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LESSON FOR NIGERIA IN THE REGIME OF FREEDOM OF THE SEAS

· **Frank E. Akperegin [Graduate Candidate]** LLB, WDU Oghara) Graduate candidate, School of Postgraduate studies Benson Idahosa University Benin City. The author could be contacted at <akpereginf@gmailcom>

·**Professor Anya Kingsley Anya [Ph.D., B.L]** Doctoral Advisor and Head-Department of Public & International Law, Igbinedion University College of Law Okada
<anya.kingsley@iuokada.edu.ng> II <https://orcid.org/0009-0004-5549-1852>

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Abstract

The emergence of nation-States in historic time necessitated formulation of regulations to guide relations between States. One of such body of rules is the United Nations Convention on the Law of the Seas (UNCLOS III) 1982 which enunciated the principle of freedom to the use of the seas. The paper argued that the introduction of adequate provisions in the UNCLOS III, 1982 indeed allowed for freedom of the use of the seas, especially, inclusive of navigation; over flight; laying of submarine cables and pipes; construction of artificial islands and for some other purposes as well as examined the freedom principle under the UNCLOS III focusing on impacts on states' for instance, Nigeria, being a developing state. The authors further argued that the advanced States benefitted more from the free use of the seas than less developed or developing nations, by virtue of application of sophisticated technologies and supersonic science. The paper therefore maintained that this freedom of utilization of the seas has contributed to peaceful coexistence and cooperation between States. The paper concluded with recommendations for periodic review and close adherence to the UNCLOS III, 1982 for continued enjoyment of the freedom of the seas and for Nigeria as a coastal State to maximize the opportunity the freedom affords.

Keywords: Freedom of the Seas, convention, coastal state, sophisticated technology, sub-marine

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1. Introduction

The principle of the freedom of the seas credited to a Dutch scholar and lawyer, Hugo Grotius (1583-1645) was an expression already on the lips of people: belligerent and neutral.[1] Before then, there was a period when Spain and Portugal laid claims to the seas by virtue of the Bulls of Pope Alexander VI of 1443 and 1506.[2] Such unilateral claims and attendant problematic

1 Hugo Grotius., 'The Freedom of the Seas (Oxford University Press, 1916) 4 <https://oll.libertyfund.org/EBooks/Grotius 0049. pdf> accessed 9 February, 2024
2. Ibid

consequences finally came to a rest in 1982 when a universal order on the sea was improved by the Montego Bay Convention on the subject-matters.[3]

The deliberate effort to settle the issues in order to ensure orderly use of the seas started with the 1930 Hague Codification Conference through to United Nations Convention on Law of Sea 1958, 1960 and finally 1982. In other words the convocation of UNCLOS III, 1982 answered the age old historical question: 'whose is the bed of sea beyond the limit of national jurisdiction'?[4] Consequent on the above, there is need to examine the United Nations Convention on the Law of the Seas (UNCLOS III) 1982, most especially as it relates to the 'freedom of the seas,' as well as the restrictive exceptions to the freedom of the seas and thereafter, incidental lessons for Nigeria.

2. Theoretical Framework

An examination of the conceptual and theoretical framework on freedom of the seas will afford the opportunity to appreciate the investigation. The principle of the law of the seas under UNCLOS III, 1982 is hinged on Hugo Grotius theory which emphasized that nations could not appropriate to themselves the high seas as it naturally belonged to all.[5] This is otherwise known as 'The doctrine of the open seas.' The theory considers the seas a *res communis* in international law and should be accessible to all nations but incapable of appropriation.[6] Grotius theoretical argument in support of 'the freedom of the seas' was published in 1625 in his *Mare liberum*, even though such view was then not generally held.[7]

At a time in history, the sea was thought capable of being subjected to national sovereignties.[8] Then, Hugo Grotius theory emerged to refute the unjustified claims of nations like Spain and Portugal to the high seas, to the exclusion of foreigners therefrom.[9] He observed that:

