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Unravelling the International Law/Federalism Conundrum: The Nigerian Onshore/Offshore Dichotomy Controversy Revisited

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Abstract

This study undertakes the critical appraisal of public international law and state practice regarding ownership of resources offshore. The insights gained regarding the nature of such rights shall be ranged against the perennial acrimonious contentions between the Nigerian Federal State and its Oil Producing Riparian Constituents. The study found that Articles 56, 57 and 76 and 77 of UNCLOS III, 1982 is *jus inter gentium* and does not vest unqualified rights over both living and non-living offshore resources. That granted, the study further found that reliance on the orthodoxy of Public International Law will result in absurd and inequitable outcomes.

Keywords

Ownership of Resources Offshore, Sovereign Rights over Offshore Resources, Nature of States Rights Offshore, Federal State, Riparian Constituents, Resource Allocative Mechanism

1. Introduction

With the world's oceans constituting about 90 per cent of the hydrosphere and water covering about 70 per cent of the earth's surface, the world's oceans no doubt constitute the new frontier for exploitation of natural resources for economic growth and development. Technological development has engendered considerable interests in deep-sea mining and exploitation of the immense reserves of mineral resources of the sea and increased the world's reserves of vital mineral resources (Brown, 1994).[1] The new interest in deep-sea mining has en-

[1]Technological developments made it possible to recover oil at depths of 10,000 feet, a little over 3000 metres and distances of 250 nautical miles, *Oceans and the Law of the Sea*, 1997 UN Doc. A/52/487 (20 October, 1997), para. 245.

gendered complex legal problems deriving from the open sea doctrine and the legal status of maritime zones. At the municipal plane, it has engendered passionate contentions between federating units of the Federal State and the central government over which tier of government should exercise jurisdiction over the belt of waters and the seabed and subsoil appurtenant to riparian States for fiscal purposes.[2]

In view of the foregoing, the modest task we have set for ourselves in this paper is an appraisal of public international law and State practice with respect to jurisdiction over the resources of the continental shelf with a view to highlighting the attendant community of conducts pursuant to a better understanding of the nature of States rights offshore, whilst concomitantly bringing such understanding to bear on the ongoing controversy between the government of the Federation of Nigeria and the Littoral States over which tier of government has jurisdiction over the continental shelf for fiscal purposes.

We argue the thesis that any attempt to resolve the onshore/offshore dichotomy issue through strict legalism and polemic will lead to a *cul de sac*, thus whilst not understating the importance of legal syllogism and precision we will underscore the extra legal criteria implicit in the issue and highlight its political sensitivity, the resource potentials of the continental shelf and the economic criteria implicit in the case. It will result in travesty of justice to rely strictly on the fact that the law of the sea treaty is between the Federal state and not its constituent federating units and so deny them certain modicum of entitlements for revenue sharing purpose. The jurisdictional claim of the riparian States shall be subjected to thoroughgoing analysis vis-*à-vis* the international legal aspect of federalism.

2. Clarification of Terms

We are obliged to clarify and explain the idea of offshore resources within the context of this paper. The term offshore resources as used within the present context encompass living and non-living resources of the seabed and superjacent waters. Offshore resources include living marine organisms of the sea, and this includes fisheries and other living organisms, which inhabit the deep sea, in contradistinction to onshore living resources of inland waters and territorial landmass.

The Non-living offshore resources denotes variegated mineral ores and hydrocarbons *in situ* in the deep sea bed and the continental shelf in contradistinction to onshore non-living resources such as mineral ores, hydrocarbons, pre-

[2]According to T. Copeland, "The 1982 United Nations Convention on the Law of the Sea provided a legal framework for the overall management and care of ocean resources. It came about due to the international desire to establish legal order over the seas and oceans and efficient and equal utilization of marine resources. All those involved knew that an agreement of this kind would promote economic order and would consider the best interest of all mankind not simply one particular country or 'State.' It was also agreed that the legal division of resources would lead to peace, security and cooperation between countries", 10 May, 2004, available at Attorney-General of the Federation v. Attorney-General of Abia State & Ors. (Sc 28/2001) [2002]NGSC 25 (April 2002).

cious stones *in situ* within the territorial landmass and inland waters. Our major concern in this paper is strictly focused on just one genre of non-living resources that is hydrocarbons.

3. The Nature of States Rights over Continental Shelf Minerals

Considerable proportion of the seabed and its subsoil which has been subsumed under the jurisdiction of the State, is the zone characterized geographically as the continental margin. That zone is composed of the continental shelf; continental slope; and the continental rise.

The greater part of the shelf is situated without the regulation limits to State jurisdiction in the offshore, that is, the territorial sea. The *raison d etre* for the doctrine of the continental shelf, a configuration of juridical postulates, applicable to offshore mineral development, was needed to constitute the fundamental premise for organic development of a comprehensive and integrated norm of international law, which would delineate State rights over the shelf and the mineral resources thereof (Churchill & Lowe, 1999).[3]

The continental shelf is that feature, extending up to 200 nautical miles from the baseline, within which the Littoral State exercises extensive rights in relation to natural resources. Basically, the relationship between offshore resources and the continental shelf as a legal postulate is the nature and extent of State rights over the non-living resources of the continental shelf. The Law of the Sea Convention 1982 has defined that right, as sovereign rights for the purposes of exploring it and exploiting its natural resources. These rights are exclusive and non-proprietary in nature, no party can exercise a parallel rights over the resources of the continental shelf appertaining to a Littoral State (Brown, 2003).

If it chooses not to invoke these rights it does not detract from the fact that it is inalienably vested with these rights as an incident of statehood. Its exercise can only be in abeyance for the Littoral State to invoke whenever it so elects. By that token, other States are precluded from exercising these rights in the continental shelf adjacent to the Littoral State.

We will dwell largely on the juridical nature of the continental shelf; certain distinguishing features of the continental shelf will be underscored in subsequent paragraphs. The preoccupation in that regard is the exploration of the nature of the Littoral States rights over offshore areas without the periphery of the territorial sea. Of fundamental concern in that connexion is the Littoral States right to the exploration of the petroleum resources of the continental shelf.

[3]Brown, note 1 chapters10 and 11; O'Connel, note 1 , chapter 13; R.R. Churchill and A.V. Lowe, *The Law of the Sea*, (Manchester University Press, 1999), Chapter 8; H. Lauterpacht, "Sovereignty over Submarine Areas", (1950) 27 *BYIL*, *376*; Jennings and Watts, Oppenheim's International Law. Note 1 764; E.D. Dickenson, "Jurisdiction at the Maritime Frontier", (1926) 40 *Harvard Law Review*, *1-27*; D.N. Hutchinson, "The Seaward Limit to Continental Shelf Jurisdiction in Customary International Law", (1985) 56 *BYIL*, 133-87; N. Leanza and L. Sico *Mediterranean Continental Shelf. Delimitations and Regime*, (Dobbs Ferry, Oceana).

3.1. State Rights in the Continental Shelf

The *fons et origo* of the doctrine of the continental shelf was contained in the Truman Proclamation of 1945, where the United States declared that it would henceforth regard the petroleum resources of the continental shelf adjacent to its coast as "appertaining to the United States, subject to its jurisdiction and control", that claim perhaps represents the first unequivocal claim to exercise unilateral jurisdiction over marine resources without the limits of the territorial sea. The signigicance of the Truman Proclamation transcended a mere claim to jurisdiction. It was a thorough going articulation of principles which were universalizable, and served to point a direction to other coastal States to adopt the principle as the basis of their claim on jurisdiction over their continental shelves (Hollick, 1997). The claim made by the proclamation was unambiguous and minimal. It expressly exempted jurisdiction over water column, that is, rights of fishing and navigation were not excluded. It was not a claim to sovereignty.

The proclamation cannot be interpreted as a claim to sovereignty for two reasons. First, that word is not employed anywhere in the document and second, the United States constitution does not permit the President, acting in isolation, by proclamation, to annex "territory". This seems to lend support to the functional, as opposed to the territorial nature of the claim made by President Truman. The operative words, "appertaining to", "jurisdiction" and "control" were open ended enough to permit a number of interpretations. A brief explanation on the exercise of "jurisdiction" and the exercise of rights will suffice. Whilst territoriality is the spatial representation of the sovereignty of the State over defined geographical parameters, "jurisdiction" is the constitutional or statutory parameters within which sovereign power may be exercised.

