

OIL BUNKERING WITHIN THE NIGERIAN MARITIME SECTOR: THE URGENT NEED FOR REFORM OF GOVERNMENT POLICIES AND LAWS.¹

Introduction:

“Government seizes 14 ships for bunkering...”

(The Guardian of 30/1/04 front page).

“Shell Loses 9m Barrels to Bunkerers”

(The This Day of 26/2/04 at page 8).

“Police arrest 37 foreigners, 270 others for oil bunkering”

(The Guardian of 27/2/04, front page).

“Police parade 90 over oil bunkering”

. 37 foreigners, 53 Nigerians on the list

(The This Day of 27/2/04, page 6).

“25 Expatriates, 5 Others Arraigned for Illegal Bunkering”

(The This Day of 3/3/04 at page 4).

“Thirteen Oil bunkering suspects know fate today”

(The Guardian of 3/3/04, page 3).

So newsworthy in Nigeria of recent has been oil bunkering or illegal oil bunkering, the arrest, detention and arraignment of those suspected to have committed an offence relating to it and detention of their ships, that some Nigerian newspapers had had the above-stated headlines on news concerning oil bunkering. Government’s attention and policies or laws on oil bunkering and its enforcement institutional and administrative frameworks, are because bunkering oil is a product of crude oil, the mainstay of the Nigerian economy a part of which is being stolen by crime syndicates and because its transportation in the maritime sector has economic, security, strategic and other implications. Crude oil being the earner of about 95% of its revenue, the Federal Government protects jealously from illegal activities, crude oil and petroleum products, so as to generate enough revenue for national development and enhance its foreign reserves.

What is “oil bunkering”?

For a correct answer to the above question and a better understanding of oil bunkering, one should first understand what ‘bunkers’ or ‘bunker fuel’, is. Bunkers “is fuel consumed by the engines of a ship, (or the) compartments or tanks in a ship for fuel storage” or “fuel used to power a ship” or “ a ship’s fuel.” Therefore, “bunkering” or “oil

¹ Being a paper presented by Mr. Michael Igbokwe at the Annual Conference of the Nigerian Maritime Law Association held in Victoria Island, Lagos on 5th and 6th May, 2004.

bunkering” is “to replenish or replenishing the ship with fuel...”² Bunker fuel includes Automotive Gas Oil [AGO] and Low Pour Fuel Oil [LPFO], which are products of the refining of crude oil or some of the “petroleum products” available in Nigeria. Without bunkers, ships’ engines cannot run and they would have to be shut down or the ships be towed by tugs to give them motive power (which would be more expensive) and the maritime shipment of cargo and passengers by vessels, shipping business which is capital intensive, and the economy would all be adversely affected. Non-supply of bunkers to, or non-bunkering of, ships could be likened to the non-supply of petroleum or fuel to motor vehicles and its attendant disruptions of transportation of passengers and goods and various aspects of the economy. The supply of 550 mt of marine fuel oil and 100 mt of marine diesel oil or bunkers to the MV Sea Winner that had not been paid for was held to be material supplied to a ship for her operation or maintenance and therefore an action in rem.³ The arrest of bunkers requested for by time charterers on the basis that they had a lien over it, was held meant to “effectively arrest the ship”.⁴ So, oil bunkering is a necessity for maritime shipping within the Nigerian maritime sector, but it becomes “illegal oil bunkering” if inter alia, it is carried out without requisite statutory licences or valid documents, or in violation of the Nigerian maritime laws and the guidelines made by the statutory institutions regulating it, and vice versa. As would be seen in greater detail below, the Department of Petroleum Resources grants licences for oil bunkering, while the Nigerian Navy assists the Department of Petroleum Resources, Nigeria Police Force and other security agents in enforcing the laws relating to oil bunkering and the Nigeria Police Force investigates the offences, whilst the Attorney General of the Federation prosecutes suspected offenders in the law courts.