> If … it was right to take up arms because innocent passage was refused across foreign territory, how much more justly will arms be taken up against those from whom the demand is made of the common and innocent use of the sea, which by the law of nature is common to all? …. If this case should be taken into court, there can be no doubt what opinion ought to be anticipated from a just judge… Let nothing be done in a public river or on its bank, by which a landing, or a channel for shipping be obstructed …. If anyone be prevented from navigating the sea, or not

[3] Charles E. Ochem and Chisom P. Ohajianya, 'An Appraisal of the Concept of Blue Economy and the Nigerian Maritime Industry,' in O. V. C. Okene, Nally Nwadei and GG Otuturu (eds.) *Credible Governance: Legal Essays in Honour of His Excellency, Henry Seriake Dickson, Esq* (Zubic Infinity Concept, 2020) 549
[4] Ibid
[5] Malcolm N Shaw., *International Law* (7th ed., Cambridge University Press, 2014) 17
[6] Ibid, at P. 400
[7] Norman D. Palmer and Howard C. Perkins, *International Relations* (3rd rev. ed, AITBS Publishers, 2010) 279
[8] Malcolm, Supra, P. 17
[9] Grotius, Supra

> allowed to sell or to make use of his own wares and products, he can bring an action for damages on that ground…[10]

Grotius' view which led to the theory of the freedom of the seas finally prevailed, partly because it accorded with wide interests of the North European States, which demanded freedom of the seas for the purposes of exploration and expanding commercial intercourse with the East.[11] The prevailing Dutch ideas as to free trade and the needs of an expanding commercial empire was nicely accorded by Grotius' open seas doctrine.[12]

3. The Scope and Development of UNCLOS III, 1982

The preamble to the UNCLOS III, 1982 simply provides that:

> The States parties desire to settle…all issues relating to the law of the sea and …as an important contribution to the maintenance of peace, justice and progress for all people of the world … a legal order for the seas and oceans which will facilitate international communication and will promote the peaceful uses…the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment…that the codification and progressive development of the law of the sea…will contribute to the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights and will promote the economic and social advancement of all peoples…in accordance with the purposes and principles of the United Nations as set forth in the Charter…

Having had a glimpse of the reason for the UNCLOS III, 1982, it is also equally important to look at some historical factors that contributed to its present completion. One of them was emergence of scientific and technological developments on the use of the high seas.[13] Another reason was the discovery of political and economic realities, necessitating an International Convention to discuss unsettled issues on the law of the seas.[14] To that end, the United Nations General Assembly decided in November, 1973 that the Seabed Committee work which had progressed significantly and sufficiently, be permitted to convocate a conference on the law of the sea, especially as its principles had been decided three years before.[15] Accordingly, the Committee was dissolved and the Sea Conference convened in New york, US from 3rd to 15th December, 1973.[16]

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[10] Ibid, at P. 85
[11] Malcolm, at P. 400
[12] Ibid
[13] Ochem and Ohajianya, Supra, at P. 551
[14] Ibid.
[15] Ibid.
[16] UNGA RES 3067 (XXVIII) 1973

Having discussed several topical issues and questions bordering on the seabed and ocean floor beyond the limits of national jurisdiction in its inaugural session, the Conference went through several stages from multiplicity of text to a single final text.[17] Finally, a call for a vote resulted to overwhelming adoption of the text known today as the UNCLOS III 1982, which established a comprehensive framework for the regulation of all oceans and sea space.[18]

The scope-treatise of the UNCLOS III 1982 is divided into 17 parts and nine annexes and provisions governing *inter alia*, the limits of national jurisdiction over ocean space, access, navigation, protection, and preservation of the marine environment, exploitation of living sources and conservation, scientific research, seabed mining and other exploitation of non-living resources and the settlement of disputes. It also establishes new international bodies to carry out functions for the realization of specific objectives.

