Curiously, it has not set out the jurisdictions it enjoys in the EEZ in the same legislation. The assimilation of rights in EEZ resources to the same plenary extent as regarding territorial sea living and shelf resources infers an assertion by South Africa of identical powers to regulate access and exploitation in its EEZ as would obtain in its territorial sea. Regarding stocks of living resources, South Africa probably possesses capacity to harvest all total allowable catches in its EEZ.⁷⁵ Even so, at

(d) authorization and control of scientific research.

KA Maritime Zones Act, *supra* note 49, s. 5.

70 LOS Convention, *supra* note 1, art. 60.

71 *Ibid.*, arts. 94, 211 and 217.

72 KA Maritime Zones Act, *supra* note 49, s. 6; MZ Sea Law, *supra* note 41, art. 12; implementing LOS Convention, *supra* note 1, art. 58(1).

73 TZ Territorial Sea & EEZ Act, *supra* note 44, s. 11.

74 SA Maritime Zones Act, *supra* note 37, s. 7(2). It reads: 'Subject to any other law the Republic shall have, in respect of all natural resources in the exclusive economic zone, the same rights and powers as it has in respect of its territorial waters.'

75 In fact, South Africa's fish stocks are either fully or overexploited by its domestic capacity, and the country is now challenged to ensure that its reorganization of the sector secures fishery conservation and exploitation on a sustainable footing. On the status and management of stocks in South African, Namibian and Angolan waters, see: *Review of the State of World Marine Fishery Resources*, FAO Fisheries Technical Paper No. 457 (FAO, 2005), Section B7; Marine Resources Assessment Group Ltd (MRAG), *Review of Impacts of Illegal, Unreported and Unregulated Fishing on Developing Countries*, Final Report prepared for the UK's Department for International Development (DFID) with support from the Norwegian Agency for Development Co-operation (NORAD), London (July 2005), pp.153–61. For detailed discussion of the involved subject of fisheries reform in South Africa, see: *Focus Issue: 'Fisheries Reform in South Africa 1994–2004.'* 30 *Marine Policy* (2006): 3–110; B.C. Glavovic, 'Coastal Sustainability - An Elusive Pursuit? Reflections on South Africa's

least in terms of the LOS Convention, this state's legislated position downplays its obligation under relevant provisions of the treaty. For instance, Article 62(3) of the LOS Convention demands that South Africa considers, in addition to its own interests

... the provisions of articles 69 [referring to land-locked states] and 70 [referring to geographically disadvantaged states], the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimise economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.⁷⁶

The significance of this point is that in the territorial sea, South Africa's sovereign right to conserve and exploit its living resources is not subject to any such obligation in favour of third states, which in its case would potentially include land-locked states Botswana, Lesotho, Swaziland and Zimbabwe. Indeed, third states generally (thus including land-locked, geographically disadvantaged and states that have habitually fished its EEZ) are under a duty to not violate its sovereign and exclusive resource rights, interests and regulatory authority when exercising their navigational rights in the territorial sea.⁷⁷

In practice, it may be presumed that by claiming EEZ jurisdiction, South Africa would not exercise rights and jurisdictions inconsistent with the LOS Convention's provisions regarding that zone.⁷⁸ However, national legislation, in this case, Section 7(2) of the South African Maritime Zones Act, is an eloquent public declaration of its presumed understanding and claim to relevant entitlements under the EEZ regime. Thus, its implications are critical regarding, for instance, the establishment and effective management of transboundary marine protected areas, a means of ocean resources management and environmental protection which is steadily solidifying among Eastern African states.⁷⁹ Therefore, even if the contrary implication of the Section as pointed out above may seem notional, at least, it emphasises the need for South Africa to clearly legislate claims that are consistent with the express and implied intendments regarding EEZ rights and jurisdictions under the LOS Convention. If this is a real concern, the obvious solution is to expand Section 7(2) of the Maritime Zones Act to reflect the distinction between *sovereign rights* and *jurisdictions* under the regime of the EEZ as set out under Article 56 of the LOS Convention. For, in terms of resources exploration and exploitation, and related economic and other marine use and environmental protection purposes, this distinction is respectively

Coastal Policy Experience,' 34 *Coastal Management* (2006): 111–32; E. Witbooi, 'Fishing Rights: A New Dawn for South Africa's Marine Subsistence Fishers,' 19 *Ocean Yearbook* (2005): 74–104; L. van Sittert, 'Those Who Cannot Remember the Past are Condemned to Repeat It: Comparing Fisheries Reforms in South Africa,' 26 *Marine Policy* (2002): 295–305.

