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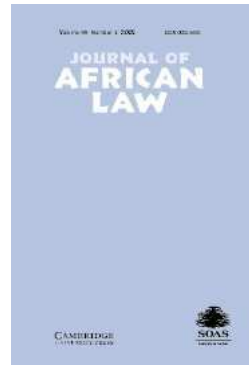
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## Who owns the Nigerian offshore seabed: federal or states? An examination of the Attorney General of the Federation v. Attorney General of Abia State & 35 Ors Case

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**WHO OWNS THE NIGERIAN OFFSHORE SEABED:  
FEDERAL OR STATES? AN EXAMINATION OF THE  
ATTORNEY GENERAL OF THE FEDERATION v.  
ATTORNEY GENERAL OF ABIA STATE & 35 ORS CASE**

EDWIN EGEDE\*

INTRODUCTION

Nigeria, a nation located on the western coast of Africa with a coastline of about 853 kilometres,<sup>1</sup> has a federal structure of government made up of the central federal government and 36 states,<sup>2</sup> eight of which are located on the coast [hereinafter referred to as “littoral states”].<sup>3</sup> Its offshore belts are blessed with extensive oil and gas fields, mostly on its continental shelf.<sup>4</sup> These offshore fields are presently being explored and exploited through contractual arrangements between the Nigerian government, through its State Petroleum Corporation (SPC), the Nigerian National Petroleum Corporation (NNPC),<sup>5</sup> and various multinational oil and gas companies.<sup>6</sup> Under Nigerian law, the ownership of natural resources is vested in the federal government.<sup>7</sup> However, the 1999 Constitution<sup>8</sup> provides a revenue formula whereby states, with natural resources being exploited within their territory, are entitled to a certain percentage of the revenue accruing directly to the federation account

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<sup>1</sup> See C.I.A.—the World Factbook 2003. <http://www.odci.gov/cia/publications/factbook/index.html> [Accessed 1 February, 2005]. All url references in this article are as at 1 February, 2005 unless otherwise stated.

<sup>2</sup> See ss. 2 and 3 of the 1999 Constitution of the Federal Republic of Nigeria.

<sup>3</sup> Akwa-Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers.

<sup>4</sup> See generally P.C. Underwood, “Ocean boundaries and resource development in West Africa” in D.M. Johnston and P.M. Saunders (eds.), *Ocean Boundary Making: Regional Issues and Development*, London, Croom Helm, 1988, 229–267. Also for map identifying Nigerian offshore oil wells see <http://www.equatorialoil.com/pages/techreview.html>

<sup>5</sup> See the NNPC Act, Cap. 320, Laws of the Federation of Nigeria, 1990.

<sup>6</sup> The main natural resource, which generates the bulk of the revenue in the federation account, is crude oil. As a result of Nigeria’s tremendous natural gas potential, natural gas is expected in the near future to become a major foreign exchange earner.

<sup>7</sup> See s. 44 (3) of the 1999 Constitution and s. 1 (1) of the Minerals and Mining Act No. 34 of 1999.

<sup>8</sup> This Constitution came into force on 29 May, 1999 when the military regime of General Abubakar handed over to the civilian government of President Olusegun Obasanjo. Nigeria has had a chequered constitutional history replete with military interventions in governance resulting so far in five different Constitutions: 1960 (Independence); 1963 (1st Republic); 1979 (2nd Republic); 1989 (3rd Republic) and 1999 (4th Republic).

from such exploitation. This provision, which is contained in section 162(2) of the Constitution, provides:

“The President, upon the receipt of advice from the Revenue Mobilisation Allocation and Fiscal Commission, shall table before the National Assembly proposals for revenue allocation from the Federation Account, and in determining the formula, the National Assembly shall take into account, the allocation principles especially those of population, equality of States, internal revenue generation, land mass, terrain as well as population density. Provided that the principle of derivation shall be constantly reflected in any approved formula as being not less than thirteen per cent of the revenue accruing to the Federation Account directly from any natural resources.”<sup>9</sup>

The proviso of this section, which incorporated what is popularly known in Nigeria as the “*derivation formula*”, brought to the fore the need to determine (especially as regards revenue derived from the oil and gas resources) whether the offshore bed of the territorial sea, exclusive economic zone and continental shelf of Nigeria should be regarded as part of the littoral states or not? The dispute in this regard culminated in the federal government taking the states before the Supreme Court and the subsequent landmark decision of the court on this issue. This article seeks to critically examine the decision of the Supreme Court as it relates to the ownership of the offshore seabed as between the federal Government and the littoral states.<sup>10</sup> This analysis, in view of the fact that the natural resources in contention in these zones—oil and gas—are located in the seabed, shall for the most part be limited to the seabed of these zones as distinct from the water column.

*ATTORNEY GENERAL OF THE FEDERATION V. ATTORNEY GENERAL  
OF ABIA STATE & 35 ORS.*<sup>11</sup>

On 6 February, 2001, the federal government of Nigeria through the Attorney General of the federation and minister of justice filed an action before a full Court of the Supreme Court of Nigeria<sup>12</sup> against the 36 states of the federation, including the eight littoral states.<sup>13</sup> In its ten-paragraph Writ of Summons and Statement of Claim the federal government called on the Supreme Court to make the following determination:

“A determination by this Honourable Court 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 that State pursuant to the proviso to section 162(2) of the Constitution of the Federal Republic of Nigeria, 1999.”

<sup>9</sup> See K. Ebeku, “Nigerian Supreme Court and ownership of offshore oil”, (2003) 27 *Natural Resources Forum* 291–299, for an analysis of the historical setting of the derivation principle.

<sup>10</sup> The case also decided certain other issues, e.g. payment of derivation on agricultural products, funding of primary school education, allocation of revenue to Federal Capital Territory, Non-payment of Capital Gains Tax and Stamp Duties, Funding of the Judiciary, Joint Venture Calls and NNPC projects and External Debt Servicing.

<sup>11</sup> [2002] 6 N.W.L.R. (part 764), 542.

<sup>12</sup> This was done under s. 239, which confers original jurisdiction on the otherwise appellate Supreme Court over disputes between the Federal Government and States and between States inter se, and s. 234, which requires a full panel of seven judges to deal with constitutional matters, of the 1999 Constitution.

<sup>13</sup> Filed as Suit No. SC. 28/2001.

While on its face the determination sought by the federal government appears to be restricted to merely resolving the seaward boundary of the littoral states, a careful reading of the statement of claim, where in certain paragraphs the federal government averred that natural resources located within the offshore bed and the federal capital territory should be deemed to be derived from the federation and not any state,<sup>14</sup> the actual dispute was as to the ownership of such offshore bed as between the littoral states and the federal government.

On 5 April, 2002 the Supreme Court of Nigeria delivered its decision. In its judgement in this case, a novel point in Nigerian jurisprudence, the Supreme Court found no concrete help from the Nigerian Territorial Waters Act (TWA),<sup>15</sup> the Exclusive Economic Zone Act (EEZA),<sup>16</sup> the Sea Fisheries Act (SFA),<sup>17</sup> or any post-independence legislation.<sup>18</sup> Rejecting the attempt by the counsel to the federal government to rely on the TWA, EEZA and SFA, to support his arguments on the seaward boundary of the littoral states, the Chief Justice of Nigeria stated as follows:

“Chief Williams has tried to show this by inference or implication under the provisions of the Territorial Waters Act, the Sea Fisheries Act and the Exclusive Economic Zone Act, all of which made reference to the territorial waters of Nigeria. However, with respect, none of the legislations (sic) expressly defines the seaward boundary of the littoral States. This, in my opinion, cannot be inferred from the legislations (sic).”<sup>19</sup>

Neither did the present 1999 Constitution of Nigeria expressly address this point.<sup>20</sup> The Court, faced with a dearth of current legislation on this point, resorted to certain pre-independence colonial Orders in Council to arrive at its decision. Also it had to wade through a number of foreign cases dealing with the issue of ownership of the offshore bed as between the central government and the unit states. Eventually the Court, with one voice, though in some regards there were divergent views, decided that the bed of the territorial sea, exclusive economic zone and continental shelf of Nigeria did not form

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<sup>14</sup> Paras. 8(c), (d), and 9 of the Statement of Claim of the Federal Government filed on 6 February, 2001. Despite these provisions of the Plaintiff’s Statement of Claim, the Supreme Court, after stating that the principle of derivation did not apply to the Federal Government, observed somewhat contrary to the Plaintiff’s case as contained in its claim that, “... what the Plaintiff appears to be saying is that whatever remains in the Federation account after the application of the principle of derivation, is for distribution among beneficiaries listed in subsection (3) of section 162 [the Federal Government, the State Governments and the Local Governments] and in accordance with the formula approved by the National Assembly.” See OGUNDARE, J.S.C., above, n. 11, at 653.

