

**UNIVERSITY OF NAIROBI**

**Master of Laws Project Report**

**Kenya and Implementation of Conventions  
on Marine Pollution by oil from Ships**

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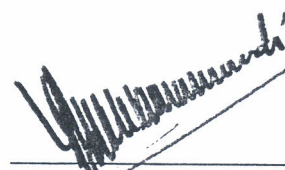
## DECLARATION

I MUGURE THANDE do hereby declare that this is my original work and has not been submitted and is not concurrently being submitted for a degree in any other university.

Signed: M. T. L. b.

**MUGURE THANDE**

This project report is submitted for examination with my approval as University Supervisor

Signed:   
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**PROF. CHARLES ODIDI OKIDI**



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## DEDICATION

To

Wahito, my mother

and

to

Wacera, my daughter

## ACKNOWLEDGEMENTS

I wish to express my sincere gratitude to:

The Almighty God for giving me the ability to undertake this project.

Prof Charles O. Okidi, my supervisor, for providing research material, scholarly care in reviewing my work and for guiding me along the way.

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## CHAPTER 1

## INTRODUCTION

States are obliged under international environmental law not to cause or permit serious or significant harm to other states or to common spaces. This principle is not simply one of responsibility for injury *ex post facto* but necessarily primarily an obligation of diligent prevention and control in reference to foreseeability or likelihood of harm and of its potential gravity<sup>1</sup>. This principle has been elaborated in arbitral decisions such as the *Trail Smelter* arbitration<sup>2</sup>, Article 21 of the Stockholm Declaration and Article 2 of the Rio Declaration. It was also detailed by the International Court of Justice in its advisory opinion on nuclear weapons.

The obligation not to cause environmental harm has its roots in the common law principle of *sic utere tuo ut alienum non laedus* which literally translated means do not cause your property to harm another. States are under a general obligation not to use their territory or to allow their territory to be used in a way that can harm the interests of another state.

This obligation of diligent prevention and control arises when there is a risk of actual and serious harm occurring. Foreseeability of harm in the sense of an objectively determined risk will usually be sufficient to engage the state's duty of regulation and control.

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<sup>1</sup> Birnie, Patricia W. and Alan E. Boyle, International Law and the Environment (Oxford University Press), 2002, p. 115.

<sup>2</sup> The US-Canada Joint Commission held that no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

This study focuses on the extent to which Kenya has put mechanisms in place to impose reasonable precautions to reduce the frequency of incidents of harm to the marine environment caused by pollution by oil from ships and to foresee and minimize such damage before it occurs and to provide compensatory remedies and sanctions *ex poste facto*. The study also focuses on the extent to which Kenya has implemented the provisions of conventions on marine pollution from ships of which it is a signatory and how far the said conventions have been domesticated. The said conventions include *inter alia* the United Nations Convention on the Law of the Sea (LOS Convention), the International Convention for the Prevention of Pollution from ships 1973, and its protocol of 1978 (MARPOL 73/78) and the 1985 Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (the Nairobi Convention).





## CHAPTER 2 BACKGROUND

Kenya as well as other countries in the East African region suffer from the effects of chronic oil pollution as a result of the discharge of the oily residues from tankers traversing the region to and from the Middle East area in the Western Indian Ocean<sup>3</sup>. Every year, about 475,000 tons of oil are transported through the region from the Arabian Gulf to European and North American markets<sup>4</sup>. About half of this oil is carried by Very Large Crude Carriers (VLCC) averaging about 200,000 dead weight tones (DWT). On any given day there are about 200 tankers in East African waters going to and from the Gulf<sup>5</sup>. With so much oil traversing the region on a daily basis, spills are inevitable. Oil pollution is also caused by local tanker and general cargo traffic due in part to the lack of adequate oily waste reception facilities at the port and inadequate local regulations, surveillance and control<sup>6</sup>.

The coastal zone is an area with frequently changing biological, chemical and geological attributes. It is highly productive and its biologically diverse ecosystems offer crucial nursery habitats for many marine species. The coastal zones' features such as coral reefs, mangrove forests, beach and dune systems serve as critical natural defences against storms flooding and soil erosion. Further, the coastal zone attracts vast human settlements due to its proximity to the oceans' living and non-living resources, marine transportation and recreation.

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<sup>3</sup> Oil Pollution Control in the East African Region, UNEP Regional Seas Reports and Studies No. 10. p. 37.

<sup>4</sup> Hinrichsen Don, Our Common Seas, UNEP, 1990, pp141-149.

<sup>5</sup> Ibid.

<sup>6</sup> Oil Pollution Control in the East African Region, UNEP Regional Seas Reports and Studies No. 10. p. 37.

The existing international law on the control of ship borne pollution of the marine environment is extremely vital. It however has to be lodged within the sovereign legal machinery of Kenya, in order to have an effective application. So long as the control principles of pollution by oil from ships rest only at the level of international law, our national legislature, executive and judiciary may not consider themselves obliged to apply all of them. Kenya has not fully domesticated the said conventions and therefore needs to domesticate them and make them part of the laws of Kenya if they are to be assured of implementation. In order to achieve this, Kenya must make appropriate legal and institutional adjustments to enable it implement and enforce the provisions of the conventions.

Pollution of the marine environment has been defined in Article 1 of LOS Convention as:

“the introduction by man, directly or indirectly, of substances or energy into the marine environment (including estuaries) resulting in such deleterious effects as harm to living resources, hazard to health, hinderance to marine activities including fishing, impairment of quality for use of sea-water and reduction of amenities”.

Despite its extremely vast scope, this definition is not viewed as entirely comprehensive by environmentalists. By the late 20<sup>th</sup> Century, the degradation of the oceans could no longer be attributed to the “introduction by man of substances or energy” only<sup>7</sup>. Okidi observed that marine pollution is not just caused by the “introduction of substances or energy” by man and

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<sup>7</sup> Martine Remond-Gouilloud, Prevention and Control of Marine Pollution, in “The environmental Law of the Sea” (Ed), Douglas M. Johnston, (IUCN), 1981.

therefore expanded the definition of pollution by slotting in introduction by any means whatsoever. Thus he has defined marine pollution as,

“Introduction in any manner whatsoever, of any substances or energy, into the marine environment, including estuaries, which may result in deleterious effects such as harm to living resources, hazardous to human health, hindrance to activities including fishing, impairment of quality for use of sea water, and reduction of amenities”<sup>8</sup>.

This is in recognition of the fact that man is not solely responsible for the introduction of substances or energy into the marine environment that cause pollution. For instance, deep-sea mining for harvesting ferromanganese nodules on the ocean floor as well as the dredging of the sea floor for extracting sand and gravel are causes of impairment of the seas, which imply no introduction of any kind.

The ocean has long been considered a reservoir for man’s wastes but it is clear that in many parts of the world the capacity of the coastal ocean for such materials is at or past its limit. As the capacity of near shore marine areas to absorb wastes is approached, it becomes apparent that such disposal is not “free” as it has always been treated. Instead, other uses of coastal areas are impaired, and the social costs of waste disposal begin to be recognized<sup>9</sup>.

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<sup>8</sup> Okidi, Charles Odidi Regional Control of Ocean Pollution: Legal and Institutional Problems and Prospects. (Sijthoff & Noordhoff), 1978, p. 140.

<sup>9</sup> Smith, Leah J., Economics of Marine Pollution, Oceanus, Vol. 18, No. 1 (Full 1974) p. 55.



## The Statement of the Problem

The Western Indian Ocean of which the Kenyan coast is a part is the busiest tanker route in the world. The port of Mombasa alone receives approximately 3 million tones of oil each year<sup>10</sup>. In spite the said volume of oil the port of Mombasa has no reception facilities. This is contrary to MARPOL'S mandatory discharge standards, which restrict the discharge of oily water by vessels and at the same time impose an obligation on port states to provide reception facilities for disposal of the discharge. This poses a constant danger and black greasy tar is often found on the beaches<sup>11</sup>.

Most oil pollution is caused by routine cleaning of tanks and discharge of dirty ballast waters and bilge slops<sup>12</sup>. Pollution problems and remedies are generally viewed by states from differing perspectives. Coastal states have the most direct interest in protecting their coastal resources and related environment. Kenya is not a shipping country. It is however a coastal state as well as a port state and as such is concerned about the pollution of the marine environment by oil from ships. The Kenyan coastal area has multiple uses, which include fisheries, recreation, coastal tourism, port services as well as navigation. Pollution of the marine environment by oil from ships therefore poses a problem for Kenya in that it constitutes a threat to a considerable number of the aforesaid human interests ranging from public health to the loss of amenities.

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<sup>10</sup> Okidi, Supra Charles Odidi "Legal Aspects of the Management of the Marine and Coastal Areas" (Unpublished) 15, June 1993.

<sup>11</sup> Ibid.

<sup>12</sup> Hinrichsen Don, Our Common Seas, (UNEP), 1990, pp141-149.

Marine pollution in the waters of the Eastern African region is recognized to be notable and requiring immediate attention to prevent the problem from reaching critical magnitudes. Oil pollution is in clear evidence in all coastal waters of this region. Since there have been no known major tanker accidents or blowouts in the area, it can be presumed that the oil pollution results from deliberate discharges such as tank flushing and deballasting which occurs especially in the approaches to the ports of the oil terminals in the Middle East<sup>13</sup>. Due to the heavy tanker traffic, most of the polluting oil is washed to the East African Coast by ocean currents.

### **Justification**

Oil pollution of the marine environment poses a danger to the coastal zone, which is highly productive and its biologically diverse ecosystems offer crucial nursery habitats for many marine species. Oil pollution destroys the coastal zones' features such as coral reefs, mangrove forests, beach and dune systems which serve as critical natural defences against storms flooding and erosion. Oil pollution further threatens human settlements within the coastal zone as well as the oceans' living and non-living resources, marine transportation and recreation.

This study aims at interrogating the existing and proposed legal and regulatory framework governing pollution of the marine environment with particular focus on oil pollution from ships. The work undertaken by the task force on the review of maritime laws in Kenya is noted.

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<sup>13</sup> Okidi, Charles Odidi, "Nairobi Convention: Conservation and Development Initiatives" Environmental Policy and Law, Volume 15, Number 2, November 1985, p.44.

## **Objectives**

### **Ultimate Objective**

This study is aimed at ultimately proposing ways of eliminating the impediments to Kenya's comprehensive implementation and domestication of the provisions of the LOS Convention, MARPOL 73/78 and the Nairobi Convention relating to the control of pollution of the marine environment by oil from ships. The study further aims at proposing appropriate legal mechanisms for imposing reasonable precautions to reduce the frequency of incidents of harm to the marine environment caused by pollution by oil from ships and for minimizing such damage before it occurs.

### **Immediate Objective**

By the end of the research project, the researcher will be able to describe the extent to which Kenya has implemented and domesticated the provisions of the Conventions relating to the control of pollution of the marine environment by oil from ships.

## **Hypothesis**

- ◆ Kenya's dualistic approach to treaty implementation is responsible for failure by Kenya to domesticate international conventions on control of pollution of the marine environment by oil from ships.

- ◆ Treaty making is the exclusive domain of the executive arm of government. This is responsible for the failure by Kenya to implement the international law provisions for the control of pollution of the marine environment by oil from ships.
- ◆ Complacency and half measures by the Government result in the failure to domesticate and implement treaties.

### **Research Questions**

What does the international legal regime provide in relation to shipborne oil pollution of the marine environment?

What does the law in Kenya provide in relation to control of pollution of the marine environment by oil from ships?

How would Kenya apply international standards on a precautionary basis to protect the marine environment from shipborne oil pollution?

Does Kenya have the capacity to deal with vessels, which pose a threat to the marine environment within its national jurisdiction?



What legal mechanisms are in place for imposing reasonable precautions to reduce the frequency of incidents of harm to the marine environment caused by pollution by oil from ships and for minimizing such damage before it occurs?

## Theoretical Framework

The underpinning theory of this study is the precautionary principle. The precautionary principle is one of the most important principles for anticipating and avoiding environmental damage before it occurs. While penalties exist in law for environmental injuries *ex poste facto*, preventable environmental damage is often irreversible.

