

The Exclusive Economic Zone and the legacy of FX Njenga

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‘No man is truly great who is great only in his lifetime.
The test of greatness is the page of history.’ William Hazlitt

Introduction

Many dream of leaving behind great legacies. To some, this remains a fantasy, to a few, the dream materialises. The likes of Wangari Maathai¹ and Christof Heyns² are fine examples of people whose legacies live on. This paper will delve into the history of another legend, FX Njenga,³ whose eminence transcends national and regional boundaries. Born on 6 January 1940, Njenga pursued his primary and secondary education in Kenya. He proceeded to Makerere University for the Preparatory University Studies Intermediate Certificate from 1959 to 1961. Between 1961 and 1963, he attended University College, Dar es Salaam where he studied law and obtained an LLB (Hons). He took his graduate studies at Columbia University from 1964 to 1965 and later got into New York University for a year’s postgraduate studies in 1967. In 1965, he attended the Hague Academy Course in the Netherlands where he obtained a diploma in the Academy.

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¹ Kenyan social, environmental and political activist. The first African woman to receive a Nobel Peace Prize.

² South African human rights expert, activist and champion for pan Africanism.

³ 6 January 1940-26 December 2008.

Njenga served in various capacities and is remembered as a preeminent professor of law, as an international civil servant, diplomat, and firm believer in the equal status and importance of the views of the Third World in the construction and development of international law. In particular, his contributions to the discipline of international law as a pioneer African scholar and practitioner of international law remain exemplary, as this paper will detail shortly.

Prof Njenga exemplifies competent leadership, pan Africanism, and critical scholarship. Prof Njenga had served as Dean, Faculty of Law, Moi University, and taught in the Faculty up till his unfortunate demise in 2008. A close friend recalls that he carried student dissertations with him to hospital and would be marking on his bed. His former students of Moi University remember his commitment to his students, and his relaxed easy personality that made him loved by students. A story is recounted by one of his former students, that once the law students were on strike, had blockaded the law building and would not let in their lecturers until their demands were met. Then came along Prof Njenga, affable, strutting to his office. The striking students instinctively unblocked the entrance to let him, *and him alone*, pass, and then resumed their blockade.

But even before his professorial years at Moi University, Prof Njenga served with distinction in varied regional and international bodies such as the United Nations General Assembly (UNGA) Committee on Peaceful Uses of the Sea Bed and Ocean Floor (1969-1972), the Third United Nations Conference on the Law of the Sea (UNCLOS III) (1973-1980), United Nations Commission on International Trade Law (1970-1975) and as a member and President of the UNGA Sixth Committee (1969-1975). Prof Njenga also served in the Organisation of African Unity as Political Director (1980-1987), and as Secretary General of the Asian African Legal Consultative Organisation (1988-1994).⁴ All through his career, he was, from time to time consulted as a trusted legal adviser to the Kenyan Ministry of Foreign Affairs. More especially, Prof Njenga is widely remembered for his contribution to the development of modern

⁴ FX Njenga's Curriculum Vitae, UN A/CN.4/456/Add.2, 19 April 1994.

law of the sea and the development of the exclusive economic zone concept which is the focus of this paper.

The exclusive economic zone, as defined by the United Nations Convention on the Law of the Sea, refers to an area beyond and adjacent to the territorial sea, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed.⁵ The EEZ was a *new* concept introduced in the 1982 Law of the Sea Convention (LOSC) and has been described as one of the most important pillars of the Convention.⁶ To understand the significance of Prof Njenga's contribution, there is need to take into cognisance three things: the practice and intercourse of coastal states in respect to similar notions before the conceptualisation of the exclusive economic zone concept; Asian and African States' position in the then legal framework of laws governing the seas; and the implication of the concept at its inception and contemporarily.

i. State practice before the exclusive economic zone

Assertions of exclusive jurisdiction over maritime resources beyond the territorial sea can be traced to a proclamation issued by the United States with respect to coastal fisheries. This assertion saw a declaration for the establishment of conservation zones in areas of the high seas contiguous to the coasts of the United States, where fishing activities had been taking or would be taking place substantially in light of future development.⁷ In this Proclamation, the freedom of navigation for all states was maintained, this being a customary right of the high seas.

