

## LANDLOCKED STATES, TRADE CONSTRAINTS AND DEVELOPMENT: TOWARDS A REAL RIGHT OF ACCESS TO THE SEA \*

### Abstract

Landlocked states are confronted with various obstacles to international trade on account of lack of their geographical location. To trade, they must depend on access to the sea through one or more transit states since they have no sea-coast of their own. Usually, long distances between them and the ports, and sometimes poor transport infrastructure in the transit states make cost of trade much higher for them than for littoral states. This state of affairs is worsened by the fact that a transit state could, under extant rules of international law, deny access. Starting from 1921, efforts were made by the comity of states to enhance access for landlocked states. The United Nations Convention on the Laws of the Sea, 1982 (UNCLOS) eventually elevated access to a 'right'. This paper examines the constraints ranged against landlocked states in international trade due to their lack of a sea-coast and how those constraints impact on development. It argues that though UNCLOS elevated access to a right, what landlocked states actually have is an imperfect right of access. This is due to provisions in the Convention on access to the sea which empty the right of access of all the substance of a real right. The paper suggests that, on grounds of common humanity, access to sea for landlocked states should be recognised as a real right of landlocked states. It suggests that such right shall not be capable of being denied or curtailed except it poses an actual, verifiable security risk to a transit state.

**Keywords:** Landlocked States, Trade Constraints, Development, Right of Access, Sea

### 1. Introduction

Landlockedness is one of those geographical inhibitions that confront some states and forced upon them by nature. A state is landlocked if it has no sea-coast.<sup>1</sup> There are 44 landlocked states 33 of which are developing countries.<sup>2</sup> The lack of a sea-coast inhibits a landlocked state from access to and from the sea for the purpose of international trade, and exploitation of the sea which is a source of food and enormous other resources.<sup>3</sup> To access the sea in order to trade and exploit the sea, landlocked states must, necessarily, transit through a coastal state, or, in the case of double landlockedness, through another landlocked state and a coastal state.<sup>4</sup> The state through which a landlocked state must have transit in order to reach the sea is referred to as a transit state. A transit state is therefore 'a state, with or without a sea-coast, situated between a landlocked state and the sea, through whose territory traffic in transit passes.'<sup>5</sup> Transit routes through transit states may be long and available transport infrastructure could be poor. These inevitably make transportation costly. Security of transit will also depend on the security situation of transit state(s) so that security challenges in the transit state(s) inextricably take their toll on the movement of goods to and from the sea ports. These challenges and few others make landlocked states less competitive in international trade which is a major contributor to national development. Due to these challenges, landlocked states had in the past made efforts to have the issues involved addressed at the international level. Landlocked states did not only aspire to a right to free access to and from the sea in order to participate in international trade, but also sought for a universal treaty on the matter.<sup>6</sup> As will be seen presently, various international instruments were prepared at the behest of the international community of states in a bid to address the question of access for landlocked states to the sea, the last being the United Nations Convention on the Law of the Sea (UNCLOS), 1982.<sup>7</sup> This paper will examine the constraints faced by landlocked states as a result of their lack of direct access to the sea. It will appraise the efforts made at the international plane before and under UNCLOS to ensure that, despite their disadvantaged geographical location (which is not their making), those states could still access the sea with as little difficulty as possible. The paper will then critically evaluate the extent to which those efforts made by the international community of States to ameliorate the inconveniences of landlockedness have achieved that objective.

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<sup>1</sup> Art. 9(4), Annex III, United Nations Convention on the Law of the Sea, 1982 (hereinafter 'UNCLOS').

<sup>2</sup> C. Meza, C. li, L. koodlur & Others, Energy Policy of Landlocked Countries, IT WAS Science and Diplomacy Workshop on Innovative Energy Policies for Sustainable Future, 2013, 1.

<sup>3</sup> See generally, J. Andrassy, 'International Law and the Resources of the Sea' (Columbia: Columbia University Press, 1970) 13-31; See also K. Uprety, 'Landlocked States and Access to the Sea: An Evolutionary Study of a Contested Right' (1994) *Dick. J. of Int'l L.*, 401-496.

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

<sup>5</sup> Art. 24(1)(b) UNCLOS.

<sup>6</sup> Uprety (n 3) 203.

<sup>7</sup> The Convention was adopted in Montego Bay, Jamaica in 1980 at the end of the Third United Nations Conference on the Law of the Sea (UNCLOS III).