Jurisdiction within the context of the United Nations Convention on the Law of the Sea 1982[4] is defined as the control which the Littoral State has regarding the establishment and use of artificial islands, installations and structures, marine scientific research, the protection and preservation of marine environment as a common heritage of mankind. The wording of Articles 76 and 77 does not provide for rights *in re propia* over offshore resources even as it provides for them as rights *in re aliena*. So rights as used within the context of the United Nations Convention on the Law of the Sea 1982, underscores the interest, recognized and protected by international law, which a Littoral State has in the resources of the hydrosphere appertaining to it. There is a duty on the part of other States to refrain from alienating these rights from it, as international law views such as a wrong. These rights we must reiterate are not proprietary. They are usufruct and inchoate, and signify the exclusive interest which the Littoral State has over offshore resources. They operate negatively by imposing an obligation on other States to refrain from staking an interest in these resources. The rights

[4]As at 31 August, 2001, 136 States parties, including the European Community were bound by UNCLOS III, source at http://www.oceansatlas.org/cds static/international tribunal law sea 439 23414.html. (accessed 22/7/22).

are *rights in rem* as they impose an obligation on the whole world to so refrain. A minimalist interpretation must be given to these rights within the context of the United Nations Convention on the Law of the Sea 1982. It does not provide for rights and or jurisdiction over the water column.

The Proclamation proposed that, the United States would delimit opposite and adjacent boundaries with neighbors on "equitable principles", on its face value, the Truman Proclamation was innocuous and did not disparage the rights of any one state, even though it presented a radical departure from the rights of States in general over an area hitherto thought to be *res communis*. The international community acquiesced, with the bulk of States embracing the underpinning principle of the Truman Proclamation (Hollick, 1981). An avalanche of claims was soon to follow the United States initiative by declarations or proclamations from some South American countries. These were in form of outlandish and complete claims to maritime jurisdiction over the seabed and subsoil, and water column within a 200 nautical miles limit whilst still permitting rights of innocent passage. These claims, theoretically based on the Truman Proclamation, seemingly had little to do with submarine minerals, and were addressed to the older problem of fisheries jurisdiction (Roach & Smith, 1996). It was apparent that the interpretation imputed to the operative words of the United States Proclamation was one, which supported claims to absolute maritime jurisdiction, sovereignty excepting the right of innocent passage (Kwiatkowska, 1991).

Great Britain because of its imperial ambitions adopted a different approach on behalf of some of its possessions in the form of outright annexation of the continental shelf adjacent to these territories, and the total assimilation of the seabed as a part of the colony. The United Kingdom had annexed the seabed of the Gulf of Paria outside territorial waters to the colony of Trinidad in 1942 following the conclusion of the Gulf of Paria Treaty with Venezuela (Treaty Relating to the Submarine Areas of the Gulf of Paria, 1942). The operative words, in that case is "annexation", the post Truman epoch ushered in

Nuances of meanings, the device employed was "annexation", characterized obliquely by the nomenclature "alternation of boundaries" (Frances, 1991). The British colonial claims did not alter the status of the superjacent waters, the western maritime States were understandably not amenable to the extensive claim to all embracing jurisdiction made by the Central American Countries (Treves & Pineschi, 1997). They would rather wish the status quo sustained, and betrayed the fear of what they were convinced would be the aftermath of the doctrine of the continental shelf. This fear was premised on the consideration that the concept would invariably disparage the rights of other States, by undermining the freedom of the seas (North Sea Continental Shelf Cases, 1969).

Another approach was typified by the claims to exclusive jurisdiction and control issued by the government of the United Kingdoms on behalf of its protectorates in the Arabian Gulf region.

A mandate was given to the International Law Commission to prepare the

draft conventions for the consideration of the United Nations Convention on the Law of the Sea 1958, the commission placed the emerging law of the continental shelf in the front burner alongside the well grounded concepts of the law of the sea such as territorial sea, innocent passage, the regime of the high sea, and the regime of living resources of the high seas. That consideration underscores the great significance, which States attach to the doctrine of the continental shelf. The Truman Proclamation catalyzed a chain reactions; the avalanche of claims drew on the nuances of meanings attached to the notions of jurisdiction, sovereignty and therefore ownership. There was no choice of nomenclature with which these claims could be construed to insulate State right from being disparaged and eroded. The International Law Commission appeared not to be oblivious to that dilemma. The International Law Commission accordingly embarked on codification in accordance with its terms of reference, the resultant rules developed by it was incorporated as Article 2 of the 1958 Convention, which reads in part:

The Coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources (Convention on the Continental Shelf, 1958).

The foregoing provisions, whilst securing the rights of exploitation of the natural resources of the shelf also circumscribed State jurisdiction over the offshore. It is however not the case that the Littoral State exercises an unfettered jurisdiction. Articles 76 and 77 of the Law of the Sea Convention are clear as to the rights and jurisdiction of the Littoral State in the zone under consideration.

The exploration for and exploitation of the resources of the seabed and subsoil of the 200 nautical miles zone is adequately treated under the regime of the continental shelf in part VI. Geomorphologically, the continental shelf may and for some countries do elongate beyond the exclusive economic zone. Ancillary rights such as those relating to the construction of installations, controlling marine scientific research and environmental protection are also provided for in Article 56(1)(6).

There are also provisions relating to the construction of installation and artificial islands (Article 60) and the rights of land locked States (Article 69) and geographically disadvantaged States (Article 70). Article 77 provides inter alia:

1) *Rights of the coastal State over the continental shelf.*

The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources (Convention on the Law of the Sea, 1982, UN Doc. A/CONF. 62/122; (1982) 21 *I.L.M.*, 1261).

The Convention contains provisions relating inter alia: to the seaward extent of the continental shelf (Article 76); the legal status of waters superjacent to the shelf (Article 78); submarine cables and pipelines (Article 79); installations and artificial islands (Article 80); drilling on the shelf (Article 81) and delimitation between opposite and adjacent States (Article 83) (Ibid).

The rather circumscribed and practical formulation of the foregoing provisions does not recognize rights over the water column, the seabed or its subsoil,

nor does it recognize ownership of minerals *in situ* it merely recognize an exclusive sovereign interest in the shelf for the purpose of carrying out petroleum and other mineral operations there. Ownership of the minerals flows from production (Article 2 of the Continental Shelf Convention 1958). The International Law Commission had to be circumspect about the use of words alluding to sovereignty or sovereign rights, the concept of the shelf was couched as being subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring and exploiting the natural resources (Article 77(4) of the 1982 Convention and 2(4) of the 1958 Convention).[5]

The International Law Commission elaborates on the philosophy, which informed that choice of wordings:

The Commission desired to avoid language lending itself to interpretations alien to an object, which the Commission considers to be of decisive importance, namely the safeguarding of the principle of the full freedom of the superjacent sea and the air space above it. Hence it was unwilling to accept the sovereignty of the coastal State over the seabed and subsoil of the continental shelf…the text as now adopted leaves no doubt that the rights conferred upon the coastal State cover all rights necessary for and connected with the exploration for and exploitation of the resources of the continental shelf (11 ILC Yearbook, 1956).

The foregoing represents an innovative form of interest and analogous to the theories of ownership developed in respect of the petroleum producing jurisdictions of the United States, a theory of qualified ownership over resources *in situ* has been developed. This United practice however should not be construed as parallel in every respect to the international law formulation. The international legal formulation could however be regarded as creating a new form of property interest, the exact nature of which is still indeterminate.[6] That consideration is of considerable significance to investors in offshore petroleum ventures, for a State can not give a licensee an interest in an offshore field greater than that which it enjoys at international law, *nemo dat quod non habet*.

The crucial issue in that regard is the security available to a financier, the touchstone of the International Law Commission's approach was therefore to offer the minimally reasonable and highly functional form of jurisdiction, with a view to forestalling an avalanche of arbitrary claims to absolute national jurisdiction in areas without the periphery of the limits of the territorial sea.[7]

Article 2 of the Law of the Sea Convention 1958, provides a reference point in the evolution of municipal legislation, the Convention upholds the concept of

[5]Article 77(4) of the 1982 Convention and 2(4) of the 1958 Convention have expanded the Truman concept of resources, which referred only to mineral resources to include organism belonging to the sedentary species.

[6]The Courts of California and Pennsylvania for example have evolved a paradigm of qualified ownership over resources *in situ*, which accords with Articles 2 of 1958 Convention and 77 of 1982 Convention.