In his paper entitled “Towards Stemming Illegal Oil Bunkering”,⁵ Mr. Max Amuchie quoting from the article titled “The Political Economy of Oil Bunkering in Nigeria” written by Dr. Kombo Mason Braide, stated inter alia that “It has been estimated that lethally armed criminal networks, operating with the tacit support of local and foreign business mafias resident in Nigeria, Niger, Chad, Burkina Faso, Sao Tome, Malabo, Benin Republic, Ghana, Cote d’Ivoire, Liberia, Sierra Leone, Angola, and elsewhere, ably chaperoned, aided, and abetted by powerful (serving and retired) military and political so called “Godfathers”, illegally siphon off US\$1billion per annum worth of petroleum (crude oil and refined petroleum products). In short, between 100,000 and 130,000 barrels a day (bbl/d) of crude oil, with an international market value of about US\$3billion, is being stolen from Nigeria daily, with impunity. This is the equivalent of a very large 95,000 metric ton crude oil tanker being hijacked every week... The process of illegal oil bunkering entails loading crude oil (or/and petroleum products) into barges in the labyrinthine creeks of the Niger Delta, directly from oil field production wellheads, or from NNPC jetties at Okrika, Calabar, Effurum, Escravos, Atlas Cove (Lagos), or from a myriad of private jetties dotted along the coastline of Nigeria, or deliberately puncturing crude oil or petroleum products pipelines. From the coastal States of Nigeria specifically in the swamps of the Niger Delta in Delta, Rivers, Cross Rivers, Akwa Ibom, Ondo, and Bayelsa States, large inventories of stolen crude oil or petroleum products are typically transhipped into larger ocean-faring marine vessels, waiting patiently on stand-by, either

² See Eric Sullivan’s Marine Encyclopaedic Dictionary 6th Edition at page 69; Dictionary of International Trade 4th Edition by Edward G. Hinkelman at page 31.

³ See, Tawa Petroleum Products v. Owners of MV Se Winner Vol. 2NSC 25.

⁴ See, Franco Daval Limited v. The Owners of MV Vitalli II Vol 3 NSC 630.

⁵ Published at page 19 of “This Day” Newspapers of 3/3/04.

midstream or off-shore, for their booty...” He then concluded that since the return to civilian rule in 1999, the Federal Government had been waging relentless wars on those Nigerians and foreigners involved in such illegal activities. Although, the theft of crude oil is popularly referred to as ‘illegal oil bunkering’ or oil bunkering, it is submitted that they are not the same thing because crude oil is not consumed by a ship’s engine. With the recent killing of seven oil workers of Chevron/Texaco including Americans, at Olero Creeks, Niger Delta that is alleged to be connected with illegal oil bunkering, a new dimension of violence and armed robbery has been introduced into oil bunkering.

Government Policy and Laws on Oil Bunkering: Licensing.

There are enactments and other regulations (made pursuant to some of the enactments) which, based on Government policy to regulate and control oil bunkering, make special provisions for the marketing and the carriage by sea of petroleum products and crude oil because the exploration, production and exportation of crude oil are the mainstay of the economy and because the distribution of petroleum products (a substantial part of which is usually done by coastal shipping in the Southern part of Nigeria), is a commodity that is essential to the economic survival and development of the nation. Consequently, the Federal Government treats illegal oil bunkering as an economic crime which must be stamped out.

In this regard, Sections 4(1), 4(3) and 4(6) of the Petroleum Act⁶ state that:

4(1) Subject to this section, no person shall import, *store, sell or distribute any petroleum products in Nigeria without a licence granted by the Minister.*

(2).....

(3) Licences granted by the Minister under this section shall be subject to the prescribed terms and conditions of where no form is prescribed or no terms or conditions are prescribed, in such form and on such terms and conditions as may be decided or imposed by the Minister.

(4).....

(5).....

(6) Any person who does, without the appropriate licence, any act for which a licence is required under this section shall be guilty of an offence and shall be liable on conviction to imprisonment for two years or a fine of two thousand naira or both, and, in addition, the petroleum products in respect of which the offence was committed shall be forfeited.

In the circumstance, the Petroleum Act prohibits the storage, sale (to ships being bunkered) or shipment of bunkering oil (AGO/LPFO) in Nigeria (including through its waters) without a licence granted by the Minister of Petroleum Resources. The licence to *distribute* petroleum products including AGO and LPFO, is granted based on certain terms pursuant to an application for it and payment of the necessary fees. Section 9(1)(e)[ii] and [iv] of the Petroleum Act also empowers the Minister to regulate the importation, handling, *storage and distribution* of petroleum and petroleum products and other flammable oils and liquids, inter alia by prescribing the notice to be given on the arrival at a port of *a ship carrying petroleum or petroleum products as cargo and to also regulate the loading, unloading, transport within a port, landing, transshipment and*

⁶ Cap. 350 LFN

shipment of petroleum and petroleum products and to provide for the licensing of lighters and other craft to carry petroleum and petroleum products⁷ within a port.

Furthermore, section 10 of the Nigerian National Petroleum Corporation (NNPC) Act⁸ provides as follows that:-

10(1) There shall be established a department to be known as the Petroleum Inspectorate (now known as Department of Petroleum Resources)⁹ which shall, subject to the other provisions of this Part, be an integral part of the Corporation.

