Transboundary Oil Pollution and International Law

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Abstract

Transboundary pollution is a type of environmental pollution which happens across specific international geographical boundaries. It originates from one country and can cause damage beyond the boundaries of the originating country, across- to the boundaries of another country’s ecosystem. Transboundary pollution is contentious for many reasons, including the fact that pollutants from countries which are heavy emitters easily travel to neighbouring countries which are more likely to have low levels of pollution, thus, subjecting it to anthropogenic stressors that consequently degrade the ecosystem in those areas. Transboundary pollution also has several legal implications, and because it occurs within the international sphere, it is considered an issue of international public law, and particularly, international environmental law.

The laws on transboundary pollution have primarily transitioned from damage control and repair of the effects of such pollution to their preventive control. In recent years, however, there has been additional sources to the legal control of transboundary pollution which has further diversified the laws which were initially available. This thesis is an analysis of the international legal instruments which have so far been created for the protection of the marine environment from oil pollution. This thesis also assesses how the obligations arising from these instruments have been enforced.

Keywords: transboundary pollution, oil pollution, marine law

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LIST OF ABBREVIATIONS

ACOPS UK Advisory Committee on Prevention of Pollution of the Sea by Oil
CLC Convention International Convention for Civil Liability for Oil Pollution Damage
EU European Union
ICJ International Court of Justice
ILC International Law Commission
IMCO Intergovernmental Maritime Consultative Organization
IMO International Maritime Organization
MEPC Marine Environment Protection Committee
MARPOL International Convention for the Prevention of Pollution from Ships, 1973
As modified by the Protocol of 1978
NSOAF North Sea Offshore Authority Forum
OILPOL International Convention for the Prevention of Pollution of The Sea by Oil
SDR Special Drawing Rights
SOLAS International Convention for the Safety of Life at Sea
STCW International Convention on Standards of Training, Certification and Watch Keeping for Seafarers
UK United Kingdom
UN United Nations
UNCED United Nations Conference on Environment and Development
USA United States of America
CHAPTER 1

INTRODUCTION

The process of making significant parts of the environment [water, air, land, amongst others] unsafe and unsuitable for use is generally referred to as pollution. Pollution often occurs as a result of the introduction of contaminants into a natural environment. Contaminants, however, do not necessarily have to be tangible as things such as light and sound can be pollutants when introduced into environments where they otherwise did not exist.\(^1\) Transboundary pollution is, as the name implies, is environmental pollution which occurs beyond boundaries—in this case, beyond state boundaries.

Transboundary pollution originates in one country, but is, however, able to cause damage in another country’s environment. This happens when contaminants from one country crossover international borders through pathways like water or air. Transboundary pollution is particularly contentious because the by-products of oil exploration and exploitation migrate from the borders of the host country, into the borders of a third party country not bound by the obligation to participate in the management of such by-products.\(^2\) The contamination and subsequent degradation of the third-party ecosystem, thus, gives rise for recourse against the polluter—usually a host-country through its national oil company; and international entities who are party to the exploration activity responsible for the transboundary pollution.

Transboundary maritime oil pollution is one of the most sensitive issues in the field of oil exploration and subsequent exploitation. The topic has gained importance due to several oil spills that have led to various developments in the international legal paradigms.\(^3\) It is necessary that with the continued oil exploration and exploitation in international waters,

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1 Bradford, 2018
2 Y. Lyons, ‘Transboundary Pollution from offshore Oil and Gas Activities, in the Seas of Southeast Asia’ 2012, pg. 13 and pg. 22
3 International Journal of Liability and Scientific Enquiry
international legal regimes should to be able to deal with pertinent issues, such as those around transboundary maritime oil pollution. About 80 per cent of marine pollution originates on land\(^4\). Various pollutants make their way into the marine environment through sewage, outfalls, drainages, rivers, precipitation, and so on\(^5\). More often than not, the condition of the marine environment is highly dependent on the activities of states which may or may not belong to a particular maritime region\(^6\). There are numerous instruments and norms which have been developed over the years to tackle the legal aspects of transboundary pollution. These legal instruments belong to two distinct legal families: the law of the sea and the law of international watercourses\(^7\). These will be delved into in the course of this thesis.

Environmental Law generally refers to the regulations, statutes, local, national and international legislation and treaties specifically designed to protect the environment from damage and to also stipulate consequences for such damage whether towards the Government, Corporations, or Individuals\(^8\). The international law of transboundary pollution is part of International Environmental Law and is historically associated with the Trail Smelter Arbitration and arguably less directly, the Corfu Channel Case\(^9\). The law on transboundary pollution has primarily transitioned from damage control and repair of the effects of such pollution to their preventive control. In recent years, there have been additional sources to the legal control of transboundary pollution which has further diversified the laws which were initially available\(^10\). This is exemplified through the

\(^5\) Ibid, Vinogradov, 2007, pg.584
\(^6\) Ibid, Vinogradov, 2007, pg.586-591
\(^7\) Ibid, Vinogradov, 2007, pg.605
\(^8\) Mason, 2018
\(^9\) Röben, 2015
\(^10\) Ibid, Röben, 2015
principles outlined in the Rio Declaration\textsuperscript{11} which currently serve as an essential source for transboundary pollution regulation. Additionally, there exists the customary law of hazardous activity-related pollution, as well as the law on pollution within shared resources. There is also a wide range of treaties dealing with specific aspects of transboundary pollution, as well as the customary law of state responsibility for unlawful acts which pertain to transboundary pollution\textsuperscript{12}.

The proposed research examines complications of transboundary pollution, particularly, of oil spillage which has caused extensive damage to marine life. The research analyses various legal factors targeted at protecting the marine environment and preventing maritime pollution. In this thesis, “transboundary pollution” will encompass environmental pollution from many sources. The connecting factor is that the phrase is used to denote "pollution" that emanates from the territory of one state and causes injury, actual or prospective, in another state. This research also examines complications of trans-boundary oil spillage which have led to damages in the marine environment and the subsequent actions nations need to take in response.

