

# AUS POLITIK UND WISSENSCHAFT

## International Law and the Control of Offshore Oil in Nigeria

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### I. Introduction

There are three main ways (depending on a country's legislation) by which oil and other natural resources may be owned, namely: private ownership, State-private ownership, and State ownership.<sup>1</sup> Generally, in developing countries, ownership of natural resources (especially mineral oils) is vested in the State,<sup>2</sup> and this is also the case in Nigeria.<sup>3</sup> In this situation, the question of fairness and equity to the natural resource-bearing communities/areas arises, especially, in view of the ecological and environmental impacts of the extraction of the resources.<sup>4</sup> Probably in response to the demands of fairness and equity, the

<sup>1</sup> See *Ajomo*, "Ownership of Mineral Oils and the Land Use Act" (1982) Nigerian Current Law Review 330, at 331. In the case of State – Private ownership, the State may jointly own minerals with the private sector or may (as in Austria) prescribe its right to specific minerals, such as uranium while leaving the residuary minerals to private ownership.

<sup>2</sup> For example, section 3 of the Venezuelan Mining Law, 1944 (as amended) provides that all mines, seams, beds or mineral deposits are "public utility", and under the country's constitution they can only be exploited under a concession granted by the National Executive Power. Similarly, the Libyan Petroleum Law declares petroleum in its natural state in strata to be the property of the State. The position is the same in Zambia (under the Mines and Minerals Act, No. 32 of 1976 (as amended)), and in Botswana (under the Mines and Minerals Act, Cap 66.01, sec. 2).

<sup>3</sup> See section 44 (3) of the 1999 constitution of Nigeria. See also S. 1 (1) of the Petroleum Act, 1969 (Cap 350, LFN 1990); S. 2 (1) of the Exclusive Economic Zones Act, 1978 (Cap 116, LFN 1990). Apparently relying on these provisions, the Supreme Court of Nigeria recently stated: "It is a notorious fact that at the moment the Federal Government controls the whole resources derived from both on-shore and off-shore drilling...This in my view does not require any evidence to prove". See *A.-G., Fed. V. A.-G., Abia State & 35 others* [2001] 11 N.W.L.R. (Pt. 725) 689, at 741 Per WALI, J.S.C.

<sup>4</sup> As has been rightly observed: "Environmentally, modern mining operations have been destructive. The removal of a non-renewable resource [such as oil] usually causes some environmental damage". See *Young*, *Third World in the First: Development and Indigenous Peoples* (London: Routledge, 1995), 157. In the same vein, it has been noted that: "The whole process of develop-

1999 constitution of the Federal Republic of Nigeria provides for the ‘principle of derivation’, by which “not less than 13 % of the revenue accruing to the ‘Federation Account’<sup>5</sup> directly from any natural resources” shall be paid to the State from which it is derived.<sup>6</sup> This ‘principle of derivation’ is not entirely new, except that this is the first time, since the 1970s, the percentage has been raised to 13 %.<sup>7</sup>

Constitutional and statutory provisions in Nigeria make clear that the Federal Government’s ownership and control of natural resources (including mineral oils) include both on-shore and off-shore resources.<sup>8</sup> However, as earlier stated, the principle of derivation – a revenue allocation principle<sup>9</sup> – appears to give some measure of ‘control’ of the resources

ment is dependant on the environment, which in turn, provides the resource base for development. Similarly, the [oil] development process has far-reaching impacts on the environment.” See *Puvimanasinghe*, “Development, Environment and the Human Dimension: Reflections on the role of Law and Policy in the Third World, with particular reference to South Asia” (2000) *Sri Lanka Journal of International Law* 35, at 38.

<sup>5</sup> The 1999 constitution (section 162 (1)) provides for the maintenance of a special account to be called the ‘Federation Account’ into which shall be paid all revenues collected by the Government of the federation”, with certain exceptions which are not material to this article. What is important is that all oil revenues go into this account, and there is evidence to indicate that about 98 % of the revenue in this account come from oil receipts. See Annual reports of the Central Bank of Nigeria, especially 1995-2000.

<sup>6</sup> Proviso to section 162(2).

<sup>7</sup> The percentage of revenue distributed by the derivation principle has varied from time to time. In the 1950s, for instance, when agriculture was the mainstay of the Nigerian economy, the percentage was as high as 50 %. For detailed information on this, see Report of the Presidential Commission on Revenue Allocation, Vol. 1 (Lagos: Federal Government Press, 1980), Chapters 2 and 9. Apart from the derivation principle, other revenue allocation principles in use in Nigeria include ‘population principle’ and the ‘principle of equality of States’. Nigeria is a Federation with (presently) 36 component States.

<sup>8</sup> Section 44 (3) of the 1999 constitution provides: “Notwithstanding the foregoing provisions of this section [which provides against compulsory acquisition of property without the payment of compensation] the entire property in and control of all minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.” See also S. 1 (1) of Petroleum Act (Cap 350 LFN 1990); S. 2 (1) of the EEZ Act (Cap 116 LFN 1990); and S. 3 (1) of the Minerals Act, Cap 226 LFN 1990. Historically, this claim can be traced to colonial Ordinances on Mineral Oils (especially, amendments of 1950 and 1959). See *Etikerentse*, *Nigerian Petroleum Law* (London: Macmillan Publishers, 1985), 5.