Subsequently, a Declaration was made by the President of Chile on 23 June 1947 where Chile asserted national sovereignty over submarine

⁵ United Nations Convention on the Law of the Sea, 10 December 1982, C.N.236.1984, Article 55.

⁶ SN Nandan, 'The exclusive economic zone: A historical perspective' <<http://www.fao.org/3/s5280t/s5280t0p.htm>> on 15 September 2022.

⁷ Proclamation No 2668, Policy of the United States with respect to coastal fisheries in certain areas of the high seas, 28 September 1945.

areas, regardless of their size and depth, as well as over the adjacent seas extending as far as necessary to reserve, protect, preserve and utilise natural resources and wealth.⁸ The Declaration further established a demarcation of ‘protected zones for whaling and deep-sea fishery’ to extend to 200 nautical miles from the coasts of Chilean territory.

The Chilean Declaration is linked to a decree by the Government of Peru in the same year which similarly, established a maritime zone of 200 nautical miles.⁹ State practice before these declarations was an exercise of jurisdiction over maritime resources at a breadth of three-nautical miles.¹⁰ Incidentally, at that time, the territorial sea concept was recognised as a derogation from the freedom of the sea.¹¹ As such, any attempt to assert jurisdiction beyond the three nautical miles was vehemently rejected.¹² This position began to erode later albeit gradually.¹³

The 1958 Geneva Conference on the Law of the Sea was unable to craft an agreed limit for the territorial sea, with forty out of seventy-three countries in attendance strongly supporting the three-nautical mile territorial sea as against an extension of the same. The 1960 United Nations Conference on the Law of the Sea also failed, by one vote, to adopt a compromise of a six-mile territorial sea, and a further nine-mile exclusive jurisdiction over fishing, subject to certain limitations.¹⁴

The differences in the fisheries issue and the breadth of the territorial waters saw the need for finding a realistic solution for the conservation and management of coastal states fisheries resources.¹⁵ Njenga’s – together with Joseph Warrioba of Tanzania – proposal for the establishment of an exclusive economic zone was amongst the solutions. The basis of the exclusive economic zone was for there to be a zone that

⁸ Presidential Declaration concerning continental shelf, 1947.

⁹ Nandan, ‘The exclusive economic zone: A historical perspective’, 1987.

¹⁰ Benard G Heinzen, ‘The three-mile limit: preserving the freedom of the sea’, 11 *Stanford Law Review* (1959) 629.

¹¹ Emerrich de Vattel, *De droit des gens*, 1758; republished in 1964, Liberty Fund, 250-251.

¹² FX Njenga, *International law and world order problems*, Moi University Press, 2001, 112.

¹³ Heinzen, *The three-mile limit: Preserving the freedom of the sea*, 630, 640.

¹⁴ Njenga, *International law and world order problems*, 112-113.

¹⁵ Njenga, *International law and world order problems*, 107.

would safeguard the interests of the coastal state in the waters adjacent to its coast without unduly interfering with the other legitimate uses of the sea by other states.¹⁶ The proposed exclusive economic zone was not to be regarded as a territorial sea since traditional freedoms of the high seas including those of navigation and overflight, together with the freedom of laying pipelines and submarine cables would persist.¹⁷ It would also be distinguished from the high seas owing to the fact that the coastal state would have the exclusive right to explore, exploit, regulate and control fisheries, besides exploiting the resources of the seabed within the zone.¹⁸

Similar to a number of unilateral declarations with respect to the breadth of the zone, the proposal for an exclusive economic zone was 200 nautical miles.¹⁹ Comparatively, the patrimonial sea concept founded by Latin American states and contained in the *Text of the Declaration of Santo Domingo*, shows a similarity to the exclusive economic zone concept.²⁰ That Njenga's idea, which he developed together with Joseph Warioba (who later rose to be Prime Minister of Tanzania, Judge of Appeal, and was a member of the first bench of the International Tribunal on the Law of the Sea) was widely accepted by a majority of states, manifest in its inscription in the 1982 United Nations Convention on the Laws of the Sea. This speaks to the substantiality of his contribution in the jurisprudence of modern law of the sea.

ii. The exclusive economic zone and Third World interests

Njenga and Warioba's idea for establishing an EEZ was of much more critical significance to developing states. Besides general protec-

¹⁶ Njenga, *International law and world order problems*, 122.