## **2. Constraints on Trade and Development**

For economic progress, every state requires, not just international trade, but also cost-effective international trade. In order to survive, all countries must be in a position to compete favourably in the world market.<sup>8</sup> But the fact of transit through another or other states for the purpose of having access to the sea subjects landlocked states to challenges in trade and the use of the resources of the sea, challenges unknown to coastal states. As already said, transit routes could sometimes be long, spanning from within the landlocked state through the transit state or states (in the case of double landlockedness), to the seaport. Since they do not have their own sea-coasts, and therefore do not have their own seaports, international trade is hardly competitive for landlocked states.<sup>9</sup> Their trade is inhibited by lack of direct access to the sea. According to UNCTAD, lack of access to the sea constitutes a major challenge for the economic and social development of a country.<sup>10</sup> As a result, many landlocked countries are said to have some of the lowest growth rates in the world,<sup>11</sup> and 'do worse than their maritime neighbours in each of the Human Development Indicators (HDI).<sup>12</sup> Due to long distances needed to be covered before accessing the sea, and sometimes procedural difficulties in the transit state, both speed and flexibility in trade with other nations are lost, resulting in lack of competitiveness in international trade.<sup>13</sup> These economic challenges are worse for developing landlocked states which, in addition to their own poor transport infrastructure, must also contend with similar transport infrastructure in the transit state or states which are also likely developing countries. In some cases, the economies of both the landlocked state and the coastal state are not complimentary but competitive. This is especially so where both countries have same exports.

Aside from costs arising from long transit routes and possibly poor transport infrastructure, landlocked states are, in addition, faced with increased costs in international trade resulting from the need for warehousing stock, delays in ports, and often payment of a portion of their transport costs in convertible currencies.<sup>14</sup> Those countries also have difficulties attracting Foreign Direct Investment (FDI) because investors make transport costs a very important consideration in their investment locations.<sup>15</sup> There are also the challenges of availability of suitable transportation infrastructure in the transit, a factor over which the landlocked state has no control, and high customs duties that the transit may impose for movement of goods through its territory. Transit states could also use their strategic geographical location as an economic or political leverage against their landlocked neighbours.<sup>16</sup> Aside from these, there are also sometimes legal and administrative hurdles placed on landlocked countries' trade by their coastal neighbours.<sup>17</sup>

All these disadvantages do have the potential to adversely affect the economies of landlocked states because they considerably reduce trade for those states compared to the volume of trade that would otherwise be the case in the absence of borders.<sup>18</sup> According to UNCTAD, the majority of these countries suffer from all the major obstacles that confront the least developed countries,<sup>19</sup> suggesting a connection between landlockedness and underdevelopment. These disadvantages are even likely to pose greater economic challenges for developing landlocked countries considering that, aside from the fact of landlockedness, they also have to contend with poor infrastructure not only in their own states, but also in the transit states which further increases transport costs.

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<sup>8</sup> Kishor Uprety, *The Transit Regime for Landlocked States* (The World Bank, 2006) 4.

<sup>9</sup> K. Uprety, 'From Barcelona to Montego Bay and Thereafter: A Search for Landlocked States' Right to Trade through Access to the Sea- A Retrospective Review' (2003) 7 *Singapore Journal of International & Comparative Law*, 201.

<sup>10</sup> UNCTAD, Study on the Establishment of a Fund in Favour of the Landlocked Developing Countries, UN ESCOR UNCTAD, at 2, UN Doc. E/5501 (21 May 1974).

<sup>11</sup> *Ibid.*

<sup>12</sup> Uprety (n 8) 18; Michael L Faye and Jeffrey D Sachs et al, 'The Challenges Facing Landlocked Developing Countries' <<http://www.eldis.org/document/A45737>> accessed 4 February 2022; Kakana Sipangule, 'Trade Needs Ports' <<http://www.dandc.eu/en/landlocked-developing-countries-struggle-high-trade-costs-and-depend-transit-countries>> accessed 4 February 2022.

<sup>13</sup> Kishor Uprety, *The Transit Regime for Landlocked States* (The World Bank, 2006) 14.

<sup>14</sup> *Ibid.* at 202; R. Makil, 'Transit Right of Landlocked Countries: An Appraisal of International Conventions, (1970) 4 *Journal of World Trade Law*, 35.

<sup>15</sup> R. Carcamo-Diaz, *Towards Development in Landlocked Economies* (Santiago: United Nations, 2004) 10.

<sup>16</sup> See A. Mpazi Sinjela 'Freedom of Transit and the Right of Access for Land-locked States: The Evolution of Principle and Law' 12(31) *GA. J. INT'L & COMP. L.*, 31, 31. See also ... Tandon, 'The Transit Problem of Uganda within the East African Community' in Z Cervenka ed., *Landlocked Countries of Africa* (.....) 90

<sup>17</sup> R. Makil, 'Transit Right of Land-locked Countries: An Appraisal of International Conventions (1970) 4 *J. World Trade L.*, 35; Michael L. Faye et al, 'The Challenges Facing Land-locked Countries (2004) 5 *J. Human Dev.*, 40.

<sup>18</sup> Carcamo-Diaz, *supra* (n 7) 12.

<sup>19</sup> UNCTAD, Transport Strategy for Landlocked Developing States, U.N. Doc. E/CN. 14/TRANS/29, 24 August, 1996, 8.