<sup>15</sup> Cap. 428, Laws of the Federation of Nigeria, 1990, as amended by Territorial Waters (Amendment) Act No. 1 of 1998. The effect of this amendment was to reduce the breadth of Nigeria’s territorial sea from 30 nautical miles to 12 nautical miles. See generally Edwin Egede, “The New Territorial Waters (Amendment) Act, 1998—comments on the impact of international law on Nigerian law”, (2000) 12 *African Journal of International and Comparative Law* 84–104.

<sup>16</sup> Cap. 116, Laws of the Federation of Nigeria, 1990.

<sup>17</sup> Cap. 404, Laws of the Federation of Nigeria, 1990.

<sup>18</sup> Nigeria gained its independence from Britain on 1 October, 1960.

<sup>19</sup> UWAIS, C.J.N., above, n. 11, at 721–722. However some of the Justices, IGUH and OGWUEGBU, J.J.S.C., were of the view that though these pieces of legislation did not expressly deal with the issue they were useful in deducing such by inference or implication. See n. 96 below.

<sup>20</sup> The 1960 Constitution of Nigeria in s. 134(6) dealing with revenue allocation provided, “For the purposes of this section the continental shelf of a Region shall be deemed to be part of that Region.” This Constitution is defunct and no similar provision is contained in the current Constitution.

part of the littoral states but rather “belonged”<sup>21</sup> to the federal government. The decision of the court on this point appeared to have been predicated, mainly, on the following:

- That the boundaries of the littoral states ended at the low-water mark by virtue of certain colonial Orders in Council, which in the opinion of the Court were still valid laws, limiting such boundaries to the “sea”;<sup>22</sup>
- That by virtue of its nature, these offshore zones are not part of the territory of Nigeria, but rather extra-territorial terrain conceded to Nigeria by international law;<sup>23</sup>
- That since international responsibility may arise from such offshore zones and the Constitution of Nigeria confers on the federal government the duty of handling external affairs, such offshore zones cannot be regarded as part of the littoral states of Nigeria;<sup>24</sup>
- That the extensive control and management, inclusive of the powers to make laws, conferred by the TWA, EEZA and the SFA on the federal government raised the inference that ownership of such zones could not be vested in the littoral states.<sup>25</sup>

In arriving at its decision against the littoral states’ ownership of the Nigerian offshore zones, the Court relied heavily on certain decisions of the English, Australian, Canadian and American Courts.<sup>26</sup> Each of the above four propositions will now be critically examined in turn.

### Colonial Orders in Council

The Supreme Court relied on certain colonial Orders in Council enacted between 1913 and 1954.<sup>27</sup> It is extraordinary that the Court was of the view that these Orders had not become defunct, though not expressly repealed, after over forty years of Nigeria’s independence and chequered constitutional history.<sup>28</sup>

The Orders relied upon by the Court are the Colony of Nigeria (Boundaries) Order in Council 1913; the Nigeria Protectorate Order in Council 1922; the Lagos Local Government (Delimitation of the Town and Division into Wards) Order in Council 1950; the 1951 Nigeria (Constitution) Order in Council, No. 1172 and the Northern Region, Western and Eastern Region (Definition of Boundaries) Proclamation 1954 made under the 1951 Order in Council. The most important of these Orders in Council appears to be the

<sup>21</sup> To the extent permitted by international law. The Court made extensive reference to the 1982 United Nations Convention on the Law of the Sea, 21 ILM 1245 (1982), which Nigeria ratified on 14 August, 1986.

<sup>22</sup> See *A-G of the Federation v. A-G of Abia & Ors*, above, OGUNDARE, J.S.C. (lead judgement), at 642–643 and 648; UWAIS, C.J.N., at 726–728; WALI, J.S.C., at 771; KUTIGI, J.S.C., at 792–795; OGWUEGBU, at 823; ONU, J.S.C., at 860 and IGUH, J.S.C., at 892–893.

<sup>23</sup> *Ibid.*, OGUNDARE, J.S.C., at 647–653; UWAIS, C.J.N., at 729–731; WALI, J.S.C., at 771–772.

<sup>24</sup> See, *ibid.*, OGWUEGBU, J.S.C., at 828–829 and ONU, J.S.C., at 856–857.

<sup>25</sup> *Ibid.*, IGUH, J.S.C., at 889–892 and ONU, J.S.C., at 854–856.

<sup>26</sup> *Ibid.*, *per* OGUNDARE, J.S.C., at 646–647; UWAIS, C.J.N., at 722; *per* OGWUEGBU, J.S.C., at 828–829; *per* ONU, J.S.C. at 857 and IGUH, J.S.C., at 892.

<sup>27</sup> See, for example, UWAIS, C.J.N., above, n. 11, at 725, who argued that because the 1979 and 1999 Constitutions did not anywhere repeal the definition of the boundaries contained in the colonial legislation these Orders in Council were still valid.

<sup>28</sup> See n. 8 above.

1951 Order, which introduced into Nigeria a federal system of government.<sup>29</sup> These Orders in Council put the boundary of the various regions out of which the present littoral states in Nigeria emerged as the “sea” (the Atlantic Ocean). The justices of the Supreme Court then argued that as these Orders in Council limited the boundaries of the present littoral states to the “sea”, they therefore precluded the extension of such boundary beyond the low-water mark. In the words of OGUNDARE, J.S.C., who read the lead judgement, “One thing, however, is clear. If the boundary is with the sea, then, by logical reasoning, the sea cannot be part of the territory of any of the old Regions [out of which the littoral states emerged].”<sup>30</sup> The Chief Justice of Nigeria, for his part, to buttress this point took the definition of “sea” in the Concise Oxford Dictionary, as “expanse of salt water that covers most of earth’s surface and encloses its continents and islands, the ocean, any part of this as opposed to dry land or fresh water”, and argued that the sea could not possibly be part of the littoral states.<sup>31</sup> It must be pointed out that the Orders in Council did not anywhere define the word “sea”. Neither does anything suggest on its face that the “sea” as used in the legislation is synonymous with the low-water mark,<sup>32</sup> as distinct from the high-water mark or even to the outer limit of the territorial sea, the latter making a distinction between the landwater waters (the territorial sea) and the seaward waters (the high seas).

Further the resort to the dictionary definition of the word “sea”, in my opinion, does not provide much assistance, as it is restricted to only the water column. It does not in itself clarify whether the legislature at that time intended the offshore seabed and subsoil within national jurisdiction, where exploration and exploitation is done for the main revenue yielding resources (crude oil and gas) in contention, to be included as part of the “sea” or part of the “land”. Perhaps an examination of certain historical evidence would give an indication of the intention of the then British colonial government as regards the offshore seabed *vis-à-vis* the land territory. It is suggested that the relevant period to determine this intention is the period between 1951 and 1954, when the Nigeria (Constitution) Order in Council introducing a federal system of government and the Northern Region, Western and Eastern Region (Definition of Boundaries) Proclamation made thereunder were promulgated.<sup>33</sup> Such historical evidence, in my view, would provide a good guide as to whether the colonial government, acting on behalf of the United Kingdom, intended the offshore seabed adjacent to Nigeria to be part of the sea or part of the land territory.

A good point at which to start is to examine the position taken before the International Law Commission by the United Kingdom during this period on the offshore seabed *vis-à-vis* land territory. Before the Commission the government of the United Kingdom appears to have endorsed the view of Sir Cecil Hurst, on the seabed of the territorial sea, that there could be exclusive

<sup>29</sup> See OGUNDARE, J.S.C., at 642–643 and UWAIS, C.J.N., at 726–728, above, n. 11.

<sup>30</sup> Above, n. 11, at 643. See also n. 2 above.

<sup>31</sup> See UWAIS, C.J.N., above, n. 11, at 728.

<sup>32</sup> See E.I. Nwogugu, “Problems of Nigeria’s international offshore jurisdiction”, (1973) 23 *I.C.L.Q.* 349 at 352.

<sup>33</sup> In *Emelogu v. the State* [1988] 2 N.W.L.R. 524 at 557, a learned Justice of the Supreme Court emphasized the importance of putting a legislation in its proper historical background in order “to correctly comprehend the true import” of the legislation.

ownership of this portion of the seabed.<sup>34</sup> Further, commenting on the Report of the International Law Commission on its Draft Articles on the High Seas, the United Kingdom, in respect of the continental shelf, said as follows:

“... the rights of a coastal State over the continental shelf are of the same nature as its rights over its land territory.”