According to Hunter, D., Salzman, J. and Zaelke Durwood in their book "*International Environmental Law and Policy*,"<sup>14</sup> the precautionary principle dictates that indication of harm, rather than proof of harm, should be the trigger for action especially if the delay may cause irreparable damage. The principle states that potential environmental risks should be dealt with even in the absence of scientific certainty. It has long been advocated by environmentalists, who see it as a more effective way of managing hazards than traditional scientific risk assessments, which call for numbers and hard proof as prerequisites for action.

The concept of the precautionary principle is not really new. The essence of the principle is captured in common-sense aphorisms such as "An ounce of prevention is worth a pound of cure," "Better safe than sorry," and "Look before you leap." Sandra Steingraber, states in her in

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<sup>14</sup> (Foundation Press), 1998, p. 360.

her book, "*Living Downstream: An Ecologist Looks At Cancer and the Environment*."<sup>15</sup> current methods of regulation, by contrast, appear governed by what some frustrated policymakers have called the "dead body" approach: wait until damage is proven before action is taken. But at what cost?

Situma, Francis D. P. in his paper titled "*The precautionary Approach to Environmental Management*"<sup>16</sup> argues that the precautionary principle evolved from the recognition that scientific certainty often comes too late to design effective legal and policy responses for preventing potential damage.

The precautionary approach has several components and measures to anticipate and then mitigate or stop any possible deleterious effects on the marine environment. The conventional precautionary principle requiring that an activity be halted even if there is uncertainty in the scientific information available is one of the measures<sup>17</sup>. Other measures include environmental impact assessment (EIA) and environmental risk assessment (ERA).

Traditionally, the best understood component of precautionary measures is the environmental impact assessment. This is the mechanism that compels a developer or project proponent to cause to be undertaken, a systematic examination of the proposed project, to determine whether or not the project will have adverse effects on the environment and if so, to propose mitigating measures. The LOS Convention in Article 206 requires that states assess the potential effects of

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<sup>15</sup> Steingraber, Sandra, *Living Downstream: An Ecologist Looks At Cancer and the Environment*, New York: (Addison-Wesley Publishing Company, Inc.), 1997, pp. 270.

<sup>16</sup> Paper presented at the Magistrates Symposium on Environmental Law, Mombasa, Kenya September 2005.

<sup>17</sup> *The making of a Framework Environmental Law in Kenya*, UNEP, Nairobi, Kenya 2001, p. 99.

planned activities under their jurisdiction and control when they have reasonable grounds for believing they may cause substantial pollution of or significant or harmful changes to the marine environment. The Environmental Management and Coordination Act (EMCA) makes provision for environmental impact assessment but in very general terms.

Environmental audit is an extension of the environmental impact assessment. Environmental audit entails the appraisal of activities that are likely to have significant effect on the environment. It involves the evaluation for the purposes of determining how far the activities conform to the statements made in the environmental impact assessment report.

Another practice in precautionary measures is environmental risk assessment (ERA). ERA seeks a selective qualitative appraisal of possible impacts of an activity. It is assumed that every human activity entails risks. ERA therefore identifies specific elements of the activity, which are likely to cause harm to the environment. It identifies and evaluates possible ecological consequences of such elements. The quantitative estimates of the environmental risks are calculated and a total evaluation is then made to determine whether the risk is worth taking<sup>18</sup>.

In international law, the precautionary principle is enshrined in both soft law as well as treaty law. The United Nations Conference on Environment and Development (UNCED), which was held in Rio de Janeiro, Brazil in June 1992, marked an important milestone in the development of the law on environmental conservation. Among the important instruments adopted at UNCED

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<sup>18</sup> The making of a Framework Environmental Law in Kenya, UNEP, Nairobi, Kenya 2001, p. 99.

was the *Rio Declaration on Environment and Development*. Principle 15 of the Rio Declaration expresses the precautionary principle as follows: -

“In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation”.

The Rio declaration is not a binding document as it falls under the category of soft law. States are however urged to adopt its principles in order to integrate environmental conservation in their development programmes.

Courts in Europe have routinely disregarded the precautionary principle in their decisions on environmental matters. The case of *R v Secretary of State for Trade and Industry ex parte Duddridge*<sup>19</sup> was an application for judicial review of the decision of the Secretary of State for Trade and Industry declining to issue regulations to the National Grid Company Plc under the Electricity Act 1989 restricting electromagnetic fields from electric cables which were being laid or were to be laid as part of the national grid. The application was brought before the United Kingdom's Queens Bench Division on behalf of three children who lived South Woodford, North East London where the National Grid Company was at the time laying a new high voltage underground cable between Tottenham and Redbridge

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<sup>19</sup> Compendium of Judicial Decisions in matters related to the Environment, National Decisions, (UNEP-ELI/PAC) 1998, Volume I, pp311-322



It was the applicants' contention that the non-ionising radiation that would be emitted from the new cables when commissioned and which would enter their homes and schools would be of such a level as would or might expose them to the risk of developing leukemia. The said that the Secretary of State should issue regulations, which would remove any such risk. The applicants sought an order compelling the Secretary of State to issue regulations, guidelines or some other directive to license holders, so as to ensure that the electromagnetic fields from the cables did not exceed 0.2 micro-teslas at the nearest point of houses adjoining the cables, or some other level at which on current research there was no evidence to suggest or otherwise hypothesize any possible risk to the health of those exposed to such fields.

The Secretary of State was of the view that it was not necessary to use his power to regulate electromagnetic fields as the scientific evidence did not establish that there was a risk of childhood leukemia. The applicants argued that in considering the issue whether there existed any danger or risks of personal injury from electromagnetic fields, the Secretary of State had misdirected by asking whether there was any evidence that such exposure does in fact give rise to such risk. The applicants argued that the Secretary of State ought to have asked himself whether there was any evidence of a possible risk even though the scientific evidence was at the time unclear. In other words, he should have adopted a precautionary approach thus lowering the threshold of scientific proof.

It was the applicants' case that the Secretary of State when considering whether to take action for the protection of human health was obliged to apply the precautionary principle which required that precautionary action be taken where the mere possibility existed of a risk of serious harm to

the environment or human health. The Secretary of State however argued that he was under no obligation to apply the precautionary principle under the European Community law or any other law. The Court held that the European Community Treaty (Article 130r) does not impose an obligation upon the Secretary of State to consider his duties under the Electricity Act 1989 in the light of the precautionary principle.

In the case of *Nicholls v. Director-General of National Parks and Wildlife Service and others*<sup>20</sup>, the applicant appealed by way of 3<sup>rd</sup> party objector before the Land and Environment Court of New South Wales against the decision of Director-General of National Parks and Wildlife to grant a licence to the Forestry Commission of New South Wales to take or kill any protected fauna in the course of carrying out forestry operations within the Wingham Management Area. The applicant's case was directed against alleged imperfections in the fauna impact statement. The applicant further argued that the Court was obliged as a matter of law to apply the precautionary approach in line with Australia's international obligations. The Court however held that the fauna impact statement was one of the several tools to be used in determining whether or not a licence ought to be issued and further held that the precautionary principle was not framed as a legal standard.

Similarly in the *Southern Bluefin Tuna (Provisional Measures) Cases*<sup>21</sup>, the International Tribunal for the Law of the Sea relied on scientific uncertainty surrounding the conservation of tuna stocks to justify the grant of provisional measures to protect the stock from further depletion

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<sup>20</sup> Compendium of Judicial Decisions in matters related to the Environment, National Decisions, (UNEP-ELI/PAC) 1998, Volume I, pp. 349-371.

<sup>21</sup> *Southern Bluefin Tuna (Provisional Measures) Cases* (New Zealand and Australia vs. Japan) ITLOS Nos. 3 & 4 (1999) paras 77-9.

pending resolution of the dispute. This has been regarded as the application of the precautionary principle but it can be explained on the basis that that the LOS Convention in effect requires a precautionary approach to fisheries conservation, or alternatively that a precautionary approach is inherent in the award of provisional measures. The Tribunal took view on the precautionary principle or approach in general international law.

The Tribunal's hesitation is attributed to the fact that the precautionary approach is not universally applied. States have adopted it selectively in the Conventions on Climate Change and Biodiversity for example and not in others. The consequences of applying the precautionary approach also differ widely. Though Principle 15 of the Rio Declaration facilitates in the determination of whether a legally significant risk exists by addressing the role of scientific uncertainty, it says nothing about how to control that risk, or about what level of risk is socially acceptable<sup>22</sup>. This is perhaps where environmental risk assessment would be most useful.

Unlike European Courts, Kenyan courts are obliged by law to apply the precautionary principle. Section 3 (5) of the Environmental Management and Co-ordination Act provides that the High Court shall in the exercise of its jurisdiction conferred on it by Section 3(3) be guided by, *inter alia*, the precautionary principle<sup>23</sup>.

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<sup>22</sup> Birnie, *supra* n.1 p. 119.

<sup>23</sup> The definition of the precautionary principle in section 2 of the Environmental Management and Co-ordination Act is a replica of Principle 15 of the Rio Declaration.



In the public interest litigation Pakistani case of *Ms. Shehla Zia and Others v. WAPDA*.<sup>24</sup> citizens concerned about the construction of a grid station in a residential area in Islamabad sent a letter to the Supreme Court for consideration as a human rights case raising two questions. Whether any government agency has the right to endanger the lives of citizens by its actions without the latter's consent. The second question was whether zoning laws vest rights in citizens, which cannot be withdrawn without the citizens' consent. The Pakistani constitution under Article 9 guaranteed the citizens' right to the protection of law from being exposed to hazards of electromagnetic fields or any other such hazards which may be due to installation and construction of any grid station, factory, power station or such like installation. Considering the gravity of the matter which may involve and affect the life and health of the citizens at large, notice was issued to the Authority.

In this case as in the *Duddridge* case referred to above, no definite conclusions had been drawn from current research but the trend was in support of the fact that there may be likelihood of adverse effects of electromagnetic fields on human health. The Court noted that energy production has been given great importance in developing countries and that Pakistan's need was indeed greater as it was bound to affect the economic development. The quest for economic development however must call for the adoption of such measures, which will not create hazards to life, destroy the environment and pollute the atmosphere.

The Court held that as there was uncertainty the Authority should observe the rules of prudence and precaution. The rule of prudence requires the adoption of measures, which might avert the

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<sup>24</sup> Compendium of Judicial Decisions in matters related to the Environment, National Decisions, (UNEP-ELI/PAC) 1998, Volume I, pp. 323-334.

danger if it were to occur. The rule of precaution on the other hand requires first the consideration of the welfare and safety of the human beings and the environment and then picks up a policy and executes the plan which is more suited to obviate the possible danger or take such alternate precautionary measures which might ensure safety. The Court therefore appointed a Commissioner to examine and study the scheme, planning device and technique employed by the Authority and report whether there was any likelihood of any hazard or adverse effect on the health of the local residents. The Commissioner was at liberty to suggest a variation of the plan to minimize the danger.

Where risks are not actually known, the environment must not be left to show harm before action is taken. The precautionary principle requires that even where there is no scientific evidence available to support a particular theory precaution should be taken.

In the category of treaty law, the United Nations Framework Convention for Climate Change (UNFCCC) is a good example of the precautionary principle at work. Article 3 (3) provides as follows:

“The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost effective so as to ensure global benefits at the lowest possible cost”.

There has been much debate about the impact of global warming and its causes. It will probably take decades to reach a conclusion about the validity of these theories. In spite of this, vital steps have been taken at the international level to control production of the gases, which are alleged to be the troublemakers. The impact of these steps on industrialized as well as developing is tremendous nevertheless limits have been imposed. Where risks are not actually known, the environment must not be left to show harm before action is taken.

The Convention on Biological Diversity (CBD) is one of the important instruments adopted at the UNCED in Rio de Janeiro, Brazil in 1992. The CBD falls under treaty law and is binding upon all its Contracting Parties. The CBD has incorporated the precautionary principle and provides in its preamble thus,

“The Contracting Parties,

*Aware* of the general lack of information and knowledge regarding biological diversity and of the urgent need to develop scientific, technical and institutional capacities to provide the basic understanding upon which to plan and implement appropriate measures,

*Noting* that it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source,

*Noting also* that there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such threat”.

