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The Nigerian Territorial Waters Legislation and the 1982 Law of the Sea Convention

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ABSTRACT

Nigeria is a coastal state located strategically on the West Coast of Africa in the Gulf of Guinea. After gaining independence in 1960 it enacted legislation in 1967 on its territorial waters, which has been amended twice, in 1971 and 1998. After participating in the Third United Nations Conference on the Law of the Sea (UNCLOS III) it became a party to the 1982 Convention on 14 August 1986. This article examines the laws governing the Nigerian territorial waters vis-à-vis the LOSC provisions on the territorial sea with a view to pinpointing how far these laws are in compliance with the relevant provisions of the LOSC.

Introduction

The territorial sea is of vital importance for security and economic reasons to Nigeria; a state strategically located on the West Coast of Africa in the Gulf of Guinea. This belt of the sea acts as a security buffer zone, with the Nigerian Navy having responsibility for defending the Nigerian territorial waters, including defence against seaborne attack, protection of international shipping and offshore oil and sea resources and installations.1 As an oil and gas producing state with rich offshore reserves, the Nigerian government has granted prospecting and exploration licences and leases in respect of its offshore zones, including its territorial sea.2 The importance of this is reflected in the specific mention of the territorial sea in the Nigerian Constitution, which emphasises

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1 See s. 1 of the Nigerian Navy Act, Cap 288, Laws of the Federation of Nigeria 1990 and http://reference.allrefer.com/country-guide-study/nigeria/nigeria144.html. (All sites referred to in this in this article were visited on 8 January 2004 except where otherwise stated.)


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that ownership of minerals, mineral oils and natural gas extend beyond resources located in the land territory to also those located in the territorial sea as well as the Exclusive Economic Zone (EEZ). Not surprisingly, as a result of the security and economic importance of the territorial sea, the Nigerian government has enacted territorial waters legislation. The first piece of this legislation, the Territorial Waters Decree, was enacted by the then federal military government on 8 March 1967 and came into force on 8 April 1967.

Prior to this, as a result of the nation’s experience as a colony of Britain and the provision in local legislation that permitted the nation to receive English statutes of general application, the applicable statute was the English Territorial Waters Jurisdiction Act 1878. This colonial legislation was expressly repealed by the 1967 legislation. On 26 August 1971 the 1967 Decree was amended, principally to extend the breadth of the territorial sea. This amendment remained in the statute books until 1998 when the legislation was again amended, this time to reduce the breadth of the territorial sea. Interestingly, the principal legislation of 1967 and the subsequent amendments were all enacted during the era of the military rule in Nigeria.

With the return to democracy and the election of a civilian government in Nigeria, the legislation on the territorial sea has remained as an existing law. This legislation is now deemed by the Nigerian Constitution to have been enacted by the National

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4 Nigeria has had a very chequered political history with several military interventions. After a civilian government from independence, the first military intervention was in 1966 and the military reigned until 1 October 1979 when power was handed over to a civilian government. This government was sacked on 31 December 1983 by a military junta and the military reigned from then until 29 May 1999 when power was again handed over to a civilian government, which is in power to date.
5 See s. 5(2) of the Territorial Waters Decree No. 5 of 1967.
6 The Territorial Waters Jurisdiction Act 1878 was regarded as a statute of general application and was applied in Nigeria by virtue of the local legislation which received into Nigeria the common law, principles of equity and statutes of general application in force in England at 1 January 1900. E.g. S. 45(1) of the Nigerian Interpretation Act 1964 provides: “Subject to the provisions of this section and except in so far as other provision is made by any Federal Law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January 1900, shall be in force in Lagos and, in so far as they relate to any matter within the exclusive legislative competence of the Federal legislature, shall be in force elsewhere in the Federation.” Para. 2 of this section however makes it clear that these “imperial” laws shall be subject to any federal law and in force in so far as the local jurisdiction and circumstances permit.
7 See United Kingdom Statute 1878, chapter 73.
8 See s. 4.
9 The Territorial Waters (Amendment) Decree No. 38 of 1971. See discussion on the breadth of the territorial sea below.
10 Territorial Waters (Amendment) Decree No. 1, 1998.
11 Perhaps the Nigerian military government took an interest in the territorial sea as a result of the security consciousness of the military.
12 The democratically elected civilian government of President Olusegun Obasanjo came into power on 29 May 1999 and after a first term of four years was re-elected for a further term of four years from 29 May 2003.
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Assembly, the federal legislative arm of government, and is now designated as an “Act”.13 This legislation is therefore, under the present civilian dispensation, referred to as the Territorial Waters Act, as amended.14

Nigeria was an active participant in the marathon third United Nations Conference on the Law of the Sea (UNCLOS III),15 having joined in the clamour for such a conference, as a result of the desire to be directly involved in the moulding of a “new” law of the sea.16 Like most other newly-independent developing states this was premised on the belief that the “old” law of the sea was simply a product of an “old boy network” of a few developed maritime states.17 After about nine years of intense negotiations, involving a highly complex negotiating process,18 the United Nations Law of the Sea Convention (LOSC)—“the constitution of the seas”—was adopted on 30 April 1982 at Montego Bay, Jamaica.19 Nigeria was one of the states that signed the Convention, which came into force on 16 November 1994, and it became a party to the Convention on 14 August 1986.20 The 1982 Convention has very comprehensive provisions on the territorial sea with a substantial part being the same as the 1958 Geneva Convention on the Territorial Sea, although the 1982 Convention also included the very significant achievement of stating agreement on the breadth of the territorial sea.21

The purpose of this article is to examine the Nigerian territorial waters legislation vis-à-vis the 1982 LOSC and to pinpoint the extent to which this legislation is in accordance with the provisions of this crucial multilateral treaty to which Nigeria is a party.

15 Nigeria gained its independence from British colonial rule on 1 October 1960.
19 It was adopted by 130 votes to four with 17 abstentions. See UNCLOS III, Official Records, Vol. XVI, pp. 152–167.
20 LOSC, Art. 308.
21 Art. 3.
The Nigerian Territorial Waters Act (as amended) and the 1982 LOSC

Breadth of the Territorial Sea

Breadth

After many years of seeking to arrive at an agreeable breadth of the territorial sea, an issue which was not resolved in the various international conferences ranging from the 1930 Hague Conference to the United Nations Conferences I and II, UNCLOS III achieved a breakthrough in this regard. From the varying claims of different states, ranging from the narrow three nautical miles to as wide as 200 nautical miles, the LOSC arrived at a compromise breadth of a maximum of 12 nautical miles, while conceding a new regime of 200 nautical miles. The Law of the Sea Convention provides that “every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.”