### 3. Efforts made by the International Community

Right from the earliest debate on the problem of landlockedness, there had been a dichotomy of stance between landlocked states on the one hand, and transit states on the other hand. While the former conceived access to the sea as a right, the latter considered it an economic principle and not a right in international law.<sup>20</sup> While the former conceived that access and transit should be a right, the latter considered them privileges. The shared challenges of landlockedness necessitated cooperation among landlocked states in pursuit of an international legal order that would recognise access and transit as rights, and that would guarantee those rights. In response, the international community beginning from 1921 sought ways to address and resolve the issue of access to and from the sea for states locked in by land. Acting under the auspices of first, the League of Nations, and later, the United Nations, four international instruments were prepared and adopted prior to UNCLOS by the international community of states which dealt, either exclusively or in conjunction with other matters, with the issue of access of landlocked states to and from the sea. These are the Statute on Freedom of Transit 1921,<sup>21</sup> the General Agreement on Tariffs and Trade 1948,<sup>22</sup> the Geneva Convention on the High Seas, 1958,<sup>23</sup> and the Convention on Transit Trade of Landlocked States, 1965.<sup>24</sup> These international instruments sought, in varying extents, to secure and assure landlocked states, the freedom and right of access to and from the sea.

#### The Barcelona Statute on Freedom of Transit, 1921

The Covenant of the League of Nations required nations to make provisions for ensuring and maintaining freedom of communication and transit.<sup>25</sup> It also established the Organisation for Communication and Transit (OCT) which was saddled with the responsibility of devising measures to ensure and facilitate communication and transit among states. The work of the Organisation led to the adoption of the text of various conventions, including the Barcelona Statute on Freedom of Transit. The Statute was adopted 'primarily to alter the economic consequences of the principles of nationalities applied, *strictum jus*, by the Treaty of Versailles. The adoption of the Statute was necessitated by the need to have an international transit regime that would guarantee communication among the landlocked states of Europe that had emerged after the dismemberment of the Austro-Hungarian Empire. The Statute required all States Parties to facilitate freedom of transit by rail or internal navigable waterways in territories under their jurisdiction which are convenient for international transit.<sup>26</sup> By the statute, States Parties expressed their recognition of the right of landlocked states to transit through neighbouring territories. To that extent, the Statute allowed the charging of only reasonable tariffs on traffic in transit, irrespective of the point of departure or destination of the traffic. Whatever tariff that was fixed by a transit state must be such that would facilitate and not inhibit international traffic. Equally, tariff, facilities for transit or restrictions imposed on transit may not depend directly or indirectly on the nationality or ownership of vessels, or means of transport utilised for a journey.<sup>27</sup> The Statute of Barcelona therefore tried to equalize the opportunity of transit through transit states to and from the sea between landlocked states and transit states. It sought to ensure that the point of departure or destination of any traffic through a transit state as well as the nationality or ownership of the means of traffic are no considerations in the applications of tariffs and restrictions. The Statute, however, permits departure from the principle laid down under it for international traffic in certain circumstances. For example, a State Party could depart from the provisions of the Statute for a limited time where the security and vital interests of the transit state so necessitate. A transit state may also depart from the principles and refuse transit of goods or passengers for reasons of public health or public security. It could also refuse transit under the authority of general international conventions or pursuant to decisions of the League of Nations.

While refusal of access to a landlocked state by a transit state on the authority of general international conventions or pursuant to decision of the League of Nations pose no problems (since such refusal would be in accordance with international law), the liberty to refuse transit for a limited time for the other reasons allowed by the Statute present some difficulties. Firstly, the Statute does not define what constitutes limited time during which a transit state could refuse access. A transit state could, therefore, exploit this lacuna in the Statute to deny needed access for an indefinite or prolonged period of time. Secondly, a transit State could for reasons other than public health and national security refuse access while presenting same as reason for the refusal. This is because the determination whether grant of access will likely endanger public health or security is the preserve of the transit state. Aside from these possible difficulties,

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<sup>20</sup> Uprety (n 3) at 207.

<sup>21</sup> The treaty was signed in Barcelona on 20 April 1921.

<sup>22</sup> The GATT was signed on 30 October 1947 by 23 countries.

<sup>23</sup> The Convention was done at Geneva on 29 April 1958 and entered into force on 30 September 1962.

<sup>24</sup> Done at New York on 8 July 1965 and entered into force on 9 June 1967.

<sup>25</sup> Art. 23e Covenant of the League of Nations.

<sup>26</sup> Art. 2 Statute of Barcelona.

<sup>27</sup> *ibid*, art. 4.

the Barcelona Statute restricts transit to water and rail transport.<sup>28</sup> It does not cover transit by land other than rail and air. This is a limitation on the transport options available to landlocked states in the movement of goods and passengers to and from the seaports, through transit states.