<sup>9</sup> All the States of the Federation of Nigeria rely heavily on the allocation of revenue from the ‘Federation Account’. As Nwabueze could say: “Federally-collected revenue is the mainstay of the finances of the State governments, accounting for a little over 90 per cent of their total revenue... Their financial viability and credibility as autonomous governmental units hang upon it”. *Nwabueze*, *Federalism in Nigeria Under the Presidential constitution* (London: Sweet & Maxwell, 1983), 181.

to the States in which they are located.<sup>10</sup> Originally, there was no distinction between on-shore and off-shore oil revenues for the purposes of the application of the derivation principle. However, it has been suggested, in 1969, during the Nigerian-Biafran civil war, the Federal Military Government introduced a dichotomy between on-shore and off-shore oil revenues.<sup>11</sup> Officially, it seems, this distinction was based on the concept that off-shore oil revenues (unlike on-shore) were derived from the Nigerian State as the entity recognised in international law, and not from any littoral State of the Federation. As the distinction was based on alleged rights of the Nigerian State under international law, the implication is that no component (littoral) State is legally entitled to receive derivation on off-shore oil revenues. This position was recently re-stated by President Obasanjo, thus:

“... the provision that Oil Companies operating on-shore or off-shore in the Niger Delta area should contribute 3 % of total annual budgets is on the high side ... [The] contribution should relate only to on-shore operations because international law will apply to off-shore operations and if the entitlements of States were to be related to off-shore operations, it will create problems of a monumental nature. *The amount which should be contributed by the Oil-Producing Companies should, therefore, be limited to two per cent (2 %) of the on-shore annual budgets of the Oil-Producing companies*”.<sup>12</sup>

The littoral States of the Niger Delta region<sup>13</sup> – the only area where oil is found in Nigeria, and constituted by ethnic minorities<sup>14</sup> – greatly resent the dichotomy and have always disputed it;<sup>15</sup> and it has been claimed that by Act No. 6 of 1975, the distinction was

<sup>10</sup> Prior to the discovery of oil and until oil became the mainstay of the Nigerian economy, the principle of derivation was applied to agricultural export products (like cocoa, groundnut, and palm oil), and it was as high as 50 %.

<sup>11</sup> See “Resource Control Suit: Is this end of an era?” (*Vanguard*, 6 August 2001). Lt. Col. Gowon, the then Military Head of State, explained that it was necessary in order for him to have money to prosecute the war. The official dichotomy was formalised as the Off-shore Oil Revenue Act 1971.

<sup>12</sup> Emphasis by the author (President Obasanjo). The extract is from a letter entitled “Niger-Delta Development Commission (NDDC) Bill 1999”, dated 21 February 2000, which President Obasanjo sent to the Senate President during the making of the NDDC Act (No. 2) of 1999.

<sup>13</sup> Rivers, Delta, and Bayelsa. Other littoral States of the Nigerian Federation are: Akwa-Ibom, Cross River, Lagos, Ogun, and Ondo.

<sup>14</sup> This is a notorious fact that needs no authority.

<sup>15</sup> Against the position of the Federal Government, the littoral states maintain “that [revenue from] natural resources located both ‘on-shore’ and ‘off-shore’ are derived from their respective States”. See *A.-G., Fed. V. A.-G., Abia State & 35 others*, at 748. Compare the claim of the Ethnic Minority Rights Organisation of Africa (EMIROAF) – quoted in Osaghae, “The Ogoni Uprising: Oil Politics, Minority Agitation and the Future of the Nigerian State” (1995) 94 *African Affairs* 325, at 327. Although the case of *A.-G., Bendel State V. A.-G., Fed.* (1982) 4 N.C.L.R. 178 (popularly known as the revenue allocation case) did not raise exactly the same issues as the recent case of *A.-G., Fed. V. A.-G., Abia state & 35 others*, it illustrates the disenchantment of the oil-bearing States to the issue of revenue allocation from the Federation Account. In that case, the plaintiff had successfully challenged a purported Revenue Allocation Act as being unconstitutional.

formally abolished by law.<sup>16</sup> In any case, the most recent legislation touching on oil revenue issues, i.e. the Niger Delta Development Commission Act (NDDC) (No. 6) 2000, neither recognize<sup>17</sup> nor create any dichotomy between onshore and offshore oil revenues (notwithstanding the objection of President Obasanjo<sup>18</sup>). It will be recalled that, in 1987, the Political Bureau (set up by a Military Head of State, Gen. Babangida) had recommended the abolition of the dichotomy on the ground that it "fails to reflect the tremendous hazards faced by the inhabitants of the areas where oil is produced offshore".<sup>19</sup>

However, it would appear that notwithstanding the statutory abolition (or non-recognition) of the distinction, the Federal Government still makes the distinction in practice,<sup>20</sup> and this may have led to conflict between it and the littoral States. Recently, this conflict had culmi-