Discharges of crude oil can remain afloat over long distances. Therefore, discharges made many miles offshore can later appear on beaches, posing both environmental and aesthetic threats. Their most obvious environmental impact, and the most frequent source of public concern, has been in the deaths of seabirds. Beyond this, however, uncertainty revolves around the extent of environmental harm. In his "*International Regulation Of Intentional Discharges Of Oil Into The Ocean: Case Study*" Ronald B. Mitchell states that some scientists contend that intentional oil discharges have significant deleterious effects for fish, shellfish, and other forms of marine life. Others argue that no evidence exists that oil spills have unalterably changed the world's oceans or marine resources<sup>25</sup>. Humanity lives in a world of scientific uncertainty and nowhere is this truer than in the realm of environmental management. In view of this, the application of the precautionary principle is imperative. Indeed support for the precautionary principle has been increasing within the global community. As such, incorporation of the precautionary principle can be found in various international legal instruments.

Rosalind Malcolm in her book "*A Guidebook to Environmental Law*<sup>26</sup>" states that if an assertion is made about the potential polluting effect of a certain substance based on a popularly held view, then steps will be taken through legislative intervention to prevent environmental damage occurring where it is not clearly established that the alleged culprit is to blame. The justification for this approach is that if subsequently the culprit is found to be to blame it might be too late to save the earth. It is therefore better to err on the side of caution than to take risks with the environment.

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<sup>25</sup> Mitchell, Ronald B., International Regulation Of Intentional Discharges Of Oil Into The Ocean: Case Study, University of Oregon, 28 June 1995.

<sup>26</sup> (Sweet & Maxwell) 1994, p 27



MARPOL can be said to express the precautionary principle in that it seeks (as stated in the preamble) the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substance. States are enjoined to take necessary measures to prevent discharge of oil or oily wastes in the ocean.

The precautionary principle is closely related to the principle of prevention because both are concerned with taking anticipatory actions to avoid environmental harm before it occurs. The pollution prevention principle reflects the fact that protection of the environment is best achieved by preventing environmental harm in the first place rather than by attempting to remedy or compensate *ex poste facto* for such harm after it has occurred and actual harm established. The pollution prevention principle can be implemented through pollution prevention policies, improved environmental management including periodic audits and environmental impact assessments.

Increasingly, there has been a growing international consensus around the need to reconsider the conventional approaches to environmental regulation and management. Pollution prevention strategies have been replacing more conventional pollution control ones. The precautionary principle requires policy makers and regulators to act in anticipation of environmental harm to ensure that this harm does not occur in the first place, rather than wait for prior scientific certainty, which may not be practical in all cases<sup>27</sup>. The principle, in facilitating the anticipatory response to and avoidance of environmental damage before it occurs helps to lower the overall

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<sup>27</sup> Situma, Francis D. P., "The precautionary Approach to Environmental Management" Paper presented at the Magistrates Symposium on Environmental Law, Mombasa, Kenya September 2005.



costs of mitigating or adapting to environmental damage<sup>28</sup>. The precautionary principle is innovative in that it changes the role of scientific data. The principle requires that once environmental damage is threatened action should be taken to prevent possible environmental interference even though there may still be scientific uncertainty as to the effects of the activity.

## **Literature Review**

There is considerable literature on the subject of marine pollution from ships at the global level. There is however not very much written on the problem at the local level. Not much either has been written on Kenya's implementation of conventions relating to the pollution of the marine environment by shipborne sources.

Oil is the most pervasive pollutant discharged from ships. As more and more ships carry greater amounts of hazardous cargo, the potential consequences of accidents have escalated proportionately. Every day, over 3,200 oil tankers transport almost half the world's oil across the world's oceans. Coastal states suffer most directly from marine pollution and therefore have the greatest interests in preventing vessel-source pollution. Notorious oil tanker spills such as the *Torrey Canyon* have caused large and immediate environmental harm. Smaller deliberate discharges from ships however are more commonplace and can be more harmful.

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<sup>28</sup> Ibid.

In *International Law and the Environment*,<sup>29</sup> Birnie Patricia W. and Boyle, Alan E. state that pollution from ships is generally of two kinds: operational and accidental. Traditionally, the tanks of oil tankers were washed at sea and the oily residue was disposed of at sea causing considerable pollution to the marine environment. International regulation sought to eliminate the need for such discharges through technical solutions and the provision of shore reception facilities.

According to Gold, Edgar vessel source pollution was the first source of pollution to arouse the attention of the world community and therefore the first to receive concerted political and legal attention at the international level. Gold goes on to state in his book "*Handbook on Marine Pollution*",<sup>30</sup> that control techniques are not easily applied to things of many different nationalities that improve almost continuously around the world in and out of every kind of jurisdictional regime. One of the greatest problems facing the maritime industry is the concept of the flag state. Martine Remond-Gouilloud, argues in a chapter titled "*Prevention and Control of Marine Pollution*" in the book "*The environmental Law of the Sea*"<sup>31</sup> edited by Douglas M. Johnston, that the difficulties inherent in normal judicial procedures against vessels arise from the economic structure of the world shipping industry. He further goes on to say correctly, that two thirds of the world commercial fleet is registered in a small number of flag states. Many of these states are "flags of convenience states" with an open registry system, which quite frankly are more interested in protecting the commercial interests of the vessels flying their flags than in protecting the marine environment. Such states are often reluctant to give effect to treaty-based

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<sup>29</sup> (Oxford University Press), 2002.p. 359.

<sup>30</sup> (Assuranceforeningen Gard), 1985.

<sup>31</sup> Martine, *supra* n. 7 p. 196.

restraints on shipping which are geared to controlling vessel-source pollution of the marine environment.

Most of the law, which has developed in response to marine pollution problems, can be characterized as either preventive (precautionary) or remedial (reactionary) in its thrust. The general obligations to prevent reduce and control marine pollution and to protect and preserve the marine environment and the “likely to” definition of pollution constitute three building blocks for precaution and prevention<sup>32</sup>. In most cases, the primary purpose of the law is either to (i) impose reasonable precautions to reduce the frequency of incidents and (ii) to minimize damage before it occurs or (iii) to provide for the availability of compensatory remedies and other forms of relief to those affected *ex poste facto*.

Frank C. Folger states in “*Prevention – The Best Method of Controlling Pollution*” that by far, the best method of controlling pollution is to prevent its occurrence in the first place. Folger goes on to argue that prevention is the result of pre-planned, voluntary action carried out under conditions controlled by the operator. He proceeds to state that containment and counter-measurement no matter how well planned and executed are still involuntary reactions carried out under emergency conditions over which the operator has limited or no control (at least initially) Folgers argument is indisputable.

Prior to MARPOL, that is the period up to and including 1971, conventions relating to marine pollution were episodic, a knee jerk response to marine pollution incidents. MARPOL 73/78 sets

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<sup>32</sup> The Law of the Sea: Priorities and Responsibilities in implementing the Convention, IUCN, 1995, p 36.

out to completely eliminate the intentional pollution of the marine environment by oil and other harmful substances and the minimization of the harmful accidental discharge of such substances<sup>33</sup>. All substances listed in the MARPOL annexes may have adverse effects on the marine environment if discharged where they may affect human health fisheries and other ocean uses such as recreational use. Though there is now greater concern about marine pollution from other sources most marine pollution will continue to be from oil. This is due in part to the fact that man's ingenuity has not so far any reasonable method of removing oil from water<sup>34</sup>. Once oil has left the vessel it is very difficult to recover.

P. M. Wambua has stated in his paper "*The Challenges of Controlling African Maritime Zones: Command, Control and Co-operation – How do we do it?*"<sup>35</sup> that at the time of the single hull tanker, *Ratma Shalini* spilled about 5 million litres of crude oil into the Port Rietz Creek at Kilindini Harbour and at the time of the single hull tanker *Mt. Gernmar Commander* which had been denied entry in the Gulf region was allowed entry in the port of Mombasa, the Kenya Maritime Authority was in place and had sufficient authority and mandate to effectively deal with the situation. The mandate and powers contained in the Order of the President establishing the Kenya Maritime Authority however, though sweeping are inadequate for the operations of the Authority. The Authority requires nothing short of the enactment of the Draft Kenya

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<sup>33</sup> Gold, Edgar Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985, p. 143

<sup>34</sup> *ibid.*

<sup>35</sup> A paper presented to the "Sea Power for Africa Symposium" held at Breakwater Lodge, Cape Town, South Africa, Aug 28-September 1, 2005.



Maritime Authority Bill, the Marine Pollution Bill as well as the Merchant Shipping Bill proposed by the task force<sup>36</sup> on the review of Maritime Laws of Kenya.

## **Methodology**

### **Design**

This research has adopted an exploratory study design.

### **Data Collection**

This study has relied largely on a literature search of secondary data sources. Most of the data used in the study was gathered from secondary sources. Secondary data was obtained from the libraries of institutions such as the United Nations Environmental Programme, The World Conservation Union (IUCN) as well as well as institutions of higher learning that offer environmental and research studies. Other data was accessed through the internet from various websites. Qualitative data generated from interviews with key informants from International Maritime Organization and the Kenya Maritime Authority was used to fill in the gaps in the secondary data sources. The researcher developed and used guides to collect the qualitative data. The guides contained several open-ended questions to guide the discussion and to open doors for probing. Samples of the guides are attached in the appendix.

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<sup>36</sup> The Task Force was appointed by the Attorney General vide Gazette Notice of 8<sup>th</sup> February 2002 and submitted its report in May 2003.

## **Presentation of data**

The data collected is of a qualitative nature and therefore no statistical data analysis was undertaken. The data is however presented in a logical sequence using topical descriptions.

## **Chapter breakdown**

The first chapter consists of the introduction of the study. It sets out the research questions to be answered and gives the justification for the study. This chapter also gives an analysis of the literature reviewed and the theory underpinning the study. The chapter further lays down the research methodology adopted.

The second chapter outlines the global problem of pollution by ships and its adverse effect on the marine environment. It illustrates various marine pollution incidents that have been reported across the globe and the responses of the international community thereto. The chapter also gives an analysis of the problem of marine pollution from ships for Kenya as well as the various incidents that have occurred.

Chapter three gives a record of the existing global regime consisting of international conventions dealing with pollution of the marine environment by oil from ships.

Chapter four focuses on the national legal regime governing marine pollution from ships.

The fifth and final chapter consists of the conclusion and recommendations.

## CHAPTER 3

## THE PROBLEM OF MARINE POLLUTION

The problem of oil pollution from ships generally of two kinds: operational or deliberate and accidental. Operational pollution is a function of the manner in which ships operate. The principal activities involving operational or deliberate and thus preventable oil pollution include bilge pumping, deballasting and tank flushing<sup>37</sup>:

- i) Bilge pumping i.e. discharge of oily waste from engine room bilges. This oily waste though minor in terms of volume per voyage becomes significant in aggregate.
- ii) Deballasting occurs after empty fuel and dry cargo tanks have been filled with salt water ballast on return voyages. This ballast water keeps vessels stable in the high seas and is pumped out when the sheltered waters including vulnerable beaches of the port are close at hand.
- iii) Tank flushing, primarily a tanker problem. When clean tanks are required, residues from previous cargo are flushed out creating an oily mixture that is pumped overboard<sup>38</sup>.

The second form of pollution from ships, which is more dramatic, but in aggregate less significant emanates from marine casualties. The sinking of large tankers exemplifies the scale

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<sup>37</sup> Oregon Law Review, Volume 50, 1971, p. 509.

<sup>38</sup> Ibid.

and potential severity of such accidents whose seriousness derives from the volume of oil or other pollutants released in one place

### **The Problem of Marine Pollution at the Global Level**

The high seas are the world's largest expanse of common space, which is freely used for navigation, exploitation of living resources, extraction of mineral wealth and as a disposal area for industrial, domestic and nuclear waste. Although the major sources of marine pollution are on land and not afloat, oil pollution is the extremely pervasive. Traditionally, oil tankers washed their oil tanks with seawater and disposed of oily residue at sea causing significant pollution. While marine casualties are more dramatic in terms of scale and potential severity, they are less significant in aggregate. They however cause great damage to fisheries and mariculture, tainting of the sea, closures, and contamination of gear and boats. Birds and sea mammals as well as their breeding areas and sensitive habitats are also affected, as are coral reefs, mangroves and salt marshes.

The harm caused to coastal communities includes disruption of water supply and industry. Shipping activities are disrupted as the ports, coastal and inland waterways are affected. Recreational activities such as boating, tourism, bathing beaches are also hampered.