### **The General Agreement on Trade and Tariffs (GATT)<sup>29</sup>**

The GATT was an agreement that sought to minimize barriers to international trade by eliminating or reducing quotas, tariffs, and subsidies while preserving significant regulations. It was intended to boost economic recovery after World War II through reconstructing and liberalizing global trade. Unlike the Barcelona Statute, it does not exclusively deal with transit for landlocked states. The only provision in the Agreement dealing with transit is found in article 5 thereof. Though making no direct reference to states without access to sea, article 5 provides for freedom of transit through the territories of a contracting party. The article provides:

There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any other circumstances relating to the ownership of goods, of vessels or of other means of transportation.

Thus, for States Parties to the GATT, a contracting state could make transit through any other contracting state for the purpose of having access beyond the frontiers of the contracting transit State. It does not matter the flag flown by, or the ownership of the vessel or other means of transportation by which transit is made, or the ownership of the goods involved in transit. Accordingly, the transit of goods from the territory of a contracting party through that of another contracting party was guaranteed. Unlike the Barcelona Statute which limits transit to railways and waterways, the GATT allows overland transport and air transit of goods,<sup>30</sup> whichever route is most convenient. The Agreement therefore widens the transport options of landlocked states in the transportation of goods through transit states. Except in the case of infringement of applicable customs laws and regulations, traffic coming from or going to another contracting party shall not be subjected to unnecessary delay or restriction by the contracting transit State.<sup>31</sup> Such traffic is also 'exempt from custom duties or other charges imposed in respect of transit except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.'<sup>32</sup> However, article 5 of the GATT (the sole article on transit) does not cover transportation of persons which is an essential aspect of transit, but only of goods (including baggage).<sup>33</sup> The whole article is dedicated to transit for merchandise through contracting parties without regard to persons. This could be due to the fact that the GATT is absolutely a trade agreement with the emphasis on the free movement of goods across state borders and the reduction of tariffs.<sup>34</sup> With respect to free transit of goods through transit states, therefore, the GATT had limited application as it applied only between contracting parties many of which were not landlocked states.

### **Geneva Convention on the High Seas**

In 1958 the U.N. convened the first United Nations Conference on the Law of the Sea.<sup>35</sup> During the 11<sup>th</sup> Session of the Conference, the United Nations General Assembly (UNGA) recommended to the Conference of Plenipotentiaries that a study be conducted on the problem of States without access to sea.<sup>36</sup> Pursuant to the recommendation, the Conference established the Fifth Committee to examine the regime of free access to the sea and to produce a draft-convention which was hoped to become part of the general codification of rules relating to the regime of the sea.<sup>37</sup> The Committee's discussions revolved mainly around two draft texts submitted by two groups of states. The first was

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<sup>28</sup> See article 2 of the Statute.

<sup>29</sup> The Agreement was signed by 23 countries in October 1947 and entered into force on 1 January 1948 in accordance with the terms of the protocol for provisional application dated 30 October 1947. Though an agreement, the GATT was also an organisation. It was in place from 1947 to 1993 when it was replaced by the World Trade Organisation (WTO).

<sup>30</sup> See art. 5, paragraph 7 GATT.

<sup>31</sup> *Ibid.*, art. 5, para. 3.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, art. 5, paragraph 1.

<sup>34</sup> See preamble to the GATT.

<sup>35</sup> The Conference was convened by United Nations General Assembly Resolution 1105(XI) of 20 February 1958. It held in Geneva from 24 February to 17 April 1958.

<sup>36</sup> See generally, Martin Ira Glassner, 'Access to the Sea for the Developing Landlocked States' (1970) *Uprety* (n..) 433.

<sup>37</sup> See Memorandum Concerning the Question of Free Access to the Sea of Landlocked Countries, U.N. Doc. A/Conf.13/29 and add. 1 (1958); 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*, 206

a group of 19 states of which 11 were landlocked states,<sup>38</sup> while the other was a group comprising the coastal states of Italy, The Netherlands and the United Kingdom.<sup>39</sup> The two groups were dichotomized on many principles concerning access to the sea for landlocked states. While landlocked states wanted a clear right of access to sea through transit states, coastal states expressed their reluctance to accept access through transit states as a right. Coastal states suggested, among others, the adoption of a non-binding 'resolution' on the free access to the sea of landlocked states rather than a binding 'convention'.<sup>40</sup> Unable to reach a compromise between the two texts, the Fifth Committee adopted a draft presented by Switzerland which it considered a compromise draft. This draft text became article 3 of the Convention on the High Seas, the only article in the Convention on access to sea for landlocked states. The article provides:

1. In order to enjoy the freedom of the seas on equal terms with coastal states, states having no sea coast should have free access to the sea. To this end States situated between the sea and a state having no sea coast shall by common agreement with the latter, and in conformity with existing international conventions, accord:
  - (a) To the State having no sea coast, on a basis of reciprocity, free transit through their territory; and
  - (b) To ships flying the flag of that State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of ports. ...

