AN APPRAISAL OF THE RIGHT OF ACCESS TO THE SEA ACCORDED TO LANDLOCKED STATES UNDERTHE 1982 THIRD UNITED NATIONS CONVENTION ONTHE LAW OF THE SEA (UNCLOS II)*

INTRODUCTION

International law has long been faced with the question of whether a coastal state which has access to the sea should alone enjoy the benefits derivable from the sea to the exclusion of land-locked states or whether the benefits of access to the sea belong as of right to all states and an as such land-locked states can not legitimately be denied the right by coastal states even on the ground of their right to territorial sovereignty[1]

The term landlocked means having no sea coast and being completely mediterranean[2] *Article 124 (1) (a) of the 1982 Third United Nations Convention on the Law of the Sea*[3]*, defines a landlocked state as a state which has no sea coast*[4] *In essence, it is a state that has no direct access to the sea, a geographic status, which places it at a*

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* By **A.A Adedeji**, LL B (Hons) B.L., LL. M, Lecturer in the Department of International Law. Faculty of Law, Obafemi Awolowo University, Ile-Ife, Nigeria

[1] D.W Bowett, The Law of the Sea (1967) p. 50 [2] Martin Ira Glassner, Access to the Sea for Developing States (Nijhoff / The Hague 1970) p.2 [3] A/Cont.62/122.7 October 1982

[4] Of the worlds approximately 170 states, 30 have no coast. 14 are in Africa, 10 in Europe, 4 in Asia and 2 in South America. The Status of San Marino, Holy see, Byelorussia, Lichtenstein as state is somewhat controversial. See Churchill and Lowe. The Law of the Sea p. 278. See also British Digest ii 6727 38 Whiteman.

[5] Note that the sense in which the term landlocked is used here is very narrow. It eliminates States such as Jordan, Iraq and the Democratic Republic of Congo which have corridors to the sea, and coast line thereon, regardless of how useless the sea coast may be for foreign trade. Such state exhibit many if not most of the characteristics of truly landlocked sates. This definition however includes those states such as Paraguay and all but the two smallest landlocked states of Europe, which have access to the sea via internationalized navigable river which are essentially "long arm" of the sea. Such states exhibit some of the characteristics of coastal states but consider themselves landlocked and could be considered as such since they do not exercise "Sovereign" control over their aqueous highways to the sea. A practical political guide to determine which states are landlocked and which are not is the question "which country participated as landlocked state at the United Nations Conferences on the subject". Going by the records, Jordan, Iraq and the Democratic Republic of Congo etc did not participate as landlocked states. See Martin Ira Glassner

severe disadvantage relative to its coastal counterparts.[5] The term access to the sea by landlocked state implies any kind of approach or route between an interior state and the sea which is used on a more or less regular basis on equitable terms. This may include in actual practice limited right of transit[6]

The problem of right of access to the sea by landlocked states has generated so much interest that, it has been an issue of discussion at international fora, right from the early decades of the 20th century. The result of this has been several provisions in a lot of treaties and conventions geared towards addressing and solving the problem. The latest and most comprehensive of these conventions is the Third United Nations Convention on the law of the sea[7] , which opened for signature on the 10th of December 1982 at Montego Bay Jamaica. The Convention came into force on the 16th November 1994, 12 months after the required minimum number of countries ratified it.[8]

The aim of this paper is to appraise the provisions of UNCLOS III on the issue of right of access to the sea by landlocked states. For clarity of exposition however, we shall examine the theoretical basis of the argument in support of the right of access of landlocked states, and the evolution of international law in respect of the matter, with specific references to landmark treaties and conventions, organised and arranged by the international community to address the issue over the years.

THEORETICAL BASIS FOR ARGUMENT IN SUPPORT OF THE RIGHT OF ACCESS

A lot of theories have been formulated by protagonist of the right of access to the sea to justify and rationalise their argument. The theories whose contents range from moral to economic and law originate mainly from scholars on the matter and could be

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[5] Transit rights here imply rights accorded by transit states. A transit state is defined in Article 124 (1) (b) of UNCLOS III to mean state with or without a sea coast situated between landlocked state and the sea through whose territory traffic in transit passes In the southern African sub-region, Republic of South Africa is a transit states for countries like Lesotho and Swaziland While in the West African Sub-region, Nigeria and Cote de'voire are transit states to some landlocked countries of the region.

[7] Hereinafter referred to as UNCLOS III

[8] This is in line with Article 308 of the Convention which state that the convention will come into force 12 month after the date of deposit of the 60th instrument of ratification.

classified under the following four headings. These are: natural law, economic necessity, innocent passage and public servitude which are hereafter examined.

(a) Natural Law Theory

The argument in support of the right of access to the sea by landlocked state was originally predicated on the principles of natural law held in the 17th century. It was believed that the right of free transit was conferred on every landlocked state by its sovereignty.

According to Grotius the foremost proponent of this theory, the ocean as *res communis* was to be accessible to all nations littoral and landlocked alike but incapable of appropriation[9] Consequently, access to the sea by states landlocked or otherwise, is a corollary of the generally acceptable notion of freedom of the High Seas. An analyst, Norman J.G Pound, summed up the argument as follows:

> *If the ocean is free to all mankind (res communis), it is reasonable to suppose that every people should have access to the shores of the oceans and the right to navigate all navigable rivers discharging into it, since they are only a natural prolongation of the free high seas*[10]

b) Public Servitude:

According to proponents of this theory there exists a right of transit as a general principle of law in itself or on the basis of a principle of law. They based their argument on the foundation of the principle of public servitude which can be compared, albeit roughly to the right of easement under public law within the municipal context. George Scelle aptly put it as follows:

> *The right of way under public law provided landlocked states with an unquestionable right of passage over territories separating them*

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[9] Mare liberum 1609 See also O'Connell, International law Vol. 1 pp et seq. Note that the this view prevailed at that time partly because it accorded with the interest of the North European State which demanded freedom at the seas for the purpose of exploration and expansion of commercial intercourse with the East. Freedom of the sea then becomes a basic principle of international law.

[10] Norman J.G pound, "A Free and Secure Access to the sea" Annals of the Association of American Geographer XLIX (1959) p. 257

from the sea, without any treaty or even in theory an international agreement[11]

(c) Economic Necessity:

The theory of economic necessity is one of the most compelling arguments to emerge in the years immediately after the Second World War.[12] Proponent of this theory have argued that, oceans have always provided the most economical means of transporting goods among world markets, and as economic well being of states become increasingly dependent on international trade and commerce, it has become evidently clear that self isolation by a country would ultimately lead to economic regression with its attendant problems.[13]

It was then recognized that even where transit historically has been allowed on an ad-hoc, bilateral basis, the risk of disruption inherent in the absence of legal guarantee usually create an unconducive environment for investment security and development plans.[14] Based on this, it has been advocated that a right of passage must be recognised, provided that its exercise causes no damage to the interest of transit state. E. Lauterpacht, a leading publicist among the proponent of this theory succinctly put it as follows:

The existence of a right of transit may be said to be dependent upon two basic conditions. In the first place, the state claiming the right of transit must be able to justify it by reference to consideration of necessity or