[7]The International Court of Justice held that the 1982 Convention on the Law of the Sea were in consonance with general customary international law, see *Gulf of Maine Case*, I.C.J.Rep. 1984, p 246; *Continental Shelf* (*Tunisia v. Libya Case*), I.C.J. Rep. 1982, p.18; *Continental Shelf* (*Libya v. Malta*) *Case*, I.C.J. Rep. 1985, p.13; *St. Pierre and Miquelon Case* (1982) 31 I.L.M., 1149.

"sovereign rights for the purpose of exploration and exploitation" being applicable to both the living and non-living resources of the exclusive economic zone, and the continental shelf.

There is some pitfall in construing the States rights set out in the convention for the pedestrian approach adopted bordering on absolute authority. The authority does not flow as a matter of course, even to parties to the treaty. The International Court of Justice clarified Article 2 in the North Sea Continental Shelf case where the Court:

…Entertains no doubt that most fundamental of all the rules relating to the continental shelf is that enshrined in Article 2 *of the* 1982 *Geneva Convention, though quite independent of it, namely that the rights of the coastal State in respect of the area of continental shelf that constitute a natural prolongation of its land territory into and under the sea exists 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. In order to exercise it, no special legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared* (*and many States have done this*) *but does not need to be constituted. Furthermore, the rights do not depend on its being exercised. To echo the language of the Geneva Convention, it is* "*exclusive*" *in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it that is its own affair, but no one else may do so without its express consent* (North Sea Continental Shelf Cases, 1969).[8]

In view of the foregoing no conscious and deliberate declaration of these rights was essential to their exercise, as far as the Court was concerned Articles 1 - 3 of the convention on the continental shelf are purely declaratory of existing norm of international law.

3.2. An Overview of National Legislation

Our preoccupation in this segment is to review certain national legislation with a view to establishing a basis for comparison of State practice vis-à-vis the phraseology and intendment of Article 2 of the convention, so as to identify certain regional and divergences in practice. To that extent, national decrees and legislation with respect to claims to living and non-living resources jurisdiction beyond the limits of the territorial sea, since 1958 will be discussed. The major concern in that respect will be non-living resources jurisdiction beyond the limits of the territorial sea, since 1958 and the significance of Article 2 of the 1958 Convention will be discussed.

The erstwhile German Democratic Republic, the Polish Peoples Republic and Russia (USSR) jointly issued a declaration in 1968, regarding the continental shelf rights in the Baltic Sea. The proclamation provides *inter alia.*

[8][1969] I.C.J. Rep. 3 p. 23; the Court of Appeal of Newfoundland Canada applied the dictum of the North Sea Continental Shelf Cases in Re Mineral and other Offshore Resources of the Continental Shelf Case, 90 ILR 234, p.262-265.

Each Baltic State, in accordance with the provision of the 1958 *Geneva Convention on the Continental Shelf and in as much as the Baltic Sea is a shallow sea, the surface and subsoil of the bed of that sea constitute a continuous belt of continental shelf, which is subject to delimitation among the respective Baltic States, in accordance with Article* 2 *of the Geneva Convention on the Continental Shelf, has sovereign rights over its Continental Shelf in the Baltic Sea for the purpose of exploring and exploiting the natural resources of the seabed and subsoil thereof.*[9]

The declaration further amplified the substance of some sections of the convention. The *raison d'etre* for the instrument, to which any Baltic State may accede, lies in Article 9, non Baltic Sea States are accordingly precluded from using, exploring and exploiting the Baltic Sea.

The United Kingdom legislation on its rights over its continental shelf, is the Continental Shelf Act, 1964 that does not provide for an outright and express claim to jurisdiction over its shelf, nor did it provide for legislative jurisdiction over its resources. It merely states:

Any rights exercisable by the United Kingdom outside territorial water with respect to the seabed and their subsoil and their natural resources are hereby vested in Her Majesty (Continental Shelf Act, 1964).

The ratification of the Convention was effected by Norway in 1970, though it was without prejudice to the fact that Norwegian claims date from 1963. The 1963 Royal Decree provides inter alia:

The seabed and its subsoil in the submarine areas outside the coast of the Kingdom of Norway are subject to Norwegian sovereignty in respect of the exploitation of and exploration for natural deposits to such extent as the depth of the sea permits utilization of natural deposits irrespective of any other territorial limits at sea, but not beyond the median line in relation to other States (Royal Decree of May 31, 1963).

The Occidental and North American countries have particularly embraced the Law of the Sea Convention they are quite amenable to the circumscribed formulation of the State rights provided in both the 1958 and 1982 conventions. The United States has proclaimed an exclusive economic zone in terms of Article 56 of the 1982 regime whilst Canada has legislation, which incorporates the 1982 rules for determining the seaward limits to the shelf.

The claims of certain Latin American countries are outlandish and *prima facie* incompatible with the exact terms of the convention (Auguste, 1960; Declaration of Montevideo, 1970). Article 7 El Salvador Political Constitution of 1950 perhaps is a quintessential of such outlandish and extensive claims to 200 nautical miles sovereignty made by the group of Central and South American countries which states:

The territory of the Republic within its present boundaries is irreducible. It

[9]Declaration of October 23, 1968, by the German Democratic Republic, Polish Peoples Republic and Union of Soviet Socialist Republic on the Continental Shelf of the Baltic Sea, UN National Legislation and Treaties Relating to the Law of the Sea.

includes the adjacent seas to distance of two hundred miles from the low-water line and the corresponding airspace, subsoil and continental shelf.

The claim has been impugned by many countries as unacceptable. The United States of America particularly has objected to the claim, however parties to the Monte Video Declaration, comprising Argentina, Brazil, Chile, Ecuador, Nicaragua, Panama, Peru and Uruguay have not only acquiesced but also recognized the claim (Ramakrishna, Bowen, & Archer, 1987).

Article 1 of the Argentine Law of 1966 eclectically drew from the 200 nautical miles claim concept and the phraseology of Article 2 of the convention, it provides *inter alia*:

1) *The sovereignty of the Argentine Nation extends to the sea contiguous to its territory out to a distance of two hundred marine miles from the lowest watermark.*

Whilst Article 3 provides:

Freedom of navigation and of air navigation shall not be affected by the provisions of the present law (Argentine Law on Sovereignty and Sea Bed, 1966).

The foregoing provisions of the Argentine law on sovereignty and seabed, is typical of Latin American concept in respect of the continental shelf since 1944. The Brazilian Decree [Law extending Territorial Sea up to 200 Miles, 1970] did not depart from the Argentine model (Decree Law Extending Territorial Sea up to 200 Miles, 1987).

The group of Central and South American States retain homogeneous state practice regarding jurisdiction beyond the outer limit of the territorial seas. They have elected to remain without the ambit of the 1982 regime whilst adopting a concept of the continental shelf, which is irreconcilable with the minimalist theory of Article 2 (Continental Shelf Act, 1964, 1964).

The Gulf States of the Arabian Gulf, remained outside the purview of the Law of the Sea Treaty for a long spell of time before its going into force, that is without prejudice to the extensive use of the sea for petroleum activities of exploration, exploitation and transportation and to the fact that prior to ratification, as non party States to the convention they (Yemen, Iran, Iraq, Kuwait, Oman and Saudi Arabia) had non-the-less promulgated shelf legislation (Razavi, 1997; Amin, 1983). Royal Decree No. 33 Concerning the Territorial Sea of the Kingdom of Saudi Arabia, 1958 provides *inter alia*:

Article 2:

The territorial sea of the Kingdom of Saudi Arabia, as well as the air space above and the territorial seabed and the subsoil beneath it are under the sovereignty of the Kingdom, subject to the established provisions of international law.

Article 4:

The sea of the Kingdom of Saudi Arabia lies outside the inland water of the Kingdom and extends seawards for a distance of twelve nautical miles (Royal Decree No. 33 Concerning the Territorial Sea of the Kingdom of Saudi Arabia,

1958).

Furthermore, in 1968, the Saudi government issued the Decree Relating to Red Sea Resources, Royal Decree No. M-27, it provides *inter alia*:

1) *The Saudi Arabia Kingdom owns all the hydrocarbon material and minerals existing in the strata of the seabed and this is in respect to the zone extending in the Red Sea bed adjacent to Saudi Continental shelf.*

2) *These resources are deemed to be a part of the Saudi territory and to be treated as the property of the State*….[10]

Great Britain issued a declaration on behalf of several of its protectorates in the Arabian Gulf in 1948. The Littoral States rights regarding the continental shelf derives from the objective criteria of the geographical and natural prolongation of the landmass into and under the sea for considerable distance, the continental shelf doctrine evolved as a consequence of the Littoral States increasing concern about the exploitation of the non-living resources of the seabed and subsoil and general economic annexation of the sea. It therefore followed as a matter of course from these concerns for a modicum of State practice to crystallize on the exercise of jurisdiction without the orthodox peripheral limits of the territorial sea for the purpose of offshore petroleum operations, these concerns, constitute a configuration of factors which underpinned the Littoral States proprietary nexus with adjacent hydrospace (Hollick, 1981; *Libya/Malta Continental Shelf Case*, 1985; *Tunisia/Libya case*, 1982; *Gulf of Maine Case*, 1984).