(2) The Minister may delegate to the Alternate Chairman (where one is appointed) or the chief executive of the Inspectorate such of the powers conferred upon him under the Oil Pipelines Act, Petroleum Act or any other enactment as he may deem necessary and in particular, but without prejudice to the generality of the foregoing, responsibility for the following matters, that is—

- (a) *issuing permits and licences for all activities connected with petroleum exploration and exploitation and the refining, storage, marketing, transportation and distribution thereof.*
- (b) *acting as the agency for the enforcement of the provisions of the said Acts and any relevant regulations made thereunder by the said Minister;*
- (c)

and notwithstanding the foregoing, any regulatory function conferred on the Minister pursuant to the said Acts or any other enactment shall, as from the appointed day, be deemed to have been conferred upon and may be discharged by the chief executive of the Inspectorate.

(3) In the exercise of the powers conferred upon the chief executive of the Inspectorate under this Act, he shall not be subject to the direction or control of any other person or authority in the Corporation except the Minister.

(4).....

The *storage, marketing, transportation and distribution* of petroleum products are wide enough to include the storage, marketing/sale, maritime transportation and distribution of AGO and LPFO used for bunkering ships but even though the Minister of Petroleum Resources can delegate to the Department of Petroleum Resources, his statutory powers to issue the permits and licences connected with oil bunkering business in the Nigerian maritime sector, currently in the absence of such delegation, the President and Commander-in-Chief of the Armed Forces as the Minister of Petroleum Resources¹⁰, issues such oil bunkering licences and permits after the Department of Petroleum Resources has received the application for oil bunkering licence and the application fees.

It has been argued that without an amendment of the Petroleum Act (an existing law) by the National Assembly or its modification (if possible) by the appropriate authority to

⁷ It is interesting to note that sections 22(5)(k), 22(5)[c] and 22(5)(m) of the Coastal and Inland Shipping (Sabotage) Act, 2003 make eligible for registration under the said Act, a tanker, bunkering vessel, barge, floating petroleum storage, and any other craft or vessel used for carriage on, through, or under water of persons, property or any substance whatever, respectively.

⁸ Cap. 320 LFN.

⁹ Investigations revealed that the Petroleum Inspectorate became the Department of Petroleum Resources during the President Ibrahim Babangida's regime, and has so remained till today although no law was made to reflect the change of name from Petroleum Inspectorate to Department of Petroleum Resources.

¹⁰ By the Petroleum (Drilling and Production) (Amendment) Regulations 2001 which is Statutory Instrument No 3 of 2001 commencing from 1/2/01, the President and Commander-in-Chief of the Armed Forces is also the Minister of Petroleum Resources and currently exercises the powers of the Minister of Petroleum Resources under the Petroleum Act, without an amendment having been made to the Petroleum Act or its modification by the appropriate authority to reflect the new development.

show that the President and Commander-in-Chief of the Armed Forces is now the Minister of Petroleum Resources, the exercise of the powers of the Minister of Petroleum Resources by the President is illegal and unconstitutional. Furthermore, some operators have alleged that as result of pressing State matters and other reasons, the President has not been quickly issuing the oil bunkering licences and permits sent to him through the Department of Petroleum Resources. The fear now is that this may adversely affect Nigerians' participation in cabotage trade under the Coastal and Inland (Cabotage) Shipping Act, 2003 since bunkering vessels, barges, off-shore service vessels, floating petroleum storage, tankers and any other craft or vessel used for carriage on, through or underwater of persons, property or any substance whatsoever are eligible for registration under the Act,¹¹ and their building up of the necessary "local content" and capacity in oil bunkering business in the maritime sector. It is also believed that the situation will also encourage capital flight due to purchase of bunkers in hard currency, "illegal oil bunkering" or black marketeering by the applicants for bunkering licence who do not want to wait too long after paying the oil bunkering application/licensing fees of US\$10,000.00 to the Department of Petroleum Resources or think their licences were being delayed because of their lack of political patronage, and because operating ships cannot do without bunkers. Moreover, the situation also hampers the maritime sector in contributing its quota to this Administration's National Economic Empowerment and Development Scheme (NEEDS) document.¹²

Consequently, shipping companies intending to engage in or to use their vessels in, the transportation of crude oil and petroleum products on Nigerian coasts and inland waterways, must apply for and obtain the necessary bunkering licences from the Department of Petroleum Resources after meeting the conditions laid down in the Guidelines for Bunkering Operations and Guidelines for Importation of Petroleum Products into Nigeria, whichever is applicable. It is the Minister of Petroleum Resources (now in the person of the President and Commander-in-Chief of the Armed Forces) who approves the issuance of Fuel Bunkering Licence to the successful applicant, whilst Petroleum Products Marketing Company Limited (PPMC), will ensure that only vessels licensed by the Department of Petroleum Resources are loaded at the approved jetties or ports. Coastal vessels other than bunkering vessels are also inspected and licensed by the Department of Petroleum Resources in accordance with the Petroleum Regulations. Under clauses 6 and 7 of the Crude Oil (Transportation and Shipment) Regulations,¹³ no ship or tanker in which crude oil is carried is allowed to depart from Nigeria without full prescribed documentation and specific authorization by the Nigerian Customs Service and other Government agency having authority in that regard and no loading, unloading or trans-shipment of crude oil shall be carried out within Nigeria at any location other than those approved by the Minister of Petroleum Resources for that purpose.