It is a truism that shipping is an international industry since vessels can fly the flag of any state and bear its nationality and have rights in all sea areas other than internal waters. A system of internationally agreed regulations of the industry is therefore inevitable not only for safety of



navigation but also of protection of the marine environment. General concern over oil pollution appears to have originated in the first decade after World War I when first the United States and then the League of Nations undertook to obtain explicit international agreement on measures to combat oil pollution<sup>39</sup>.

The oil tanker known as the *Torrey Canyon* grounded off the southwest coast of England in March 1967. The *Torrey Canyon* with a dead weight (dwt) of 118,285 struck a reef and split while carrying 880,000 barrels of crude oil<sup>40</sup>. In this incident, the crude oil fouled 100 miles of immediate beaches and spread as far out as Normandy and Brittany, 225 miles away<sup>41</sup>. This incident was a major disaster caused by human error, and was the largest single oil spill in maritime history up to 1967 and enjoyed wide media coverage.

The *Torrey Canyon* incident caught the maritime world unprepared ecologically, scientifically and even legally. For instance, over 2.5 million gallons of dispersants, which were used which often had more disastrous effects than the oil itself<sup>42</sup>. Damage claims in Britain exceeded GBP 6,000,000 FRF 40,000,000 in France<sup>43</sup>. This incident was the major turning point for the maritime world. It was to influence public policy. Public concern over the wide variety of the problems caused by the wreck resulted in relatively rapid action by several governments and international organisation. This led to the adoption of a number of conventions such as International Convention on Civil Liability for Oil Pollution Damage, (Civil Liability

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<sup>39</sup> Gold, Edgar Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985.

<sup>40</sup> Schneider Jan, Prevention and Control of Marine Pollution, in "The environmental Law of the Sea" Edited by Douglas M. Johnston, (IUCN), 1981.

<sup>41</sup> Okidi, Charles Odidi. Regional Control of Ocean Pollution: Legal and Institutional Problems and Prospects, (Sijthoff & Noordhoff), 1978, p. 28.

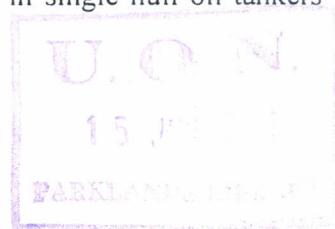
<sup>42</sup> Gold Edgar, Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985, p. 24.

<sup>43</sup> Ibid

Convention) and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (the Intervention Convention).

The VLCC *Amoco Cadiz* went aground off the coast of Brittany in France in 1978 as a result of steering failure.<sup>44</sup> This took place a few weeks after the International Maritime Organisation Conference on Tanker Safety and Pollution Prevention, which resulted in the MARPOL Protocol. In this incident, which is ranked as the 4th largest, 223,000 tons of oil were spilt causing enormous pollution damage to the French coast. The final cost eventually was \$ 280 million. The *Amoco Cadiz* incident made France change its attitude from a pragmatic maritime state to a fiercely regulatory environmental coastal state.

In 2002 the oil tanker *Prestige* sank off the Spanish coast in which 12,000 tons of crude oil were spilt. This led to the revision by the International Maritime Organisation (IMO) of regulations in Annex 1 of the MARPOL Convention. A revised schedule for the phasing out of single hull oil tankers and a new regulation banning the carriage of heavy grade oil in single hull oil tankers entered into force on 5 April 2005<sup>45</sup>.



## The Problem of Marine Pollution at the Local Level

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<sup>44</sup> Chorley and Giles, "Shipping Law" (8<sup>th</sup> Edn), (Pitman Publishing), 1987, p.56.

<sup>45</sup> IMO News, No. 2 2005, p. 6.

The sources of marine pollution in Kenya's coastal and marine areas fall under the several categories. Marine pollution from land-based sources is the single largest problem constituting 85% of the total problem of degradation of the coastal and marine environment<sup>46</sup>.

Land based sources of marine pollution consist of pollution discharged directly into the sea from point sources such as industrial wastewater, sewage, etc. Non-point sources include run-off that flows directly into the sea such as motor oils or agricultural chemicals by rainwater.<sup>47</sup> Among the various sources of pollution, dumping of wastes is perhaps the most difficult to monitor. Exploitation of the marine resources as well as engineering and military activities are other sources of pollution of the marine environment. Shipborne sources of pollution include discharges, spills and intentional dumping of wastes from ships. This study is concerned with deliberate and accidental pollution caused by oil from ships.

Capt James Ferrari, a former Principal Secretary, Ministry of Transport for Seychelles estimated that on average about 35,000 tons of oil are spilled into the Western Indian Ocean every year through normal shipping operations and the actual figure could be much higher<sup>48</sup>. The 200 mile exclusive economic zone to which every coastal state is entitled under the LOS Convention constitutes part of the high seas. Under Articles 69 and 70 of the LOS Convention, landlocked and geographically disadvantaged states have equitable rights to exploit part of the surplus of the living resources of the exclusive economic zones of coastal states of the same sub region. Kenya like every other coastal state is a trustee for the international community in respect of its 200

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<sup>46</sup> Okidi Charles Odidi. "Legal Aspects of the Management of the Marine and Coastal Areas" (Unpublished) 15, June 1993, p 11.

<sup>47</sup> The Law of the Sea: Priorities and Responsibilities in implementing the Convention, (IUCN), 1995, p 36.

<sup>48</sup> Ibid.



mile exclusive economic zone and therefore has an obligation to keep it pollution free on behalf of such states.

As the world becomes more aware of the global environmental stresses and strains, it is easy to see that humanity is in trouble. It is necessary for collective action by every nation state and every global citizen to safeguard the environment. In addition, since not all countries are in a position to play an equal part as protector, precaution must be employed as facilitator in devices to help the strong to assist the weak in the common cause of survival. It is imperative that both governments and industries alike take a stronger stand to protect and rejuvenate the earth's diminishing resources in order to preserve a safe and secure future for the generations to come. In order to do this, it must be accepted that all nations have a duty to care for the earth, and that the environment, not industry, determines the limits of tolerance of ecosystems<sup>49</sup>. Intergenerational equity will be ensured by encouraging equality among generations, neither authorizing the present generation to exploit resources to the exclusion of future generations, nor imposing unreasonable burdens on the present generation to meet indeterminate future needs<sup>50</sup>.

In spite of the danger posed by the oil to the marine environment, Kenya and other countries in the region have not yet developed contingency plans for combating oil spills and even if they had a plan of action, they do not have the technical and material (equipment) capacity to handle emergencies. In Kenya, marine conservation does not appear to be a priority, greater concern being placed on conservation of terrestrial animal life. In 1985, countries in the region came

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<sup>49</sup> Parassram Natasha, The Precautionary Principle: A Simple Approach to Environmental Sustainability, New York University.

<sup>50</sup> Weiss Edith Brown "In Fairness to Future generations: International Law, Common patrimony and Intergenerational Equity" 1996. Pp 37-39.

together to form the East African Action Plan under the auspices of the United Nations Environmental Programme<sup>51</sup>. Baseline pollution studies are being carried out in order to pinpoint local problem areas and assign priorities. The action plan calls for a number of measures including inter alia facilities made available to train pollution control technicians and strengthening of oil spill contingency plans. Public awareness campaigns are critical for the overall success of coastal management plans. So far however, there is little government interest in coasts other than for agriculture and tourism development.

The concept of “port state denial” has become established within the maritime industry as a mechanism to ensure compliance with the International Safety Management (ISM) Code<sup>52</sup>. Coastal states such as Kenya, which have not implemented through domestication, the provisions of coastal and port state jurisdiction provided for in the relevant treaties, find it difficult to deny entry to or control vessels that pose a risk to their territorial waters. The consequences of a major spillage can be extremely serious in a developing country like Kenya because there are fewer resources available for dealing with such spillage.

The near shore is the area of greatest potential damage and from the polluter’s point of view, where all major claims will originate from. Damage will consist of severe fouling of shore areas, including beaches harbours, fishing ports and other amenities, direct impact on fisheries, port and tourist activities, etc<sup>53</sup>. High concentrations of substances such as petroleum have been found on the oceans’ surface and with continued accumulation these could have complex and long lasting

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<sup>51</sup> Hinrichsen Don, *Our Common Seas*, (UNEP), 1990, pp141-149.

<sup>52</sup> Lobach Terje, “Port State Control of Fishing Vessels” *FAO I Legal Papers Online* #29, May 2002.

<sup>53</sup> Gold Edgar, *Handbook on Marine Pollution*, (Assuranceforeningen Gard), 1985, p. 149.



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<sup>53</sup> Gold Edgar, Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985, p. 149.

effects. The effects of pollution are most severe in coastal waters and semi-enclosed seas along the world's shore-lines. Shorelines and their marine living resources will suffer ever increasing damage if current, business-as-usual approaches to policy management, and institutions continue<sup>54</sup>.

While most oil pollution casualties are likely to involve tankers, it should be noted that many dry cargo and passenger vessels have a tanker capacity of several thousand tons and may therefore pose a serious threat of oil pollution in the event of an accident<sup>55</sup>.

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<sup>54</sup> Our Common Future: The World Commission on Environment and Development, p263.

<sup>55</sup> Manual on Oil Pollution, Salvage 1997 Edn, International Maritime Organisation.

## CHAPTER 4 EXISTING INTERNATIONAL LEGAL REGIME

The law of the sea dates back to Roman times. These laws were driven by commercial and military interests and have over the years regulated the use of and passage on the seas. Hugo Grotius argued that since natural law forbade ownership of the commons, “the sea is common to all because it is so limitless that it cannot become the possession of one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries”.<sup>56</sup> Environmental matters were not a concern of oceans law until after World War II primarily because the seas’ bounty appeared to be inexhaustible and pollution remained small scale and local. Most of the law, which has developed in response to marine pollution problems, can be characterized as either preventive or remedial in its thrust.

### **The period prior to *Torrey Canyon***

The emergence of serious environmental problems was evident as early as 1926 when a draft convention on oil pollution from ships was drawn up at an International Maritime Conference in Washington D. C. The problem was discussed in both technical and legal terms and a draft convention on pollution from ships drawn up but failed to be ratified by any nation<sup>57</sup>. Over time, states have grappled with the issue of formulating a legal regime for the prevention control and reduction of vessel-source pollution.

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<sup>56</sup> Hugo Grotius was a Dutch scholar who wrote Mare Liberum in 1609.

<sup>57</sup> Birnie, *supra* n. 1 p. 347.

## The OILPOL 1954

The first binding treaty on oil pollution was the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), which was adopted in London in 1954. OILPOL was exclusively designed to deal with the oil pollution problem caused by bilge pumping, deballasting and tank flushing. The convention prohibited the intentional operational discharge of oil and oily mixtures by ships in specified areas of the oceans. The basic rule of this treaty was that discharges containing more than one hundred parts per million of “persistent oils” must occur outside the prohibited zones, that is the area lying within fifty miles of the nearest coast. Oil-water separating devices were also required on all ships and all loading and discharging operations were to be recorded in an “oil record book” which was subject to inspection at regular intervals.

There were a number of amendments to OILPOL. In 1962, the convention was amended to extend the original fifty-mile wide no discharge zones to 100 miles in width<sup>58</sup>. The *Torrey Canyon* disaster exposed some weaknesses in OILPOL. Enforcement of the above provisions for instance was left to flag states, which are more interested in protecting the commercial interests of the vessels flying their flags than in protecting the marine environment. The benefits sought through the convention were therefore not achieved. In view of this the convention was amended in 1969 and discharge standards were applied to vessels even when outside the narrow prohibited zones. In 1971, further amendments to the treaty imposed certain standards on tank subdivision and stability. The amendments called for compulsory limits on the size of tanks in tankers. It was

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<sup>58</sup> Oregon Law Review, Volume 50, 1971, p. 510.



felt that smaller tank sizes might result in less pollution particularly due to collision and stranding<sup>59</sup>. The ship construction industry opposed these amendments, as they would be costly for the industry.

Although MARPOL 73/78 superseded OILPOL, its provisions remained effective until 1983 when MARPOL entered into force.