We can now consider the Nigerian situation.

4. The Nigeria Federalism and Jurisdiction over Offshore Petroleum Resources

The judgment of the Supreme Court of Nigeria on Friday 5th April, 2002 in the case *Attorney General of the Federation v. Attorney General of the 36 States* ([2002] *Vol.*6 *M.J.S.C.*1) put paid momentarily to the claim and counter claim between the eight Littoral States viz: Akwa-Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers States and the Federal Government over the resources of the continental shelf.[11] Specifically the Federal Government maintains that natural resources located within the continental shelf of Nigeria are not derivable from any State of the federation.

The Littoral States counterclaim that their territories extended beyond the low water mark zone into the territorial water and even onto the continental shelf and exclusive economic zone. They maintain that natural resources derived from

[10]Saudi Arabian Royal Decree Relating to Ownership of Red Sea Resources. September 7, Royal Decree No. 27 dated 9/7/133 Hejira.

[11]In the US, The Coastal Zone Management Act (CZMA) has been enacted to provide means of balancing competing interest in offshore areas of the Outer Continental Shelf. Under the Act's provisions, priority was to be given to national defense, fisheries and energy related projects. The Act requires States to establish management plans for their coastal areas. It also requires that any federal action including private actions that require federal permits be consistent with the States CZMA management plans. Coastal Zone Management Act (CZMA) (16 U.S.C.1451 et seg.) available at http://www.boem.gov/environmental-assessment/coastal-zone-.management-act (accessed 28/6/2023).

both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to the "not less than 13 per cent" allocation as provided in the proviso to subsection (2) of section 162 of the constitution of the Federation of Nigeria.

The Federal Government took out a writ of summons, which prayed for:

A 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 section 162(2) *of the constitution of the Federal Republic of Nigeria* 1999 (Attorney General of the Federation v. Attorney General of the 36 States, 2002).

Basing its judgment on the ruling of the Supreme Court of the United States of America in *United States v. State of California* (332 *US* 19, 24-25, 67 *US Reports* 1658); *United States v. State of West Virginia* (295 *US* 463.55 *S.CT.*789, 79 *L.Ed.* 1546), international customs and conventions especially the United Nations Convention on the Law of the Sea (UNCLOSIII) 1982 and section 162(2) of the constitution of the Federation of Nigeria 1999, the Court entered judgment in favour of the Federal Government.

The claims with regards to jurisdiction and offshore sovereignty made by the Littoral States; runs against the grain of customary international law with regard to jurisdiction and offshore sovereignty. For one, the Law of the Sea Treaty, UNCLOS III, 1982 is *strictu senso* an international system, *jus inter gentium* which regimes stricture the rights, duties, jurisdiction and sovereignty of Sovereign Nation States in the hydrosphere.[12] It is not an intra State system, and therefore precludes federating units of a particular Sovereign Nation State from its purview.[13] Nonetheless, Articles 56, 57 and 76 and 77 on the nature of offshore rights and jurisdiction over resources of the continental shelf and the living resources of the exclusive economic zone (even in the case of Sovereign Nation States), does not vest unfettered and proprietary rights on the Nation State. It merely confers a rather qualified and highly circumscribed right on the Nation State, for the purpose of exploring, exploiting and managing the resources of the continental shelf and the exclusive economic zone. Whilst these rights are *in re aliena* they are not rights *in re a propia*. Thus the Federal Government of Nigeria cannot devolve on the eight Littoral States rights that do not reside in it, *nemo dat quod non habet*.[14]

[12]See Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China, 1998, available at http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf (accessed 20/1/23); H. Rashid, "Sea Boundary of Bangladesh: A Legal Perspective" Daily Star of Bangladesh, February 29, 2004, available at https://www.thedailystar.net/news-detail-230381(accessed 28/6/2023) (accessed 20/1//23)

[13]The Ocean Act of Canada 1996 provides inter alia: Federal Laws apply over marine installations in connection with exploration of the continental shelf appertaining to it. Application of provincial law is allowed in section 21(1) (a)-(c) subject to the limitations such law applies to exclusive economic zone resources and it does not relate to minerals or other non-living resources, available at https://laws-lois.justice.gc.ca/eng/acts/0-2.4/fulltext .html (accessed 20/1/23).

[14]Note 6 supra.

The further back we trace the evolutionary path of the regime of the sea, the *res nullius* status of the seas remain sacrosanct, the seas perhaps share this nature with the outer space and the heavenly bodies. Thus the eight Littoral States have no *locus standi* at international law to claim jurisdiction in a sphere of the planet earth that is *extra territorial* even to the Government of the Federation of Nigeria.

The Nigerian case and its implication for federalism are not without precedents.[15] A review of the United States of America analogies will suffice, with a view to elucidating how the different tiers of government fair under fiscal federalism.

Hitherto, before the outbreak of hostilities of World War II, most riparian federating units of the United States of America claimed jurisdiction over submerged lands extending seawards from the coast to three nautical miles, which represent the official breadth of the United States of America territorial sea. The State of California demised the adjoining submerged area of its shoreline for exploration and exploitation of its hydrocarbon resources in the 1920s. There was an initial negative acquiescence of the United States Federal Government, which was broken during the Second World War. It was the strategic nature of oil as energy source both for the prosecution of war and for industrial development that informed the Truman Proclamation of 1945 in which it was unilaterally declared *inter alia* that, the government of the United States of America, "regards the natural resources of the subsoil and seabed (sic) of the continental shelf beneath the high seas but contiguous to the coast of the United States of America, as appertaining to the United States subject to its jurisdiction and control".[16]

Subsequently the United States Government brought a suit against the State of California claiming jurisdiction over submerged lands extending from the coast on the basis of consideration of commerce, national defense and international relations.[17] Similarly, the Court held that, the United States Federal Government has jurisdiction in the cases involving the States of Louisiana, Texas, Alaska, and Maine. The only divergence of note in this holdings and the California case is that California claimed jurisdiction within three nautical miles territorial sea in contradistinction to the 24 nautical miles beyond the customary United States

[15]In Canada, the Federal Government has authority over oceans and their resources. Provincial and territorial governments have jurisdiction over shorelines. Some marine areas and many land based activities. The Canadian Federal Parliament passed the Canada Oceans Act (COA), which received Royal Assent in December 1996. The COA represents a pivotal step in establishing Canadian ocean jurisdiction and consolidating federal management of oceans. More information on coastal management in Canada available at https://laws-lois.justice.gc.ca/eng/acts/0-2.4/fulltext.html (20/1/23).

[16]Proclamation No. 2667, 10 Fed.Reg. 12,303 (1945); in the Article "Terror Attacks on our Seaports and Coastal Environment-America's Primary Maritime Issue", John Brisco, draws attention to US need to provide adequate security offshore as part of its responsibility under international law, stressing that the jurisdiction over offshore areas is a function of US territorial sovereignty onshore, May 22, 2002, available at https://nsgl.gso.uri.edu/cuimr/cuimrr02025.pdf.

