

THE RIGHTS OF AFRICAN LANDLOCKED STATES UNDER THE UNITED NATIONS  
CONVENTION ON THE LAW OF THE SEA: REAL OR ILLUSORY RIGHTS?

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DECLARATION

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM (Marine and Environmental Law) in approved courses and a minor dissertation.

The other part of the requirement for this qualification was the completion of a programme of courses. I hereby declare that I have read and understood the regulations governing the submission of LLM (Shipping Law) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## LIST OF ACRONYMS

AU: African Union

EEZ: Exclusive Economic Zone

GATT: General Agreement on Tariffs and Trade

ISA: International Seabed Authority

LDC: Least Developed Country

LLGDS: Landlocked and Geographically Disadvantaged States

LOSC: The United Nations Convention on the Law of the Sea

UNCLOS I: The First United Nations Conference on the Law of the Sea

UNCLOS II: The Second United Nations Conference on the Law of the Sea

UNCLOS III: The Third United Nations Conference on the Law of the Sea

UNCTAD: United Nations Conference on Trade and Development

UNECA: United Nations Economic Commission for Africa

UNDP: United Nations Development Program

UNTS: United Nations Treaty Series

UN-OHRLLS. United Nations Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States

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## CHAPTER 1 INTRODUCTION

### I AIM

The sea constitutes an important feature in world geography as it covers more than 70% of the surface of the globe.<sup>1</sup> Human uses of the sea include trade, travel, mineral extraction, power generation, and most importantly, it provides the world with supplies of food (fish). Thus, coastal and maritime tourism, aquaculture, renewable energy, mineral resources, biotechnology, fisheries, shipbuilding and ship repair, offshore oil and gas, and transport are all subsectors that the sea accounts for in a State's economy.

While coastal States can easily enjoy access to the sea and benefit from its resources mainly for reason of their advantageous geographical proximity to this body of water and sovereignty over the waters within their national jurisdiction, the same ease does not apply to landlocked States due to their lack of territorial access to the sea. Indeed, landlocked States have to pass through transit States to gain access to the sea.

The latest and most important legal instrument governing the seas is the 1982 United Nations Law of the Sea Convention,<sup>2</sup> also referred to hereunder as the LOSC or the Convention. Given the landlocked geographical nature of 44 nations of the world, the LOSC had to accord special consideration and make specific provisions to deal with the problem of these States, their interests and rights to access the sea and to participate in the exploitation and exploration of its resources.<sup>3</sup>

In order to enjoy freedom of navigation and the benefits of trade associated with such freedom, a State needs ports or access to them. Furthermore, as far as exploiting and exploring both living and non-living marine resources, coastal States obviously have the advantage over landlocked States as they have sovereign rights over the resources in their Exclusive Economic Zones (EEZ) and continental shelves.

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<sup>1</sup> Peter Malanczuk and Michael Akehurst *Akehurst's Modern Introduction to International Law* 7 ed (1997) 173.

<sup>2</sup> United Nations Convention on the Law of the Sea, 1982. 1833 UNTS 31363, 21 ILM 1261. The Convention was adopted in Montego Bay on 10 December 1982, and entered into force on 16 November 1994, information available at [https://www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](https://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm) accessed June 2021. Full text of Convention available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) accessed in June 2021.

<sup>3</sup> Document A/CONF.62/C.2/L.29 (30 July 1974) Official Records of the Third United Nations Conference on the Law of the Sea Volume III: Explanatory paper on the draft articles relating to land-locked States in document A/AC.138/93 available at [https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_3/a\\_conf62\\_c2\\_l29.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_3/a_conf62_c2_l29.pdf) accessed in July 2021.

In an attempt to redress landlocked States' natural disadvantages, the Convention confers on these States several rights. This dissertation will firstly identify the rights conferred by the LOSC on landlocked States in general and analyse the nature of these rights and their relevant provisions in the Convention. Thereafter, with a special focus on African landlocked countries, the dissertation will seek to determine the extent to which these particular States have been able to exercise the rights to access the sea, to participate in the exploitation of the living resources of their neighbouring coastal States' EEZs and to share in the revenue derived from exploitation activities in the Area. Indeed, to avoid infringing on the sovereignty of the transit and coastal States, these three rights are neither absolute, nor self-executory. The objective of this dissertation is to therefore determine whether African landlocked States have been able to exercise these rights and enjoy the resulting benefits or whether they have failed to do so and, as a result, perceive these rights to be illusory. With the help of case studies, the dissertation will identify the obstacles and factors that influence the exercise of each of these rights.

Where African landlocked States have succeeded in crossing the preliminary hurdle and have been able to exercise the said right, the dissertation will identify the elements that facilitated such success. However, where the exercise of this right still remains theoretical to African landlocked States, an attempt shall be made to identify and analyse the hurdles and challenges that contributed to such failure for the landlocked State. Thereafter, a study shall be carried out on various initiatives put forth by the African Union (AU) and other regional and international bodies to enable the African landlocked States better exercise these rights, and if possible, make them a reality. The efficacy of these initiatives will be assessed and, where necessary, suggestions for their improvement and alternative solutions will be offered.

## **II DISSERTATION ARGUMENT**

The Law of the Sea Convention provides for landlocked States' right of access to the sea, freedom of transit, participation in the living resources of neighbouring EEZs, and a share in the revenue derived from exploitation activities in the Area.

As far as access to the sea is concerned, the LOSC grants landlocked States the right to access the sea subject to the conclusion of bilateral, regional and sub-regional agreements with the transit State. The exercise of this right is therefore not self-executory. The nature of the relationship between the landlocked State and the transit State, the goodwill of the transit State, the existence of mutual consideration, and regional integration initiatives all play a role in the success or failure

of the conclusion of transit agreements. Using Ethiopia as an illustration, the dissertation argues that though the conclusion of agreements is a hurdle to cross before a landlocked State is able to exercise its right to access the sea, this challenge can be overcome once several elements are put in place. The denial of access to the sea by a transit State is currently a rare occurrence, and an African landlocked State is able to exercise its right of access.

The LOSC has conferred on landlocked States the right to participate in the exploitation of the living resources in the EEZ of its regional coastal States. The exercise of this right is also subject to the conclusion of bilateral and regional agreements with the coastal State. In an analysis of the types of fisheries agreements commonly concluded in the Western coast of Africa, the dissertation focuses on the landlocked States of Mali and Burkina Faso. With the help of this case study, the dissertation is able to identify the factors which hinder African landlocked States from exercising this right. Although the LOSC has conferred this right on African landlocked States, the latter are yet to exercise it. Using the SADC Protocol on Fisheries as an illustration, the dissertation argues that even with a regional instrument to regulate a landlocked State's participation in the fisheries within its region, African landlocked States have not yet been able to participate in the exploitation of the fisheries of their neighbouring States' EEZs.

Prior to and during UNCLOS III, several African landlocked States exerted strenuous negotiating efforts and made persistent demands for more extensive rights to the non-living resources of the sea and to an allocation of revenue from the exploitation of these mineral resources. By making the Area the 'common heritage of mankind', the Convention confers upon all States the right to exploit its non-living resources and grants landlocked States priority in being allocated a share in the revenue derived from exploitation activities in the Area. However, because of the developing status of most African landlocked countries, and because deep sea-bed mining is capital intensive and requires a skilled workforce and state-of-the-art technology, exploitation of the non-living resources in the Area remains unreal for these countries. Regarding the share in the revenue derived from exploitation of the Area, this has not yet materialised as commercial deep seabed mining has not commenced in the Area.

### **III STRUCTURE**

Chapter 1 is the introductory section of the dissertation. It provides an outline of the topic covered and a summary of the chapters' treatments.

Chapter 2 recounts the history and development of the law of the sea, identifies the various treaties before the LOSC. This chapter provides information on the body of law governing the seas, the evolution of the law of the sea, the progressive development of the LOSC up to its final stage of adoption at UNCLOS III. This chapter also features an analysis of the role and contribution of African States at UNCLOS III, particularly the quest by African landlocked States to acquire unrestricted rights to marine resources.

Chapter 3 of the dissertation begins with the definition of the essential words and terms employed in the LOSC and then proceeds to identify the various rights granted to landlocked States by the Convention over the different maritime zones. The relevant provisions of the Convention are cited.

Chapter 4 is a study of the right of access to the sea granted by the LOSC to landlocked States. This right is not self-executory as it is made subject to the conclusion of regional and bilateral agreements. The chapter examines the characteristics of this right, the dependence of the exercise of this right upon the nature of the relationship between the landlocked State and its transit neighbour, and the importance of the transit State's goodwill in negotiating the agreement. Several past examples of the transit State hindering the landlocked State's access to the sea are also cited. The chapter finally analyses the trend of transit arrangements in Africa and lists some successfully concluded regional transit agreements.

Through two case studies, chapter 5 takes a closer look at the conclusion of bilateral transit agreements by the African landlocked State of Ethiopia. Both case studies highlight the importance of the relationship between the landlocked State and its transit neighbour, and reiterate the major role of bilateral regional agreements in the exercise of the right of access and freedom of transit. While the first case study involving Ethiopia and Eritrea is an illustration of a failed bilateral agreement, the second between Ethiopia and Djibouti is a success story.

Chapter 6 concerns a landlocked State's right to participate in the exploitation of the living resources of the EEZs of coastal States. This chapter examines the fisheries agreements that are commonly concluded in a part of the western coast of Africa. Thereafter, focusing on the landlocked States of Mali and Burkina Faso, it identifies the challenges and factors that hinder these landlocked States from exploiting the living resources in the EEZ of neighbouring Senegal. A brief study of the provisions of the SADC Protocol on Fisheries concludes this chapter.

Chapter 7 examines a landlocked State's right to participate in the exploitation of non-living resources in the Area and to receive a share in the revenue derived from deep seabed mining activities as provided by article 82 of the LOSC.

Chapter 8, the concluding chapter of the dissertation, provides a summary of the rights examined throughout the dissertation. It seeks to determine whether African landlocked States have succeeded or failed in exercising and benefiting from these rights and ultimately draws the conclusion as to whether the exercise of the right is real or illusory, practical or theoretical. The dissertation then identifies and assesses several current and proposed initiatives by the African Union, regional bodies and international organisations designed to assist the African landlocked State to better exercise and benefit from these rights as well as provide solutions for the challenges these States face in exercising these rights.

## CHAPTER 2 HISTORY OF THE LAW OF THE SEA, UNCLOS I, II AND III, AND LANDLOCKED STATES

### I BACKGROUND

Owing to coastal States' need to gain greater control over the marine areas close to their shorelines, the law pertaining to the sea and its resources had to be developed, updated and revised. In the nineteenth and twentieth century, the seas were governed by the principle of freedom of the sea.<sup>4</sup> After World War II, many countries claimed three nautical miles as the maximum limit of their territorial seas,<sup>5</sup> while others adopted different limits.<sup>6</sup>

Realizing the pressing need for the codification of legislation pertaining to the oceans after the Second World War, the international community assigned the task of codifying this body of laws<sup>7</sup> to the United Nations International Law Commission, who produced four draft conventions.<sup>8</sup> The conventions were adopted at the First United Nations Conference on the Law of the Sea (UNCLOS I).<sup>9</sup> These four conventions are more widely referred to as the 1958 Geneva Conventions and are made up of the Convention on the Territorial Sea and Contiguous Zone<sup>10</sup>; the Convention on the High Seas<sup>11</sup>; the Convention on Fishing and Conservation of the Living

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<sup>4</sup> Yoshifumi Tanaka *The International Law of the Sea* 3 ed (2019 Cambridge University Press Cambridge) 22-24.

<sup>5</sup> Yoshifumi Tanaka op cit note 4 at 27 and 28.

<sup>6</sup> R Churchill and A Lowe *Law of the Sea* 3 ed (1999 Manchester University Press Manchester) 78.

<sup>7</sup> General Assembly Resolution 374 (IV), adopted on 6 December 1949 titled 'Recommendation to the International Law Commission to include the regime of territorial waters in its list of topics to be given priority' available at [https://undocs.org/en/A/RES/374\(IV\)](https://undocs.org/en/A/RES/374(IV)) accessed in July 2021.

<sup>8</sup> A/CONF.13/32 Vol.1: preparatory documents, text of the draft articles concerning the law of the sea adopted by the International Law Commission at its eighth session (Off. Rec. of the General Assembly, 11<sup>th</sup> Session, Supplement No. 9 (A/3159), available at [https://legal.un.org/ilc/documentation/english/reports/a\\_cn4\\_104.pdf](https://legal.un.org/ilc/documentation/english/reports/a_cn4_104.pdf) accessed in July 2021.

<sup>9</sup> First United Nations Conference on the Law of The Sea (UNCLOS I) Geneva 24 Feb - 27 April 1958, convened by Resolution 1105 (XI) of the UN General Assembly, UNCLOS I Off. Rec. Vol II. [https://legal.un.org/diplomaticconferences/1958\\_los/docs/english/vol\\_2/resolutions.pdf](https://legal.un.org/diplomaticconferences/1958_los/docs/english/vol_2/resolutions.pdf) accessed in July 2021.

<sup>10</sup> United Nations Convention on the Territorial Sea and Contiguous Zone, 1958. 516 UNTS 205. This convention was adopted in Geneva on 29 April 1958, and entered into force on 10 September 1964, information available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-1&chapter=21](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21). Full text available at [https://treaties.un.org/doc/Treaties/1964/11/19641122%2002-14%20AM/Ch\\_XXI\\_01\\_2\\_3\\_4\\_5p.pdf](https://treaties.un.org/doc/Treaties/1964/11/19641122%2002-14%20AM/Ch_XXI_01_2_3_4_5p.pdf) accessed in May 2021.

<sup>11</sup> United Nations Convention on the High Seas, 1958. 450 UNTS 11. This convention was adopted in Geneva on 29 April 1958 and entered into force on 30 September 1962, information and full text available at <https://www.legal-tools.org/doc/7b4abc-1/pdf/> accessed in June 2021.

Resources of the High Seas;<sup>12</sup> and the Convention on the Continental Shelf.<sup>13</sup> The Second United Nations Conference on the Law of the Sea (UNCLOS II)<sup>14</sup> did not achieve a convention<sup>15</sup> and failed to reach any agreement concerning fishing rights.<sup>16</sup> The mandate of the Third United Nations Conference on the Law of the Sea (UNCLOS III)<sup>17</sup> was the adoption of a Convention dealing with all matters relating to the Law of the Sea.<sup>18</sup>

UNCLOS III, with more than 160 State participants, produced the United Nations Convention on the Law of the Sea (LOSC),<sup>19</sup> which ultimately came into force on 16 November 1994.<sup>20</sup> It is noteworthy that the first sixty countries to ratify the Convention were almost all developing States.<sup>21</sup>

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<sup>12</sup> United Nations Convention on Fishing and Conservation of the Living Resources of the High Seas, 1958. 559 UNTS 285. This convention was adopted in Geneva on 29 April 1958, and entered into force on 20 March 1966, information available at [https://www.gc.noaa.gov/documents/8\\_1\\_1958\\_fishing.pdf](https://www.gc.noaa.gov/documents/8_1_1958_fishing.pdf) accessed in June 2021.

<sup>13</sup> United Nations Convention on the Continental Shelf, 1958. 499 UNTS 311. This convention was adopted in Geneva on 29 April 1958 and entered into force on 10 June 1964, information available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-3&chapter=21](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-3&chapter=21). Full text available at [https://legal.un.org/ilc/texts/instruments/english/conventions/8\\_1\\_1958\\_continental\\_shelf.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/8_1_1958_continental_shelf.pdf) accessed in June 2021.

<sup>14</sup> Second United Nations Conference on the Law of The Sea (UNCLOS II) held from 17 March to 26 April 1960, convened by Resolution 1307 (XIII) of the General Assembly of the United Nations, available at [https://legal.un.org/diplomaticconferences/1960\\_los/docs/english/vol\\_1/a\\_res\\_1307\\_xiii.pdf](https://legal.un.org/diplomaticconferences/1960_los/docs/english/vol_1/a_res_1307_xiii.pdf) accessed in June 2021.

<sup>15</sup> A/CONF.19/L.15 Final Act of UNCLOS II Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, Annexes and Final Act) available at [https://legal.un.org/diplomaticconferences/1960\\_los/docs/english/vol\\_1/a\\_conf19\\_l15.pdf](https://legal.un.org/diplomaticconferences/1960_los/docs/english/vol_1/a_conf19_l15.pdf) accessed in June 2021.