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[11] George Scelle, Manual de d'roit International Public (1941), Part 1 p. 389 cited in F.C.N 14/INR 144, p.4 and quoted by Martin Ira Glassner at p.17. Note that access to the sea by landlocked countries have been linked to a general right of transit. The United Nations Economic Commission for Africa for example state clearly that, "the problem of free access to the open sea by a landlocked country is part of a more general one of freedom of transit. The latter comprises in itself the fundamental economic interest and the legal safeguard of the countries concerned" See United Nations E.C.A. Transit Problems of Eastern African landlocked State (E.C.N. 14/INR/44) (Addis-Ababa, 6 Nov 1963) p.3[12] Martin Ira Glassner p. 28

[13] Note that this was succinctly expressed in the principle of international law adopted by the 1964 United Nations Conference on Trade and Development (UNCTAD) and incorporated verbatim in the preamble to the 1965 convention on Transit Trade of landlocked state as Principle I thus:

" There recognition of the right of every landlocked state offree access to the sea is an essential principle for the expansion of international trade and economic development"

[14] Fawole Oyeronke, "A Critical Examination of the Rules Relating to the Access to the Sea by landlocked State". Unpublished seminar paper presented to the 1992/93 LL.M Class of the Faculty of law, Obafemi Awolowo University, Ile-Ife Nigeria on International law of the sea p.3

> *convenience. Secondly, the exercise of the right must be such as to cause no harm or prejudice to the transit State*[15]

(d) Innocent Passage:

The principle of innocent passage through territorial waters of coastal states recognised in international law had been cited in support of an analogous right of transit for landlocked states. According to one writer:

> *The right of landlocked states to free transit over land is the same as recognized in territorial waters as the right of innocent passage ... The reason for the existence of innocent passage in international law is the same as civil law.*[16]

A point in fact worth noting about the various theories mentioned above, is that they tend to grant a general freedom of access to the seas in favour of landlocked states without due regard to the right of territorial sovereignty of coastal states. This position is contrary to positive law and state practice on the matter. What exists in reality is that the claim of transit by landlocked states had not gone without opposition by coastal states. As a matter of fact the major obstacle to the development of a guaranteed right of access to the sea for landlocked countries has been the claim of territorial sovereignty by coastal states[17]

These nations have consistently argued that the principles of state sovereignty and territorial integrity allows them to approve or disallow all transit through their territories[18]. They have further contended that the right of access for land locked countries cannot be properly resolved through a single international rule, but instead it is a matter for bilateral or regional agreements.[19] Since in any case, sovereign

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[15] E. Lauterpacht, " Freedom of Transit in International Law". Transactions of the Grotius Society XLIV (1958-59) quoted by Martin Ira Glassner P.27. See also, O' Connel, International Law, VoL.1 (Ocean Publication, 1965) p. 613-614; see also S. Pufendorf, De Jure Naturae Et Gentium 354 (Classics of international Law Trians 1934) [16] A .H Habib, The Right of Free Access to the Sea (1966) p. 4

[17] Hurbert Thierry, 'les Etats's proves de littoral Maritime; Revue Generale de Droit International Public LXII (October – December 1958) p. 615 cited by Martin Ira Glassner at p. 28-29.

[18] For instance, the Pakistani representative at the Caracas session of UNCLOS III referring to the history of transit right for landlocked countries, stated that neither access nor transit by landlocked states were unqualified legal rights but stemmed from agreement between the parties concerned. However, since transit by a landlocked state was in effect an encroachment on the sovereignty of the transit state, only the latter could determine the extent to which it was willing to accept such limitations on sovereignty.

[19] Fawole Oyeronke p. 4

jurisdiction over all the activities within their territory include the prerogatives of denying the traffic of landlocked countries as a matter of security. It is consequently contended that rights of transit need to be granted and enforced only on a reciprocal basis[20] It is however important to note that the problems of access has been recognised as an international issue by the world community rather than a peculiar problem of landlocked states, and has been treated as such a several international conferences organized to address the issue.

The outcomes of these conferences have been several treaties and conventions which represent the agreement reached on the issue. It is these treaties and conventions that represent the various evolutionary phases of international law on the issue of access to the sea by landlocked states. The significant ones among these conventions would now be examined.

(a) The 1921 Barcelona Conference:

The issue of right of access to the sea by landlocked states has been, prior to the 20th century only on the basis of numerous bilateral treaties between landlocked and coastal states. It was not until 1921 at the General Conferences on Communication and Transit held in Barcelona, Spain[21] that, the collective effect or landlocked countries toward a global recognition of an assured right of access started.[22] Representative of nations present at the conference adopted the Convention and Statute on Freedom of Transit other wise known as the Barcelona Convention. The agreement obligates contracting parties to facilitate free transit by rail or waterway on routes convenient for international transit through their territory.

It is significant to note that the convention had just one sentence declaration recognizing the right of a flag of state having no seacoast as the only document produced that has direct reference to landlocked states. Nevertheless, by not

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[20] Ibid p. 3

[21] Generally referred to as the Barcelona Conference. Note that before the Barcelona Conference, tacit reference had been made along this line. For example, the framers of the league of nation did not deal specifically with the question of access to the sea, but rather with the broader one of freedom of transit. Article 23 (e) of the covenant provides that members of the league: will secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the league.
It was pursuant to this that the Barcelona convention was signed April 20, 1921 along with several other important documents and the convention and statute on the International Regime of Maritime Ports signed at Geneva on December 9, 1923

[22] Martin Ira Glassner p 20

distinguishing between coastal states and landlocked states with or without navigable rivers in its provisons[23], it did make a substantial and important contribution to the establishment of the right of access of landlocked states to the sea.

The Barcelona convention is however not without some defects and limitations. One of such is that its provision is not of universal applicability as it is rather confined to states that are party to the convention alone[24]. In addition, the convention's focus is on railway and waterway transport to the exclusion of road transport, thus excluding a greater portion of Africa and Asia which depend on overland routes to and from the sea. Moreover, the Barcelona convention's attention was mainly on the landlocked countries of Europe without taking sufficient account of the distinct and peculiar position of states in other part of the world[25].

In spite of the above mentioned limitations however, the Barcelona convention has come to be regarded as a *datum plane*, a minimum standard to be used in subsequent negotiations for bilateral and multilateral agreement on transit, including those involving access to the sea. In this respect it retained its value and prestige for 40 years[26]

(b) The General Agreement on Tariffs and Trade:

Shortly after the end of the Second World War, the major trading nations of the world at the initiative of the United States of America, made a commitment to reduce tariffs and other barriers to trade for their mutual benefit, and to facilitate post-war reconstruction, recovery and peace. The general principles of liberalized trade agreed upon by the participants and the specific undertaking by the participants, were embodied in the General Agreement on Tariffs and Trade [27] (GATT) adopted at Geneva on October 30, 1947.

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[23] Ibid p. 21

[24] A proposal that the Convention expressly states its universal application was rejected on the grounds that in allowing states which were not parties to enjoy its benefits, fewer states would elect to become parties. See Makil, Transit Rights of Landlocked Countries: An Appraisal of International Conventions 4.J World Trade L. 35 40 C 1970.