<sup>16</sup> See *Etikerentse*, Nigerian Petroleum Law, at 5. Apart from the claim of Etikerentse, it has not been possible to trace other records dealing with Act No. 6 of 1975; so that the status of the Act is doubtful. Besides, it has also been claimed that the on-shore/off-shore dichotomy was 'abolished' by a law called Federation Account (Amendment) Act [Decree] (No. 106) of 1992 which provides in part: "For the avoidance of any doubt, the distinction hitherto made between the onshore oil and off-shore oil mineral revenue for the purpose of revenue sharing and the administration of the fund for the development of the oil producing areas is hereby abolished". See "Resource Control Suit: Is this end of an era? – written by David Dafinone (*Vanguard*, 6 August 2001). Again, it has not been possible to confirm this claim, mainly because most of the laws made by the successive military governments in Nigeria are difficult to get, as they were not generally available. Even if these claims are proved to be wrong, it is clear, as indicated in the text above, that S. 14 (2) (b) of the NDDC Act, 2000 does not make any distinction between on-shore and off-shore oil revenues.

<sup>17</sup> See section 14 (2) (b). The sub-section provides for the contribution of "3 per cent of the total annual budget of any Oil Producing Company operating, on-shore and off-shore, in the Niger Delta, including gas processing companies", to the fund of the NDDC (a statutory body established for the purpose of "tackling ecological problems which arise from the exploration of oil minerals in the Niger Delta area").

<sup>18</sup> See text above, and accompanying footnote. The NDDC Act became law without the assent of President Obasanjo; it was re-passed by the National Assembly/Parliament, after President Obasanjo withheld his assent at the first occasion. The act of re-passage, read together with President Obasanjo's earlier objection (when he indicated an intention to have a distinction made between onshore and offshore oil revenues) could be interpreted to mean a rejection of such distinction by the great body of the people.

<sup>19</sup> See Report of the Political Bureau (Lagos, Nigeria, 1987).

<sup>20</sup> In 2001, the present Federal Government started to implement the 13 % derivation, but State Governors of the of the littoral States had often complained of being short-changed. For example, Governor Alamieyeseigha of Bayelsa State recently said in a newspaper interview: "...what is being given do not amount to 13 per cent...[T]he State only gets 7.8 per cent which [amounts] to 60 per cent of 13 per cent". See *Vanguard* (16 July, 2001). Similarly, Governor Peter Odili of Rivers State had pointed out that Rivers State "has not collected anything [within the region of] 13 % derivation". See "Rivers Seeks Equitable Revenue from Oil", *Vanguard* (9 July, 2001). Rivers State and Bayelsa State are two of the three most important oil-producing States of the Federation of Nigeria; the third is Delta State.

nated in an action<sup>21</sup> (filed by the Federal Government (primarily) against the littoral States<sup>22</sup>) for the determination of "the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from the State pursuant to the proviso to section 162 (2) of the Constitution of the Federal Republic of Nigeria, 1999".<sup>23</sup> In essence, the plaintiff contends that there is a distinction between offshore oil revenue and onshore oil revenue, for the purposes of calculating the 13 % derivation prescribed by the current Nigerian constitution, whereas the defendants/littoral States (especially the Niger Delta states) see no such distinction.

Perhaps as a weapon of war, the littoral States and some of the other defendants<sup>24</sup> had raised preliminary objections to the action (challenging the jurisdiction of the court to hear the case), and the Supreme Court – where the action was filed pursuant to section 232 (1) of the 1999 Constitution of Nigeria<sup>25</sup> – has recently given its ruling thereon.<sup>26</sup> Although the substantive suit was adjourned to 29 October 2001 for hearing, there are indications (judging from prevailing political atmosphere<sup>27</sup>) that the plaintiff (the Federal Government of

<sup>21</sup> *A.-G., Fed. V. A.-G., Abia State & 35 others*, at 3.

<sup>22</sup> Although the action was in substance against the littoral States, non-littoral States were joined by the plaintiff. Preliminary objection by the littoral states against the joinder of the non-littoral states was dismissed by the Supreme Court (by a majority of 6-1) on the ground that: "In the instant suit the dispute is between the plaintiff and the littoral states, but the result of the suit will certainly affect non-littoral States in Revenue Allocation from [the] Federation Account. All the States, who are now defendants, whether littoral or non-littoral have a stake in the result of this suit ... they are to be affected and they are rightly joined" (at p. 737-8). See further, *idem* p. 745.

<sup>23</sup> [2001] 11 NWLR (Pt.725) 689, at 726-7.

<sup>24</sup> The other defendants/objectors are: Anambra State, Ebonyi State, and Edo State.

<sup>25</sup> The sub-section provides: "The Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute between the Federation and a State or between States if and in so far as that dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends".

<sup>26</sup> The preliminary objections were based on a number of grounds, including want of jurisdiction. Arguments were heard from both parties and in a reserved ruling given on 11 July 2001, the Supreme Court dismissed (by a majority of 6-1) all the grounds of the preliminary objections. See *A.-G., Fed. V. A.-G., Abia State & 35 others*.

<sup>27</sup> From the beginning, southern politicians, especially from the Niger Delta region of the country, were very critical of the action. They had pointed out that the Federal Government did not go to court over what President Obasanjo had described as an unconstitutional action (the introduction of Islamic legal system in some northern States of the Federation). Their contention is that the agitation for 'resource control', which appeared to have been the reason for the action, was a political issue, and not legal. See "[Off-shore] Suit: Ruling not a setback", (*Vanguard*, 13 July, 2001).