“Her Majesty’s Government agree that it is for the time being impracticable to develop submarine areas internationally; that the continental shelf is not *res nullius*; and that the right to exercise sovereignty over the continental shelf is independent of the concept of occupation.”<sup>35</sup>

These statements appear to suggest that at the relevant time the then British colonial Government was of the view that the coastal state had sovereignty over the offshore seabed and subsoil of the continental shelf, and also that the rights it exercised over the continental shelf were of the same nature as those over its land territory. It is contended, in light of this, that the intention of the legislature at the time was not that these offshore seabeds should be part of the sea, but rather be appurtenant to the land territory of Nigeria. On 8 August, 1957 the Colonial Office notified the Governor-General of Nigeria of this inherent rights theory, by which the offshore seabed and subsoil was automatically deemed to be part of the land territory. In this notification it was said “it is now fairly settled law that the shelf adjacent to any territory is appurtenant to it in much the same way that territorial waters are.”<sup>36</sup> Subsequent historical evidence in the form of another notification by the Colonial Office of 10 March, 1959 to the Governor-General of Nigeria suggests a change of position, at least in respect of the continental shelf. In this notification it was said that: “The Foreign Office have concluded that the wording of Article 2(1) of the Convention on the Continental Shelf precludes incorporation of the shelf adjacent to Nigeria within the boundaries of Nigeria.”<sup>37</sup> The question therefore would be: what is the critical date for determining the relevant intention for the purposes of interpreting the 1951 Order in Council and the 1954 Proclamation? In my view, the critical date should be pre-1959, where the relevant intention can be inferred from the comments of the United Kingdom, the colonial State, before the International Law Commission and the 1957 notification, rather than the 1959 notification. Even so, in 1959 the then Federal Parliament of Nigeria enacted the Minerals Oils (Amendment) Act where for the purposes of the Act “land” was defined as including both the territorial waters and the seabed and subsoil of the continental shelf,<sup>38</sup> thereby suggesting that land in Nigeria includes both land on the landward and seaward side of the low-water mark.

<sup>34</sup> Yearbook of the International Law Commission, 1953, vol. II, New York, United Nations, 1959, at 267–268, and C. Hurst, “Whose is the bed of the sea?” (1923–24) IV *B.Y.I.L.* 34–43.

<sup>35</sup> Yearbook of the International Law Commission, *ibid.*, 266–267. See also G. Marston, “The extension of the maritime boundaries of certain British colonies under the Colonial Boundaries Act, 1895: a special case?” in Carl Grundy-Warr (ed.), *International Boundaries and Boundary Conflict Resolution—Proceedings of the 1989 IBRU Conference*, University of Durham, U.K., Durham, Boundaries Research Press, 1990, 255.

<sup>36</sup> See G. Marston, “The incorporation of continental shelf rights into United Kingdom law”, (1996) 45 *I.C.L.Q.* 13, at 21–22. See the *Grisbadarna Case (Norway v. Sweden)*, Scott (1909), Hague Court Reports 121 at 127, which describes the territorial waters as an “inseparable appurtenance” of the land territory.

<sup>37</sup> Marston, *ibid.*, at 27.

<sup>38</sup> S. 2 of Act No. 9 of 1959.



The more recent Petroleum Act<sup>39</sup> also seems to incorporate the offshore bed as part of the land and not the sea. After vesting ownership of petroleum in the federal government,<sup>40</sup> it goes on to state that this “applies to all land (including land covered by water) which (a) is in Nigeria, or (b) is under the territorial waters of Nigeria, or (c) forms part of the continental shelf, or (d) forms part of the Exclusive Economic Zone of Nigeria”. A first glance at this provision might give the impression of a distinction between land in Nigeria and the territorial sea, continental shelf and the EEZ, thus indicating an intention to exclude the latter as part of Nigeria. However the reference to “all lands (including land covered by water)”, indicates that the distinction is a matter of form to differentiate between two types of land in Nigeria, namely non-submerged and submerged land.

All in all, it appears that at worst these Orders in Council referred to by the Court are irrelevant, or at best they are rather ambiguous. The reliance of the Court on those pieces of legislation to support its decision is not convincing. It does appear that the Court in its bid to locate municipal legislation as a fallback over-stretched the meaning of the word “sea” to be synonymous with the “low-water mark”.

### **Nature of offshore seabed and subsoil within Nigeria’s national jurisdiction**

After examining the provisions of the 1982 United Nations Convention on the Law of the Sea (LOSC), including articles 2, 3, 55, 57, 76, 77 and 78, the Court came to the conclusion that the offshore maritime zones within the national jurisdiction of Nigeria were not part of the territory of Nigeria but some kind of extra-territorial terrain which international law conceded to Nigeria to exercise certain jurisdictional rights.<sup>41</sup> OGUNDARE, J.S.C., in his lead judgement put it as follows:

“The sum total of all I have been saying above is that none of the Territorial Waters Act, Sea Fisheries Act and Exclusive Economic Zone Act has extended the land territory of Nigeria beyond its constitutional limit, although the Acts give municipal effect to international treaties entered into by Nigeria by virtue of its membership, as a sovereign State, of the Comity of Nations. These treaties confer sovereignty and other rights on Nigeria over certain areas of the sea (the Atlantic Ocean).”<sup>42</sup>

The court was heavily influenced by the decision of BARWICK, C.J., in *New South Wales & Ors. v. The Commonwealth*,<sup>43</sup> who said:

“... the international concession was not that the territory of the nation, in a proprietary or physical sense, was enlarged to include the area of water in the territorial sea or the area of subjacent soil. Indeed, the very description ‘territorial waters’ emphasises, in my opinion, that they are waters which wash the shores of the territory of the nation state, otherwise regarded as ending at the margin of the land.”<sup>44</sup>

<sup>39</sup> See also s. 1 of the Petroleum Act, Cap. 350, Laws of the Federation of Nigeria 1990.

<sup>40</sup> See n. 7 above on ownership of mineral resources in Nigeria.

<sup>41</sup> See above, n. 11: OGUNDARE, J.S.C., at 647–651; UWAIS, C.J.N., at 729–731.

<sup>42</sup> Above, n. 11, at 652. See also decision of UWAIS, C.J.N., *ibid.*, at 731.

<sup>43</sup> (1975–76) 135 *C.L.R.* 337 at 363.

<sup>44</sup> *Ibid.* quoted by OGUNDARE, J.S.C., above, n. 11, at 652.

### Territorial sea

The Supreme Court, in arriving at the decision that the territorial sea was not part of Nigeria did not address itself to the fact that there is historical evidence to show that even as far back as the nineteenth century certain states have claimed part of the territorial sea as part of their territory.<sup>45</sup> Under international law the coastal state is granted sovereignty over the territorial sea.<sup>46</sup> In *Utah Div. of State Lands v. United States*<sup>47</sup> the United States Supreme Court pointed out that ownership of submerged lands is an essential attribute of sovereignty.<sup>48</sup> This raises the issue of whether the fact that international law, both customary and treaty, confers upon the coastal state sovereignty of the territorial sea implies ownership of such? The Nigerian Court did not appear to have adequately addressed this interesting (and very relevant) jurisprudential issue of the relationship between sovereignty and ownership.<sup>49</sup>

The attempt by certain counsel to the show littoral states ownership, through affidavit evidence pointing to historical claim of certain parts of the sea by communities indigenous to such states, was rejected by the Court as being “against the grain of statutory instruments (Orders in Council) and the common law and international law”.<sup>50</sup> This issue of indigenous community ownership of parts of the sea was however examined in the more recent New Zealand case of *Ngati Apa, Ngati Koata & Ors. v. Ki Te Tau Ihu Trust & Ors.*<sup>51</sup> In this case the Court of Appeal, looking at the issue of sovereignty and ownership of the offshore seabed, embarked on an interesting jurisprudential excursion of distinguishing between territorial sovereignty vested in the Crown (*imperium*) in respect of the foreshore and seabed of the territorial sea and the right of ownership of such (*dominium*). The Court then went on to emphasize the possibility of *imperium* being vested in the Crown in respect of such offshore zones while *dominium* may be vested in someone else. In this case certain Maori native groups, the Ngati Apa, Ngati Koata, Ngati Kuia, Ngati Rarua, Ngati Tama, Ngati Toa, Rangitane and Te Atiawa, applied to

<sup>45</sup> See P. Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, New York, Kraus Reprint, 1970, 115–119; Hurst, above, n. 34, and V. Prescott and S. Davis, “Aboriginal claims to seas in Australia”, (2002) 17(1) *International Journal of Marine and Coastal Law* 1–31.