[25] Fawole Oyeronke p.5

[26] Martins Ira Glassner p. 21 op. cit.

[27] Hereinafter referred to as GATT.

Although, specifically, GATT did not refer to landlocked states and neither was it organised for that purpose, in its Article V entitled Freedom of Transit, the principles of Barcelona Convention was clearly reaffirmed as follows:

> *There shall be freedom of transit, through the territory of each contracting party via the routes most convenient for international transit to or from the territory of other contracting parties.*[28]

Interestingly however, the GATT provision just like the Barcelona convention fell short of making the freedom of transit a general legal principle applicable to all states[29]

(c) The Geneva Convention on the Law of the Sea (GCLOS) 1958.

At the 11th session of the United Nations General Assembly, in February 1957, on the basis of the request of landlocked states, the issue of access to the sea was included on the agenda of the first United Nations Conference on the law of the sea to be held in 1958 in Geneva. The landlocked states based their request on the ground that existing international law and practices on the issue were inadequate[30]

At the conference, the fifth committee was assigned the specific task of addressing the issue of the right of access to the sea of landlocked states. One significant event worth noting at the several debates on the issue at the floor of the committee is the vigorous assertion of the landlocked states of an equal right with coastal states, in matters of navigation[31].These assertions were hinged on the arguments "*of economic liabilities suffered by reason of inaccessibility to the sea and reflected coop-ration in reducing the distinction between maritime and landlocked states*"[32]

Expectedly, these claims and assertions attracted severe opposition from coastal states. They argued that their recognition is unnecessary and would be superfluous in light of the multilateral conventions in existence on the issue which they considered to be

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[28] 61 Stat AYIT I A.S No 1700, 55 U N. T S. 187, 210 1950
[29] Fawole Oyemike p.5
[30] Ibid.
[31] Max Sorensen Law of the Sea, International Conciliation (No 520 November 1958) p. 199-200 cited by Martins Ira Glassner at p. 30
[32] G. Etzel Pearcy, "Geographical Aspects of the law of the Sea" Annals of the Association of American Geographers, XLIX (March 1959) p.22

adequate. For this group of states, the way forward, is to urge more states to adopt the existing conventions on the matter to make their application universal[33]

However, considering the rigorous debates, the recommendations of the landlocked states was subjected to at the fifth committee it could be said that the effort of the landlocked state was reasonably successful, when examined in light of the fact that the final recommendation of the committee to the conference contained essentially though in modified form the element of the principles advocated by the landlocked states[34]

The recommendation which was eventually accepted by the full conference and incorporated as Article 3 of the convention on the high seas[35] reads in part as follows;

> (1).. *in order to enjoy the freedom of the seas on equal term with coastal states, states having no sea coast should have free access to the sea. To this end, states situated between the sea and state having no sea coast shall by common agreement with the latter and in conformity with existing international convention accord*
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> *(a) To the state having no sea coast, on a basis of reciprocity free transit through their territory, and*
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> *(b) To ship flying the flag of that state equal treatment to that accorded to their own ships, or to the ships of any other states, as regards access to seaport and the use of of such ports.*
>
> *(2).States situated between the sea and the state having no sea coast shall settle, by mutual agreement with the latter and taking into account the rights of the coastal state or state of transit and the special conditions of the state having no sea coast, all matter relating to freedom of transit and equal treatment in parts in case states are not already parties to existing international conventions*[36]

It is important to note that the GCLOS of 1958 is significant in many respects. In the first instance, it represents the first ever codification of the rules of the sea[37] In addition to this and more importantly, it is the first international document recognizing that the High Seas belongs to all nations landlocked or otherwise and as such should be

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[33] Fawole Oyeronke p 6
[34] Martin Ira Glassner p 30
[35] Note that it is one of the four conventions produced by the conference on the law of the sea.
[36] A./ CONF 13/43, p 87
[37] Fawole Oyeronke p 6

kept open[38] Furthermore, the provision of Article 3 paragraph 1 (a) of the High seas convention which gives landlocked states right of free transit through the territory of transit states is helpful in emphasizing the economic necessity of free access to the sea and stressing that access to the sea is a corollary of the freedom of the seas[39]

On a critical examination however, it could be said that the convention did not break any new grounds as far as the issue of right of access to the sea of landlocked countries is concerned[40] Its operation which was predicated on the phrase "in conformity with existing international convention" was intended to refer to all agreements dealing with the matters (bilateral as well as multilateral) especially, the Barcelona Convention of 1921 and the Geneva Convention of 1923 on maritime ports. It was apparently hoped in this way to give broader effects to the substance of these agreements, permitting free access to most type of vessels, and at the same time, preserve the sovereignty of the coastal states by requiring the landlocked state to negotiate an agreement to secure the open access[41] There is nothing in the convention indicating an obligation on the transit country to grant free access.

The effect of this is that there is no automatic right of access. For the right to operate at all, there must be a bilateral agreement between landlocked states and coastal states. Where no such agreement is in place, there is no right of access[42]

Against this background, the approach of the conference to the issue of right access to the sea by landlocked states could be said to be inherently conservative. Dr. Tabibi the rapporteur of the 5th Committee aptly described the outcome of the conference in this

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[38] 1958 High Seas Convention Article 2. Note that Article 4 of the same convention recognises the right of every state, whether coastal or not, to sail ships under its flag on the High Seas. [39] Martin Ira Glassner p. 31

[40] Ibid [41] Myres Mc Dougal and William T. Burke: The Public Order of the Oceans: A contemporary International law of the sea (New Haven: Yale University Press 1962) p. 113.

[42] An example of this could be seen in the impasse between India and Nepal following the expiration of trade treaty between the two in October 1970. Before another agreement could be reached, it was alleged that India imposed unreasonable restrictions on trade with Nepal and stopped the supply of even essential commodities to Nepal The matter was not resolved until some six months later when Prime Minister Indira Ghandi of India and King Muhendra of Nepal met over it. See Sarup, Transit of landlocked Nepal. 21 International Comp. L.Q. (1972) p 294

respect, in his evaluation where he stated that Article 3 of the Convention of the High Seas "firmly established" the legal of transit for landlocked states, the practical aspects ... remained unsolved"[43] This shows that a great deal remains to be done. Consequently pressure for more definitive solution to the question of access to the sea continued to increase after 1958[44]

D. The United Nations Convention on the Right of Trade of Landlocked Countries

This was the first conference convened under the United Nations Conference on Trade and Development[45] (UNCTAD) in 1967 held in New York. There were vigorous debates throughout the conference on a lot of things. This include, the question of whether free access to the sea was an inherent right of landlocked states which could be re-affirmed in the convention, or whether, the task of the conference is just limited to resolving technical problems of transit traffic. Moreover, the issue of whether the convention should specify the procedures for clearing in transit through custom[46] was also raised and debated.

