

NOTES AND COMMENTS

The legal solution to maritime pollution in Africa

The issue of finding solution to maritime pollution in Africa cannot be more relevant than now. The uses of water are many and diverse and its value to man is inestimable. Water is unquestionably a significant means of transportation and communication. There are also the rich resources of the sea like sea foods, minerals and hydrocarbon. The latter is exploited from the continental shelf below the sea water and has in recent times been the pivot of the economy of some African states. Water is also used to produce heat and light.¹ Hence the entire maritime or aquatic environment need to be saved from pollution. Africa is actively striving to promote virile maritime life.

Maritime pollution or "pollution of the marine environment" means

"the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of the sea water and reduction of amenities".²

Pollution is therefore a damage to the marine environment.³

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1. For example the tides are used to generate electricity.
 2. See, Article 1 (4) of the United Nations Convention on the Law of the Sea (UNCLOS) 1982.
 3. For other possible meanings of pollution, see Allen L. Springer, "Towards a meaningful Concept of Pollution in International Law", 26 I.C.L.Q., (1977) 531.

Sources of pollution

The main sources of maritime pollution are shipping, dumping, sea bed activities and land-based and atmospheric activities. Ships often use oil-burning diesel engines and they normally discharge some oil along with their bilgewater into the sea. Besides, the fumes that the ships discharge through their funnels into the air eventually return to sea. Ships also often empty their garbage and discharge their sewage into the sea. All these pollute the sea. Marine pollution by shipping also occurs where some oil from the ship enters the sea due to collision or other accidents as was the case in the *Torrey Canyon* spill of 1967, the *Santa Barbara* incident in California, USA in January 1969, the *Argo Merchant* spill of Nantucket Island in 1976 and the *Amoco Cadiz* spill of 1978. These cases opened the eyes of the entire world to the danger of oil pollution due to shipping accident.

In the *Torrey Canyon* incident, the *Torrey Canyon*, a Liberian super-tanker carrying over 1,19,000 tons of crude oil,⁴ became stranded on the Seven Stones on the high seas off the coast of Cornwall on its way to Milford Haven. Oil escaped in large quantities causing great pollution along the coasts of France and the United Kingdom. To prevent further escape of oil and to preserve the coastal waters from oil pollution, the United Kingdom bombed the tanker from the air. Also, in the *Argo Merchant* spill, the Liberian supertanker *Argo Merchant* was on a voyage from Puerto La Cruz, Venezuela to Salem, Massachusetts. On December 15th, 1976 she stranded about 25 miles southwest of Nantucket Island. She was carrying a cargo of 27,560 tons of fuel oil. After remaining in her stranded position for several days, the vessel broke into two and sank. The entire cargo spilled into the ocean and became a total loss. At the time of the grounding and during the period which followed, catastrophic environmental damage to adjacent shore areas was avoided by the fortuity of winds and currents carrying the oil to the open sea.⁵ The most traumatic of all the spillages was the *Amoco Cadiz* spill of 1978. On March 16, 1978, the Liberian supertanker *Amoco Cadiz* lost control of her rudder⁶ and

4. This was the conclusion of the 1967 Report of the Liberian Board of Investigation, 6 I.L.M. (1967) 480.

5. See Jacobson & Yellen, "Oil Pollution: The 1984 London Protocol and the Amoco Cadiz", 15 *Journal of Maritime Law and Commerce* (1984) 467.

6. The ship ran onto sharp reefs in high seas on Thursday night, March 16, 1978. After heavy pounding, the ship broke up the next day and 3 of the 15 holds split open. See, Ebere Osieke, "Flags of Convenience Vessels: Recent Developments", 73 A.J.I.L. (1979) 604.

subsequently grounded off the Brittany coast. The result was the most serious oil tanker spill in the history of marine transportation and the most costly maritime accident to date. Both the vessel and her 24 million cargo of Arabian crude oil were totally lost. In the days that followed, over 65 million gallons of crude oil created a slick approximately 18 miles wide and 80 miles long, polluting 130 miles of French Coastline.