The Convention allows for the establishment of a territorial sea of up to twelve nautical miles (12nm) in breadth, providing various methods for determining baselines and for distinguishing between territorial waters and internal waters. The traditional right of innocent passage through territorial water is recognized. The concept of archipelagic water was introduced for the sake of archipelagos States.

Beyond the territorial waters, the Convention allows the creation of an Exclusive Economic Zone (EEZ) of up to 200 nautical miles. The Convention allows the coastal State certain rights in the EEZ for the purpose of economic advantage, notably rights over fishing and exploitation of non-living resources, as well as concomitant limited jurisdiction in order to realize those rights. The land-locked States and geographically disadvantaged States must be given access to those resources of the zone. The Convention lays a broad framework for the peaceful accomplishment of this purpose, thereby making the sea a heritage of mankind and thus the concept of blue economy.

4. Freedom of the Seas

The ‘freedom of the seas’ long ago propounded by Grotius that the sea cannot be occupied like the land, and that it is free to all nations without control by none, found support in Article 87 (1) (2) of the UNCLOS III, 1982 to the effect that: The high seas are open to all States, whether coastal or land-locked…exercised under the conditions laid down by this Convention, and by other rules of international law… *inter alia*:

[17] Ochem and Ohajianya, Supra at P. 552
[18] Ibid, at P. 554

(a) 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…
(e) freedom of fishing, subject to the conditions laid down…;
(f) freedom of scientific research…
The freedoms shall be exercised by all States with due regard for
the rights under this Convention with respect to activities in the Area.

The summary provision articulated above, clearly pointed to the area of the seas where freedom can be exercised under the UNCLOS III, 1982, that is to say, the high seas which is 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.[19] Significantly, some judicial decisions lent support to article 86 of the UNCLOS III, 1982 as to the high sea and its freedom.

In the case of *United States of America v Louisiana*, the US Supreme court decided that 'the high seas as distinguished from island waters are generally conceded by modern States to be subject to exclusive sovereignty of no single nation.'[20] Furthermore, in the *Lotus* case (*France v Turkey)***,** the ICJ held that '… no state can exercise state sovereignty over any vessel on high seas.'[21] This freedom provisions in respect of the seas and its uses is to be enjoyed by all States of the world on equal rights basis in consonance with the rules governing activities in high sea. Some of these activities need to be examined.

I. Freedom of Navigation

Noteworthy of this freedom activity is the fact that the major mode of transportation through continents and countries for the purpose of trading at a time was by sea.[22]The reason for this means of transportation could be that most parts of the earth's planet is covered with seas and oceans making it easily possible to get from one place to another, navigating along the sea. Presently, navigation through the seas is still a norm in search of trade and commerce, especially now that vessels are of increased technology and speed.[23]

The navigational freedom of the seas is reiterated in the case of *Le Louis*,[24] where Lord Stowell decided that 'all nations have equal rights to the un-appropriated parts of the ocean [seas] for

[19] Article 86 of the UNCLOS III, 1982
[20] (1960) 363 US 1, 33
[21] **(**1927)
[22] Ochem and Ohajianya, Supra, at P. 555
[23] Ibid
[24] (1817) 2 DOS 210, 243

their navigation'. Further on the issue of the freedom of seas, is the *Mirianna Flora* case,[25] where an American Judge decisively declared: 'upon the ocean [seas] in time of peace, all possess an entire equality. It is the common highway of all appropriated to the use of all and no one can vindicate to himself [herself] a superior or exclusive prerogative there.'

Flowing from the above authoritative references, the freedom of navigation in the seas has indeed come to stay as Grotius, many years ago propounded it. In exercising this right, every state should sail, by flying its flag on the high seas.[26] The essence of doing so is to establish the existence of a genuine link to the shipping vessel and the State whose flag is being flied.[27] To that end, the flag State must effectively exercise its jurisdictional control in administrative, technical and social matters over ships flying its flag.[28] Sailing without flag as required in the provisions of the UNCLOS III, 1982, can lead to declaring such ship stateless.[29] That is to say, as a ship without nationality.