⁷⁶ LOS Convention, *supra* note 1, art. 62(3).

⁷⁷ LOS Convention, *supra* note 1, arts. 19(2)(i) and 21(1)(d)(e)(g).

⁷⁸ Convention on the Law of Treaties, done at Vienna, 23 May 1969, in force 27 January 1980, 1155 *UNTS* 131, art. 18.

⁷⁹ See references and related literature cited at *supra* notes 2 & 3, and accompanying text.

germane to the exclusive sovereign status of the territorial sea, as opposed to the combined sovereignty and jurisdictional characteristics of coastal state interests and authority in the EEZ.

E. Continental shelf

The LOS Convention in Article 76 defines the continental shelf to include the shelf proper as well as the continental slope and continental rise, and in effect the entire continental margin.⁸⁰ Where a continental shelf does not extend more than 200nm from the baselines, a coastal state may claim 200nm. If the continental margin extends beyond 200nm, the area beyond that limit may be claimed by the coastal state and the delineation of the outer limits must satisfy a unique legal process involving an international institution. This is the Commission on the Limits of the Continental Shelf referred to earlier, established by UNCLOS for Article 76 purposes, and empowered to make recommendations related to the establishment of the outer limits of the continental shelf. East African broad margin states must submit to this body scientific and technical information in conformity with Article 76 as evidence of where, in their opinion, the outer limits of their continental shelves ought to be delineated. Only outer limits established in accordance with those recommendations will be considered final and binding. The LOS Convention provides state parties a ten-year period from when the convention enters into force in their regard to make a submission to the UN Commission.⁸¹

There are different views, mostly conservative, on how many and which African states can potentially claim extended continental shelves.⁸² The reality is that until a state conducts a desktop study, it cannot be sure whether it is in a position to make such a claim.⁸³ As noted earlier, South Africa is in a position to claim an extensive extended continental shelf. Mozambique is also in a position to claim an extended shelf well beyond its 200nm EEZ. Kenya and Tanzania may well be able to claim an extended shelf, but to a much lesser extent.

Mozambique and South Africa have legislated the extended continental shelf. South Africa has done so explicitly with reference to Article 76 of the LOS Convention.⁸⁴ Mozambique has legislated the entire continental margin as its legal continental shelf.⁸⁵ Kenya and Tanzania have not legislated the continental shelf

⁸⁰ LOS Convention, supra note 1, art. 76.

⁸¹ LOS Convention, supra note 1, Annex II, Art. 4.

⁸² See for instance Egede, who identifies seven African states and also refers to other studies that suggest additional states. E. Egede, 'The Outer Limits of the Continental Shelf: African States and the 1982 Law of the Sea Convention,' 35 *Ocean Development & International Law* (2004): 157–78, at 159–60. This study does not identify Kenya, Mozambique, Nigeria and Tanzania as having the potential to make extended continental shelf submissions.

⁸³ Such a study engages high level technical and scientific skills and resources, demands ample time, and requires impressive financial outlays. See C. Carleton, 'Article 76 of the UN Convention on the Law of the Sea – Implementation Problems from the Technical Perspective,' 21 *International Journal of Marine & Coastal Law* (2006): 287–308.

⁸⁴ SA Maritime Zones Act, supra note 37, s. 8.

⁸⁵ MZ Sea Law, supra note 41, art. 13.

(let alone the extended continental shelf), conservatively focusing solely on the EEZ. It may be recalled that during UNCLOS III, Kenya had strong reservations about an extended continental shelf entitlement that would occur at the expense of the International Seabed Area.⁸⁶ Because at customary law the continental shelf is the natural prolongation of the coastal frontage of land territory, it appertains to the coastal state *ipso iure* and *ab initio* and does not need to be declared.⁸⁷ This means that these two states are not required by law to formally claim the continental shelf in order to have it. However, the definition of the outer limits where these extend beyond 200nm is still subject to the LOS Convention procedure described above, and it is a moot point whether after the expiry of the ten-year period since the Convention entered into force for Kenya and Tanzania, there still would be an entitlement to claim the extended shelf. This is the only right in the LOS Convention whose exercise has a specific treaty-based limitation (prescriptive) period.