Another source of maritime pollution is dumping.⁷ The main distinction between dumping and spillage is that while the latter is accidental, the former is a deliberate disposal. Besides, while what is spilled are or may be valuable, what is dumped are 'wastes'. Dumping at sea has become an increasingly popular way of disposing of waste resulting from land-based activities like industrial wastes, and at times such wastes are dumped on a state territory through the sea. This is a source of pollution of most relevance to Africa in view of the recent spate of containerised wastes dumpings in African marine belt. Such containerised wastes are highly toxic, and are often containerised with the hope that they will remain containerised for long periods, with dilution occurring very slowly or not at all. In fact the wastes which are containerised and dumped in the oceans include low-level radioactive wastes and highly toxic chemicals. Many of these chemicals such as the chemical weapons, mustard gas and nerve gas are wastes only in the sense that someone wants to get rid of them, and not in the sense that they are the unwanted by-products of human activities.⁸ Such containerised chemical wastes have been known to cause damage in several cases. For example, Danish fishermen operating off the Swedish coast in the Baltic have been burnt by fish contaminated with German mustard gas dumped by the Allies after World War II.⁹

Waste-dumping became a major issue in Africa in 1988 following the discovery of toxic waste from Europe and the United States, in Nigeria and Guinea. Under the European Economic Community safeguards, wastes may be exported only if an importing country has formally agreed to take it and possesses adequate disposal facilities. Faced with the increasingly strict rules and the high cost of toxic waste disposal at home, foreign companies have turned increasingly to specialised firms to ship the waste

7. See, Article 1 (5) of the 1982 Law of the Sea Convention.

8. Oscar Sachachter and Daniel Serwer, "Marine Pollution Problems and Remedies", 65 A.J.I.L. (1971) 84.

9. *London Times*, August 10, 1969.

principally to African countries. For example, environmentalists say that poly-chlorinated biphenyl a deadly chemical used in the electrical industry, costs 2,000 dollars per tonne to incinerate in West Europe, but has been dumped in Africa for under 200 dollars a tonne. Other contracts were also entered into to ship wastes to Benin Republic for 2.5 dollars a tonne and to Guinea-Bissau for 40 dollars.¹⁰ The Nigerian navy had in May 1987 reportedly revealed a similar plan by foreign ships to dump toxic waste in Nigerian coastal waters.¹¹

Apart from dumpings, another source of marine pollution is sea-bed activities. Industrial debries and some amount of oil and chemicals are often discharged from oil exploration and exploitation installations. Some land-based activities also discharge pollutants into rivers or directly into the sea.¹² To the list may also be added atmospheric or air-based pollution which is essentially a form of landbased pollution but is increasingly being treated as a separate source.¹³

Causes and problems

The problem of maritime pollution has increased in recent times due to technological development, increased discovery of oil wells with the corresponding increase in carriage of oil by ship through the sea, and also with the rise in industrial development which has necessitated the disposal of industrial wastes. There is also the problem of frequent accidents by unseaworthy flag of convenience oil tankers. However, the greatest problem in the question of maritime pollution, especially as it concerns the high seas which surrounds Africa, is that any law made to curtail or regulate the use of high seas would amount to a negation of the fundamental principle of international law that the high sea is free.¹⁴

The principle of freedom of the high seas has both negative and positive application. Its negative meaning is that the high seas lie beyond the territories of all states of the world, and that no state has, or can have exclusive powers over them.¹⁵ The positive construction of the principle

10. See *The Guardian*, Monday, August 8, 1988, p.7; *African Concord*, Vol. 2 No. 15, 12 July, p. 22.

11. *Newswatch*, July 18, 1988, p.2

12. See the *Trail Smelter* case, 35 A.J.I.L. (1941) 684.

13. See Articles 212 and 222 of the 1982 Law of the Sea Convention.

14. Dinstein, "Oil Pollution by Ships and Freedom of the High Seas", 3 *Journal of Maritime Law & Commerce*, (1971-72) 363.

15. See Article 2 of the Geneva Convention on the High Seas, 1958 and Article 89 of The Law of the Sea Convention, 1982.

defies a clear cut definition, because it is not easy to spell out precisely the aggregate rights that the freedom encompasses.¹⁶ In other words, it would appear that every state has a right to discharge oil or other pollutants into the high seas. However, in as much as the freedom of the high seas is shared by the whole family of nations, common sense demands that it "shall be exercised by all states with reasonable regard to the interests of other states".¹⁷

The solution

Each municipal system provides within it legal regulation for control of marine pollution. In the absence of internationally agreed procedure it is suggested that states should have power to unilaterally extend their municipal anti-pollution laws to the seas. Nigeria, for example, has the Oil in Navigable Waters Act 1968, which is in fact a local enactment of the provisions of the International Convention for the Prevention of Pollution of Sea by Oil 1954 to which Nigeria had earlier adhered. More recently, Nigeria has the Harmful Waste Criminal Provisions Act, 1990 which prohibits the carrying, depositing or dumping of harmful wastes in Nigeria's inland waterway, territorial waters, contiguous zone or Exclusive Economic Zone. The prohibition should be extended to the high seas. This is so because if harmful waste is dumped at the high seas the harmful consequences will obviously spread to the Nigerian territorial waters or at least to Nigeria's Exclusive Economic Zone.