\textbf{1.1 BACKGROUND OF THE STUDY}

This research is motivated by the need to establish the current state of affairs in transboundary maritime oil pollution and public international law. There have been several instances and cases that involve transboundary pollution, and it sometimes gets quite complicated to handle them and establish liability and damages and subsequent compensation. The uncontrolled discharge of petroleum products and other materials from offshore oil exploration and various industrial operations have had direct and sometimes

\textsuperscript{11} The Rio Declaration on Environment and Development (1992) set out 27 guiding principles for sustainable development throughout the world. It states that the only way to have any form of long term growth is to ensure that it is grounded in the context of environmental protection (Sustainable Development Advocacy Toolkit, 2015)

\textsuperscript{12} Ibid, Rio Declaration, Sustainable Development Advocacy Tool Kit, 2015
deleterious impacts on the marine environment.\textsuperscript{13} These deleterious effects are sometimes felt beyond the national boundaries but affect more than one country hence the need to establish legal frameworks under public international law\textsuperscript{14}.

The United Nations (UN) has spearheaded international efforts aimed at ensuring the peaceful, cooperative, legally defined uses of the seas and oceans\textsuperscript{15}. The UN responded to calls for effective international regimes to govern the seabed and the ocean floor beyond the defined national jurisdictions. This call led to the creation of the United Nations Seabed Committee, the subsequent signing of a treaty prohibiting nuclear weapons on the seabed, and the adoption of the declaration that all resources of the seabed beyond limits of national jurisdiction are the common heritage of humankind\textsuperscript{16}. An equally important feat achieved by the UN in an attempt to protect the ocean and seas was the adoption of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The convention helped in resolving several issues related to ocean usage and sovereignty including the following:

- Establishing the freedom-of-navigation rights
- Setting of territorial sea boundaries
- Creation of exclusive economic zones
- The setting of rules for extending continental shelf rights
- Creation of the International Seabed Authority; and
- The creation of conflict-resolution mechanisms (including the UN Commission on the Limits of the Continental Shelf)\textsuperscript{17}.

\textsuperscript{14} \textit{Ibid}, Swan J. M, 1994
\textsuperscript{15} United Nations, 2018- UN 2018
\textsuperscript{16} \textit{Ibid}, UN 2018
\textsuperscript{17} \textit{Ibid}, UN 2018
The Convention (UNCLOS) was opened for signature on 10 December 1982 in Montego Bay, Jamaica.\textsuperscript{18} This was after approximately fourteen years of work that involved the participation of more than 150 countries representing all continents of the world\textsuperscript{19}. When the convention was adopted, it embodied in one instrument all the traditional rules for the uses of the oceans, and at the same time, it introduced new legal concepts and regimes which included new concerns.\textsuperscript{20} The Convention also provided the framework for further development of specific areas of the law of the sea, and this has led to the development of public international law with regards to international waters.

The UNCLOS entered into force by Article 308, on 16 November 1994, 12 months after the date of deposit of the sixtieth instrument of ratification\textsuperscript{21}. Today, the UNCLOS is globally recognised as the regime dealing with all matters relating to the law of the sea and therefore in this thesis, the focus will be based on the UNCLOS as a source of Public International Law.

The Convention comprises 320 articles and nine annexes that governs all aspects of marine scientific research, ocean space, such as delimitation, environmental control, economic and commercial activities, transfer of technology and the settlement of disputes relating to ocean matters.\textsuperscript{22} This research is therefore informed by various events which have unfolded in the recent past against the existing legal frameworks. The research will also analyse and look into the existing conditions and the expected changes and adjustments in international public law which are aimed at the proper regulation of marine oil pollution. This is important because of the dire nature of oil pollution in water bodies which has resulted in the extinction

\textsuperscript{18} Ibid, UN 2018
\textsuperscript{19} Ibid, UN 2018
\textsuperscript{20} Ibid, UN 2018
\textsuperscript{21} Ibid, UN 2018
\textsuperscript{22} Ibid, UN 2018
of ecosystems.\textsuperscript{23} The fact that these consequences occur beyond national boundaries has contributed to the need for viable and effective international laws to ensure that pollution issues are resolved within the appropriate legal frameworks.

**1.2 OBJECTIVES OF THE STUDY**

This thesis seeks to establish the legal standing of transboundary maritime oil pollution under the domain of Public International Law. It has been mentioned earlier that oil exploration and exploitation in the ocean and seas has led to various environmental effects and most of these effects are transboundary despite the type of oil pollution. The determination of boundaries and keeping all activities within the national waters does not guarantee protection from pollution, especially from other territories. Therefore, it was imperative for states to deal with such issues under international law. States cannot exercise sovereignty in isolation because the impact of activities in one state can affect another state. The limits to the extent of exercising state sovereignty begin when such exercise of sovereignty hinges on another state’s territorial rights and integrity.\textsuperscript{24}

With increasing offshore oil exploration and exploitation, oil shipment through international waters and coastal oil refineries, there is also need for the improved international legal regime so that the effects, especially on international maritime environments, are adequately dealt with. This study will seek to establish the relationship between various relevant concepts under transboundary maritime oil pollution and public international law. It will clearly illustrate how these two major and naturally independent issues are so intricately connected and the need to ensure that they evolve simultaneously to ensure that each one of them is successful. The thesis will also go further and establish the legal perspectives in oil exploration and exploitation in seas which is referred to as the offshore exploration and other oil activities that would lead to transboundary oil pollution and how public international law


\textsuperscript{24} C. Mendis, ‘ Sovereignty vs. Trans-Boundary Environmental Harm- The Evolving International Law Obligations and the Sethusamuduram Ship Channel Project’ 2012, pg. 10
has managed to curb such incidences through proper legal channels and dispute resolution mechanisms. The research will include relevant case laws that would go further in proving the stance of public international law in relation to transboundary maritime oil pollution.