In terms of this limitation period, it must be pointed out that Mozambique and South Africa became parties to the LOS Convention in 1997 and, technically, they should be making submissions to the Commission at this time. The Commission had adopted Scientific and Technical Guidelines to guide states in preparing and making their submissions in 1999.⁸⁸ The Commission recognised that some states may not be in a position to make timely submissions and, in particular, that developing states would likely encounter difficulties in meeting the scientific and technical requirements within the ten year deadline. The Commission therefore decided that for states in whose regard the LOS Convention entered into force before 13 May 1999, the ten year period would commence on 13 May 1999.⁸⁹

With regards to making its claims, South Africa will be able to define the outer limit of its continental shelf without it overlapping with a claim from an opposite shelf, both for the mainland and the Prince Edward Islands. However, an overlap with a claim from adjacent Mozambique is conceivable. South Africa has claimed a shelf in accordance with Article 76 of the LOS Convention and has set

⁸⁶ See Egede, *supra* note 82, p. 158.

⁸⁷ LOS Convention, *supra* note 1, art. 77(3).

⁸⁸ Rules of Procedure of the Commission on the Limits of the Continental Shelf, CLCS/Rev. 3 (6 February 2001); Modus Operandi of the Commission, CLCS/L.3 (12 September 1997); Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf, CLCS/11 (13 May 1999) and CLCS/11/Add (3 September 1999).

⁸⁹ Intergovernmental Oceanographic Commission, Training and Technology Transfer in Africa for the Implementation of Article 76 of the United Nations Convention on the Law of the Sea (UNCLOS), 22nd Session of the Assembly, Paris, 24 June–4 July 2003, IOC Doc. IOC–XXII/Inf. 4, available at <http://unesdoc.unesco.org/images/0013/001393/139324e.pdf> (accessed 20 January 2008). The decision of the Commission to count the ten-year submission deadline from 13 May 1999 is, in a literal sense, not in keeping with Art. 4 of Annex II of the LOS Convention. However, the decision is pragmatic because when the Commission issued its guidelines in 1999, it not only indicates that it is then ready to deal, but it also offers all potential submitters the minimum standard technical and scientific requirements which their submissions must meet. As Elferink and Johnson, *infra* note 91, demonstrate, the Commission itself is honing its jurisprudence on application of Article 76 in the context of the first submissions. Clearly, between the Commission and state parties to the Convention, this implied revision of when time starts counting under Article 4 of Annex II is acceptable.

out coordinates of the outer limits, even before making a submission to the UN Commission.⁹⁰ South Africa has yet to make a submission to the UN Commission and consider any recommendations made by that body before it can finalise the outer limits of the extended continental shelf. Mozambique has a more complex situation because it not only potentially shares an extended continental shelf with South Africa as an adjacent state, but also with Madagascar as an opposite state. Moreover, France retains possession of Juan de Nova, Bassas da India and Île Europe, tiny islands located between Mozambique and Madagascar, also claimed by Madagascar, which, if they remain in French possession and are given full effect, would carve out large EEZ and extended continental shelf areas from what Mozambique and Madagascar could claim.⁹¹ However, the territorial dispute with Madagascar apart, well-established international jurisprudence concerning small islands does not support the giving of full effect to islands of similar attributes, size and location in a maritime boundary delimitation process before an international tribunal.⁹²

Tanzania and Kenya became parties to the LOS Convention in 1985 and 1989 respectively, but the Convention entered into force in their regard in 1994. Technically, if Tanzania felt that its marine geography permitted an extended continental shelf claim, it should be preparing a submission. Tanzania's continental shelf has geological and geomorphological attributes that potentially favour an extended continental shelf, although likely consisting of a fringe on the seaward side of its EEZ limits in the Indian Ocean, and possibly meeting a similar claim from a neighbouring state. Tanzania would need to undertake a desktop study to determine if it has continental margin conditions that could justify an extended continental shelf submission. Although it has not yet undertaken such a study, Tanzania sent technical experts to a meeting concerning the preparation of Article 76 submissions to the UN Commission in Sri Lanka in May 2005.⁹³

90 SA Maritime Zones Act, *supra* note 37, Schedule 3.

91 For discussion of the situation in this geographical context in light of the contested claims of sovereignty over the identified islands, see Mrema, *supra* note 45, pp. 334–41. For an analysis assessing possible solutions from the position of Madagascar, see A. Tahindro, 'The Implementation of UNCLOS in the Indian Ocean Region: The Case of Madagascar,' 12 *African Yearbook of International Law* (2004): 349–435 at 367–84. On practice by states and by the Commission that could guide South Africa, Mozambique and Madagascar in their claims to extended shelf areas in this situation, see A. G. Oude Elferink and C. Johnson, 'Outer Limits of the Continental Shelf and "Disputed Areas": State Practice Concerning Article 76(10) of the LOS Convention,' 21 *International Journal of Marine & Coastal Law* (2006): 461–87.