<sup>16</sup> A/CONF.19/SR.14 Extract from the 14<sup>th</sup> plenary session held on 26 April 1960 UNCLOS II Off. Rec. [https://legal.un.org/diplomaticconferences/1960\\_los/docs/english/vol\\_1/a\\_conf19\\_sr14.pdf](https://legal.un.org/diplomaticconferences/1960_los/docs/english/vol_1/a_conf19_sr14.pdf) accessed in June 2021.

<sup>17</sup> Third United Nations Conference on the law of the Sea (UNCLOS III) 1973-1982, convened by General Assembly resolution 2750C(XXV), [https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/res/a\\_res\\_2750\\_xxv.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/res/a_res_2750_xxv.pdf) accessed in July 2021.

<sup>18</sup> UN General Assembly Resolution 3067 (XXVIII) giving mandate to the UNCLOS III available at [https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/res/a\\_res\\_3067\\_xxviii.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/res/a_res_3067_xxviii.pdf) accessed in June 2021.

<sup>19</sup> *Supra* note 2.

<sup>20</sup> A/CONF.62/SR.182, 182<sup>nd</sup> Plenary meeting, Extract from the Official Records of the Third United Nations Conference on the Law of the Sea, Volume XV. Voting of the Draft Convention took place at the 182<sup>nd</sup> plenary meeting at the United Nations Headquarters, New York on 30 April 1982. Signing of the Final Act and the opening of the Convention for signature were held at Montego Bay on 10 December 1982, information available at [https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_16/a\\_conf62\\_sr182.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_16/a_conf62_sr182.pdf) accessed in June 2021.

<sup>21</sup> Barbara Kwiatkowska et al *International Organizations and the Law of the Sea: Documentary Yearbook 1997* 13 (1999 Brill Leiden) 18.

Rights over different maritime zones, namely the territorial sea,<sup>22</sup> the contiguous zone,<sup>23</sup> the exclusive economic zone,<sup>24</sup> the continental shelf,<sup>25</sup> the high seas,<sup>26</sup> the international seabed area,<sup>27</sup> and archipelagic waters<sup>28</sup> are all defined under the Convention. It also makes provision for access to and from the sea<sup>29</sup> and participation in the exploitation of resources of the sea for landlocked States.<sup>30</sup>

## II THE REGIME BEFORE THE LOSC

### *(a) Introduction*

For a number of years before the LOSC regime, landlocked States' demands were mostly focused on free access to the sea, however, over time, access to the resources of the sea on the same terms and conditions as coastal States became a major concern for landlocked States.<sup>31</sup> Most landlocked States viewed the right of access to the sea as an inherent right, already embodied in international law.<sup>32</sup> As the high seas are open to all nations by virtue of the principle of freedom of the high seas, landlocked States claimed that access to the sea should, as a result, be a logical consequence of this freedom and ought to be enforceable even in the absence of agreements.<sup>33</sup> Most coastal States regarded the right of access to the sea as a contractual right granted on the basis of mutual consideration and that could be revoked.<sup>34</sup> Several legal instruments before the LOSC addressed the rights of access to and from the sea and transit rights of landlocked States.

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<sup>22</sup> LOSC Section 3.

<sup>23</sup> LOSC Section 4.

<sup>24</sup> LOSC Part V.

<sup>25</sup> LOSC Part VI.

<sup>26</sup> LOSC Part VII.

<sup>27</sup> LOSC Part XI.

<sup>28</sup> LOSC Part IV.

<sup>29</sup> LOSC Part X.

<sup>30</sup> LOSC art 69, 82 and 148.

<sup>31</sup> Kishor Uprety 'From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States' Law, Justice and Development Series (2003) 7 *Singapore Journal of International & Comparative Law* Singapore 201 at 203.

<sup>32</sup> Z Cervenka 'The right of access to the sea of African land-locked countries' (1973) 6 *Verfassung und Recht in Ubersee* 299 at 300.

<sup>33</sup> T Maluwa 'Southern African land-locked States and rights of access under the new law of the sea' (1995) 10 *IJMCL* 529 at 539.

<sup>34</sup> Z Cervenka op cit note 32 at 300.

*(b) The 1921 Barcelona Convention*<sup>35</sup>

The 1921 Barcelona Convention and its Statute on Freedom of Transit was the first international instrument to establish freedom of transit. The drawback of the Barcelona regime is that it concerned only water and rail transport: it did not apply to road and air transport. It was formulated mostly by the European States. Article 1 of the Statute defines ‘traffic in transit’ to include ‘persons’ and ‘goods’.

*(c) The 1947 General Agreement on Tariffs and Trade (GATT)*<sup>36</sup>

Article V of the 1947 General Agreement on Tariffs and Trade (GATT) reaffirmed the principles of the Barcelona Convention and Statute on Freedom of Transit: it confines the application of the agreement to goods and not to persons, and provides that traffic in transit ‘shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and all transit duties’.<sup>37</sup> The GATT suffers from being general, and not specifically mentioning landlocked States.<sup>38</sup>

*(d) The 1948 Havana Charter*

The 1948 Havana Charter, which was devoted to freedom of transit for landlocked countries, never came into force.<sup>39</sup>

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<sup>35</sup> United Nations Convention and Statute on Freedom of Transit, 1921. 171 LNTS 7, p 11. This convention was adopted in Barcelona on 20 April 1921, and entered into force on 31 October 1922, information available at <https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=560&chapter=30&clang=en>. Full text available at <https://link.springer.com/content/pdf/bbm%3A978-94-015-1176-6%2F1.pdf> accessed in June 2021.

<sup>36</sup> General Agreement on Tariffs and Trade (GATT), 1947. 55 UNTS 187. This Agreement was adopted in Geneva on 30 October 1947, and entered into force on 1 January 1948. Information and full text available at <https://www.worldtradelaw.net/uragreements/gatt.pdf.download> accessed in June 2021

<sup>37</sup> GATT art 5(3).

<sup>38</sup> Helmut Tuerk ‘The Landlocked States and the Law of the Sea’ (2007) 40 *Revue Belge De Droit International* 91 at 95.

<sup>39</sup> Havana Charter for an International Trade Organization, 1948. UN publication, Sales No.1948.II.D.4. The charter was adopted in Havana on 24 March 1948, but is not yet in force, information available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-1-b&chapter=10&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-1-b&chapter=10&clang=en). Final Act and Related Documents available at [E/CONF.2/78](https://www.un.org/Depts/los/convention_agreements/convention_treaties.htm) accessed in June 2021.

(e) *Convention on Transit Trade of Landlocked States, 1965*<sup>40</sup>

The Convention on Transit Trade of Landlocked States (the 1965 New York Convention) was adopted under the auspices of UNCTAD.<sup>41</sup> The 1965 New York Convention accepts the principle of reciprocity,<sup>42</sup> promotes the conclusion of transit agreements between landlocked and transit States,<sup>43</sup> and reasserts the principles of free access to the sea,<sup>44</sup> freedom of the seas on equal terms for landlocked States and coastal States,<sup>45</sup> and the conclusion of regional and other international agreements by all States.<sup>46</sup> Although the term ‘legitimate interests’<sup>47</sup> is not defined in the 1965 New York Convention, the exceptions in article 11, namely grounds of public morals, public health or security, and the protection of intellectual property<sup>48</sup> provide a non-exhaustive list of these interests.<sup>49</sup> It should be pointed out that the 1965 New York Convention achieved much more than the previous instruments<sup>50</sup> as it recognized landlocked States’ rights of transit to and from the sea<sup>51</sup> and used the term ‘shall’<sup>52</sup> instead of ‘should’, thereby reinforcing the nature or spirit of the right of transit.<sup>53</sup> This Convention was described as ‘the only multilateral treaty attempting to prescribe solutions to the specific problems of landlocked States’.<sup>54</sup> However, although it recognized the landlocked States’ right of access and transit, the 1965 New York Convention did not explicitly provide for a general categorical right of access under international law.<sup>55</sup> The actual obligations

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<sup>40</sup> United Nations Convention on Transit Trade of Landlocked States, 1965. 8641 UNTS 597. The convention was adopted in New York on 8 July 1965, and entered into force on 9 June 1967, information available at [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=X-3&chapter=10&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=X-3&chapter=10&clang=en). Full text available at <https://cil.nus.edu.sg/wp-content/uploads/2019/02/1965-Convention-on-Transit-Trade-of-Land-Locked-States-1.pdf> accessed in April 2021.

<sup>41</sup> Edmund Jan Osmańczyk *Encyclopedia of the United Nations and International Agreements: T to Z* 3 ed 4 (2003 UN Publications New York) 2354.

<sup>42</sup> The 1965 New York Convention States art 15.

<sup>43</sup> The 1965 New York Convention Principles III.

<sup>44</sup> The 1965 New York Convention Principle I.

<sup>45</sup> The 1965 New York Convention Principles II.

<sup>46</sup> The 1965 New York Convention Principle VI.

<sup>47</sup> The 1965 New York Convention Principle V.

<sup>48</sup> The 1965 New York Convention art 11.

<sup>49</sup> James L Kateka ‘The International Law of the Sea’ in David Joseph Attard et AL (ed) *The IMLI Manual on International Maritime Law* 1 (2014 Oxford University Press Oxford) 436.

<sup>50</sup> Anina Maurer *Landlocked States and the Protection of the Marine Environment – with Special Emphasis on Switzerland* (Minor Dissertation, University of Tromsø, 2015) 7.

<sup>51</sup> The 1965 New York Convention Principle II.

<sup>52</sup> The 1965 New York Convention art 2(1).

<sup>53</sup> Anujin Onon *An analysis of international law principles in state practice of bilateral transit treaties* (Dissertation No 1423 World Maritime University 2020) 21.

<sup>54</sup> Kishor Uprety op cit note 31 at 208

<sup>55</sup> T Maluwa op cit note 33 at 535.

of the coastal States to grant access were defined as moral rather than legal.<sup>56</sup> Furthermore, the practical impact of the 1965 New York Convention was limited, as a minimal number of transit countries signed or ratified it.<sup>57</sup>

Article 3 of the 1958 Geneva Convention on the High Seas fails to carry the weight of an obligation<sup>58</sup> as it uses the term ‘should’.<sup>59</sup> Besides this weak language, in the same article, the 1958 Geneva Convention on the High Seas provided for reciprocity, asking that coastal States accord to the State having no sea coast, on a basis of reciprocity, free transit through their territory.<sup>60</sup> Mutual agreement is required to settle all matters relating to freedom of transit.<sup>61</sup> Hence, the High Seas Convention places no obligation on transit States to accord landlocked States a right of access.

Although landlocked States had the benefits of the principles of Most Favored Nation and national treatment under article 3 of the High Seas Convention,<sup>62</sup> the right of access was qualified by reciprocity, mutual agreement and the legitimate interests of the transit State.<sup>63</sup> The conventional regime before the LOSC did not therefore expressly declare that freedom of transit is a general legal principle applicable to all States.<sup>64</sup> Hence, the need to improve the rights of landlocked countries persisted. Landlocked States continued to demand a formulation of rights that was ‘more valid, objective, and universal.’<sup>65</sup>

### III UNCLOS III AND THE LOSC

The United Nations Convention on the Law of the Sea (LOSC) was signed at Montego Bay in 1982. Described by several UNCLOS III participants as a ‘package deal’<sup>66</sup>, the Convention involved extensive negotiations and concessions on the part of the participating countries. Three

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<sup>56</sup> Z Cervenka op cit note 32 at 301.

<sup>57</sup> Yoshifumi Tanaka op cit note 4 at 308.

<sup>58</sup> James L Kateka op. cit note 49 at 436.

<sup>59</sup> Convention on the High Seas art 3(1).

<sup>60</sup> Convention on the High Seas art 3(1)(a).

<sup>61</sup> Convention on the High Seas art 3(2).

<sup>62</sup> Bojotlhe O G Butale *Bridging The Gap To The Sea For Landlocked States: A Case For Botswana* (2016 United Nations – The Nippon Foundation of Japan Fellowship Programme) 25

<sup>63</sup> Ibrahim Wani ‘An Evaluation of the Convention on the Law of the Sea from the Perspective of the Landlocked States’ (1982) 22(4) *Virginia Journal of International Law* 627 at 627-628.

<sup>64</sup> A Mpazi Sinjela ‘Freedom of Transit and the Right of Access for Landlocked States: The Evolution of Principle and Law’ (1982) 12(1) *Georgia Journal of International and Comparative Law* 31 at 42.

<sup>65</sup> Kishor Uprety ‘*The Transit Regime for Landlocked States: International Law and Development Perspectives*’ *Law, Justice, and Development Series* (2005 World Bank Publications Washington DC) 75.

<sup>66</sup> A/CONF.62/SR.182 156 Off. Rec. UNCLOS III, Volume XVI: 182<sup>nd</sup> plenary meeting [https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_16/a\\_conf62\\_sr182.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_16/a_conf62_sr182.pdf) accessed in June 2021.

committees were set up to deal with several topics: the First Committee<sup>67</sup> was allocated the topic of international regime of the sea-bed and ocean floor beyond national jurisdiction; the Second Committee<sup>68</sup> dealt with the territorial sea, the continental shelf, the exclusive economic zone, the contiguous zone, the high seas and land-locked countries and other related matters; and the Third Committee<sup>69</sup> was assigned the topic of the preservation of marine environment. Ultimately, a text made up of 320 articles divided into 17 parts, supplemented by 9 Annexes (88 Articles) and 4 Resolutions were adopted by the Conference and form today an integral part of the Convention.<sup>70</sup>

As of 28 May 2021, 168 States were party to the Law of the Sea Convention.<sup>71</sup> This figure covers ‘28 landlocked States out of a total number of 44 such States with United Nations membership.’<sup>72</sup>

#### IV AFRICAN STATES AT UNCLOS III AND THE LLAGDS GROUP

Forty-nine African countries participated at the UNCLOS III.<sup>73</sup> From the onset of the conference, the Organization of African Unity (OAU)<sup>74</sup> recognized the need for Africa to harmonize her position on various issues and present a unified front.<sup>75</sup> Preparatory meetings leading to the upcoming conference were held among the African States and the OAU, where proposals and texts were drafted and discussed, and positions and interests defined.

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<sup>67</sup> A/CONF.62/C.1/SR.1 Off. Rec. UNCLOS III, Volume II: Summary records of meetings of the First Committee 1st meeting, 10 July 1974 available at

[https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_2/a\\_conf62\\_c1\\_sr1.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c1_sr1.pdf) accessed in June 2021.

<sup>68</sup> A/CONF.62/C.2/SR.1 Off. Rec. UNCLOS III, Volume II: Summary records of meetings of the Second Committee 1st meeting, 3 July 1974 available at

[https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_2/a\\_conf62\\_c2\\_sr1.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c2_sr1.pdf) accessed in June 2021.

<sup>69</sup> A/CONF.62/C.3/SR.1 Off. Rec. UNCLOS III, Volume II: Summary records of meetings of the Third Committee 1st meeting, 4 July 1974 available at

[https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_2/a\\_conf62\\_c3\\_sr1.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_2/a_conf62_c3_sr1.pdf) accessed in June 2021.

<sup>70</sup> A /CONF.62 7121, incorporating documents A/CONF.62/121/Corr.3, 7 and 8 of 6 December 1982 and A/CONF.62/121/Corr.8 of 9 December 1982, Final Act of the Third United Nations Conference on the Law of the Sea, full text available at [https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf) accessed in June 2021.

<sup>71</sup> United Nations, Division for ocean affairs and law of the sea, Chronological lists of ratifications, accessions and successions to the Convention and the related Agreements as at 28 May 2021, available at <[www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)>, accessed in June 2021.

<sup>72</sup> UN ‘Landlocked States with UN membership’ available at <http://www.un.org/en/members> accessed in July 2021.

<sup>73</sup> Final Act of the UNCLOS III, Annex IX art 8: Participation in the Conference 160-161 [https://www.un.org/depts/los/convention\\_agreements/texts/final\\_act\\_eng.pdf](https://www.un.org/depts/los/convention_agreements/texts/final_act_eng.pdf) accessed in June 2021.

<sup>74</sup> Established by the Organization of African Unity (OAU) Charter in Addis Ababa, 25 May 1963, available at [https://au.int/sites/default/files/treaties/7759-file-oau\\_charter\\_1963.pdf](https://au.int/sites/default/files/treaties/7759-file-oau_charter_1963.pdf) accessed in June 2021.

<sup>75</sup> 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: The First Phase’ (1982-1983) 7(1) *DLJ* 39 at 44-49.

