

# Access To The Ocean: An Evaluation Of The Regime Of The Rights Accredited To The Landlocked States Under The UNCLOS, 1982

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## ABSTRACT

*"States without Access" to and from the sea constitute almost one-fifth of the states in the international community. Despite being recognized by several international instruments, landlocked states have yet to enjoy their full rights. The UNCLOS offers a thorough legal framework for controlling the resources and uses of ocean areas. However, it also substantially limits the rights of landlocked states to maritime resources, severely restricting their ability to engage in international and seaborne trade. This essay examines the rights that landlocked governments enjoy under the UNCLOS, including the rights to access marine resources, navigation rights, and sea access. Additionally, this article delves into the obstacles that impede the effective execution of these rights as well as the diverse strategies employed to address the issues associated with their enforcement.*

## PROLOGUE:

*"Just as the criteria to which they (Coastal State and transit states) must give effect are basically founded upon geography, the practical methods in question can likewise only be methods appropriate for use against a background of geography"*(emphasis added)

-International Court of Justice, in the *'Gulf of Maine Case.'*<sup>i</sup>

The UNCLOS,<sup>ii</sup> -which has rightly been called the "Constitution for the Oceans",<sup>iii</sup> provides the comprehensive legal framework to regulate of ocean-spaces and their uses and resources.

Indeed the preamble of the Convention bluntly indicates the necessity to take into account “*the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries, whether coastal or landlocked*” (emphasis added). Conventionally, the oceans constituted two important functions:<sup>iv</sup> first, as a medium of the preferential support of communication (*jus communicationis*),<sup>v</sup> and secondly as a vast reservoir of living and non-living resources.<sup>vi</sup> Nearly one-fifth of the states i.e., 44 states<sup>vii</sup> of the international community, are ‘States without Access’ to and from the sea (SWA), i.e., states that do not possess coastline.<sup>viii</sup> Their geographical location not only cuts them off from sea resources, but it limits their access to seaborne and international trade as such, face major disadvantages. Accordingly, the international community has paid special attention to the situation of landlocked States and the vulnerability that entails. The Convention in fact constitutes the greatest expansion of sovereign rights and jurisdiction in history, substantially limiting the rights of landlocked states to maritime resources.<sup>ix</sup>

In this context the rights of landlocked states recognized by the Convention are restrained with providing the right of access to and from the seas and freedom of transit, as such, categorically overlooked the fact that in addition to coastal states, landlocked states also have maritime interests. Thus, this paper aims to examine and evaluate the rights accredited to landlocked states and the impediments to the practical realization of those rights, through the lens of the Conventional framework of the UNCLOS. Such discussion, however, includes the rights of access to the sea and freedom of transit, the claims to mineral resources of the sea and so on; describes a multifaceted approach to realize the problems of enforcing these rights as well.

## **I. CONNOTATION OF THE NOTION “LANDLOCKED STATES”**

Leaving aside technical issues relating to statehood, the term ‘land-locked state’ gives rise to no particular problems of definition. The definition of the ‘landlocked states’, in both law and geography, depicted under different instruments are by and large similar. It connotes a State that has no sea coast and which must, therefore, rely on its neighboring state (s) for access to the sea.<sup>x</sup> It follows from art.124 (1) (a) of the Convention that a “landlocked States” means a state which has no sea coast”. The land-locked States are distinct from other States in one

decisive fact: they lack access to and from the sea.<sup>xi</sup> In other words, a land-locked state relies on a transit state which is a state with or without a seacoast, situated between a land-locked state and the sea, through whose territory traffic in transit passes.<sup>xii</sup>

Thus, through the territory of which neighboring states, land-locked states get access to the sea, known as 'transit states'. For instance, India and Bangladesh are transit states for Nepal; Senegal is a transit state for Mali.