92 See D. M. Dziedzornu and S. B. Kaye, 'Conflicts Over Maritime Boundaries: The 1982 United Nations Law of the Sea Provisions and Peaceful Settlement,' 16 *Ocean Yearbook* (2002): 541–607 at 568–70; D. Bowett, 'Islands, Rocks, Reefs, and Low-Tide Elevations in Maritime Boundary Delimitations,' in J. I. Charney and L. M. Alexander eds., *International Maritime Boundaries Volume I*, Martinus Nijhoff Publishers (1993), pp. 131–51 at 131–47; V. Prescott and G. Triggs, 'Islands and Rocks and their Role in Maritime Delimitation,' in D. A. Colson and R. W. Smith eds., *International Maritime Boundaries Volume V*, Martinus Nijhoff Publishers (2005), pp. 3245–80.

93 Department for Ocean Affairs and the Law of the Sea, Training Opportunities, available at http://www.un.org/Depts/los/clcs_new/training_issues_opportunities.htm (accessed 20 January 2008).

Even so, Tanzania's intentions at this time remain unclear and it is conceivable it could be missing an opportunity to maximise a significant benefit for broad margin states in the LOS Convention. Apparently Kenya, which has similar continental margin conditions as Tanzania, is currently in the process of preparing an extended continental shelf submission to the UN Commission, a far cry from its UNCLOS III concerns over Article 76.

In effect, East African states now have until 2009 to make their submissions and it appears that Kenya, Mozambique and South Africa are making preparations for such a submission. The preparation of these submissions requires a significant scientific, legal and financial effort by the submitting state, for which relatively little time is left before the 2009 deadline expires.

F. Maritime boundary delimitation provisions

Like other coastal states, African states have been guided by principles and rules of customary and conventional law in the delimitation of their maritime boundaries.⁹⁴ Although East African states have delimited several maritime boundaries with their neighbours, there are several boundaries as yet to be delimited. Kenya has delimited its maritime boundary with Tanzania, but not with Somalia.⁹⁵ In addition to Kenya, Tanzania has delimited maritime boundaries with Mozambique and Seychelles.⁹⁶ Both Kenya and Tanzania have yet to delimit boundaries with Comoros. Mozambique has as yet to delimit boundaries with Madagascar and South Africa. As noted earlier, a particularly complicated issue for Mozambique is the French island possessions of Juan de Nova, Bassas da India and Île Europe, which are also claimed by Madagascar.

From a national maritime zone legislation perspective, where there is no maritime boundary with a neighbour, any legislative provisions on maritime boundary delimitation can be significant in clarifying a state's understanding (*vis-à-vis* its neighbours) of the applicable principles and rules, and as to providing national authorities and the courts with guidance on the extent of jurisdiction that may be exercised. However, where domestic legislation prescribes that a party would delimit its boundaries with its neighbours by any particular method or methods, actual implementation of such a provision obviously does not

⁹⁴ LOS Convention, *supra* note 1, arts. 15 (territorial sea), 74 (EEZ) and 83 (continental shelf).

⁹⁵ Agreement between Kenya and the United Republic of Tanzania on Delimitation of the Maritime Boundary between the Two States, (Exchange of notes: Kenya – 17 December 1975; Tanzania – 9 July 1976), *National Legislative Series*, UN Doc. ST/LEG/SER.B/19 (1980) (hereafter Kenya–Tanzania), p. 406.