The study will also identify some of the specific ways that maritime pollution occurs and the extent to which it affects other nations. This will help in establishing and outlining the extent of possible conflicts which can arise due to the importance of the sea in economic growth and development of some nations. It is also important to note that some countries depend primarily on offshore drilling and therefore it is imperative to outline how vital each country would get involved in such issues. The thesis will then delve into the issue of sovereignty of states and how this will come to play when discussing transboundary maritime oil pollution and public international law. The independence and interdependence of states, therefore, will come to play, and the thesis will seek to establish how these two critical issues can be dealt with under public international law in relation to transboundary maritime oil pollution.

The thesis will also seek to establish the existing legal regimes and how they have been interacting with the issue of transboundary maritime oil pollution and the challenges that have been experienced over time. This will enable the research to establish the direction that the relationship should take in the future and with the increasing need for environmental protection. The research will, therefore, go into environmental principles and legal regimes that fall under the realm of maritime oil pollution and try to discuss the same under the banner of public international law.

The research questions that will be answered within this thesis are based on the analysis of the International Legal Instruments, which have so far been created for the Protection of the Marine Environment from Oil Pollution and the assessment of how the obligations arising from these instruments have been enforced. Against the backdrop of current Transboundary Maritime Oil Pollution and Public International Law criteria on the elements that constitute: liability, damages and compensation- the research questions are

a. what is the success rate for International in holding states liable in conflicts on transboundary pollution is?
b. Will regulations and directives effectively furnish emerging legal trends that will convince sovereign states to jointly and severally comply with responsibilities and obligations arising from managing the effects of pollution?

c. Can the actualisation of a single, legally binding instrument, which has similar relevant, intricate provisions of series of existing- and part obsolete instruments, be more effective in a joint responsibility towards Protecting Global Marine Environment from Oil Pollution?

1.3 SCOPE OF RESEARCH

There are various activities that lead to transboundary pollution or environmental damage including but not limited to maritime oil pollution. These activities are usually carried out in one state, but they transfer environmental effects to the territory of another state. This kind of damages was traditionally referred to as transboundary damage, but under the developed environmental law debate, they are referred to as international environmental damage or international environmental harm. Currently, the academic discussion on transboundary damage as a whole is guided by four major elements: human causation; the physical relationship between the activity concerned and damage caused; a determined threshold of severity requiring legal action; and the transboundary movement of harmful effects.

This research will look into various pollution types occurring as a result of oil exploitation and transportation in the marine environment. Subsequently, this thesis will also delve into the purpose of environmental law and the fundamental legal basis upon which the law has developed over time. This will lead to the analysis of the legal issues surrounding

26 Ibid, Hanquin 2013, pg.3
27 Ibid, Hanquin 2013, pg.4
transboundary maritime oil pollution and other relevant policies and regulations that states have entered into for the purpose of environmental protection.

There has been a consensus among international law experts that public international law does not adequately cover issues to do with transboundary pollution\(^{29}\), part of this research will attempt to find the nexus between public international law and the influence of jurisprudence with transboundary maritime oil pollution.

The requirement of victims is exceptionally relevant to transboundary maritime oil pollution because offshore oil activities can also be interfered with through natural causes and hence causes pollution. It is therefore essential that a link be established between the activity and human causation for legal redress. Notably, the research will look into legal redress available when activities carried out in a particular jurisdiction threatens to, or causes harm in other jurisdictions. It is also important to state that international law provides the platform for reparation when such transboundary harms are inflicted, and therefore the research will also look at the extent to which such avenues can and have been exploited. The challenges which have emerged in ensuring that such issues are contained under international law will also be looked at. While the International Law Commission has done a proper and extensive examination of state responsibility for wrongful acts, the review outlined numerous challenges because there are many issues that were not covered by international law.\(^{30}\) This indicates some of the challenges faced in addressing transboundary pollution and how public international law can sometimes fall short of jurisdiction hence leaving a lot to question.

### 1.4 RESEARCH METHODOLOGY

Based on the way the legal doctrine has been practiced, it would be factual to consider it as a hermeneutic (interpretive) discipline which largely includes empirical, argumentative, logical and normative elements\(^{31}\). Description of the law is almost inseparable from its


\(^{30}\) Ibid, Barboza J. 2010

\(^{31}\) Hoecke, 2011
interpretation\textsuperscript{32}, as such, this research will employ two methodologies, the descriptive, and evaluative approach.

The descriptive approach is aimed at describing the current state of affairs transboundary maritime pollution. As the name implies, the descriptive process defines, in as much detail as possible, phenomenon and its characteristics\textsuperscript{33}. The evaluative approach, on the other hand, allows an assessment of the rules, laws and treaties concerned with transboundary maritime pollution. The evaluative approach is useful for determining whether these laws are in accordance with the moral, political, economic, and in this case, the environmental aims of society\textsuperscript{34}.

With regards to data collection, the research will employ the doctrinal method which primarily involves the collection and use of secondary data\textsuperscript{35}. The doctrinal method allows the analysis of existing statutory provisions by applying the logical reasoning powers of the researcher\textsuperscript{36}. The method has been adopted specifically because it allows for the collection and use of various judgments, treaties, statutes texts, legal journals and documents from which the researcher can make analysis and draw conclusions\textsuperscript{37}.