The Nigerian territorial sea prior to 1967 was only three nautical miles, obviously as a result of the British colonial influence as reflected in the Territorial Waters Jurisdiction Act 1878, which was received into Nigeria and was still applicable even after the nation obtained her independence. Even the local Interpretation Act, enacted in 1964, declared the territorial sea of Nigeria to be three nautical miles. With the enactment of the 1967 legislation the breadth of the Nigerian territorial sea was increased to 12 nautical miles, the English Territorial Waters Jurisdiction Act was repealed, and the Interpretation Act and other existing legislation referring to the territorial sea, e.g. the Sea Fisheries Act, were amended to reflect the new breadth. Barely four years later in 1971 after the successful prosecution of a civil war consequent upon an attempt by the then Eastern Region of Nigeria to secede, the

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23 On EEZ see LOSC, Part V.
24 Art. 3.
25 See note 6 above.
26 S. 18(1) of the Interpretation Act 1964.
27 S. 1 of the Territorial Waters Decree 1967.
28 See note 8 above.
29 This legislation was enacted in 1961 to regulate fishing within Nigerian waters. In 1992 the 1961 legislation was replaced with the Sea Fisheries Act No. 17.
30 S. 3 of the Territorial Waters Decree.
31 The civil war was between the federal government of Nigeria and the then Eastern Region of Nigeria, which wanted to cede from Nigeria to become a separate republic of Biafra. It was prosecuted for 30 months from July 1967 to January 1970. Up to the time of the commencement of the civil war Nigeria had four regions—Northern, Western, Mid-Western and Eastern. However by 1967 the then military regime of General Yakubu Gowon had created from these regions 12 states. Thereafter there have been increases in the number of states.
territorial sea was again increased to 30 nautical miles. The decision to increase the territorial sea immediately after the civil war obviously had considerable security implications though a Nigerian official was reported to have explained that the increase was based on the belief by the Nigerian government that a territorial sea of 30 miles was a preferable alternative to having a 12-mile territorial sea with a further contiguous zone of 18 miles. In the same way as the 1967 legislation, the 1971 statute also amended the Interpretation Act and other relevant legislation to reflect the new breadth. This legislation remained on the statute books until 1 January 1997; about twelve years after Nigeria became a party to LOSC when it was again amended by the Territorial Waters (Amendment) Decree, which rolled back the breadth of the territorial sea to 12 nautical miles. Though this legislation does not on its face refer to the LOSC it brings the nation’s municipal law, with respect to the breadth of the territorial sea, in line with the LOSC. It is speculated in certain circles in Nigeria that this amendment, which was enacted in the heat of the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) case (the Bakassi case) before the International Court of Justice by the military government of the late General Sani Abacha, was intended to help put the nation in a good light as one that honours its international obligations. However, it must be pointed out that quite a number of coastal states, including African states, had, since the coming into force of LOSC, adopted a territorial sea of a maximum breadth of 12 nautical miles. Again like that of 1967 and 1971, the 1998 legislation specifically amends the Interpretation Act but unlike its predecessors fails to specifically amend any other legislation referring to the territorial sea. However it follows from ordinary rules of interpretation that any reference to territorial sea in any domestic legislation would be deemed to be a territorial sea of 12 nautical miles.

cont.

from time to time, all under military regimes—in 1976 General Muritala Mohammed increased it to 19 states; in 1991 General Babangida increased it to 30 states; and in 1996 General Abacha increased it to the present number of 36 states.

32. S. 1(1) of the Territorial Waters (Amendment) Decree 1971.


36. See para. 20.7 of Nigeria’s Counter-Memorial filed in the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening) case where it was stressed that Nigeria claimed a 12-mile territorial sea “as it is entitled to do under international law . . .” and then proceeded to attach copies of its domestic legislation, including the Territorial Waters Act 1967 as amended. See at http://www.icj-cij.org/icjwww/idocket/icn/icnpleadings/icn ipleadings_19990501 countermemorial_nigeria_c00p20.pdf.


38. S. 2(b).
Baselines
The LOSC provides very detailed rules on the baselines from which the breadth of the territorial sea is measured. These baselines range from the normal rule of the low-water line to the peculiar ones applicable to special geographical conditions, including straight baselines for coasts that are deeply indented or fringed with islands, reefs, mouths of rivers, bays, ports, roadsteads, low-tide elevations, islands and archipelagos. States are also allowed under the Convention to utilise a combination of methods in the determination of their baselines provided the conditions stated therein are satisfied. Under the Nigerian Territorial Waters Act as amended only the low-water mark is specified as the baseline for measuring the breadth of the territorial sea. The legislation says: “The territorial waters of Nigeria shall for all purposes include every part of the open sea within twelve nautical miles of the coast of Nigeria (measured from the low water mark) or the seaward limits of inland waters.”

Though this provision received judicial endorsement in the recent Supreme Court of Nigeria decision of *A-G of the Federation v A-G of Abia State and 35 Others*, the judgment of one of the Supreme Court judges, Ogwuebu JSC, appears to suggest rather ambiguously that different rules may apply in the case of the coast of Cross River State, one of the component states in Nigeria. In his judgment the learned justice of the Supreme Court said:

> ...the seaward boundary of the littoral States which are component parts of Nigeria is the low water mark of the land surface thereof or the seaward limits of

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40 Art. 5.
41 Art. 7. See the Anglo-Norwegian Fisheries case, [1951] ICJ Rep 116 at 128.
42 Art. 6.
43 Art. 9.
44 Art. 10.
45 Art. 11.
46 Art. 12.
47 Art. 13.
48 Art. 121.
49 Art. 47.
50 Art. 14.
51 S. 1(1).
53 This controversial case, on who as between the federal government of Nigeria and component states of Nigeria located at the coast owns the Nigeria offshore zones within national jurisdiction, was decided, in the exercise of its original jurisdiction to hear disputes between the federal government and the unit states under the Constitution, by seven judges of the Supreme Court, the highest court in Nigeria, namely Uwais CJN, Ogundare JSC, Wali JSC, Kutigi JSC, Ogwuegbu JSC, Onu JSC and Ighu JSC. See ss. 232(1) and 234 of the 1999 Constitution.
54 There are 36 states in Nigeria, eight of which (Akwa Ibom, Bayelsa, Cross River, Delta, Lagos, Ogun, Ondo and Rivers) are located at the Nigerian coastal boundary. See s. 3 of the 1999 Constitution.
the inland waters within the States as the case may be and in the case of the defendant (Cross River State) which has archipelagic islands, her southern boundary is the seaward limit of her internal waters.\textsuperscript{55}

First, this judgment identifies the seaward boundary of the component units in Nigeria located along the coast as either the low-water mark or “the seaward limits of inland waters”. The question is whether the low-water mark and the seaward limits of inland waters are alternative methods of measuring the Nigerian territorial water. It does appear, in the view of this writer, that it was not the intention of the legislature to have alternative methods. Rather, a study of the provisions of the Act, which emphasises the low-water mark as the basepoint for measuring the Nigerian territorial sea by putting it in parenthesis, suggests that the phrase “the seaward limits of inland waters” does not appear to detract from the baseline being the low-water mark, but merely emphasises the distinction between the internal waters\textsuperscript{56} (the water within the landward limits of the baseline) and the territorial sea (on the seaward limits of the baseline). The provisions of the Act cannot therefore be interpreted to endorse any baseline beyond the normal baseline of the low-water mark. Secondly, the judgment appears to suggest different rules for the Cross River area because of the archipelagic islands. There is of course no suggestion that Nigeria is a mid-ocean archipelagic state, which obviously it is not,\textsuperscript{57} but rather raises the issue of Nigeria, in the Cross River area, having a so-called “coastal” archipelago as a result of islands fringing its coast.\textsuperscript{58} The provisions of the LOSC on straight baselines cover such coastal archipelagos. Article 7(1) provides:

In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

A perusal of the map of Nigeria reveals certain parts of the coastline are indented, especially around the Niger Delta area, thereby raising the possibility of the application of straight baselines. This in addition raises the prospect of the application of the Article 7(2) provisions to the Niger Delta, one of the largest deltas in the world. Article 7(2) provides:

Where because of the presence of a delta and other natural conditions the coastline is highly unstable, the appropriate points may be selected along the furthest seaward extent of the low water line and, notwithstanding subsequent regression of the low water line, the straight baselines shall remain effective until changed by the coastal State in accordance with this Convention.