## II. THE REGIME OF RIGHTS, THE LANDLOCKED STATES ARE ENDOWED WITH

The rights of landlocked states are not only recognized by the states' practices rather it has been cited in several international instruments. Such as Article 3 of the High Seas Convention indicates that 'states without coastlines 'should' have free access to the sea', worth mentioning is that it reflects customary international law.<sup>xiii</sup> Further, Article V of the GATT (1994, Freedom of Transit) provides for freedom of transit of goods, vessels, and other means of transport across the territory of WTO members.

In the law of the sea, particularly under the Convention, the land-locked States are endowed with vis-a-vis- their transit states on the seas are outlined under three principal tract mentioned herein:

Firstly, '**Right to access to Sea**'<sup>xiv</sup>; the uses of the oceans by land-locked States can only be effective if such States enjoy a right of access to and from the sea.<sup>xv</sup> It mainly relies on freedom of transit through the States by whose territories they are separated from the sea.

Secondly, '**Navigational rights**'; owing to the importance of freedom to communicate and trade, the navigational rights of land-locked States merit particular consideration.<sup>xvi</sup>

Thirdly, the '**Right to access to marine resources**'; involves the safeguarding of their interests and legitimate interests in various uses of the oceans, such as sea communication, the exploration and exploitation of marine resources, and marine scientific research.

However, the claims of coastal States over a 200-nautical-mile EEZ significantly reduce the size of the high seas where the principle of freedom applies. The extension of the coastal State jurisdiction over the high seas has placed land-locked States in a difficult position.<sup>xvii</sup>

### III. LEGAL INSURANCE: THE RIGHTS CONFERRED ON THE LANDLOCKED STATES UNDER UNCLOS

#### a. The Rights of Land-Locked States across Maritime Zones:

To better understand the rights of land-locked states on the seas, it is worth looking at their rights in the different maritime zones. Accordingly, the following are maritime zones, sometimes of other states, where land-locked states are conferred with several rights to exercise.

#### 1. Rights of the Landlocked states in the Territorial Sea:

Within the Territorial sea of a state, which extends up to 12 nautical miles, -measured from baselines,<sup>xviii</sup> A ship of a landlocked state shall enjoy the right mentioned hereinafter;

##### i. *Right of Innocent Passage:*

The Convention clarifies that Subject to the Convention, ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea.<sup>xix</sup>

It also provides for the freedom of navigation in the waters beyond the territorial sea.<sup>xx</sup> Hence, land-locked states shall have the right of innocent passage, provided such passage is “not prejudicial to the peace, good order or security of the coastal state.”<sup>xxi</sup>

##### ii. *Other Navigational Rights in the Territorial sea*

The UNCLOS, for a landlocked state, also ensures the right of transit passage used for international navigation, and right of innocent passage through archipelagic waters.

#### 2. Rights in the Exclusive Economic Zone:

Article 57 extends exclusive economic zones up to 200 nautical miles from the baselines. Article 58 (1) provides that in the EEZ “*all States, whether coastal or land-locked, enjoy the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention*” (emphasis added).

Furthermore, art.62 (2) stipulates the right to harvest in its EEZ with the coastal states', provided that it gives other States including landlocked states access to the surplus of the allowable catch.

While, Article 69 (1) of the convention substantiates that “*on an equitable basis, landlocked States shall have the right to participate in the exploitation of an appropriate part of the surplus of the living resources of the exclusive economic zones of coastal States*” (emphasis added).

### **3. Rights in the High Seas:**

As per article 86 of the convention high seas means “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or the internal waters of a State, or in the archipelagic waters of an archipelagic State”. Article 89 of the convention underscored that no state can claim sovereignty over the high seas. Thus, no national or exclusive jurisdiction of any state can be claimed or exercised. Therefore, like other maritime zones, the high seas are a regime where land-locked states are allowed to exercise considerable rights.

#### *i. Article 87: Freedom of The High Seas*

Article 87 (1) of the convention also affirms that “the high seas are open to all States, whether coastal or land-locked”. Following this premise, the convention provided for all states: “...