The failure to obtain the requisite permits or licences or the possession of invalid or expired permits or licences, is "illegal oil bunkering" which could lead to the violator

¹¹ See section 22(5) of the Coastal and Inland Shipping (Sabotage) Act, 2003.

¹² The Honourable Minister of Transport had in his press conference on the Coastal and Inland (Cabotage) Shipping Act, 2003 held on 18/4/04 stated that the Act is the maritime sector's expression of the overall goals of this administration as encapsulated in the National Economic Empowerment and Development Scheme (NEEDS) document and that it offers the maritime industry the opportunity to contribute significantly towards employment generation, wealth creation, poverty reduction and eradication. It requires the cooperation, coordination and commitment of key economic sectors and agencies, namely, the maritime sector, oil and gas industry, banking and financial institutions.

¹³ Cap. 350 LFN.

being liable for imprisonment for two years or a fine of N2000 or both and the forfeiture of the petroleum products concerned¹⁴ and the master of any such ship that violates the Petroleum Regulations (on licensing or permits) shall on conviction be liable for N100 fine or imprisonment for 6 months. The Minister of Petroleum Resources or any person authorized by him is empowered pending the trial of any violator (person or body corporate) to inter alia cause the arrest or seizure of any cargo or ship in which crude oil is carried, arrest or cause to be arrested and handed over to law enforcement agents, all persons involved in the illegal carriage of crude oil by a ship, in order to be dealt with in accordance with the law, withdraw or cancel any licence granted by him to any such person but the penalty for any non-compliance with any of the regulations is a fine of N100 or imprisonment for six months.¹⁵

Considering the aforesaid penalties for illegal oil bunkering under the Petroleum Act and Nigerian National Petroleum Corporation Act lenient, the Federal Government later on enacted other laws including the Special Tribunal (Miscellaneous Offences) Act¹⁶ and Economic and Financial Crimes Commission Act, 2002 for stiffer penalties. Section 3(17) of the Special Tribunal (Miscellaneous Offences) Act provides as follows:

- (17) Any person who *without lawful authority or appropriate licence –*
- (a) imports, exports, *sells, offers for sale, distributes or otherwise deals with or in crude oil, petroleum or petroleum product in Nigeria;*
 - (b) *does any act for which a licence is required under the Petroleum Act,*
- shall be guilty of an offence and liable on conviction to be sentenced to imprisonment for life, and in addition, any vehicle, vessel, aircraft or other conveyance used in connection therewith shall be forfeited to the Federal Government.¹⁷

Before this Act, illegal petroleum products were subject to seizure but since the enactment of the Act in 1983, a vessel used in connection with the offence of illegal oil bunkering, is liable to be forfeited to the Federal Government.

Moreover, pursuant to section 4 of the Special Tribunal (Miscellaneous Offences) Act police investigation¹⁸ into cases relating to offences under the Act, shall be concluded *not later than 28 days* after the arrest of the accused person and particulars of such investigation shall be sent to the Attorney General of the Federation *not later than 7 days after the conclusion of police investigation.*¹⁹ In reality, the Nigeria Police Force has not been concluding its investigation into cases of illegal oil bunkering within 28 days of the arrests of suspects. For instance, the Inspector General of Police told the world recently that the MT Capbreton was arrested off Forcados on 1/7/03 with 6,500 mt of fuel oil and 15 crew of different nationalities,²⁰ but they were not arraigned until 2/3/04, which is a period of about 8 months after their arrests and so this calls to question the preservation

¹⁴ See section 4(6) of the Petroleum Act. In reality, the Nigerian Navy has been arresting and detaining any vessel and its master and owners and handing them over to the Nigerian Police Force for prosecution for illegal “oil bunkering” or transportation of stolen crude oil or petroleum products or transportation of petroleum products in Nigerian waters without any or valid licence.

¹⁵ See also Regulation 106(2) of the Petroleum Regulations; cap 350 LFN for offences for violating the Regulations and also Petroleum (Amendment) Act, 1997.

¹⁶ Enacted in 1983 cap. 410 LFN

¹⁷ Under section 10(6) of cap. 410 aides, abettors, procurers and conspirators with any person to commit the offence are liable for the same penalty for the offence under the Act.