The first United Nations Conference on the Law of the Sea came up with the 1958 Convention on the High Seas which required states to inter alia, to draw up regulations to prevent vessel-source and other pollution of the seas by oil. Following several disasters, such as the *Torrey Canyon* discussed above, a series of conventions were drawn up under the auspices of the International Maritime Organisation (IMO). Other reported incidents include the tanker *Arrow*, which ran aground in 1970 on Gerberus Rock in Chedabucto Bay, Nova Scotia, Canada, the 1971 collision off San Francisco in the United States between the *Arizona Standard* and the *Oregon Standard* and the *Juliana* in 1971, at the Nigiita Harbour, Japan<sup>60</sup>.

### **The period after *Torrey Canyon***

The period after the *Torrey Canyon* incident can be referred as the precautionary era. The precautionary language of, “likely to” and “liable” began to feature in Conventions in the

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<sup>59</sup> Gold, Edgar, Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985, p. 38.

<sup>60</sup> Ibid.

definition of pollution of the marine environment.<sup>61</sup> Conventions after 1973 anticipated a precautionary approach in noting that pollution includes not only the introduction of substances that result in deleterious effects but also those that are “likely to” or “liable” to do so. The aim of the conventions was to combat accidental pollution (unforeseen events) and operational pollution (deliberate acts, such as the cleaning of tanks with seawater). The general obligations to prevent, reduce and control marine pollution and to protect and preserve the marine environment and the “likely to” definition of pollution constitute three building blocks for precaution and prevention<sup>62</sup>. In most cases, the primary purpose of the law is to impose reasonable precautions to reduce the frequency of incidents and to minimize damage before it occurs or to provide for the availability of compensatory remedies and other forms of relief to those affected *ex post facto*.

When the LOS Convention was negotiated in the 1970s and early 1980s, states were just beginning to understand the sources, extent, risks and impacts of marine pollution and how to anticipate and avoid it. Under Article 196 of the convention, in view of the rapid pace of technological development and more intensive use of the oceans, states are required to take all measures to prevent, reduce and control pollution resulting from the use of technology. Further, Article 194 calls for measures designed to minimize pollution from vessels with particular emphasis on measures to prevent accidents and respond to accidents. The convention additionally requires that states assess the potential effects of planned activities under their jurisdiction or control when they have reasonable grounds for believing they may cause

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<sup>61</sup> In the LOS Convention (Art. 1.4) in the definition of pollution, reference is made to introduction of substances and energy that are “likely to result in deleterious effects ...” while MARPOL 73/78 refers to introduction of harmful substance into the sea that “is liable to create hazards...”.

<sup>62</sup> The Law of the Sea: Priorities and Responsibilities in implementing the Convention, IUCN, 1995, p 36.

substantial pollution or significant or harmful changes to the marine environment. In furtherance of the precautionary principle, each state is under an obligation under Article 204, to monitor the effects of any activity it permits or engages in to determine whether it is likely to pollute the marine environment.

### **The Intervention Convention 1969**

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution (Intervention Convention) was another result of the *Torrey Canyon* disaster. The Intervention Convention also known as the Public Law Convention<sup>63</sup> was concluded in 1969 and came into effect in 1975. The convention gives coastal states limited rights to take preventive measures on the high seas against vessels, which are considered to present grave and imminent danger to coastlines and other coastal interests from oil pollution as a result of a maritime casualty.

This convention was a departure from the traditional international legal principle of non-interference in the legitimate operations in the high seas and therefore caused considerable debate<sup>64</sup>. For the first time states other than flag states were permitted to take preventive and mitigating action against foreign vessels provided that there was a real concern that oil pollution might result in major harmful consequences.

Under this convention, coastal states are allowed to take early action on the high seas against vessels, which pose a threat to their coastlines. Although in principle vessels exercising high seas

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<sup>63</sup> Oregon Law Review, Volume 50, 1971, p. 544.

<sup>64</sup> Gold, Edgar, Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985, p. 38.

freedoms are subject only to the jurisdiction of the flag state, an exceptional right of coastal state intervention in international law can be derived from the principle of necessity<sup>65</sup>, hence the clarification of the rights of coastal states in the Intervention Convention. The fact that coastal states are given the right to take action in areas beyond their national and maritime jurisdiction is indicative of the seriousness with which the threat of large-scale ship borne marine pollution was taken after the *Torrey Canyon* incident. The international community adopted a precautionary approach from this point on. This single incident of navigational negligence therefore changed maritime history.

### **The Civil Liability Convention 1969**

The International Convention on Civil Liability for Oil Pollution Damage (The Civil Liability Convention) was a direct result of the *Torrey Canyon* disaster and was adopted at a conference in Brussels in 1969. The incident had demonstrated that the traditional liability aspects of maritime law could not deal satisfactorily with claims arising out of oil pollution. The conference had noted that resolving the difficulties confronting coastal states in securing adequate compensation was not simply a matter of removing jurisdictional obstacles, harmonizing liability and ensuring that the polluter would pay. The more important question was how the loss should be distributed given the longstanding tradition of permitting ship owners to limit their liability in maritime claims and in the case of oil, the cargo owners were expected to share the burden<sup>66</sup>.

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<sup>65</sup> Birnie, *supra* n.1 p. 379.

<sup>66</sup> *ibid*



The convention most significantly changed the traditional damage liability base from one of proven fault or negligence to one of strict liability<sup>67</sup>. The convention introduced a system of certification, making pollution damage insurance basically compulsory and giving a right of direct action against the insurer if the ship owner did not pay. The purpose of the convention is to provide a uniform set of international rules and procedures for determining liability and as a consequence provide compensation to those who suffer damage caused by the escape of discharge of oil. The convention only covers oil and nothing else.

Under the convention, flag states have an obligation to ensure their vessels carry insurance as provided under the convention and port states have the right to verify the validity or currency of such insurance in respect of vessels entering their ports. By virtue of a protocol to the convention, compensation is now available to state parties for pollution damage caused within the Exclusive Economic Zone<sup>68</sup>.

This convention is a private law convention and channels liability to the ship owner who is strictly liable for the damage caused. Actions under this convention must be brought before the courts of the Contracting Parties within 3 years from the date of the incident but not later than 6 years.

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<sup>67</sup> Edgar Gold, Handbook on Marine Pollution, Assuranceforeningen Gard, 1985, p. 24.

<sup>68</sup> Guruswamy, Lakshman D., Sir Geoffrey W. R. Palmer, Burns H. Weston, "International Environmental Law and World Order" (West Publishing Co.) 1994 p 588.

## **The Fund Convention 1971**

The Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (Fund Convention), which was adopted in 1971, is a supplementary convention to the Civil Liability Convention. This convention was concluded when insurance underwriters realized that for very large scale pollution incidents the Civil Liability Convention limits might be inadequate. This convention therefore considerably extended the limits of the Civil Liability Convention, particularly for significant shipping disasters.

The Fund Convention serves two roles. It provides limited coverage for compensation claims exceeding the maximum coverage under the civil liability convention and shifts responsibility for the increased liability from ship owners to the cargo owners. Essentially, the Fund Convention constitutes a levy on oil importers whose cargo the vessels carry. The Fund Convention provides a maximum compensation of \$16 million per incident for victims of oil pollution damage who are not fully recompensed by the ship owner's liability under the Civil Liability Convention.

The Fund and Civil Liability Conventions provide a combined maximum liability of \$30 million for each incident, providing that the cost in case of large damages is in effect borne by both the ship owner and the cargo owner (the oil companies). If the ship owner is not liable to pay under certain circumstances, the Fund pays the entire compensation due up to \$60 million for each incident. The Fund Convention will not however apply where the ship causing the pollution incident is in breach of the provisions of the International Maritime Organization's (IMO) Conventions.

## MARPOL 1973

The international community responded to the *Torrey Canyon* disaster and to the problem of oil spills and other ship borne pollution by adopting the International Convention for the Prevention of Pollution from Ships, (MARPOL). The Convention was negotiated in London in 1973 and entered into force in October 1983. MARPOL's stated objective is to achieve the complete elimination of intentional pollution of the marine environment by oil and other harmful substances and the minimization of accidental discharge of such substances<sup>69</sup>. The Convention was a result of long and difficult negotiations between coastal and shipping interests. Coastal states obtained through MARPOL, a very effective new anti-pollution regime while maritime states obtained better, safer and more modern operating requirements, which must inevitably be cost effective. MARPOL strengthened the International Maritime Organization (IMO) by becoming the very centre-piece of the International Maritime Organization's "safe ships and clean oceans" principle<sup>70</sup>. Upon entry into force, this Convention superseded the 1954 OILPOL Convention (see Article 9.1) and ushered in a considerable change in the international control of the marine environment.

In order to achieve its first objective of eliminating operational pollution from ships MARPOL has made provisions to that effect in Chapter II of Annex I. MARPOL's approach to regulation of operational pollution is broadly similar to that of OILPOL. It relies mainly on technical measures to limit oil discharges. These provisions are meant to take advantage of modern technology and operating methods to eliminate all but minimal levels of oil discharge, to ensure

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<sup>69</sup> Preamble to International Convention for the Prevention of Pollution from Ships, (MARPOL)

<sup>70</sup> Gold, Edgar, Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985, p. 58.



that these have the least impact on coastal states and to emphasize port discharge for residues, which cannot otherwise be disposed of<sup>71</sup>.

MARPOL further sets new construction standards, which are more stringent for new vessels and which were amended in 1992 to require double hulls following the *Exxon Valdez* incident.

One of the weaknesses of OILPOL was poor enforcement of its provisions. MARPOL adopted a much more effective scheme of enforcement in response to pressure from coastal states dissatisfied with the observance of OILPOL involving the co-operation of coastal, port and flag states. The co-operation involves a system of certification, inspection and reporting whose purposes are to make the operation of defective vessels difficult or impossible and to facilitate the performance by flag states of their primary jurisdiction to prosecute and enforce applicable laws.

According to Edgar Gold<sup>72</sup>, the blackest period in marine pollution history occurred during a two month span from December 1976 to January 1977 when a whole series of major tanker disasters received world wide media coverage. Examples include *Argo Merchant*, *Sansinena*, *Oswego Peace*, *Daphne*, *Irenes Challenge*, *Olympic Games* and others. Almost all of these disasters were caused by human error or negligence.

Following the said series of tanker spills, at the demand of the United States and other coastal states, a separate protocol was negotiated in 1978, which provided that the convention and the

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<sup>71</sup> Birnie, *supra* n. 1 p. 363.

<sup>72</sup> Gold, Edgar, Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985, p. 29.



protocol would be read together as a single document known as MARPOL 73/78 which is short of Marine Pollution. The negotiations were supervised by the International Maritime Organisation at the Conference on Tanker Safety and Pollution Prevention in February 1978. The overarching objective of MARPOL is to create a verifiable, enforceable regime to prevent pollution discharges from ships. MARPOL contains six annexes each with provisions relating to the control of specific types of pollution. Regulations in Annexes I and II covering oil pollution and noxious liquid substances in bulk respectively are mandatory on all parties. Other annexes are optional and participation varies widely. Kenya is a signatory to MARPOL 73/78 and all the six annexes.

MARPOL relies on three approaches to prevent pollution. First, MARPOL parties were not unaware of the fact that ships were prone to noncompliance by the crew of specific procedures such as discharging beyond fifty miles of the coast thus rendering widespread enforcement nearly impossible. The parties also recognized that no nation could effectively police the ocean. They therefore came up with the mandatory discharge standards, which restricted the discharge of oily water by vessels and at the same time imposed an obligation on port states to provide reception facilities for disposal of the discharge.

Secondly, MARPOL set in place detailed technical specifications to reduce the opportunity for non-compliance. The MARPOL convention of 1973 required segregated ballast tanks (SBT) only on new tankers of more than 70,000 dwt. The MARPOL protocol of 1978 extended the requirement to include all new crude oil tankers of more than 20,000 dwt and all new product carriers of more than 30,000 dwt. Under the protocol, all existing crude oil carriers of more than

40,000 dwt were required to have either SBT or clean ballast tanks (CBT) or approved crude oil washing. Violations of the equipment standards could be detected by inspection in any port as well as during initial construction. Detecting states could prosecute such violations in court and could also detain ships found in violation until they no longer "posed a threat to the marine environment"<sup>73</sup>. In practice, this required dedicating approximately 30% of the total cargo volume for tanks that would carry only ballast, never oil.

