



UNCLOS AND GOOD ORDER AT SEA: A NORMATIVE FRAMEWORK

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INTRODUCTION



“...but the crucial matter is that in the end product, the Draft Convention had to balance the various economic, political, security and social interests delicately. And this is what makes UNCLOS III unique in the history of multilateral treaty negotiation. Almost each and every provision is so delicately balanced against others that most observers believe that reactivating one or two issues may in fact lead to a chain reaction that may reduce the monumental draft convention to a rubble”

(Prof C. Odidi Okidi; Nov,1982)



INTRODUCTION



- * *'Africa has 14 landlocked countries among which are some of the least developed of the underdeveloped world. Therefore, here is the largest number of states with problems of transportation, access to sea, technology for fishing and mining, access to the resources themselves both juridically and physically and lack of capital for investment in related areas. Among the African countries are some of the leading exporters of land based minerals similar to those likely to be recovered from the sea bed'*
- * (C. O. Okidi 1982)



INTRODUCTION





INTRODUCTION



- ❑ Hitherto the debate on piracy off the coast of Somalia has been confined to counter piracy operations and other measures taken to react to piracy e.g prosecutions in domestic jurisdictions.
- ❑ Not much in-depth discussion on the underlying **causes of piracy**; the overall concept of good order at sea(GOAS); and the role, if any, of the interests of regional landlocked states (LLSs) in GOAS.
- ❑ In order to objectively discuss the role of LLSs in maintaining GOAS ,there is urgent need to formulate a theoretical basis for the elements that constitute the broad concept (of GOAS).



INTRODUCTION



- The suggested theoretical paradigm adopts an enlarged meaning of security as viewed within the larger regional context(s) based on:
 - ✓ internationalization of national affairs, conflicts and politics; and
 - ✓ Interdependence including contemporary complex interdependence.
- The **UNCLOS** framework is seen as part of the complex web of interdependence in which the interests of LLSs influence, and are in turn influenced by, GOAS.



THEORETICAL FRAMEWORK



□ The Expanded Concept of Human Security

- ✓ Since the beginning of the 21st Century the term “security” was essentially contested and underwent tremendous redefinition.
- ✓ The redefinition was meant to capture (i) the special security perspectives of third world states;(ii) the broadened concerns of the concept ; and (iii) the effect of globalisation in all its concomitant aspects.
- ✓ The state centric perspective of security has now changed to encompass not just states but also individuals and persons and the environment in which the state operates-**human/societal security.**



THEORETICAL FRAMEWORK



- ✓ The concept of human security therefore focuses on the individual and how to mitigate the threats to individuals security.
- ✓ The expanded concept encompasses an array of factors in the wider environment such as the economy, food, health, environment and politics that threaten an individual's security.
- ✓ All these factors are interdependent in a complex way and therefore human security cannot exist where one of the parameters is not satisfied; we cannot talk of political independence (security?) in the absence of economic security **or** economic independence (security) in the face of a threat to the environment (environmental security).



HISTORICAL CONTEXT OF UNCLOS



- ❑ The seas have been the basis of civilization, commerce and navigation.
- ❑ The seas have therefore performed three functions: **medium of communication** ; **reservoir of resources**; and **sink of waste**-hence the need of legal rules.
- ❑ **UNCLOS** seeks to provide a “constitution” for ocean governance; broad framework for global ocean governance.
- ❑ African states played a key role in the adoption of UNCLOS; indeed when a vote on UNCLOS became inevitable at UNCLOS III (1982) all independent African states voted affirmatively.



HISTORICAL CONTEXT OF UNCLOS



- ❑ Some of the African states were key in the inclusion of some of the key provisions of UNCLOS:
 - ✓ EEZ (by Kenya);
 - ✓ modification of the concept of innocent passage through the TS and straits; and
 - ✓ the concept of archipelagic states.
- ❑ Some of these concepts were designed to benefit African LLSs: the **OAU** made a declaration to include the right of access to the sea by LLSs and the right to exploit marine resources in the EEZ of coastal states.



HISTORICAL CONTEXT OF UNCLOS



- ❑ For African states **UNCLOS** “constituted an opportunity to break away from their colonial past and to engage in a new kind of regime-building expected to contribute to the economic and social advancement of all peoples , effectively a new international economic order” (**Aldo Chirop** et el 2008).
- ❑ Benefits of UNCLOS were expected to be multidimensional; contributing to the economic, political and social security of newly emergent African states.
- ❑ It has been contended that UNCLOS favours coastal states to the disadvantage of landlocked states (see balancing of rights in respect of TS and EEZ)



HISTORICAL CONTEXT OF UNCLOS



- ❑ UNCLOS is a carefully structured compromise between various (historical) interests; those who advocated for open seas (*mare liberum*) and advocates for closed seas (*mare clausum*) ; between landlocked states and coastal states; and between major coastal states and smaller coastal states.
- ❑ It can therefore be argued that **UNCLOS** is the only comprehensive framework that ensures human security by proper governance and management of the oceans and marine resources.