⁹⁶ Agreement between the Government of the United Republic of Tanzania and the Government of the People's Republic of Mozambique regarding the Tanzania/Mozambique Boundary, Maputo, 28 December 1988 (hereafter Tanzania–Mozambique), available at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/TZA-MOZ1988TM.PDF> (accessed 20 January 2008); Agreement between the Government of the United Republic of Tanzania and the Government of the Republic of Seychelles on the Delimitation of the Maritime Boundary of the Exclusive Economic Zone and the Continental Shelf, 23 January 2003, 2196 *UNTS* 14 (No. 38874) (hereafter Seychelles–Tanzania).

depend on the acting state alone.⁹⁷ Clearly, national legislation in this situation is not opposable to neighbouring states. Despite domestic legal provision, maritime boundary delimitation retains an international dimension.⁹⁸ Therefore, the functional value of such legislated provision is limited and temporary, as once maritime boundaries are delimited, this type of provision can be expected to be replaced by amending legislation implementing the boundary treaty(ies) concerned.

At the outset, a distinction needs to be made between delimitation of the territorial sea on the one hand, and the delimitation of the EEZ and continental shelf on the other. Insofar as the territorial sea is concerned, coastal states may extend their territorial sea limits to the median equidistant line with neighbouring states where there is disagreement.⁹⁹ Mozambique has implemented this provision to the effect that the median line would be considered the territorial sea limit with that state.¹⁰⁰ This is important for Mozambique because it has not yet delimited any maritime zone boundaries with South Africa. Kenya's legislation has a similar provision, except that the median line for the territorial sea boundary with an adjacent state is not premised on the absence of agreement with that state.¹⁰¹ As in Mozambique's case, this provision is significant for Kenya because it has not delimited any maritime zone boundary with Somalia. South African and Tanzanian legislation do not contain similar provisions. In the interim, South Africa appears to be using the median line as the limit of its enforcement authority in waters adjacent to Mozambique.

The delimitation principle in the LOS Convention is stated more generically in relation to the EEZ and continental shelf. Delimitation 'shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable

97 The KA Maritime Zones Act, *supra* note 49, at s. 4(3) & (4) reserves the right of Kenya to determine its EEZ boundaries with Tanzania and Somalia respectively, but subject to the choice of agreed basepoints with Tanzania and, in regard to Somalia, subject to bilateral agreement on the basis of international law. See also TZ Territorial Sea & EEZ Act, *supra* note 44, s. 7(3) & (4).

98 The maritime boundary delimitation process is an exercise in international relations and requires appropriate transmutation and application of international legal principles and rules, inevitably by inter-state co-operation including boundary agreement negotiation between or among coastal neighbours. Consequently, both state practice and third party intervention in disputed delimitation situations continue to evolve common trends to harmonise conduct and expectation in this issue area. For detailed discussion, see Dziedzorn and Kaye, *supra* note 92, pp. 541–66, 585–606; D. Anderson, 'Developments in Maritime Boundary Law and Practice,' in Colson and Smith eds., *supra* note 92, pp. 3199–3222.

99 'Where the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The above provision does not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance therewith.' LOS Convention, *supra* note 1, art. 15.

100 MZ Sea Law, *supra* note 41, art. 5.

101 KA Maritime Zones Act, *supra* note 49, s. 3(4).

solution'.¹⁰² In practice, the equitable solution is not one necessarily determined by geometrical computations, such as through the equidistance method. On a case-by-case basis, it may also involve various factors including coastal proportionality to maritime area, patterns of uses of the area concerned, socio-economic factors, and so on.¹⁰³ Of the four East African states considered in detail in this article, only Mozambique has implemented in its legislation the LOS Convention equitable solution principle, taking into account all relevant circumstances and the respective interests of the states concerned and the international community for EEZ and continental shelf boundary disputes.¹⁰⁴ Insofar as the EEZ boundary is concerned, there is no similar provision invoking equidistance where the boundary with a neighbour remains unsettled. Rather, the Sea Law re-states the LOS Convention principle that delimitation must be in accordance with equitable principles.¹⁰⁵ The provision concerning the continental shelf is different, to the effect that in the absence of agreement within a reasonable period, delimitation will be undertaken in accordance with international law.¹⁰⁶ This general invocation of international law suggests that delimitation would still have to be undertaken with a view to producing an equitable solution (itself a principle of international customary and conventional law) and possible resort to Part XV dispute settlement procedures in the LOS Convention. However, it does not appear that Mozambique and South Africa have reached a stage where a third party dispute settlement procedure is called for. South Africa does not have similar provisions in its counterpart Maritime Zones Act, 1994.