There are other requirements in exercising the navigational freedom of the seas, such as:

a. Taking and observing measures necessary to ensure safety at sea by operating seaworthy ships;

b. Manning the ship with trained crew members in line with labour conditions and applicable international legal instruments;

c. Equip the ship with signals to maintain communications and prevention of collision at sea;

d. Placing ship in charge of master, officers, and crew who are fully conversant with the international regulations of 'dos and don'ts' including reduction and control of marine environment of pollution.[30]

II. Restrictive Limitation to the Freedom of Navigation of the Seas

The principle of the freedom of the seas in respect of navigational right is not absolute. There are exceptional restrictions that can interfere with the free use of the seas. A State found wanting in them is liable to punishment provided in legal instruments in tandem with international laws.

[25] (1826) Wheaton 1, 43
[26] Article 90, UNCLOS III, 1982
[27] Article 91, UNCLOS III, 1982
[28] Article 94 UNCLOS III, 1982
[29] Article 92 of the UNCLOS III, 1982
[30] Article 94 of the UNCLOS III, 1982

Some of the restrictions associated with the principle of freedom of navigation include the following:

a. Prohibition of transportation of slaves.
b. Prohibition of maritime piracy.
c. Prohibition of illicit trafficking in narcotic drugs or psychotropic substances.
d. Prohibition of unauthorized broadcasting.[31]

In fact, piracy is one of the prohibitions to freedom of the seas. For example, it is a piratical act for, 'any illegal acts of violence, detention or…depredation committed for private ends by the crew or the passengers of a…ship…on the high seas, against another ship or aircraft … persons or property on board such ship or aircraft… in a place outside the jurisdiction of any State….'[32] Furthermore, a State involvement in this prohibited act of piracy, irrespective of the freedom of the seas, can lead to its ship or air-craft and property on board being seized, and persons on board arrested by effecting State whose court of law will determine the legal action to be taken against those acts.[33] For instance, the Canadian Criminal Code, for example, provides for the punishment of life imprisonment for any act of piracy such as stealing her ship or its cargo, starting a mutiny or inciting others to do so.[34] It should also be noted that the case of *Re Piracy Jure Gentium,*[35] afforded the Privy Council the opportunity to hold that: 'A person guilty of piracy has placed himself beyond protection of any State. He [she] is no longer a national, but *hostis humani generis.* The case showed clearly the seriousness of piracy acts and the incidental implication requiring all States to exercise jurisdiction over such offence.[36] It should be noted that seizure of ship or aircraft on account of piracy should be done by marked and identified authority being in government service. The usage of state warships or military aircraft is an example of marked and identifiable property of state authority. [37]

Furthermore, another instance that attracts prohibition to the freedom of seas navigational right is 'illegal traffic in narcotic drugs or psychotropic substances.' As a matter of fact, the illegal use of these substances has become and identified as the bane of most abnormal behaviour in our society. In an effort towards curbing the menace, it is required of all States to cooperate in

[31] Maritime Upgrading Studies Institute
[32] Article 101 of UNCLOS III, 1982
[33] Article 105 and 101 of UNCLOS III, 1982
[34] Section 76 of the Canadian Criminal Code
[35] (1934) AC 586
[36] Mohammad Naqib Ishan and Jan Ahmad Ibrahim Kulliyyah, *Freedom of Seas, Passage Rights and the 1982 UNCLOS* (Workshop on Maritime Diplomacy for Institute of Diplomacy and Foreign Relations, 7 December 2011) <www.scribd.com> accessed 11 February, 2024
[37] Article 107 of the UNCLOS III, 1982

suppression of trafficking in substances engaged by ships on the high seas contrary to international Convention.[38]

Unauthorized broadcasting from the seas negative the navigation freedom of the seas, hence all states are to cooperatively suppress it. It could be by means of radio or television sound transmission from a ship or installation on the high seas intended for reception by the general public contrary to international legal regulations other than for distress calls. Unauthorized broadcasting may lead to prosecution before the Court of flag State, State of registry of installation, State of which the broadcaster is a national, State where the transmitted broadcast can be received, or any State where authorised radio communication suffered interference. Arrest of person or ship and seizure of apparatus involved in the unauthorized broadcasting at seas can result.[39]

On issue of prohibition of the transport of slaves through the seas, every state is required to take preventive measures and punish the State whose flag the ship is flying and free any slave taking refuge on board of any ship.[40] The provision seriously frowns at slave trade.