However, it became increasingly difficult to ignore the conflict of interest between the landlocked and the coastal States, especially as far as the exploitation of coastal zone resources was concerned. Whilst the African landlocked countries demanded unrestricted rights to the non-living resources in their coastal zone beyond the territorial sea, and were completely opposed to the concept of national limits, African coastal States, backed by the OAU, insisted on the exclusive sovereignty over their economic zone and would not consider granting coastal States rights to mineral resources in this zone.<sup>76</sup>

The African States' Regional Seminar on the Law of the Sea, held at Yaoundé, Cameroon, from 20 to 30 June 1972,<sup>77</sup> recommended a 12-mile territorial sea, and urged African States to extend their sovereignty over an economic zone including the living and non-living resources of the zone. On August 7, 1972, at the UN Sea-Bed Committee, Kenya submitted a proposal entitled 'Draft Articles on the Concept of An Exclusive Economic Zone Beyond the Territorial Sea'<sup>78</sup> in favour of the economic zone concept. The proposal recommended a territorial sea of 12 miles and an economic zone of 200 miles over which the coastal state would have exclusive jurisdiction for the purpose of control and exploitation of all resources and prevention and control of pollution.<sup>79</sup>

At the OAU Council of Ministers in May 1973, the economic zone regime was adopted unanimously, and, in its '1974 Declaration on the Issues of the Law of the Sea'<sup>80</sup> the OAU supported both the Yaoundé and the Kenya proposals. The OAU Declaration endorsed landlocked States' right of access to and from the sea,<sup>81</sup> recognized the economic zone in which the coastal State exercises permanent sovereignty over all the living and mineral resources<sup>82</sup>, as well as landlocked States' right to share in the exploitation of the living resources of their neighbouring

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<sup>76</sup> Penelope Simoes Ferreira 'The role of African states in the development of the law of the sea at the third United Nations conference' (1979) 7 (1-2) *Ocean Development & International Law* 89 at 91, 101, 102.

<sup>77</sup> A/AC.138/79 General Assembly Off. Rec.: 28th session supplement no. 21 (A/9021) 'Report of the African States' Regional Seminar on the Law of the Sea', reprinted in *Int'l Legal Mat.* Vol. XII (1) (January 1973) 210.

<sup>78</sup> A/AC.138/SC. II/L.: Draft Articles on the Concept of An Exclusive Economic Zone Beyond the Territorial Sea, 10, August 7, 1972, reprinted in *Int'l Legal Mat.* XII (January 1973) 33-35.

<sup>79</sup> C Odidi Okidi 'The Kenya Draft Articles on Exclusive Economic Zone Concept: Analysis and Comments on the Original Proposal' in *Management of Coastal and Offshore Resources in Eastern Africa* (1978 University of Nairobi IDS Occasional Paper No 28) 63-85.

<sup>80</sup> Declaration of the Organization of African Unity on the issues of the Law of the Sea, adopted by the Council of Ministers on 19 July 1974, Doc A/CONF.62/33 (1975) UNCLOS III Off. Rec. Vol. III available at [https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_3/a\\_conf62\\_33.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_3/a_conf62_33.pdf) accessed in June 2021.

<sup>81</sup> OAU Declaration art 2.

<sup>82</sup> OAU Declaration art 6 and 7.

economic zones on an equal basis as nationals of coastal states, under agreements to be concluded.<sup>83</sup>

Now, while some of the African landlocked States supported the economic zone concept conditionally, others were completely against it. The first group was willing to accept the EEZ concept provided the Convention granted them rights of access to the sea and to fisheries, but, the second group insisted on the right to exploit all the resources in the zone.<sup>84</sup> A proposal by Uganda and Zambia entitled ‘Draft articles on the Proposed Economic Zone’<sup>85</sup> was submitted to the Committee on the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction on 16 July 1973. It requested for the creation of regional or subregional economic zones reserving fisheries to the exclusive use of all States in the region<sup>86</sup> and the establishment of regional authorities to exclusively manage the mineral resources in the zone on behalf of the regional States.<sup>87</sup> This particular proposal relating to living resources in the proposed economic zone was not followed through as it was not included in any subsequent proposals by landlocked States.<sup>88</sup>

The ‘Draft articles in keeping with the Declaration of Developing Land-locked and other Geographically Disadvantaged States’<sup>89</sup> was submitted by Zambia in September 1976. It proposed once again the establishment of regional and subregional economic zones ‘beyond uniform limits of the territorial seas of coastal States’,<sup>90</sup> and demanded for all States (whether landlocked or coastal<sup>91</sup>) equal rights of exploitation and exploration of the natural resources in the proposed

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<sup>83</sup> OAU Declaration art 9.

<sup>84</sup> Penelope Simoes Ferreira op cit note 76 at 110.

<sup>85</sup> A/AC. 138/SC. II/L. 41, Report of the Committee on the peaceful uses of the sea-bed and the ocean floor beyond the limits of national jurisdiction Vol. III, General Assembly Off. Rec: 28<sup>th</sup> Session, Draft articles on proposed economic zone at p.89-91 *file:///C:/Users/Nancy%20Mubima/Downloads/A\_9021(Vol-III)-EN%20(1).pdf* accessed in July 2021.

<sup>86</sup> Draft articles on the proposed economic zone art 4(2).

<sup>87</sup> Draft articles on the proposed economic zone art 4(4).

<sup>88</sup> C Odidi Okidi op cit note 75 at 67.

<sup>89</sup> A/CONF.62/C.2/L.95, UNCLOS III Off. Rec. Vol. VI: Zambia: Draft articles in keeping with the Declaration of Developing Land-locked and other Geographically Disadvantaged States adopted at Kampala in March 1974 available at [https://legal.un.org/diplomaticconferences/1973/los/docs/english/vol\\_6/a\\_conf62\\_c2\\_195.pdf](https://legal.un.org/diplomaticconferences/1973/los/docs/english/vol_6/a_conf62_c2_195.pdf) accessed in July 2021.

<sup>90</sup> Draft articles in keeping with the Declaration of Developing Land-locked and other Geographically Disadvantaged States art 1.

<sup>91</sup> Draft articles in keeping with the Declaration of Developing Land-locked and other Geographically Disadvantaged States art 2(1).

zone,<sup>92</sup> and for the creation of ‘institutions or organizations to explore the zone and exploit its resources on behalf of the States and to distribute all its benefits equitably.’<sup>93</sup>

The Kampala Declaration<sup>94</sup> resulted from The Conference of the Developing Landlocked and Geographically Disadvantaged States held in Kampala from 20 March to 22 March 1974.<sup>95</sup> The Declaration was presented at UNCLOS III by a group of landlocked and geographically disadvantaged States (LLGDS Group).<sup>96</sup> The African landlocked States formed part of this Group.<sup>97</sup> Among its nine principles, the Declaration insisted on landlocked States’ free and unrestricted access to and from the sea,<sup>98</sup> landlocked States’ free and unrestricted transit rights,<sup>99</sup> both categories of States’ right to access the seabed Area and to participate in the exploration and exploitation of the Area and its resources and to derive benefits therefrom,<sup>100</sup> as well as their equal jurisdiction rights with other States over resources in areas adjacent to the territorial sea.<sup>101</sup>

While Part X of the Convention would ultimately address landlocked States’ right of access to the sea and freedom of transit, article 69 would deal with their rights to the living resources of the sea and article 82 would entitle these States to a share in the revenue derived from exploitation of the Area.

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<sup>92</sup> Draft articles in keeping with the Declaration of Developing Land-locked and other Geographically Disadvantaged States art 2(1) (a) and (3).

<sup>93</sup> Draft articles in keeping with the Declaration of Developing Land-locked and other Geographically Disadvantaged States art 4.

<sup>94</sup> A/CONF.62/23, Extract from the UNCLOS III Off. Rec. Vol III: The Kampala Declaration. The Kampala Declaration was adopted in Kampala, Uganda, 2 May 1974. [https://legal.un.org/diplomaticconferences/1973\\_lof/docs/english/vol\\_3/a\\_conf62\\_23.pdf](https://legal.un.org/diplomaticconferences/1973_lof/docs/english/vol_3/a_conf62_23.pdf) accessed in June 2021.

<sup>95</sup> Supra note 89.

<sup>96</sup> C Odidi Okidi op cit note 75 at 67.

<sup>97</sup> Helmut Tuerk ‘Landlocked and Geographically Disadvantaged States’ in Donald Rothwell et al (eds) *The Oxford Handbook of the Law of the Sea* (2015 Oxford University Press Oxford) 328. The Group was originally called ‘Group of land and shelf-locked States’.

<sup>98</sup> The Kampala Declaration Principle 1.

<sup>99</sup> The Kampala Declaration Principle 3.

<sup>100</sup> The Kampala Declaration Principle 4.

<sup>101</sup> The Kampala Declaration Principle 9.

## CHAPTER 3 RIGHTS OF LANDLOCKED STATES UNDER THE LOSC

### I INTRODUCTION

This chapter gives an overview of the rights accorded to landlocked States by the LOSC. It begins by defining the essential terms that are used throughout the LOSC, and therefore throughout this dissertation. The ensuing section then provides a history of the evolution of the right of access to the sea for landlocked States. Finally, the rights conferred on landlocked States over different maritime zones are enumerated, together with their relevant provisions.

### II BACKGROUND

Due to a growing world population, it has become necessary, since the middle of the twentieth century, to fully exploit marine resources.<sup>102</sup> An important trend therefore appeared towards more national authority over maritime areas, resulting in a reduction of the extent of the high seas and regression of its freedoms.<sup>103</sup> This occurrence had an adverse and direct effect on landlocked States with respect to the seas and their resources, placing them in a gradually unfavourable position relating to maritime uses as they were confronted with the loss of rights they had enjoyed thus far, either in practice or in theory.<sup>104</sup>

As far as landlocked countries are concerned, the lack of a seacoast divests them from claiming exclusive rights concerning maritime areas.<sup>105</sup> Rights of transit, together with adequate physical infrastructure, are equally needed across the territory of other countries to enable them to enjoy the advantages of maritime trade and communication. Furthermore, due to the increasing extension of sovereign rights and jurisdiction over maritime areas by a growing number of coastal States, the rights and interests of landlocked States in the sea have become a matter of concern over the years.<sup>106</sup>

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<sup>102</sup> Manfred Niekisch et al 'The Current State of International Fisheries and the Protection of Extensively Overfished Fish Stocks' in Hans-Joachim Koch et al (eds) *Legal Regimes for Environmental Protection: Governance for Climate Change and Ocean Resources* (2015 Brill/Nijhoff Publishers Leiden) 131.

<sup>103</sup> Helmut Tuerk op cit note 97 at 326.

<sup>104</sup> Ibid.

<sup>105</sup> Gunther Jaenicke 'The Law of the Sea Convention and the Development of a New International Economic Order' in Thomas Oppermann et al (eds) *Reforming The International Economic Order* (1987 Duncker and Humblot Berlin) 147.

<sup>106</sup> H Tuerk and G Hafner 'The Landlocked Countries and the United Nations Convention on the Law of the Sea' in B Vukas (ed), *Essays on the New Law of the Sea* (1985 Sveucilisna naklada Liber Zagreb) 328.

### III DEFINITIONS

#### (a) *Landlocked State*

There are currently 44 landlocked States in the world.<sup>107</sup> Out of its 55 countries, the African continent counts 16 landlocked States.<sup>108</sup> The 1993 break-up of Ethiopia into two States, Ethiopia and Eritrea, left the former State landlocked,<sup>109</sup> and the split in July 2011 of Sudan created a landlocked South Sudan State.<sup>110</sup>

Article 124(1)(a) of the LOSC defines landlocked States as States which have ‘no sea-coast’, a definition based on Article 1(a) of the 1965 New York Convention.<sup>111</sup> The use of the term ‘sea-coast’ would imply that ‘countries bordering a body of water that is in itself landlocked, even if called a ‘sea’, are also to be considered landlocked and not coastal States.’<sup>112</sup>

Thus, landlocked States are defined by their lack of a seacoast.<sup>113</sup> Generally, a landlocked State has little control over the availability of transport routes to and from the sea and therefore depends on its neighbouring countries to have access to the sea. In other words, landlocked States are those ‘States which get access to the sea through the territory of their neighbouring States known as transit States, passing persons, baggage, goods, and other freights through the land of these transit States.’<sup>114</sup> Most landlocked States are situated very far from the sea: Kazakhstan is situated 3750 km from the sea while Chad, Niger, Zambia, and Zimbabwe are over 2,000 km away from the nearest seacoast.<sup>115</sup>

It is noteworthy that remoteness from the sea is not the only consideration for landlocked States. Other factors, such as the availability of adequate transport facilities, and the number of

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<sup>107</sup> UNCTAD List of Landlocked States available at <http://unctad.org/en/Pages/ALDC/Landlocked> accessed in July 2021.

<sup>108</sup> Thoughtco 44 landlocked countries without direct ocean access, information available at <https://www.thoughtco.com/landlocked-countries-1435421> accessed in July 2021.

<sup>109</sup> Iyob Ruth *The Eritrean Struggle for Independence - Domination, resistance, nationalism 1941-1993* (1997, Cambridge University Press, Cambridge) 11–25.

<sup>110</sup> Wikipedia ‘Eritrea’ available at [https://en.wikipedia.org/wiki/Land-locked\\_country](https://en.wikipedia.org/wiki/Land-locked_country) accessed in June 2021.

<sup>111</sup> LOSC art 124(1) (a) and Convention on Transit Trade of Landlocked States art1(a)

<sup>112</sup> Helmut Tuerk op cit note 97 at 331.

<sup>113</sup> Stephen C Vasciannie *Landlocked and Geographically Disadvantaged States in the International Law of the Sea* (1990, Clarendon Press Oxford) 4.

<sup>114</sup> Endalcachew Bayeh ‘The Rights of Landlocked States Under the International Law: The Role of Bilateral/Multilateral Agreements’ (2015) 4 (2) *Social Sciences* 27.

<sup>115</sup> James L Kateka op cit note 49 at 431.

outlets a State may utilize to reach the sea, also count.<sup>116</sup> Some landlocked countries have only one country as a neighbour, and the latter enjoys direct access to the high seas, while others may be bordered by two or more such countries, or even be encircled by several other landlocked countries, making such a country ‘doubly landlocked, requiring the crossing of at least two national borders to reach a coastline’.<sup>117</sup>

*(b) Coastal State*

The term ‘coastal State’ ‘is not defined by the LOSC; however, Article 2 of the Convention describes the extent of a coastal State’s sovereignty as extending into ‘an adjacent belt of sea, described as the territorial sea.’<sup>118</sup> Territorial seas are discussed in Part II, Section 2 of the Convention in relation to baselines which are themselves described in Article 5 as normally lying, ‘along the low watermark of the coast.’<sup>119</sup>

*(c) Transit State*

Article 124 (1, b) of the LOSC defines a transit State as ‘a State with or without a seacoast, situated between a landlocked State and the sea, through whose territory traffic in transit passes’.<sup>120</sup> Thus, landlocked States get access to the sea through the territory of transit States. For instance, India and Bangladesh are transit States for Nepal; Senegal is transit state for Mali; Argentina together with other South American States, is transit State for Bolivia; and Djibouti is also the most important transit State for Ethiopia.<sup>121</sup> Transit States can either be landlocked themselves, or be coastal States, with a direct access to the sea.<sup>122</sup> Some transit States are known to use their ‘strategic position as an economic or political lever against landlocked neighbours as shall be demonstrated in one of the case studies in a subsequent chapter.’<sup>123</sup>

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<sup>116</sup> James L Kateka op cit note 49 at 433.

<sup>117</sup> Wikipedia ‘Landlocked Country’ available at [https://en.wikipedia.org/wiki/Landlocked\\_country](https://en.wikipedia.org/wiki/Landlocked_country) accessed in July 2021.

<sup>118</sup> LOSC art 2.

<sup>119</sup> LOSC art 5.

<sup>120</sup> LOSC art 124 (1b).

<sup>121</sup> Endalcachew Bayeh op cit note 114 at 27.

<sup>122</sup> LOSC art 124 (1b).

<sup>123</sup> A Mpazi Sinjela op cit note 64 at 24.