A close scrutiny of the provisions of article 3 would show that the article comes short of creating a right of access to sea of landlocked states through transit states. While it aspires to enjoyment of the 'freedom of the seas on equal terms with coastal States', the article provides that states with no sea coasts 'should have' free access to the sea. This, it is submitted, makes free access under the Convention permissive rather than peremptory. It also subjects access to agreement between landlocked states and transit states on the basis of reciprocity and not as a matter of right. It could therefore be safely concluded that the Geneva Convention on the High Seas failed to meet the aspiration of landlocked states which was a *right* of access to sea through transit states.

#### **The Convention on the Transit Trade of Landlocked States, 1965 (New York Convention)**

The New York Convention became necessary following continued, unrelenting pressure asserted by landlocked states for a recognized right of access to and from sea. In response to the demands of landlocked states, the U.N. in 1965 organized a conference in New York with the aim of producing and adopting a convention on transit trade of landlocked states. At the end of proceedings at the conference, the New York Convention was signed on 8 July 1967 and it entered into force on 9 June 1967. It is the only international convention that exclusively addresses the transit trade challenges of inland states with all its 16 substantive articles dwelling on the matter of transit. Under article 1 of the Convention, the convention is to apply only to traffic in transit between landlocked states and maritime ports. The Convention defines 'traffic in transit' as the passage of goods 'throughout the territory of contracting states, between a landlocked state and the sea, when this passage is a portion of a complete journey comprising a sea transport which precedes or follows directly the passage.'<sup>41</sup> To constitute traffic in transit, therefore, the traffic must be a part of the journey which either precedes a sea transport or follows it through the territory of a contracting state. The Convention affirms that 'recognition of the right of each landlocked State of free access to the sea is an essential principle for the expansion of international trade and economic development.'<sup>42</sup> It provides that '[f]reedom of transit shall be granted under the terms of this Convention for traffic in transit and means of transport.'<sup>43</sup> The Contracting States are to take measures for regulating and forwarding traffic across their territory and such measures shall facilitate traffic in transit on routes mutually acceptable for transit by the Contracting Parties.<sup>44</sup> To prevent the restriction of free lawful transit on any grounds, the Convention prohibits 'discrimination based on the place of origin, departure, entry, exit or destination or any circumstances relating to the ownership of the goods or the ownership, place of registration or flag of vessels, land vehicles or other means of transport used.'<sup>45</sup> Accordingly, so long as transit is lawful, it is not to be restricted or refused by a transit Contracting State in a manner discriminatory against the landlocked state. A transit state may not, for example, restrict carriage by a landlocked state through its territory to only vessels flying its own flag, or owned by its nationals.

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<sup>38</sup> See *Acts of the U.N. Conference on the Law of the Sea* (Preparatory Document, 1958), Vol. 1, at 84-85.

<sup>39</sup> *Ibid.*

<sup>40</sup> Uprety (n 3) 207.

<sup>41</sup> *Ibid.*

<sup>42</sup> Art. 2(1) UNCLOS.

<sup>43</sup> Art. 2(1) New York Convention

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

As a matter of fact, transit states are obligated under the Convention to prevent difficulties that may occur during transit which may impede traffic in transit. They are to provide, for examples, storage facilities at least equal to their own,<sup>46</sup> to avoid delay in transit,<sup>47</sup> and to ensure the safety of both the goods and the route of transit.<sup>48</sup> Transit states could, however, refuse transit for ‘... goods of a kind of which the importation is prohibited, either on grounds of public morals, public health or security, or a precaution against disease of animals or plants or against pests...’<sup>49</sup> Under article 11(4), a Contracting State could also take any action necessary for the protection of its ‘essential security interests.’ It could therefore refuse or restrict access if its national security is thereby threatened. Unlike the treaties before it on the matter of transit for inland states, the New York Convention provides not only transit for goods, but also passage of persons whose movement is necessary for traffic in transit through the territory of a transit states. It therefore recognizes the imperative of free movement of persons through the territory of transit states without which traffic in transit is impossible. Such movement of persons is, however, subject to the authorization of the transit state in accordance with its laws, rules and regulations.<sup>50</sup> Thus, any breach of the laws and regulations for such movement by persons whose movement across the territory of the transit state is necessary for traffic in transit could be restricted.