¹⁸ Under section 4 of the Police Act, cap. 359 LFN, it is the duty of the police to prevent and detect crime, apprehend offenders, preserve law and order, protect life and property and due enforcement of all laws and regulations with which they are charged. See also section 214(2)(b) of the 1999 Constitution.

¹⁹ See section 4 cap. 410.

²⁰ See This Day of 3/3/04 at page 19.

of their fundamental rights to fair hearing and personal liberty. It is further submitted that apart from being a violation of the crew's constitutional and fundamental right to personal liberty enshrined in section 35 of the 1999 Constitution, section 4 of Special Tribunal (Miscellaneous Offences) Act being inconsistent with section 35(4) of the 1999 Constitution,²¹ is void to the extent of its inconsistency.²²

Furthermore, "*oil bunkering*" is included as a part of the definition of "*economic crime*" under the Economic and Financial Crimes Commission Act, 2002, and any vessel which is used or intended to be used to transport or facilitate the transportation, sale, receipt or concealment of economic crime shall be forfeited to the Federal Government unless it appears that its owner or other person in charge of it did not consent to or know or willfully connive in the economic crime.²³ By virtue of the powers conferred on it,²⁴ the Economic and Financial Crimes Commission can prosecute any person who without lawful authority imports, exports, sells, *distributes or otherwise deals with or in crude oil, petroleum or petroleum products in Nigeria or does any act for which a licence is required under the Petroleum Act and their abettors and aides.*²⁵ Failure to obtain and possess a valid licence or permit from the appropriate agencies will be tantamount to illegal oil bunkering or crude oil transportation which are now regarded as "economic crimes" which in view of current serious stance of the Government to stamp out illegal oil bunkering and crude oil theft, "illegal oil bunkerers" are being prosecuted under the Special Tribunal (Miscellaneous Offences) Act and Economic and Financial Crimes Commission Act²⁶ by the Economic and Financial Crimes Commission. On being found guilty, a stiffer penalty is life imprisonment or/and forfeiture of the vessel to the Federal Government.

However, an amazing observation in the above definition of "economic crime" in the Economic and Financial Crimes Commission Act, 2002 in relation to oil bunkering, is that it is not "illegal oil bunkering" (which is based on oil bunkering without any or a valid licence from the appropriate Government agency), but "oil bunkering" per se that the Economic and Financial Crimes Commission Act, 2002 has defined as an economic crime. The grave implication of this definition is that a bunkering vessel or tanker or barge or floating petroleum storage which being eligible for registration for cabotage trade in oil bunkering in coastal and inland shipping as provided for in section 22(5) of the Coastal and Inland Shipping (Cabotage) Act, 2003 is registered in the Special Register for bunkering and is duly licensed by the Department of Petroleum Resources for oil bunkering, will be arrested with its crew and detained and prosecuted for an "economic crime" if it engages in "oil bunkering" trade. Penalties for violations will of course be, life imprisonment and forfeiture of the vessel to the Federal Government. The effect of this provision includes chasing away or discouraging Nigerians from participating in cabotage "licensed oil bunkering" and causing ships engaged in coastal and inland shipping to get their bunkers from outside Nigeria in hard currency thereby adversely affecting cabotage trade because vessels cannot sail or safely stay afloat without bunkers! An immediate amendment of the definition of economic crime to

²¹ Section 35(4) of the 1999 Constitution. See also the African Charter on Human and Peoples Rights [Ratification and Enforcement] Act set out the African Charter on Human and Peoples Rights as chapter 10 Laws of the Federation of Nigeria

²² See section 1 of the 1999 Constitution.

²³ See sections 40 and 24 of the Economic and Financial Crimes Commission Act, 2002.

²⁴ Section 6(2)(e) and (f) *ibid* of the Economic and Financial Commission Act, 2002.

²⁵ These are offences created under Sections 3(17) and 10(6) of the Special Tribunal (Miscellaneous Offences) Act cap. 410 LFN.

²⁶ Some foreigners and Nigerians arrested in 2003 by the Navy, have already been arraigned in the Federal High Court, Lagos for illegal oil bunkering, crude oil theft and as abettors and aides of the crimes and their vessels detained.

exclude “oil bunkering” or to put the word “illegal” before “oil bunkering” is therefore urgently required here.

The Role of the Navy/Nigeria Police Force in Enforcing Oil Bunkering Laws.

This paper will not be complete without looking at the role of the Nigerian Navy in the implementation and supporting of the coordination of the implementation of oil bunkering laws, apart from its responsibility of defending the Federal Republic of Nigeria by sea²⁷ and that of the Nigerian Police Force on investigating such offences. But it is noteworthy that a similar problem of definition exists in the statutory powers conferred on the Navy in that respect.