[17]The State of Oregon in setting its Ocean Management Goals and Policies underscored the significance of articulating it within the constraint of existing US federal laws, which confers jurisdiction over the continental shelf on the Federal Government, May 4, 2001, further information on these policies available at https://www.oregon.gov/lcd/ocmp/pages/ocean-planning.gspx.

three nautical miles territorial sea in the case of United States v. Texas ([339 US 707 (1950)]). The jurisdiction claim of Texas State of the belt of submerged lands adjoining it was unique, on account of its history as a Sovereign Republic prior to absorption into the union of American States.[18]

The State of Texas deposed that it is vested with equivalent sovereignty and jurisdiction over the submerged lands adjacent to it.[19] The Court basing its decision on the principle of equality of states held that when Texas entered the Union it became a unit of the Federation of United States of America, which rights are at parity with other units of the federation.[20]

As a corollary to the United States of America Supreme Court ruling in *United States v. State of California*, the United States Congress promulgated the submerged Land Act of 1953 (SLA) ([43 U.S.C. 1331-1343 (1982)]). The SLA revised the California decision and conceded jurisdiction and control over submerged lands within the United States of America customary three mile territorial seas. The Outer Continental Shelf Act (OCSLA), 1953 ([43 U.S.C. 1331-1343 (1982)]) vested jurisdiction and control of the submerged lands beyond the three nautical miles belt seawards and the resources thereof in the Federal Government of the United States of America.[21]

The foregoing analogies and precedents are germane to (Crawford, 2003; Charlesworth et al., 2003) the problem engendered by the contentions of the Government of Federation of Nigeria and the riparian States which are largely a political question to which political solution must be sought. After much political horse-trading, the Federal Government of Nigeria revised the decision of the Supreme Court of Nigeria by removing the onshore/offshore dichotomy (The Revenue Allocation (Abrogation of Dichotomy in the application of the principle of Derivation) Act, 2002).

The history and evolution of Nigeria federalism is unique, forged together by imperial fiat of Great Britain from motley ethnic nationalities with diverse cul-

[18]The ruling by the US Supreme Court in the case Trans American Natural Gas Corporation v. United States Department of the Interior and others 1986 affirmed the US Federal Government Jurisdiction over the outer continental shelf. In that case a petition for a writ of certiorari seeking a review of fiscal regimes imposed by the US Department of Interior was denied, available at http://www.justice.gov/osg/brief/transamerican-natural-gas-corporation-petitioner-v-United-States-departmentinterior-et-al. In Canada there have been periodic tensions between two levels of government over questions of jurisdiction the question of who owned the resources of the continental shelf is a prime example, July 12, 2001 available at http:/digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=2207&context=dlj (accessed 20/1/23).

[19]See generally "The New Judicial Federalism in the United States: Expansive State Constitutional Rights Decisions" William Roberts, February 13, 2004 available at https://doi.org/10.1093/acpref:osc/9780195334340.0007 (20/1/23).

[20]For an insight into current US Ocean Policy, see Admiral James D. Watkins, USN (Retired) Chairman U.S. Commission on Ocean Policy, Testimony Before the Committee on Foreign Relations United States Senate, October 14, 2003, available at https://www.commerce.senate.gov/2004/4/U.S-commission-on-ocean-policy (accessed 20/1/23).

[21]For an insight into the application of the Outer Continental Shelf Act 1953 see J.A. Duff, "Law and Technology Spur Deep Water Oil and Gas Exploration in Gulf of Mexico" August 8, 2002 available at http://www.Olemiss.edu/orgs/SGL/gulf.htm (accessed 20/1/23).

tures. It is the position of a respectable community of opinion that Nigeria is a classic model of a failed State. Ravaged for more than 30 years by military banditry and kleptocracy, some of its federating units seek the renegotiation of the Nigeria Union and clamor for the devolution of powers to the units in form of resource control, States own police force and what has been characterized as fiscal federalism in certain quarters.

Whilst the foregoing strongly held positions can hardly be faulted, given the inequity and injustices of the past, the Nigerian Union must be made to work, and this is the view in respectable quarters within the Federation of Nigeria and the international community.

Nigeria's existence has been characterized as paradoxical, due to the vastness of its demography, as the largest black African nation in the world with about 200 million people, which translates to one-fifth of blacks in the world. To many analyst Nigeria is a sleeping giant, the only hope of the black race, and because of the large vibrant population and natural endowment it is envisaged that it would spearhead the economic development for the whole of Africa given the magnitude of its human and natural resources.

With such profile, the international community has grudgingly come to the realization that it ignores the significance of Nigeria to its own peril. Contrary to that cosmopolitan nature which an accident of history foisted on the entity now known as Nigeria, its *classe politique* have chosen not to put the existence of Nigeria in historical perspective and capitalize on it, to build a strong and virile nation which will be the pride of Africa, nay the black race and the entire community of humans.

In a world that is tending towards larger mega unions of nation States for economic, political and strategic synergy, the Nigeria *classe politique* have evinced a proclivity for holding fast to divisive symbols and primordial loyalties, to curtail such centrifugal tendencies however, the government at the center must be truly national and more inclusive; there must be equitable allocation of resources amongst the federating units and judicious husbandry of revenues accruing to the Federation Account.

There must be good governance at the center and the federating units, above every consideration, the present rentier State structure must be dismantled and restructured to a limited government. The prevailing overbearing and overwhelming federal presence in the economic sphere should be duly and properly curtailed and reduced to those traditional federal functions of defense and international relations and such matters.

The emphasis should be on effecting changes in the economic sphere by curtailing waste and inefficiency in the economy engendered by inefficient public enterprises that constitute behemoth monopolies in strategic sectors such as energy, telecommunication, aviation, transport, shipping and the oil sector. The States interest in such public enterprises must be divested and sold to private domestic and foreign investors, who have the technical capacity and the financial capability to run such enterprises efficiently. The efficiency thus catalyzed will

have a domino impact throughout the economy. The attendant wellbeing would render every centrifugal contention superfluous and redundant, above all it would remove the wind from the sails of tribal warlords.

Concomitantly, opening up rural areas and the development of rural infrastructure should increase productivity. This will not only arrest the rural urban drift but will put about 70 per cent of the population, back to work.

The foregoing represents the extra legal criteria implicit in the resource control problematic. They represent the social, economic and political under currents, which heats up the polity, and engender the national question of which resource control is a derivative.

Rather than seeking legal redress of this national malady, the chain of causality must be traced to those predisposing factors in the polity, which are the primary causative agents. It is because the *social contract* in Nigeria is discharged always in the breach that the national question is being stridently posed, and we would ignore those questions to our own peril.

4.1. Evaluation of the Judgment of the Supreme Court of Nigeria

The Supreme Court's decision appears unassailable on issue of substantive international law. The decision however fails to meet the requirement of fundamental justice in its application of that law and on its distorted application of the case law. For instance, it did not exhaust the extra legal criteria implicit in the United States of America and the United Kingdom case law, which it cited copiously as authority and which are *inpari materia* with the Nigeria case. It failed to highlight the caveats in the United States case law and legislation emanating from the United States Supreme Court holding. To understand the behavior of the Supreme Court of Nigeria, a cursory insight into the *rentier* structure of the Nigerian State is pertinent. A rentier State structure is an economic structure, in which the economy is based on a commodity or natural resources, for example petroleum, in which revenues in form of ground rents; royalties, taxes, bonuses, and share of profits accrue directly to the Federation Account. The economy is characterized by a shrinking real sector and a disproportionately large service sector. There is no backward and forward integration in the economy, in view of the lack of nexus between the oil sector and other sectors of the economy.

The Nigerian State depends overwhelmingly on the revenue accruing from oil, which accounts for about 80 per cent of the total balance of trade receipts. The Supreme Court decision no doubt is aimed at the sustenance of the rentier State structure. The law is not neutral; perhaps the normative character of the law represents the core of its essence. The law by its nature cannot be neutral, it is value laden.[22] This leads to a pertinent question, which is often posed, for example, what is the law? Austin characterizes the law, as the command of the sove-

[22]"…The connection between law and ideology is both complex and contentious…at issue is an understanding of ideology as a source of manipulation. Law as ideology directs its subjects in ways that are not transparent to the subjects themselves law, on this view, cloaks power… October 22, 2001 available at http://plato.stanford.edu/archives/sum2019/entries/law-ideology/ encyclopedia of philosophy (accessed 20/1/23).

reign who is used to being habitually obeyed and in turn not in the habit of obedience to other entity (Hart & Austin, 1954; Hart, 1958). The next question is, who is the sovereign? The sovereign could be personalized in an individual as in a monarchy or dictatorship, and when that is the case, the State resides in the person of the sovereign, and the person of the sovereign resides in the State. In a democracy, the State seemingly has an impersonal nature, distinct from that of the individuals, groups and institutions that direct its affairs, nothing however can be further from the truth than that assertion. The will of the "State" in a democracy is the will of the dominant group, which directs its affairs. It is this group that determines what the directive principles of State policy are, and once determined, it becomes the national purpose, which all the institutions of the State pursue wherein then lies the neutrality of the law? The law has never and can never be devoid of ideology or values. Hart took a decisive step beyond Austin toward depersonalizing governance and turning legal order into a regime of rules, but in Hart's analysis the legislature is still the dominant governing institution. While it is true that law making is itself governed by rule in the sense that certain procedures must be followed and certain criteria of validity adhered to, it is still the case that legislative majorities (or coalition of interest groups) may enact laws that further their own good at the expense of the good of others, so authority is top-down, and governance by persons rather than rules is entrenched. Law is not neutral and certain, many court's decisions have political motives behind them, and several inconsistencies can be found in the common law as well. Thus if people believe that the "law" rules them, the State's authority will be more secure than if they realize that men rule them. Pious references to the "majesty of law" turn our eyes to the written constitutions and law books and away from the plain fact that men pass the law and men interpret it. The foregoing represents the normative criteria with which the Supreme Court as presently constituted arrived at its decision in the resource control suit.