<sup>46</sup> Art. 2(1) of the 1982 United Nations Convention on the Law of the Sea, 21 ILM 1245 (1982), states 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.” Art. 2 (2) extends such sovereignty to the airspace and bed and subsoil of the territorial sea. See also art. 2 of the 1958 Convention on the Territorial Sea and Contiguous Zone. In the *Grisbadarna Case* (1909) Hague Reports, 121 at 127, the Permanent Court of Arbitration held that when territory was ceded to Sweden: ‘the radius of maritime territory constituting an inseparable appurtenance of this land territory must have automatically formed a part of this cession.’ See also Judge Sir Arnold McNair’s dissenting judgement in the *Anglo-Norwegian Fisheries Case* ICJ Reports (1951) 116 at 160 and G. Marston, “The evolution of the concept of sovereignty over the bed and subsoil of the territorial sea” (1976–1977) XLVIII *B.Y.I.L.* 321–332.

<sup>47</sup> 482 U.S. 193 at 195 (1987).

<sup>48</sup> See also *United States v. Texas*, 339 U.S. 707 at 717 (1950).

<sup>49</sup> See on this D.P. O’Connell, “The juridical nature of the territorial sea”, (1971) 45 *B.Y.I.L.* 304–383 and Marston, above, n. 46.

<sup>50</sup> Above, n. 11, *per* OGUNDARE, J.S.C., at 652–653 and UWAI, C.J.N. at 722–724.

<sup>51</sup> [2003] NZCA 117 (19 June, 2003). For an examination of this case when it initially came up before the Maori Land Court see J.S. Davidson, “New Zealand: ownership of the foreshore and sea-bed”, (1998) 13(4) *International Journal of Marine and Coastal Law* 617–622. Also see Australian case of *Mabo v. Queensland* [No. 2] (1992) 175 CLR 1.

the Maori Land Court for declaratory orders that certain land below the mean high-water mark in the Marlborough Sounds were Maori customary lands. The Attorney General and certain non-Maori parties filed preliminary objections to the effect that such applications could not succeed as a matter of law, since lands falling under the foreshore and territorial sea of New Zealand were, under common law and certain legislation,<sup>52</sup> vested in the Crown. The Court of Appeal was of the view that the mere fact that the foreshore and the bed of the territorial sea were vested in the Crown did not in itself exclude Maori ownership of such offshore lands under native law and custom. As far as the Court was concerned, though the Crown had imperium over such offshore lands by reason of sovereignty this did not in itself exclude the dominion of the Maoris over such land if there was evidentiary proof, to be laid before the Maori Land Court, proving such native rights. The Court held that conferring sovereignty of such offshore zones on the Crown under common law will only apply subject to local custom, including property rights. Also, the Court was of the view that legislation vesting such offshore zones in the Crown, since it had no express expropriatory purpose, could only be read as vesting such on the Crown subject to the preservation of existing property interests, including Maori property rights, if satisfactorily established by evidence.

Nigeria, like New Zealand, as a former British territory with native population, also received the common law subject to local custom, including property rights.<sup>53</sup> The New Zealand Court of Appeal, in arriving at its decision, quoted extensively and relied heavily on the Privy Council case of *Amodu Tijani v. Secretary, Southern Nigeria*.<sup>54</sup> Here the Privy Council made it clear that though Lagos and the territory round it had been ceded to the British Crown, this sovereign right of the Crown did not in itself extinguish the ownership rights under native law and custom.<sup>55</sup> In arriving at this decision, the Privy Council issued a warning about the tendency of trying to understand the type of title under native law and custom by trying to equate it with concepts familiar only in English law.<sup>56</sup> Accordingly, the Privy Council felt constrained to point out that: "As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with."<sup>57</sup>

Unfortunately the Nigerian Supreme Court, because it relied on ambiguous Orders in Council, and also because of its reliance on the purported enunciation of the common law by the case of *R v. Keyn*, did not critically evaluate the evidence tendered by certain littoral states. These states,

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<sup>52</sup> Such as the New Zealand Territorial Sea and Fishing Zone Act, 1965 and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act, 1977; Foreshore and Seabed Endowment Revesting Act, 1991; Resource Management Act, 1991 and the Harbours Acts 1878 and 1950.

<sup>53</sup> See *Laoye & Ors v. Oyetunde* [1944] A.C. 170 at 172–173, where Lord Wright stated: "The policy of the British Government . . . is to use for purposes of the administration of the country [Nigeria] the native laws and customs in so far as possible and in so far as they have not been varied or suspended by statutes or ordinances affecting Nigeria. The courts which have been established by the British Government have the duty of enforcing these native laws and customs, so far as they are not barbarous, as part of the law of the land."

<sup>54</sup> [1921] 2 AC 399.

<sup>55</sup> *Ibid.*, at 404.

<sup>56</sup> *Ibid.*, at 402–403.

<sup>57</sup> *Ibid.*

especially Cross Rivers and Lagos states, gave evidence through their pleadings and affidavit evidence in support of their attempt to establish ownership under native law and custom over these offshore zones by certain communities indigenous to these states. As far as UWAIS, C.J.N., was concerned, though the evidence adduced was useful it did not help in answering the question of the seaward boundaries of these states.<sup>58</sup> Without the benefit of a critical evaluation and definite pronouncement on such evidence by the Nigerian Court, it is difficult to say whether or not such evidence conclusively established any customary ownership by the indigenous communities over such offshore zones.<sup>59</sup> An examination of such evidence was essential, for if such customary ownership of these offshore zones had been established it behoved the Nigerian Court to apply the common law subject to this customary right of ownership. If such customary rights of ownership are established to have existed, by virtue of the Nigerian Land Use Act, these rights have since 1978<sup>60</sup> become vested in the governor of the state in which such indigenous communities are situated. This raises the possibility that such offshore zones are vested through this means on littoral states able to prove such ownership under native law and custom.

### Continental shelf and EEZ

As regards the offshore bed of the continental shelf of Nigeria, which overlaps with the EEZ, in so far as it does not extend beyond 200 nautical miles,<sup>61</sup> the Court, while referring to the provisions of articles 76–78 of the LOSC, appears to have glossed over the nature of the continental shelf under international law.<sup>62</sup> Considering the novelty of a case such as this before the Court, it would have been expected that in reaching its decision on the continental shelf *vis-à-vis* Nigeria, the Court would have examined the historical development of the concept of the continental shelf from the Truman Proclamation,<sup>63</sup> along with the numerous decisions of the ICJ on this, especially the 1969 decision of the *North Sea Continental Shelf* Cases.<sup>64</sup> Though these decisions

<sup>58</sup> See n. 11, above, at 723–724.

<sup>59</sup> See Prescott and Davis, above, n. 45, at 16–18, where the writers suggested that such evidence should include detailed knowledge of current and past members of the clan about reefs, rocks, channels, currents and tides as well as precise knowledge about seasonal variations that occur in the type, quantity and amount of food that can be obtained from the sea.

<sup>60</sup> S. 1 of the Land Use Act, Cap. 202, Laws of the Federation of Nigeria 1990 states that “subject to the provisions of this Act, all land comprised in the territory of each State in the Federation is hereby vested in the Governor of that State and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act.”

<sup>61</sup> See the Continental Shelf (Libyan Arab Jamahiriya/Malta) Case, ICJ Reports (1984), 3, paras. 33 and 34. While the EEZ goes beyond the seabed aspects to include the water column resources and issues, this article shall not give prominence to the latter because the central focus of the dispute before the court was in respect of revenue from oil and gas resources located in the offshore seabed of Nigeria.

<sup>62</sup> Above, *per* OGUNDARE, J.S.C., at 655–656. See the interesting analysis on the basis of a coastal States’ title to these offshore seabeds in M. Evans, *Relevant Circumstances and Maritime Delimitation*, Clarendon Press, Oxford, 1989, 44–62 and P.A. Symonds *et al.*, “Characteristics of continental margins” in P.J. Cook and C.M. Carleton (eds.), *Continental Shelf Limits: The Scientific and Legal Interface*, Oxford, 2000, 25–63.

<sup>63</sup> For the text of the Truman Proclamation of 28 September, 1945 see (1946) 40 *A.J.I.L.*, suppl., 45–48.