The doctrinal method of data collection inadvertently establishes the method of analysing the data collected. The analytical and legal reasoning inherent to the doctrinal research process requires a qualitative approach in order to analyse data\textsuperscript{38}. The research will employ the use of content analysis for the sake of identifying patterns and themes within the texts and bodies of documents which will be analysed\textsuperscript{39}. This process is necessary and has been

\textsuperscript{32} Ibid, Hoecke 2011
\textsuperscript{33} Vibhute & Aynalem, 2009
\textsuperscript{34} Ibid, Vibhute & Aynalem 2009
\textsuperscript{35} Chakraborty, 2015
\textsuperscript{36} Ibid, Chakraborty, 2015
\textsuperscript{37} Ibid, Chakraborty, 2015
\textsuperscript{38} Kharel, 2018
\textsuperscript{39} Ibid, Kharel, 2018
used by legal scholars to identify meanings of judicial and legislative texts. The process allows for deconstructing texts rather than synthesising meanings from the text and is thus suitable for doctrinal analysis.

1.5 DEFINITION OF TERMS

1.5.1. Harmful Substance
In the course of this research, the term ‘harmful substances’ is in reference to any substance which, if introduced into the sea, is liable to: create hazards to human health; cause harm to living organisms and marine life; lead to the damage of amenities and/or interfere with other uses of the sea. The definition of harmful substances also covers any substance subject to control by the present Convention.

1.5.2 Administration
Except stated otherwise, administration, when used in the research, refers to the government of the state under whose authority a ship is operating. Art 2(2) of the Articles of the International Convention for the Prevention of Pollution from Ships in reference to this definition states

‘With respect to a ship entitled to fly a flag of any state, the administration is the government of that state. With respect to fixed or floating platforms engaged in exploration and exploitation of the sea-bed and subsoil thereof adjacent to the coast over which the coastal State exercises sovereign rights for the purposes of exploration

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40 Ibid, Kharel 2018
41 Ibid, Kharel 2018
42 MARPOL - International Convention for the Prevention of Pollution from Ships Amended by Resolution MEPC.111(50) Amended by Resolution MEPC.115(51) Amended by Resolution MEPC.116(51) - Articles of the International Convention for the Prevention of Pollution from Ships, 1973
and exploitation of their natural resources, the administration is the government of the coastal state concerned.  

1.5.3. Blow-out

Blow outs occur when the pressure in a well exceeds the control capacity of the wellhead valves. This results in the uncontrolled expulsion of formation fluids from the oil well.

1.5.4. Pollution

Pollution occurs when contaminants are released into a natural environment [e.g., water, air, land, amongst others.] and consequently makes such environments unsafe and unsuitable for use. As earlier stated, contaminants are not necessarily always tangible. For example, light and sound can be pollutants when introduced into environments where they otherwise did not exist.

1.5.5. Marine Pollution

The UN defines marine pollution as the introduction by man – either directly or indirectly, of substances or energy to the marine environment resulting in harmful effects including, hazards to human health, a hindrance to marine activities, damage of the quality of seawater for various uses and reduction of amenities.

1.5.6. Transboundary Pollution

Refers to pollution that originates in one country but, by crossing the border through pathways of water or air, is able to cause damage to the environment in another country.

44 Ibid, Article 2 (2)
45 Glossary of Oil and Gas Terms [https://cogcc.state.co.us/COGIS_Help/glossary.htm] accessed on 28 June 2017
47 Bradford, 2018
49 United Nations, n.d.
1.5.7. Public International Law

Public international law is defined thus:

“Public international law is composed of the laws, rules, and principles of general application that deal with the conduct of nation states and international organisations among themselves as well as the relationships between nation-states and international organisations with persons, whether natural or juridical.”

Public International Law is sometimes called the "law of nations" or just simply international law. It need to differentiated from Private International Law, which has the resolution of conflict of national law as its focal point. Private International Law is about determining the law of which country is applicable to specific situations.

51 The University of Melbourne, 2018
52 Public International Law: https://ruwanthikagunaratne.wordpress.com/2011/03/26/lesson-1-what-is-public-international-law/ accessed on 28 June 2017
Chapter 2

2. LITERATURE REVIEW

2.1 EXISTING FUNDAMENTAL RULES OF INTERNATIONAL LAW

International law is the term given to the rules which govern relations between states\(^5\). Unlike other areas of law, international law has no defined area and governing body; it, however, covers various laws, rules and customs which govern, impacts and deals with legal interactions between different states and their governments\(^4\). While mostly focused on the activities of states, international law also regulates the actions of entities including international organisations; non-state actors, e.g., national liberation movements; international non-governmental organisations; and multinational companies, amongst others. These non-state actors are often subjects of international law and are thus considered as having a legal personality which means that they have both duties and rights provided for by international law\(^5\).

International law encompasses a wide range of international customs; agreements; treaties; charters; protocols and tribunals; and various legal precedents of the International Court of Justice (ICJ)\(^6\). Without a specific governing and enforcing entity, the international law is a largely voluntary endeavour where the power of enforcement can be exercised only when parties have consented to adhere and abide by an agreement established under international law\(^7\). Notwithstanding the absence of a superior authority, the international law is considered by states to be binding upon them\(^8\). Multilateral treaties under international law

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\(^5\) Department of Foreign Affairs and Trade, Ireland, 2018
\(^4\) HG Experts, 2018
\(^5\) Diakonia, 2013
\(^6\) HG Experts, 2018
\(^7\) Ibid, HG Experts, 2018
\(^8\) Ibid, HG Experts, 2018
also do not apply to all states except those who have ratified such treaties and have thus agreed to be bound by them\textsuperscript{59}.