It is purely fortuitous that these criteria correspond to the prescription of the International Law of the Sea. That consideration however does not devoid the judgment of its ideological and or normative criteria. For one, our Lords Justices of the Supreme Court of Nigeria were enamored of the core of the international law of the sea, whilst discountenancing the penumbra. In basing its judgment strictly on the cut and dry of the international law of the sea, the Court fails to meet the requirement of fundamental justice. For a greater insight into the core of the law of the sea itself evince it is of noblest intendment.

This intendment is the economic empowerment of emergent and nascent underdeveloped sovereign States. In its evolution, the international law of the sea has been predicated on peremptory norms of international law of the right to development; right to permanent sovereignty over natural resources and attainment of a new international economic order. These rights are not abstract rights; they are rights that appertain to "Peoples" and finite individuals, which constitute them. Secondly, the absurd effect of the Supreme Court's application of the law of the sea is to alienate these rights from a segment of its ultimate beneficia-

ries. In that regard, it failed, in its judgment, to meet the requirement of justice, for there is no rule of law, nay, international law which permits the application of a rule of law when such would lead to absurdity, create a greater mischief than which it sought to correct or when it leads to manifest injustice or when it will lead to unconscionable political outcomes.[23]

Thirdly, the mischief which the international law of the sea sought to redress or prevent or eradicate is the disequilibria and lopsidedness in development between the industrialized developed nations and emergent underdeveloped nascent sovereign States, through the device of a new international economic order; right to permanent sovereignty over resources and right to development, as earlier adumbrated, these rights are not abstract rights, the ultimate beneficiaries of these rights are the "Peoples", "Nationalities" and to a tolerable extent the "individuals" that make up these nations. Thus, were the Supreme Court judgment to be enforced to the letter, without qualifications or distinctions, it would have led to a very absurd outcome of alienating those rights from the nationalities which constitute the Nigerian Riparian States, and of negating the intendment of the international law of the sea.

Fourthly, the Supreme Court erred in not taking into cognizance, the political sensitivity of the issue, the resource potential of the marine feature, which is the subject of the suit and the economic criteria implicit in the case. Since the Court is so given to legal syllogism it would have followed it through to its logical conclusion, that is, that the right, which the continental shelf convention confers, is not an abstract right belonging to a phantom entity called the "Nigerian State". The federation of Nigeria is an aggregation of "Nationalities" made up of individuals who are the ultimate beneficiaries of the rights, which the international law of the sea confers on the Nigerian State.

Sagacity is not the fort of the judiciary in Nigeria, the judiciary in Nigeria is statute bound, and this attitude is reflected in many of its judgments, even when it is against the grain of judicial thinking in the Anglo-American legal system under which orbit, the Nigerian legal system operates. For example, to date, the judiciary in Nigeria still adheres to the absolute immunity doctrine against the tide of practice in the Anglo-American legal system.

4.2. The Claims of the Oil Producing Riparian States

The riparian oil producing States of Nigeria sought resource control, particularly they clamour for the control of the petroleum resources derived from their jurisdictions. Amongst other things, they hinge their claim on the precedent set in the 1963 Republican Constitution of Nigeria which provides *inter alia*; that revenue derived from imports be paid 100 per cent to the State in proportion to the consumption of the product; excise duty: 100 per cent payment to the State according to the proportion of the duty collected. For minerals, the constitution shares the revenue in the proportion of 50:20:30; that is, 50 per cent for derivation, 20 per cent to the Federal Government and the remaining 30 per cent paid

[23]See Anglo-Norwegian Fisheries case, ICJ Rep. 1957, p.116.

into the distributable pool to be shared among the States, including the Donor State.

They also contend that the continental shelf belongs to the ethnic nationalities adjoining it, whilst concomitantly, basing that claim on their construction of section 3 of the Constitution of Nigeria, 1999, which vest all land in the State Governors as trustees of the people. The common thread that runs through the plethora of contributions to the discourse on resource control and jurisdiction offshore from Littoral States perspective is that they are all hinged on the same premise of historical titles of nationalities to the land inhabited by them prior to amalgamation in 1914.

That granted, what is not clear is whether, what they want is 100 per cent control of resources or whether a proportion of revenue accruing to the common pool of the Federation Account as derivation from the proportion of the revenue derived from exploitation of oil in their territories. If their claim is the former, then a major amendment to the 1999 Constitution becomes necessary. However if their claim is the latter, then, all that may be required is an upward review of the not less than 13 per cent derivation for fiscal purposes provided under the proviso to paragraph (2) of section 162 of the 1999 Constitution of the Federation of Nigeria. In that regard, there is a need for a major redefinition of issues, for the sake of clarity, the claim should focus strictly on upward review of the not less than 13 per cent of the total revenue accruing to the Federation Account from exploitation of petroleum resources in the various Littoral States.

Be that as it may, the danger, in basing the Littoral States claim on historical titles prior to amalgamation and to the assertion that the sovereignty of the Littoral States derives from their sovereignty over the continental landmass of which the continental shelf is a natural prolongation into and under the sea for considerable distance lies in the possibility of its being susceptible of *reductio ad absurdium* when considered under public international law and the theory of equality of States.

If on the other hand, the claim is indeed hinged on supposed precedent in the 1963 Constitution, regarding revenue sharing formula, it is instructive to highlight the provision of that Constitution under schedule 1 which list "mines and minerals including oil fields, oil mining geological surveys and natural gas" as item 25 in the exclusive legislative list, in which only the Federal Government has jurisdiction. Since then, the control of mines and mineral resources have featured as items 39 in part 1 of second schedule in the exclusive legislative list both in 1979 and 1999 Constitutions.

That granted, hydrocarbons and other organic minerals and variegated ores, may not be assimilated to the 1963 Republican Constitution Revenue Formula because of their vagrant nature, they share this nature with wild life. Their ownership flows from production, that is, the application of the factors of production pursuant to their capture. Thus unlike crops such as cocoa, groundnuts and palm produce, which are susceptible of out and out husbandry, thereby rendering their ownership more determinate, hydrocarbons have a "wild" and vagrant

existence, they have to be "won". Thus the person who captures it acquires a qualified right, which flows from production, after payment of requisite ground rents.

The claims of the Littoral States instead of being based on any historical titles to territory, and dis-analogies, should rather be based on more universalizable notions of justice and equity, hinged on the consideration of contiguity and the fact that, the environmental impact of oil explorations both onshore and offshore is felt in its devastating effect in the immediate environment of oil producing communities which qualifies the States for a proportion of the total revenue accruing from exploitation attributable to such States *ex jure*.[24] Such entitlement should be duly and properly enshrined in the Constitution. What the proportion should be is a political question, which is beyond the scope of this paper.

4.3. The International Law Federalism Conundrum

Perhaps a most appropriate procedure pursuant to establishing a nexus between international law and the onshore/offshore dichotomy controversy in Nigeria is to gain an insight into the nature of the relationship existing between federalism and international law. The adoption of that procedure is informed by the consideration that the law of the sea is an international system, *jus inter gentium* which subjects are sovereign States, as contradistinguished from federating units of such sovereign States. If we were able through our test, to establish a nexus between international law and federalism, then we would have negated the most fundamental premise upon which the Supreme Court judgment was based, that is, that the law of the sea does not have federating units in its purview and this precludes them from having jurisdiction over continental shelf resources. Should our test yield a result that cannot connect federalism with international law, then our position that the Supreme Court of Nigeria did not err *ipso jure* but fails to meet the requirement of fundamental justice in its application of the law in the resource control suit will be valid.