<sup>64</sup> I.C.J. Reports (1969), 3.

applied to disputes between nation states in the international sphere and not disputes between component units of a federal state, it would have been helpful if these decisions had been considered and applied by the Nigerian court in determining the exact nature of the continental shelf *vis-à-vis* Nigeria as a nation state. This would have guided the Court in its interpretation of the Nigerian constitution and domestic legislation to ascertain as between the federal government and littoral states who owns the Nigerian continental shelf. The decision of the Supreme Court appears to reveal a court that was not eager to embark on detailed analysis of the nature of the continental shelf under international law. The Court merely restricted itself to a rather cursory reference to treaty provisions, especially the United Convention on the Law of the Sea, without necessarily examining decisions of international courts on the nature of the continental shelf. This in itself could be said to be symptomatic of the fact that in respect of international law the Court appeared to be on very tenuous grounds.<sup>65</sup> Perhaps this can be explained away in the sense that Nigerian judges, like most common law jurisdictions, generally do not have a culture of international law as was pointed out by Judge Rosalyn Higgins when she said:

“... there is another culture that exists, in which it is possible to become a practising lawyer without having studied international law, and indeed to become a judge knowing no international law. Psychologically that disposes both counsel and judges to treat international law as some exotic branch of law, to be avoided if at all possible, and to be looked upon as if it is unreal, of no practical application in the real world.”<sup>66</sup>

However perhaps the shortcoming in this regard of the Supreme Court, made up of many eminent jurists, can be attributed to a shortage of resources, not least research assistants.<sup>67</sup>

Since the Truman Proclamation, the basis of a coastal State's title to the continental shelf has been the natural prolongation principle. This has been emphasized in various decisions of the international courts.<sup>68</sup> In the *North Sea Continental Shelf Cases*<sup>69</sup> the Court explained that: “The continental shelf is, by definition, an area physically extending the territory of most coastal states into

<sup>65</sup> There were some glaring errors in the statements of some of the justices in respect of international law, e.g. of such statements are *per* OGUNDARE, J.S.C., at 651: “By the 1958 Convention the breadth of the territorial sea is a maximum of 3 miles.” *Per* UWAI, C.J.N., at 731: “It is noted that the 3 nautical miles mentioned in the case were later extended to 12 nautical miles by the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, which preceded the 1982 United Nations Convention on the Law of the Sea.” It is trite under international law that the issue of the breadth of the territorial sea, one of the major issues that led to the convening of UNCLOS III, was not dealt with by the Geneva Convention but rather by the 1982 United Nations Convention on the Law of the Sea. See R. Churchill and V. Lowe, *The Law of the Sea*, Manchester, 1999, 77–81.

<sup>66</sup> R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford, 1994, 206.

<sup>67</sup> There is no provision for research assistants for the Judges under the Supreme Court Rules so they do all their research themselves. This puts intense pressure on this rather overworked court having, in addition to its original jurisdiction, extensive appellate jurisdiction to hear and determine appeals from the Court of Appeal emanating from all parts of the country.

<sup>68</sup> See, e.g., the *North Sea Continental Shelf Cases*, n. 64, above; arbitration between the UK and France UNRIAA Vol. XVIII(1977), 49 at para. 79 and 92 at para. 194; the Continental Shelf (Tunisia/Libya) Case, ICJ Reports(1982), 18; Continental Shelf (Libya/Malta) Case, ICJ Reports (1985), 13.

<sup>69</sup> *Ibid.*

a species of platform which has attracted the attention first of geographers and hydrographers and then of jurists.”<sup>70</sup>

The Court in this case went on to state:

“... The rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land 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 resources.”<sup>71</sup>

In addition, the Court, emphasizing the basis of the rights of the coastal state over the continental shelf, points out that:

“What confers the ipso jure title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea.”<sup>72</sup>

The decision in the *North Sea Continental Shelf* Cases has since been supported by subsequent decisions of the International Court of Justice including the *Tunisia/Libya* Case.<sup>73</sup> The Court in this case emphasized that the natural prolongation principle was not only part of customary international law but had been incorporated into article 76 of the then draft Law of the Sea Convention, which was eventually retained as the same article 76 in the final draft of the Convention.<sup>74</sup>

While article 76(1) of the UNCLOS 82 now places an emphasis on distance, it does not detract from the continental shelf being a natural prolongation of the land territory of the coastal State. Article 76(1) states:

“*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.*” (italics mine for emphasis)

The effect of the decisions of the international courts is that the continental shelf, to the extent limited by international law,<sup>75</sup> is to be regarded as part of the coastal state by reason of its contiguity to the landmass. Certain African States, in line with the natural elongation principle, have enacted legislation to the effect that the continental shelf will be regarded as part of their territory, at least for certain limited purposes, including mining and customs and excise. For example, the Namibian Territorial Sea and Exclusive Economic Zone Act states that,

“The continental shelf referred to in subsection (1) shall be regarded as part of Namibia and shall for the purposes of (a) the exploitation of the natural resources of the sea; and (b) any provision of any law relating to mining,

<sup>70</sup> Ibid., 51 at para. 95.

<sup>71</sup> Ibid., 22 at para. 19.

<sup>72</sup> Ibid., 31 at para. 43.

<sup>73</sup> Above, n. 68.

<sup>74</sup> Above, n. 68, 46–47 at paras. 43 and 45.

<sup>75</sup> Art. 77 of LOSC.

precious stones, metals or minerals, including natural oil, which applies in that part of Namibia which adjoins the continental shelf, be deemed to be State land.”<sup>76</sup>

In the recent South African case of *De Beers Marine (PTY) Ltd. v. The Commissioner for the South African Revenue Service*,<sup>77</sup> it was held that the continental shelf as defined by the Maritime Zones Act<sup>78</sup> shall be deemed to be part of the Republic of South Africa for the purposes of Customs and Excise.<sup>79</sup>

The Nigerian Court throughout its entire examination of the continental shelf appears not to have considered the idea of it being a natural prolongation of the land territory of Nigeria. If the continental shelf is a natural prolongation of the land territory of Nigeria, the issue is who owns it? This is to be determined by the domestic laws of Nigeria, some of which will be examined in the subsequent section.

### Municipal laws of Nigeria

The most compelling factor in determining whether the “ownership” of the territorial sea, continental shelf and EEZ of Nigeria is vested in the federal government or the littoral states is the municipal law of Nigeria. Unfortunately the municipal law failed to expressly deal with this issue.

#### *The 1999 Constitution*

The 1999 Constitution is the supreme law of Nigeria; any law that is inconsistent with its provisions is to the extent of such inconsistency null and void.<sup>80</sup> There are no express provisions on the ownership of the offshore seabed as between the federal government and the littoral states under the Constitution. However, is such ownership implicit in the Constitution? The Constitution declares Nigeria to be a federation consisting of states and a federal capital territory (FCT). The FCT is the only territory vested in the federal government under the Constitution.<sup>81</sup> While the FCT is clearly defined by the Constitution in terms of precise co-ordinates,<sup>82</sup> the extent of the various states are merely defined by mentioning the local governments areas in each state in the federation without any exact delimitation of such.<sup>83</sup> The counsel for the littoral states argued strenuously that since the offshore bed within Nigerian national jurisdiction does not fall within the precise constitutional definition of the FCT, it should be taken to be part of the local government areas, which are not defined with precision, of the abutting littoral states.<sup>84</sup> The court, however, too readily dismissed the arguments of counsel for the littoral states, in this regard, on erroneous grounds, including the contention of one of the judges that a local government cannot exist on the

<sup>76</sup> S. 6 (2) of Act No. 3 of 30 June, 1990.

<sup>77</sup> The Supreme Court of Appeal of South Africa, Case no. 165/2001, Judgement delivered on the 20 May, 2002. See <http://wwwserver.law.wits.ac.za/sca/files/16501/16501.pdf>

<sup>78</sup> Act No. 15 of 1994.

<sup>79</sup> S. 5(b) of the Customs and Excise Act No. 92 of 1964.

<sup>80</sup> S. 1.

<sup>81</sup> S. 2(2).

<sup>82</sup> Ss. 3(4), 297 and Part II of the First Schedule.

<sup>83</sup> Ss. 3(1) and (2) and Part I of the First Schedule.