*(d) Geographically Disadvantaged State*

Article 70(2) of the Convention defines geographically disadvantaged States as ‘coastal States which, because of their geographical situation, depend on the EEZs of other States and cannot claim an EEZ of their own.’<sup>124</sup>

*(e) Developing States*

Although developing States are accorded a distinct position in certain of the provisions of the LOSC, the term ‘developing State’ is not defined by the Convention. The UN defines a developing State as ‘a country with a relatively low standard of living, undeveloped industrial base, and moderate to low Human Development Index (HDI) relative to other countries.’<sup>125</sup> According to their economic size or capital market growth, developing countries can in turn be ranked into these four decreasing orders: newly industrialised countries, emerging markets or economies, frontier markets and Least Developed Countries (LDC).<sup>126</sup> The UN defines an LDC as a developing country ‘exhibiting the lowest indicator of socioeconomic development and having the world’s lowest HDI rating.’<sup>127</sup> Developing States can also be classified by geography into Small Island Developing States<sup>128</sup> and landlocked developing countries.<sup>129</sup> Out of the world’s 32 landlocked developing countries, 17 are ranked as least developed, and 12 of these are situated in Africa.<sup>130</sup> However there has been a lot of debate as to the definition of the term ‘developing State’ and as a result, several definitions of the term exist. The World Bank prefers using the terms ‘low-income’ or ‘lower-middle-income economy.’<sup>131</sup>

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<sup>124</sup> LOSC art 70(2).

<sup>125</sup> UNDP ‘Human Development Reports’ available at <http://hdr.undp.org/en/content/human-development-report-2020-readers-guide> accessed in July 2021.

<sup>126</sup> Wikipedia ‘Developing country’ available at [https://en.wikipedia.org/wiki/Developing\\_country](https://en.wikipedia.org/wiki/Developing_country) accessed in July 2021.

<sup>127</sup> UN Department of Economic and Social Affairs ‘LDC Identification Criteria & Indicators’ available at <https://www.un.org/development/desa/dpad/least-developed-country-category/ldc-criteria.html> accessed in August 2021.

<sup>128</sup> UNOHRLLS ‘Small Island Developing States’ available at <https://www.un.org/ohrls/content/small-island-developing-states> accessed in July 2021.

<sup>129</sup> UNOHRLLS ‘Landlocked Developing Countries’ available at <https://www.un.org/ohrls/content/landlocked-developing-countries> accessed in July 2021.

<sup>130</sup> UNCTAD ‘Landlocked Developing Countries’ available at <https://unctad.org/topic/landlocked-developing-countries/list-of-LLDCs> accessed in July 2021.

<sup>131</sup> Neil Fantom and Umar Serajuddin *The World Bank’s Classification of Countries by Income Policy Research Working paper No 7528* (2016 World Bank Publishers Washington DC) 4 and 10 available at <https://documents1.worldbank.org/curated/en/408581467988942234/pdf/WPS7528.pdf> accessed in July 2021.

## IV LOSC PROVISIONS GRANTING RIGHTS TO LANDLOCKED STATES

### *(a) Rights of landlocked States in different maritime zones*

Landlocked States enjoy various rights in the different maritime zones.

#### *(i) Territorial sea*

Article 3 of the LOSC extends the territorial sea up to 12 nautical miles, measured from baselines.<sup>132</sup> Subject to the Convention, 'ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea' according to article 17 and 'freedom of navigation in the waters beyond the territorial sea' according to article 38 (1).<sup>133</sup> Therefore, landlocked States have the right of innocent passage, but 'such passage should not be prejudicial to the peace, good order or security of the coastal State', according to article 19 (1).<sup>134</sup>

#### *(ii) Exclusive economic zone*

As far as the EEZ is concerned, Article 57 extends it up to 200 nautical miles from the baselines.<sup>135</sup> Article 58(1) confirms that the freedoms of 'navigation and over-flight and of the laying of submarine cables and pipelines, and other such freedoms in the EEZ can be enjoyed by all States, whether coastal or landlocked.'<sup>136</sup>

#### *(iii) High seas*

Article 86 of the LOSC defines high seas as 'all parts of the sea that are not included in the EEZ, in the territorial sea or the internal waters of a State, or the archipelagic waters of an archipelagic State.'<sup>137</sup> Like other maritime zones, the high seas are a regime where landlocked States are allowed to exercise considerable rights as they are beyond the national jurisdiction of any State. Article 89 of the LOSC provides that 'no State can claim sovereignty over the high seas.'<sup>138</sup> Article 87 (1) reiterates that the high seas are 'open to all States, whether coastal or landlocked.'<sup>139</sup>

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<sup>132</sup> LOSC art 3.

<sup>133</sup> LOSC art 38(1).

<sup>134</sup> LOSC art 19(1).

<sup>135</sup> LOSC art 57.

<sup>136</sup> LOSC art 58(1).

<sup>137</sup> LOSC art 86.

<sup>138</sup> LOSC art 89.

<sup>139</sup> LOSC art 87.

In view of this, the LOSC, under the same provision, provides for all States: ‘(a) freedom of navigation; (b) freedom of over-flight; (c) freedom to lay submarine cables and pipelines, subject to Part VI; (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI; (e) freedom of fishing, subject to the conditions laid down in section 2; (f) freedom of scientific research, subject to Parts VI and XIII.’<sup>140</sup>

Therefore, it is clear that landlocked States are bestowed with the same rights on the high seas as coastal States. Article 90 allows landlocked States to equally ‘sail ships flying their flags on the high seas as coastal States.’<sup>141</sup> Article 136 of the Convention states that ‘the seabed regime and its resources are the common heritage of mankind, where no State can claim or exercise sovereignty or sovereign rights.’<sup>142</sup>

*(iv) The Area/ Seabed Regime*

Article 136 mentioned above, is reiterated concerning this area. Exceptionally, article 148 of the LOSC tends to ‘promote the effective participation of landlocked States in the activities of the area having due regard to their special need.’<sup>143</sup>

*(b) Right of Access to and from the Sea and Freedom of Transit*

An entire chapter of the LOSC, namely Part X, is devoted to the right of access of landlocked States to and from the sea and to freedom of transit.

Article 125 of the Convention clearly confirms the right of access to and from the sea and freedom of transit of landlocked States. According to this above-mentioned provision, landlocked States have the right of access to and from the sea and freedom of transit to enjoy rights conferred on them by the LOSC.<sup>144</sup> Additionally, Article 131 provides for equal treatment of ships flying the flag of a landlocked State.<sup>145</sup>

Freedom of transit is further ensured by the provisions of Articles 127(1) and (2) of the LOSC which prohibits transit States from ‘levying customs duties, taxes, and other charges on traffic in transit or from subjecting means of transport in transit to higher taxes or charges than

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<sup>140</sup> LOSC art 87.

<sup>141</sup> LOSC art 90.

<sup>142</sup> LOSC art 136.

<sup>143</sup> LOSC art 148.

<sup>144</sup> LOSC art 125.

<sup>145</sup> LOSC art 131.

those customary in the transit State.<sup>146</sup> Preferential treatment of specific nations is prohibited under Article 126.<sup>147</sup>

Articles 130(1) and (2) place an obligation on transit States to take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit. If such delays or difficulties occur anyway, the competent authorities of the transit States and landlocked States concerned are required to cooperate towards their expeditious elimination.<sup>148</sup>

These minimum requirements, however, do not prohibit covenants or agreements between transit and landlocked States to go beyond what is provided for in the LOSC, as stated by articles 128, 129 and 132.<sup>149</sup>

Thus, in addition to the means of transport listed in the LOSC '(railway rolling stock, sea, lake and river craft, road vehicles, porters, and pack animals)',<sup>150</sup> other means of transport can be agreed upon between the concerned States.

It should be expressly pointed out that, in part X of the Convention, access to the sea is described as 'enforceable against States parties to the LOSC.'<sup>151</sup> One could deduce that the terminology employed in the above-quoted article 125(1) of the Convention is proof of a critical move away from the language used in the High Seas Convention, in favour of landlocked States. Although article 3 of the High Seas Convention provides that landlocked and geographically disadvantaged States 'should' have free access to the sea, it fails to specify whether the obligation to grant such access is legally binding or morally compelling on the concerned State party to the same High Seas Convention.<sup>152</sup>

Article 125(1) of the LOSC could be said to have adopted a bolder approach concerning the right of access than the one adopted at article 3 of the High Seas Convention. The LOSC does not make the grant of rights of access dependent on the transit State's sovereign discretion, unlike the High Seas Convention.<sup>153</sup> It rather specifies that bilateral or regional arrangements will be the

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<sup>146</sup> LOSC art. 127.

<sup>147</sup> LOSC art. 126.

<sup>148</sup> LOSC art. 130.

<sup>149</sup> LOSC art 128, 129 and 132.

<sup>150</sup> LOSC art.124 (1) and (2).

<sup>151</sup> H Tuerk and G Hafner op cit note 106 at 67.

<sup>152</sup> Z Cervenka op cit note 32 at 301 and 302.

<sup>153</sup> T Maluwa op cit note 33 at 538.

means by which such rights will be exercised.<sup>154</sup> Hence, it can be stated that the LOSC has recognised the transit rights of landlocked States as a ‘real juridical right’.<sup>155</sup>

Article 131 of the Convention provides for the right of landlocked States to ‘sail ships under their maritime flag.’<sup>156</sup> This article does not oblige the landlocked State to conclude any agreement with the port State in order to exercise the right of access or use of its port, and this is not limited to the ports of coastal transit States alone, but applies to all maritime ports.<sup>157</sup>

*(c) Right to the resources of the sea*

Article 69 (1) of the LOSC grants landlocked States a right to participate, on an equitable basis, in the exploration and exploitation of the living resources of EEZs of coastal States.<sup>158</sup> When doing this, it is essential that the relevant economic and geographical circumstances of all the States concerned be taken into account and that the provisions of the said article and of articles 61 and 62 are respected. This participation is subject to other terms and modalities also listed at article 69(2).

*(d) Right to marine scientific research*

Article 254 of the Convention provides for the rights of landlocked States regarding marine scientific research. Article 254(2) entitles States to be ‘informed of planned marine scientific research projects and to participate in such projects.’<sup>159</sup> It allows the States to simply take part in projects carried out by third States and competent international organizations in the EEZ of neighbouring coastal States and, according to article 254(3), they must be given the opportunity to participate in such research activities only ‘whenever feasible’.<sup>160</sup>

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<sup>154</sup> TMaluwa op cit note 33 at 538-539.

<sup>155</sup> Kishor Uprety op cit note 66 at 86.

<sup>156</sup> LOSC art 131.

<sup>157</sup> A Mpazi Sinjela op cit note 64 at 72.

<sup>158</sup> LOSC art 69.

<sup>159</sup> LOSC art 254(2).

<sup>160</sup> LOSC art 254(3)

## **CHAPTER 4 LANDLOCKED STATES' RIGHT OF ACCESS TO THE SEA AND FREEDOM OF TRANSIT UNDER THE LOSC**

### **I INTRODUCTION**

The present chapter delves into a deeper analysis of the freedom of transit and the right of access to the sea granted to landlocked States by LOSC. It assesses their practical effectiveness by questioning the 'absolute' nature of this right and freedom. It examines the territorial sovereignty of transit States, their discretion to grant or deny access to the landlocked State, giving a few past examples of transit denial. This chapter also analyses the importance of the relationships between landlocked and transit States in the exercise and enjoyment of these rights, and, focusing on African landlocked States, it demonstrates the importance of bilateral, regional and sub regional transit agreements, describing some of these arrangements in place in several regions on the continent.

### **II BACKGROUND**

Just before the start of UNCLOS I, a group of landlocked States led by Switzerland, convened to discuss and draft a memorandum of principles, which was submitted to UNCLOS I for consideration.<sup>161</sup> Three of the five proposed principles concerned the right of access to the sea and transit.<sup>162</sup> Article 3 of the 1958 Convention on the High Seas emanated from this proposal but, as discussed in the previous chapter, it did not give landlocked States an unrestricted, enforceable or guaranteed legal right of access, due to the fact that an agreement had to be negotiated with the transit states. Therefore, at UNCLOS III, the landlocked States still sought to secure an absolute right of transit across neighbouring transit countries, which would guarantee them access to the sea.

### **III RIGHT OF ACCESS AND FREEDOM OF TRANSIT UNDER THE LOSC**

Article 125 of the LOSC provides for the right of access by landlocked States to and from the sea and freedom of transit through the territory of transit States by all means of transport.<sup>163</sup> It further

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<sup>161</sup> A/CONF.13/C.5/L.1 Extract from UNCLOS Off. Rec. Vol VII: Memorandum submitted by the Preliminary Conference of Land-locked States, p. 70-72 available at [https://legal.un.org/diplomaticconferences/1958\\_lo/doc/english/vol\\_7/annexes.pdf](https://legal.un.org/diplomaticconferences/1958_lo/doc/english/vol_7/annexes.pdf) accessed in July 2021.

<sup>162</sup> Ibid: Principles Enunciated by the Preliminary Conference of Land-Locked States p.78-79.

<sup>163</sup> LOSC art 125(1).

provides that, in order to exercise this freedom of transit, landlocked States shall enter into bilateral, subregional, or regional agreements with transit States, the terms and modalities for such arrangements being left to the discretion of the countries concerned.<sup>164</sup> Hence, the freedom of transit is qualified by the conclusion of agreements between the landlocked and the transit States. Article 125 of the Convention uses the word ‘shall’ when referring to the landlocked State’s right of access and freedom of transit<sup>165</sup> and to the conclusion of agreements.<sup>166</sup> The word shall suggests ‘recognition of a real juridical transit right’<sup>167</sup> and an obligation to enter into an agreement.<sup>168</sup> However, this raises some difficulties as it remains uncertain whether an international Convention can impose such an obligation without an express statement to that effect.<sup>169</sup> Also unclear is whether the landlocked State would have a right of recourse if the transit State refuses to enter into such an agreement, or creates conditions that make the said agreement impossible.<sup>170</sup> This obligation seems to be in the category of a limited right ‘incapable of being enforced against the will of the State possessing the territory.’<sup>171</sup>

The right of access to the sea is therefore neither self-executing, nor is it directly enforceable.<sup>172</sup> The freedom of transit conferred on landlocked States is subject to the transit States’ rights to exercise full sovereignty over their territory. There are therefore certain practical restrictions to the right of access granted to landlocked States in article 125 (1) of the LOSC.

Article 125 (3) provides that when exercising their full sovereignty over their territory, transit States shall have the right to take all measures necessary to ensure that the rights and facilities provided for with regards to landlocked States do not in any way infringe their own legitimate interests. The term ‘legitimate interest’ is undefined. It then follows that, on the grounds of the protection of legitimate interests, transit countries can seriously contest and impede the landlocked

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<sup>164</sup> LOSC art 125(2).

<sup>165</sup> LOSC art 125 (1).

<sup>166</sup> LOSC art 125(2).

<sup>167</sup> Bojotlhe O G Butale op cit note 62 at 23.

<sup>168</sup> David Freestone et al *The Law of the Sea: Progress and Prospects* (2006 Oxford University Press) 209.

<sup>169</sup> Endalcachew Bayeh op cit note 114 at 29.

<sup>170</sup> Kishor Uprety op cit note 65 at 88.

<sup>171</sup> Ramesh Kumar Rana *Right of access of landlocked state to the sea by the example of bilateral agreement between landlocked state- Nepal and port state – India* (unpublished LLM Thesis, University of Tromsø, 2010).

<sup>172</sup> Anina Maurer op cit note 50 at 10.

countries' rights and freedom of access to the sea. If misused by the transit States, this clause could render existing transit agreements null.<sup>173</sup>

Therefore, the legal, administrative, and political adjustments in the bordering transit States can serve as a pretext for legitimate interest in order to hinder the landlocked State's access rights.<sup>174</sup> This proves that easy and free access to and from the sea depends on the transit States' goodwill.

Thus, although Article 125(1) of the LOSC provides a legal basis for landlocked States to access the sea through transit States, this right of access must, in practice, be based on an agreement with the transit neighbour, as provided by Article 125(2) and (3); furthermore, this largely depends on the prevailing relationship between the landlocked and transit States.<sup>175</sup> Although the legal right of access has been granted to landlocked States, cooperation with the transit State and goodwill on the part of the transit State are required to make the exercise of this right a reality for the landlocked State.<sup>176</sup>

Because landlocked countries are highly reliant on their neighbouring countries for transit, the political stability and good governance of these transit States are highly significant. Clashes, wars, strife or disputes in or even with the transit State will compel the landlocked State to seek other passages, means and ways to the sea, if any.