IV. CONCLUSION

The support for the LOS Convention provided by African states continues to be widespread and committed. At the time of writing, only four coastal states are not yet parties, whereas the record among land-locked states is less impressive. There are slightly fewer than half of Africa's land-locked states who are parties. Lesotho's recent (May 2007) adherence to the Convention suggests that there are likely to be more land-locked states that will become parties to the Convention, even though they will remain minor beneficiaries. In contrast, coastal states that are parties must legislate the plenitude of EEZ rights and jurisdictions and, in the appropriate case, claim extended shelf areas. This is imperative to ensure

102 LOS Convention, *supra* note 1, arts. 74 & 83.

103 For detailed discussion through the cases, see Dzidzornu and Kaye, *supra* note 92, pp. 566–85. See also B. H. Oxman, 'Political, Strategic, and Historical Considerations,' in Charney and Alexander eds., *supra* note 92, pp. 3–40; B. Kwiatkowska, 'Resource, Navigational and Environmental Factors in Equitable Maritime Boundary Delimitation,' in Colson and Smith eds., *supra* note 92, pp. 3223–44.

104 MZ Sea Law, *supra* note 41, arts. 10 & 14. The two provisions are not worded identically. Art. 14 (continental shelf) only states the first part of the principle, i.e., that delimitation should be carried out by agreement, and without referring to an equitable solution as an objective as in art. 10 (EEZ). The legislator's intention in distinguishing between the two is not apparent.

105 MZ Sea Law, *supra* note 41, art. 10.

106 MZ Sea Law, *supra* note 41, art. 14.

that they maximise the potential socio-economic and political advantages that are available to them by virtue of those entitlements. In view of these, the main points highlighted by the foregoing assessment, especially the four East African states' claims to maritime areas, must be reiterated.

The most striking observation supported by the evidence canvassed in this article is that twenty five years since the adoption of the LOS Convention, there is still a significant number of African states that have not legislatively appropriated the full maritime zone benefits provided to coastal states by that instrument. This fact is at odds with the longstanding African regional support for the Convention. The reasons vary from state to state, but it appears that there may be a lack of appreciation of the full potential and utility of the maritime zones that coastal states could legitimately claim under the LOS Convention. The contiguous zone and jurisdiction for the protection of underwater cultural and historical heritage stand out in this regard. Even in relation to the other maritime zones, including baseline delineation, there is much legislation that is antiquated, perhaps because it is based on the text of the Geneva Conventions, or is not well drafted, or has simply not been maintained up to date. It is important that maritime zone legislation be kept up to date as the efficient and effective legislative and enforcement jurisdiction of a state depends on proper definition of national maritime space to enable a legitimate exercise of power by national authorities and the exercise of jurisdiction by the courts. Also, despite the significant efforts of several African states to bring their once excessive claims into conformity with the LOS Convention, there remain claims by some states that are inconsistent with both the conventional and customary law of the sea.

To varying extents, the foregoing shortcomings are reflected in the maritime zones legislation of the four East African states. As shown, not all of these states have maximised benefits conferred by the LOS Convention. Mozambique and South Africa appear to have done so for the most part. Compared to Kenya and Tanzania, Mozambique and South Africa have some of the most modern and up to date maritime zone legislation. Modernity is not limited to their maritime zone legislation but also extends to a range of other marine and environmental legislation. The two states appear to have embarked on massive legal reform following the end of the civil war and apartheid respectively. For instance, under the umbrella of its National Environmental Management Act,¹⁰⁷ South Africa is progressively reforming and innovating legislation in various sectors of resources and environmental governance. In the marine sector, not only is resources regulation being revamped, but along with it is devolution of jurisdiction to coastal provinces and local administrations to implement national laws on marine resources management and conservation, and marine environmental protection.¹⁰⁸ An important aspect of this is the developing comprehensive legislation on

107 National Environmental Management Act (as amended), No. 107 of 27 November 1998, in force 29 January 1999.

108 See J. Glazewski and M. Haward, 'Towards Integrated Coastal Area Management: A Case Study in Co-operative Governance in South Africa and Australia,' 20 *International Journal of Marine & Coastal Law* (2005): 65–84 at 65–9, 72–80, 83–4.