<sup>84</sup> For comprehensive summary of arguments of counsel see UWAIS, C.J.N., above, n. 65, at 699–722.

sea.<sup>85</sup> It is my contention that the Court's decision was based on its failure to appreciate the crucial link between a contiguous landmass and the submerged land under the sea. Also, even if it is conceded that the boundary of the littoral states ends at the low-water mark, this would necessarily mean that the part of the sea on the landward of the low-water mark, which is part of internal waters,<sup>86</sup> will be part of one of the local governments, combining with the others to form the contiguous littoral state. It is my contention that there is nothing incongruous about the territorial sea and bed of the EEZ and continental shelf being part of the local government areas contiguous to the sea. The Constitution, by avoiding precise co-ordinates in describing states and local government areas, certainly does not preclude the submerged land of the offshore bed being a part of the local government area adjoining it.<sup>87</sup>

Another point that appeared to have swayed the Supreme Court against arguments of counsel for the littoral states was the fact that the previous 1960 and 1963 Nigerian Constitutions had made express provisions deeming the continental shelf as part of the then regions for revenue derivation purpose, while the current 1999 Constitution was silent on the question.<sup>88</sup> As far as the Court was concerned, the 1960 and 1963 constitutions only "deemed" that the continental shelf be part of the units solely for revenue purposes and if this provision had not existed the revenue derived from exploitation of resources in this offshore bed would not have been accruable to such regions.<sup>89</sup> It is my contention that the silence of the 1999 constitution does not in itself lead to the conclusion that littoral states do not have ownership of the continental shelf. Implicitly, the 1999 Constitution, by limiting the federal territory to a clearly defined FCT, appears to lean in favour of the littoral states' ownership of the offshore bed, including the continental shelf.

#### *The Offshore Oil Revenues (Registration of Grants) Act*

The argument that these offshore seabed zones are part of the littoral states is also supported by implication by the Offshore Oil Revenues (Registration of Grants) Act.<sup>90</sup> This Act states that:

"All registrable instruments relating to any lease, licence, permit or right issued or granted to any person in respect of the territorial waters and the continental shelf of Nigeria shall, notwithstanding anything to the contrary in any enactment continue to be registrable in the States of the Federation, respectively, which are contiguous to the said territorial waters and the continental shelf."<sup>91</sup>

In cases where there are disputes as to whether or not any instrument is registrable in any state, such dispute is required to be determined by the head of the federal government whose decision shall be final and binding.<sup>92</sup> This legislation, which was enacted during the military regime, is still a valid and

<sup>85</sup> KUTIGI, J.S.C., above, n. 11, at 791–792.

<sup>86</sup> Art. 8 of LOSC 82.

<sup>87</sup> S. 3 (1) and First Schedule Part 1 of the 1999 Constitution.

<sup>88</sup> OGUINDARE, J.S.C., above, n. 65, at 654–655.

<sup>89</sup> See s. 134 of the 1960 and s. 140 of the 1963 Constitutions. Refer to nn. 2 and 20 above.

<sup>90</sup> Cap. 336, Laws of the Federation of Nigeria, 1990. See UWAI, C.J.N., above, n. 65, at 714, for argument of counsel to the 3rd Defendant, Akwa Ibom State, in this regard.

<sup>91</sup> S. 1 (1).

<sup>92</sup> S. 1(2).



subsisting law, though the validity of the provision giving the head of the federal government the right in cases of dispute, presumably between two contiguous littoral states, to make a final and binding decision, is doubtful in view of the provisions of the Constitution that gives the Supreme Court original jurisdiction over disputes between states.<sup>93</sup>

The fact that such registration is to be done in the littoral state contiguous to such offshore zone rather than the Federal Capital Territory certainly weighs in favour of these zones being regarded as part of the littoral states and not federal government territory.

*The Territorial Waters Act (TWA), Exclusive Economic Zone Act (EEZA) and Sea Fisheries Act (SFA)*

The TWA (stating the breadth of the territorial sea and making provision in respect of the exercise by the Nigerian courts of criminal jurisdiction over the Nigerian territorial sea),<sup>94</sup> the EEZA (regulating the Nigerian EEZ) and the SFA (regulating fishing within Nigerian waters),<sup>95</sup> while not making express provision for ownership of the offshore zones, were utilized by certain justices of the Supreme Court to rule against littoral states ownership. As far as IGUH, J.S.C., and ONU, J.S.C.,<sup>96</sup> were concerned, the fact that the legislation had given extensive governmental authority and powers, including the power to make laws, to the federal government was an indication that ownership could not lie with the littoral states. Admittedly, a lot of governmental authority and control is conferred by the legislation on the federal government. For the TWA, the original legislation in 1967 had initially given both the federal government and the littoral states, then known as regions, concurrent powers to make laws in respect of the territorial waters of Nigeria.<sup>97</sup> By 1971, with the amendment of the 1967 legislation, this power to make laws in respect of the territorial waters became limited to the federal government.<sup>98</sup> The EEZA, as amended by the EEZ (Amendment) Act,<sup>99</sup> vests the sovereign and exclusive rights with respect to the exploration and exploitation of the EEZ in the Federal Republic of Nigeria, such rights to be exercisable by the federal government.<sup>100</sup> It also allows the federal government to establish artificial islands and installations for the purpose of exploring and exploiting, conserving and managing the natural resources in the EEZ.<sup>101</sup> Under this Act the power to prosecute for offences committed in this zone is conferred on the Federal Attorney General and the jurisdiction to try such offences is conferred upon the Federal High Court,<sup>102</sup> a Court considered to be established by the federal government, as opposed to the State High Courts, which are Courts of

<sup>93</sup> S. 232(1).

<sup>94</sup> See E. Egede, "The Nigerian territorial waters legislation and the Law of the Sea Convention (LOSC) 1982", (2004) 19(2) *The International Journal of Marine and Coastal Law* 147–172.

<sup>95</sup> See nn. 14, 15 and 16 above.

<sup>96</sup> Above, n. 11, at 889–892 and 854–856 respectively.

<sup>97</sup> See s.1 (2) of the Territorial Waters Act, No. 5 of 1967.

<sup>98</sup> See para. 2 of the Schedule to the Territorial Waters (Amendment) Act No. 38 of 1971.

<sup>99</sup> Act No. 42 of 1998.

<sup>100</sup> S. 2(1).

<sup>101</sup> S. 3.

<sup>102</sup> The Territorial Waters Act merely states "Nigerian Court" without specifying the exact Court having jurisdiction to try offences committed in the territorial waters of Nigeria. See ss. 2 and 3.

the states.<sup>103</sup> The SFA requires fishing vessels wishing to fish in the Nigerian territorial sea and EEZ to be licensed.<sup>104</sup> The licensing officer is in this Act defined as the Minister of Agriculture, Water Resources, and Rural Development, a minister of the federal government, or any person appointed by him.<sup>105</sup> Undoubtedly, these laws confer upon the federal government extensive powers of control and management of these offshore zones. It is however doubtful if such can be used to infer federal government ownership of such zones.<sup>106</sup> Such inference is confronted with the challenge of how such federal government ownership can be placed within the constitutional framework limiting federal government ownership to a clearly defined FCT, which obviously does not include offshore zones. As has been argued above, the attempt by the Court to exclude such zones from being part of Nigeria, especially the seabed portion, is not convincing.<sup>107</sup> Further the authority of the federal government to make laws in these zones and to exercise control and management is not based on their ownership of these zones, but rather on the fact that such issues are placed under the federal government's legislative powers under the Exclusive Legislative List of the 1999 constitution.<sup>108</sup> Just as the exclusive powers to legislate over matters in the Exclusive Legislative List of the Constitution, when exercised over the land territory of a State or any part thereof, does not make such territory any less the territory of such State (for instance, the mere fact that the federal government has policing powers over the land territory of a state does not make the territory any less that of the state), so too the exclusive powers to legislate over matters in the offshore zones cannot in itself be a basis to ascribe ownership of such zones to the federal government. A perusal of the Exclusive Legislative List of the Constitution consisting of 68 items reveals that the Exclusive list does not restricts the right to legislate on all matters in respect of the territorial sea, continental shelf and EEZ of Nigeria to only the federal government. The constitutionality of the 1971 amendment of the TWA in the light of the 1999 Constitution is therefore doubtful.<sup>109</sup> Though the states cannot legislate in respect of these offshore zones on, for instance, mines and minerals, maritime shipping and navigation and defence, which fall under the Exclusive List,<sup>110</sup> nothing stops them from legislating on matters outside this list. For instance, nothing precludes the littoral states from legislating on antiquities or monuments found in the offshore bed as long as it can establish that such bed is part of the state. This is of course subject to the proviso that they are not designated as national antiquities or monuments.<sup>111</sup> This in itself would lead in a rather cyclic

<sup>103</sup> Ss. 4 and 5. See ss. 249–254 (Federal High Court) and ss. 270–274 (State High Courts) of the 1999 Constitution.

<sup>104</sup> S. 1.

<sup>105</sup> S. 15.