Such unilateral extension of jurisdiction into the high seas may in fact be a welcome development as it may eventually lead to multilateralism.¹⁸ This unilateral approach to finding solution to maritime pollution appears

16. However, Article 2 of the Geneva Convention on the High Seas 1958 which listed 3 freedoms or rights, and Article 87 of the 1982 Convention which has added 2 more freedoms, thus making it 6.

17. See Article 2 of the High Seas Convention 1958 and Article 87 (2) of the 1982 Convention. This is the meaning of the maxim: *sic tuo utere ut alienum non laedas* enunciated in the *Trial Smelter* case, *supra*, n.12.

18. Examples of unilateralism developing into multilateralism are prolific. An instance is the 1945 Truman Proclamation on the Continental Shelf which was later adopted by the 1958 Geneva Convention on the Continental Shelf, and the unilateral determination of baselines by Norway which was eventually accepted as legitimate in the *Anglo-Norwegian Fisheries Case*, 1951 I.C.J. Reports 116. Also, the 200-miles claim originally made only by Chile, Peru and Ecuador has now been accepted by the seaward delimitation of the novel EEZ concept under the 1982 Law of the Sea Convention.

the most opposite¹⁹ to the African situation due to the reluctance of the developed countries to ratify multilateral treaties in this regard. Marine pollution is unarguably a direct consequence of industrial production and consumption. Therefore, obligations to protect and preserve the marine environment can be effective only if they bind the important industrialised nations of the world. But unfortunately, many of these countries like the United States, England, Germany, Belgium, Italy and Luxembourg which between them are responsible for over 50% of the world's gross domestic product, and are accountable for about the same proportion of pollution, have not yet signed the 1982 Law of the Sea Convention²⁰ which has specific provisions on marine pollution.²¹ As a further measure, companies should be forced to record what they do with waste and should be encouraged by legislation to treat such waste properly. Such legislation may yield surprisingly fruitful results. An example may be had in the *Trail Smelter* case.²² In this case the sulphurous fumes from the Trail Smelter in South-Central British Columbia were carried by the atmosphere into the agricultural area of Eastern Washington State, destroying the crops there. It was clearly an instance of the industry of one state interfering with the industry of another. The arbitral tribunal ordered Canada to pay compensation to the United States for damages caused by the fumes by the privately owned Canadian Smelting Company. The result of this case was that the Trail Smelter had to find means of stemming the emissions of sulphur oxide into the atmosphere in order to stop the destruction of Washington State farmers' crops. As it turned out, the sulphurdioxide was recovered from the stacks and converted into ammonium sulphate, which was later sold to the Eastern Washington farmers as fertilizer.²³

This illustrates the point that state legislation may force a company to convert wastes that had formerly been discharged into marine environment into a useful by-product.

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19. The main objection to the unilateral approach would be that it is likely to lead to conflicts with other users of the sea. But this objection cannot be a serious one when compared to the dangers of marine pollution.
 20. L.D. Guruswamy, "Environmental Protection & the UN Convention on the Law of the Sea", 4 *Lloyd's Maritime and Commercial Law Quarterly* (1983) 705.
 21. See Part 12 of the Law of the Sea Convention 1982.
 22. *Supra*, n. 12.
 23. Waldichuk, "Control of Marine Pollution: An Essay Review" 4 *Ocean Dev. Int. Law* (1977), 269 at p.285 Lawrence Juda, "IMCO & The Regulation of Ocean Pollution From Ships", 26 *I.C.L.Q.* (1977) 558.

African states should also refuse to allow dumping of wastes on their coast from industrialised nations. This coupled with global and regional regulatory systems²⁴ would reduce the problem of maritime pollution in Africa.

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24. See Okidi, "Toward Regional Arrangements for Regulation of Marine Pollution", 4 *Ocean Dev. & Inter. Law* (1977), 1.

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