\textsuperscript{55} Note 52 above, p. 828.
\textsuperscript{56} Art. 8.
\textsuperscript{57} See LOSC, Art. 46 for definition of archipelagic states and Part IV thereof for the special regime applicable to such states.
\textsuperscript{58} For more on mid-ocean and coastal archipelagos see Churchill and Lowe, \textit{op. cit.}, pp. 118–131.

This provision, unlike other methods of determining baselines,⁵⁹ is subsidiary to Article 7(1) and therefore can only be applicable if either of the twin conditions—deeply indented and cut into coastline or fringe of islands along the immediate vicinity of the coast—is satisfied.⁶⁰ Thereafter it has to be shown that the presence of the delta makes the coastline “highly unstable”.⁶¹

However despite the statement of the learned Justice of the Supreme Court on the fringe islands in the Cross River area, there is no legislative backing

⁵⁹ See Arts. 9–13.
⁶⁰ See Qatar v Bahrain [2001] ICJ Reps, para. 212, where the ICJ observed that “the method of straight baselines, which is an exception to the normal rules for the determination of baselines, may only be applied if a number of conditions are met. This method must be applied restrictively. Such conditions are primarily that either the coastline is deeply indented and cut into, or that there is a fringe of islands along the coast in its immediate vicinity.”
for the use of straight baselines or any other methods, except the low-water mark, for the measurement of the territorial sea in this or any part of the coast of Nigeria. Arguably the silence of the Nigerian legislation on straight baselines may be attributable to the fact that the Nigerian coastline does not satisfy the conditions of either being deeply indented or having a fringe of islands along its immediate vicinity. Whether or not this is the position can only be categorically determined by a comprehensive on-ground survey by geographers and surveyors to determine not only the low-water mark, but also whether the physical configuration of certain parts of the Nigerian coastline qualify under the Article 7 provisions. Thereafter there is a need to produce and publish charts precisely indicating such baselines as required by LOSC, Article 16.

Publicity of baselines

Such baselines are required by LOSC to be shown on charts of a scale or scales adequate for ascertaining their position or in the alternative by a list of geographical co-ordinates specifying the geodetic datum. These charts or lists of geographical co-ordinates are to be given adequate publicity by the coastal state, which is required to deposit a copy of such charts or list with the Secretary-General of the United Nations. The Territorial Waters Act as amended, which baldly states that the territorial sea shall be measured from the low-water mark, gives no indication on its face that the baselines should be shown on charts to be given publicity, unlike legislation in certain other jurisdictions. Even if the intention was to give room for the appropriate government agency to prepare the necessary charts, the preferred view would have been for the Act to make specific mention of such charts thereby conferring it with legislative status, if only by reference. For example the Territorial Sea and Exclusive Economic Zone Act of Namibia, while pointing out that the territorial sea of Namibia shall be measured from the low-water line, goes on further to require that such may “be marked or indicated by appropriate symbols on scale [large] charts officially recognised by Namibia”. Likewise the Tanzanian Territorial Sea and Exclusive Economic Zone Act 1989 requires that the low-water line from which its territorial sea is measured should be

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62 See V. Prescott, “Publication of a Chart Showing the Limits of South Africa’s Maritime Claims”, (1999) 14 International Journal of Marine and Coastal Law 558 at 559 where Prescott points out that certain states, including South Africa, by drawing straight baselines along their coastlines are acting contrary to the rules under LOSC, Art. 7.
63 E.g. on 27 October 1995 the South African government published charts indicating its baselines. See Prescott, ibid.
64 Art. 16(1).
65 Art. 16(2).
67 S. 2(1).
68 S. 2(2)(b).
“marked on a large-scale chart or map officially recognised by the Government of the United Republic”. 69

Whether or not the Nigerian government has such charts officially recognised by government can only be a matter of speculation as no adequate publicity has been given to such, if they exist at all. An occasion for the Nigerian government to tender such officially recognised charts indicating the baselines was presented in the case of A-G of the Federation v A-G of Abia State and 35 Others, 70 a case involving a dispute between the federal government and component states of Nigeria as to the ownership of the offshore zones within national jurisdiction, including the territorial sea, in order to determine whether or not minerals resources located therein can be deemed to be situated in certain component states for revenue allocation purposes. 71 A challenge by some of the component states, in the form of a preliminary objection asking the case to be dismissed on the grounds of the neglect of the federal government to tender any evidence to prove the low-water mark of Nigeria, failed to move the latter to tender such evidence, rather it preferred to argue its case on points of law only. 72 The Court agreed with the federal government that the issue before the Court did not require evidence, but was a matter of law. According to Ogundare JSC, who read the lead judgment:

In my humble view... the seaward boundary of a littoral State as we are called to determine in this case [the court found such boundary to be the low-water mark], is a matter of law. What becomes factual, and on which evidence will be required to prove, is the actual location of that boundary. 73

Whether or not one agrees with this distinction, which in the opinion of this writer is a rather fine one since the controversy between the two sides involved the need to determine the actual location of their boundaries, it suffices to say that this opportunity to tender before the court large-scale charts, if they exist, indicating the low-water mark of Nigerian waters, was not utilised by the federal government. Perhaps it would not be far-fetched to attribute this to the absence of any specific provision on evidentiary proof of the low-water mark in the Nigerian territorial waters legislation, unlike similar legislation of certain African states. However there is no doubt that the best possible evidential proof would be officially recognised charts indicating the baselines. The Namibian Territorial Sea and Exclusive Economic Zone Act No. 3 of 1990, unlike the Nigerian legislation, gives evidential value to such officially recognised charts by stating: “In any proceedings before a court of law any chart referred to in paragraph (b) shall be prima facie evidence of the

69 S. 5. See also s. 1(1) of the Maritime Zones (Delimitation) Law 1986 of Ghana.
70 Note 52 above.
71 S. 162(2) of the 1999 Constitution.
72 Ogundare JSC, note 52 above, pp. 643–644.
73 Ibid., p. 644.
matters referred to therein.” The Seychelles Maritime Zones Act No. 2 of 1999 goes even further by pointing out that a document purporting to be certified by the President of Seychelles as a true copy of a chart or list of geographical co-ordinates marking the baselines “shall be received in any proceedings as conclusive evidence of any matter” as regards the Seychelles baselines.74 The way and manner in which the Nigerian legislation is couched, without specifically mentioning official charts, may leave room for the conclusion that the issue of the determination of the low-water mark under the Act is a matter of abstract law rather than evidence that needs to be proved by actually producing charts marking the low-water mark. As to whether such officially recognised charts exist is not too clear but subsequent events after the decision in the Supreme Court case75 involving the establishment of a task force by a federal government agency, the Revenue Mobilisation and Fiscal Commission, to determine the low-water mark, appear to suggest that at the time of the decision of the Court there were no such charts.76

The requirement of charts or geographical co-ordinates under the LOSC imposes a duty upon the coastal state not only to give it due publicity but also to deposit a copy of such chart or list with the Secretary-General of the United Nations.77 While it is not clear if such official charts existed as at the time of the Supreme Court of Nigeria decision in 2002, what is clear is that if such charts exist they have not been given adequate publicity nor deposited with the United Nations Secretary-General as required by the Article 16 provision.78