A point in fact worth nothing about the conference is that while all speakers stressed the need for the freest possible transit for landlocked countries, only few delegations interestingly, were really willing to surrender much of their own "sovereignty" in order to achieve this[47] In addition to this, there was an evident lack of agreement among landlocked countries on the urgency for and scope of a new condition[48] These actually hindered any spectacular development with respect to the right of access at the

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[43] A H Tabibi p 2 and 19[44] Martins Ira Glassner p. 33

[45] The convention came into force on 9th June 1969. For text, see Whiteman Digest of International Law (1963-) IX 1156.

[46] Martin Ira Glassner p 36[47] Ibid.

[48] Broadly speaking, the European landlocked states had few complaints while those of Africa, Asia and South America were most vigorous in seeking broader rights and guarantees for the landlocked states emphasising importance of access to the sea to economic development *Afortiori*, some transit states were more understanding and co-operative than others particularly those which had good relations with their neighbouring landlocked states

conference. As a matter of fact along this line, the convention "contains little which is new and no radical innovations or breakthrough"[49]

On a final analysis however, the convention represent an important milestone in the efforts to tackle the issue of right of access by landlocked states in international law. Apart form adopting the principle of free access and setting out the conditions under which freedom of transit will be granted, the convention provides a frame work for the conclusion of bilateral treaties which in this respect is not directly dispositive to the right of access.[50]

The landlocked states particularly the developing ones however, were expectedly far from being satisfied with its provision. As events unfolded in subsequent years, the convention's provisions turns out not to be the last word on the subject[51]

THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA (UNCLOS III)

The origin of the Third United Nations Conference on the Law of the Sea could be traced to the startling and unique proposal of Dr. Arvido Pardo, the Maltese representative to the United Nation that the seabed and ocean floor "underlying the sea beyond the limit of national jurisdiction" should be declared by the United Nations to be the common heritage of mankind", and *ipso facto* cannot be "subject of national appropriation" in any manner whatsoever[52] In a very comprehensive, well documented and forthright speech before the first Committee of the General Assembly in 1967 Dr. Arvido Pardo emphasized the need for the creation of an effective international regime for the seabed and ocean floor beyond a clearly defined national jurisdiction and the acceptance of that area as "common heritage of mankind" to be used and exploited for peaceful purpose, for the exclusive benefit of mankind[53]

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[49] Mr John H.F. Legal Adviser to His Majesty's Government of Nepal and member of Nepals delegation at the Conference analysis on the Conference quoted by Martin Ira Glassner p. 37-38.

[50] Ian Brownlie, Principles of International Law (3rd ed. Oxford) p. 285.

[51] Martin Ira Glassner p. 38

[52] See note Verbale dated 17 August 1967, from the Permanent mission of Malta to the UN Secretary General DO.No. A/6695, UNGAOR, 22nd Sees; Agenda item 92 Annexes (1967) p.1

[53] Arvido Pardo, in UN DOC. A/C, 1/PV. 1516, 1 November, 1967.

The General Assembly responded unanimously not only by declaring the seabed and ocean floor beyond the limit of national jurisdiction as "common heritage of mankind", which could not be appropriated by any state, but also by establishing an ad-hoc seabed committee which was later made permanent. It is the seabed committee that eventually became a forum for the preliminary negotiations on a new comprehensive law of the sea.

After nine years of conference negotiations the Third United Nations Convention on the law of the Sea (UNCLOS III) was adopted by the law of the sea conference on the 30th August 1982[54] UNCLOS III marked the final stage in the codification of the customary norms and the development of international rule regarding the use of the world ocean in general and of the landlocked states in particular[55]

When compared with the Geneva Convention on the law of the Sea, UNCLOS III has more comprehensive provisions geared towards maintaining the right of landlocked states in the freedom of the High Seas in a number of articles. In addition, a specific Part X was created to deal with measures that will facilitate the exercise of the right of access to the sea by landlocked states. Furthermore, measures that will enhance the freedom of transit sate for the purpose of exercising right relating to the freedom of the Sea being heritage of mankind were also stipulated. These provisions will now examine.

1. ACCESS TO MARINE RESOURCES:

The issue of access of landlocked states to marine resources could be categorised into three, based on the three distinct legal regime governing the three major areas the High seas has been demarcated[56] They are

a. Access to the resources of the Exclusive Economic Zone[57]

b. Access to the International Seabed; and

c. Access to the resources of the High Sea.

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[54] A/ CONF. 62/122, 7 October 1982. As to the outcome of the vote taken on the 30th April 1982. See A/COCF62/SR,pp.9-10

[55] Fawole Oyeronke p.7

[56] Ibid p. 9

[57] Hereinafter referred to as the E.E.Z

(a) Access to the Resources of the Exclusive Economic Zone:

One of the new innovations contained in UNCLOS III is the concept of the Exclusive Economic Zone (EEZ)[58] The idea of the EEZ was raised quite early at the negotiations. It was finally accepted as a compromise between states seeking a 200 mile territorial sea and those wishing for a more restricted system of coastal state power[59]

The EEZ is an area of the Sea beyond and adjacent to the territorial sea, which extend from the baseline from which the breadth of the territorial sea is measured 200 nautical miles into the sea[60] It is subject to the specific legal regime established under the convention.[61] Within the EEZ, the coastal state enjoys:[62]

> *(a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether living[63] or non living of the water superjacent to the seabed and its subsoil and with regard to other activities for the economic exploitation and exploitation of the Zone, such as the production of energy from the water currents and winds;*
>
> *(b) Jurisdiction with regard to*
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> *(i) the architecture, and use of artificial islands, installation and structure [64]*

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[58] The concept of the EEZ extending beyond the territorial sea was first developed by certain Latin American countries to ensure the exclusive jurisdiction over fishing resources in a belt adjacent to their territorial sea. The development of the concept received impetus with the Taiwan declaration of 1945 and was given further boost by the Santo Domingo declaration of 1972 by South American Countries bordering the Caribbean Sea It was then called Patrimonial Sea See O' Connel, International Law of the Sea, Chapter 14, Brown, International of Law of the Sea Chapter 10 and 11, Churchill and Lowe, International Law of the Sea Chapter 9, D.J. Attand, The Exclusive Economic Zone in International Law (Oxford) 1986 and B. Kwigtowska, The 200 mile Exclusive Economic Zone in the law of the sea (Dordrecht) 1989.

[59] Malcom N. Shaw, International Law 4th ed. (Cambridge University Press) p.42

[60] Article 57 UNCLOS III

[61] Article 55 UNCLOS III

[62] Article 56 UNCLOS III

[63] See Also Article 60 UNCLOS III

[64] See also Article 60 UNCLOS III

(ii) Marine Scientific research[65]

(iii) the protection and preservation of the marine environment[66]

The above provision undoubtedly has the effect of extending the jurisdiction of the coastal states over part of the High seas with the consequence of reduction in the part of the High seas and international seabed and ipso facto the marine resources available to the landlocked an geographically disadvantaged states[67]

Expectedly, resistance to the concept of the EEZ came most especially from those two groups of countries at the conference. In order to ensure their support for the concept, it was realized quite early in the debates that some concessions would have to be made to these group of states. This resulted in the limited access given to the landlocked states to the living resources of the EEZ.