(a) freedom of navigation; (b) freedom of overflight; (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”(emphasis added).<sup>xxii</sup> Thus, it is evident that land-locked states are conferred with significant rights on the high seas equally with coastal states.

#### *ii. Article 90: Right of Navigation*

In addition to the navigational right given under the aforementioned article, article 90 of the convention further allows them to equally sail ships flying their flags on the high seas as coastal states.

### **4. Rights in the International Seabed Regime (The Area)**

Article 136 of the convention states that the area and its resources are the common heritage of mankind; where no state can claim or exercise sovereignty or sovereign rights [Article 137 (1)]. Furthermore, Article 140 stipulates the Area shall be open to use exclusively for peaceful purposes by all States, where all activities therein shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether coastal or land-locked. More importantly, article 148 of the convention tends to promote the effective participation of land-locked states in the activities of the area having due regard to their special need. Landlocked shall have Special Representation in council of the Authority [Article 161]

**b. Freedom of Transit: Access to Sea**

As relates to freedom of transit, it is compelling to look into Article 125(1) of the Convention, - a clear and self-explanatory provision, which plainly articulates the right of access to and from the sea and freedom of transit of land-locked states, to enjoy rights conferred on them by the convention.<sup>xxiii</sup> One of the Prominent classical jurists, *Lauterpacht* asserted that states may legitimately claim “the right of transit” when there exist two fundamental conditions. Firstly, they must be capable of proving the merits and necessity of the right claimed; Secondly, it has to be manifested that the exercise of the right must not cause disturbance or prejudice to the transit State.<sup>xxiv</sup>

Leading international lawyers like *McNair* and *Hyde* believe that the transit right of landlocked states is not a principle recognized by international law but rather a right governed by agreements concluded with coastal States.<sup>xxv</sup>

The right of access to and from the sea as well as freedom of transit has also been reaffirmed by UNGA.<sup>xxvi</sup> It is not only the general principle of international law but also has obtained the status of customary international law<sup>xxvii</sup>, which is inviolable in nature. However, this right is contingent upon bilateral, sub-regional, or regional agreements.<sup>xxviii</sup> Furthermore, transit States shall take necessary measures to protect their sovereignty if transit threatens to infringe their legitimate interest.<sup>xxix</sup>

In addition to the rights of access to the sea, Part X of The Convention, outlined in detail, a few other provisions that could be implicitly linked and ancillary with the right of access. These are as follows:<sup>xxx</sup>

**1. Exclusion of the MFN Clause**

Art.126 of the UNCLOS excludes the application of the most-favored-nation clause to privileges accorded under the convention and immunizes all agreements granting special rights of access or facilities based on the geographic position of Land-Locked states.

**2. Exemption of the custom duties etc.**

Art.127 exempts customs duties, taxes, or other charges for Traffic in transit (except charges levied for specific services rendered),<sup>xxxix</sup> Means of transport in transit, and other facilities (higher than those levied for the use of means of transport of the transit State).<sup>xxxix</sup>

**3. Free Zones and other Custom facilities**

Art.128 allows the provision of free zones or other customs facilities at ports of entry and exit in the transit state when agreed upon by the states concerned.

**4. Principle of Cooperation**

Art.129 importune transit states to cooperate with their Landlocked neighbors in the construction or improvement of means of transport in the transit state.

**5. Discretionary Measures**

Art.130 obligates transit states to take ‘all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit’. If delays or difficulties should occur, the competent authorities of both states are required to cooperate in their expeditious elimination.

**6. Ships flying the flag**

Art.131 states that ships flying the flag of Land-Locked states are to enjoy treatment equal to that accorded other foreign ships in maritime ports.

**7. Greater facilities:**

Art. 132 provides for continued operation of existing facilities greater than those mandated by the convention, if the parties so desire, and grants of greater facilities in the future also are not precluded.