Regarding the rules for use of means of transport through the transit state, the Convention provides that such modalities are to be established by ‘common agreement’ among the Contracting States concerned.<sup>51</sup> The Convention therefore provides the international framework for freedom of traffic in transit and leaves Contracting States to finalise on the rules for use of means of transport when passing across part or through the whole territory of Contracting States. In the event that Contracting States fail to reach agreement, a commission would be appointed on the request of either party to arbitrate the matter.<sup>52</sup> The provision on the common agreement of Contracting States for use of means of transport in transit, as an author has pointed out, ‘guarantees the rights of landlocked states in a way that neither the GATT nor the 1958 Convention on the High Seas could.’<sup>53</sup> It is submitted, however, that Contracting States having not reached agreement on, and included in the Convention rules for use of means of transport, agreements may in many cases fail to be reached between states. In the absence of agreement, a transit state may limit or altogether refuse access to sea through its territory until agreement is reached or until a commission has mediated. During the period when access was limited or refused, and if such period be prolonged, the landlocked state was bound to suffer economically.<sup>54</sup>

Aside from the difficulties that may arise as a result of states failing to reach agreement, challenges may also arise regarding the requirement of reciprocity of access provided under the Convention. Under article 15, landlocked states are to grant reciprocal rights of transit to coastal states. It is submitted that the requirement of reciprocity under the Convention is unnecessary. This is because the essence of landlocked state’s right of access through transit states is only to access the sea as a matter of economic necessity. A reciprocal right of access by coastal states into the territory of landlocked states is not for the purpose of accessing anything of which they are deprived by nature. A transit state may well restrict or refuse access on the ground that it is allowed no reciprocal right of access by a neighbouring inland state. The requirement of reciprocity may thus constitute an obstacle to unrestricted access for landlocked states.

The New York Convention therefore, farther than the conventions before it on the subject, recognized the rights of landlocked states to access the seas through the territories of coastal states and imposed obligations on transit states to facilitate free transit. Despite recognising this right, the Convention fell short of making right of access positive international law. It at best proclaimed an economic principle that, for the purpose of trade, inland countries would have free access to sea through transit coastal states. The Convention has had negligible impact because not many

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<sup>46</sup> Ibid., art. 6(1)

<sup>47</sup> Ibid., art. 7(1)

<sup>48</sup> Ibid., art. 11(2)

<sup>49</sup> Ibid., art 11(1)

<sup>50</sup> Ibid., art. 2(3)

<sup>51</sup> Ibid., art. 2(2)

<sup>52</sup> Ibid art. 16.

<sup>53</sup> P. Childs, ‘The Interests of Landlocked States in Law of the Seas’ (1972) 9(3) San Diego Law Review, 701, 713-14.

<sup>54</sup> This challenges this may pose could be illustrated with the impasse that occurred between Nepal and India after the expiration of their Treaty of Trade in 1970. While the two states were yet to reach another agreement, India was alleged to have imposed unreasonable restrictions on trade with Nepal and stopped supply of commodities (including essential ones) to Nepal. This state of affairs persisted for six months until the impasse was resolved. See .....Sarup, ‘Transit Trade of Landlocked Nepal’ (1972) 21 Comp. L. Q., 394; A. Mpazi Sinjela, ‘Freedom of Transit and the Right of Access for Landlocked States: The Evolution of Principle and Law’ 12(13) GA. J. INT’L & COMP. L., 31, 40.

states signed it, and many of those that did are not transit states, leaving landlocked states to continue in their search for solutions to their geographical disadvantage.<sup>55</sup>

### **The United Nations Convention on the Law of the Sea, 1982 (UNCLOS)**

At the Third United Nations Conference on the Law of the Sea,<sup>56</sup> landlocked states sought to have included in the Convention to emerge from the Conference a right of access to the sea by for them. They conceived access to sea through transit states as a right while transit states regarded it an economic principle rather than a right in international law.<sup>57</sup> The landlocked states' position prevailed at the Conference and access to sea was elevated to a right under UNCLOS. Under the Convention, landlocked states 'shall have the right of access to and from the sea' and 'shall enjoy freedom of transit through the territory of transit states by all means of transport.'<sup>58</sup> The Convention therefore expressly guarantees transit right of landlocked states through transit states to and from the sea. Unlike the 1958 Law of the Sea Convention on the High Seas which provided that 'states having no sea-coast should have free access to the sea,'<sup>59</sup> UNCLOS recognises the use of the territory of transit states by landlocked states as a right. Different from the Convention on the High Seas under which the use of the territory of a transit state by a landlocked state is subject to agreement between both states, transit under UNCLOS requires no agreement between the landlocked and transit states concerned. Agreement is only required with respect to the terms and modalities for exercising freedom of transit.<sup>60</sup> Furthermore, while under the Convention on the High Seas a transit state is to accord the landlocked state free transit through its territory on the basis of reciprocity, UNCLOS does not make the right of access subject to reciprocity by the landlocked state. Aside from the right of transit guaranteed under article 125 of UNCLOS, landlocked states are guaranteed other rights under the Convention. Under article 17, a ship flying the flag of a landlocked state is entitled to the right of innocent passage<sup>61</sup> through the territorial sea of a coastal state. Landlocked states are also to enjoy the right to freedom of the high seas.<sup>62</sup> High seas freedom means that the high seas are open to all states whether coastal or landlocked. The right to freedom of the high seas includes such high seas freedoms as navigation, overflight, laying of submarine cables and pipelines, construction of artificial islands and other installations, fishing and scientific research.<sup>63</sup>