In line with the formula incorporated through Article 69 (1) into UNCLOS III, the landlocked states and states with special geographical characteristics are given the right

> *... to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the EEZ of Coastal states of the same sub-region or region taking into account the relevant economic and geographical circumstances of all state concerned ...*

The meaning of the phrase "equitable basis" is quite significant. It was adopted as a compromise option from the landlocked states proposal of their participation in the use of the resources of the EEZ on an "equal and non discriminatory basis", [68] which was opposed by distant water fishing nations and coastal states who were in no mood to accept the right of the landlocked states on an "equal non discriminatory basis" The

[65] See further Part XIII of UNCLOS III; and also Churchill and Lowe, Law of the sea Chapter 15.
[66] Sea Further Part XII of the Convention; See also Churchill and Lowe Law of the Sea Chapter 14.
[67] Article 70 (2) defines States with special geographical characteristics as "coastal states including states which border on enclosed or semi-enclosed seas, and whose geographical situation makes them dependent upon the exploitation of the living resources of the E.E Z of their states the sub-region or region for adequate supply of fish for the nutritional purposes of their populations or part thereof and coastal state which can claim no EEZ of their own"
[68] See Article 2 of the proposal introduced by the landlocked countries known as the Afghanistan proposal at Caracas, Venezuela in 1974, UN DOC. A/CONF. 62/C.2/C.2/9

resultant compromise was the right to participate "on an equitable basis" which only implies the principle of fairness and justice and not of equality[69]

Another phrase worthy of note in Article 69 (1) commonly referred to as the sharing clause is "an appropriate of the surplus" This was incorporated to break the deadlock created by the insistence of the landlocked state on claiming the share of the EEZ living resources as a matter of right and the insistence of the coastal states on their discretion to allow participation only with their consent and the extent to which they wanted it.

By phrasing the Article thus, the right of the landlocked state to exploit the living resource of the EEZ on an equitable basis is recognized. The right would however be exercised in a more limited way. In effect, the right essentially would not be exercised in the living resources of the EEZ as a whole, but only in the appropriate part of the surplus[70] Interestingly, the coastal state is empowered under Article 62 to establish the total allowable catch of the fishery resources which they are not capable of harvesting i.e the surplus. The implication of this is that coastal states have discretionary power as far as the issue of exploitation of the living resources of the EEZ[71] is concerned and the extent to which a landlocked state can exercise its right of access to these resources is dependent on how the discretionary power of the costal state is exercised.

Furthermore, it is important to note that the terms and modalities of participation of landlocked states in the resources of the EEZ is to be determined through bilateral, sub-regional or regional agreement[72] These agreement however, should take into account various considerations such as relevant economic and geographical circumstances with a view to bring a balance among the interest of the various states engaged in fishing in the E.E.Z without been burdensome or disadvantageous to any single states[73] The incorporation of the principle of agreement was insisted upon by coastal state in opposition to the claim of landlocked states to the fishery resources of the EEZ as a matter of right[74]

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[69] Rama Puri. Legal Regime Fisheries Indian Journal of International Law (IJIL) Vol. 22 No. 2 April – June, 1982 Op cit p. 244
[70] Ibid
[71] Ibid
[72] Article 70 (3) UNCLOS III
[73] See Articles 69 (2), 70 (2), and 63 (3) UNCLOS III
[74] Rama Puri 245

This provision however does not set any priorities for the coastal state in determining the allocation of its surplus to the various claimant states. It only makes it incumbent on the coastal state not to ignore the above mentioned factors while it allocates its surplus fishery resources to the various states of the region[75]

Another defect in this provision that could limit the exercise of the right of access of landlocked state to the resources o the EEZ is the apparent lack of definition or yardsticks for determining the regiona affiliation of landlocked countries. For some, geographically, it is easy, while it could pose a serious problem in some other cases. For instance, the Republic of Chad is a landlocked state that shares borders with Nigeria a coastal in the West Africa sub-region, Sudan which has its coast on the red sea, and Libya a North African country with coast on the Mediterranean Sea. The question of which sub-region does it belong for the purpose of determining the EEZ of the country it can claim a right of access to may not be quite easy to answer.

It is also significant to point out the fact that the right of access of landlocked states to the resources of the EEZ is determined by the economic class to which a particular landlocked country falls into. The right of participation of landlocked countries is restricted to the EEZ of a developed state of the same region or subregion[76]. However, coastal state whose economy is overwhelmingly dependent on the exploitation of the living resources of its EEZ is not obliged to comply with Article 69 and 70 which actually constitute the backbone of the right of access to the resources of the EEZ[77] The effect of this is that any landlocked state that falls into the same region with such a coastal state will not be able to have access to the living resources of the EEZ of such a coastal state. It is submitted that this provision constitute a radical departure from the idea of the sea and its resources being a "common heritage of mankind" and a contradiction to the sharing on an " equitable basis" clause enshrined in Article 69 (1) earlier on discussed.

It is important to note that the right of access of a landlocked state to the living resources of the EEZ is not transferable. This however does not preclude a landlocked state from obtaining technical or financial assistance that will facilitate the exercise of their right from a third state or international organisation[78]

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[75] Ibid op. cit.
[76] See Articles 69 (4) UNCLOS III
[77] Article 71 UNCLOS III
[78] Article 71 UNCLOS III

The control of the coastal states over the surplus living resources of their EEZ remains. This will be exercised through rules and regulation they will make form time to time. They will license foreign fishing vessels and other equipments and charge for them. They are also empowered to determine the species which may be caught, and fish quotas of catch whether in relation to particular stocks or catch per vessel over a period of time or the catch by nationals of any state during a specified period[79] In Article 73 of UNCLOS III coastal states are provided with various enforcement mechanism such as, boarding, inspection, arrest and judicial proceedings but not imprisonment or corporal punishment.

A point in fact worth noting from the analysis of these provisions is that coastal states are placed in a pre-eminent position in this zone of vital economic importance.[80] The exercise of the right of access of landlocked state to the EEZ is left more or less subjectively to the discretion of the coastal state. This in our view may hinder the full actualisation of the common heritage of mankind ideals behind UNCLOS III in respect of the resources of the EEZ.

Furthermore, the conferment of exclusive right upon the coastal states over the living resources of the EEZ might lead to the under utilization of these resources as many of the coastal states particularly the developing ones lack the capacity to effectively exploit these[81] Although it is in the interest of the coastal state particularly the developing countries to promote the objective of optimum utilization of fishery resources, which may be considered to be an obligation on their part to enter negotiation to grant access to other states in the exploitation of the EEZ, there is nothing preventing a coastal states from taking decisions in a capricious manner[82]

This issue though would seem to have been taken into consideration with the provision of settlement of dispute over the sharing of fishery resources in the convention[83], the potency of the provision however appears to be doubtful in light of the non-compulsory and non-binding nature of adjudication in respect of fishery dispute as provided in the convention.

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[79] Article 62 (4) UNCLOS III
[80] Rama Puri p 245 Op Cit
[81] Public International law edited by Robert M MacLean 13th ed. (1991 HLT Publications) p. 200
[82] For details on this point. See J.C Phillip, "The Exclusive Economic Zone As A Concept in International Law", Vol. 26 (1970) International Comparative Law Quarterly p. 6023
[83] Article 297 (3).