Nigeria) may not press the case to conclusion in the court.<sup>28</sup> The purpose of this short article is to briefly examine the international Law of the sea (specifically, relevant international instruments), with a view to determining which of the conflicting views (indicated above) is, legally speaking, plausible.<sup>29</sup>

## II. Off-shore Resources and International Law: A nutshell

In an article in 1982, a leading Nigerian international scholar expressed the view that under international law no state of the Federation of Nigeria can lay claim to off-shore oil resources, as this is exclusively federal property.<sup>30</sup> In his own words:

”... international law recognises the right of States with sea boundaries to all minerals in both the territorial sea and continental shelf of their littoral territory. In the eye of the international law only the Federal government of Nigeria as a corporate entity has the personality recognised on the international plane. It is therefore the owner of waters and subsoil of our littoral territory and the resources in respect of them up to the limits prescribed by international law. *None of the ... constituent units [States] of the Federation can lay a claim to any right respecting Nigeria’s territorial waters or the continental shelf or the EEZ and the mineral resources in them.* The passing of the Territorial Waters Act 1967,<sup>31</sup> ... and the EEZ Act of 1978<sup>32</sup> were local measures to give

<sup>28</sup> It may be symptomatic of the reluctance to pursue the case to conclusion that, when the case came up for hearing on 29 October 2001, the Federal Attorney-General (representing the plaintiff, before his brutal assassination on 23 December 2001) was found not to have filed and served necessary papers for the hearing of the case. See ”Hearing Stalled in On-shore/Off-shore Case”, (*Vanguard*, 30 October 2001). Having regard to the existing tension in the Niger Delta region as a result of environmental degradation, caused by oil exploitation, and also as a result of what appears to be inequity in the allocation and utilisation of oil revenue derived from the region. See *Human Rights Watch*, Nigeria: The Price of Oil (New York, 1999), it seems axiomatic that a judicial determination of the substantive suit, especially if it goes against the Niger Delta littoral States, is an invitation to chaos. Although the hearing of the substantive suit appears to be making some progress thereafter, it will indeed be surprising if the political situation in the Niger Delta does not eventually determine the fate of the substantive suit. The likelihood is that the suit will be withdrawn from court at some stage, and politically settled.

<sup>29</sup> Notwithstanding the possibility that the substantive suit may not proceed to conclusion in the court, there is every indication (judging from newspaper reports) that the question raised remains potentially volatile. See, by example, ”Resource Control Suit: Is this end of an era?”, (*Vanguard*, 6 August 2001). Perhaps it is time to politically address the ‘resource control’ issue currently being canvassed and pursued by the Niger Delta people, in the overall interest of the Federation.

<sup>30</sup> *Ajomo*, Ownership of Mineral Oils, at 334.

<sup>31</sup> Cap 428, LFN 1990.

<sup>32</sup> Cap 116, LFN 1990.

expression to the norms of international law and thus consolidate the claims to ownership of mineral oil and other resources in these zones”,<sup>33</sup>

The learned scholar did not develop this view, probably because the issue was not a focal point of that article.<sup>34</sup> Similarly, as earlier indicated, in the recent case of *A.G., Fed. V. A.-G, Abia State & 35 others* the plaintiff relied on international law in contending that offshore oil revenues are derived from the Nigerian State and not from any littoral State. The relevant portions of its Statement of Claim states:

”8. By reason of the facts pleaded in [the preceding] paragraphs ... of this Statement of Claim, the plaintiff states that: ...

(c) The natural resources located within the territorial waters of Nigeria and the Federal Capital Territory are deemed to be derived from the federation and not from any State;

(d) The natural resources located within the Exclusive Economic Zone and the continental Shelf of Nigeria are subject to the provisions of any treaty or other written agreement between Nigeria and any neighbouring littoral foreign State, derived from the Federation and not from any State.

9. In further support of the averments in paragraph 8 of this Statement of Claim the plaintiff will contend at the trial of this action that ... it is only the Federal Government of Nigeria and not the Government of any of the States comprised in the Federation of Nigeria that has power to:

(i) exercise legislative, executive, or judicial powers over the entire area designated as the ‘Territorial Waters of Nigeria’ ...

(ii) exercise any of the sovereign rights exercisable by Nigeria over the entire area designated as the ‘Exclusive Economic Zone’ ...”

Notwithstanding that no international instrument was cited in the above Statement of Claim (of course the rules of pleadings require only the statement of relevant facts, not law<sup>35</sup>), it

<sup>33</sup> *Ajomo*, Ownership of mineral Oils, at 334 (emphasis added). Most recently, while commenting on the proposal of the Ethnic Minority Rights Organisation of Africa (EMIROAF) that ”Off-shore resources protected by the federal government shall be jointly owned and the rights of States immediately adjoining the shores to revenue therefrom shall be guaranteed”, Osaghae expressed a view in agreement with Ajomo, thus: ”...the proposal that proceeds from off-shore oil should be shared between the central government and the adjoining State does not make much sense because such oil is derived from land belonging to the federation rather than to the constituent States”. See *Osaghae*, *The Ogoni Uprising*, at 327, footnote 4. See further, *Etikerentse*, *Nigerian Petroleum Law*, especially at 4-9.