¹⁷ 'International legal materials', 12 Cambridge University (1973) 33-35. See also *Revised Draft Articles on Exclusive Economic Zone Concept Submitted by Kenya, 1972*, Article 3.

¹⁸ *Revised Draft Articles on Exclusive Economic Zone Concept Submitted by Kenya*, International Legal Materials, Articles 2 and 4.

¹⁹ The 1952 Santiago Declaration on the Maritime Zone signed by Chile, Peru and Ecuador; 'National claims in adjacent seas' *Geographical Review* (1951) 185. *Draft Articles on Exclusive Economic Zone Concept Submitted by Kenya*, Article 7.

²⁰ Declaration of Santo Domingo, UN A/AC138-80, 9 June 1972.

tion of all coastal states interests, there was an exigency to ameliorate the position of African and Asian states in the international regime governing the seas. Prior to UNCLOS III, the interests of developing states had been largely ignored in the development of international law. At the thirteenth session of the Asian African Legal Consultative Committee, it was stated that the 'present regime of the high seas benefits only the developed countries...'.²¹ Consequently, measures were adopted to put an end to the situation. Among them was bloc formation and common position negotiation among the developing countries with the purpose of creating a solid platform for negotiations at the global conference. Kenya's 1971 report submitted to the Asian African Legal Consultative Committee (AALCC), contained the following remarks:

For a long time, our views were unheard and our interests unheeded, when international law was being formulated by the so-called civilised nations, which by definition excluded both Asian and African countries. With the grant of independence to these countries, we now have the opportunity of having our views heard and incorporated in the development of international law.²²

The Kenyan delegation to the AALCC, headed by FX Njenga, was opposed to UNCLOS III being used as a forum for tackling unresolved issues arising from the 1958 Convention.²³ In their report, the delegation pointed out that most states in Africa had not participated in the formulation of the four Geneva Conventions on the Law of the Sea. In any case, if the rules of the law of the sea served the interests of developing countries, such was only by coincidence and not by design. The delegation strongly held that the forthcoming UNCLOS III, which was scheduled to start in 1973, must have the competence to re-examine those rules which perpetrated inequalities and not simply the unresolved issues from the previous legal regime.²⁴

²¹ Report of the Thirteenth session of the Asian-African Consultative Committee, Lagos, 1972, 18-25.

²² Asian African Legal Consultative Committee, Report of the twelfth session, held in Colombo, 1971.

²³ Njenga, *International law and world order problems*, 121.

²⁴ Report of the twelfth session of the Asian-African Legal Consultative Committee, 93-94.

As such, the exclusive economic zone concept was precisely aimed at securing Third World interests. Tayo Akintoba reports that

the concept was first introduced by African states ... [it] called for the extension of fisheries jurisdiction within the zone *in order to keep developed countries away from their shores and to ensure the exclusive right of coastal African states to exploit living and non-living marine resources.*²⁵

The ingenuity of Njenga and Warioba's idea occasioned massive support from AALCC membership. The exclusive economic zone concept was subjected to evaluation in subsequent sessions of the AALCC.²⁶ In these sessions, the concept was developed further and its main elements concretised. The proposal was wholly endorsed by the Committee prior to the Kenyan delegation's formal presentation of the same to the Seabed Committee in 1972.²⁷ The Organisation of African Unity (OAU) also contributed to the strengthening of African states' position in the advocacy for equitable rights for developing states in the international law regime of the seas.²⁸ It did so by passing no less than fourteen resolutions on the question of the law of the sea. Particularly, the OAU adopted a declaration on the issues of the law of the sea which captured the exclusive economic zone concept.²⁹ More specifically, it played a unifying role in the harmonisation of the African position. It would have been almost impossible to have a coherent African position without the political guidance of the OAU.³⁰