Delimitation of Territorial Sea Boundaries with Neighbouring States

The neighbouring maritime states of Cameroon, Republic of Benin, Equatorial Guinea and Sao Tome and Principe surround Nigeria by virtue of its location.79 As a result, the issue of delimitation of maritime boundaries, including the territorial sea, is of concern to the nation. While the issue of delimitation of the territorial sea, as a result of the modest breadth of 12 nautical miles adopted by the LOSC, has ceased to be a major issue in respect of most states with opposite coasts, it is still of interest as regards states with adjacent coasts.80 The LOSC requires that such delimitation should, in the absence of

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74 S. 28.
75 Judgment was delivered by the Supreme Court on 5 April 2002.
77 Art. 16.
an agreement by the states concerned to the contrary, be by way of the
equidistance/special circumstances rule.\textsuperscript{81} Though Nigeria has ratified the
LOSC, its Territorial Waters Act as amended does not deal with the issue of
delimitation of its territorial sea with neighbouring coastal states. This silence
raises the issue of whether the provisions of the LOSC on delimitation of the
territorial sea form part of Nigerian law. As a result of the strictly dualist
nature of the Nigerian constitutional framework inherited as a former colony
of Britain, like virtually all commonwealth countries,\textsuperscript{82} strictly conventional
rules do not form part of Nigerian domestic law until enacted in appropriate
municipal legislation.\textsuperscript{83} However a conventional rule that is at the same time
customary international law, has automatic application in Nigeria (just as it
does in English Law) as part of the common law of Nigeria.\textsuperscript{84} In the Nigerian
Supreme Court case of \textit{Ibidapo v Lufthansa Airlines}, Wali JSC pointed out
that “Nigeria, like any other Commonwealth country, inherited the English
customary law rules governing the municipal application of international law.”\textsuperscript{85}

The conventional rules of delimitation of the territorial sea in the LOSC,
which unlike its counterpart on the continental shelf has remained consistent
since the 1958 Geneva Convention, can be said to have crystallised into cus-
tomary international law and subsequently codified in the LOSC.\textsuperscript{86} In the
\textit{Dubai/Sharjah Border Arbitration}\textsuperscript{87} the tribunal appears to have regarded
the provisions of Article 12 of the 1958 Territorial Sea Convention and the draft
of what is now Article 15 of LOSC as reflective of customary international
law.\textsuperscript{88} Even if the provisions of Article 12 of the Geneva Convention did not


\textsuperscript{82} Adeke advocates an adoption of a monistic approach for Commonwealth countries. See A.O.
Adeke, “Africa in International Law: Key Issues of the Second Millennium and Likely
351 at 366–368.

\textsuperscript{83} See s. 12 of the Constitution of the Federal Republic of Nigeria 1999. See also the Supreme
Court of Nigeria decision in \textit{Abacha v Fawehinmi} [2000] 6 NWLR (Part 660), 228, and
analysis of the Nigerian Court of Appeal decision on s. 12 in this case and other cases in
note 14 above.

\textsuperscript{84} See the following English cases: \textit{Buvot v Babuit} (1737) Cases t. Talb. 281; \textit{Triquet v Bath}
(1764) 3 Burr. 1478; \textit{West Rand Central Gold Mining Co. v R.} [1905] 2 KB 391; and

\textsuperscript{85} [1997] 4 NWLR (Part 498), 124 at 150.

\textsuperscript{86} See \textit{North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal
Activities in and against Nicaragua (Nicaragua v United States)} [1986] ICJ Rep 14. Also see
M.E. Villenger, \textit{Customary International Law and Treaties} (Dordrecht/Boston/Lancaster,
and Third States”, (1983) 77 AJIL 541 at 553–566, and A. D’Amato, “An Alternative to the

\textsuperscript{87} 91 ILR 543.

\textsuperscript{88} Art. 12 of the Geneva Convention and Art. 15 of LOSC are in \textit{pari materia}. Churchill and
Lowe point out that the conventional rules on delimitation of the territorial sea are consist-
crystallise into customary international law prior to LOSC, the widespread ratification of the LOSC, including the provisions of Article 15, could be said to have caused such provisions to metamorphose into customary international law.\(^{89}\) The International Court of Justice in the *Qatar v Bahrain* case clearly pointed out that the provisions of Article 15 had become part of customary international law.\(^{90}\) These provisions, though not specifically included in the Nigerian Territorial Waters Act, would as customary international law become part of the domestic law of Nigeria. However, this silence on the part of the Nigerian legislation can be contrasted with the practice of certain African states which specifically mention delimitation of the territorial sea in their domestic legislation. For example the legislation of Djibouti on its maritime boundaries\(^{91}\) provides that the delimitation of the maritime frontiers of its boundaries, including the territorial sea, with neighbouring states whose coasts are adjacent or opposite to Djibouti should be by agreement with such states.\(^{92}\) Pending such agreement the law provides that the maritime frontiers of Djibouti "shall not extend beyond a median line between the two States or beyond a line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the Republic [Djibouti] and of the State in question are measured". This provision of the Djibouti legislation can be contrasted with the more recent legislation of Namibia.\(^{93}\) The Namibian legislation, like the Djibouti legislation, requires such delimitation to be determined by agreement, but goes on to state that pending the conclusion of the agreement or if no such agreement is reached, the extent of the Namibian territorial sea "may be determined or altered by Namibia as it deems fit".\(^{94}\) The Djibouti legislation is a preferred model, as it is substantially in conformity with the provisions of the 1958 Geneva Convention and the subsequent LOSC provisions. The Namibian legislation, by reserving to itself the exclusive right to determine its territorial sea in such an instance, does not comply with the LOSC, which requires that in the event of the failure to reach an agreement the delimitation should be by the equidistance/special circumstances rule. The Nigerian legislation’s silence on this matter could arguably be attributed to the belief that the issue of delimitation between adjacent or opposite states, a matter of concern only to nation states, is relevant only to the international and not the domestic sphere. However this position is difficult to sustain as similar legislation dealing with the Nigerian Exclusive Economic Zone


\(^{90}\) See *Qatar v Bahrain* [2001] ICJ Rep, paras. 174–177.

\(^{91}\) Law No. 52/AN/78 Concerning the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, the Maritime Frontiers and Fishing, enacted on 9 January 1979. See http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/africa.htm.

\(^{92}\) Art. 15.

\(^{93}\) Territorial Sea and Exclusive Economic Zone of Namibia Act No. 3 of 1990. See United Nations website, note 91 above.

\(^{94}\) S. 5.
(EEZ) specifically makes provision for delimitation of EEZ between Nigeria and neighbouring states with opposite or adjacent coasts. The reason for the silence of the Territorial Waters Act on this, in the view of the writer, can only be attributable to the rather sparse and limited scope of the legislation.