Moreover, the idea of granting the "surplus" of the living resources of the EEZ to the landlocked state in our view appears to be a mirage, with the absence of objective scientific criteria for deciding such important questions like "allowable catch" and the "capacity to harvest" in the convention. Even in the event of the development of these criteria, their implementation may be quite difficult as long as coastal states are unwilling to fully allow the issue of access and utilization of the resources of the EEZ to be determined purely on the platform of the concept of common heritage of mankind.

(b) Access to the Resources of the Seabed

Until the arousal of world attention by Arvido Pardo in his speech before the United Nations General Assembly in 1967, to the need to establish a legal regime for the seabed and subsoil jurisdiction, there was no recognition of any general principle of law or convention apart from the traditional freedom of the high seas subsumed generally under the title "freedom of the sea"[84] governing the status, and usage of the seabed together with its resources.

As a matter of fact, freedom to explore and exploit the mineral resources of the seabed and subsoil of the submarine areas of the High seas was not even included in the 1958 convention on the High seas, which refers to other traditional freedoms.[85] Apart from providing that these freedoms "shall be exercised by all states with reasonable regard to the interest of other states in their exercise of the freedom of the High seas", the 1958 convention merely but specifically states that "the High seas being open to all nations, no state may validly purport to subject any part of them to its sovereignt"y[86]

However, the development of technology which led to the discovery of abundance of mineral resources on the ocean floor and bed, and its exploitation, only makes it a matter of time before nations particularly the developed countries started appropriating the ocean floor to themselves[87]

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[84] R.P Arnand, Legal Regime of the Seabed and the Developing Countries (Thompson Press, India) p 176
[85] See Article 2 of the High Seas Convention which refers to Freedom (1) of Navigation (2) of fishing (3) lay submarine cables and pipelines (4) to fly over High seas and (5) others which are recognised by the general principle of international law.
[86] Article 2
[87] R. P Arnand p. 180

All the uncertainties about the extent of national jurisdiction, the legal regime of the seabed, together with the possibility of the technologically advanced nation appropriating part of the seabed and ocean floor to themselves with the possibility of an attendant international conflict resulted in a warm reception of Arvido Pardo's proposal. Pursuant to it, the seabed and ocean floor beyond the limit of national jurisdiction was declared to be a "common heritage of mankind", under the control of an International Agency known as the International Seabed Authority[88]

The purpose of the establishment of the seabed beyond the limit of national jurisdiction referred to as "the Area" by the convention is to ensure that all states whether developed or not, coastal or landlocked benefit financially in the exploration and exploitation of the area[89]

In order to secure the participation of other states particularly the landlocked and geographically disadvantaged states in the area, it is stated that:

> *(1) Activities in the area shall as specially provided for in this part, be carried out for the benefit of mankind as a whole, irrespective of the geographical location of states, whether coastal or landlocked and taking into particular consideration the interest and need of developing states and the people who have attained full independence or other self governing status recognized by the United Nation in accordance with General Assembly resolution 1514 (XV) and other relevant General Assembly resolution*[90] *Furthermore, the effective participation of developing states in the area shall be promoted as specifically provided for in this part having due regard to their special interest and needs, and in particular to the special needs of the landlocked and geographically disadvantaged among them, to overcome obstacles arising from their disadvantaged location, including remoteness from the area and difficulty of access to and from it*[91]

[88] Article 136 and Article 156, 157 UNCLOS III
[89] Article 140 UNCLOS III
[90] Article 140 (1) UNCLOS III
[91] Article 140

It should be noted that other resources of the seabed beyond limit of national jurisdiction not connected with the seabed resources can be exploited by all nations without permission from the International Seabed Authority, likewise other uses connected with the High seas contained in Article 87. However, the legal status of the superjacent waters to the area and the airspace above those waters are not affected by right granted under this part or exercise pursuant thereto[92]

Undoubtedly, the above provisions are land marked provisions and in the light of the fact that they serve has the basis for the creation of a legal regime for the Seabed, they are quite commendable. Their vague and tenuous nature may however constitute an achilles heel in the realization of their revolutionary provisions. In the first instance, the area of the seabed beyond the limit of national jurisdiction declared by the convention is without proper definition, limit or demarcation.

Secondly, the deep seabed was declared a "common heritage of mankind" without actually defining the concept. This has given rise to all forms of interpretation the concept has been subjected to[93] For instance, the concept has been described by some as having "no legal content"[94], unknown in international law; vague and without any "legal implication"[95] To others, "it is not a legal principle but embodies rather agreed moral and political guidelines which the community of states has undertaken as a moral commitment to follow in good faith in the elaboration of the legal regime for the area beyond the limit of national jurisdiction".[96] In the view of others however, the issue of the legal weight of the concept does not really arise as all legal concepts are devoid of legal content before their adoption[97]

In addition to the above, the convention stated that the exploration and exploitation of the deep seabed would be carried out for the benefit of mankind without explaining or stating practical steps on how this would be done. Article 140 (2) only declares that "The Authority shall provide for the equitable sharing of financial and other economic benefits derived from the activities in the area through appropriate mechanism on non-

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[92] Article 135
[93] See the comment of the Belgian delegate, Debergh at the Seabed Committee quoted by R. P. Arnand p. 206. See UN. Doc. NO. a/AC. 138/SC I /SR 13 August 1967 p. 13
[94] See Canadian delegate's Alan Beerley comment quoted by R.P. Arnand. ibid
[95] See French, Japanese and Soviet delegates's comment quoted by R.P. Arnand ibid
[96] Professor E.D Brown, "The 1973 Conference on the law of the sea; The Consequences of Failure to Agree" Paper presented at the 6th Annual Conference of the Law of the Sea Institute, University of Rhode
[97] Sani Gecerriro (Brazil) in UN DOC A/C1/PV.1674, 31st October 1969 p. 770

discriminatory basis in accordance with Article 100 paragraph 2(f) (1) which is another nebulous clause."

Furthermore, and even more importantly, the convention predicated the realization of these provisions on the operations of the Seabed Authority. However, following the amendment of part XI of UNCLOS III in 1994[98] pursuant to the United States objection to the provision and the unfortunate acquiescence of the International community, the concept of the deep seabed beyond the limit of national jurisdiction been the common heritage of mankind, has been undermined. The deep seabed will no longer be exploited in future as a common heritage of mankind with particular regard to the needs of poor countries as envisioned by Arvido Pardo and desired by the General Assembly in 1967[99] It will now be exploited on a commercial terms irrespective of the needs and interest of the weaker members of the international community. In this respect, the special interest of landlocked countries can no longer be guaranteed.