The problem of transboundary pollution is an issue that international law would typically address. The transboundary damage caused by large-scale industrial, agricultural, and technical activities is not a novel problem in international law\textsuperscript{60}. Hanquin suggests that between the ‘80s and 90’s the scope and content of remedial practice, as it relates to transboundary damage, is concerned has expanded exceedingly\textsuperscript{61}. The expansion of said practices has led to significant impact and development in three specific fields of international law, namely: the regime of State responsibility; international liability for injurious consequences arising from acts not prohibited by international law; and international environmental law\textsuperscript{62}. State responsibility and international liability will be discussed subsequently. However, we now turn our attention to international environmental law, a relevant subset of international law.

### 2.1.1 International Environmental Law

International Environmental Law (occasionally referred to as international ecological law) is a subset of international law which aims to regulate the behaviour of states, individuals, and international organisations with respect to the environment\textsuperscript{63}. The development of International Environmental Law as a separate area of public international law commenced with the Stockholm Conference on the Environment in 1972\textsuperscript{64}. Current issues of international concern which are covered by environmental law include the depletion of the ozone layer and global warming, desertification, destruction of tropical rainforests, marine pollution from ships, international trade in endangered species (e.g. ivory trade), shipment of hazardous wastes to Third World countries, protection of wetlands, oil spills, transboundary

\textsuperscript{59} Department of Foreign Affairs and Trade, Ireland, 2018
\textsuperscript{60} Hanquin, 2003, pg 3
\textsuperscript{61} Ibid, Hanquin, 2003, pg 3
\textsuperscript{62} Ibid, Hanquin, 2003, pg 4
\textsuperscript{63} Legal Information Institute, 2018
\textsuperscript{64} Georgetown Law Library, 2018
nuclear air pollution (e.g. Chernobyl), and so on. Environmental law is also interdisciplinary, cutting across other areas of international law, including commercial/business law, trade, and human rights.

There are two major declarations on international environmental they are:

1. The Declaration of the United Nations Conference on the Human Environment, also known as The Stockholm Declaration (1972). This declaration was the first international attempt at aimed at measuring the global human impact on the environment. The Stockholm Declaration was also aimed at the preservation and enhancement of the human environment.

2. The second declaration is the Rio Declaration on Environment and Development, also known as The Rio Declaration (1992). The Rio Declaration came out of the United Nations Conference on Environment and Development (UNCED), which is also referred to as the Rio Earth Summit. At the Rio Conference, the international community was concerned with the task of systematising and restating existing normative expectations regarding the environment. The Rio Declaration was also concerned with boldly stating the legal and political underpinnings of sustainable development.

A common thread between the two declarations and perhaps the most significant provision in both of them relate to the prevention of environmental harm. The second part of both Stockholm Principle 21 and Rio Principle 2 both established the State’s responsibility in

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65 Ibid, Georgetown Law Library, 2018
66 Ibid, Georgetown Law Library, 2018
68 Stockholm Declaration, 1972, pg 3
69 Rio de Janeiro 'earth summit', 1992 Agenda 21, pg 1
70 Ibid, Handl, 2018
71 Ibid, Handl, 2018
72 Ibid, Handl, 2018
ensuring that activities within its control do not cause damage to the environment of other States or areas beyond national jurisdiction or control\textsuperscript{73}. The Stockholm Declaration allowed States to balance the obligation above by recognising the sovereign rights of States to exploit natural resources according to their environmental policies\textsuperscript{74}. The Rio Declaration, on the other hand, extended that right by stating that States were allowed to explore natural resources according to their environmental and developmental policies\textsuperscript{75}.

There are several treaties and conventions which have been established since the Stockholm Principle. The most relevant once will be discussed over the course of this research.

\textbf{2.1.2 Sovereignty and Territorial Integrity}

Sovereignty is one of the most important issues that must first be looked into when dealing with transboundary pollution. State sovereignty was established in the Charter through the following affirmation in Article 2(1)

\begin{quote}
“The Organisation is based on the principle of the sovereign equality of all its Members.”\textsuperscript{76}
\end{quote}

The Charter also declared that all States should be free from any form of interference from outside and also that States should seek to resolve all disputes peaceably and in a manner which does not endanger international peace and security\textsuperscript{77}. The implication of the sovereignty of state as established by the UN, particularly where transboundary pollution is concerned, is that injured states can seek legal redress through the international law system against any state which has acted wrongfully against it. However, it is important for states to have an identifiable obligation that exists between them in order to be able to seek redress

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{73} Ibid, Handl, 2018
\item \textsuperscript{74} Ibid, Handl, 2018
\item \textsuperscript{75} Ibid, Handl, 2018
\item \textsuperscript{76} United Nations, 2018
\end{itemize}
\end{footnotesize}
for harm/injury\textsuperscript{78}. While ‘full’ and ‘absolute’ sovereignty implies that states can freely use resources within their territories, it is still important to note that territorial sovereignty is a limited concept and states are liable for any [transboundary] damage they may cause\textsuperscript{79}. The sovereignty of the state cannot be exercised in isolation especially if the activities of one state often has effects upon on another state, and consequently, on their sovereign rights\textsuperscript{80}.

As Oppenheim noted in 1912:

\begin{quote}
“A State, despite its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State.”
\end{quote}

Simply put, state sovereignty does not mean that the state is above the law. International law becomes instrumental in resolving conflicts within states even though there are often challenges around its application and monitoring\textsuperscript{82}.