Innocent Passage

The sovereignty of a coastal state, while extending beyond its land territory and internal waters to its territorial sea, including its airspace and bed and subsoil, is subject to the right of ships of all states, whether coastal or landlocked, to enjoy innocent passage through the territorial sea. This right, developed side by side with the concept of the territorial sea to maintain a balance between the right of the coastal state to have sovereignty over its territorial sea and the right of all other states to enjoy navigation over the territorial sea, was incorporated into the LOSC. Like the 1958 Convention before it, the LOSC defines passage as navigation through the territorial sea either for the purpose of traversing it without entering internal waters or proceeding to or from internal waters. Such passage is to be continuous and expeditious though it may include stopping and anchoring which are incidental to ordinary navigation or which are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons or aircraft in danger or distress. Whilst adopting the definition of the earlier Geneva Convention to the effect that passage is innocent as long as it is not prejudicial to the “peace, good order or security” of the coastal state, the LOSC goes on to list 12 activities which would make a passage of a foreign ship cease to be innocent. These 12 activities include what appear to be obviously “hostile” activities such as the threat or use of force against the coastal state contrary to international law; weapons exercise or practice; espionage and propaganda against the defence or security of the coastal state; launching, landing or taking on board of any aircraft or military device; loading or unloading of commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulation of the coastal state; acts of wilful and serious pollution; acts aimed at interfering with any systems of communication or other facilities or installations of the coastal state. It also includes unauthorised fishing and research or

95 See s. 1(2) of the Exclusive Economic Zone Act, Cap. 116, Laws of the Federation of Nigeria 1990, which provides that in the absence of any agreement the delimitation of overlapping EEZs with neighbouring littoral states shall be by median line principle (opposite states) or the equidistance principle (adjacent states).
97 LOSC, Arts. 2 and 17. See also Art. 14(1) of the Convention on the Territorial Sea and the Contiguous Zone (TSC).
98 Art. 18(1). See also Art. 14(2) of the TSC.
99 Art. 18(2). Art. 14(3) of the TSC.
100 Art. 19(1). Art. 14(4) of the TSC.
101 Art. 19(2).
survey activities. In addition this list includes a rather open-handed clause—
“any other activity not having a direct bearing on passage”\textsuperscript{102}—which appears
to suggest that this list is not a closed and exhaustive one. This clause
arguably may open the way for a coastal state to adjudge an activity not
amongst those specifically mentioned, as not innocent once it is determined
not to have a direct bearing on passage, and prejudicial to its peace, good
order or security.\textsuperscript{103}

The Nigerian territorial waters legislation does not specifically mention the
right to innocent passage. However this right is referred to cursorily by the
Sea Fisheries Act.\textsuperscript{104} This Act, in a provision dealing with unlicensed motor
fishing boats, states: “Every unlicensed motor fishing boat in transit or enjoy-
ing the right of innocent passage within Nigeria’s territorial waters or its
exclusive economic zone shall . . .”\textsuperscript{105}

With this legislation it is not clear if the right to innocent passage is being
applied to both the Nigerian territorial sea and the EEZ. However it must be
pointed out that under the LOSC the right to innocent passage has no bearing
on the EEZ, where foreign ships enjoy freedom of navigation as one of the
freedoms of the high seas, since this zone is a special zone giving the coastal
state not sovereignty but only sovereign rights and jurisdiction of a strictly
economic nature.\textsuperscript{106} The Sea Fisheries Act, though referring to the right of
innocent passage, does not anywhere define the right; neither does it refer to
any other legislation defining this right. The position of the Nigerian Territorial
Sea Act can be contrasted with the South African Maritime Zones Act\textsuperscript{107} which
specifically states: “The right to innocent passage shall exist in the territorial
waters.”\textsuperscript{108} It then goes on to define this right by reference to the earlier
Marine Traffic Act\textsuperscript{109} which defines innocent passage as “passage which is not
prejudicial to the peace, good order or security of the Republic”.\textsuperscript{110} In the case
of Nigeria recourse can however be made to the fact that the right of innocent

\textsuperscript{102} Art. 19(2)(I).
\textsuperscript{103} However see para. 3 of the Uniform Interpretation of Norms of International Law Governing
Innocent Passage, signed between the United States of America and the then USSR which
states that Art. 19(2) sets out an exhaustive list. (1989) 14 LOSB 12–13, quoted in Churchill
and Lowe, op. cit., p. 86.
\textsuperscript{104} Act No. 71 of 1992. See LOSC, Art. 21, which allows coastal states to adopt laws and reg-
ulations relating to innocent passage in order to prevent the infringement of its fisheries laws
and regulations, as well as for the safety of navigation; protection of navigational aids and
facilities or installations; protection of cables and pipelines; conservation of living resources
of the sea; preservation of the environment; marine scientific research and hydrographic sur-
veys and to prevent the infringement of fiscal, immigration or sanitary laws.
\textsuperscript{105} S. 2.
\textsuperscript{106} LOSC, Arts. 55, 56 and 58.
\textsuperscript{107} Act No. 15 of 1994.
\textsuperscript{108} S. 4(3).
\textsuperscript{109} Act No. 2 of 1981.
\textsuperscript{110} S. 1.
passage, clearly a rule of customary international law,111 becomes a part of its domestic law automatically.112 The recognition of this right as part of Nigerian domestic law appears to have been endorsed by the Supreme Court of Nigeria in the case of *A-G of the Federation v A-G of Abia State and Others*, where Ogundare JSC, reading the lead judgment, pointed out as follows:

The rules of international law that have evolved over the centuries are now crystallised in the Geneva Convention on the Territorial Sea and Contiguous Zone, 1958 . . . The Geneva Conventions provide for limits of the territorial sea,113 the right of innocent passage through the territorial sea and the use of the high seas. Articles 1 and 2 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, 1958 are relevant to the case on hand and I, therefore, quote them hereunder . . .114

While the learned judge of the Supreme Court did not specifically refer to customary international law, the whole tone of his statement seemed to suggest that he regarded the provisions of the Geneva Convention on the Territorial Sea and Contiguous Zone as codifying customary international law which could be applied directly as part of Nigerian law.

However the issue that arises is the scope of the right of innocent passage applicable as part of Nigerian domestic law. This is especially relevant considering that the LOSC goes into details concerning activities that would make a passage cease to be innocent. Have the provisions of Article 19 crystallised into customary international law, making it applicable under Nigeria domestic law? Churchill and Lowe, after examining certain state practice, rightly in this writer’s view, conclude: “These developments are rapidly transforming Article 19 of the 1982 Convention into a rule of customary international law.”115

It is not too clear if warships enjoy the right of innocent passage through the territorial sea. While the *Corfu Channel* case116 makes it clear that the right to innocent passage is available to warships in respect of straits, the LOSC does not specifically extend such right to warships passing through non-strait territorial sea.117 It has however been suggested that since the LOSC refers to submarines and other underwater vehicles, which are inevitably war vessels, having to exercise the right by navigating on the surface and showing their

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112 See discussion in section above on Delimitation of Territorial Sea Boundaries with Neighbouring States.
113 The learned judge erroneously held that the Geneva Conventions provided for the limits of the territorial sea. However this was one of the failings of the Geneva Conventions, which was one of the crucial issues dealt with at UNCLOS III.
114 Note 52 above, p. 649.
115 *Churchill and Lowe*, *op. cit.*, p. 87.
117 See LOSC, Art. 45 and *Churchill and Lowe*, *op. cit.*, pp. 88–92.
flags, this right applies also to warships. The practice of certain states in this regard has been to require such war vessels to give prior notification before exercising such right.

Nigerian state practice on the issue of innocent passage of warships can be deduced from the policy statement, in response to the decision of the International Court of Justice in the Bakassi case, issued by the federal government of Nigeria. In this statement the federal government espoused the following:

Whilst the effect of the Court’s decision is to grant sovereignty over Bakassi to Cameroon, it does not affect the right of innocent passage enjoyed under international law by all vessels, including Nigerian naval vessels, travelling to and from the sea to the west of Bakassi, whether on the Nigerian or the Cameroonian side of the Maroua line.