All oil tankers now have to be fitted with double hulls or use another method that provides the same level of protection according to the IMO. Requirement for double hulls became effective on June 6, 1993. This provision was adopted in March 1992 as changes to MARPOL 73/78. Other changes adopted were that existing tankers be fitted with double hulls or an equivalent design when they reach 25 years of age. This took effect in July 1995. Design standards for new ships were included in regulation 13 F of Annex 1. This applied to tankers ordered after July 1993, whose keels were laid on or after January 6, 1994 or which were delivered after July 6, 1996.

Thirdly, MARPOL further introduced navigation standards in the form of restrictions for ships passing through Special Areas. These are areas which are particularly vulnerable to oil pollution due to their oceanographical and ecological condition and to the nature of the traffic.

States are obliged under Regulation 12 of Annex I of MARPOL to provide adequate port facilities for the reception of such residues and oily mixtures as remain from oil tankers and other

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<sup>73</sup> Mitchell, Ronald B. International Regulation Of Intentional Discharges Of Oil Into The Ocean: Case Study, University of Oregon, 28 June 1995.

ships adequate to meet the needs of the ships using them. Port reception facilities are intended to pave the way to the elimination of intentional pollution of the marine environment from maritime activities as envisaged in the preamble to MARPOL.

MARPOL also introduced innovative documentation requirements to ensure compliance. Compliance with design standards was ensured through the requirement that all tankers over 150 tons and other vessels over 400 tons hold an International Oil Pollution Prevention (IOPP) Certificate. It is the responsibility of the flag state to ensure that its vessels comply with the technical standards set by MARPOL by inspecting its vessels at periodic intervals and issuing the IOPP certificate. The IOPP certificate is *prima facie* evidence that MARPOL'S technical standards are satisfied. Inspection is not left to flag states alone. Port states are empowered by Article 5 of MARPOL to inspect any vessel required to hold an IOPP certificate while in their ports. Such inspection is for the purposes of confirming possession of a valid certificate or determining the condition of the vessels where there are clear grounds for believing that it does not correspond substantially to the certificate.

The release and use of toxic substances in the environment have had substantial unintended consequences affecting human health and the environment. Some of these concerns are high rates of learning deficiencies, asthma, cancer, birth defects and species extinctions, along with global climate change, stratospheric ozone depletion and worldwide contamination with toxic substances and nuclear materials. While it is true we realize that human activities such as shipping involve hazards, the industry must proceed more carefully and adopt a precautionary approach to all its activities. It is therefore necessary to implement the precautionary principle: When an activity raises threats of harm to human health or the environment, precautionary



measures should be taken even if some cause and effect relationships are not fully established scientifically<sup>74</sup>. In this context MARPOL through its provisions on the ship construction standards, certification and inspection and the mandatory discharge standards promotes the precautionary principle.

Marine pollution has many adverse effects, which only point to prevention. The inevitability of maritime accidents requires the need for raised environmental consciousness at all levels so that prevention through adoption of precautionary measures and better operating procedures can be refined.

### **The Los Convention 1982**

The United Nations Law of the Sea Convention (the LOS Convention) was signed in Montego Bay on 10<sup>th</sup> December 1982 and came into force twelve years later in 1994. The LOS Convention provides the first global framework on all aspects of the law of the sea. The LOS Convention may be thought of as the constitution for ocean governance providing broad rules and directions to guide general behaviour but often requiring issue-specific agreements to give its provisions concrete meaning<sup>75</sup>.

United Nations Law of the Sea Convention (LOS Convention) establishes a thorough framework for the regulation of all ocean space. It represents the first comprehensive statement of international on the protection and preservation of the marine environment. The Convention goes

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<sup>74</sup> Rachel's Environment and Health Weekly #586 February 19, 1998.

<sup>75</sup>Hunter, D., J. Salzman, and Durwood Zaelke. International Environmental Law (Foundation Press), 1998.



beyond the 1958 treaties and other sources of international law. The Convention is multifaceted and symbolizes a monument to international cooperation in the treaty making process. Having perceived the need to elaborate a new and comprehensive regime for the law of the sea the international community cooperated in this effort on a scale that was unprecedented in treaty history.

The LOS Convention was the result of the most ambitious ever attempt by the United Nations to reform international law<sup>76</sup>. The Third United Nations Conference on the Law of the Sea (UNCLOS III) was charged with the responsibility of developing an umbrella treaty for the oceans, which would embrace all aspects of ocean law – The United Nations Convention on the Law of the Sea (the LOS Convention). In the LOS Convention, states have agreed inter alia to refrain from polluting the marine environment. They have also committed to take necessary measures to prevent, reduce and control marine pollution.

The LOS Convention developed the important new concept of universal port and coastal state enforcement, which traditionally was exclusively the province of the flag states. The major innovation of the Los Convention is the regime of the 200 nautical mile exclusive economic zone, which empowers coastal states to enforce within that zone, standards for the conservation of the marine environment. Previous attempts to control pollution from ships had been inadequate and so Canada and Australia supported by the majority of developing states led a strong lobby at UNCLOS III seeking a general extension of coastal state legislative and

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<sup>76</sup> Gold Edgar, Handbook on Marine Pollution, (Assuranceforeningen Gard), 1985, p. 36.

enforcement jurisdiction beyond the relatively limited provisions of MARPOL<sup>77</sup>. The authority of coastal states is however limited by the regime of innocent passage and beyond the territorial sea, vessels have high seas navigation rights.

### **The OPRC Convention 1990**

Spills can take weeks to clean up, however the scale of the initial actions taken can reduce the overall response time. Without preplanning an organisation will be wasting resources. The International Convention on Oil Pollution Preparedness Response and Cooperation (OPRC) was concluded in 1990 by the International Maritime Organisation following the 1989 *Exxon Valdez* oil spill. The OPRC Convention emphasizes preventive measures and emergency planning on board the vessels or facilities where accidents occur. It covers ships, offshore units engaged in gas or oil activities or the loading or unloading of oil and sea ports and oil handling facilities including oil terminals and pipelines.<sup>78</sup>

Preventive measures are taken to prevent/minimize pollution damage. If a tanker incident occurs it may be necessary to take measures to prevent oil from escaping from a damaged ship e.g. by sealing of fractures. In connection with a spill, measures may have to be taken to contain the oil or prevent escaped oil from reaching the coastline using booms around the vessel itself or along

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<sup>77</sup> Birnie, *supra* n.1 p.373.

<sup>78</sup> The Law of the Sea: Priorities and Responsibilities in implementing the Convention, IUCN, 1995, p 39.

the coast that is threatened. Dispersants may also be used at sea at great cost to combat oil spill. These are preventive measures<sup>79</sup>.

Under the OPRC, parties must take all appropriate measures to prepare for and respond to marine incidents. In particular, a national system capable of responding promptly and effectively must be established including the designation of a competent national authority and a national contingency plan. Parties to the Convention are also required to ensure that offshore oil operations within their jurisdiction and port handling facilities are conducted in accordance with emergency procedures approved by the competent national authority.

### **The Nairobi Convention**

At the regional level, the early meetings of the Governing Council of the United Nations Environment Programme (UNEP) endorsed a regional approach to the control of marine pollution and management of marine and coastal resources. In 1974, the Regional Seas Programme was initiated<sup>80</sup>. The 1985 Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (the Nairobi Convention) falls under the Regional Seas Programme, which was initiated by the United Nations Environmental Programme (UNEP) in 1974. Article 6 of the Nairobi Convention provides that the Contracting Parties shall take all appropriate measures to prevent, reduce and combat pollution caused by dumping of wastes and other matter at sea.

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<sup>79</sup> Guruswamy, Lakshman D., Sir Geoffrey W. R. Palmer, Burns H. Weston, "International Environmental Law and World Order" (West Publishing Co.) 1994 p 588.

<sup>80</sup> The objective and strategy of the Regional Seas Programme were adopted at the sixth session of UNEP Governing Council, see UNEP/GC.6/7, para. 397, approved by GC decision 6/2 of 24<sup>th</sup> May 1978.

The Nairobi Convention is a comprehensive umbrella agreement for the protection, management and development of the marine and coastal environment. The convention addresses the problem of pollution from ships extensively. Article 5 requires the contracting states to take all appropriate measures to prevent reduce and combat pollution arising from discharges from ships. The parties are further required to ensure effective implementation of the applicable international rules and standards established within the framework of the International Maritime Organisation, which is the competent international organization for the purposes of the convention. The contracting states adopted a protocol to the convention known as the Protocol Concerning Cooperation in Combating Marine Pollution in Cases of Emergency within the region. The protocol requires the contracting parties to co-operate in taking all necessary precautionary and remedial measures in the event of a pollution incident as well as measures to reduce the risks of such pollution.



## CHAPTER 5 THE NATIONAL LEGAL REGIME

Despite Kenya not having had major oil spill incidents, rapid degradation of the marine environment through pollution has become a matter of serious concern. A survey of Kenya's treaty practice in environmental matters indicates that Kenya has accepted many relevant global and regional agreements. The survey however revealed that Kenya's treaty practice as judged by ratification accession and other forms of acceptance do not correspond to the progressive policy pronouncements on environmental matters<sup>81</sup>. The various international and regional conventions have to date not been provided for in the national legislative framework.

### **Conventions to which Kenya is a party**

Kenya is a party to the 1982 United Nations Convention on the Law of the Sea (LOS Convention), which came into force in 1994. Kenya ratifies the LOS Convention on March 2, 1989. Kenya has also ratified the Convention for the Protection, management and Development of the Marine and Coastal Environment of the Eater African Region (Nairobi Convention) and its Protocol concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region and the Protocol concerning Cooperation in Combating Marine Pollution in cases of Emergency in the Eastern African Region. Further, Kenya ratified International Convention for the Prevention of Pollution from Ships, (MARPOL 73) and all its annexes on September 12, 1975 and its 1978 Protocol MARPOL in December 1992.

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<sup>81</sup> The Making of a Framework Environmental Law in Kenya, (UNEP), Nairobi, Kenya 2001, p 131. .

Kenya is also a party to the International Convention on Oil Pollution Preparedness, Response and Cooperation of 1990 (OPRC). Yet another convention that Kenya has ratified is the International Convention on Civil Liability for Oil Pollution Damage, 1969 (Civil Liability Convention). The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage is yet another useful convention of which Kenya is a party having ratified it in December 1992. In spite of ratifying the said conventions, Kenya has not domesticated the same largely due to lack of well-defined domesticating procedures thus subjecting herself to the obligations under the conventions yet denying herself the benefits thereof. It is trite international law that once a state becomes a party to a convention, the legal effect of it is that the state then becomes bound by the convention, and is therefore obliged to implement it by incorporation into its body of national law. Whether the state domesticates the convention or not, it is nevertheless subject to it *vis-à-vis* other state parties, but it cannot enforce the convention against them unless the same becomes part of the law of the land<sup>82</sup>. In other words, though the provisions of the conventions can be enforced against Kenya, Kenya cannot enjoy the benefits thereof by enforcing the same against other states.

According to Wambua, Paul Musili<sup>83</sup>, Kenya like many African countries is notorious for ratifying treaties, which are never domesticated. The treaties are negotiated by officials of the relevant ministries without consultation with other pertinent agencies and without considering how the provisions of such conventions fit in with the national agenda.

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<sup>82</sup> Mukherjee, Proshanto K. "Maritime Legislation" (World Maritime University) 2002, p. 126.

<sup>83</sup> Wambua, Paul Musili., "The Challenges of Controlling African Maritime Zones: Command, Control and Co-operation – How do we do it?" A paper presented at the "Sea Power for Africa Symposium" held at Breakwater Lodge, Cape Town, South Africa, August 28 – September 1, 2005.

In April 2005, a single hull Indian oil tanker known as *Ratma Shalini* was punctured while off loading its crude oil cargo at the Kipevu Oil Terminal at the Mombasa Port. This caused a spill of about 5 million litres of crude oil into the Port Reitz creek at the Kilindini harbour. The resulting environmental damage included loss of marine life as well as hundreds of mangrove trees<sup>84</sup>. In August 2005, the *Mt. Gernmar Commander*, another single hull oil tanker docked and off-loaded its oil cargo at the Mombasa port on 13<sup>th</sup> August 2005. This single hull tanker was allowed into the port despite the fact that the same had been denied entry into the Gulf region and despite the fact also that the Kenya Maritime Authority had already been established.