<sup>34</sup> The article was concerned with the question whether the Land Use Act, 1978 (Cap 202, LFN 1990), which vests (in trust) the ownership of all land comprised in the territory of a State of the Federation in the Governor of that state, has thereby affected or conflicts with the Federal Government’s ownership of mineral oils under the Petroleum Act 1969 (Cap 350, LFN 1990); and also, in large measure, with the impact of the Land Use Act on the pre-existing customary land tenure.

<sup>35</sup> See *Onamade V. A.C.B. Ltd.* [1997] 1 NWLR (Pt. 480) 123, at 145, where the Supreme Court of Nigeria stated the rule thus: ”...it is not necessary to plead law before reliance can be placed on it. It is sufficient to plead material facts which will lead to a certain legal result, and once sufficient

seems clear that the plaintiff (perhaps influenced by the opinion of Professor Ajomo<sup>36</sup>) relies on the Law of the Sea Conventions<sup>37</sup> (and the domestic laws made pursuant thereto<sup>38</sup>). These (the Conventions) are the relevant international instruments on this subject. Accordingly, their relevant provisions will be the guiding principles for the purposes of the object of this article.

It may be remarked that the Law of the Sea<sup>39</sup> is wide-ranging and rather complex, and this is evidenced by the provisions of the 1958 and 1982 Law of the Sea Conventions. For the purposes of this short article, it is neither possible nor useful to delve into the intricacies of this law.<sup>40</sup> As indicated earlier, only the aspects relevant to our present interests (including historical aspects) will be briefly considered.

It has been pointed out that for centuries the main principle governing the uses of the seas and oceans was 'freedom of the seas', "under which everyone could navigate, conduct commerce and fish, as long as the rights of others to do so were not hindered".<sup>41</sup> The concept of the 'territorial sea' evolved in the course of debates in the Seventeenth and Eighteenth centuries between the advocates of the 'freedom of the seas' or '*mare liberum*'<sup>42</sup> and the proponents of 'closed seas' or '*mare clausum*'.<sup>43</sup> Significantly, Grotius and his followers never claimed that all seas were open to use by all men.<sup>44</sup> "It was generally accepted that coastal States enjoyed the right to regulate certain activities [for instance,

material facts have been pleaded, the inference to be drawn from such pleaded facts and the particulars of the law to be relied upon for such an inference need not be pleaded". See also *Vandervell's Trust (No.2), White V. Vandervell trustees Ltd.* (1974) 3 All E.R. 205, at 213; Anyanwu V. Mbara [1992] 5 NWLR (Pt. 242) 386, at 398. For the same rule, relating to evidence, see *Pascutto V. Adecentro (Nig.) Ltd.* [1997] 11 NWLR (Pt. 529) 467, at 491.

36 See above.

37 See below.

38 For example, the Exclusive Economic Zone Act.

39 The law we are concerned with here is the Public International Law of the Sea – that is, the law relating to the rules which bind States in their international relations concerning maritime matters. This contrasts with the rules of private Maritime Law, which deal with such matters as marine insurance, carriage of goods by sea and maritime liens.

40 For detailed study, a useful reference is *Churchill and Lowe, The Law of the Sea* (Manchester University press, 1988). See further, *Brown, The International Law of the Sea, Vol. 1 – Introductory Manual* (Aldershot, England: Dartmouth publishing Company, 1994).

41 *Schrijver, Sovereignty Over Natural Resources* (Cambridge: Cambridge University Press, 1997), 202.

42 One of the chief advocates was Hugo Grotius in 1609. See also *Gentili, Hispanicae Advocationis* (1613), text in *Abbott, Hispanicae Advocationis Libri Duo* by Alberico Gentili, Vol. II (the translation), (New York: Oxford University Press, 1921).

43 For example, John Seldon in 1635.

44 See *Churchill and Lowe, The Law of the Sea*, at 59.

for defence purposes or for the protection of their fisheries against foreign fishermen] in waters adjacent to their coasts".<sup>45</sup> Later, in the course of evolution (especially between 1930 and 1958, the year in which the first UN Conference on the Law of the Sea took place) "emphasis shifted from the sea 'as an avenue of transportation and communication' to the sea as an important economic zone for the exploitation of natural resources".<sup>46</sup> The turning point of this development came during the course of the Second World War. As Schrijver has pointedly remarked, "during this war, as a result of awareness among the allied States of their dependence on the supply of strategic minerals from overseas, oil companies in the industrialised States began to develop technologies enabling them to exploit the mineral resources of the sea-bed".<sup>47</sup>

Perhaps it was this technological development that influenced President Truman of the United States to make his now famous Proclamation of 28 September 1945, thusly:

"Having concern for the urgency of conserving and prudently using its natural resources the United States regards the natural resources of the subsoil and sea-bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control".<sup>48</sup>

It is notable that what the Proclamation claims was 'rights' and 'jurisdiction', and not territory. In other words, the claim was limited in scope. Indeed, international law does not recognise anything more than 'sovereign rights' of a coastal State in the continental shelf.<sup>49</sup>

This point was recently emphasised by the Canadian Supreme Court, thus:

"... in the ordinary meaning of the term, the continental shelf is not part of a coastal State's territory. The coastal State cannot 'own' the continental shelf as it can 'own' its land territory. The regulation by international law of the uses to which the continental shelf may be put is simply too extensive to consider the shelf to be part of the State's territory. International law concedes dominion to the State in its land territory, subject to certain definite restrictions. By contrast, in the continental shelf the limited rights that international law accords are the sum total of the coastal State's rights ... Much of the argument in the present case is based on the assumption that continental shelf rights are proprietary. We do not think continental shelf rights are proprietary in the ordinary

<sup>45</sup> *Schrijver*, *Sovereignty Over Natural Resources*, at 203.