4.4. The Meaning of Federalism

The literature evidences a plethora of approaches to the study of federalism. According to Wheare, federalism is a "method of dividing powers so that the general and regional governments are each within a sphere, coordinate and independent" (Wheare, 1993). The major flaw of this characterization is the emphasis on independence. In contradistinction to Wheare's definition, Vile posits thus:

[24]In the United States of America, there is a growing demand for revenue sharing between the Federal Government and Coastal States where the environmental impact of outer continental shelf oil exploration activities is immediately felt. Jim Geringer, Governor of the State of Wyoming in a Testimony Before the House Resources Committee, March 10, best articulates this thinking, available at https://www.govinfo.gov/content/PKg/CHRG-104hhrg93198/pdf/CHRG-104hhrg93198.pdf. (Geringer, testified as the Chairman of Association of Western Governors, United States of America) (accessed 20/1/23).

Federalism is system of government in which central and regional authorities are linked in a mutually interdependent political relationship; *in this system a balance is maintained such that neither level of government becomes dominant to the extent that it can dictate the decisions of the other*, *but each can influence*, *bargain with*, *and persuade the other*, *usually*, *but not necessarily*, *this system will be related to a constitutional structure establishing an independent legal existence for both central and regional government*, *and providing that neither shall be legally subordinate to the other. The functions of government will be distributed between these levels* (*exclusively*, *competitively*, *or cooperatively*), *initially perhaps by a constitutional document*, *but thereafter by political process*, *involving where appropriate the judiciary*; *in this process the political interdependence of the two levels of government is of the first importance in order to prevent one level absorbing all effective decision-making power* (Vile, 1985).

In their characterization of federalism, statesmen, political scientists and jurists often use the nomenclature federal, confederal and federation, confederation and confederacy in a manner signifying synonym. The architects of the American constitution used the terms federal and confederal interchangeably, characterizing a confederate republic as an assemblage of societies of two or more States. They proposed that the hallmark of the Federal State is that the National government on one hand and the State government on the other are autonomous in their respective jurisdictions. That perspective corresponds to the theory of federal equilibrium or theory of dual sovereignty or dual federalism (Mason & Beaney, 2002).

Contemporaneously, federation or Federal State differs from a confederation or confederacy. Confederation has been defined as a union of States, which retain their autonomy. The German Weimer Republic, the United States of America, before 1787, the Hellenist confederation, the Swiss Confederation prior to 1848 and the European Union are examples of confederations (Friedrich, 2002).

What can be inferred from the foregoing is that in a Federal State neither federal government nor the constituent units are subsumed under the other, even as they are coordinate, distinct and independent. That adumbration flounder's completely in the face of the reality in Federal State, which evince administrative cooperation and political interdependence between federal governments and States as the dominant feature of the Federal State. Dual federalism implies conflicting claims to sovereignty or put differently, "dual sovereignty" (Vile, 1985) a concept, which is not amenable to the doctrine of sovereignty in international law. The foregoing granted, federalism compels cooperation, consensus building, negotiation to avoid conflict between the different tiers of government (Watts, 1995).

The foregoing surveys of the different approaches to federalism have a common thread running through them, that is, a federal structure would have amongst other things, the following characteristic, viz: Division of powers between the federal and federating units; a modicum of autonomy between them; concurrent

impact of action of both on the life of the peoples of the federation; a device for the protection of that division enshrined in the constitution.

5. Federalism and International Law

Perhaps the fundamental factor responsible for the divide between international law and federalism is the nature of federalism itself, which entails the division of jurisdiction between the federal government and federating units. That nature runs against the grain of the fundamental principle of sovereignty, upon which the international legal order is based. The international law cum federalism problematic includes capacity and or personality; responsibility and immunity. Whilst the rights, duties and status of the sovereign Federal State is within the purview of international law, international law does not have its constituent units within its purview, they are not subject of international law, According to Brierly, where constituents of a federation exercise capacities internationally,

Such capacities are probably exercised as agents for the union, even if the acts concerned are done in the name of the component State (Brierly, 1995).

These issues are not abstract, as the Nigerian situation has shown. It is however not alone in this international law/federalism loop. There is a raging controversy in Canada, between the central government and the provinces regarding the sharing of sovereignty (*Attorney General for Canada v. Attorney General for Ontario*, 1937). The aim in this segment is to enquire whether there is a nexus between classical federalism and classical international law, and if it exists, we will attempt to gain an insight into the fundamental relationship that exist between them.

5.1. Personality in International Law and Federalism

In the *Austro-German Customs Union Case*,[25] Judge Anzilotti amplified the provision of Article 1(d) of the Montevideo Convention on Rights and Duties of States 1933 ((1934) 165 L.N.T.S. 19. U.S.T.S 881, .4 Malloy 4807; 28 *A.J.I.L.*, Supp., 75), as referring to independence in law, of a sovereign State, imbued with capacity to enter into relations with other States, which will give rise to rights and duties under international law, inferring from the foregoing, international personality can be generally characterized as the capacity to be a bearer of rights and duties under international law. That definition is restrictive in that it makes the status of international personality contingent upon a determination by international law.

Can federating units be assimilated to the international legal system and thereby assume international personality? Herein lies the conundrum. The status of the federal sovereign State has been guaranteed by international law, what is indeterminate is the status at international law, of its constituent federating units. The pertinent question to ask is how many juridical personalities do the Federal

[25]Austro-German Customs Union Case P.C.I.J., series A/B, No.41 (1931). Judge Anzolotti was one of the seven judges in the majority who found the proposed Union incompatible with Article 88 of the Treaty of St. Germain as well as with the protocol of 1922.

State has? There is a divide between those who position that it is not possible for federating units of a State to be recognized as international person, for the simple reason that they are neither full nor half sovereigns, that is, they are not "States" properly so called at international law, and those who position that when endowed constitutionally with international competence, they may become to a reasonable degree, subjects of international law. According to the International Law Commission Commentary, Article 6 of the Vienna Convention on the Law of Treaties, 1969,[26] which provides that every State possesses capacity to conclude treaties. The term "State" is used in Article 6 "with the same meaning as in the Charter of the United Nations, the Statute of the International Court of Justice, the Geneva Convention on Diplomatic Relations, that is, it means a State for the purpose of international law" ((1966) 11 *Y.B.I.L.C.*, 192.). Thus, customary international law, does not have constituent federating units of a Federal State in its purview, it then follows that they cannot be invested with international personality.[27] The foregoing is without prejudice to the existence of examples of Federal States in which units within the federation are constitutionally vested with powers to make treaties, as enshrined in Article 32(3) of the Bonn Constitution. They do so as organs of the Federal State, and they would not by such constitutional provision be assimilated in general to Sovereign States and thus are not within the purview of international law. Consequently, there is no mistiness as to the capacity of Federal States in international law; their international status is a function of their sovereignty. In contradistinction, the capacity of federating units to enter into international agreements is not a derivative of sovereignty but is conferred by the federal constitution (Ibid). That is, if at all the federal constitution confers limited token international competence on them. Such constitutional provisions would not have vested international personality, which is merely sufficient but not necessary condition for international capacity. For it to confer personality, it has to be complemented by other conditions such as recognition by other Sovereign States subjects of international law.

The rule of international law inferable from the foregoing is that in relations to the issue on international personality in Federal States, the Federal States in so far as they are recognized as Sovereign Nation States of the comity of nations, are vested with full international personality irrespective of their constitutional limitation.[28] Concomitantly, the assumption of international personality by con-

[26]U.K.T.S 58 (1980) Cmnd. 7964; 1155 U.N.T.S. 331; (19690 81. L.M. (1969) 63 A.J.I.L.875 in force 1980; see UN docs. A/Cont.39/11 and 1.

[27]United Nations Conference on the Law of Treaties, Second Session, Provisional Summary Record of the Eight Plenary Meeting, Vienna, 28 April, 1969, pp.15-16 (Doc.A/coNF.39/SR.8).

[28]The opinion adumbrated in certain quarters that constituents possess sovereignty is roundly condemned in the following US Supreme Court cases: In US v. Curtiss-Wright Export Corporation a case, relating to the powers of the federal government in respect of external affairs, the supreme court declared: "As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the members of the international family. Otherwise, the United States is not completely sovereign", 299 US 304 at 318 (1936); in Mackenzie v. Hare, the same Court asserted that: "As a Government, the United States is invested with all the attributes of sovereignty", 239 US 299 at 311 (1915); in New York v. United States, it was held that "the States on entering the Union surrendered some of their sovereignty", 326 US 572 at 594 (1946).

stituent federating units of a Federal State flounders totally.

5.2. International Responsibility and Federalism

Article 6 of the United Nations Convention on State Responsibility provides amongst other things that:

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or subordinate position in the organization of the State (I.L.C.'s 1996 Report, G.A.O.R., 51ST Sess., Supp. 10, 0.125).