One of the important responsibilities of a sovereign state is the responsibility to control the benefits within its territory, and as established by the Law of The Sea (UNCLOS), this includes bodies of water which have been determined be part of a state’s territory. This means that activities which take place in the sea and specifically within the legal territory of a state are under the control of the state and this includes cases of transboundary pollution\textsuperscript{83}. Therefore, under international environmental law, a state will always claim to have the right to allow any kind of activity within its territory without unnecessary interference from other

\textsuperscript{78} Ibid, Mendis C. 2006
\textsuperscript{79} Ibid, Mendis C. 2006
\textsuperscript{80} Ibid, Mendis C. 2006
\textsuperscript{81} Akehurst, Michael. "Jurisdiction in international law." Brit. YB Int’l L. 46 (1972): 145.
\textsuperscript{82} Introduction to International Law (8\textsuperscript{th} ed., 1977), p.3
\textsuperscript{83} J. B. Yates, Unilateral and Multilateral Approaches to Environmental Problems (1971), 21 U. of T.L.J. 182.
states, and in the event of transboundary pollution, the other state has the right to seek claims for damage due to the same sovereignty.\(^{84}\)

### 2.1.3 State Responsibility

In order for a state to seek redress for environmental injuries, there must be a breach or non-performance of the obligation that is imputable to the state against which the claim is being made, and there must have been damage.\(^{85}\) State responsibility has been interpreted to mean that a state is liable to ensuring the safety of citizens from another state. However, the same logic can be applied to transboundary pollution, especially when certain activities endanger or cause risk to persons and property of another state.\(^{86}\) Thus, states are obligated not to cause pollution to other states as the injured state has the legal right to seek redress under international law. Essentially, state responsibility is concerned with the breach by a state of one or more of its international obligations, and in international law, responsibility is the result of obligation.\(^{87}\) This means that every breach of an international obligation entails international responsibility.\(^{88}\)

State responsibility also determines when an international obligation has been breached, as well as what the consequences of the breach ought to be.\(^{89}\) It also provides stipulations on which States are entitled to react and what the permissible means of that reaction are.\(^{90}\)

According to the International Law Commission (ILC), an act being attributed to a state must have emanated from one of the branches of the state such as the judiciary, legislative, executive, or other branches of government that may have been acting when the act

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\(^{84}\) Ibid, J. B. 1971

\(^{85}\) The International Law commission, 11 Yr Bk Int L Comm p. 183


\(^{87}\) Law Teacher, 2018

\(^{88}\) Ibid, Law Teacher, 2018

\(^{89}\) Ibid, Law Teacher, 2018

\(^{90}\) Ibid, Law Teacher, 2018
occurred\textsuperscript{91}. A state can also be responsible for any acts [of pollution] that are transboundary when it is not directly involved in the act but fails to prosecute the responsible individuals or obstruct justice in any way that can be proved\textsuperscript{92}. This also applies when a state is part of an unjust procedure of prosecution, unwarranted delay in the judicial procedure or when there is no reasonable possibility of adequate compensation\textsuperscript{93}. A state responsible for an internationally wrongful act is obligated to stop the act and offer appropriate assurances and guarantees of non-repetition\textsuperscript{94}. Such states are also required to make full reparations for the injury caused by the internationally wrongful act\textsuperscript{95}. The obligation to make reparation is sometimes referred to as a liability\textsuperscript{96}.

The liability for environmental damage is based on a breach of an international legal obligation as established by treaty, or by a rule of customary international law, or possibly under general principles of international law\textsuperscript{97}. State liability is likely to be concerned with the consequences of a breach of obligation, which encompasses the obligation not to cause significant harm. However, state responsibility and liability may also arise when other substantive obligations and procedural requirements\textsuperscript{98}.

Sands asserts that while all pollution having harmful effects might give rise to environmental damage, it is unlikely that all environmental damage will result in state liability\textsuperscript{99}. He further states that there are no agreed international standards establishing a threshold for environmental damage which would supposedly trigger a liability and allow claims to be

\textsuperscript{92} Law Teacher, 2018
\textsuperscript{93} Ibid, Law Teacher, 2018
\textsuperscript{94} Sands, 2012
\textsuperscript{95} Ibid, Sands, 2012
\textsuperscript{96} Ibid, Sands, 2012
\textsuperscript{97} Ibid, Sands, 2012
\textsuperscript{98} Ibid, Sands, 2012
\textsuperscript{99} Ibid, Sands, 2012
brought. However, it is customary practice for liability to be triggered when environmental damage is said significant or substantial\textsuperscript{100}. The threshold which might trigger liability may vary from case to case according to local or regional circumstances. It is consequently difficult to establish a damage threshold\textsuperscript{101}. This difficulty was illustrated by the Chernobyl accident where numerous issues concerning what was considered to be harmful levels of radioactivity had to be determined in the absence of legally binding international standards\textsuperscript{102}. The issue of liability can be closely related to the adoption of regulatory standards, and when the international community adopts such standards with regards to the various environmental issue, the task of identifying the level of compensable environmental damage will be easier\textsuperscript{103}.

In international law, the responsible state is liable to reparations to the injured state. In the \textit{Chorzow Factory},\textsuperscript{104} the Court observed

“...that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”

Reparation, for the purpose of this research, is defined as the affirmation of a state’s responsibility on a breach or acts or inactions that caused substantial loss to an individual, group or another state.\textsuperscript{105} The elements of reparation range from:

- Compensation: Compensation is the cover for any financially assessable damage resulting to loss of profits which occurred as a result of oil pollution amounting to economic loss, to

\textsuperscript{100} Ibid, Sands, 2012
\textsuperscript{101} Ibid, Sands, 2012
\textsuperscript{102} Ibid, Sands, 2012
\textsuperscript{103} Ibid, Sands, 2012
\textsuperscript{104} \textit{Chorzow Factory (Indemnity)} case (1928), P.C.I.J., Series A, No. 17, at pp. 27-28
the extent which any change that occurred in the process of the pollution can be traced to the event of the pollution.\textsuperscript{106}

- Restitution: restitution is the re-establishment of the previous state of a place, situation or, for the sake of this thesis, an ecosystem prior to the damaging effects of oil pollution-arising either from exploration or transportation.\textsuperscript{107} Restitution is done to the extent which any change that occurred in the process of pollution can be traced to the event of the pollution.\textsuperscript{108}

- Rehabilitation; and Disclosure of truth; and, Guarantees of non-repetition. Usually, the reparation is done such that it corresponds to the degree of damage that is suffered by the injured state, therefore within the context of transboundary pollution, restitution would not be possible.\textsuperscript{109} It is possible in transboundary cases to reverse the damage and hence remove the illegality of the damage, so the best way forward is reparation.