The above comments on the limitation of the convention's provisions notwithstanding, the provisions are remarkable in a number of respects. First of all even in its vague and uncertain language, it lays down clear certain rules which nobody can ignore in the future in respect of the deep seabed. In addition, it leaves no one in doubt that the authority of the coastal state does not extent to the mid-ocean. Furthermore, it has come to firmly establish that there is an area of the sea bed beyond the limit of national jurisdiction that is not subject to appropriation by any nation. Moreover, the common heritage of mankind concept which is the underlying basis for the provision and exploitation of the seabed resources for the benefit of all nations, especially the developing countries, and the exclusion of the seabed from arms race can no longer be ignored in international law.[100]

(c) Access to the High Sea Resources:

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[98] Negotiations leading to the Amendment were done through the office of the UN Secretary General

[99] For detail discussion on this See R.P. Arnand, Heritage of Mankind; Mutilation of an Ideal 1 JIL Vol. 37. January-March 1997 No. 1, and Olatokunbo Ogunfolu, "An Appraisal of the United Nations Law of the Sea Agreement Relating to Deep Seabed Unpublished seminar paper presented to the 1996/97 LL.M Class on the Law of the Sea, Faculty of law, Obafemi Awolowo University, Ile-Ife [100] R P Arnand p. 202 Op. Cit.

The High Seas encompassed all part of the sea that are not included in the EEZ, territorial sea, or in the internal waters of a state or in the archipelagic state.[101] It is important to note that the legal regime of the High Seas is not applicable to international lakes and landlocked seas except by special arrangement[102] However, by virtue of acquiescence, customs which perhaps are reinforced by convention on particular question, seas which are virtually landlocked may acquire the status of the High Sea[103]

Article 87 (1), which has its formulation in the rule that the High seas are not open to acquisition by occupation on the part of state individually or collectively,[104] states that "The High Seas are open to all states, whether coastal or landlocked. Freedom of the High seas is exercised under the condition laid down by this convention and by other rules of international law."For both coastal and landlocked states, these rights comprises of [105] (a) Freedom of Navigation; (b) Freedom of Overflight; (c) Freedom to lay submarine cables and pipelines [106] ; (d) freedom to construct artificial Islands and other installations permitted under international law; [107] (e) Freedom of of Fishing[108]; (f) freedom of Scientific research.

The exercise of these freedoms by states is however restricted by the provision that "the High seas shall be reserved for useful purposes." [109] Further limitation is also placed on the exercise of these freedoms by the requirement that they will be exercised by all states with reasonable regard to the interest of other states. [110] It should be noted

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[101] Article 86 UNCLOS III Note that by virtue of this definition, the EEZ is prescriptive and not obligatory. Note further that a significant portion of the High seas are exercisable in the EEZ according to Article 58 and 86 of UNCLOS III.

[102] Note that Lakes and landlocked seas entirely enclosed by the land of single state are territory of that state. See Oppenheim, International Law. Vol. 1 8th ed. (1995) p 477 - .9, 587- 8.

[103] Ian Brownlie Principles of Public International Law (4th ed.) p. 232-233. An example of such a Sea is the Baltic and Black Sea. In such cases, much turns on the maintenance of freedom of transit through the Strait communicating with other large bodies of sea. It is doubtful whether, apart from acquiescence and special agreement on access and other issues, the Baltic and the Black sea would have the structure of open seas. See Kpzhernikov (ed) International Law on Access to the Black Sea and its status. See also The Montreax Convention, 1936 31 American Journal of International Law (A J I.L) (1937) Suppl., p.1

[104] Enshrined in Article 89which state that no state may validly purport to subject any part of the High Seas to its sovereignty.

[105] Note that this listing is similar to the one in the 1958 Geneva convention of the High Seas (Article 2) and is non exhaustive. Note further that the 4 freedoms itemised particularly, the first two are supported by arbitral jurisprudence and are inherent in many particular rules of law. Note also that the EEZ does not from part of the High seas although a significant aspect of the regime of the High seas applies to the zone.

[106] Subject to Part VI[107] Subject to Part VI[108] Subject to conditions laid down in Section 2[109] Article 88 UNCLOS III[110] Article 87 (2) UNCLOS III

that the above provisions does not differentiate between landlocked and coastal states. In effect they are applicable to both categories of countries. Consequently, landlocked states have access to, and may exploit the living resources of the High Seas as well as the seabed nodules. Moreover, they can also engage in the utilization of the High seas for such things as scientific research, construction of artificial Island and other installations, overflight and laying of submarine cables and pipeline as well as navigation.[111]

To facilitate the exercise of the rights provided for in the convention, landlocked states have been given the right of access to and from the sea including those relating to the freedom of the seas and the common heritage of mankind. In this respect, landlocked states shall enjoy freedom of transit through the territory of transit states by all means of transport. [112]

The terms and modalities for exercising the freedom of transit shall however, be agreed between the landlocked states and transit states concerned through bilateral, sub-regional or regional agreements [113] But, transit states in the exercise of sovereignty over their territory shall have the right to take all measures necessary to ensure that the rights and facilities provided for landlocked states does not in any way infringe their legitimate interest[114]

Article 130 provides measures to avoid or eliminate delays or other difficulties of a technical nature in respect of traffic in transit. It states:

> 1.*Transit states shall take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit.*
>
> *2.Should such delays or difficulties occur, the competent authorities of the transit states and landlocked states concerned shall cooperate towards their expeditious elimination*

To further enhance the transit right of landlocked states, the convention provides that its operation...

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[111] Churchill and Lowe, The Law of the Sea p. 280-281.
[112] Article 125 (1) UNCLOS III. Article 124 (1) (d) defines means of transport Note that the definition excludes pipeline and gas line (air transport) unless the state concerned agreed to the contrary
[113] Article 125 (2) UNCLOS III

> *does not entail the withdrawal of transit facilities which are greater than those provided for in this convention and which are agreed between state parties to this convention or granted by a state party. This convention does not preclude such grant of greater facilities in future*[115]

This provision has the effect of given room for bilateral agreement between landlocked states and transit states in respect of trapsit outside that of the convention. In other words, if a landlocked state can through an agreement arrange a form of transit with a transit state more favourable than those provided under the convention, the operation of such an agreement is not precluded by the convention going by the provision.[116] Furthermore, traffic in transit shall not be subject to any custom duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic, which should not be higher than those levied for the use of these facilities by transit states. [117]

A point worth noting about the above provisions is the predication of the rights of landlocked states on agreement with transit states. In effect, it means that the rights are not absolute.[118] This however is designed by the convention to balance the interest of both landlocked and coastal states. The convention intends to achieve this by seeking to ensure the co-existence of exercise of the freedom of High seas by landlocked states and the rights of sovereignty of coastal states.[119]

Unfortunately, the convention is silent on how to deal with situation where states refuse to reach an agreement. It is however our opinion that state parties to the convention are under obligation to show good faith in abiding with the provisions of the convention and where one party failed to show good faith, provisions for settlement of dispute under the convention could be invoked.