On the authority of the foregoing provision, Federal States under Public International Law are responsible for the acts of omission or commission of their constituent parts. The rule in international law is that a Sovereign State cannot evade its international obligations on account of its constitutional limitations; additionally, constituent units not being subjects of international law cannot be internationally responsible. In the *Chorzow Factory Case* (*Merits*) the Permanent Court of International Justice held:

It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparations.[29]

That fundamental rule of international law is in turn predicated on more specific rules. A breach implies that an act or omission in contravention of an international obligation must have been sustained and such act and or omission must be imputable to subject of international law.

5.3. The Responsibility of the Federal State as a Sovereign

The Federal States responsibility for its constituting units engenders conflict of laws problem between international law and municipal law. Hence its solution can be found in the rules of international law regarding the question of responsibility. In the *Chorzow Factory Case*, the Permanent Court of International Justice held:

From the standpoint of international law and of the Court, which is its organ, municipal laws are merely facts. Consequently, a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force.[30]

Where conflicts arises between international law and municipal law, the Court held:

A State, which contracted valid international obligations, is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.[31]

[29]1928 PCIJ, ser. A, no 17, p.29 see also Spanish Zone of Morocco Claims (1924), 2 RIAA, P.615; Phosphates in Morocco Preliminary objections, 1938 PCIJ, ser. AIB. no 74, p.28.

[30]1926 PCIJ, ser. A. no 7, 19. See the Case, Treatment of Polish Nationals in Danzig, Advisory Opinion (1932), 1932 PCIJ, ser.A/B no.44, p.24.

[31]Exchange of Greek and Turkish Population, Advisory Opinion (1925) PCIJ, ser. A/B no.44, p.24.

The position in international law, it would seem, is that a treaty is superior to the constitution, which latter, must give way, the legislation of the State must be assimilated to the treaty, not the treaty to the law. Thus, what ever may be the relations *inter se* between the constituent units of a Federal State on one hand, and members of the international community, on the other, such constitutional relationship cannot establish the responsibility of the units for their acts or omission to other nations.

The reason being that such units are not recognized in the comity of nations, they can not wage war on other nations, they can not sign treaties without the consent of the Federal Government and so can not breach one; in the sphere of international relations, their existence is totally eclipsed and subsumed under the sovereignty of the Federal State, and as a consequence of the territorial sovereignty of the Federal State, it is responsible for any act or omission within its jurisdiction.

A cursory look at the judicial attitude at the municipal plane would be pertinent. Decisions of Federal State Courts have reiterated and underscored the responsibility of the Federal State for the conduct of a federating unit contravening the international obligations of the federation. In the case *Re. Ownership of Offshore Mineral Rights* (65 *DLR* (2d), 353 (1968), p.380). The Supreme Court of Canada held that the Province of British Columbia could not claim the right to explore and exploit, or claim legislative jurisdiction over the resources of the continental shelf. The Court hinged its decision on the following reasons:

Canada is the Sovereign State, which will be recognized by international law as having the rights stated in the 1958 *Law of the Sea Convention, and its Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligation and responsibilities imposed by the Convention* (65 *DLR* (2d), 353 (1968), p.380).

Earlier, the United States Supreme Court had so held in a number of cases, which are *in pari materia* with the Canada Supreme Court holding. It would seem that the United States Supreme Court's holding in those cases influenced the decision of the Supreme Court of Canada.[32]

Aside from the ruling of the Nigerian Supreme Court in the case, *Attorney General of the Federation of Nigeria v. Attorney General of the* 36 *States* ((200) Vol. 6 M.J.S.C. 1), perhaps another evidence of the responsibility of the Federal State for the acts and omissions of the constituents is the fact that an examination of the international debt profile of Nigeria indicates that a considerable proportion is imputed to federating units. Thus in determining whether or not the constituent units are responsible for their breach of international obligations, it is concomitantly important to consider the conduct of other nations. As earlier shown, the decision to accept Ukraine and Byelorussia as original members of the United Nations was politically motivated. It was not predicated on the objec-

[32]See United States v. State of California 332 US 19, 24-25, 67 US Reporter 1658; United States v. State of West Virginia 295 US 463.55 S.CT 789, 79 L.Ed.1546; United States v. State of Louisiana, (339US 699 (1950)); United States v. State of Texas [(339 US 707 (1950)].

tive criteria of the federal structure of the Soviet Union. Consequently, as members of the United Nations, they had assumed international obligations of their own; if they breached them, they would be liable. Their responsibility however, is predicted *strictu senso* on their antecedent recognition by the variegated Sovereign Nations comprising the United Nations Organization.[33]

The same principle which stricture international personality in Federal States viz: sovereignty, recognition and consent are relevant in the determination of responsibility in Federal States. As sovereign subjects of international law, they are obligated to answer for the acts or omissions of their constituent units. In accordance with the general principles of sovereignty, consent and recognition in international law, only the Federal State is sovereign, it follows that its federating units cannot invoke immunity as sovereigns. The foregoing results support our thesis that the Supreme Court of Nigeria did not err *ipso jure*, but failed to meet the requirement of fundamental justice, by not taking cognizance of the resource potentials of the shelf, the political sensitivity of the issue and the economic criteria implicit in the case. It also erred, because its ruling in its judgment negates the intendment of the International Law of the Sea, which is the economic empowerment of "Peoples". The rights which the Convention guarantees are not abstract rights existing *in vacuo*, they appertain to "Peoples", the "Peoples" of the Nigerian Riparian States are "Peoples" within the context of the International Law of the Sea, hence those rights guaranteed by the Convention appertains to them *ex jure* and *a fortiori* entitled to the not less than 13 per cent allocation as provided in the proviso to sub section (2) of section 162 of the Constitution of the Federal Republic of Nigeria.

6. Conclusion

We have attempted an appraisal of public international law and state practice with respect to jurisdiction over the resources of the continental shelf. We have highlighted the community of state conducts with regard to jurisdiction offshore and concomitantly examined the nature of States rights over offshore petroleum resources. The paper in the attempt to establish a nexus between classical international law and classical federalism pursuant to unraveling the international law/federalism conundrum engendered by the ongoing onshore/offshore dichotomy controversy between the federal government of the Federation of Nigeria and the Riparian States over which tier of government has jurisdiction offshore, demonstrated that federating units of the Federal State are without the purview of the Convention, though they are the ultimate beneficiaries of the rights conferred on the Federal State. It is trite law that international law confers

[33]Contrast with the event in 1947, when the Baltic States who had been members of the international telecommunication Union before 1940, were deprived of their vote on ground that they had lost their international standing upon becoming members of the Soviet Union. The same States which had accepted Ukraine and Byelorussia as members of the United Nations refused to recognize on this occasion the international status of the Baltic Republics, see Documents of the International Telecommunications Conference at Atlanta City, United States of America, 1947; Bern. Bureau of the ITU, 1948, Minutes of the Second Plenary Session 18-19 July 1947.

jurisdiction over offshore resources on the Federal State over and above the federating constituent units, however as demonstrated in this paper, invocation of the cut and dry of the law would not lead to the final determination of the matter and leads to a miscarriage of justice.

Beyond positivist international law, it has been shown that the Supreme Court did not err *ipso jure* but fails to meet the requirements of fundamental justice in its application of the law in the resource control suit and we submit that it erred fundamentally, in not factoring into its ruling the extra legal criteria implicit in the case. It also erred, because its ruling in its judgment is antithetical to the very core of the international law of the sea which it seemingly upheld in its decision. The rights, which the Convention guarantees, are not abstract rights *in vacuo* nor do they inhere in a phantom entity styled the "Nigerian State". The rights appertain to "Peoples", the "Peoples" of the Nigerian Riparian States are "Peoples" within the context of the international law of the sea, hence those rights guaranteed by the Convention appertains to them *ex jure* and *a fortiori* entitled to the not less than 13 per cent allocation as provided in sub section (2) of section 162 of the Constitution of the Federal Republic of Nigeria. It is possible first to disaggregate these rights conferred by international law of the sea on the Sovereign Nation State and invest its constituents with them and algebraically apportion them at the level of the constituents and then disaggregate them by apportioning them amongst the variegated nationalities that constitute the federating units, then finally disaggregate them at that level by apportioning them amongst the groups, individuals constituting these nationalities. Under this schema therefore, constituent units are the ultimate beneficiaries of the rights conferred by UNCLOS III, 1982.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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