Section 1(4) of the Armed Forces Act, 1993 states as follows: -

“Notwithstanding the generality of the provisions of subsection (2) of this section—

- (a) the Navy shall, in particular, be further charged with
- (i) *enforcing and assisting in co-ordinating the enforcement of all customs laws, including anti-bunkering, fishery and immigration laws of Nigeria at sea,*
- (ii) *enforcing and assisting in co-ordinating the enforcement of national and international maritime laws ascribed or acceded to by Nigeria,*
- (iii)
- (iv) promoting, co-ordinating and enforcing *safety* regulations in the territorial waters and the Exclusive Economic Zone of Nigeria. (emphasis by me).

By virtue of the above section, the Nigerian Navy has the responsibility of implementing and supporting the organisation of the implementation of “anti-bunkering” (sic) laws of Nigeria at sea (not on land), but this function is fluid because its nature is not specified, but it has been taken to include using its firepower or boats or ships to ensure its men board and arrest and detain erring ships and later hand them over to the police for investigation and prosecution by the Attorney-General of the Federation and the protection of ships which are under detention until completion of police investigation and prosecution by the Attorney-General of the Federation. However, the provision wrongly gives the impression that the “anti-bunkering” laws in question (that is to say, the Special Tribunal (Miscellaneous Offences) Act, the Petroleum Act and NNPC Act and the Regulations/Guidelines made thereunder), are anti-bunkering or that bunkering per se is illegal. It is submitted that just as the framers of the Economic and Financial Crimes Commission Act wrongly included “bunkering” as an “economic crime”, the framers of the Armed Forces Act are under the misconception that “bunkering” per se is an illegal activity, whereas oil bunkering becomes illegal only if carried out without due licence/permit or lawful authority. This section therefore requires an urgent amendment by the National Assembly to reflect the correct position. Furthermore, under the Coastal and Inland Shipping (Cabotage) Act, 2003²⁸ an Enforcement Officer may where necessary enlist the assistance of the Nigerian Customs Service, *the Nigerian Navy, the Nigerian Police* and any other law enforcement agencies as he may deem necessary, in discharging his duties of enforcing its provisions on any vessel (including bunkering vessel, barge, floating petroleum storage, or tanker) under the Act.²⁹

²⁷ Also by section 217(2) of the 1999 Constitution, the Navy is one of the armed forces to defend Nigeria from external aggression, maintain its territorial integrity and secure its borders from violation on land, sea and air.

²⁸ Section 31(3)(d).

²⁹ An enforcement officer is charged with inter alia stopping and boarding, detaining any vessel or its officers or both, and with a warrant search the vessel and seize anything that is evidence of violation of the Cabotage Act.

More significantly, the roles being played by the Nigerian Navy in enforcing the oil bunkering laws of Nigeria is seen as a policing role, which is one of the three traditional roles of a Navy as enunciated by Ken Booth, the other two being military and diplomatic roles. This policing role extends to arresting vessels and crew and operators/owners engaged in illegal oil bunkering (and other illegal cabotage shipping activities) from Lagos to Bakassi (420 nautical miles) and down to the Exclusive Economic Zone of Nigeria (200 nautical miles from the baselines) which is 84,000 square nautical miles; a very wide area indeed to patrol! As already done by the US Navy and the Chinese Navy³⁰ in respect of their waters, the effective control of this 84,000 square nautical miles is strategic to Nigeria's survival and as a powerful maritime nation, because a nation that jokes with its seapower would be consigned to the dustbin of history. There have been allegations of attacks by pirates and those backed by foreign illegal oil bunkerers and buyers of stolen crude oil on foreign and local oil workers and the Navy in the creeks of the Niger Delta, which creeks require enough modern armed personnel and patrol boats to be policed to secure life and property and fight illegal oil bunkering. However, notwithstanding the donation by the USA Government, of four out of the promised six naval vessels to the Nigerian Navy to fight illegal oil bunkering and its other activities, based on a Memorandum of Understanding on Defence signed by the two countries,³¹ unless as provided in the 1999 Constitution the Navy is adequately and effectively equipped and maintained³² through the provision of modern sophisticated bottoms and well-trained personnel as a part of capacity building to perform those roles and additional roles under the Coastal and Inland Shipping (Cabotage) Act, it would be incapacitated in performing the policing responsibility.

Enquiries have shown that as a part of the above policing roles, the Navy through its four naval bases³³, gives written clearance (without a fee) upon a written application made to it by a vessel's owner/operator, for permission to carry out oil bunkering within the area it polices. It is believed that the issuance of the clearance enables the Navy to be aware of, monitor and control the activities of such vessel, since any vessel may be pretending to carry out a legitimate trade within Nigerian waters but in actual fact it is carrying out an espionage against the interest of the nation. However, it has been argued that since the procurement of naval clearance is not specifically provided for under any of the applicable laws, it is illegal, notwithstanding its beneficial purpose.