One of the significant short-comings in respect of the right of access of the landlocked countries in the above provisions is the elimination of the most favoured clause from applying to the provision of the convention and special agreement relating to the

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[115] Article 132 UNCLOS III
[116] Oyeronke Fawole p. 11
[117] Article 128 UNCLOS III
[118] Malcom M. Shaw, p. 417
[119] Ibid Op. cit

exercise of the right of access[120] The effect of this would be the lack of a universal yardstick by which the terms and modalities of the agreement relating to freedom of transit could be assessed[121] Consequently, a landlocked state would have to accept whatever term the transit state will specify in such agreement without necessarily comparing with other similar agreement. In this respect, the UNCLOS III has not improved on the 1958 GCLOS in relation to the exercise of the freedom of the seas by landlocked states.[122]

The above weaknesses not withstanding, the affirmation of a right of access to the seacoast for landlocked states, by the convention is an important landmark development in the quest of landlocked states for an unhindered right of access to the sea. [123]

II ACCESS TO NAVIGATION BY LANDLOCKED STATES:

Prior to 1914, there was doubt as to whether under customary international law, ships of landlocked states had the right to sail on the sea and fly their flags. Some states, mostly maritime states, argued that since landlocked states had neither maritime ports nor war ships, they could not verify the nationality of merchant vessel, nor exercise control over them. After the end of the First World War however, at the treaty of Versailles of 1919[124] and other peace treaties concluded, parties agreed to recognize the flag flown by the vessels of a landlocked party which were registered at a specific place in the territory which was to serve as the port of registry of such vessel.[125]

This right was concretised in the general declaration recognizing the right to fly a flag by a state having no sea coast, adopted at the 1921 League of Nations Conference on Communications and Transit[126]

Since then, the view that landlocked states have the same navigational rights as costal state has become firmly established. Thus both the 1958 GCLOS and UNCLOS III provides specifically that ships of all state whether coastal or landlocked have the

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[120] Fawole Oyeronle Op Cit p 11
[121] Ibid
[122] Note that this is one of the criticisms of the 1958 Geneva Convention in relation to the exercise of the freedom of the seas by landlocked states.
[123] Malcom M Shaw p 417
[124] Article 273 of the Versailles Treaty
[125] Fawole Oyeronke p 8
[126] 2 7 LNTS 14

rights of innocent passage[127] in the territorial sea of coastal states and the freedom of navigation on the High seas[128]

Generally, the coastal state, may not hamper innocent passage and in particular, it may neither impose requirements on foreign ships landlocked or otherwise which have the practical effects of denying or impeding the right of innocent passage , nor discriminate in form or in fact against ships or cargoes destined for any particular foreign state or states.[129]

III. ACCESS TO PORTS

The ports of coastal states fall within the internal waters of the state.[130] Under customary international law, the internal waters are so linked and connected to the land domain of a coastal states that both are considered to be subject to the same legal regime. Consequently, the rights of sovereignty of coastal states extend to its internal waters.[131]

The right of landlocked states to the use of the sea and transit right would however be useless without access to the use of ports of a coastal state and a right of access across the territory of states lying between landlocked states and the sea.[132] Access in this respect includes, loading and unloading of cargo, embarking or disembarking of passengers as well as taking supplies and fuel on board. In addition, access also includes the possibility of conducting trade [133]

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[127] In Article 19(1) Innocent passage is defined as passage which is not prejudicial to the peace, good order or security of coastal states. [128] See Article 87 of UNCLOS III[129] N.A. Maryam Green, International Law 3rd ed. (Pitman Publishing) p. 208. [130] See Article 8 and 12 of UNCLOS III[131] See the Fisheries case United Kingdom v Norway (ICJ Reports) 1951116 at p. 133[132] Fawole Oyeronke p. 9

[133] Rainer Lagoni in the Article "Seagoing Vessels in Internal Waters" in Encyclopedia of Public International Law Vol. 11 p. 1036

[134] See for instance Article 2 of the statute of the Geneva Convention and Statute on the International Regime of Maritime Ports of December 9 1923 (LNTS Vol. 58 p. 285) which stipulates equal treatment for all sea going vessels as regards freedom of access to maritime ports and the use of port facilities for the 3 contracting states

The question of access to open maritime ports has been regulated in several international agreements[134], apart from several bilateral agreements on shipping and commerce which generally provides for equal treatment concerning the access to ports. Some even create a right of access.[135]The question of whether or not there exist a general and an absolute right of access in the absence of any agreement is answered variously and divergently by scholars and jurist of international law[136]

However, state practices in closing their ports, even in situations where their vital interests are apparently not concerned, seems to indicate that except for situation of distress, there does not exist a general right of access to internal waters in general or to ports in particular in customary international law[137] Even in cases where a right of access exists, the coastal state may impose conditions for entry to it is ports. It also has the right to take necessary steps to prevent any breach of these conditions before a ship enters its internal waters[138]

Although UNCLOS III does not provide a general right of access to the ports of coastal state for landlocked countries, it nevertheless makes provision for equal treatment for ship flying the flag of landlocked states in line with that accorded foreign vessels in maritime ports in Article 131.

This provision, upon close perusal, however, seems to be ambiguous. Does treatment mentioned in the provision include as it does specifically in 1923 convention access to ports or does Article 131 simply deals with the treatment to be accorded a vessel of a landlocked state which already enjoys a right of access under some other agreement or

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[134] UNCLOS III Article 25 stipulates that states shall endeavour to facilitate access to their harbours in particular for foreign scientific, marine research vessel.

[136] The institute de Droit International regarded free access in 1928 as a "general rule" (Ann IDI, Vol. 34 (1928) p. 473). others points to the dictum of the Arbitrator in the Aramco Arbitration that "according to a general principle of public international law, the ports of every state must be open to foreign merchant vessels and can only be closed when the vital interest of the state so required" (ICR, Vol, 27(1963) p. 117 at p. 212) although in the context of the award, this dictum may well be reduced to the conventional obligation of the coastal state not to discriminate among foreign ships which call at is ports. See D. P.O. Connell, The International Law of the Sea ed. by I.A. Shearer) Vol. 2 (1994) 73-746; 848 and A.V Lowe, The Right of Entry into Maritime Ports in International Law, San Diego Law Review, Vol. 14 (1977) p. 600. The ICJ in the Nicaragua case said that, it is "by virtue of its sovereignty that the coastal state may regulate access to its ports" (ICJ Reports 1986, p. 14 at p. 11 para. 213). The Courts here added that "where the vessels of one state enjoy a right of access to port of another state, the hindering of this right by the laying of mines constitute an infringement of the freedom of communication and of maritime commerce (Ibid, p. 128 et seq, para. 253); however, in so stating, the court did not pass upon the circumstances under which any such right of access may come into existence. [137] Rainer Lagoni p. 1037[138] See Article 25 (2) UNCLOS III

provision. If the latter is the case, the provision in Article 131 would seems to be of little practical value for the obligation it contains already result from the 1923 convention and from most, if not all bilateral treaties given access [139] to ports of coastal states.

CONCLUSION

There is no doubt that the provision of UNCLOS III with respect to the right of access to the sea by the landlocked states are commendable steps in the right direction, As could be seen however from the discussion above, due to ambiguities uncertainties and vagueness which characterizes some of these provisions, there is an urgent need to review them if the laudable intentions behind these provisions would become a reality. This even becomes necessary in the light of the fact that access to the sea and its vast resources would play a crucial role in the economic well being and development of nations in the future as land based resources particularly mineral ores get exhausted. Consequently, the rights of landlocked states (a greater percentage of which are poor developing countries) to the resources of the sea cannot be ignored if the economic well being of the citizens of these countries is to be ensured.