integrated coastal management. This Bill reflects the national policy to ensure sustainable development as enshrined in the Constitution, not only as a matter of responsibility for state agencies, but also in terms of public participation in the process, and under the Constitution's mandate of co-operative governance.¹⁰⁹ As well, it is obvious that South Africa and Mozambique must work to co-ordinate, for instance, their environmental impact assessment regulations to facilitate co-operative management of their transboundary marine and terrestrial resources and environmental protection. On this subject, South Africa could learn from Mozambique.¹¹⁰ In all, these matters are directly relevant to marine resources use and environmental protection¹¹¹ and, therefore, to the exercise of rights and jurisdictions conferred by the LOS Convention. Clearly, despite a lengthy period of legal stagnation, the maritime (and related) legislation of these two East African states seems to have not only caught up with, but even overtaken those of most other African states.¹¹²

Another specific issue that is common to, but highlighted by the nature of the provisions in the maritime zones legislation of the East African states, relates to extended continental shelf claims. African broad margin states are the major beneficiaries of the LOS Convention on the continent. It is likely that in preparing their submissions on their understanding of the limits of their continental shelf before the UN Commission, they will need to review their maritime zones legislation. Some states, such as South Africa, anticipated this need. South Africa and Mozambique are expected to make submissions to the Commission on the Limits of the Continental Shelf. Other potential broad margin candidates, such as Kenya, Tanzania and possibly others, would need to review their legislation in view of implementing Article 76 and other continental shelf provisions of the LOS Convention should they proceed and succeed with the submission. They will need to bear in mind the limitation period for such submissions in order not to jeopardise their right to this major benefit in the LOS Convention.

Tanzania's legislation calls for particular attention in this context. In addition to considering the possibility of qualifying as a broad margin state, Tanzania appears not to have maximised LOS Convention benefits on other fronts. Its legislation has not fully maximised the benefits under the rules on baselines delineation by

109 See Constitution of the Republic of South Africa Act, No. 108 of 1996, adopted 8 May 1996, in force 4 February 1997, ss.7, 8, 24, 40 & 41, available at http://www.oefre.unibe.ch/law/icl/sf00000_html (accessed 20 January 2008); National Environmental Management: Integrated Coastal Management Bill (Working Draft 10.7 (September 2006)), at Preamble and ss. 2-5 & 7. More generally on South Africa's progressively developing environmental law regime, see A. Paterson, 'Current Survey: South Africa,' 13(4) *Environmental Liability* (2005): CS58-CS64; A. Paterson, 'Current Survey: South Africa,' 14(6) *Environmental Liability* (2006): CS78-CS87.

110 See J. Nel, 'EIA Partnerships in the SADC Region – Learning Points for South Africa from Mozambique's EIA Regulations,' 8 *South African Journal of Environmental Law & Policy* (2001): 95-104.

111 In relation to South Africa, see Glazewski & Haward, *supra* note 108, pp. 72-6.

112 For instance, regarding environmental protection legislation and its enforcement, South Africa is comparatively ahead of most sub-Saharan African states, including Nigeria. For discussion, see D. M. Dzidzornu, 'Environment Protection in Africa: A Panorama of the Law and Practice,' 22 *Journal of Energy & Natural Resources Law* (2004): 148-70 at 156-65.

specifically incorporating them for the delineation of straight baselines or bay closing lines. If Tanzania employs these rules, it could increase its marine areas that could be considered internal waters. The significance of this is that there is no right of innocent passage in internal waters where a higher degree of control could conceivably be exercised, whereas such a right exists in the territorial sea. Additionally, Tanzania and Kenya, among many other African states, have not claimed contiguous zones, which they should.

Finally, the discussion in this article highlights the need for African coastal states to develop and replenish national legal and related expertise in the law of the sea. A quarter century since the adoption of the LOS Convention, it has become obvious that the generation of African UNCLOS III leaders who became experts on the international law of the sea in the period of two decades, are now no longer necessarily active in the legal departments of ministries of foreign affairs, justice and other pertinent ministries. Some may have simply moved on to different institutions or other issue areas. That the maritime legislation of many coastal African states is not contemporaneous with their entitlements under the LOS Convention may not be attributable only to the lack of attention to the matter by national governments. It may also be due to the non-availability of competent personnel to work in the issue area. While the new generation of legal advisors moving into that professional space needs to invest in international law of the sea and interdisciplinary marine affairs expertise, it is defensible to argue that the effort must intentionally be made, particularly by coastal states to rebuild or build fresh capacity in the international law of the sea. African maritime zone legislation and its administration require competent and highly skilled legal practitioners who should remain up to date with legal developments as well as with evolving national interests. This is critical in the 21st century when the maritime areas under national jurisdiction hold untold potential for national economic growth and geopolitical leverage, both regionally and at the international level.