III. Freedom of Fishing

Fish, which provides the most important source of protein to majority of African population, is said to be playing a vital contribution to food and nutritional security of about 200 million Africans and income for over about 10 million.[41] The main home or habitat to the fishes is the seas. In fact, researchers believe that 95 per cent of the animal species in the oceans [seas] may still be unknown.[42] That is to say, discovery of new species are continuously being made from the seas. What right do States have over fishing in the seas? Does their freedom extend to fishing?

As provided in the Convention, all States have the right to engage in fishing on the high seas subject to some of the following:

(a) Their treaty obligations;

(b) Tights, duties and interests of other States;

(c) Necessary conservation and management of living resources;

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[38] Article 108 of UNCLOS III, 1982
[39] See Article 109 of UNCLOS III, 1982
[40] Article 99 of UNCLOS III, 1982
[41] Mgbolu and Iteshi , Supra
[42] Anonymous, 'Staggering Diversity in the Oceans,' *Awake!* (2004) August 228 <www.jw.org>accessed 13 February 2024

(d) Cooperating with established fisheries organization, and etcetera.

The provision allow for freedom of fishing subject to the UNCLOS.

IV. Freedom to Lay Submarine Cables and Pipes

In this regard, it has led to the region's connectivity, largely creating various business opportunities such as data and telephony service.[43] Gone are the eras of travelling to a far-away telecommunication office before making calls. Right from where you are, it is possible to make calls and communicate with friends and loved ones far apart so long there is network and phoning device with airtime. This feat is as a result of installation of intercontinental submarine cables across the seas, allowing for high capacity band-width and high definition networks.[44] With respect to this freedom, Article 79 of the UNCLOS III, 1982**,** provides some of the following:

a. All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with provisions of this article.

b. … the coastal State may not impede the laying and maintenance of such cables or pipelines.

c. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State.

The above provision spelt out how freedom to lay submarine cables and pipeline should be exercised by States with necessary technologies and expertise. In doing so, cognizance must be given to coastal States' rights and permit.

V. Freedom of Scientific Research

Research is 'a systematic search for facts or scientific investigation of the principles and facts of any subject, based on original and first-hand study of authorities or experiment'[45] The seas is considered to be one of Earth's most valuable resources where fishes and shellfishes are housed and where minerals like salt, sand, gravel, some manganese, copper, nickel, iron, cobalt and so forth can be found and mined for man's useful purposes.

Further provisions on how to exercise freedom of scientific research in the seas by States are as provided:

[43] Mgbolu and Iteshi, Supra
[44] Ibid.
[45] TU Akpoghome, OT Umahi and TC Nwano, *Mapping the Contours of Legal Research Writing and Documentation in Nigeria* (2nd ed.) University of Nigeria Press Limited 2020) 3

i. Marine scientific research…shall be carried out exclusively for peaceful purposes and for the benefit of mankind as a whole…

ii. The authority …may enter into contracts for that purpose States parties shall promote:

(a) participating in international programmes and encouraging cooperation in marine scientific research by personnel of different countries and of the Authority;

(b) …or other international organisations as appropriate …

(c) effectively disseminating the results of research and analysis when available through the authority or other international channel's when appropriate.[46]

There are general principles that need be adopted when carrying out the marine scientific research. They include:

i. Applying appropriate scientific methods and means compatible with the UNCLOS III, 1982.[47]
ii. Carefulness not to unjustifiably interfere with other legitimate uses of the seas.[48]
iii. Compliance with all relevant regulations adopted in protecting and preserving the marine environment in conformity with the UNCLOS III, 1982.[49]

In exercising all of these, rights and welfare of other States should be put into consideration.