²⁵ TO 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, The Hague, 1996, 2-3, cited in Humphrey Sipalla, 'Bridging the business and human rights divide with lessons from UNCLOS' deep sea mining regime' in Juan Carlos Sainz-Borgo and others (eds) in *In honour of a modern Renaissance man: Liber amicorum Guðmundur Eiriksson*, UP-eace/OP Jindal/Universal Law Publishing, San Jose/Sonapat/Gurgaon, 2017, 243.

²⁶ Reports of the thirteenth and fourteenth sessions of the Asian-African Legal Consultative Committee, 1972-1973.

²⁷ Nandan, *The exclusive economic zone: A historical perspective*, 1987.

²⁸ C Odidi 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', *Dalhousie Law Journal* (1982) 45.

²⁹ Supplement No.21 [A/9021], Report of the Committee on the Committee on the Peaceful Uses of the Seabed and Ocean Floor beyond the limit of National Jurisdiction.

³⁰ Njenga, *International law and world order problems*, 129.

An appreciation of Njenga's pan Africanism ascription would be incomplete in the absence of mentioning Articles VI and VII of the revised Draft Articles on EEZ. In the spirit of African solidarity, Njenga and Warioba proposed for the right of landlocked, near landlocked and states with a small shelf, to exploit the living resources of an exclusive economic zone belonging to a neighbouring coastal state.³¹ Despite a modification of the original draft which diluted the initial vision of the exclusive economic zone, owing to discordant views amongst African countries, the essential idea was largely retained. Article VIII of the original draft reads as follows:

that African countries recognise, in order that the resources of the region may benefit all regions therein, that the landlocked and other disadvantaged countries are entitled to share in the exploitation of the region on equal basis as nationals of coastal States, on the basis of African solidarity and under such regional or bilateral agreements as may be worked out.³²

Indeed, the rights of landlocked and geographically disadvantaged states in reference to exploitation of living resources within the exclusive economic zones of coastal states are enshrined in LOSC Articles 69 and 70.³³

iii. Implication of the exclusive economic zone concept at its inception and contemporarily

The inscription of the exclusive economic zone in LOSC saw the granting of equal jurisdiction for the exploitation of maritime resources to an extent of 200 nautical miles. This jurisdiction was to apply to all coastal states; developed or developing. The issue of equality was thus addressed competently giving African and Asian states a pedestal from

³¹ Draft Articles on the Exclusive Economic Zone Concept, International Legal Materials, Articles 6 and 7.

³² Declaration of the Organisation of African Unity on the 'Issues of the law of the sea' of 2 July 1973.

³³ Louis B Sohn and John E Noyes, *Cases and materials on the law of the sea*, Brill, 1951, 570-572.

which they could manage and control their maritime resources without undue interference from developed countries. The establishment of such a zone was also significant as it prevented the exploitation of African states' maritime resources by developed states on the basis that the developing states did not have the capacity to utilise their resources by dint of their lack of technological assets essential for such exploitation.³⁴

The legal assertion of developing states' rights to avert exploitation of maritime resources by developed states was thus successful. This notwithstanding, it is troubling to note that African states are barely taking any measures aimed at realising the immense potential of the seas around Africa. Besides the various legislations establishing respective national exclusive economic zones, there are hardly any regulations at national, regional or continental level for the exploitation, exploration or conservation of the zones.³⁵ In the interest of developing states, it would be beneficial for these states to have short-term and long-term mechanisms in place which would assure the full exploitation of the maritime resources of their various exclusive economic zones.

Further, potential realisation by African countries of their maritime endowment is significant as it would honour the valiant efforts of the pioneers of this concept; them being African for that matter. Whether out of some sense of duty or not, paying homage to the exceptional achievements which led to concretised norms that safeguard African states' interests in the international legal regime of the seas seems to be of great import.