From this statement it appears that the federal government recognises the right to innocent passage of all ships, including warships. The silence on the issue of the need for prior notification or authorisation to exercise this right indicates that the federal government does not endorse such requirement. This view is supported by the fact that Nigeria, unlike certain other states, did not make any such declaration in this regard under Article 310. The requirement of prior notification by a foreign vessel, including a warship, in view of the conflicting claims by various states, does not appear to be part of customary international law, and consequently is not part of Nigerian law. However the Nigerian government does reserve to itself the right to require a foreign ship to leave its territorial waters if it regards the ship’s passage to be prejudicial to the peace, good order or security of Nigeria. In October 1989, about a year after an Italian ship dumped toxic industrial waste at Koko port in the then Bendel State of Nigeria, the Nigerian government ordered out of its territorial

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118 See LOSC, Art. 20 and ibid., p. 89.
119 See however para. 2 of the Uniform Interpretation of Norms of International Law Governing Innocent Passage which insists that no such prior notification is required by all ships, including warships. Quoted in Churchill and Lowe, ibid., pp. 89–90. On the former USSR’s policy on prior notifications of warships, see also W.E. Butler, “Innocent Passage and the 1982 Convention: The Influence of Soviet Law and Policy”, (1987) 81 AJIL 2, 331.
122 Examples of states which made such declarations are Algeria, China, Croatia and Oman. Egypt, Malaysia, Malta and Yemen in addition to making declarations requiring warships to give prior notification also require such in respect of passage of nuclear-powered ships and ships carrying nuclear or other inherently dangerous and noxious substances. See http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm.
124 See LOSC, Arts. 25(1), 25(3) and 30.
125 See passage accompanying note 141 below.
sea a Greek ship suspected to be carrying frozen meat contaminated by the nuclear fallout from Chernobyl.126

Jurisdiction

In extending the sovereignty of the coastal state to the territorial sea, the LOSC concedes to it the power to exercise certain legislative and enforcement jurisdiction,127 both criminal and civil, over this belt of the sea.

Criminal jurisdiction

The criminal jurisdiction of arrest, investigation and trial in respect of a crime committed on a foreign ship during passage through the territorial sea is to be exercised only where: the consequences of the crime extends to the coastal state; the crime is of a kind to disturb the peace of the coastal state or the good order of the territorial sea; the assistance of the local authorities of the coastal state has been requested by the master of the ship or a diplomatic agent or consular officer of the flag state; such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.128 These limitations to the criminal jurisdiction do not in any way affect the wide criminal jurisdiction a coastal state has in respect of a foreign ship passing through its territorial sea after leaving its internal waters.129

The Nigerian Territorial Waters Act, as amended, goes into some details on the issue of criminal jurisdiction, and is in many regards similar to the English Territorial Waters Jurisdiction Act 1878. Under the Nigerian legislation, a person, Nigerian or foreigner, can be arrested, tried and punished for an act or omission committed within the Nigerian territorial sea, if such would constitute an offence under any law in force in any part of Nigeria.130 The Act covers not only crimes committed on board or by means of a ship, including a foreign ship, but also that committed on or by means of a structure resting on the sea-bed or subsoil (presumably offshore oil and gas installations) of the Nigerian waters.131 The Act makes the trial of a foreign national by a Nigerian court for any offence committed in the territorial sea subject to the consent of the Attorney-General of the federation, in the form of a certificate of consent.132 However the failure to obtain such consent does not affect the exercise of any power of arrest, search, entry, seizure or custody in respect of such offence. Neither does it affect any obligation on any person in respect of a recognisance or bail bond entered in consequence of the arrest of such foreign national. It also does not affect the powers of any court to remand (whether

127 For the distinction between legislative and enforcement jurisdiction see the very astute and interesting analysis in Churchill and Lowe, op. cit., pp. 92–100.
128 Art. 27(1).
129 Art. 27(2).
130 S. 2(1).
131 S. 2(2).
132 S. 3(1) and (4).
on bail or in custody) any foreign national brought before the court. The failure to obtain such consent only renders the trial as voidable and not void since if no objection is raised during the trial such failure shall not in any way affect the validity of the trial. These provisions have been criticised by Adeoye Akinsanya as conferring an unqualified criminal jurisdiction on the Nigerian government contrary to Article 19(1) of the 1958 Geneva Convention on the Territorial Sea, which is identical to the Article 27(1) provisions of the LOSC. While *prima facie* an interpretation of the provisions of the Act might lead to such conclusion, it is arguable that because it does not specifically exclude the provisions of the 1958 Convention Article 19(1) and what is now LOSC, Article 27(1) such limitation can be inferred from the presumption of interpretation that the legislature enacts laws consistent with international law unless the contrary is clearly expressed. In *Ibidapo v Lufthansa*, Wali JSC of the Nigerian Supreme Court explained the practice to be adopted by the Nigerian courts in cases where the domestic legislation does not clearly and expressly override international law as follows:

The practice of our courts on the subject matter is still in the process of being developed and the courts will continue to apply the rules of international law provided they are found not to be over-ridden by clear rules of our domestic law. Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to live in isolation. It shall continue to adhere to, respect and enforce both multilateral and bilateral agreements where their provisions are not in conflict with our fundamental law.

The Nigerian legislation appears to give a special place to the offence of piracy as defined by the law of nations by making it an exception to the requirement of obtaining the consent of the Attorney-General in a case involving a foreign national, and by specifically emphasising the jurisdiction of the Nigerian court to try such offence of piracy. This presumably does not refer to piracy committed within the Nigerian territorial waters since piracy under the law of nations as defined by LOSC, Article 101 is limited to that committed outside the national jurisdiction of any state. The jurisdiction of the Nigerian court in this regard is therefore in exercise of its universal jurisdiction under international law to try the offence of piracy. It is suggested that the Nigerian

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133 S. 3(2)(a)–(c).
134 S. 3(2)(d)–(e).
137 Note 85 above, p.150.
138 See LOSC, Art. 101 for definition of piracy.
139 S. 3(3).
140 S. 2(4).
141 LOSC, Art. 100 places a mandatory duty of co-operation by all states in the repression of piracy on the high seas or in any other place outside the jurisdiction of any state.
courts would actually exercise this jurisdiction under the Territorial Waters Act in respect of an offender arrested while within the Nigerian territorial waters. Foreign nationals actually committing acts of "piracy" within Nigerian territorial waters can be arrested, tried and punished under the appropriate criminal laws in force in Nigeria to deal with robbery and brigandry if the Article 27 exceptions apply.\footnotemark[142]

Examples of domestically created offences within the contemplation of the Territorial Waters Act, presently of grave concern to the Nigerian government, are those involving the dumping of harmful waste and "illegal bunkering"\footnotemark[143] of oil. Both offences carry severe mandatory sentences of life imprisonment, an indication of the seriousness the Nigerian government attaches to these offences.