Kenya is in the process of developing the Kenyan National Oil Spill Response Contingency Plan (NOSRCP) in implementation of the International Convention on Oil Pollution Preparedness, Response and Cooperation of 1990 (1990 OPRC Convention). A National Contingency Planning workshop was organized Organised by the Kenyan Ministry of Transport with the support of the International Maritime Organisation (IMO) to review a draft of the Kenyan National Oil Spill Response Contingency Plan (KNOSRCP).<sup>85</sup> It is expected that the same will be in place by March 2006.

### **Existing laws in Kenya**

Kenya is governed by Acts of Parliament, which derive their force from the Constitution. This part will spotlight on the existing laws in Kenya, which govern the marine environment,

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<sup>84</sup> *The Standard*, Thursday, 11<sup>th</sup> August 2005, p S2.

<sup>85</sup> National Workshop on Contingency plan at the Nyali Beach Hotel, Mombasa on 4<sup>th</sup> April 2005.



specifically oil pollution of the marine environment. It will point out the provisions of the various acts of parliament and identify the weaknesses inherent in therein. Kenya lacks a proper policy, legislative and institutional framework for addressing pollution of the marine environment.

The legal regime governing marine pollution is contained Part IX of the Merchant Shipping Act, 1967<sup>86</sup> containing three brief sections 308, 309 and 310 dealing with interpretation, pollution of the sea and pollution of the air respectively. Section 308 defines terms such as “oil”, “oily mixture” and the “discharge” thereof. Terms such as “mile” “heavy diesel oil” and “dark smoke” are also defined in this section. Section 309 makes it an offence for to discharge oil or oily mixture into a harbour or into the sea within 100 mile from the coast of Kenya. Such offence is punishable with a fine not exceeding a paltry Kenya Shillings ten thousand. Section 310 makes the emission of dark of dark smoke within the limits of a port for a period exceeding five minutes an offence. The section does not however provide for the penalty for the offence. Clearly, these provisions fall far short of what is required under the international and regional conventions listed above<sup>87</sup>.

Kenya has domesticated the provisions in parts II and V of the Los Convention relating to territorial waters and the exclusive economic zone by enacting the Maritime Zones Act of 1989<sup>88</sup>. The said Act establishes and delimits the territorial waters, which extend to 12 nautical miles and the Exclusive Economic Zone of Kenya, which extends to 200 nautical miles from the

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<sup>86</sup> Chapter 389 of the Laws of Kenya.

<sup>87</sup> Explanatory Note, “The Draft Marine Pollution Bill, 2002.

<sup>88</sup> The commencement date for the Maritime Zones Act was 25<sup>th</sup> August 1989 while Kenya ratified the Los Convention on 2<sup>nd</sup> March 1989.



recognized baseline. Section 2, of the Fisheries Act Chapter 378 of the Laws of Kenya has defined Kenya's fishery waters as the waters inter alia of the maritime zones described in the Maritime Zones Act.

The Merchant Shipping Act (Chapter 389 of the Laws of Kenya) primarily aims at the registration and regulation of sea going vessels. Under Merchant Shipping Act it is an offence to discharge oil or oily mixture from a ship into a harbour or into the sea within 100 miles from the coast of Kenya (See Section 309, The Merchant Shipping Act. The 100 mile notion is a carry over from the "prohibited zone" contained in the 1962 amendment to the International Convention for the Prevention of Pollution of the Sea by Oil adopted in London in 1954<sup>89</sup>. The concept of the "prohibited zone" became obsolete after the oil spilled in the *Torrey Canyon* incident spread over a distance of more than 200 miles. Although Kenya is a party to the LOS Convention, The Merchant Shipping Act has not been revised to implement the provisions of the LOS Convention relating to the breadth of a coastal state's Exclusive Economic Zone<sup>90</sup>. The import of this is that the exercise of Kenya's sovereignty over half of its exclusive economic zone is limited by its own statute.

Further, no provision is made in Kenya's national legislation for hot pursuit recognized in the LOS Convention, for vessels found in violation of the Merchant Shipping Act and other national laws but which attempts to escape.

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<sup>89</sup> The making of a Framework Environmental Law in Kenya, UNEP, Nairobi, Kenya 2001, pp. 65,66.

<sup>90</sup> Article 57 of the United Nations Convention of the Law of the Sea provides that the exclusive economic zone of a coastal state shall not exceed 200 nautical miles.

Kenya has not updated the Merchant Shipping Act to implement the revised rules of the International Maritime Organisation (IMO) on tanker single hull phase out. These rules were revised in 2003 following the sinking of the oil tanker *Prestige* off the Spanish coast in 2002. Indeed the Kenya Maritime Authority had no legal basis to prevent a single hull tanker, *Mt. Gernmar Commander* which had been denied entry in the Gulf, from docking at the Mombasa port on 13<sup>th</sup> August 2005<sup>91</sup> in spite of the potential pollution risks involved. The regulation banning the carriage of heavy grade oil in single hull oil tankers was adopted in December 2003 as amendment to Annex I of the MARPOL<sup>92</sup>. The amendment specifies that tankers of single hull construction should be phased out or converted to a double hull according to a schedule based on their year of delivery. This double hull requirement seeks to reduce the risk of oil spills from tankers involved in low energy collisions or groundings.

The Environmental Management and Coordination Act of 1999 (EMCA) contains provisions in Part V thereof for protection of the coastal zone. Section 55(5) makes the release of polluting or hazardous substances into the coastal zone an offence liable to a fine of not less than 1million shillings or imprisonment for a period not exceeding 2 years or both. Section 55(6) empowers the Minister to make regulations to prevent reduce and control pollution of the coastal zone inter alia from vessels. Regrettably, other than the Environmental (Impact Assessment and Audit) Regulations of 2003, the Minister has not made regulations dealing specifically with the problem of oil pollution of the marine environment.

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<sup>91</sup>Saturday Nation, 13<sup>th</sup> August 2005, p. 36.

<sup>92</sup> Revised Regulation 13G of MARPOL Annex I.

### **Task Force on review of maritime laws**

In view of the inadequacy of the existing legal regime on marine pollution, the Government in 2002 appointed a task force on the review of the maritime laws of Kenya<sup>93</sup>. The terms of reference were inter alia:

- i) to examine and review the relevant maritime pollution prevention conventions and existing environmental legislation with a view to establishing a coordinated and comprehensive marine pollution regulatory regime.
  
- ii) to make recommendations on proposals for reform or amendment of maritime laws to ensure that they are consistent with the conventions and recommendations of the International Maritime Organization and other treaty instruments as well as international protocols to which Kenya is a party and where appropriate make recommendations on how the process of implementation of such treaties, conventions or protocols can be improved or enhanced.

The task force completed its work and submitted its report to the Attorney General in May 2003. The report contained a draft sessional paper on maritime policy, draft Marine Pollution, Kenya Maritime Authority and Merchant Shipping Bills, among others. Of these bills, none have been enacted and only the Kenya Maritime Authority Bill has been published.

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<sup>93</sup> The task force was appointed vide Gazette Notice Number 645 of 8<sup>th</sup> February 2002.



The Marine Pollution Bill contains in Chapter 2, provisions relating to prevention of pollution by oil. The provisions include the survey of ships and the issuance of an International Oil Pollution Prevention Certificate (IOPP Certificate) by the Director-General of the Kenya Maritime Authority. Ship construction standards as provided in MARPOL have been incorporated in the proposed bill.

Section 72 of the Bill further provides for port reception facilities at oil loading terminals, repair ports and in other ports in which ships have oily residues to discharge. These facilities are for the reception of such residues and oily mixtures as remain from oil tankers and other ships and must be adequate to meet the needs of the ships using them without causing undue delay to ships. The bill has also made provision for Oil Record Books for the purpose of recording machinery space operations for all ships and for cargo/ballast operations for oil tankers.

The above provisions contained in chapter 2 of the proposed Marine Pollution Bill are intended to prevent oil pollution of the marine environment. These are in fact precautionary measures. It is therefore regrettable that the Bill has not been published and it is not clear when it is likely to be published and eventually enacted into law.

As indicated earlier, policy makers in Kenya appear to have turned their back to the sea. It is evident that the full potential and wealth of the sea has not been realized. Any bill dealing with the marine environment is therefore dealt with at a snail's pace. Our marine resources are being stolen from our continental shelf and taken to Japan and Korea<sup>94</sup>.

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<sup>94</sup> Personal interview with the Director-General Kenya Maritime Authority on 24<sup>th</sup> October 2005.



## CHAPTER 6 CONCLUSIONS AND RECOMMENDATIONS

As stated earlier, treaty making is the exclusive domain of the executive arm of government. The Task Force to review the maritime laws submitted its report to the Attorney General in May 2003. Among the draft bills drawn by the task force include inter alia the Merchant Shipping Bill, the Kenya Maritime Authority Bill and the Marine Pollution Bill. Of these three bills, only the Kenya Maritime Authority Bill has been published but has to date not been enacted.

The Kenya Government appears to lack political commitment to finalize the measures initiated for the control of marine pollution from ships. Indeed the Permanent Secretary, Ministry of Transport acknowledged the governments inertia in his speech during the closing ceremony of the workshop on national marine oil spill response contingency plan, when he urged “... *government ministries and Departments to ensure that the document that has been produced by this workshop does not end up in their shelf or computer diskettes until it is erased without any action*”<sup>95</sup>. This apathy on the part of Government as well as the fact that there is minimal or no lobby force/interest groups to advocate for domestication of treaties are responsible for the failure by Kenya to implement the international law provisions for the control of pollution of the marine environment by oil from ships.

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<sup>95</sup> National Workshop on Contingency plan at the Nyali Beach Hotel, Mombasa on 4<sup>th</sup> April 2005

Contrary to the researcher's earlier assumption and contrary further to what Wambua. Paul Musili asserts in his paper<sup>96</sup> that the Kenya Maritime Authority has sufficient mandate, the researcher was able to establish that the Kenya Maritime Authority is hampered in its operations by a lack of a comprehensive legal framework within which to operate. This is a primary reason why the Authority was unable to deny entry to the single hull *Mt. Gernmar Commander*, into the Port of Mombasa on August 13, 2005. Ships crews are very conversant with the laws of the various coastal and port states and therefore know which states have stringent maritime laws, lax laws or no laws<sup>97</sup>. Further, Kenya lacks a proper institutional framework for addressing pollution of the marine environment. In all cases where there have been incidents of oil spills, it is the Kenya Navy that has been called upon to play its peacetime role of assisting in the exercise of cleaning up and restoration of the marine environment. This is what happened in the *Ratma Shalini* incident described above.

According to Wahutu Frederick, Director-General of the Kenya Maritime Authority<sup>98</sup>, Kenya does not have its own oil tankers and has to depend on tankers from other countries to deliver its oil. From an economics point of view therefore, Kenya cannot afford to deny single hull tankers entry into its port before the phase out deadline of 2015. Further, the phase out period for single hull is subject to exemptions. The revised Article 13G of MARPOL Annex 1 allows the Administration (flag State) to permit continued operation of some tankers beyond their phase out date but not beyond the anniversary of the date of delivery of the ship in 2015 or the date on

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<sup>96</sup> Wambua, Paul Musili, "The Challenges of Controlling African Maritime Zones: Command, Control and Co-operation – How do we do it?" A paper presented at the "Sea Power for Africa Symposium" held at Breakwater Lodge, Cape Town, South Africa, August 28 – September 1, 2005.

<sup>97</sup> Personal interview with Regional Coordinators, International Maritime Organisation, J. P. Muindi, on 19<sup>th</sup> October 2005.

<sup>98</sup> Personal interview on 24<sup>th</sup> October 2005.

which the ship reaches 25 years of age after the date of delivery, whichever is earlier<sup>99</sup>. The Kenya Maritime Authority, in the absence of substantive laws and regulations is unable to discharge its duties effectively in ensuring safe and pollution free coastal waters.

Additionally the Government ought to move away from the 'policy' of half measures. The Government established the Kenya Maritime Authority through a Presidential Order under section 3 of the State Corporations Act. This is a half measure and the problem with half measures is that they lead to complacency. Now that the Kenya Maritime Authority has been established, there is no longer urgency for pushing the Kenya Maritime Authority Bill to parliament for enactment into law. This is regrettable because the Bill empowers the Minister to make regulations for the better carrying into effect of the provisions of the Bill. No regulations can be made under the Presidential Order. Further, under the Bill, the Authority is inter alia designated the "competent oil spill authority" as required by the International Convention on Oil Pollution Preparedness Response and Cooperation. The Authority therefore remains hampered in its operations, as the presidential order is inadequate in for the purposes of discharging its mandate.