<sup>46</sup> *Schrijver*, *Sovereignty Over Natural Resources*, at 204. See also *Sharma*, "Territorial Sea", in Bernhardt (ed.), *Encyclopaedia of Public International Law*, Instalment 11 (North-Holland: Amsterdam, 1981-1990) at 328-33.

<sup>47</sup> *Ibid.*, at 208. It is well-known that continental shelves are often rich in mineral resources such as oil and gas as well as in sand and gravel. Also, most fish stocks are found in the waters above continental shelves.

<sup>48</sup> Text in 40 AJIL (1946), Supplement of documents, p.45.

<sup>49</sup> See the provisions of the Law of the Sea Conventions below.

sense ... In pith and substance they are an extra-territorial manifestation of, and an incident of, the external sovereignty of a coastal State".<sup>50</sup>

Further, it is important to note that in the 'Truman Proclamation' the claim to rights and jurisdiction was justified as being:

"... reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon co-operation and protection from the shore, since the continental shelf may be regarded as an extension of the landmass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities over its shores which are of their nature necessary for utilization of these resources".<sup>51</sup>

It was not long before other coastal States began to issue similar proclamations.<sup>52</sup> For example, on 29 October 1945 Mexico issued a presidential statement by which it claimed "the whole continental shelf adjacent to its coasts and all and every one of its natural riches known or still to be discovered, which are found in it". Argentina followed suit on 9 October 1946; it issued a "Declaration proclaiming sovereignty over the epicontinental sea and continental shelf".

Against this backdrop, the first United Nations Conference on the Law of the Sea (UNCLOS I) held at Geneva in 1958.<sup>53</sup> It succeeded in adopting 'four Conventions'<sup>54</sup> (drafted by the ILC): the Convention on the Territorial Sea and Contiguous Zone;<sup>55</sup> the Convention on the High Seas;<sup>56</sup> the Convention on the Continental Shelf;<sup>57</sup> and the Convention on Fishing and Conservation of the Living Resources of the High Seas.<sup>58</sup> Significantly, as explained in the reports of the ILC, the first three of these Conventions are based,

<sup>50</sup> Reference re The Seabed and Subsoil of the Continental Shelf Offshore Newfoundland (1984), 5 D.L.R. (4<sup>th</sup>) 385, at 396.

<sup>51</sup> *Ibid.*, at p.45.

<sup>52</sup> For these, see 41 AJIL (1947), Supplement of Documents, p. 14.

<sup>53</sup> Before this Conference, there had been an earlier attempt instigated by the League of Nations to codify the peacetime rules of the International Law of the Sea. A Committee of experts was appointed in 1924 to produce a list of subjects ripe for codification, which would be considered at a Conference. The Conference, which convened at the Hague in 1930, did not, unfortunately, succeed in adopting a Convention on territorial waters. However, draft articles were produced which proved useful in the drafting of the 1958 Law of the Sea Conventions by the International Law Commission (ILC).

<sup>54</sup> Collectively called Geneva Conventions on the Law of the Sea, 1958.

<sup>55</sup> 516 UNTS 205.

<sup>56</sup> 450 UNTS 82.

<sup>57</sup> 499 UNTS 311.

<sup>58</sup> 559 UNTS 285.

in large measure, upon customary international law – i.e. ‘international custom, as evidence of general practice accepted as law’.<sup>59</sup>

It is remarkable that part of what was accepted as customary international law<sup>60</sup> here was the proclamation of President Truman of the United States and those of other States that made similar claims. According to Churchill and Lowe, “these claims, coupled with the belief that they were permissible in international law, provided the basis of a customary rule, recognising coastal States’ ownership of continental shelf resources ... [These] rights were, in 1958, set out in articles 1-3 of the Continental Shelf Convention”.<sup>61</sup> In its judgement in the *North Sea Continental Shelf case*, the ICJ regarded those articles as “reflecting, or crystallising, received or at least emergent rules of customary international law”.<sup>62</sup> The court said more:

“The rights of coastal States in respect of the area of continental shelf that constitutes a natural prolongation of its territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right.”<sup>63</sup>

But what is ‘continental shelf’? Article 1 of the Convention on the Continental Shelf, 1958<sup>64</sup> defined ‘continental shelf’ as referring:

“(a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands”.<sup>65</sup>

<sup>59</sup> Section 38 of the Statute of the ICJ. Churchill and Lowe (*The Law of the Sea*, at 5) argue that this ICJ formula is misleading, and contend that “it would be better phrased, ‘international custom, as evidenced by a practice generally accepted as law’”. With respect, there is hardly any significant improvement in their preferred formulation.

<sup>60</sup> Note that, in principle, customary international law is binding upon all States.