Between 1987 and 1988 approximately 3,880 tons of toxic and hazardous waste were dumped by an Italian company at Koko, Nigeria. One of the responses of the Nigerian government to this embarrassing incident was to enact the Harmful Waste (Special Criminal Provisions, etc.) Act,\footnotemark[144] which criminalised the dumping of harmful waste on the land territory, internal waters, territorial waters, contiguous zone or EEZ of Nigeria.\footnotemark[145] The Act provides that a person\footnotemark[146] who, without lawful authority, does the following acts shall be guilty of a crime under the Act:

Carries, deposits, dumps or causes to be carried, deposited or dumped, or is in possession for the purpose of carrying, depositing or dumping, any harmful waste on any land or in any territorial waters or contiguous zone or Exclusive Economic Zone of Nigeria or its inland waterways.\footnotemark[147]

\footnotetext[142]{S. 2 of the Territorial Waters Act. See e.g. the Nigerian Criminal Code, Cap. 77, Laws of the Federation of Nigeria 1990. In a report compiled by the International Maritime Bureau, piracy at sea is reported to have reached record levels in the first quarter of 2003, with Indonesia reported to have the highest incidence (28 incidents) and Nigeria (9 incidents) included amongst the next three worst-affected countries—others are India and Bangladesh. See http://news.bbc.co.uk/1/hi/world/asia-pacific/2994013.stm.}

\footnotetext[143]{This is the popular term used to describe the offence in Nigeria both within and outside government circles. See passage accompanying note 155 below for explanation of this offence.}


\footnotetext[145]{S. 1(2).}

\footnotetext[146]{A person includes foreign diplomatic personnel. Under s. 9 of the Act immunity from prosecution conferred on diplomats by or under the Nigerian diplomatic Immunities and Privileges Act is excluded in respect of crimes committed under the Harmful Wastes Act. See discussion on the implications of this in Uchegbu, op. cit., p. 218. See note 143 above.}

\footnotetext[147]{S. 1(2)(a). Under s. 12 the Act also provides for a concurrent civil liability for any damage
From the rather wide definition of the crime contained in the Harmful Waste (Special Criminal Provisions, etc.) Act it appears that, technically, a person can be tried even for carrying harmful waste through the Nigerian territorial waters, though he is just passing through and has no intention of entering internal waters or dumping such harmful waste in the Nigerian maritime zones including the territorial sea. It is however doubtful if in such situations the government of Nigeria would be interested in prosecuting such a person. In this writer’s view the better option would be to order such vessel containing the harmful waste out of Nigerian territorial waters on the grounds that such passage being contrary to the sanitary laws of Nigeria has ceased to be innocent.\footnote{See LOSC, Art. 19(2)(g) and note 126 above on the incident of the Greek ship.}

Any person found guilty under the Act shall, on conviction, not only be sentenced to a mandatory sentence of life imprisonment but in addition shall have, in the case of dumping in the territorial sea, the vessel used in transportation or importation of the toxic waste forfeited and vested in the federal government of Nigeria.\footnote{S. 6(a).} The Act also permits any police officer without warrant to enter and search any vessel that he has reason to believe is connected with the offence;\footnote{S. 10(1)(a).} to perform tests and take samples of any substances related to the connection of the crime found on the vessel;\footnote{S. 10(1)(b).} arrest any person suspected to have committed the crime;\footnote{S. 10(1)(c).} and seize any item or substance which is believed to have been used in the commission of the crime, provided upon such seizure a written receipt is given for the seized items.\footnote{S. 10(1)(d) and (2).} The provisions of the Harmful Waste Act could be said to be in line with LOSC, Article 216(1)(a) which allows a coastal state to enforce laws and regulations adopted in accordance with the Convention and international law to prevent, reduce and control marine environment pollution resulting from dumping of pollutants within its territorial sea, EEZ or its continental shelf. However the penalty of life imprisonment, even against foreign nationals, raises the issue of its compatibility with LOSC, Article 230(2). Under the Article 230(2) provisions, coastal states are required to impose only monetary penalties with respect to violations of its domestic laws to prevent, reduce and control marine environment pollution committed by foreign vessels in its territorial sea, except in the case of a wilful and serious act of pollution. The definition of harmful waste by the legislation appears to reveal that only “a wilful and serious act of pollution” including death of or injury to any person resulting from such dumping of harmful waste except it can be shown that such damage was either due wholly to the fault of the person who suffered it; or it was suffered by a person who voluntarily accepted the risk.
would constitute an offence under the Nigerian legislation, thereby arguably putting it under the Article 230(2) exception. Harmful waste is defined as:

any injurious, poisonous, toxic or noxious substance and, in particular, includes nuclear waste emitting any radioactive substance if the waste is in such quantity, whether with any other consignment of the same or of different substance, as to subject any person to the risk of death, fatal injury or incurable impairment of physical and mental health; and the fact that the harmful waste is placed in a container shall not by itself be taken to exclude any risk which might be expected to arise from the harmful waste.

The other offence of illegal bunkering of oil involves Nigerian crude oil being obtained without lawful authority or appropriate licence; conveyed in barges and illegally transferred to vessels, usually foreign vessels located in the territorial sea, to be transported and sold to certain foreign refineries. The nation is reported to be losing approximately 70,000 barrels of oil daily from these illegal bunkering activities. This course results in the loss of a large amount of foreign exchange by the Nigerian government. Under the Miscellaneous Offences Act any person, including a foreign national, who without lawful authority or an appropriate licence imports, exports, sells, offers for sale, distributes, or otherwise deals with or in any crude oil, petroleum or petroleum products in Nigeria, including the territorial sea, shall be guilty of an offence punishable by mandatory imprisonment for life. In addition to such imprisonment any vehicle, vessel, aircraft or other conveyance used in connection with the offence shall be forfeited to the federal government of Nigeria.

The Nigerian Navy, in its role of patrolling Nigerian waters, including the territorial sea, is charged with the responsibility of intercepting vessels involved in illegal dumping of harmful waste and illegal bunkering. In October 2003 a ship, the African Pride, carrying 11,300 tons of stolen Nigerian crude oil and having on board 20 Russians and two Romanians, was arrested by the Nigerian Navy within Nigerian territorial waters on an accusation of engaging in illegal bunkering. At the time of writing this article

154 S. 15.
155 See the Nigerian Presidential Research and Communications Unit website: http://www.nigeriafirst.org/article_765.shtml.
157 S. 3(17).
158 Ibid. Recently an agency of the Nigeria government, the National Maritime Authority (NMA), in a bid to isolate vessels being used for illegal bunkering, issued a Marine Shipping Notice requiring all operators and owners of ships operating within the Nigerian waters to obtain the registration (for Nigerian-owned ships) or licensing (for foreign ships) of such ships with the NMA. From 1 January 2004 a failure to obtain such registration or licensing, as the case may be, would result in the arrest of the ship and prosecution of the ship operator or owner. See http://www.nigerianmaritimediary.com/dailynews.php?id=481 (visited on 16 December 2003).
159 S. 1 of the Navy Act. See note 1 above.
the Nigerian authorities have not made clear whether these foreigners will be tried under the Miscellaneous Offences Act.