Though not with warrants of arrests or search, purporting to be empowered by its enabling statute and the Constitution, the Navy arrests erring vessels³⁴ reasonably suspected of having committed oil bunkering offences, and causes them to be detained within any of the naval bases until investigations are concluded by it or the police; or/and the crew and owners/operators are handed over to the police and prosecuted. However, if the Navy and the police have not been following the provisions of sections 35(4) and

³⁰ These countries have long realised the strategic importance of their control of the seas and their maritime affairs and have deliberately formulated policies to achieve those targets.

³¹ See the report titled "US donates ship to Nigerian Navy" in The Guardian of 27/2/04.

³² See Section 217(2).

³³ The naval bases are at Apapa, Warri, Port-Harcourt and Calabar and are have naval controller of shipping.

³⁴ The Minister of Petroleum Resources or any person authorized by him is empowered pending the trial of any violator (person or body corporate) to inter alia cause the arrest or seizure of any cargo or ship in which crude is carried, arrest or cause to be arrested and handed over to law enforcement agents, all persons involved in the illegal carriage of crude by a ship, in order to be dealt with in accordance with the law, withdraw or cancel any licence granted by him to any such person but the penalty for any non-compliance with any of the regulations is a fine of N100 or imprisonment of six months.

35(5), 36(5) and 44(1)(k) of the 1999 Constitution in the arrests and detention of the crew/operators/owners and the oil bunkering vessels in enforcing and assisting in co-ordinating the enforcement of the oil bunkering laws at sea and investigation of the offences respectively, then the performance of their statutory roles would be illegal and unconstitutional. Moreover, lawyers to suspects must have access to them and any sick suspect must have access to good medical treatment.

It is therefore mandatory that the law enforcement agents must bear in mind, the following among other constitutional provisions, in performing their statutory roles with respect to oil bunkering, namely:-

Sections 35(1)[c] and 35(4) of the 1999 Constitution providing as follows:-

“Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law.....

[c] for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence.

(2).....

(3).....

(4) Any person who is arrested or detained in accordance with subsection (1)[c] of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of –

(a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

(b) three months from the date of his arrest or detention in the case of a person who has been released on bail,

he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

(5) In subsection (4) of this section, the expression “a reasonable time” means-

(a) in the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometres, a period of one day; and

(b) in any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable.

(6) Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person.

Section 36(5) of the 1999 Constitution states:

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:

Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts.

By Section 44(1) of the said Constitution, “No moveable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or

interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the purposes prescribed by a law, among other things—

- (a).....
- (b).....

(2) Nothing in subsection (1) of this section shall be construed as affecting any general law-

(k) relating to the temporary taking of possession of property for the purpose of any examination, *investigation or enquiry*;

“Moveable property” will include a ship or bunkering vessel and bunkers.

It is submitted that even where without the consent of the owners/operators or a court order, the Nigeria Police Force or Navy takes possession of any moveable property such as a bunkering vessel reasonably suspected to have been connected with the violation of the laws on oil bunkering, for the purpose of any examination or investigation or enquiry, the possession must be temporary in order to be constitutional. The word *temporary* is a reference to a short or limited time, which cannot be the same as many months. It is submitted that because time is money in shipping, a short time detention of such a vessel or its cargo, should not be more than 7 days, failing which the vessel or cargo should be released on procured bank guarantee or bail bond secured in such a way as to guarantee that the owners/operators will be present to face any prosecution that may arise.

The general perception of some operators in oil bunkering is that the Navy and the marine police unnecessarily harass them and disturb their shipping operations without reasonable excuse and sometimes detains their crew and ships arbitrarily. Mention was made of the case where a vessel whose owners are duly licensed to carry on bunkering business was detained by the Navy for up to 8 months and only released when the Navy was taken to court for unlawful detention and of another case where a vessel on charter whose owners are duly licensed to carry on oil bunkering business was detained by the Navy for about five months without being informed of the reasons for the detention despite repeated demands by the owners for its release, thereby causing it to incur losses running into millions of Naira. In fact, the Navy has been blamed for taking sides “as interested party” in, contractual matters relating to shipping and to be fond of detaining vessels based on “order from above”, thereby discouraging ship owners.³⁵