A worthy example, in this case, would be the building of the Tanzania-Zambia Railway line (TAZARA). Until the mid-1960s, Zambia, an East African landlocked country, used Zimbabwe (then known as Southern Rhodesia) as transit route to access South African ports. As a retribution for Zambia's support of the liberation movement, Zimbabwe closed its borders, thereby compelling Zambia to construct the TAZARA railway line as an alternative route to gain access to ports.<sup>177</sup>

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<sup>173</sup> M I Glassner 'Resolving the problems of landlockedness' in D Hodder et al (eds) *Landlocked states in Africa and Asia* (1998) 197 at 204.

<sup>174</sup> Kishor Uprety op. cit note 31 at 203.

<sup>175</sup> Snow T et al *Country Case Studies on the Challenges Facing Landlocked Developing Countries* (2003) 5 (1) Human Development Report Office, Occasional paper, background paper for HDR (2003 United Nations Development Programme New York) 31-68.

<sup>176</sup> Kishor Uprety op cit note 65 at 87 and 88.

<sup>177</sup> Kacana Sipangule 'Trade needs ports' D+C Development and Cooperation E-Newsletter Physical and Social Infrastructure (2017) available at <https://www.dandc.eu/en/article/landlocked-developing-countries-struggle-high-trade-costs-and-depend-transit-countrie>, accessed in June 2021.

Again, in January 1986, the landlocked kingdom of Lesotho, which is totally encircled by South Africa was virtually blockaded by the latter country for political reasons.<sup>178</sup> This is another clear demonstration of a coastal State exploiting a landlocked State's vulnerable geographic position and dependence on the coastal State for transport, communications network, and access to the sea.

Due to the 1977 to 1992 civil war in neighbouring country Mozambique, Malawi could no longer use the Mozambican ports of Beira and Nacala and was thus compelled to divert its shipments to Durban in South Africa and Dar es Salaam in Tanzania.<sup>179</sup>

In the event a transit State fails to demonstrate political will to conclude an agreement and negotiate the terms and conditions of access with the landlocked State, the latter's right of access to and from the sea will be inevitably affected.<sup>180</sup>

Indeed, whilst granting an apparently valid freedom of transit to landlocked States, the Convention encumbers the exercise of the same freedom with the conditionality of bilateral, sub regional or regional arrangements.<sup>181</sup> In other words, though the freedom of transit can be said to exist in theory, it cannot stand alone in practice, as it is subject to an agreement negotiated by both the landlocked and the transit State - the said agreement is, in fact, the catalyst giving practical effect to the freedom.<sup>182</sup> The terms and modalities to be decided by the transit State as stipulated at article 125(3) of the Convention regulate the exercise of the right of transit.<sup>183</sup>

Although landlocked States are not endowed with a self-executing right to access<sup>184</sup>, transit States are nevertheless required to consider granting access, engaging in negotiations, and seeking to conclude a transit agreement with the landlocked State, in good faith.<sup>185</sup> During the negotiations of such an agreement, a transit State can impose its terms and conditions in order to limit the extent

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<sup>178</sup> T Maluwa op cit note 33 at 531.

<sup>179</sup> The World Bank International Trade Department *Malawi Trade and Transport Facilitation Audit* (2004 World Bank Publishers Washington) 5.

<sup>180</sup> Kishor Uprety op cit note 65 at 86 – 88.

<sup>181</sup> Surya P Subedi 'Transit Arrangements between Nepal and India: A Study in International Law' in Richard Hodder-Williams et al (eds) *Landlocked States of Africa and Asia* (2013 Routledge Publishers New York) 183.

<sup>182</sup> Jean-François Arvis et al *Connecting Landlocked Developing Countries to Markets: Trade Corridors in the 21st Century* (2011 World Bank Publications Washington DC) 73.

<sup>183</sup> R Churchill and A Lowe op cit note 6 at 287.

<sup>184</sup> Myron Nordquist and Satya Nandan *United Nations Convention on the Law of the Sea 1982: A Commentary* (1985 Springer Netherlands) 402.

<sup>185</sup> Endalcachew Bayeh op cit note 114 at 29.

and scope of the exercise of this right by the landlocked State and can rightly justify these limitations as measures to protect its ‘legitimate interests’.

African landlocked States are slowly but surely mastering the skill of negotiating transit agreements, often with the aid of UNCTAD or other outside agencies.<sup>186</sup> Hence, African landlocked States have succeeded in working out transit arrangements within their respective regions and subregions, resulting in improved transit conditions. Indeed, numerous bilateral, regional and subregional agreements have been and continue to be concluded among African landlocked and coastal States concerning transit and access to seaports. The principles of these agreements are mostly formulated according to those in Part X of the LOSC.<sup>187</sup> These agreements provide the landlocked State with alternative port routes, reduce transportation and transit times for their cargo, and simplify the customs processes, while the transit State receives payment in form of commissions and charges.<sup>188</sup> Such arrangements are therefore mutually beneficial and, according to the contracting parties’ discretion, may take the form of a treaty, a memorandum of understanding, a protocol of agreement, an agreement, a letter, exchange of notes.<sup>189</sup> Below are some examples of such agreements entered into among African landlocked and transit States. The Protocol on Communication, Transport and Meteorology in the Southern African Region<sup>190</sup> is an instrument designed by the Southern African Development Community (SADC).<sup>191</sup> SADC has 16 Member States,<sup>192</sup> six of which are landlocked,<sup>193</sup> and it seeks to achieve the development of Southern Africa through regional integration.<sup>194</sup>

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<sup>186</sup> M I Glassner op cit note 173 at 202.

<sup>187</sup> M I Glassner op cit note 173 at 203

<sup>188</sup> UNCTAD *The Way to the Ocean : Transit corridors servicing the trade of landlocked developing countries* (2013 UN Publications New York and Geneva) 4 available at [https://unctad.org/system/files/official-document/dtl1b2012d1\\_en.pdf](https://unctad.org/system/files/official-document/dtl1b2012d1_en.pdf) accessed in June 2021.

<sup>189</sup> M I Glassner op cit note 173 at 203.

<sup>190</sup> Protocol on Transport, Communication and Meteorology in the Southern African Development (SADC) Region adopted at Maseru on 24 August 1996, entered into force on 1 July 1998 text available at [https://www.sadc.int/files/7613/5292/8370/Protocol\\_on\\_Transport\\_Communications\\_and\\_Meteorology\\_1996.pdf](https://www.sadc.int/files/7613/5292/8370/Protocol_on_Transport_Communications_and_Meteorology_1996.pdf) accessed in July 2021.

<sup>191</sup> Declaration and Treaty establishing the Southern African Development Community, Windhoek, August 1992. The SADC was formerly established in 1980 as the Southern African Development Coordination Conference (SADCC). [https://www.sadc.int/files/8613/5292/8378/Declaration\\_\\_Treaty\\_of\\_SADC.pdf](https://www.sadc.int/files/8613/5292/8378/Declaration__Treaty_of_SADC.pdf) accessed in July 2021.

<sup>192</sup> SADC Member States available at <https://www.sadc.int/member-states/> accessed in July 2021.

<sup>193</sup> Botswana, Eswatini, Lesotho, Malawi, Zambia and Zimbabwe.

<sup>194</sup> SADC Treaty art 5.

The SADC Protocol on Transport, Communication and Meteorology aims to establish cost effective and fully-integrated transportation systems<sup>195</sup> and recognizes the right of freedom of transit of persons and goods,<sup>196</sup> and the right of unimpeded access to and from the sea of all members States, both landlocked<sup>197</sup> and coastal.<sup>198</sup> The Protocol also provides for the establishment of regional development transport corridors in order to facilitate the unimpeded access and travel between the Members States.<sup>199</sup>

The Memorandum of Understanding on the Development and Management of the Trans-Kalahari Corridor is an agreement among the governments of the Republics of Botswana, Namibia and South Africa.<sup>200</sup> The Trans-Kalahari Corridor is a highway connecting Walvis Bay (Namibia) to the heartland of South Africa (Gauteng Region) through landlocked Botswana. The MoU aims to implement the ‘integrated and seamless movement of goods and persons’<sup>201</sup> through, among other strategies, the harmonization of customs procedures<sup>202</sup> and maintenance of border post facilities.<sup>203</sup>

The Northern Corridor Transit Agreement and Transport Agreement is a multilateral treaty between Burundi, Democratic Republic of Congo, Rwanda, Uganda and Kenya.<sup>204</sup> It concerns the Northern Corridor, a trade route connecting the first four above-cited landlocked countries to the port of Mombasa, in Kenya.<sup>205</sup> The contracting parties agree to grant each other free movement and right of transit within each other’s territories<sup>206</sup> and put in place facilities promoting such

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<sup>195</sup> SADC Protocol on Transport, Communication and Meteorology art 2.3.

<sup>196</sup> SADC Protocol on Transport, Communication and Meteorology art 3.2 (2) (a).

<sup>197</sup> SADC Protocol on Transport, Communication and Meteorology art 3.2(2) (b).

<sup>198</sup> SADC Protocol on Transport, Communication and Meteorology art 3.2(2) (c).

<sup>199</sup> SADC Protocol on Transport, Communication and Meteorology art 3.5.

<sup>200</sup> Memorandum of Understanding on the Development and Management of the Trans-Kalahari Corridor, signed at Walvis Bay on 3 November 2003, text available at [https://www.ssatp.org/sites/ssatp/files/publications/HTML/legal\\_review/Annexes\\_fr/Annexes%20VI\\_fr/Annexe%20V I-18.pdf](https://www.ssatp.org/sites/ssatp/files/publications/HTML/legal_review/Annexes_fr/Annexes%20VI_fr/Annexe%20V I-18.pdf), accessed in June 2021.

<sup>201</sup> MoU on the Development and Management of the Trans-Kalahari Corridor, Preamble.

<sup>202</sup> MoU on the Development and Management of the Trans-Kalahari Corridor art 2.1 and 2.2.

<sup>203</sup> MoU on the Development and Management of the Trans-Kalahari Corridor art 2.3 and 2.4.

<sup>204</sup> The Northern Corridor Transit Agreement signed in Nairobi on 6 October 2007, text available at [http://www.ttcanc.org/documents/the\\_northern\\_corridor\\_transit\\_agreement.pdf](http://www.ttcanc.org/documents/the_northern_corridor_transit_agreement.pdf) accessed on 29 June 2021.

<sup>205</sup> Yao Adzibgey et al *Institutional Arrangement for Transport Corridor Management in Sub-Saharan Africa* (October 2007 SSATP Working paper no 86) 3.

<sup>206</sup> The Northern Corridor Transit Agreement art 5 (a).

movement and transit.<sup>207</sup> The Agreement was revised in 2007<sup>208</sup> and South Sudan acceded to it in 2012.<sup>209</sup>

The case studies of Ethiopia, Eritrea and Djibouti in the following chapter demonstrate the importance of the nature of the relationship between the landlocked and coastal in concluding and maintaining a transit agreement. While the Ethiopia-Eritrea arrangement failed, the Ethiopia-Djibouti Agreement is a success story to date.

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<sup>207</sup> The Northern Corridor Transit Agreement art 5(c).

<sup>208</sup> UNCTAD ‘Northern Corridor Transit and Transport Agreement’ available at [https://unctad.org/system/files/non-official-document/tlb\\_20210212\\_trlc\\_presentation2\\_en.pdf](https://unctad.org/system/files/non-official-document/tlb_20210212_trlc_presentation2_en.pdf), accessed in July 2021.

<sup>209</sup> Northern Corridor Transit and Transport Coordination Authority (NCCTA) ‘Our Partners’ available at <https://www.ccacoalition.org/en/partners/northern-corridor-transit-and-transport-coordination-authority-nccta> accessed in July 2021.

## CHAPTER 5 CASE STUDY: ETHIOPIA, ERITREA, AND DJIBOUTI

### I INTRODUCTION

As emphasized in the previous chapter, landlocked States do not have an absolute right of access to and from the seas, nor do they have unrestricted freedom of transit. Hence, the nature of relationships between the States as well as the demonstration of ‘good faith’ by the transit and coastal States play a major role in the exercise and enjoyment of these rights by the landlocked State. Depending on the nature of their existing relationship with the landlocked State, the transit and coastal States may not be willing to negotiate any bilateral agreement and thereby put impediments on the landlocked State’s free transit and right of access to the sea. Thus, the political will and commitment of transit and coastal States greatly condition the landlocked State’s freedom of transit and right of access to the sea.

In this regard, the two case studies below are practical examples of the dependence of landlocked States on their relations with their neighbouring transit States in exercising their rights of transit and access to ports, and to the sea.

### II CASE STUDY: ETHIOPIA, ERITREA AND THE PORT OF ASSAB

Ethiopia and Eritrea are neighbouring countries located in the Horn of Africa. Whilst Ethiopia is landlocked, Eritrea is bordered on the northeast and east by the Red Sea.<sup>210</sup> For years, the port of Assab, located in the extreme south of the Eritrean territory,<sup>211</sup> provided Ethiopia with constant access to the sea and to international trade.<sup>212</sup>

The port of Assab had seven main shipment docks as well as properly fitted handling facilities, managing, all by itself, more than 75% of Ethiopia’s sea-borne offshore raw material shipment trade coming through the Red Sea Corridor.<sup>213</sup> Ethiopia’s main export product, coffee, was mostly shipped via Assab, benefitting from the special duty and other advantages granted by the port.<sup>214</sup> The country’s crude oil was imported using the port of Assab as well, and, after

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<sup>210</sup> Wikipedia ‘Eritrea’ available at <https://en.wikipedia.org/wiki/Eritrea> accessed in June 2021.

<sup>211</sup> Teshome Wolde Giorgis *Transit transport systems for Ethiopia* (1995 UN Publishers Geneva) 4 available at <https://unctad.org/en/Docs/poldcd96.en.pdf> accessed in June 2021.

<sup>212</sup> Teshome Wolde Giorgis op cit note 211 at 5.

<sup>213</sup> The New Humanitarian ‘Eritrea-Ethiopia: IRIN Focus on Assab (5 June 2000)’ available at <https://reliefweb.int/report/eritrea/eritrea-ethiopia-irin-focus-assab-5-june-2000> accessed in June 2021.

<sup>214</sup> Teshome Wolde Giorgis op cit note 211 at 6.

refinement, it was sent to the interior parts of Ethiopia.<sup>215</sup> The fate of Assab port was therefore closely watched as access to the Red Sea was vital to landlocked Ethiopia.<sup>216</sup> In May 1998, hostilities broke between the two countries resulting in the closure of the Assab-Addis Ababa corridor.<sup>217</sup>

Prior to this, in 1991, when Eritrea first seceded, it granted Ethiopia duty-free access to the port; however relations started to sour from early 1997 when Ethiopia and Eritrea accused each other of blocking the free flow of trade and investment.<sup>218</sup> Eritrea retaliated by increasing duties on goods destined for Ethiopia through Assab. Subsequently, administrative matters, claims of inflated charges and commissions, as well as local currency conversion rates brought the relationship to an effective end in late 1997, resulting in severe political and economic repercussions for both countries.<sup>219</sup> Despite preferential access to the Assab port, which was free of duty and taxes, Ethiopia stated that it paid very high commissions, worth millions of dollars annually, and thus became gradually displeased with what it termed as ‘Eritrean economic opportunism’.<sup>220</sup>

Eritrea often asserted that the conflict was about ‘Ethiopia securing access to the Red Sea, claiming the border issue was a pretext for a wider agenda’.<sup>221</sup> Ethiopia on the other hand dismissed all allegations against it regarding the territorial dispute but accused Eritrea of intentionally being uncooperative and thereby sabotaging the arrangements of agreed access to the Red Sea.<sup>222</sup>

Before 1997, Assab port was responsible for the biggest portion of imports and exports for Ethiopia, while Eritrea kept Massawa port in the north for itself and the northern Ethiopian region of Tigray.<sup>223</sup> However, the free port of Djibouti, which connects both countries by road and rail,

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<sup>215</sup> Teshome Wolde Giorgis op cit note 211 at 6.

<sup>216</sup> Anoushiravan Ehteshami and Emma C Murphy *The International Politics of the Red Sea* (2011 Routledge New York) 88.

<sup>217</sup> Wuhib Muluneh ‘Landlockedness and Dependency on Coastal Countries: The Case of Ethiopia’ in Richard Hodder-Williams, Sarah J. Lloyd, Keith McLachlan (eds) *Landlocked States of Africa and Asia* (2013 Routledge New York) 80.

<sup>218</sup> Adekeye Adebajo *UN Peacekeeping in Africa: From Suez Crisis to the Sudan Conflicts* (2012 Jacana Media Johannesburg) 177.