#### **4. Is Access a Real Right?**

Although UNCLOS elevated access to and from the sea by landlocked states to transit states to a right under international law, the right is also discounted by other provisions of the Convention. While section 125(1) recognises free transit as a right, article 125(2) subjects this right to the agreement of the landlocked state and the transit state on the terms and modalities for the exercise of the right of transit. Thus, though landlocked states are entitled to free transit, such transit is only according as the parties may agree. This means that the freedom of transit though termed a right under the Convention is far less than a right in practice. The requirement of agreement on the terms and modalities of access poses challenges. Firstly, the Convention supposes that agreement will in every case be reached by the States Parties concerned. A transit state may, however, prevent agreement from being reached on the terms and modalities of access. In the absence of agreement, access cannot be granted by the transit state. Where this is the case, the landlocked state may insist on access under article 25(1) of UNCLOS which recognises access to the sea as a right. Such situation could give rise to an international row. Secondly, a transit state may be willing to agree to only such terms and modalities that are inconvenient and unfavourable to the landlocked state. For example, the most difficult and costly route may be all that the transit state is willing to agree to, making trade not only difficult, but also costly for the landlocked state. Under article 25(3) of UNCLOS, transit states shall, in the exercise of their full sovereignty over their territories, take all measures necessary that the rights and facilities to be accorded landlocked states shall by no means infringe the legitimate interests of transit states. 'Legitimate interest' is left open-ended having not been defined under the Convention. It is submitted that various inhibitions could be ranged against landlocked states' international trade using 'legitimate interest' of transit states as excuse. This is especially so where the landlocked and transit states are in conflict. For example, in 1989 India (a transit state to landlocked Nepal) relied on legitimate interest to deny access to Nepal. The two countries at the time had some differences bordering on trade and political issues

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<sup>55</sup> Sinjela, 43.

<sup>56</sup> The Conference

<sup>57</sup> Uprety, (n 3) 207.

<sup>58</sup> Art. 125 UNCLOS.

<sup>59</sup> Art. 3 Convention on the High Seas, 1958.

<sup>60</sup> Art. 125(2) UNCLOS.

<sup>61</sup> Passage is said to be innocent so long as it is not prejudicial to the peace, good order or security of the coastal state through whose territorial sea passage is made.

<sup>62</sup> Art. 87 UNCLOS.

<sup>63</sup> Art. 87 *ibid*.

which had very little to do with the exercise of the transit right of Nepal.<sup>64</sup> In the 1960s, Southern Rhodesia (now Zimbabwe) closed its borders to Zambia and effectively cut Zambia's access to South African ports. This was done in retaliation for Zambia's support for the liberation movement.<sup>65</sup> In view of all these, it is clear that transit states are not really under any obligation to ensure transit for landlocked states to and from the sea under UNCLOS. The 'right' of landlocked states to free transit to and from the sea through transit states is therefore an 'imperfect right'.<sup>66</sup> For this reason, one author has concluded that article 25 of UNCLOS does not actually grant any new rights to landlocked states that were not there before the Convention.<sup>67</sup> This writer cannot agree more with him because a real right of access must be capable of enforceability rather than depend on the goodwill of the transit state. If it is whittled down by other rights of transit states recognised by law (as is the case under UNCLOS) it becomes a mere privilege lacking the force of law.

## **5. The Way Forward**

States are differently endowed by nature. The difference in the natural endowment of states accounts in part for the interdependence of states. No state, therefore, is capable of meaningful existence in isolation. It is also a truism that no state became endowed with any natural resource whether mineral resource, arable land or sea by its own effort. Flowing from this is the fact that no state became coastal or landlocked because of its own doing. It is submitted that the sea, the main medium of international trade, must be seen as one of the commons heritages of mankind and access to it through a transit state must not be denied a landlocked state. The global commons are 'areas of the globe designated by the international community as falling outside national jurisdiction and the resources of which are not amenable to the exclusive appropriation of any state.'<sup>68</sup> The use of the seas for the purpose of international trade should be accorded a common heritage status as such other commons as the international seabed,<sup>69</sup> the outer space,<sup>70</sup> and Antarctica.<sup>71</sup> Aside from the right of all states to participate in the distribution of the resources of the international seabed, all states whether coastal or landlocked are, under UNCLOS, entitled, subject to agreement with coastal states, to exploitation of the surplus of fisheries resources in a coastal state's EEZ.<sup>72</sup> Under the Convention, when a coastal state has reached its harvesting capacity in the exploitation of the fisheries resources of its EEZ, it is required to enter into agreement with other states (coastal or landlocked) for the optimal exploitation of the surplus. This way, though landlocked, a state could still participate in the exploitation of fisheries resources in a coastal state's EEZ. The earliest origins of the common heritage principle have been traced, among others, to religious and natural law underpinnings.<sup>73</sup> All religious traditions emphasise the promotion of peace and the resolutions of disputes; the importance of generosity, of sharing of wealth with the poor and the unfortunate, even if they have not earned it.<sup>74</sup> They enjoin us to freely give that which we have freely received.<sup>75</sup> They emphasise the common humanity of mankind. Since no state can survive without trade, it is only of our common humanity that, for the purpose of trade, the sea becomes a common heritage of mankind to which all landlocked states are entitled as of right. If this is so, then the right of access to the sea by landlocked states through transit states must be seen as a right appurtenant to the right to use the sea for trade. The rights of landlocked states to participate in the surplus of the fisheries resources of the EEZ of coastal states, to participation in the resources of the international seabed, and to the use of the high seas become meaningless without a right of access to the sea through transit states. Access should therefore be elevated to a real right with the landlocked