<sup>106</sup> The Chief Justice rejected the attempt by counsel for the federal government to raise such inference. See n. 19 above.

<sup>107</sup> See above, "Nature of offshore seabed and subsoil within Nigeria's national jurisdiction" section of this article.

<sup>108</sup> See s. 4(2) and Part I of the Second Schedule of the constitution. There are three legislative lists: Exclusive (Federal Government only); Concurrent (Federal and States); and Residual (States only). The constitution specifies matters contained in the Exclusive and Concurrent Lists while the Residual List, which is not expressly drawn out, are those matters not falling under the Exclusive and Concurrent Lists. See s. 4 and the Second Schedule of the constitution.

<sup>109</sup> See n. 98 above.

<sup>110</sup> See paras. 17, 36 and 39.

<sup>111</sup> See s. 4 (7) and para. 3 of Part II of the Second Schedule of the Constitution.

manner to the question before the Court as to whether such offshore bed is part of the littoral states or not? This points to the futility of using the extensive legislative, control and management argument as a basis for holding in favour of federal rather than littoral states' ownership of the Nigerian offshore zones.

### Foreign cases

The Supreme Court relied heavily, in view of the novel nature of the case, on certain foreign cases from Britain, America, Australia and Canada.<sup>112</sup> While there is nothing wrong with obtaining guidance from foreign cases in dealing with novel points, it is my view that these cases were either inappropriate or distinguishable from the case before the Supreme Court.

The Supreme Court relied very heavily, in arriving at its decision, on the oft-criticized case<sup>113</sup> of *R v. Keyn*,<sup>114</sup> a classic example of a case where it is rather difficult to extricate the ratio decidendi as a result of the number of judges involved and their divergent opinions.<sup>115</sup> From subsequent cases interpreting *R v. Keyn* it is taken to have been decided that under the common law the territorial sea was not part of the territory of England.<sup>116</sup> This interpretation as regards the ratio decidendi of this case was obviously accepted by the Supreme Court of Nigeria. Even if it is accepted that this was the position of the law at the time of the decision in *R v. Keyn*, it is difficult to accept that it is still the present position of the law. Customary international law on the territorial sea, a great part of which was merely codified by the Law of the Sea Convention,<sup>117</sup> has since the decision of that case clarified that the coastal State's sovereignty extends beyond its land territory to the territorial sea.<sup>118</sup> Under Nigerian law, while treaties have to be transformed by local legislation to be enforceable in Nigeria,<sup>119</sup> customary international law automatically applies as an enforceable part of Nigerian laws.<sup>120</sup> As SHAW, L.J., in the

<sup>112</sup> See *R. v. Keyn* (1876) 2 Ex.D.63 (British); *United States v. Louisiana* 394 US 11, 699 (1950); *United States v. State of California* 332 US 19 (1947); *United States v. State of West Virginia* 295 US 463 (American); *New South Wales v. Commonwealth* 8 ALR (1975-6) 1 (Australian) and *Re. Ownership Offshore Mineral Rights*, Vol. 65 DLR 2nd, 354, 1967 (Canadian).

<sup>113</sup> See, e.g., O'Connell, above, n. 49, at 304-383; and J. Gibson, "The ownership of the sea-bed under British territorial waters", VI(2) *International Relations* (1978) 474-499.

<sup>114</sup> (1876) 2 Ex.D.63. For a detailed account of the case including arguments at the hearing, see G. Marston, *The Marginal Seabed: United Kingdom Legal Practice*, Oxford, Clarendon Press, 1981, 114-151.

<sup>115</sup> See O'Connell, above, n. 49, at 328-331 and Marston, *ibid.*, 137.

<sup>116</sup> See Marston, above, n. 113, at 192-219; See also Reference *Re. Ownership of Off-Shore Mineral Rights*, above, n. 111, at 2027.

<sup>117</sup> See Preamble 7 of the LOS Convention 1982, which recognizes that part of the Convention, is merely codification of existing customary international law. Quite a number of the provisions of the Convention, which initially could be said to be progressive development, could be said to have crystallized into customary international law as a result of the overwhelming number of States that have ratified the Convention; as at 1 February, 2005, 148 States had ratified the Convention. See [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm). See also *North Sea Continental Shelf Cases*, and L.T. Lee, "The Law of the Sea Convention and Third States", (1983) 3 *A.J.I.L.* 541-568 on how Convention provisions can crystallize into customary international law.

<sup>118</sup> See n. 47 and discourse on territorial sea above.

<sup>119</sup> See s. 12(1) of the 1999 Constitution and *Abacha v. Fawehinmi* [2000] 6 N.W.L.R. (Part 660), 228.

<sup>120</sup> See WALL, J.S.C., in *Ibidapo v. Lufthansa Airlines* [1997] 4 N.W.L.R. (Part 498) 124 at 150 who points out that Nigeria inherited the English common law rules on the municipal application

English Court of Appeal case of *Trendtex v. Central Bank of Nigeria*, rightly pointed out concerning the courts of England, which is similarly applicable to the courts of Nigeria, "What is immutable is the principle of English law that the law of nations (not what was the law of nations) must be applied in the courts of England."<sup>121</sup> Further, the common law position, as pointed out above, would apply subject to local conditions, including relevant native laws and custom, including those affecting property rights, to be established by a preponderance of evidence.<sup>122</sup>

Most of the judges of the Supreme Court appear to have been impressed with American, Australian and Canadian cases that preferred the central government, rather than the component units, as a result of the international responsibility argument.<sup>123</sup> The argument is to the effect that international responsibility may arise from the offshore zones, and since the federal government, and not the littoral states, is the repository of the function to carry out external affairs under the Constitution, such offshore zones cannot be regarded as part of the littoral states.<sup>124</sup> A.V. Lowe has rebutted this contention.<sup>125</sup> He points out amongst other things that any international responsibility is for a nation state as a whole, both central and the component units, and the fact that the federal government is the competent organ to handle external affairs is a matter of form.<sup>126</sup> He also points out that this cannot be a basis for deciding against the units in favour of the central government as regards offshore zones since the nation state acting through the federal government is no more nor less responsible under international law for offshore activities than it is for onshore activities.<sup>127</sup> Any activity, whether onshore or offshore, affecting another nation's interest will bring about international responsibility. Therefore if this cannot be used as a basis to impute that the littoral states are any less owners of the onshore lands, it should in the same vein not be a basis to impute such in respect of offshore lands. The distinction between the issue of ownership of offshore beds and international responsibility was recognized by the Australian legislature when it enacted the Coastal Waters (State Powers) Act, 1980.<sup>128</sup> This Act, which purports to transfer constitutional powers over coastal waters and title to seabed minerals from the Commonwealth to the states, recognized this distinction by stating

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of international law. Under the English common law rules customary international law has automatic application in the municipal setting. See *Buvot v. Babuit* (1737) Cases t. Talbot. 281; *Triquet v. Bath* (1764) 3 Burr. 1478 and *Trendex Trading Corporation v. Central Bank of Nigeria* [1977] Q.B. 529.

<sup>121</sup> Ibid. at 578.

<sup>122</sup> See n. 48 above and the discourse of the New Zealand case of *Ngati Apa & Ors v. Ki Te Tau Ihu Trust & Ors*. Above.

<sup>123</sup> See, e.g., OGWUEGBU, J.S.C., above n. 11, at 828–829, and ONU, J.S.C., above at 856–857, referring to such cases as *U.S. v. Louisiana*, above; Reference *Re. Ownership of Offshore Minerals Rights*, above, and *New South Wales & Ors. v. Commonwealth*, above, note 111. See in the case of Australia, s. 6 of the Seas and Submerged Lands Act, 1973, as amended by the Maritime Legislation Amendment Act, 1994, which clearly vests sovereignty in respect of the territorial sea, airspace, seabed and subsoil thereof in the Commonwealth.

<sup>124</sup> See para. 26 of the Exclusive Legislative List, Second Schedule Part I of the 1999 Constitution.

<sup>125</sup> A.V. Lowe, "International law and Federal offshore lands disputes", (1977) *Marine Policy* 311–317.

<sup>126</sup> Ibid. at 312.

<sup>127</sup> Ibid. at 313.