<sup>61</sup> *The Law of the Sea*, at 6.

<sup>62</sup> [1969] ICJ Rep. 3, at 39.

<sup>63</sup> At 122, para. 19.

<sup>64</sup> U.N.T.S. No. 7302, Vol. 499, pp. 312 – 321. The Convention was agreed at Geneva on 29 April 1958.

<sup>65</sup> Nigeria’s continental shelf as defined in S. 15 (1) of the Petroleum Act 1969 (Cap 350 LFN 1990) is similar to this.

Although the 1982 United Nations Law of the Sea Convention<sup>66</sup> (which has replaced the 1958 Conventions on Law of the Sea<sup>67</sup>) contains a more detailed definition of the continental shelf,<sup>68</sup> Article 76(1) thereof contains some elements mentioned in the above definition. It provides:

”The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance”.

As regards the rights of States over natural resources of the continental shelf, the 1958 Continental Shelf Convention and the 1982 UN Law of the Sea Convention contain almost identical provisions.<sup>69</sup> In Article 2 of the 1958 Convention it was provided as follows:

- ”1. *The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.*
2. The rights referred to in paragraph 1 of this article are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. *The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at harvestable stage, either are immobile on or under the seabed or are unable to move except in contact with the seabed or subsoil”.*<sup>70</sup>

<sup>66</sup> Located in XXI ILM. The 1982 Convention was the result of UNCLOS 111. The Convention was signed at Montego Bay, Jamaica, on 10 December 1982; it entered into force on 16 November 1994. Nigeria ratified the Convention on 14 August 1986.

<sup>67</sup> See Article 311 of the 1982 Convention.

<sup>68</sup> See Article 76.

<sup>69</sup> Commenting on the Geneva Convention on the Continental Shelf, Brown observed: ”...reflecting technological advances in submarine oil exploration and exploitation, and responding to the need for a legal regime to govern such activities, [the Convention] is without doubt a major landmark in the history of the Law of the Sea”. See *Brown*, *The International Law of the sea*, at 9.

<sup>70</sup> Emphasis added. For the present law on the issue, see Article 77 of the 1982 Convention. There are only two differences in drafting style between the two provisions: 1). The expression, ”or make a claim to the continental shelf” appearing in Art. 2 (2) of the 1958 Convention is not repeated in Art. 77 (2) of the 1982 Convention; 2). The expression, ”referred to in these articles” in Art. 2 (4) of the 1958 Convention has been replaced with the expression ”referred to in this part” under Art. 77 (4) of the 1982 Convention.

Further, under the International Law of the Sea, coastal States also have sovereign rights in the Exclusive Economic Zone,<sup>71</sup> which is defined as "an area beyond and adjacent to the territorial sea, subject to the specific legal regime [established under Part V of the 1982 Convention], under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention".<sup>72</sup> These rights (which are almost identical with those in the continental shelf) are set out in Article 56 (1) (a) of the 1982 Convention:

"Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds".

With regard to the 'territorial sea',<sup>73</sup> and contiguous zone, it is recognised that "the sovereignty of a coastal State extends beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea";<sup>74</sup> and "this sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil".<sup>75</sup>

Perhaps it may be wondered why coastal States should enjoy all these rights. The United States Supreme Court has provided a justification for the recognition of the above rights. In the case of *United States V. California*,<sup>76</sup> the court pertinently observed:

"The three-mile rule [original breath of the territorial sea claimed by the United States<sup>77</sup>] is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location ... [Protection and control of the three-mile belt] has been and is a function of national external sovereignty ... [and is] of vital consequence to the nation in its desire to engage in commerce and to live in

<sup>71</sup> Churchill and Lowe have argued that "the EEZ must be regarded as a functional zone of a *sui generis* character, situated between the territorial sea and the high seas". See *Churchill and Lowe*, *The Law of the Sea*, at 130.

<sup>72</sup> Article 55.

<sup>73</sup> Every State has the right to establish the breath of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with the 1982 Convention. (Art. 3).

<sup>74</sup> Article 2 (1) of the 1982 Convention.

<sup>75</sup> Article 2 (2) of the 1982 Convention.

<sup>76</sup> 332 U.S. 19 (1947).

<sup>77</sup> Before the legal regime established by the 1982 Convention – territorial sea cannot exceed 12 nautical miles – it had been difficult to agree on the breath of the territorial sea; States made different claims, some well above 12 miles. For example, in 1967, Nigeria claimed 30 nautical miles (See S.1 (1) of the Territorial Waters Act, 1967 (Cap 428 LFN 1990)). For detailed information on this, see *Brown*, *The international Law of the Sea*, Chapter 6.

peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace. And as peace and world commerce are the paramount responsibilities of the nation, rather than an individual State, so, if wars come, they must be fought by the nation. The [individual] State is not equipped in our constitutional system with the powers or the facilities for exercising the responsibilities which would be concomitant with the dominion which it seeks".<sup>78</sup>

The above observation of the United States Supreme Court also indicates that the sovereign rights of States under the Law of the Sea Conventions is bestowed on 'States' as recognised in international law (which, in the case of 'Federal States' like the United States, Canada, Australia, New Zealand, and Nigeria, is the country as an entity, and not its component units, by whatever name called). This point was also rightly recognised by the Nigerian Supreme Court in the recent case of *A.-G., Fed. V. A.-G., Abia State & 35 others*:

"The 'State' used in various Conventions on the Law of the Sea refers to sovereign state. Each sovereign country decides on nomenclature for its component parts. In India they have States as components of their Republic; in Canada it is provinces, in Australia it is regions. The notion of States in Nigeria came with [the] 1979 constitution based on States creation in 1967; before then we had Regions. It is certainly not true that the 'State' referred to in international conventions refer to our provinces that we conveniently call States".<sup>79</sup>

### III. Concluding Remarks

The above brief exposition of the International Law of the Sea has amply shown that under the legal regime of the Law of the Sea, the control and exercise of sovereign rights over off-shore natural resources is vested in coastal States as the entity recognised in international law. In *Reference re ownership of off-shore Mineral Rights*,<sup>80</sup> the Canadian Supreme Court underlined this point as follows:

"It is Canada which is recognised by international law as having rights in the territorial sea adjacent to the province of British Columbia ... Canada has now full constitutional capacity to acquire new areas of territory and new jurisdictional rights which may be available under international law. The territorial sea now claimed by Canada was defined in the Territorial Sea and Fishing Zones Act of 1964 ... The effect of that Act,

<sup>78</sup> 332 U.S. 19 (1947), at 34 – 35. See also, *United States V. Louisiana*, 339 U.S. 699 (1950), at 705. For similar and academic justification of the sovereign rights of States, see *Eikerentse*, Nigerian Petroleum Law, at 6. It should be noted, however, that it is not all rights; the Conventions also impose certain duties/obligations on coastal states. See, for example, Art. 56 (2) of the 1982 Convention.

<sup>79</sup> [2000] 11 N.W.L.R. (Part 725) 689, at 738.

<sup>80</sup> (1967), 65 D.L.R. (2d) 353.

coupled with the Geneva Convention of 1958, is that Canada is recognised in international law as having sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada ... The sovereign State which has the property in the bed of the territorial sea adjacent to British Columbia is Canada ... It is the sovereign State of Canada that has the right, as between Canada and British Columbia, to explore and exploit these lands, and Canada has exclusive legislative jurisdiction in respect of them ... *The mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond local or provincial concern or interests ... Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign States.* Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign State recognised by international law and thus able to enter into arrangements with other States respecting the rights in the territorial sea ... Canada is a signatory to the Convention on the Territorial Sea and Contiguous Zone and may become a party to other international treaties and conventions affecting rights in the territorial sea.”<sup>81</sup>

The above observation of the Canadian Supreme Court applies *mutatis mutandis* to Nigeria. The result is that, in the case of Nigeria, off-shore oil legally belongs to the Federal Government – so that any revenue derived from its exploitation, is derived from the Federal Government, and not from any littoral State of the Federation.

But whether this is an issue fit to be resolved legally in the context of Nigeria is a different matter altogether. The dispute seems to have arisen in the first place because of the Federal Government ownership and control of both on-shore and off-shore oil resources in Nigeria, unlike the case in the United States and Canada, for example;<sup>82</sup> and also because of some alleged inequity in the allocation of oil revenue.<sup>83</sup> Therefore, the issue seems to be more political than legal. According to one commentator:

”It is my fervent prayer that the justices of the Supreme Court will not allow themselves to be dragged into politics which is hot, full of greed and exploitation; a game of com-

<sup>81</sup> At 375-6, emphasis added.

<sup>82</sup> In both the US and Canada, the State does not lay claim to onshore mineral resources located in the constituent States/Provinces.

<sup>83</sup> As Governor Peter Odili of Rivers State puts it: ”... the fight for resource control by the people of the Niger-Delta is not a fresh demand, but a call for the restoration of national justice in Nigeria ... The time has come for Nigerians to pay us back equitably for our contribution to the sustenance of the unity of this country”. See ”Four South-South Governors list reasons for pursuing Resource Control”, (*Vanguard*, 12 July 2001). To another observer, ”the use of the resources of the Niger Delta people by the Federal Government and its agencies is largely inequitable, and that is the reason why the clamour for resource control began in the region”. See *Vanguard*, 11 July 2001.

promises, arrangements and settlements; a spiritual wasteland, a battleground of envy, hatred and intolerance and a godless venture”.<sup>84</sup>

This view finds support in the dissenting ruling of Karibi-Whyte, J.S.C., in the recent case of *A.-G., Fed. V. A.-G., Abia State & 35 others*, where he admonished his learned brothers thus: ”The watch-word in the situation is caution ... It is preposterous to assume jurisdiction where there is no cause of action.<sup>85</sup> Similarly indiscreet to do so in a factual situation fraught with dangerous political consequences and fit only for political resolution”.<sup>86</sup> It is hoped that caution will prevail in the circumstances.

<sup>84</sup> See ”Resource Control Suit: Is this end of an era?”, (*Vanguard*, 6 August 2001).

<sup>85</sup> The question whether or not there was a cause of action in that case is not part of our present concern; our interest here relates only to the observation that it was a political issue.

<sup>86</sup> [2000] 11 N.W.L.R. (Pt. 725) 689, at 774.