The twin offences of dumping harmful waste and illegal bunkering of oil, which have adverse implications concerning the environment and economy of Nigeria, would in many regards fall under the Article 27(1) exceptions as crimes the consequences of which extend to Nigeria and of a nature to disturb its peace and the good order of its territorial sea.\textsuperscript{161}

\textit{Notification of diplomatic agent or consular officer of flag state}

In exercising its criminal jurisdiction over a foreign national, the coastal state is required by the LOSC not only to notify, at the request of the master, a diplomatic agent or consular officer of the flag state before taking any steps, or in the case of an emergency while the measures are being taken, but in addition to facilitate contact between such agent or officer and the ship’s crew.\textsuperscript{162} The Nigerian Territorial Waters legislation does not expressly deal with the issue of such notification of a diplomatic agent or consular officer of the flag state as required by LOSC, Article 27(3). However, such a duty would be deemed to be imposed on the Nigerian government as the provisions of Article 27(3), which is comparable to Article 36 of the Vienna Convention on Consular Relations 1963 to which Nigeria is a party,\textsuperscript{163} could be said to create individual rights in favour of such foreign nationals that allows their home government to institute international judicial proceedings on their behalf for a breach of its duty by the arresting state.\textsuperscript{164}

\textit{Civil jurisdiction}

The LOSC also deals with the civil jurisdiction of the coastal state over foreign ships and foreigners.\textsuperscript{165} The coastal state is not to stop or divert a ship passing through its territorial sea for the purpose of exercising civil jurisdiction over a person on board the ship.\textsuperscript{166} Neither can it levy execution against or arrest a foreign ship for the purpose of any civil proceedings except in respect of obligations or liabilities assumed or incurred by the ship itself in the course or for the purpose of its voyage through the waters of the coastal state.\textsuperscript{167} This is without prejudice to the right of such coastal state in accordance with its laws, to levy execution against or to arrest, for the purpose of any civil proceedings, a foreign ship lying in or passing through its territorial

\textsuperscript{161} See \textit{Pinaka v the Queen} [1979] AC 107, PC.
\textsuperscript{162} Art. 27(3).
\textsuperscript{163} 596 UNTS 261. Nigeria became a party on 22 January 1968 by accession.
\textsuperscript{165} Art. 28.
\textsuperscript{166} Art. 28(1).
\textsuperscript{167} Art. 28(2).
sea after leaving such coastal state’s internal waters.\textsuperscript{168} The Nigerian territorial waters legislation, which is restricted to criminal jurisdiction, does not deal with the issue of civil jurisdiction in respect of the territorial sea. However the Nigerian Admiralty Jurisdiction Act,\textsuperscript{169} and Admiralty Jurisdiction Procedure Rules made thereunder,\textsuperscript{170} are sufficiently wide to cover the issue of civil jurisdiction within the territorial sea. The whole purport of the Admiralty Jurisdiction Act, which extends the admiralty jurisdiction \textit{inter alia} to “all ships, irrespective of the places of residence or domicile of their owners”\textsuperscript{171} and “all maritime claims, wherever arising”,\textsuperscript{172} suggests that the Nigerian courts can exercise civil jurisdiction in respect of the territorial sea over a foreign ship or foreign nationals. There is nothing in either the Admiralty Jurisdiction Act or the Rules to imply that any such jurisdiction would be exercised contrary to the provisions of LOSC, Article 28 since the legislature is presumed to enact laws in line with international law except where otherwise expressly stated.\textsuperscript{173}

\section*{Immunity of Warships and Non-commercial Governmental Ships}

Under the LOSC the immunities of warships and non-commercial governmental ships from the criminal and civil jurisdiction of the coastal state is recognised.\textsuperscript{174} This is however subject to the right of a coastal state to order out of its territorial sea a warship that does not comply with its laws and regulations,\textsuperscript{175} and also the right of such state to demand from the flag state of the warship and non-commercial government ships reparations for damages suffered as a result of the failure of such ships to comply with the laws and regulations of the coastal state.\textsuperscript{176} In respect of governmental ships the immunity does not extend to those involved in commercial transactions. Although the Nigerian Territorial Waters legislation makes no reference to the issue of immunity, the Nigerian state practice appears to lean in favour of absolute immunity rather than restricted immunity. In \textit{Kramer Italo Ltd v Government of the Kingdom of Belgium, Embassy of Belgium, Nigeria},\textsuperscript{177} the Belgium Embassy in Nigeria commissioned a contractor to build a residence for their Ambassador. Subsequently, the contractor instituted an action against the government of Belgium and the embassy in Nigeria claiming reimbursement for the additional expenses it incurred in carrying out the building contract. The Nigerian Court of Appeal refused to accept the arguments of the contractor that the doc-

\begin{footnotesize}
\begin{itemize}
\item Art. 28(3).
\item Act No. 59 of 1991.
\item S.I. 21 of 1993.
\item S. 3(a).
\item S. 3(b).
\item See passage accompanying notes 136 and 137 above.
\item Art. 32.
\item Art. 30.
\item Art. 31.
\item A 1988 decision of the Nigerian Court of Appeal, reported in (1996) 103 \textit{International Law Reports} 299–311.
\end{itemize}
\end{footnotesize}
trine of restrictive sovereign immunity was part of Nigerian law and held that the absolute sovereign immunity was still the applicable law in Nigeria. The court was of the view that the doctrine of restrictive immunity was a new doctrine of international law, which though contained in the national legislation of certain nations, albeit not including Nigeria, had not evolved into a rule of customary international law.\textsuperscript{178} Despite holding that the restrictive immunity was not part of Nigerian law, the learned judge, Ademola JCA, went on to consider, in the alternative, the possibility of restrictive immunity applying in the particular case and held that the immunity still applied because a contract whereby an embassy commissions a contractor to build a residence for its ambassador could not be classified as a commercial transaction. In arriving at its decision the Court of Appeal made reference to an earlier Supreme Court of Nigeria decision in \textit{African Reinsurance Corporation v Abate Fantaye},\textsuperscript{179} a case not involving sovereign immunity but rather diplomatic immunity, which is governed by the Nigerian Diplomatic Immunities and Privileges Act.\textsuperscript{180} In this case one of the judges of the Supreme Court, Karibi Whyte JSC, as an \textit{obiter dicta}, pointed out that the doctrine of absolute sovereign immunity applied in Nigeria. From the position of these cases it does appear that governmental ships, both commercial and non-commercial, are entitled to immunity from being impleaded in the Nigerian courts. This in itself goes an extra step beyond the Article 32 provisions of the LOSC but does not conflict with it.

Conclusion

Clearly the Nigerian Territorial Waters legislation in itself \textit{vis-à-vis} the LOSC is not comprehensive. Its content appears to point to it being more of a Territorial Waters Criminal Jurisdiction Act, since it dwells on the breadth of the territorial sea of Nigeria and the criminal jurisdiction of the Nigerian courts over this belt of the sea. The principal legislation was enacted in 1967 long before the 1982 Convention, but subsequently amended in 1998 after the 1982 LOSC, yet this latest amendment merely limits itself to bringing the breadth of the territorial sea in line with the LOSC. Despite the rather sparse nature of the Nigerian legislation there is room to incorporate the various LOSC provisions through customary international law as a result of its automatic application as part of Nigerian law, except where specifically excluded by domestic law. The Nigerian Territorial Waters Act does not exclude the possibility of applying the LOSC provisions that have acquired the status of customary international law, but rather impliedly encourages this by its reference in certain sections to the "Law of Nations".\textsuperscript{181} While certain LOSC provisions which

\textsuperscript{178} See lead judgment of Ademola JCA at p. 307 and Awogu JCA at p. 311.
\textsuperscript{179} (1986) 3 NWLR (Part 32) 811.
\textsuperscript{181} See ss. 2(4)(5) and 3(3).
have crystallised into rules of customary international law can be applied automatically in Nigeria, in this writer’s opinion the preferred option would be to have new principal legislation that clearly and specifically contains the territorial sea provisions of the LOSC, a treaty that has been ratified by Nigeria. Perhaps even better still would be new comprehensive maritime zones legislation in line with the LOSC, dealing not only with the Nigerian territorial sea but also all other maritime zones within the national jurisdiction of Nigeria. \(^{182}\)

\(^{182}\) See e.g. the South African Maritime Zones Act No. 15 of 1994.