<sup>219</sup> Adekeye Adebajo op cit note 218.

<sup>220</sup> Dan Connell *Historical Dictionary of Eritrea* 3 (2019 Rowan and Littlefield Publishers Washington) 94.

<sup>221</sup> The New Humanitarian op cit note 213.

<sup>222</sup> Supra note 213.

<sup>223</sup> Teshome Wolde Giorgis op cit note 211 at 4.

also served Ethiopia.<sup>224</sup> Once the conflict began, the ports of Berbera in Somalia and as well as that of Mombasa, Kenya were deemed adequate alternative routes for Ethiopia.<sup>225</sup>

A demand by Eritrea that Ethiopia refurbish Assab's oil refinery, was the straw that broke the camel's back.<sup>226</sup> The Assab port facilities were considered decrepit by Ethiopia, who claimed that maintenance and renovation should have been undertaken by Eritrea, considering the large amounts of money the latter collected from Ethiopia, in form of commissions and charges.<sup>227</sup>

The Ethiopian government issued a notice to the Assab port authorities in 1997, informing them that it would soon cease making use of the port, as this was no longer profitable for Ethiopian businessmen.<sup>228</sup> Although the switch was a more expensive option at the outset, Djibouti port became the best alternative for Ethiopia, as subsequent special arrangements between both governments were made, rendering the change cost-effective.<sup>229</sup>

Once Ethiopia switched to using the Djibouti port, Assab port was economically ruined.<sup>230</sup> By March 1999, most activities at the port had ceased.<sup>231</sup> Until June 2002, all operations at Assab were at a standstill, no ships were docking in, the port administrative offices were closed, and the population in the area had drastically decreased.<sup>232</sup>

### **III CASE STUDY: ETHIO-DJIBOUTI UTILIZATION OF PORT OF DJIBOUTI AND SERVICES TO CARGO IN TRANSIT AGREEMENT** <sup>233</sup>

When Eritrea seceded from Ethiopia, Ethiopia lost access to the port of Assab and, as a result, Ethiopia had to find an alternative and affordable access to the sea: Djibouti offered such a route

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<sup>224</sup> Thomas Opcansky 'Djibouti: Economy' in Katharine Murison *Africa South of the Sahara* 32 ed (2003 Europa Publications London) 341.

<sup>225</sup> Supra note 213.

<sup>226</sup> Michael M Ogbeidi *Egypt and Her Neighbours: A Reader* (2011) 269.

<sup>227</sup> Supra note 213.

<sup>228</sup> Human Rights Watch Organization *Eritrea & Ethiopia: The Horn of Africa War: Mass Expulsions and The Nationality Issue* (2003 Human Rights Watch University of Michigan) 31.

<sup>229</sup> Thomas Opcansky op cit note 224.

<sup>230</sup> Life & Peace Institute 10 *Horn of Africa Bulletin* 6 (1998) 7.

<sup>231</sup> Zekeriya Mohammed and Mesai Mitiku *A Long Way to Peace & Justice: The Ethiopia-Eritrea Conflict as Reported by the World Media* (2002 Ethiopian News Agency, University of Michigan) 170.

<sup>232</sup> The New Humanitarian op cit note 213.

<sup>233</sup> Ethio-Djibouti Utilization of Port of Djibouti and Services to Cargo in Transit Agreement, 2002. The Agreement was signed in Djibouti on 13 April 2002, information available in The National Gazette of Ethiopia available at [https://lawethiopia.com/images/federal\\_proclamation/proclamations\\_by\\_number/284.pdf](https://lawethiopia.com/images/federal_proclamation/proclamations_by_number/284.pdf) accessed in June 2021.

and became the main port for Ethiopia.<sup>234</sup> Djibouti is located in the Horn of Africa and is bordered by Ethiopia in the south and west, and the Red Sea and the Gulf of Aden in the east.<sup>235</sup>

The ‘Ethio-Djibouti Utilization of Port of Djibouti and Services to Cargo in Transit Agreement’ was signed on 13 April 2002 and ratified by both Ethiopian and Djiboutian parliaments.<sup>236</sup> The agreement is based on the LOSC, on the principles of free access, and transit to the sea for landlocked countries and covers port entry, customs, documentation, land transport, security along the corridor, facilities maintenance, approval procedures for public and private Djiboutian and Ethiopian operators who use the corridor, as well as others.<sup>237</sup>

By way of this agreement, the Republic of Djibouti grants the Federal Democratic Republic of Ethiopia permanent right of access to the sea and transit of its cargo from and to Ethiopia through the territory of Djibouti.<sup>238</sup> The right to use the facilities of the international port of Djibouti as well as invest in it, if need be, for the purposes of advancing Ethiopia’s international commercial transactions is also granted therein.<sup>239</sup> Likewise, the agreement entitles Ethiopia to enjoy the benefit of preferential tariffs on all services provided by the port of Djibouti.<sup>240</sup>

Moreover, Ethiopian companies are entitled, under the agreement, to apply for and acquire land parcels in the duty-free zone of the Port for their transit operations.<sup>241</sup> Besides, parties to the agreement agreed to standardise and organise transport and communications activities to promote the flux of trade between the two countries, as well as streamline procedures and documentation requirements for trade and communication operations.<sup>242</sup> In addition, a consultation procedure and several committees have been set up to ensure smooth running in the application of the agreement.<sup>243</sup>

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<sup>234</sup> Philippe Cabanuis *Improvement of Transit Systems in The Horn of Africa* (2003 UNCTAD Study) 4 available at [https://unctad.org/en/Docs/ldc20034\\_en.pdf](https://unctad.org/en/Docs/ldc20034_en.pdf) accessed in June 2021.

<sup>235</sup> Wikipedia ‘Djibouti’ available at <https://en.wikipedia.org/wiki/Djibouti> accessed in June 2021.

<sup>236</sup> Supra note 233.

<sup>237</sup> Philippe Cabanuis op cit note 234 at 5-6.

<sup>238</sup> Supra note 233.

<sup>239</sup> Ibid.

<sup>240</sup> The New Humanitarian ‘Accord signed to use Djibouti port’ (2002 *IRIN News Addis Ababa*) available at <https://www.thenewhumanitarian.org/report/31135/djibouti-ethiopia-accord-signed-use-djibouti-port> accessed in June 2021.

<sup>241</sup> Teshome Wolde Giorgis op cit note 211 at 5.

<sup>242</sup> United Nations Conference on Trade and Development ‘The Djibouti City – Addis Ababa Transit and Transport Corridor: Turning Diagnostics into Action’ (2018 United Nations New York/Geneva) 20 available at [https://unctad.org/en/PublicationsLibrary/aldc2018d6\\_en.pdf](https://unctad.org/en/PublicationsLibrary/aldc2018d6_en.pdf) accessed in July 2021.

<sup>243</sup> Philip Cabanuis op cit note 234 at 5 .

The good faith demonstrated by both the Djibouti and Ethiopian governments has contributed to the success of the Djibouti-Addis Ababa corridor.<sup>244</sup> Because both nations will benefit from the growth of the corridor, stakes are high on both sides.<sup>245</sup> Thus, Ethiopia's quest to find a cost-effective alternative access to the sea after its fall-out with Eritrea and loss of access to the port of Assab ultimately paid off, thanks to Djibouti.

Hence, this Agreement is a worthy example of the importance and relevance of negotiations and healthy relationships between landlocked and transit States for the effective exercise of the right of access to the sea.

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<sup>244</sup> Chowdhury A et al *Geography Against Development: A Case for Landlocked Developing Countries* 6 (2006 United Nations New York) 164.

<sup>245</sup> *Ibid.*

## CHAPTER 6 RIGHT OF LANDLOCKED STATES TO PARTICIPATE IN THE EXPLOITATION OF THE LIVING RESOURCES IN THE EEZS OF REGIONAL COASTAL STATES

### I INTRODUCTION

This chapter examines the landlocked State's right to participate in the exploitation of the living resources of the EEZs of coastal States in its region. This right is not absolute: participation in the exploitation of the living resources is subject to the conclusion of an agreement or arrangement with the coastal State. In addition, the coastal State has the discretion in the allocation and in determining the surplus of the living resources.

### II BACKGROUND

The concept of an exclusive 200 nm coastal zone in which coastal States had exclusive sovereign rights to exploit the living marine resources provoked such alarm among the landlocked States because '90% of the living resources harvested from the ocean are located within 200 nm of the coast.'<sup>246</sup> Such a zone represented an impediment to their access to a significant part of the oceans' living resources.<sup>247</sup> Though the Kampala Declaration<sup>248</sup> made no mention of the EEZ, it proposed that landlocked States be allowed to exercise jurisdiction over the resources in areas adjacent to the territorial sea, on a non-discrimination and equal basis with all other States.<sup>249</sup> The OAU Declaration<sup>250</sup> stated that African land-locked countries were 'entitled to share in the exploitation of living resources of neighbouring economic zones on an equal basis as nationals of coastal States on bases of African solidarity and under such regional or bilateral agreements as may be worked out.'<sup>251</sup> Part V of the LOSC provides for the EEZ and lays out the rights and duties of States in this zone.<sup>252</sup>

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<sup>246</sup> C Joyner 'Ocean Fisheries, US Interests, and the 1982 Law of the Sea Convention' (1995) 7 *Georgetown International Environmental Law Review* 749 at 751.

<sup>247</sup> C Odidi Okidi op cit note 75 at 63-64.

<sup>248</sup> Supra note 94.

<sup>249</sup> Kampala Declaration Paragraph 9.

<sup>250</sup> OAU Declaration supra note 81.

<sup>251</sup> OAU Declaration art 9.

<sup>252</sup> LOSC art 55-75.

### III PARTICIPATION IN THE EXPLOITATION OF THE LIVING RESOURCES OF THE EEZ

Article 62 of the Convention provides that the coastal State shall have the right to determine its capacity to harvest the living resources of the exclusive economic zone. However, where the coastal State lacks the capacity to harvest all its allowable catch, it shall grant other States access to the said surplus of its harvesting capacity through agreements or other arrangements.<sup>253</sup>

This right is therefore not only limited to an appropriate part of the surplus of the living resources<sup>254</sup> but the coastal State, in determining its maximum allowable catch and its capacity to harvest that catch, has the discretion to determine whether or not a surplus exists.<sup>255</sup> The term ‘surplus’ is not defined by the LOSC<sup>256</sup> nor does the Convention provide the criteria to be used in allocating such surplus among the competing States.<sup>257</sup> Article 62 provides that the coastal State shall grant to ‘other’ States access to this surplus. There is no mention, at this stage, of any particular type of State being favoured. The ‘appropriate part’ of this surplus, to be determined by the coastal State, is equally a vague and undefined term.<sup>258</sup> The order of priority, the terms and conditions of the allocation and the agreement to be concluded are left solely at the discretion of the coastal State.<sup>259</sup> It is also uncertain whether the coastal State is under the obligation to ensure that there is a surplus<sup>260</sup> and that an equitable agreement is concluded.<sup>261</sup>

Articles 69 of the LOSC grants landlocked States a ‘right to participate on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the EEZs of coastal States of the same sub region or region.’<sup>262</sup> It is worth noting that the terms ‘region’ and

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<sup>253</sup> LOSC art 62.

<sup>254</sup> LOSC art 69.

<sup>255</sup> Yoshifumi Tanaka op cit note 4 at 488.

<sup>256</sup> Willam R Edeson ‘A Brief Introduction to the Principal Provisions of the International Legal Regime Governing Fisheries in the EEZ’ in Syma A Ebbin et al (eds) *A Sea Change: The Exclusive Economic Zone and Governance Institutions for Living Marine Resources* (2005 Springer Dordrecht) 19.

<sup>257</sup> WT Burke, ‘The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction’ (1984) 63 (1) *Oregon Law Review* 73 at 78.

<sup>258</sup> Mohamed Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (1987 Martinus Nijhoff Dordrecht) 69.

<sup>259</sup> Barbara Kwiatkowska *The 200 Mile Exclusive Economic Zone in the New Law of the Sea* (1989 Brill Leiden) 71.

<sup>260</sup> WT Burke op cit note 257 at 98.

<sup>261</sup> R K Sizani ‘The Law of the Sea Convention and the Rights of Neighbouring African Landlocked States to Fish in the South African Fishing Zone’ (1991) 3 *African Journal of International and Comparative Law* 507 at 515.

<sup>262</sup> LOSC art 69.

‘sub region’ are not defined in the Convention.<sup>263</sup> This poses a problem due to the fact that, if a certain region or sub region is broadly defined as encompassing a wide circle of countries, the share of living resources to be allocated among these States would be smaller.<sup>264</sup> Similarly, if the circle comprised a restricted number of countries, the States would have a larger share.

Article 69(2) of the LOSC provides that the terms and modalities of this right are to be established through bilateral, subregional or regional agreements.<sup>265</sup>

Articles 62(2) and 69(2) of the Convention therefore establish a legal basis for fisheries agreements. Over the years, African coastal countries have entered into three types of agreements concerning access to fishery resources in their EEZs. The first is the public bilateral agreement, entered into between the coastal State and a foreign State or political entity granting the foreign vessels access to the coastal State’s fishery resources.<sup>266</sup> This involves the conclusion of Fisheries Partnership Agreements, developed by the European Union, and entails the financial contribution of vessel owners.<sup>267</sup> The second category of arrangement is a private agreement between the coastal State and a producers’ organisation or a vessel owner. In this case, the coastal State issues a fishing license subject to the payment of an access fee determined either on the basis of the vessel’s fishing capacity or the catch volume.<sup>268</sup> The third category of agreement is a private agreement between two companies, either in the form of a joint venture granting private vessels the same rights of access as national vessels, or in the form of a vessel charter agreement in which a fishing company in a coastal State is provided with one or more vessels by a foreign fishing vessel owner to exploit the fishing resources for agreed compensation.<sup>269</sup>

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<sup>263</sup> Patrick Vrancken and Ernesta Swanepoel, “Landlocked States” in P Vrancken and M Tsamenyi (eds) *The Law of the Sea – The African Union and its Member States* (2017 Cape Town Juta) 730 at 748.

<sup>264</sup> Yoshifumi Tanaka op cit note 4 at 488.

<sup>265</sup> LOSC art 69(2).

<sup>266</sup> Pierre Failler *Consultancy to conduct a review of previous and current fisheries agreements concluded by some African Union Member States: Final Report* (2015 African Union - Interafrican Bureau for Animal Resources) 1 available at <https://www.researchgate.net/publication/299513786> accessed in June 2021.

<sup>267</sup> European Commission, EU Sustainable fisheries partnership agreements (SFPAs), available at [https://ec.europa.eu/oceans-and-fisheries/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas\\_en](https://ec.europa.eu/oceans-and-fisheries/fisheries/international-agreements/sustainable-fisheries-partnership-agreements-sfpas_en) accessed in May 2021.

<sup>268</sup> Pierre Failler op cit note 266 at 2.

<sup>269</sup> Ibid.

Fishing holds an important place in the economies of many African countries, and particularly the West African countries that border the Atlantic Ocean.<sup>270</sup> In an analysis of the trend of fisheries agreements concluded by West African States bordering the Atlantic Ocean, the public bilateral agreement proved to be the most popular arrangement to date.<sup>271</sup> Signed essentially with European Union fleets in the form of Fisheries Partnerships Agreements (FPA), it particularly concerns the tuna or tuna-like species.<sup>272</sup> Cape Verde, Côte d'Ivoire, Guinea-Bissau, Liberia, São Tomé and Príncipe and Senegal have all signed FPAs with the EU and these are still in force.<sup>273</sup> New protocols are negotiated from time to time and relate mostly to the fishing capacity and the financial compensation.<sup>274</sup>

Mali and Burkina Faso are landlocked States located in this region.<sup>275</sup> While Mali borders the coastal States of Côte d'Ivoire, Guinea, Senegal and Mauritania, Burkina Faso's neighbouring coastal States are Benin, Côte d'Ivoire, Ghana, and Togo.<sup>276</sup> According to article 69(1) of the Convention, Mali and Burkina Faso would have 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 the above-mentioned coastal States. The terms and modalities of such participation are to be established by the States concerned through bilateral, subregional or regional agreements.<sup>277</sup> However, the recorded fisheries agreements signed by these African coastal States are either with foreign vessels or amongst themselves, but not with any of these landlocked States.<sup>278</sup>

The West African coastal States in this region are all developing countries, lacking the basic infrastructure of shore-based facilities and trained personnel to participate in large-scale marine fishing.<sup>279</sup> This is worsened by the absence of data-collection capacity and lack of proper marketing structures.<sup>280</sup> It therefore ensues that these African coastal States will most assuredly

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<sup>270</sup> Food and Agricultural Organisation (FAO), FAO Fisheries Circular No. 922 FIPP/C922 available at <http://www.fao.org/3/w3839e/W3839e01.htm> accessed in June 2021.