<sup>128</sup> Act No. 75 of 1980.

as follows:

“Nothing in this Act affects the status of the territorial sea of Australia under international law or the rights and duties of the Commonwealth in relation to ensuring the observance of international law, including the provisions of international agreements binding on the Commonwealth and, in particular, the provisions of the Convention on the Territorial Sea and the Contiguous Zone relating to the right of innocent passage of ships.”<sup>129</sup>

Furthermore the decisions of these foreign cases were based upon their peculiar constitutional history. For example the American cases following the earliest decision of *United States v. California*,<sup>130</sup> upon a careful perusal appear to be based largely on the equal footing doctrine.<sup>131</sup> This doctrine is premised on the peculiar constitutional history of America that all states were admitted into the union on equal footing with the 13 original colonies. Consequently, since there was no historical support to show that the original colonies acquired ownership of the territorial sea, all subsequent states could not be said to have acquired such ownership. Despite the similar presidential style of government in Nigeria, the American equal footing doctrine, based on the unique constitutional history of America, does not apply to Nigeria. Though the Supreme Court of Nigeria examined the constitutional history of Nigeria by looking at the colonial Orders in Council demarcating the boundaries of the then regions of Nigeria, the interpretation given to such Orders by the Court was flawed. In addition, a central common factor that appears to run through American, Canadian and the Australian constitutional history which greatly influenced the decisions referred to, is the fact that the component units were in existence before merging to form a federal system of government, thereby giving room for the illusion that the component units by implication surrendered their rights to these offshore zones to the central government. In the case of Nigeria the situation is different, as both the federal and component units emerged at the same time with no such implication of surrender of rights to offshore lands.<sup>132</sup> KUTIGI, J.S.C., as a lone voice, though he eventually arrived at the same conclusion as the other judges in respect of the ownership of these offshore zones,<sup>133</sup> pointed out, and rightly in my view, that these foreign cases were not exactly relevant to the Nigerian situation.<sup>134</sup>

#### AFTERMATH OF THE DECISION OF THE SUPREME COURT—A POLITICAL SOLUTION

Immediately after the decision of the Supreme Court, which had far-reaching adverse financial implication for certain littoral states, the federal government embarked on what it termed a “political solution” to the issue.<sup>135</sup>

<sup>129</sup> S. 6.

<sup>130</sup> Above, n. 112.

<sup>131</sup> See also *The United States v. Louisiana*, above; *United States v. State of Alaska*, 117 S.Ct.1888 (1997); *Idaho v. United States*, 533 U.S. (2001).

<sup>132</sup> Nwogugu, “Problems of Nigerian offshore jurisdiction”, above, n. 32, at 360.

<sup>133</sup> He erroneously relied on the Colonial Orders in Council. See author’s argument above.

<sup>134</sup> Above, n. 11, at 790–791.

<sup>135</sup> By excluding offshore seabed from the ambit of the derivation formula certain littoral States such as Akwa Ibom, Bayelsa, Cross River, Rivers and Ondo State, which have virtually no onshore oil deposits but mainly offshore, are adversely affected financially by the Supreme Court’s

The federal government appointed a presidential committee under the chairmanship of the then Works and Housing Minister, Chief Tony Anenih, to find a political solution to the crisis emanating from the Supreme Court's judgment. The committee recommended that there should be legislative intervention in the form of an enactment by the National Assembly that the natural resources found offshore be deemed to be found within the territory of the adjacent littoral state for the purpose of the application of the derivation principle.<sup>136</sup> In itself there is nothing new about legislative intervention after a rather controversial decision.<sup>137</sup> The case of *R v. Keyn*, for example, resulted in legislative intervention through the Territorial Waters Jurisdiction Act, 1878.<sup>138</sup>

Further to the committee's recommendation, the Nigerian President, Olusegun Obasanjo, sent a Bill to the National Assembly. The purpose of the Bill, to be cited as the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, was to abolish the onshore/offshore dichotomy created by the Supreme Court decision in the application of the principle of derivation. The Bill, as originally sent to the National Assembly provided in section 1(2) that:

"As from the commencement of this Act, the contiguous zone of a State of the Federation shall be deemed to be part of that State for the purposes of computing the revenue accruing to the Federation Account from that State pursuant to the provisions of subsection (2) of section 162 of the Constitution of the Federal Republic of Nigeria 1999."<sup>139</sup>

In passing the Bill the National Assembly however tinkered with section 1(2) and replaced "contiguous zone" with "the continental shelf and exclusive economic zone contiguous" to the littoral state. As a result of this amendment, there was a stalemate between the President who insisted on restricting the application of the abolition of this dichotomy to the contiguous zone, and the National Assembly, which took the view that such abolition should extend to the continental shelf and the exclusive economic zone.

Over a year ago the President proposed, as a means to achieve a compromise, to replace "the contiguous zone", as contained in the original Bill, and the "continental shelf and economic zone" inserted by the National Assembly, with the phrase "200-metre water depth isobath".<sup>140</sup> The President, in his letter dated 5 February, 2003 to the Senate, purported to be guided by article

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decision. See "Supreme Court Ruling: How Does It Affect the States?" *THISDAY* newspaper, 8 April, 2002.

<sup>136</sup> The Committee however felt that a long-term solution to the onshore/offshore issue raised by the Supreme Court would require constitutional amendment. See Oma Djebah (2002) "Resource Control: How Long Can Obasanjo Hold Out?" [http://www.nigerdeltacongress.com/articles/resource\\_control\\_how\\_long\\_can\\_ob.htm](http://www.nigerdeltacongress.com/articles/resource_control_how_long_can_ob.htm). Under S.9 of the 1999 Constitution constitutional amendment involves a long and complicated procedure.

<sup>137</sup> The National Assembly of Nigeria, consisting of the Senate and the House of Representatives, has the power under s. 4 (2) of the 1999 Constitution to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List.

<sup>138</sup> Marston, above, n. 114, at 138-149.

<sup>139</sup> See Oma Djebah and Bature Umar (2002), "Obasanjo moves against Onshore/Offshore Dichotomy: Sends abolition bill to N/Assembly", <http://www.thisdayonline.com/archive/2002/09/05/20020905news01.html>

<sup>140</sup> "Obasanjo proposes new way out of Onshore/Offshore crisis", *The Nigerian Guardian*, 26 February, 2003.

76 of the United Nations Convention on the Law of the Sea in making his compromise proposal.<sup>141</sup> However, the 200-metre water depth appears to be a throwback to the 1958 Convention on the Continental Shelf in which the 200-metre depth or exploitability criterion was used to describe the continental shelf.<sup>142</sup> The modern law of the sea, as contained in article 76(1) of the LOSC, utilizes the different criteria of natural prolongation of the land territory/distance of 200 nautical miles. It is therefore difficult to imagine why the President, if he purported to be acting in line with article 76, should have any objections to retaining the term “continental shelf”. To make doubly sure that this is in line with article 76 of the Convention, the definition section of the Act could further provide that the term “continental shelf” as contained in the Act should be as defined in “the United Nations Convention on the Law of the Sea 1982 or as from time to time defined by any subsequent Convention binding on Nigeria.”<sup>143</sup>

After much disagreement between the executive and the legislative arm, the latter has accepted the compromise proposal of the President. On 9 January, 2004, the President presented the Bill, which was approved and passed by the Senate and the House of Representatives on 20 January, 2004 and 10 February, 2004 respectively.<sup>144</sup>

#### CONCLUSION

The legislative intervention initiative in the form of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, 2004 is a step in the right direction to rectify an obviously flawed decision of the Supreme Court. However, the demarcation of the relevant maritime zones, for the purposes of the derivation formula, cannot be arbitrary but must be based on established principles of public international law. The derivation principle should be extended to the continental shelf of Nigeria as defined by article 76 of the 1982 Law of the Sea Convention, a treaty that has been ratified by Nigeria. Anything less will be mere political expediency that will derogate from the whole essence of a legislative intervention to achieve an equitable outcome based on well-established rules of public international law as to the nature of the offshore zones. A resort to the 200-metres water depth isobath is a reversion to the depth and exploitability definition of the 1958 Continental Shelf Convention which appears anachronistic, especially in the light of Nigeria’s ratification of the 1982 Convention.

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<sup>141</sup> Ibid.

<sup>142</sup> See art. 1 of the 1958 Geneva Convention on the Continental Shelf (1958) 53 *A.J.I.L.* 858–862.

<sup>143</sup> See, e.g., Mauritius’ Maritime Zones Act No. 13 of 1977; Ghana’s Maritime Zones (Delimitation) Law 1986; Namibia’s Territorial Sea and Exclusive Economic Zone Act No. 3 of 1990 and South Africa’s Maritime Zones Act No. 15 of 1994.

<sup>144</sup> Kola Ologbondiyan, “Senate Passes Onshore/Offshore Bill”, *THISDAY* newspaper, 21 January, 2004. See Schedule to the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act, 2004.