There are several ways in which reparation may be done including but not limited to monetary reparation, apologies and statements of future intent; and in some cases the international tribunals may impose injunctions to restrain pollution activities in the future, while the International Court of Justice (ICJ) may also give temporary measures that should be able to prevent further damage that may ensue during the conduct of an action or before it.\textsuperscript{110}

\textbf{2.1.4 Maritime Jurisdiction and Pollution}

The main aim of this thesis is to look into transboundary maritime oil pollution and its standing or in international law. It is, therefore, necessary that it generally look at the issues revolving transboundary pollution before going into the specific issues in the field. The maritime environment has been beneficial to the growth and development of international

\textsuperscript{106} Articles 36, Draft Articles on Responsibilities of States for Internationally Wrongful Acts, with commentaries, pg. 99
\textsuperscript{107} Ibid, Articles 36, pg. 96
\textsuperscript{108} Ibid, Article 35
\textsuperscript{109} Ibid, Article 35
\textsuperscript{110} Ibid, Article 35
environmental law, and it will continue to contribute immensely to that growth.\textsuperscript{111} There has been significant progress in developing laws regarding the marine environment due to the rising concerns of transboundary pollution, and it is, therefore, important to note that many rules developed under the marine environmental law have considerable impact in the development of the whole area of environmental law.\textsuperscript{112}

There have been several attempts, through various treaties and conventions, to protect the marine environment. The various stages of oil production and distribution can lead to harmful environmental effects and in the marine environment. Often, these environmental damages are transboundary and tend to have far-reaching effects because water travels and there are no territorial boundaries that can protect territories from polluted water. The oil spill in the Gulf of Mexico is a prime example of the devastating effects of oil production activities can have on the marine environment.\textsuperscript{113} In order to ensure that risks such as those seen with the Gulf of Mexico spill are well contained, countries have entered into several agreements which belong in the field of environmental law. These agreements give leeway for legal redress under international law within international tribunals or the ICJ.

The United State Government and Mexico developed and entered an international agreement called MEXUS in order to insure both parties against the risk of a trans-boundary oil spill\textsuperscript{114}. Both countries began pursuing the terms of the International Agreement to forestall the repeat of the 1979 Ixtoc blowout and spill which originated in the Bay of Campeche and negatively impacted the US\textsuperscript{115}. The Agreement was therefore drawn based on nearshore and shoreline

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\textsuperscript{111} Auburn, \textit{Offshore Oil and Gas in Antarctica}, 20 GERMAN Y.B. INT'L L. 139 (1978).
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\textsuperscript{112} \textit{Ibid}, Auburn, 1978
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\textsuperscript{113} The Gulf oil spill is recognised as the worst oil spill in U.S. history. Within days of the April 20, 2010 explosion and sinking of the Deepwater Horizon oil rig in the Gulf of Mexico that killed 11 people, underwater cameras revealed the BP pipe was leaking oil and gas on the ocean floor about 42 miles off the coast of Louisiana. By the time the well was capped on July 15, 2010 (87 days later), an estimated 3.19 million barrels of oil had leaked into the Gulf.
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\textsuperscript{114} Potential Impacts of a US/Mexico Transboundary Spill, https://www.onepetro.org/conference-thesis/SPE-179708-MS
\end{flushright}

\begin{flushright}
\textsuperscript{115} \textit{Ibid}, Potential Impacts of a US/Mexico Transboundary Spill
\end{flushright}
responses where critical response resources would need to transit the border and many responsible party management issues would likely challenge any response to spills. This assumption changed the introduction of deep-water drilling and production in the Gulf to ensure protection from transboundary oil pollution.

The International Convention for the Prevention of Pollution of The Sea by Oil (OILPOL)\textsuperscript{116} and the UNCLOS are both considered the most progressive step towards the protection of marine environment\textsuperscript{117}. The above OILPOL and UNCLOS both have several provisions that require states to commit to the protection of the marine environment from various hazards including oil pollution\textsuperscript{118}. This means that states have a responsibility to ensure that any kind of marine pollution is addressed under the law and therefore transboundary maritime oil pollution will also be addressed by the same provisions of the convention.

Canada, for instance, has taken a keen interest in Article 234, Section 8 of the UNCLOS. The article mainly targets ice-covered coastal states and provides them with a broad jurisdiction for the adoption and enforcement of domestic rules for pollution that is caused from ships because pollution of the marine environment in such regions is able to cause irreversible damage to the ecological systems\textsuperscript{119}.


\textsuperscript{118} Ibid. arts, 192-96.

\textsuperscript{119} (United Nations, 1982)
Article 234 of the convention gives due international recognition to the stand taken by Canada in the Arctic Waters Pollution Prevention Act. Arctic shipping pollution prevention regulations are quite clear on the standards that are required, and these regulations have been recognised and given legality under international law in the prevention of marine pollution. One of the most important and explicit references to the marine environment is found in article 194 (12) which states as follows:

“States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.” United Nations Convention on the Law of the Sea - Part XII, Article 194

Subsequently, Article 235 states the conditions for liability and responsibility. These articles provide the basis for offending states be held liable for any damages that can be attributed to them directly, or indirectly through persons under their jurisdiction who have caused pollution.

2.2 THE EVOLVING INTERNATIONAL ENVIRONMENTAL LAW OBLIGATIONS
In order to have an understanding of the evolving obligations of environmental law, it is important to look at some of basic issues such as the main sources of international law and in extension international environmental law.