(See head note as adopted from C.O. Okidi- 1982).



GOAS vis a vis HUMAN SECURITY



- ❑ What exactly entails GOAS? Definition lacks clear contour delineations and it may thus suffer the danger of subjective interpretation.
- ❑ RSIS policy paper(e.g) on GOAS in South East Asia, focuses narrowly on safety and security of shipping and development of marine resources. Is the focus sufficient or limited?
- ❑ Viewed from the prism of the expanded concept of human security, then GOAS provides an objective conceptual framework through which the interests of LLSs can be examined.
- ❑ Effects of threats from the sea extend landward and vice versa! The threats from the sea are interlinked with challenges in hinterland.



RIGHTS OF LLCs UNDER UNCLOS FRAMEWORK



RIGHTS SPECIFIC TO LLSs

- ❑ Right of access/transit to and from the sea in order to exercise their rights under UNCLOS(Art 125) .
- ❑ Terms of freedom of transit are to be agreed between LLSs and TSs through bilateral, sub-regional or regional agreements.
- ❑ Right for the traffic in transit not to be subject to any customs duties, taxes or other charges except charges levied for specific services rendered in connection with such traffic (Art 127).
- ❑ Right to treatment that is equal to that accorded to other foreign ships in maritime ports(Art 131).
- ❑ Right to excess over surplus (MAC-HC=SAC) in the EEZ.



RIGHTS OF LLCs UNDER UNCLOS FRAMEWORK



GENERIC RIGHTS

- ❑ All ships (including land-locked states), enjoy the right of innocent passage through the TS; the passage must be continuous and expeditious (Art 17).
- ❑ All states enjoy the right of transit passage (continuous and expeditious) through international straits; it includes passage for the purpose of entering leaving and returning from a state bordering the strait(Art 37 and 38).
- ❑ All states, enjoy in the EEZ, the freedoms of navigation, over flight and of the laying of submarine cables and pipelines, and other lawful uses of the sea related to these freedoms (Art 58)



RIGHTS OF LLCs UNDER UNCLOS FRAMEWORK



GENERIC RIGHTS

- All states, enjoy in the High seas (a) the freedom of navigation;(b) freedom of over flight;(c) freedom to lay submarine cables and pipelines(d) freedom to construct artificial islands and other installations permitted under international law,(e) freedom of fishing, (f) freedom of scientific research (subject to the limiting provisions of UNCLOS).



RIGHTS OF LLCs UNDER UNCLOS FRAMEWORK





CHALLENGES FACING LLCs



- Lack of Direct Access to the Sea/Geographical Handicap.
- Remoteness from world markets.
- High trade transaction costs.
- Political situations in transit States.
- Conditions of infrastructure in LLSs and transit States.
- Security in the transit states.
- Lack of capital for investment.
- Disease and poverty.



LINKING GOAS TO CHALLENGES OF LLCs



- ❑ The concept of human security underscores the complex interdependent nature of phenomena affecting human security such as crime, conflicts, politics, national affairs and the environment.
- ❑ Some of the challenges facing landlocked states are interlinked with problems in coastal states as transit corridors.
- ❑ Some of the manifestations of lack of GOAS that threaten human security include: piracy and other forms of organized crime; IUU fishing; and pollution all of which have a link to challenges facing LLCs in East Africa.



LINKING GOALS TO CHALLENGES OF LLCs



- ❑ Piracy and other organized crimes
 - ✓ Adverse effects on commerce and trade;
 - ✓ Proliferation of arms in the region and the potential of fuelling conflict; and
 - ✓ Trafficking in persons, small arms and light weapons (SALWs), Drugs, and Illegal trade in natural resources and counterfeit goods



❑ IUU Fishing and Pollution

- ✓ Illegal exploitation of Marine Resources

(MAC- HC = SAC)

- ✓ Pollution of the Marine Environment

(destabilisation of ecosystem and depletion of resources)



CONCLUSIONS



- ❑ The **UNCLOS** framework secures the rights of regional LLSs in East Africa and by involving them in the management of the oceans and the resources therein.
- ❑ The rights of LLSs (in the **UNCLOS** framework) are therefore seen as part of the complex web of interdependence in which such interests influence, and are in turn influenced, by the GOAS in the Indian Ocean Region (IOR).
- ❑ It is in the interests of such LLSs of East Africa to effectively engage in finding solutions to lack of GOAS.