Although illegal oil bunkering should be treated and punished as a serious economic crime, the duty of the law enforcement agents to protect the Nigerian economy should be balanced with the preservation of the fundamental and constitutional rights of the owners/operators and crew of any vessel and their shipping operations and with minimal or no disruptions of shipping operations (because of the capital intensive and strategic natures of shipping), in line with internationally accepted principles and standards upon such conditions as are reasonably necessary to ensure that they appear for a fair trial at a later date. In this regard, where the detained ship is a foreign ship, the Government agency that detains the ship should immediately inform the Minister of Transport about the detention, who shall inform the consul or diplomatic representative of the country whose flag the vessel is flying or the maritime authorities in that country. **Nigeria cannot be seriously trying to rebuild its national fleet and increase its ship ownership.**

³⁵ See “Operators Decry Govt’s Role in Maritime Activities” reported in the Guardian newspapers of 2/5/04 at page 48.

manning and building capacities and yet through the wrongful enforcement of its laws on oil bunkering, be discouraging investors in and operators of, shipping.

From the foregoing, there is an urgent need for the following among other reforms of Government policies and laws on oil bunkering in the Nigerian maritime sector.

Proposed Reforms of Government Policies and Laws on oil bunkering:

1. Oil Bunkering per se not being wrong or illegal but illegal if carried on without licence or due authority, or carried on as a guise for espionage or other security breach, laws such as the Armed Forces Act and the Economic and Financial Crimes Commission Act still treating bunkering per se as illegal contrary to the Petroleum Act and the Nigerian National Petroleum Corporation Act, must immediately be amended by the National Assembly through the efforts of the Federal Ministry of Transport and the Special Adviser to the President on Petroleum Resources, so as not to adversely affect Nigerians' participation in cabotage trade and the economy.
2. Being a littoral State, Nigeria should begin to see the sea and its control of the activities there especially through its agents including the Nigerian Navy, Nigeria Customs Service, the Marine Police as strategic to its economy, for effective policing of its 84,000 square nautical miles waters, and its becoming a super power in Africa or at least in the West and South West African sub- Region and as such sufficiently fund them for the qualitative training of their personnel and for their qualitative and modern equipment and procurement of modern operational vessels.
3. The President and Commander-in-Chief of the Armed Forces, should immediately decentralize and remove from himself, the licensing of oil bunkering vessels and delegate the duty to the Director of the Department of Petroleum Resources, (as was the case in the past and who also licenses oil blocks), for quicker processing and granting of the licences to genuine ship operators/oil bunkerers so as to discourage capital flight and encourage Nigerians' participation in cabotage trade in oil bunkering.
4. The law enforcement agents must respect the fundamental human rights (to liberty, fair hearing, ownership of property) of those suspected of having committed oil bunkering offences and grant them access to lawyers of their choice, and with little or no disruptions of their shipping operations, in carrying out their statutory functions of enforcement and investigating and prosecuting oil bunkering/economic crimes. More education and enlightenment of the enforcement agents on this need must be regularly undertaken.
5. The law enforcement agents must follow due process and the rule of law and obey court orders in respect of prosecution and defences of oil bunkering offences and matters: Never again shall vessels be arrested or detained because of "orders from above". Rather, where applicable, a vessel's arrest/detention should be based on orders of the courts or pursuant to the laws!

6. Shipping being capital intensive, to avoid counter-productivity in trying to develop and support acquisition and increment of national tonnage and killing shipping by running investors out of shipping business due to protracted detention of vessels during investigation of allegations of commission of illegal oil bunkering crimes, any vessel connected with oil bunkering offence should be released immediately if no proceedings for the commission of the oil bunkering crime are instituted within seven days from the day on which the vessel is arrested/detained, or if the proceedings filed within those seven days are concluded without convicting the master or owner, or if a sufficient amount or bank guarantee to cover the penalty of the offence or the value of the vessel, is paid to the detaining agency on behalf of the Federal Government, as security (but refundable if no proceedings are filed within seven days or where filed, the master or owner is not found guilty).
7. Introduction of guidelines by the Department of Petroleum Resources for the certification of oil exports based on “chemical fingerprinting” of crude oil, suggested by Shell Petroleum Development Company, to facilitate the recovery of stolen crude oil or bunkers and discourage illegal oil bunkering.
8. In as much as it serves a beneficial purpose, the procurement of naval clearance (and its guidelines) by a ship operator or master must be specifically backed by or provided for in a relevant law so as to prevent its abuse or arbitrary use and enable the operators and their lawyers to know what is expected of them.

If the above proposals are quickly implemented by those concerned, our oil bunkering business and shipping will be the better for it.

I thank you very much for listening.

Mike Igbokwe Esq.

5/5/04.

PS: As a result of the call made in this paper by the Writer, the Economic and Financial Crimes (Establishment) Act, 2004 was enacted to repeal that of 2003 and to make “illegal oil bunkering” and not “bunkering” any longer, an economic crime.