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<sup>64</sup> SP Subedi, *Dynamics of Foreign Policy and Law (A Study of Indo-Nepal Relations)* (Oxford University Press, 2005) 69.

<sup>65</sup> Sipangule, above.

<sup>66</sup> RK Rana, *Right of Access of Landlocked States to the Sea by the Example of Bilateral Agreement between Landlocked State – Nepal and Port State – India* (LLM Thesis, University of Tromsø, 2010) 15.

<sup>67</sup> Uprety (n 3) 216.

<sup>68</sup> V. Iwunze, 'A Critical Examination of the Benefits Accruing to Third World Countries under the United Nations Convention on the Law of the Sea, 1982' (Ph. D Thesis, University of Uyo, 2018) 59. On common heritage of mankind, see further J Frakes, 'The Common Heritage of Mankind and the Deep Seabed, Outer Space and Antarctica: Will Developed and Developing Countries Reach a Compromise?' (2003) *Wisconsin International Law Journal*, 409-434.

<sup>69</sup> Art. 136 UNCLOS.

<sup>70</sup> Art. 11 of the 1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies, 5 December, 1979, 1363 U.N.T.S. 3.

<sup>71</sup> Though Antarctica is not yet declared a common heritage of mankind, it has been recommended that the common heritage approach be considered in a future international design for Antarctica. See, example, U.N. Doc. A/C/1/12PV.2 (1983), 38<sup>th</sup> Sess., 1<sup>st</sup> Comm., Summary Record of the 42<sup>nd</sup> Mtg. (the comments of Mr. Abidin of Malaysia).

<sup>72</sup> Art. 62(2) UNCLOS.

<sup>73</sup> See JE Noyes, 'Common Heritage of Mankind: Past, Present and Future' (2011-2012) 40 *Denv. J. Int'l L& Pol'y*, 457-458.

<sup>74</sup> The Holy Bible calls on owners of property to leave a portion of the yields of their land to aliens, orphans and widows: *Deuteronomy* 24: 19-21; 15: 7-8; *Leviticus* 19:10; *Proverbs* 25:21. The Holy Book also calls on Christians to share material wealth with the less fortunate: *Matthew* 5: 24; *Luke* 18: 22. The Holy Koran also explains true piety or righteousness as including the giving of one's substance, however cherished, to kinsmen and orphans, the needy, the traveller, beggars: *Koran* 2:177.

<sup>75</sup> The Holy Bible, *Matthew* 10:8.

and transit states reaching agreement on the responsibilities of both states in the maintenance of transit routes. Except for acts of aggression or other acts of the landlocked state which ascertainably jeopardize the security of the transit state, any other wrongful act of the landlocked state during transit should entitle the transit state, not to a right to deny access, but to a right to make an international claim against the transit state.

## **6. Conclusion**

The importance of access to the sea for all states can hardly be over-emphasised. This is because of disparities in the resources of states which make them dependent on one another through trade. Landlockedness, it has been shown in this paper, is a major challenge for states without a sea-coast due to the impediments it places on trade. Efforts made in the past by the international community to guarantee a right of access to the sea for landlocked states failed to elevate access to a real right enforceable by landlocked states. It was expected, especially by developing their world states, during negotiations at the Third Law of the Sea Conference that the convention that would emerge from the Conference would guarantee a right of access for landlocked states. UNCLOS, for the first time, provided for the 'right' of landlocked states to access the sea through transit states. However, other provisions of the Convention on access to the sea have eroded the very substance of such right of access by subjecting it to other determinations by transit states. This has left landlocked states with the shell of a right of access to the sea. The consequence is that transit states could still deny or limit access to the sea for landlocked states by taking advantage of loopholes inherent in UNCLOS. As already pointed out, landlocked states, especially developing landlocked states face various trade challenges occasioned by lack of their own sea-coasts. The challenges they face as a result fade to insignificance when compared to a total denial of access by transit states on grounds presently permitted in the law of the sea. It is hoped that the international community of states will in the future accord access to sea for landlocked states the status of a real, enforceable right on considerations of our common humanity.