VI. Freedom to Construct Artificial Island and other Installations

Most times, artificial islands and installations are constructed in the seas for the purpose of exploring and exploiting, conserving and managing living or non-living natural resources.[50] How should this freedom be exercised? Article 60 of the UNCLOS III, 1982 contains the fact that:

a. Due notice must be given of the construction of such…and permanent means for giving warming of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure safety of navigation, taking into account any generally accepted international standards established …also have due regard to fishing, the production of the marine environment and the rights and duties of other states. Appropriate publicity shall be given to the depth, position and dimensions of any…not entirely removed.

b. The coastal State may, where necessary, establish reasonable safety zones around such artificial islands, installations and structure…

c. …taking into account applicable international standards…related to the nature and function of the artificial island…

[46] Article 143 of the UNCLOS III, 1982
[47] Article 240 (b) of the UNCLOS III, 1982
[48] Article 240 (c) of the UNCLOS III, 1982
[49] Article 240 (d) of the UNCLOS III, 1982
[50] Article 56 of the UNCLOS III, 1982

6. Conclusion and Recommendation

Grotius' freedom of the seas principle propounded in the 16th century has come to stay in reality. The seas, especially the high sea is free for every nation States - be it coastal or landlocked-to exercise their rights on equal basis for navigation, over-flight, laying of submarine cables and pipelines, construction of artificial islands and other installations and conducting of scientific research. In doing so, obedience should be paid to the UNCLOS III, 1982 and other laws – international and municipal- that regulates the free use of the seas.

Nigeria as a coastal State and one of the parties to the UNCLOS III, 1982 as ratified on 14 August, 1986,[51] has a lot to benefit in exercising the freedom principle of the seas. She should be able to beneficially harness its maritime strength in deep seabed mining and have a part in sharing of its proceeds[52]. This will involve obtaining requisite license from the international Seabed Authority, cooperation with national and multi-national exploration companies and investing largely into the project.[53]

Exercising and enjoying the freedom of the seas is not without challenges for States like Nigeria. The following recommendations are therefore useful:

a. Mapping out ways through which Nigeria can usefully exploit other marine resources for major and higher source of revenue diversification than depending mainly on oil and gas.

b. Beefing up Nigeria's economic development in the areas of scientific and technological innovations is germane and helpful in harnessing the seas resources.

c. Investing in knowledge and education capacity, fabrication and importing of requisite technological instruments as they relates to the seas with a view to benefiting maximally from it.

d. States should sincerely respect one another under the principle of jurisdictional sovereignty and integrity in terms of getting necessary permits and licenses and payment of due charges.

e. States should also show respect for the domestic or municipal laws during transit or passage to avoid unnecessary friction between them.

[51] Isaac O. Babatunde and Enobong Mbang Akpemabang, 'Impediment to Enforcement of Environmental Treaties against Oil Pollution,' *NAUJILJ* (2017) 2 (8) 12-27 <www.ajol.info>index.phd>naujilj>article>view> accessed 11 February, 2024
[52] Ochem and Ohajianya, supra, at P. 556
[53] Ibid, at P. 558

f. International Seabed Authority should be up and alive to the purpose of being constituted so that the freedom of the seas is not misused, thereby keeping the seas from pollution. This task also extends to all States.
g. All States should work in concerted effort to fight to a halt every acts inimical to exercising freedom of the seas such as armed and piracy attacks.

h. Periodic reviews of the UNCLOS to absorb others issues of concern that may come up in the future in respect of the Seas freedom.

It is maintained that the above will no doubt benefit Nigeria as a continental nation State with rights to the freedom of the seas. It will also enhance better international relationship between States.