#### IV. LEGAL IMPEDIMENTS: A CRITICAL ANALYSIS OF EXERCISE OF THE RIGHTS ACCREDITED TO THE LANDLOCKED STATES

To exercise all those rights mentioned above, land-locked states must make an agreement with the transit states. Among these rights, the core one is access to the sea in other words securing the freedom of transit. This is the pivotal enjoyment of the entire series of rights on the sea, as such; all other rights are mostly related to and rely on the exercise of this right.

Notwithstanding, Article 125 (1) leaves the door open to land-locked states to access to and from the sea and freedom of transit, such rights are put along with significant practical restrictions, such as ‘the terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States.’<sup>xxxiii</sup> “It will thus be seen that there is no absolute right of transit, but rather that transit depends upon arrangements to be made between the landlocked and transit states”- as noted by *Shaw*.<sup>xxxiv</sup> Thus, it should be considered along with sub-articles 2 and 3 of the same article,<sup>xxxv</sup> where Article 125 (3) laid down that ‘*transit States shall have the right to take all measures necessary to ensure their full sovereignty over their territory, regarding the rights and facilities provided for land-locked*’ (emphasis added). Thus, sub-article 3 gives absolute rights to the transit states to take all measures they feel necessary. On the other hand, the convention has not imposed any restrictive measures, which can narrow down the implications of it. Some scholars confirm that Article 125(2) provides for a *pactum de contrahendo*, but what is the scope of the obligations of the transit States, is not clear.<sup>xxxvi</sup> In light of this, scholars also argued that the Convention does not put any commitment on the transit states to refrain from creating constraints for landlocked states, though whether it is possible to stop passage totally or on certain occasions is not clear.<sup>xxxvii</sup> Hence, it is contingent on the prevailing relationship between the land-locked and transit states,<sup>xxxviii</sup> while the legal, administrative, and political adjustments in the neighboring states can be hindrances to the land-locked states’ access rights under the guise of legitimate interest.<sup>xxxix</sup> Where the term ‘legitimate interests’ can be and has been interpreted by transit states according to their conveniences as we witnessed in the Nepal and India crisis and border blockade, when Nepal and India had some differences on other trade and political issues that had very little to do with the exercise of Nepal’s transit rights.<sup>xl</sup> Whereas the very term is not defined in the pretext of



the protection of legitimate interests, transit countries can critically challenge the rights and freedoms of landlocked countries.

On top of that all, article 69(1) of the convention provides the right of landlocked states to participate in the exploitation of the surplus of living resources in the exclusive economic zone in an equitable manner, here again, the terms and modalities of such participation are to be made by the concerning states through bilateral, sub-regional or regional agreements.<sup>xli</sup> It manifests that, even though the state secures freedom of transit, it needs to have a sort of agreement with the coastal state of an exclusive economic zone to exploit a surplus of living resources.

*Lauterpacht*, a classical jurist, concludes that instruments, recognizing the principle of free transit, like the Covenant of the League of Nations, the Barcelona Convention, and similar instruments require transit States “to negotiate and conclude, on reasonable bases, transit agreements.”<sup>xlii</sup> In contrast to this, emerging jurist like *Surya Subedi* argues that the actual right to exercise this freedom is itself no longer dependent on a bilateral agreement with the transit state, breaking from the Barcelona tradition; it eliminates the requirement of reciprocity.<sup>xliii</sup> Recently, the ICJ in the case of *Peru vs. Chile* has affirmed this proposition and made a similar ruling in regard Bolivia to access to sea. Some other scholar also argues that this is only the subject of procedural requirements for the transit, routes, and exit and entry points to avoid the security concerns of the transit states.