<sup>271</sup> Ibid.

<sup>272</sup> Supra note 267.

<sup>273</sup> Ibid.

<sup>274</sup> Pierre Failler op cit note 266 at 7.

<sup>275</sup> Wikipedia 'Mali' available at <https://en.wikipedia.org/wiki/Mali> accessed in May 2021.

<sup>276</sup> Wikipedia 'Burkina Faso' available at [https://en.wikipedia.org/wiki/Burkina\\_Faso](https://en.wikipedia.org/wiki/Burkina_Faso) accessed in May 2021.

<sup>277</sup> LOSC art 69(2).

<sup>278</sup> Pierre Failler op cit note 266 at 15-23.

<sup>279</sup> Penelope Simoes Ferreira op cit note 76 at 96.

<sup>280</sup> Ibid.

reap more pecuniary benefits from the license arrangements entered into with financially sound foreign countries or national bodies.

Mali and Burkina Faso are poor developing countries.<sup>281</sup> From the onset, the costs of developing a fisheries industry, competing with the foreign fishermen's bid, and providing a proper transportation network all disqualify the landlocked African State from direct participation in fisheries and in the conclusion of any fisheries agreement with its regional coastal States.<sup>282</sup> It therefore appears that, without mutual consideration, the fisheries agreement between the coastal and landlocked State cannot exist.

Article 69(3) of the Convention grants developing landlocked States the right to the fish in the coastal State's EEZ even if the coastal State has the capacity to harvest all the allowable catch of fish.<sup>283</sup> This right does not depend on the existence of a surplus: in other words, the developing landlocked State has the right to the fish, even without a surplus.<sup>284</sup> In this case, Mali and Burkina Faso, being developing landlocked States qualify for this right. However, the coastal States in this West African region are themselves developing countries, with economies that are overwhelmingly dependent on the exploitation of the living resources of their EEZ, as set out at article 71 of the Convention. Indeed, the rights granted at article 69 do not apply where a coastal State's economy is intensely dependent on the exploitation of the living resources of its exclusive economic zone.<sup>285</sup>

The SADC Protocol on Fisheries<sup>286</sup> is one of the SADC instruments which seeks to achieve the development of Southern Africa through regional integration.<sup>287</sup> In its preamble, the Protocol acknowledges UNCLOS as well as the 'special position of landlocked member States'.<sup>288</sup> The

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<sup>281</sup> Index Mundi 'Burkina Faso vs Mali' available at <https://www.indexmundi.com/factbook/compare/burkina-faso.mali/economy> accessed in May 2021.

<sup>282</sup> Penelope Simoes Ferreira op cit note 76 at 96.

<sup>283</sup> D J Devine 'Southern Africa and the law of the sea: problems common, uncommon and unique' 1986 *Acta Juridica* 31.

<sup>284</sup> D J Devine op cit note 283 at 31.

<sup>285</sup> Helmut Tuerk 'The Rights of Landlocked States in the Law of the Sea' in Keyuan Zou's (ed) *The Belt and Road Initiative and the Law of the Sea* (2020 Brill/Nijhoff, Leiden /Boston) 191.

<sup>286</sup> SADC Protocol on Fisheries, 2001. The Protocol was adopted at Blantyre on 14 August 2001, and entered into force on 8 August 2003, Information and full text available at [https://www.sadc.int/files/8214/7306/3295/SADC\\_Protocol\\_on\\_Fisheries.pdf](https://www.sadc.int/files/8214/7306/3295/SADC_Protocol_on_Fisheries.pdf), accessed in July 2021.

<sup>287</sup> Supra note 191.

<sup>288</sup> SADC Protocol on Fisheries, Preamble.

Protocol can be said to recognise the rights of its landlocked member States<sup>289</sup> to participate in the fisheries of their neighbouring coastal states' EEZ<sup>290</sup> as granted at article 69 of the LOSC. The importance of access agreements is stressed in the Preamble, defined at article 1(2) and further elaborated on at article 10 of the Protocol. The Protocol encourages the harmonisation of legislation concerning the management of shared resources<sup>291</sup> and provides for access by non-SADC<sup>292</sup> States to the fisheries resources of the SADC. However, despite its generous and liberal approach towards landlocked States, the Protocol still remains an 'on paper' initiative. Indeed, Southern African coastal states are yet to grant their landlocked neighbours the right to exploit the living resources in their EEZs.<sup>293</sup>

Hence, until African coastal States allow their African landlocked neighbours to exploit the fisheries in their EEZs, the African landlocked States might, with some justification, view the exercise of the right conferred on them by article 69 of the LOSC as simply theoretical.

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<sup>289</sup> Supra note 193: Botswana, Eswatini, Lesotho, Malawi, Zambia and Zimbabwe.

<sup>290</sup> Supra note 192: Angola, Comoros, Democratic Republic of Congo, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Namibia and South Africa.

<sup>291</sup> SADC Protocol on Fisheries art 8.

<sup>292</sup> SADC Protocol on Fisheries art 10 (1) and (2).

<sup>293</sup> Bojotlhe O G Butale op cit note 62 at 5.

## CHAPTER 7 RIGHT OF LANDLOCKED STATES TO SHARE IN THE REVENUE DERIVED FROM THE EXPLOITATION OF NON-LIVING RESOURCES IN THE AREA

### I INTRODUCTION

This chapter examines the provisions of the Convention relating to the Area and the rights of landlocked States therein. It seeks to determine whether these provisions have fulfilled the African landlocked State's long-held desire to have a share in the revenue of the exploitation of the non-living resources of the sea.

### II BACKGROUND

The parts of the ocean floor which do not form a part of a coastal State's territorial claim are called the Area.<sup>294</sup> Now, apart from the extension of sovereign rights over its EEZ and continental shelf, the coastal State has the potential of extending its continental shelf to 350 nautical miles from the coastline. Article 76 of the Convention allows the coastal State that extra 150 nm provided it is able to show that 'the outer edge of its continental margin extends beyond 200 nm.'<sup>295</sup>

Hence, the recognised 200 nm EEZ concept, coupled with the potential of an extension of the same to 350 nm reduces the Area, which represents, for landlocked States, an avenue to benefit from the non-living resources of the ocean. Already in May 1978, at the seventh session of UNCLOS III, the head of delegation of Nepal expressed concerns about the diminishing size of the Area and proposed the establishment of a Common Heritage Fund (CHF).<sup>296</sup> As compensation for the erosion of the Area, it was proposed at draft article 304 (1) of the Draft Articles on The Common Heritage Fund,<sup>297</sup> that the CHF would 'receive a share of the net revenues from the mineral exploitation of the sea-bed and subsoil of the exclusive economic zone'.<sup>298</sup> Draft articles 303(c) and 305 of the Draft Article on the CHF provide that 'revenues from portions beyond the

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<sup>294</sup> LOSC art 1(1).

<sup>295</sup> LOSC art 76(4).

<sup>296</sup> A/CONF 62/65 Extract from the Off. Rec. of the UNCLOS III, Vol IX: Memorandum relating to the establishment of a common heritage fund in the interest of mankind as a whole but particularly in the interest of developing nations (The Nepal Proposal), p.175 available at [https://legal.un.org/diplomaticconferences/1973\\_los/docs/english/vol\\_9/a\\_conf62\\_65.pdf](https://legal.un.org/diplomaticconferences/1973_los/docs/english/vol_9/a_conf62_65.pdf), accessed in July 2021.

<sup>297</sup> A/CONF 62/65 Extract from the Off. Rec. of the UNCLOS III, Vol IX, p 176-179: Draft Articles on The Common Heritage Fund.

<sup>298</sup> Draft Articles on The Common Heritage Fund, draft art 304(1).

exclusive economic zones of member States’ are also to be made into the CHF.<sup>299</sup> The revenue received by the CHF would then be ‘used principally to assist developing nations.’<sup>300</sup> The CHF concept was supported by several other landlocked and geographically disadvantaged States and would be fully explained at the 1980 New York Session of UNCLOS III.<sup>301</sup> Although the CHF was never established, article 82 of the Convention is a form of compensation to the landlocked State for the encroachment of the Area, as it endows upon the landlocked and developing State a portion of the financial and economic benefits that would flow from deep seabed exploitation in the Area.<sup>302</sup>

### III LOSC PROVISIONS CONCERNING THE AREA

Article 1(1) of the LOSC defines the Area as ‘the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.’<sup>303</sup> Part XI of the Convention deals with the international seabed (the Area) and unequivocally insists on the principles of non-discrimination and equality of all States in carrying out activities in the international seabed.<sup>304</sup> The Area is termed ‘the common heritage of mankind’<sup>305</sup> at article 136 of the Convention. Activities therein are to be ‘carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or landlocked.’<sup>306</sup>

Article 82 of the LOSC stipulates an obligation on coastal States to make payments or contributions in kind with respect to the exploitation of the non-living resources of their outer continental shelves (OCS).<sup>307</sup> Responsibility for the implementation of Article 82 rests with the International Seabed Authority (the ISA or the Authority), an intergovernmental organization established by the Convention under Article 156, whose mandate is to act on behalf of humankind in the Area and to organize and control activities in the Area.<sup>308</sup> The annual payments and

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<sup>299</sup> Draft Articles on The Common Heritage Fund, draft art 303(c) and 305.

<sup>300</sup> Draft Articles on The Common Heritage Fund, draft art. 298(4).

<sup>301</sup> A/CONF.62/WP.10/Rev. 3, Extract from the Official Records of UNCLOS III, Volume VIII (Informal Composite Negotiating Text, Sixth Session): ‘Background Paper on the Common Heritage Fund Proposal’.

<sup>302</sup> International Seabed Authority *Issues Associated with the Implementation of Article 82 of the United Nations Convention on the Law of the Sea* ISA technical Study no.4 (ISA 2009 Kingston, Jamaica), 37-40.

<sup>303</sup> LOSC art. 1(1).

<sup>304</sup> LOSC art 137

<sup>305</sup> LOSC art 136.

<sup>306</sup> LOSC art 140.

<sup>307</sup> LOSC art 82.

<sup>308</sup> LOSC art 156, 157 and 158.

contributions pertaining to the exploitation of non-living resources in the continental shelf beyond 200 nautical miles are to be made to the ISA.<sup>309</sup> The Authority must then globally apportion the revenue among States, ‘on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them’.<sup>310</sup> Article 82(4) exempts a developing State from making such payments or contributions if the said State is a net importer of a mineral resource produced from its continental shelf.<sup>311</sup>

#### IV IMPLEMENTATION OF ARTICLE 82 OF THE LOSC

As discussed in the preceding chapter on the fisheries resources, direct participation in marine fisheries for African landlocked States has so far been impractical. Most African landlocked States had foreseen this challenge, and even before UNCLOS III began, had sought to obtain unrestricted rights to the non-living resources of the sea, or at least to share in the revenue derived therefrom.<sup>312</sup> Indeed, in the Kampala Declaration,<sup>313</sup> landlocked States demanded the right to access the seabed Area and to participate in the exploration and exploitation of the Area and its resources and to derive benefits therefrom.<sup>314</sup>

While article 82(4) of the Convention provides for such revenue-sharing, the system for the equitable allotment of financial and other economic benefits derived from activities in the Area is yet to be elaborated.<sup>315</sup> At the International Workshop organized by the ISA in collaboration with the China Institute for Marine Affairs, Beijing, from 26 to 30 November 2012, the implementation of LOSC, article 82 of the Convention was discussed.<sup>316</sup> In accordance with the provisions of Article 82(4), an agreement was reached wherein the highest priority and ranking would be granted to the eight ‘doubly-disadvantaged’ State parties, having the characteristic of being both landlocked States and Least Developed Countries (LDC).<sup>317</sup> These would be followed by the 37

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<sup>309</sup> LOSC art 82(1).

<sup>310</sup> LOSC art 82(4).

<sup>311</sup> LOSC art 84.

<sup>312</sup> Penelope Simoes Ferreira op cit note 76 at 96-97.

<sup>313</sup> Supra note 94.

<sup>314</sup> The Kampala Declaration Principle 4.

<sup>315</sup> Helmut Tuerk ‘Questions Relating to the Continental Shelf Beyond 200 Nautical Miles: Delimitation, Delineation, and Revenue Sharing’ (2021) 97 *Int’l L. Stud.* 232 at 256.

<sup>316</sup> International Seabed Authority *Implementation of Article 82 of the United Nations Convention on the Law of the Sea* ISA Technical Study No. 12 (ISA 2013 Beijing, China) p.2 available at <https://isa.org.jm/files/files/documents/ts12-web.pdf> accessed in July 2021.

<sup>317</sup> ISA Technical Study no. 12 op cit note 316 at 28.

States Parties that are either landlocked States or LDC, and next would be other similar classes of countries such as ‘Small Island Developing States’ and geographically disadvantaged States.<sup>318</sup> Other developing States Parties, and then the remainder of the States Parties would follow.<sup>319</sup> However, this implementation strategy is yet to be practiced as no commercial-scale deep seabed mining has taken place so far.<sup>320</sup>

The 1994 Implementation Agreement relating to Part XI of the LOSC stipulates that developing landlocked States must be represented on the Council of the Authority ‘in the same manner as several other groups of States parties representing special interests.’<sup>321</sup> The ISA Assembly has the duty to see to it that, in the process of the Council members’ election, the representation of landlocked and geographically disadvantaged States in that Council is reasonably proportionate to the one in the Assembly.<sup>322</sup> The composition of the Council has not been practically altered by this provision, however landlocked States are properly represented within the ISA as elected officials, actively engaging in its work.<sup>323</sup>

Currently, there are 47 African countries that are members of the Authority, 11 of which are landlocked.<sup>324</sup> Most of the African countries are either in arrears of contribution or have never paid,<sup>325</sup> and only 4 of the landlocked countries (Burkina Faso, Lesotho, Uganda and Zambia) attend ISA meetings.<sup>326</sup>

For the African landlocked State, deep seabed exploration and mining would be economically burdensome, as it is a capital-intensive industry, requiring state-of-the-art technology and skilled workforce.<sup>327</sup> Therefore, the right to exploit the mineral resources of the

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<sup>318</sup> Ibid.

<sup>319</sup> Ibid.

<sup>320</sup> Rakhyun E. Kim ‘Should deep seabed mining be allowed?’ (2017) 82 *Marine Policy* 134.

<sup>321</sup> Section 4 of the United Nations Convention on the Law of the Sea available at [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/part114.htm](https://www.un.org/Depts/los/convention_agreements/texts/unclos/part114.htm), accessed in June 2021.

<sup>322</sup> R Churchill and A Lowe op cit note 6 at 281.

<sup>323</sup> Sub-section C. Article 161 of the United Nations Convention on the Law of the Sea available at [https://www.un.org/Depts/los/convention\\_agreements/texts/unclos/part114.htm](https://www.un.org/Depts/los/convention_agreements/texts/unclos/part114.htm) accessed in January 2021.

<sup>324</sup> International Seabed Authority, ISA Members States available at <https://www.isa.org.jm/member-states> accessed in June 2021.

<sup>325</sup> International Seabed Authority *Marine Mineral Resources of Africa’s Continental Shelf and Adjacent International Seabed Area: Prospects for Sustainable Development of the African Maritime Domain in Support of Africa’s Blue Economy* ISA Technical Study no. 20 (ISA 2017) 21 available at <https://isa.org.jm/files/files/documents/ts20.pdf> accessed in June 2021.

<sup>326</sup> UNOHRLLS *Enhancing the participation of the Landlocked States in the implementation of Sustainable Development Goal (SDG) 14* (2017 UN Publications New York) 11 available at [http://unohrlls.org/custom-content/uploads/2017/12/Report\\_Oceans-Conference-Side-event.pdf](http://unohrlls.org/custom-content/uploads/2017/12/Report_Oceans-Conference-Side-event.pdf) accessed in June 2021.

<sup>327</sup> ISA Technical Study no 20 op cit note 325 at 16-18.

deep sea is still far from becoming a reality for the African landlocked State. Being both landlocked and developing, the African landlocked State is doubly disadvantaged and would therefore be granted the highest priority in the allocation of the revenue. However, this becomes a reality only once deep seabed exploitation activities commence.