African concerns aside, many disturbing issues have arisen over the years owing to the exclusive economic zone concept. The establishment of the exclusive economic zone was effectively the commencement of a process of substantial 'privatisation-nationalisation' to shrink what has been called the global commons. Sovereign rights before 1982 extended to a breadth of 12 nautical miles.³⁶ After the LOSC, 35% of the world's

³⁴ Nandan, *The exclusive economic zone: A historical perspective*, 1987.

³⁵ Njenga, *International law and world order problems*, 137.

³⁶ Martin Lishexian Lee, 'The interrelation between the law of the sea convention and customary international law', *San Diego International Law Journal* (2006) 412.

waters have been excluded from the 'common heritage of mankind'.³⁷ Concern arises where, with the workings of ocean currents that lead to huge concentrations of phytoplankton – the crucial base of the fisheries food chain – being massively deposited within exclusive economic zones, so that 87 coastal states control over 95% of the world's fisheries, and replenishment rates are seriously threatened because of overfishing by these states.³⁸ In 1989, global fish catch was recorded at 90 million metric tonnes. This value has never been repeated since and with subsequent catches, the numbers have remained stagnant or declined. The situation is so bad that it is estimated that all the world's fisheries could collapse by 2050 as ocean acidification and habitat destruction are also taking their toll.³⁹ Unless stringent measures are taken to restrict and prevent overexploitation of living resources in the economic zones, there is an anticipation of horrid consequences.

There is also a worrying trend for coastal states to forego their marine conservation obligations. The prioritisation of economic ambitions especially among developed states at the expense of protecting the sea has led to various negative environmental side effects such as noise and light pollution which endanger not only the living organisms in the sea but also have adverse effects on the seabed.⁴⁰ This particularly relates to mining activities in the exclusive economic zone and the high seas.⁴¹ Lack of clear mechanisms formulated to hold states accountable for destruction of the environment only adds to the problem at hand. Coastal states ought to take the initiative of conserving the marine environment through domestic legislation, regional and continental resolutions. With

³⁷ Liam Camping, Alejandro Colas, *Capitalism and the sea: Sovereignty, territory and appropriation in the global ocean*, 2017, 5.

³⁸ Achin Vanaik, 'The UNCLOS isn't as perfect and it's time we acknowledge that,' Transnational Institute, 12 August 2020. < <https://thewire.in/world/unclos-maritime-law-flaws> > on 24 March 2022.

³⁹ Vanaik, *The UNCLOS isn't as perfect and it's time we acknowledge that*, 2020.

⁴⁰ Greenpeace International, 'Deep seabed mining: An urgent wake-up call to protect our oceans,' July 2013.

⁴¹ Kathryn A Miller, Kristen F Thompson, Paul Johnston and David Santilo, *An overview of seabed mining including the current state of development, environmental impacts, and knowledge gaps*, 2018.

effects of adverse climate change already being felt, such measures for preservation of the sea should not be taken lightly.

Another problem that has arisen from the establishment of exclusive economic zones is the creation of disputes between and among states. When these zones overlap, it is ordinarily left to the disputing states involved to sort matters out.⁴² However, with states that have existing political tension and divergent economic ambitions, the situation only tends to intensify.⁴³

iv. Conclusion

This paper's focus has been on FX Njenga's contribution to the creation of the exclusive economic zone. Having gained international acceptance, the exclusive economic zone concept can be said to be part of customary international law. With differing observations noted from state to state with regard to the exclusive economic zone, the fact that the concept provides something for every state is of primary essence. Future developments pertaining to the concept would be critical in determining the overall benefits and malefits of it. This notwithstanding, a reflection on the exclusive economic zone concept this far calls for an appreciation of its existence together with its originator. This piece is more than anything a dedication to the inspiring life of a renowned African legend.

⁴² United Nations Convention on the Law of the Sea, Articles 74 and 83.

⁴³ Vanaik, 'The UNCLOS isn't as perfect and it's time we acknowledge that,' 2020.