Another school of thought suggests that Freedom of transit through the territory of a “neighbor-state” may represent an advantage of convenience for a coastal State, but for the landlocked states, it is a question not of convenience but of survival. Therefore, they can legitimately demonstrate necessity and oblige the transit State to conclude an agreement.<sup>xliv</sup>

#### **CONCLUDING REMARKS:**

The principles of international law enshrining the rights of landlocked countries are being developed progressively. Its inevitable contributions towards them are praiseworthy. Even though land-locked states are given a right of access legally, the still worrying issue is such a right is conditioned by the need for the transit states to grant such a right.<sup>xlv</sup> Accordingly, to

avail such rights there must have agreements between landlocked and transit states. Thus, the geopolitics of transit states also highly conditioned the right to free transit; which, in turn, affects the regime of the rights of landlocked states. Thus, this paper would like to draw the conclusion that to give practical effect to those rights, respect of the international community, in particular the transit, towards the rights of landlocked states has a pivotal role. The international community has agreed on trying to obtain at UNCLOS III confirmation on the existing navigational rights of landlocked states; transit rights through states laying between landlocked states and the sea; access to the resources of neighboring coastal states' EEZs; and proper recognition of their interests in the international sea bed regime.<sup>xlvi</sup>

## ENDNOTES

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<sup>i</sup> *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. USA)* [1984] ICJ Rep. 329, para 199.

<sup>ii</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 [UNCLOS] [hereinafter 'The Convention']

<sup>iii</sup> T.T.B. Koh, 'A constitution for the oceans, remarks made by the president of the third united nations conference on the law of the sea' in *official text of the united nations conventions on the law of the sea with annex and index*, (1983) at xxxiii.

<sup>iv</sup> Malcolm N Shaw. *International Law*, (Sixth edition, Cambridge: Cambridge University Press 2008) 553.

<sup>v</sup> Mpazi Sinjela, 'Freedom of Transit and the Right of Access for Land-locked States: The Evolution of Principles and Law' (1982) 12 Ga. J. Int'l & Comp. L., 31

<sup>vi</sup> Yoshifumi Tanaka, *The international law of the sea* (Cambridge; Cambridge University Press 2012) 376; M. L. Sarin, 'The Asian-African States and the Development of International Law' in René-Jean Dupuy (eds), *The Future of International Law in a Multicultural World* ( Martinus Nijhoff Publishers 1983) 130

<sup>vii</sup> <<https://www.thoughtco.com/landlocked-countries-1435421>>accessed 15 June 2020.

<sup>viii</sup> Kishor Uprety, 'Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right' (1994) 12 Penn State International Law Review < <http://elibrary.law.psu.edu/psilr/vol12/iss3/2>> accessed 15 June 2020

<sup>ix</sup> Helmut Tuerk, 'forgotten rights? The landlocked states and the law of the sea' in Rüdiger Wolfrum, Maja Seršić and Trpimir M. Šošić (eds), *contemporary developments of international law* (Brill: Nijhoff Leiden 2016), 338.

<sup>x</sup> Stephen C. Vasciannie, *Land-locked and Geographically disadvantaged states in the international law of the sea* (Oxford Clarendon Press 1990) P. 4.

<sup>xi</sup> Tanaka (n 6), 376.

