

BOFAXE

When A Princess Causes a Nightmare (Part 1)

A Legal Assessment of the Environmental Disaster off the Coast of the Philippines

On February 28, 2023, the tanker Princess Empress sank off the coast of Oriental Mindoro, Philippines as a result of engine damage. Since then, the loaded 800,000 liters of industrial fuel oil have been leaking into the sea, causing the destruction of the habitat of all marine life around, health problems and the loss of livelihoods for more than 140,000 people. Despite attempts to close the leak, people began to remove the oil with their bare hands. But can bare hands really remain the only way to cope with this disaster?

This blogpost seeks to identify who is responsible to remove the leaked oil based on international regulations concerning the control of marine pollution from vessels.

Leges Speciales, Standards, and Recommended Practices

According to Article 197 United Nations Convention on the Law of the Sea (UNCLOS), states shall cooperate in creating international rules, standards and recommended practices and procedures consistent with the Convention for the prevention and preservation of the marine environment. The international community did so by e.g. formulating the *International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL)*, the *1966 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, 1972 (London Protocol)*, and the *International Convention on Oil Pollution Preparedness, Response and Co-Operation, 1990 (OPRC)*.

First, the MARPOL, which has been ratified by the Philippines, applies according to its Article 3 (1) to ships entitled to fly the flag of the state or operate under its authority aiming to prevent the pollution of the marine environment by the discharge of harmful substances in contravention of the Convention (Article 1 (1) MARPOL). According to Philippine's national legislation (Article 16.1. of the Domestic Shipping Development Act of 2004), a ship is entitled to fly the flag of the Philippines or operate under its authority if a *Certificate of Public Convenience* is provided. This national regulation is also manifested in Article 5 (1) in conjunction with Annex I Regulations 5 to 8 of the MARPOL. Unfortunately, as an investigation by the Philippine Senate Committee on Environment, Natural Resources, and Climate Change has found, the tanker Princess Empress was flying under the Philippines flag but lacked an updated operating permit. As a result, the tanker Princess Empress was not allowed to operate at all, making the MARPOL not applicable. Regardless of this, the Convention rather focuses on the prevention of pollution and does not contain specific provisions on the distribution of responsibility for the maritime clean-up.

Second, the London Protocols' objectives are the protection and preservation of the marine environment from all sources of pollution (Article 2). Therefore, states have to "take effective measures [...] to prevent, reduce and *where practicable* eliminate pollution caused by dumping or incineration at sea of wastes or other matter." Accordingly, Article 2 contains a phrase on the purification of the sea. But, as the wording of Article 2 also shows, the London Protocol only regulates "pollution caused by dumping [...] while dumping [has been defined as] any deliberate disposal into the sea of wastes or other matter" (Article 1.4.1.1). However, the tanker sank during heavy seas due to engine damage, which in the end caused the oil leaking into the sea. Incidental leaking does hence not construe as a deliberate disposal (Article 1.4.2.1). Another assumption would contradict the clear wording of the Protocol, although an obligation "to eliminate pollution" is enshrined here.

Third, the OPRC notes that the parties shall "take all appropriate measures [...] to prepare for and respond to an oil pollution incident" (Article 1 (1)). Although the Convention regulates in detail how to proceed in the event of an oil spill (see for example Articles 5 and 6 on actions after receiving an oil pollution report or national and regional systems for preparedness and response), it does not trigger a responsibility for a respective cleanup.

As a result, the regulations created by the international community on the basis of Article 197 UNCLOS do not contain any indications on the responsibility for cleaning up the leaked oil from Princess Empress.

Regulation Concerning the Pollution from Vessels in the UNCLOS

According to Article 211 (2) of the UNCLOS, states shall adopt laws and regulations for the prevention, reduction, and control of pollution of the marine environment from vessels flying their flag or of their registry. Especially the coastal states, such as the Philippines, may in respect of their exclusive economic zones adopt such laws and regulations (Article 211 (5) UNCLOS). The Philippines have done so through its Marine Pollution Decree of 1976 and concerning the registration and control of vessels through its Domestic Shipping Development Act of 2004.

But even if compliance with these adopted regulations is part of the obligation under Article 211 UNCLOS, the aforementioned national regulations only pave the way to the domestic court system – especially regarding the civil liability of the shipowner RDC Marines Services. So far, the RDC Marines Services already committed a multi-phased approach to restore water quality and offer reparations to affected individuals under a \$1 billion indemnity insurance.

The special regulation on the pollution from vessels in the UNCLOS does thus not help either in determining the responsibility to clean-up the disaster off the coast of the Philippines.

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General Regulations Concerning the Protection and Prevention of the Marine Environment in the UNCLOS

Lastly, general regulations of the UNCLOS regarding the protection and prevention of the marine environment could contain a responsibility-provision.

Article 192 UNCLOS positions that states have the obligation to protect and preserve the marine environment. To achieve this goal, the states are obliged to prevent, reduce, and control pollution of the marine environment from any source (Article 194 (1) UNCLOS). The states shall take all measures to ensure that “pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights”(Articles 194 (2) UNCLOS, see also Article 195 UNCLOS). Under this regulation, the Philippines are required and responsible to make sure that the leaked oil remains within their territorial sea (Article 2 (1) UNCLOS). However, the provision does not say anything about a cleanup-responsibility for the own territorial sea, especially when no other territory is endangered (see e.g. Trail Smelter Case (USA v Canada), 1941, UN Reports of International Arbitral Awards, Volume III, p. 1964).

But Part XII Section 2 UNCLOS “Global and Regional Cooperation” enshrines in Article 199 UNCLOS contingency plans against pollution: “In cases [where the marine environment is in imminent danger of being damaged or has been damaged by pollution (Article 198 UNCLOS)], States in the areas affected [...] shall cooperate in eliminating the effects of pollution and preventing or minimizing the damage.” When interpreting the wording (under Article 31 (1) Vienna Convention on the Law of Treaties), the state in which territorial sea an environmental-damaging incident occurs has the responsibility to act against the consequences. In the case of a leaking oil tanker, the respective state has to remove the oil, to the extent possible. The tanker Princess Empress sank off the coast of Oriental Mindoro. The marine area around Oriental Mindoro belongs to the territorial sea of the Philippines (see for a map). The Philippines, in particular, fall under the “states in the affected area” named in Article 199 UNCLOS.

Subsequently, the Philippines are responsible to solve the disaster by removing the leaked oil – but shall cooperate with the states around the affected area.

Concluding Remarks Regarding the Obligation to Clean Up

As this analysis has shown, a direct and specific obligation for a state to clean its own territorial sea after for example an oil spill is not contained in regulations actually intended for such accidents or rather to prevent them, and in which one would presume such a regulation to exist. But there is no gap in international law. Responsibility can be derived from the general provision Article 199 UNCLOS.

Nonetheless, as the Princess Empress accident has shown – in order to minimize the spread of damage and to ensure a fast and effective action by the responsible state – an even clearer rule for an allocation of responsibility is desirable. Although a responsibility can be derived from the general provision in Article 199 UNCLOS, there is a need for a more precise regulation (especially due to the importance of the elimination of such an environmental disaster). The insertion of such a provision would, on the one hand, be appropriate in the UNCLOS itself (under Section 5 of Part XII) or could, on the other hand, also be inserted thematically in the MARPOL or OPRC Conventions.

But in the end bare hands are, as of today, not the only way to terminate this nightmare.