## **CHAPTER 8 CONCLUSION**

### **I INTRODUCTION**

The dissertation began by examining the rights granted by the LOSC to landlocked States in general then, focusing on the landlocked African State, it analysed its rights of access to the sea and freedom of transit, its right to participate in the living resources of its neighbouring coastal State's EEZ and its right to share in the revenue derived from the exploitation of the mineral resources in the Area. As exercising these three rights is subject to meeting certain conditions, the dissertation proceeded to examine whether the African landlocked State has been successful in fulfilling the requirements set by the Convention and has ultimately been able to exercise these rights. This chapter will re-examine each of these rights individually, highlight their main characteristics, then assess the extent of the African landlocked State's success or failure in exercising the said rights. It will then identify proposed and current initiatives and strategies by the African Union and other regional bodies and international institutions toward the lot of these States in the exercise of the said rights. Recommendations will thereafter be made regarding the efficacy of the said initiatives and, if need be, how they may be improved to better serve the African landlocked State.

### **II RIGHT OF ACCESS TO AND FROM THE SEA AND THE FREEDOM OF TRANSIT**

Article 125(1) of the Convention grants landlocked States the right of access to and from the sea including those rights relating to the freedom of the high seas and the common heritage of mankind. Article 125(2) provides that the terms and modalities for exercising freedom of transit are to be agreed upon between landlocked and transit States. Therefore, the conclusion of a treaty or agreement between the landlocked State and the transit State is mandatory for access to the sea ports by the landlocked State.

African States have surmounted the hurdle of concluding agreements with their transit neighbours, and several are currently exercising the right of access to the sea. The Agreement on port utilization and the transit of goods towards Ethiopia and other regional Corridor transit agreements are good illustrations of such arrangements.

For the African landlocked State, the transit problem is slowly but surely dwindling away with the establishment of various economic integration systems. One of the AU's goals is to accelerate the 'economic integration of the continent', as provided at Article 3 of the Constitutive

Act of the AU.<sup>328</sup> Africa has eight regional economic communities (REC) whose roles are to facilitate economic integration within the regions and across the African Economic Community (AEC).<sup>329</sup> In order to accelerate the regional and continental integration processes, the AU adopted a decision to establish an African Continental Free Trade Area (AfCFTA).<sup>330</sup> Some of the aims of the agreements are to create a single market, deepen the economic integration of the continent, allow free access to commodities, goods, and services across the continent, and aid the movement of capital and people.<sup>331</sup> For the African landlocked State, if implemented, these objectives would further resolve their transit and access challenges. To date, 36 of the AU's 55 member States have ratified the agreement<sup>332</sup> and trading under the AfCFTA Agreement began on 1 January 2021.<sup>333</sup> Since the adoption of the LOSC, the activities of the UN regarding landlocked States have concentrated on transit rights for developing landlocked States and on facilitating their access to the sea.<sup>334</sup> In this regard, the United Nations Conference on Trade and Development (UNCTAD) has played a key role in promoting the interests of developing landlocked States.<sup>335</sup> The 'Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries'<sup>336</sup> and the Almaty Ministerial Declaration<sup>337</sup> is a plan adopted at a

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<sup>328</sup> Constitutive Act of the African Union, signed on 11 July 2000 at Lomé Togo, full text available at [https://au.int/sites/default/files/pages/34873-file-constitutiveact\\_en.pdf](https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf), accessed in June 2021.

<sup>329</sup> African Union 'RECs' available at <https://au.int/en/recs> accessed in June 2021.

<sup>330</sup> Agreement Establishing the African Continental Free Trade Area, signed on 21 March 2018 at Kigali, Rwanda, entered into force on 30 May 2019, full text available at [https://au.int/sites/default/files/treaties/36437-treaty-consolidated\\_text\\_on\\_cfta\\_-\\_en.pdf](https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf) accessed in June 2021.

<sup>331</sup> Agreement Establishing the African Continental Free Trade Area art 3

<sup>332</sup> UNECA 'Zambia latest country to ratify African Continental Free Trade Area (AfCFTA) agreement' available at <https://www.uneca.org/stories/zambia-latest-country-ratify-african-continental-free-trade-area-afcfta-agreement> accessed in June 2021.

<sup>333</sup> Summary of the key decisions and declarations of the 31st African Union Summit available at <https://au.int/en/pressreleases/20180706/summary-key-decisions-and-declarations-31st-african-union-summit>, accessed in June 2021.

<sup>334</sup> James L Kateka op cit note 49 at 433.

<sup>335</sup> UNCTAD 'Facilitating the Participation of Landlocked Developing Countries in Commodity Value Chains' available at <https://unctad.org/en/PublicationsLibrary> accessed in June 2021.

<sup>336</sup> Almaty Programme of Action: Addressing the Special Needs of Landlocked Developing Countries within a New Global Framework for Transit Transport Cooperation for Landlocked and Transit Developing Countries available at [https://unece.org/DAM/trans/doc/cd/Almaty\\_PoA.pdf](https://unece.org/DAM/trans/doc/cd/Almaty_PoA.pdf) accessed in July 2021.

<sup>337</sup> A/CONF.202/3 UN Document: Annex II, Almaty Ministerial Declaration 2003. The Declaration was adopted at Almaty on 29 August 2003, information available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/522/15/PDF/N0352215.pdf?OpenElement>. Text of Declaration available at <http://www.un-documents.net/almaty-d.htm> accessed in July 2021.

conference organised by UNCTAD in 2003 in Almaty, Kazakhstan. It recognizes that the key to improving transit systems is cooperation between the developing landlocked States and the transit States.<sup>338</sup> The priorities of the Almaty Programme of Action include policy improvement<sup>339</sup> by reducing customs bureaucracy in order to reduce travel days for landlocked States' exports, improved means of transport by bolstering infrastructure<sup>340</sup> and providing technical and financial assistance to landlocked States and transit countries.<sup>341</sup>

Also, from June 2015 through to December 2017, UNCTAD supported the AfCTA negotiation process (described above) by assisting the AU commission in the preparation of the draft agreement, providing technical notes, policy analysis and advisory support.<sup>342</sup>

### **III RIGHT TO PARTICIPATE IN THE EXPLOITATION OF THE RESOURCES OF THE SEA**

Article 69(1) of the Convention grants landlocked States the right to participate, on an equitable basis, in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States of the same sub region or region.<sup>343</sup> However, the exercise of this right is subject to the conclusion of bilateral, sub regional, or regional agreements with the coastal State.<sup>344</sup> However, article 69 would not apply 'in the case of a coastal State whose economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone'.<sup>345</sup> As far as fish stocks are concerned, the coastal State has the duty to determine the total allowable catch and the discretion to determine its harvesting capacity.<sup>346</sup> In cases where the coastal State finds itself unable to harvest the total allowable catch, the Convention requires that it give other States access to the surplus of its harvesting capacity.<sup>347</sup>

In the study of the West African coast, it was noted that most treaties and agreements concluded for fishing rights are between African coastal States and the European Union, or other

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<sup>338</sup> Almaty Declaration paragraph 4.

<sup>339</sup> Almaty Programme of Action Priority I

<sup>340</sup> Almaty Programme of Action Priority II

<sup>341</sup> Almaty Programme of Action Priority IV

<sup>342</sup> UNCTAD *Activities carried out in support of the implementation of the Vienna Programme of Action for Landlocked Developing Countries for the Decade 2014–2024*, (Geneva 4–12 June 2018 65<sup>th</sup> Session Part I) 7.

<sup>343</sup> LOSC art 69(1).

<sup>344</sup> LOSC art 69(2).

<sup>345</sup> LOSC art 71.

<sup>346</sup> LOSC art 62(1).

<sup>347</sup> LOSC art 62(2).

foreign shipping bodies outside Africa rather than with neighbouring African landlocked States. Indeed, the absence of mutual consideration renders the conclusion of any fisheries agreement between the African coastal and landlocked State an extremely rare occurrence. Both States are developing countries, and in most cases, the economy of the coastal State is heavily dependent on fisheries. The latter would therefore opt to enter into a lucrative agreement with foreign non-African States or bodies. As for the African landlocked State, its poor economy would not allow it to offer better terms and conditions than those that would be offered by foreign distant fishermen. Furthermore, the African landlocked State lacks the adequate fishing technology necessary to exploit the fisheries to the same capacity as the foreign vessels.

The 2050 Africa's Integrated Maritime Strategy (AIMS) was adopted by the AU in 2012.<sup>348</sup> One of the strategic objectives of the AIMS is the establishment of a Combined Exclusive Maritime Zone of Africa (CEMZA). Paragraph 30 of the AIMS describes the CEMZA as a 'common African maritime space without barriers' and Annex B defines it as 'a common maritime zone of all AU Member States.'<sup>349</sup> Paragraph 13 of the AIMS states that none of its provisions are to be construed contrary to the principle of sovereignty of the AU members,<sup>350</sup> and paragraph 59 encourages AU member States to 'claim their respective maritime limits, including their extended continental shelf where applicable', in accordance with the LOSC and principles of international law principles.<sup>351</sup> Thus, while these provisions attest to the AIMS' respect for the principle of sovereignty, they do not *per se* eliminate the possibility of some form of rearrangement of the African maritime zones.<sup>352</sup> Indeed, the words 'combine' and 'common' imply the joining together of maritime zones into one exclusive common zone.<sup>353</sup> However, the limits of this common zone are yet to be defined, and until such determination, it remains uncertain whether the current limits of the EEZ and continental shelf will change. As far as resources are concerned, the merging of several zones into one common exclusive zone could imply the right for all AU members,

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<sup>348</sup> 2050 Africa's Integrated Maritime Strategy (2050 AIM STRATEGY), adopted at the African Union (AU) Commission Headquarters in Addis Ababa, Ethiopia, on 06 December 2012, full text available at [https://cggrps.com/wp-content/uploads/2050-AIM-Strategy\\_EN.pdf](https://cggrps.com/wp-content/uploads/2050-AIM-Strategy_EN.pdf) accessed in June 2021.

<sup>349</sup> AIMS paragraph 30 and Annex B.

<sup>350</sup> AIMS paragraph 13.

<sup>351</sup> AIMS paragraph 59.

<sup>352</sup> Vishal Subun 'Africa's combined exclusive maritime zone concept' (2021) *Institute for Security Studies* p. 10 available at <https://issafrika.s3.amazonaws.com/site/uploads/ar-32.pdf> accessed in June 2021.

<sup>353</sup> Vishal Subun op cit note 352 at 9.

including landlocked States, to exploit the marine resources within the African domain.<sup>354</sup> For the African landlocked State, the implementation of the CEMZA concept could be a positive response to its demand at UNCLOS III that regional economic zones be established where it would have the freedom to exploit both living and non-living resources. The CEMZA concept calls for several concessions on the part of the coastal State concerning its sovereign rights over its marine space and possible sharing of its marine resources: this would entail serious negotiations among the AU member States.<sup>355</sup>

However, paragraph 29 of the AIMS requires the establishment of a ‘dedicated Strategic Special Task Force (S2TF)’ to implement the CEMZA.<sup>356</sup> This task force is yet to be created, and the AIMS is not a legally binding instrument.<sup>357</sup> Although the concept remains on paper, this AU initiative, if vigorously lobbied and advocated for by African landlocked States, as well as coherently and consistently implemented by the AU,<sup>358</sup> would provide an answer to the African landlocked States’ quest to exploit the resources of their neighbouring coastal States’ EEZs.

#### **IV RIGHT TO SHARE IN THE REVENUE DERIVED FROM THE EXPLOITATION OF THE AREA**

Article 136 of the LOSC designates the Area as a ‘common heritage of mankind’ and article 141 of the Convention indiscriminately grants equal rights to all States (whether coastal or land-locked) to carry out activities in the international seabed. However, deep seabed mining requires large amounts of investment in capital, advanced technology and skilled workforce, which constitute a major challenge for developing African landlocked (and coastal) States. African States would therefore need to pool their resources together, with the backing of the AU, in order to exploit the mineral resources in the Area. As early as September 1976, during UNCLOS III, in a paper recommending the creation of regional or subregional economic zones,<sup>359</sup> Uganda had proposed

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<sup>354</sup> A Benkenstein ‘Aligning Africa’s Maritime Ambitions with Broader Indian Ocean Regionalism’ (2015) 25 *SAIA Policy Insights* 1 at 4 and 5.

<sup>355</sup> E Egede ‘Africa’s Lomé Charter on African Maritime Security: What are the Next Steps?’ available at <http://www.safeseas.net/africas-lome-charter-on-maritime-security-what-are-the-next-steps/> accessed in June 2021.

<sup>356</sup> AIMS paragraph 29.

<sup>357</sup> E Egede ‘Maritime security: Implementing the AU’s AIM strategy Africa Portal’ available at <https://www.africaportal.org/features/maritime-security-implementing-aus-aim-strategy/> accessed in June 2021.

<sup>358</sup> E Egede supra note 355.

<sup>359</sup> Draft articles in keeping with the Declaration of Developing Land-locked and other Geographically Disadvantaged States supra note 89.

the ‘establishment of institutions or organizations to explore the zone and exploit its resources on behalf of the States and to distribute all its benefits equitably.’<sup>360</sup> During the third regional minerals conference held at Kampala, Uganda in June 1988,<sup>361</sup> a proposal for the establishment of an African mining institution to engage in deep seabed mining for optimum exploitation of mineral resources in Africa was submitted. However, none of these ideas have been followed through, neither is there a strategy presently in place for future implementation of such an initiative. The AIM Strategy is strangely silent on the prospect of creating an African corporation engaged in the exploitation of mineral resources in the Area. Nonetheless, the African Minerals Development Centre (AMDC),<sup>362</sup> an AU specialized institution which has been collaborating with the ISA to raise African States’ awareness with regard to deep seabed mining, could be a suitable body to develop and oversee such a mining institution.

Ultimately, however, the only compensation provided to African landlocked States by the LOSC is embodied at article 82(4), which is the equitable sharing by the Authority, of revenue derived from exploitation of the mineral resources in the Area, taking into account the interests and needs of developing and landlocked States. However, until deep seabed mining commences, this compensation remains, for African landlocked States, a distant reality.

## V CONCLUSION

By entering into bilateral, regional and subregional agreements with transit States, African landlocked States have been able to exercise its right to access the sea and the freedom of transit conferred on them by the Convention. With the African Union’s mandate to promote regional and continental integration, the creation of several Regional Economic Communities and the proposed establishment of an African Continental Free Trade Area, African landlocked States are facing less challenges as far as transit and access to the sea are concerned.

This is however not the case for fisheries agreements. Due to African landlocked States’ lack of proper industrial fishing fleet, coupled with their inability to compete with wealthier distant-

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<sup>360</sup> Draft articles in keeping with the Declaration of Developing Land-locked and other Geographically Disadvantaged States art 4.

<sup>361</sup> UNECA ‘Report of the Third Regional Minerals Conference, Kampala 13-15 June 1988’ available at <https://repository.uneca.org/bitstream/handle/10855/17981/Bib-68240.pdf?sequence=1&isAllowed=y> accessed in June 2021.

<sup>362</sup> Statute of the African Minerals Development Centre, 2016. The Statute was adopted in Addis Ababa on 31 January 2016 information and full text available at <file:///C:/Users/Nancy%20Mubima/Documents/AMDC32544-treaty-0050 - statute african mineral development centre e.pdf> accessed in July 2021.

water fishermen as well as the ‘developing country status’ of its neighbouring coastal State, they have been unable to participate in the exploitation of the living resources of their neighbouring State’s EEZ. The establishment of the African Union’s proposed Combined Exclusive Maritime Zone of Africa (CEMZA) could be the answer to African landlocked States’ difficulties in this regard, as it would entitle all AU members to exploit the marine resources within the combined maritime zone. However, the CEMZA concept is yet to be implemented and accepted by other African States. Until then, African landlocked States can justifiably regard the exercise of this right as theoretical.

All States, whether coastal or landlocked have the right to exploit the Area, the common heritage of mankind. Participation in deep seabed activities has not yet taken place for African landlocked States as these activities require high investment of capital, and these countries are all developing nations. To make this a reality, the pooling of resources among African States, under the auspices of the AU or a regional body is recommended. Article 82(4) of the Convention provides for the sharing of revenue derived from exploitation of activities, and having the characteristics of being both developing and landlocked, African landlocked States would be given priority in this allocation. However, because deep seabed mining activities have not yet commenced, African landlocked States are yet to exercise this right.

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