Both the office of the Attorney General and Parliament are lethargic. Many bills are pending either with the Attorney General or with parliament. The Marine Pollution Bill, which was submitted to the Attorney General in May 2003, is yet to be published. The Kenya Maritime Authority Bill 2004 was published on 12<sup>th</sup> November 2004 and is yet to be come law. All the Bills relating to maritime laws prepared and submitted to the Attorney General are dependent on

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<sup>99</sup> IMO News, No. 2 2005, p. 7.



the enactment of the Kenya Maritime Authority Bill as the Authority is the agency responsible for administering the maritime laws. Parliament should therefore act fast in discharging the constitutional mandate entrusted to it by the electorate – making laws.

At the moment, parliament is preoccupied with the campaign for the impending referendum on the draft constitution, which is due to take place on 21<sup>st</sup> November 2005. Most parliamentarians are on the campaign trail. As a result, crucial votes on the budgets various ministries have been passed without a quorum. Such ministries include roads and public works, water and irrigation and even the ministry of lands and housing which sought approval for the construction of a Kshs. 100 million official residential home for the president!

Kenya needs a more vibrant civil society as well as interest groups which are sufficiently knowledgeable in environmental matters to lobby and advocate for domestication of treaties. Such groups, which understand the significance of environmental conventions, could play a major role in ensuring that parliament passes the laws necessary to implement and domesticate the conventions.

Kenya's inertia with respect to implementation of international and regional conventions is identified as being linked to the lack of administrative capacity, political will and weak compliance mechanisms such as detection, investigation and subsequent enforcement.

Through this study the government is called upon to hasten the enactment of the proposed legislation concerned with vessel source pollution including the Marine Pollution Bill, Kenya



Maritime Authority Bill and the Merchant Shipping Bill. In particular, Kenya as a port state is called upon to fulfill the commitment to establish port reception facilities in accordance with the (MARPOL) 73/78 and to seek development assistance in this process. The National Oil Spill Working Group should complete its assignment so that by March 2006, the Kenya Maritime Authority will have in place a cabinet approved Kenya National Oil Spill Response Contingency Plan as recommended by the IMO supported National Contingency Planning Workshop<sup>100</sup>.

Kenya should not be pacified by the fact that it has not experienced any major incident nor by the fact that nature has so far overcome most of the oil spills by means of natural processes. It is taken for granted that the Kenya Navy will always assist without compensation, in the clean up and restoration exercise as pollution control is one of the Navy's peacetime roles. The Kenya Navy deserves both recognition and compensation for the vital role it plays in the control of pollution of the marine environment by oil from ships.

The Marine Pollution draft bill is crucial in that it makes provision for precautionary measures such as survey of ship construction standards, certification and instrumentation as well as port reception facilities provided under MARPOL. Once enacted, it shall be the responsibility of the Kenya Maritime Authority to ensure that the port reception facilities are adequate. The Authority must also ensure that the conditions for using the facilities must not deter mariners from using them either for practical or economic reasons. These precautionary measures will contribute tremendously to the prevention reduction and control of shipborne pollution of the marine environment.

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<sup>100</sup> This was a workshop organized by the Ministry of Transport supported by the International Maritime Organisation and held in Mombasa, 4-8<sup>th</sup> April 2005.

The Bill which was presented to the Attorney General, by the Task Force in May 2003 should be published and thereafter enacted without any further delay. Indeed the permanent secretary, Ministry of Transport assured participants that “...*the draft Merchant Shipping Bill which is about to be presented to the Parliament. A draft Marine Pollution Prevention Bill has also been prepared by my Ministry to specifically deal with issues of Marine Pollution which include Oil Spills*”<sup>101</sup>.

The Kenya Maritime Authority Bill, which was published on 12th November 2004, should also be enacted as a matter of urgency as the Authority is the proposed implementing agency of the Marine Pollution law.

Kenya’s dualistic approach to treaty implementation is responsible for the failure to domesticate international conventions on control of pollution of the marine environment by oil from ships. Further, given the politics and suspicions that surround the process of ratification, drafting and implementing international conventions generally, Kenya should adopt a monistic approach to treaty implementation whereby international conventions become part of domestic law upon ratification or accession and subsequent deposit of the relevant instrument with the relevant depositary. It is a fundamental premise that the application and effect of international conventions within the domestic legal order is governed by the domestic constitutional law. In a monistic method of implementation, where it is so provided for by the constitution, an international convention can become part of the domestic law simply as a consequence of its ratification or accession by the state. Virtually no legislative action is required for

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<sup>101</sup> *Supra* n 100

implementation. For example the Constitution of the United States of America provides that a treaty, once it is ratified becomes part of the "supreme law of the land, and all judges in every state shall be bound thereby" anything in the Constitution or laws of any state to the contrary notwithstanding. In Belgium, France and the Netherlands, a convention which has been accepted by the state and which has entered into force internationally automatically becomes a part of the law of the land<sup>102</sup>.

For the monistic method to be effective however, the convention must be one that is self-executing or of direct effect or application. In general terms, a self-executing or directly applicable convention is one which directly confers rights or imposes obligations on individuals to which the state party is subject. The Hague Rules for instance have been considered to be self-executing in the United States. In the case of *Westmar Marine Services v. Heerema Marine Contractors*,<sup>103</sup> the 1910 Salvage Convention was held to be self-executing. The Court stated that "(T)he Treaty is self-executing; it needs no implementing legislation".

The dualistic system on the other hand prevails in jurisdictions where some form of legislative action is required for the implementation of an international convention at the domestic level, following its ratification or accession. The dualistic system prevails predominantly in the United Kingdom and other Commonwealth countries that follow the common law system. In the *Labour Conventions Case*<sup>104</sup> Lord Atkin speaking for the Privy Council held as follows:

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<sup>102</sup> Mukherjee, Proshanto K. "Maritime Legislation" (World Maritime University) 2002, p. 127.

<sup>103</sup> 621 F. Supp. 1135 (N. D. Cal. 1985)

<sup>104</sup> *A. G. for Canada v. A. G. for Ontario* [1937] A. C. 326.



“Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decides to incur the obligations of the treaty which involve alteration of the law, they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes<sup>105</sup> .

Some civil law jurisdictions however such as Italy, Germany and the Scandinavian countries have adopted the dualistic approach<sup>106</sup>. The dualistic method may be applied by means of an Act of Parliament containing an enabling provision giving effect to a convention with the text of the convention appearing as a schedule to the Act. On the other hand, an independent piece of legislation may be enacted to implement a convention. Such legislation may incorporate the text of the convention or reproduce the pertinent provisions or even reformulate them.

The proposed draft constitution of Kenya<sup>107</sup> proposes a monistic approach to treaty implementation. Article 3 includes “customary international law and international agreements applicable to Kenya” as part of the laws of Kenya. The draft further provides in Article 92 (2) (f) that the National Environmental Commission shall facilitate public participation, discussion and input before international agreements that have consequences on the environment are ratified. The responsibility of considering and approving treaties has been bestowed upon parliament by Article 115 (g). This appears to imply that prior to the ratification of any international agreement, there must be public debate and parliamentary approval. This could further be interpreted to

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<sup>105</sup> *Supra*. n. 104, at pp347-348.

<sup>106</sup> *Supra*. n. 102

<sup>107</sup> The proposed new constitution of Kenya was published by the Attorney General on 22<sup>nd</sup> August 2005 and is due for a vote in a referendum on 21<sup>st</sup> November 2005.



mean that upon ratification and accession an international convention shall be part of Kenyan law without the need for further legislative action by parliament. If such a provision were entrenched in the Constitution, it would go a long way in eliminating the delays currently experienced in the implementation of international conventions<sup>108</sup>.

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<sup>108</sup> The referendum has since been held and the draft constitution was rejected by the people of Kenya. These provisions are however not among the contentious issues and are likely to be incorporated in future constitution making efforts.

## Table of cases

1. Labour Conventions Case
2. Ms. Shehla Zia and Others v. WAPDA.
3. Nicholls v. Director-General of National Parks and Wildlife Service and others.
4. R v Secretary of State for Trade and Industry ex parte Duddridge.
5. Southern Bluefin Tuna (Provisional Measures) Cases. Supplement No. 63
6. Westmar Marine Services v. Heerema Marine Contractors

## Table of Statutes

1. The Merchant Shipping Act, Chapter 389 of the Laws of Kenya.
2. The Fisheries Act, Chapter 378 of the Laws of Kenya.
3. The Environmental Management and Coordination Act, Act 8 of 1999.
4. Maritime Zones Act, Chapter 371 of the Laws of Kenya.
5. Proposed New Constitution of Kenya, Kenya Gazette Supplement No. 63.
6. Draft Marine Pollution Bill.
7. Draft Kenya Maritime Authority Bill.

## Table of Conventions

1. International Convention for the Prevention of Pollution of the Sea by Oil (1954).
2. International Convention on Civil Liability for Oil Pollution Damage (1969).
3. The Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971).
4. International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969).
5. International Convention for the Prevention of Pollution from Ships (1973).
6. United Nations Convention on the Law of the Sea (1982).
7. Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (1985).



## Appendix

### Sample Guide 1

1. Name.....
2. Organisation.....
3. Position.....
4. KMA was created by a presidential order under Section 3 of the State Corporations Act in June 2004. How far has KMA established its operational structures?
5. Please describe the status of the marine environment in terms of pollution from various sources.
6. What about shipborne pollution, specifically oil?
7. What is the role of KMA in the prevention reduction and control of pollution of the marine environment?
8. What briefly, are some of the achievements of KMA since its creation in June 2004?
9. Is KMA fully able to discharge its mandate by virtue of the said presidential order? If not why not?
10. The KMA Bill was published in November 2004 but is yet to become law. To what do you attribute this delay?
11. How will the enactment of the KMA Bill 2004 enhance the capacity of KMA in the discharge its mandate?
12. What is the relationship between KMA and IMO?

13. Has KMA put any measures in place to deal with accidental discharges of oil into the marine environment?
14. What about port reception facilities? How far has KMA gone in putting the same in place.
15. How did KMA deal with the incident of the Indian single hull tanker *Ratma Shalini* which spilled about 5million litres of crude oil into Port Rietz in April 2005?
16. What about the incident in August 2005 of Mt. Gernmar Commander another single hull tanker, which had been rejected in the Gulf region? Why was it allowed to dock at the Kipevu oil terminal despite the risk it posed to the marine environment?
17. What is KMA's policy regarding single hull tankers?
18. How does KMA plan to deal with such incidents in future?
19. The Task force into Maritime Laws in this country completed its task and submitted its report, which included the draft Marine Pollution Bill, to the Attorney General in May 2003. Why do you think it's taking so long for the report to be acted upon and particularly the publishing and subsequent enactment of the said bill?
20. Please describe the working relationship between KMA and KPA and NEMA in the control of marine pollution.
21. What are some of the constraints being faced by KMA in its operations?
22. What would you wish to see happening at KMA to facilitate your work of ensuring a pollution free marine environment?

## Sample Guide 2

1. Name.....
2. Organisation.....
3. Position.....
4. The IMO objectives are safe, secure shipping in clean oceans. Please elaborate.
5. How does IMO meet these objectives?
6. The Kenya Maritime Authority was established in June 2004. How is IMO working with KMA?
7. The KMA Bill was published in November 2004 but is yet to become law. To what do you attribute this delay?
8. How will the enactment of the KMA Bill enhance the capacity of KMA in the discharge its mandate?
9. What in your view is the cause of KMA's inertia in dealing with the *Ratma Shalini* incident in April 2005 and the Mt. Gernmar Commander incident in August 2005?
10. The Task force into Maritime Laws in this country completed its task and submitted its report, which included the draft Marine Pollution Bill, to the Attorney General in May 2003. Why do you think it's taking so long for the report to be acted upon and particularly the publishing and subsequent enactment of the said bill?
11. Kenya is in the process of enacting maritime laws, which in effect domesticate IMO conventions. Are you satisfied that Kenya has the capacity to implement these laws?
12. As the IMO Regional Coordinator, what would you wish to see happening at KMA to complement your work of ensuring a clean ocean?

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