- <sup>xii</sup> UNCLOS, Art.124 (1) (b); Endalcachew Bayeh, 'The Rights of Land-Locked States Under the International Law: The Role of Bilateral/Multilateral Agreements' (2015) Vol. 4, No. 2, doi: 10.11648/j.ss.20150402.12 Social Sciences < <http://www.sciencepublishinggroup.com/j/ss>> accessed 15 June 2020.
- <sup>xiii</sup> Dr. Stephen Vasciannie, 'Land-Locked and Geographically disadvantaged states' (2005) 31 Heinonline Commonwealth L Bulletin 60.
- <sup>xiv</sup> Churchill and Lowe, *Law of the Sea* (third edition, Manchester University Press 1999) 433
- <sup>xv</sup> Tananka (n 6), 378
- <sup>xvi</sup> Ibid.
- <sup>xvii</sup> Ibid.
- <sup>xviii</sup> UNCLOS, Article 3.
- <sup>xix</sup> UNCLOS, Article 17
- <sup>xx</sup> UNCLOS, Article 38 (1)
- <sup>xxi</sup> UNCLOS, Article 19 (1)
- <sup>xxii</sup> UNCLOS, Article 87 (1)
- <sup>xxiii</sup> UNCLOS, Art.125(1)
- <sup>xxiv</sup> E Lauterpacht, 'Freedom of Transit in International Law' (1958–59) 44 Transactions of the Grotius Society 332.
- <sup>xxv</sup> Kishor Uprety, '*The Transit Regime for Landlocked States: International Law and Development Perspectives*' (Washington: The World Bank 2006) 28
- <sup>xxvi</sup> UNGA Res. 46/212 (20 December 1991); Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7<sup>th</sup> edition, New York: Routledge 1997).
- <sup>xxvii</sup> In the *North Sea Continental Shelf* case, the court held that to form a customary law there must have two elements: 1. OBJECTIVE ELEMENT: *the existence of State practice*. In other words, the actions or omissions by the State must support the custom; and 2. SUBJECTIVE ELEMENT: *acceptance as law*. In other words, States when performing a custom must do so because they feel that they are legally bound to perform the custom. We call this concept *Opinio juris*. Moreover, in the view of the mandatory character of Art. 125 (1) of the UNCLOS, and the approval of this provision by consensus during the UNCLOS(conference) III, the right of the free access as embodied in the UNCLOS could now be regarded as part of customary international law.
- <sup>xxviii</sup> UNCLOS, art.125(2)
- <sup>xxix</sup> UNCLOS, art.125(3)
- <sup>xxx</sup> A Mpaszi Sinjela, 'Freedom of transit and the right of access for Land-Locked states: the evolution of principle and law' (1982) 12 Ga. J. Int'l & Comp. L. 50
- <sup>xxxi</sup> UNCLOS, art.127(1)
- <sup>xxxii</sup> UNCLOS, art.127(2)
- <sup>xxxiii</sup> UNCLOS, art.125(2)
- <sup>xxxiv</sup> Shaw (n 4).
- <sup>xxxv</sup> Bahman Aghai Diba, 'Iran and Landlocked States' (2014) <<http://www.payvand.com/news/14/dec/1111.html>> accessed 15 June 2020.
- <sup>xxxvi</sup> Uprety (n 25), 86
- <sup>xxxvii</sup> Ibid.

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<sup>xxxviii</sup> Faye and others, 'The Challenges Facing Landlocked Developing Countries' (2004) 5 *Journal of Human Development* 31.

<sup>xxxix</sup> Kishor Uprety, 'From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States' Rights to Trade through Access to the Sea –A Retrospective Review' (2003) 7 *Singapore Journal of International & Comparative Law* 201.

<sup>xl</sup> Surya P. Subedi, 'Dynamics of Foreign Policy and Law ( A study of Indo-Nepal Relations)' (Oxford: Oxford University Press 2005) 69

<sup>xli</sup> UNCLOS, article 69(2).

<sup>xlii</sup> E Lauterpacht, 'Freedom of Transit in International Law' (1958–59) 44 *Transactions of the Grotius Society* 332.

<sup>xliii</sup> Surya P. Subedi, 'Dynamics of Foreign Policy and Law ( A study of Indo-Nepal Relations)' (Oxford: Oxford University Press 2005) 68

<sup>xliv</sup> This is the basis on which Nepal had asked India to conclude a transit agreement after the Treaty of 1960 expired. See Amrit Sarup, 'Transit Trade of Land-Locked Nepal' (1972) 2 *Int'l & Comp. L. Q.* 287.

<sup>xlv</sup> Snow and others, 'Country case studies on the challenges facing landlocked developing countries' (2003) OCCASIONAL PAPER, Background paper for HDR.

<sup>xlvi</sup> Churchill and Lowe, 'Law of the Sea, third edition' (Manchester University Press 1999) 434