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121 Arctic Shipping Pollution Prevention Regulations C.R.C., c. 353
122 Art. 235(3) provides that states shall cooperate in the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.
The Statute of the International Court of Justice Article 38(1) is used as the main reference point when referring to the sources of international law.\textsuperscript{123} It states:

\textit{“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:}

\textit{(a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;}

\textit{(b) International custom as evidence of a general practice accepted as law;}

\textit{(c) The general principles of law recognised by civilised nations;}

\textit{(d) Subject to the provisions of Article 59, [The decision of the Court has no binding force except between the parties and in respect of that particular case.] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”}\textsuperscript{124}

\textbf{2.2.1 Treaties/Conventions}

According to Article 38(1) of the International Court of Justice, reference is made to “international conventions” rather than treaties but it is important to note that conventions in this context refer to treaties\textsuperscript{125}. According to the article above, treaties are the first and major source of international law, and they are also considered the most modern method of creating international law. This has become necessary more so in the politically, socially and economically advanced world with rapid global changes which cannot withstand customary international law\textsuperscript{126}. Treaties have therefore created platforms on which various agreements can be made and such agreements take the shape of the rapidly changing world and take into

\textsuperscript{123} International Court of Justice- ICJ, 2018

\textsuperscript{124} Ibid, ICJ 2018


\textsuperscript{126} Ibid, Brown 1970
considerations emerging issues in law\textsuperscript{127}. There is new global legislation that is required in many areas to avert chaos and any possible conflicts between states\textsuperscript{128}.

Treaties are important aspects of international law and diplomacy, and it is important to note that not all treaties are binding even to non-partisans\textsuperscript{129}. Treaties, Agreements or Conventions signed by various states become law between those states and parties involved\textsuperscript{130}, when the Treaties have been duly: adopted, entered into force, signed by the states willing to be bound by the treaty, and ratified into the local laws of respective states that have signed the treaty. Of great importance to this research is that there is no global convention dealing with water pollution in international rivers, lakes or common drainage basins but there are regional and global treaties that deal with maritime pollution\textsuperscript{131}. Some countries also have bilateral treaties that deal with various, but specific issues and such agreements constitute law between the parties involved. When there are extensive and sufficient numbers of agreements between states about the same issue, then it is likely that it will become customary international law due to the evidence of uniformity in state practice\textsuperscript{132}.

\textbf{2.2.2 Customary International Law}

Even in modern society, there are rules that emerge and dictate the way in which people live, and sometimes these customs become the accepted way of life by members of society. These customs are unwritten codes of conduct but and they tend to dictate the way people live\textsuperscript{133}. Customary law has always been the major source of international law until recently when

\begin{flushright}
\textsuperscript{127} Ibid, Brown 1970  \\
\textsuperscript{128} ibid, Brown 1970  \\
\textsuperscript{129} Ibid, Brown 1970  \\
\textsuperscript{131} Ibid, Joseph, 1981  \\
\textsuperscript{132} Ibid, Joseph, 1981  \\
\end{flushright}
agreements began to be adopted, and conventions became more relevant and applicable\textsuperscript{134}. Customs are supposed to be an obligation to the members of the society that practice it and therefore in order to know what constitutes customary law, one has to look at the practices of a state\textsuperscript{135}.

Within the context of international environmental law, particularly where transboundary pollution is concerned, it becomes important to establish state practice and the requisite \textit{opinion juris} on the part of countries so as to establish if there exists such an unwritten code. Availability or the possibility of customary law may come from several possible sources such as from statements and declarations made by government officials to their legislatures, opinions of legal advisors to their governments, press releases by governments and published extracts from relevant articles\textsuperscript{136}. They can also be deduced from similar articles in bilateral or regional conventions that may help to develop and come up with rules of customary international law\textsuperscript{137}.

Customary laws are often also deduced from the writings of renowned international jurists and the decisions of both national and international courts and tribunals, with the provision that they do not always attempt to represent existing international law and are evidence that the voting states have accepted the said customary law and it has been adopted by international organisations\textsuperscript{138}. Finally, customary law can also be deduced from a unilateral action by states which then follows a specific pattern or agreement which leads to states

\begin{footnotesize}
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\item \textsuperscript{134} \textit{Ibid}, L. L. & Rajan R. S, 2001
\item \textsuperscript{135} \textit{Ibid}, L. L. & Rajan R. S, 2001
\item \textsuperscript{136} \textit{Ibid}, L. L. & Rajan R. S, 2001
\item \textsuperscript{138} For a good analysis of the worth of United Nations General Assembly resolutions and declarations (albeit in the context of expropriation of foreign property) see the international arbitral decision: \textit{ Texaco Overseas Petroleum Company and California Asiatic Oil Company v. The Government of the Libyan Arab Republic} (1978), 17 Int. L. Mat. 1.
\end{itemize}
\end{footnotesize}
agreeing that said action or agreement becomes the norm.\textsuperscript{139} These customs become very important because when there is no written agreement between the states to solve any conflicts arising from transboundary pollution, then they serve as the next reference point for legal action.\textsuperscript{140}

Several lawyers and leaders have argued that customary international law does not take into consideration the issue of sovereignty and therefore it denies the states the right and prerogative to use their territories in matters that are of great concern to them.\textsuperscript{141} One of the cases that have been critical to the evolution and development of International Environmental Law is the \textit{Trail Smelter Case} between Canada and USA.\textsuperscript{142} The arbitral tribunal in this international decision held that;

\begin{quote}
...under the principle of international law, as well as the law of the United States, 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 of persons therein, when the case is of serious consequence, and the injury is established by clear and convincing evidence.\textsuperscript{143}
\end{quote}

Even though this case was not based on maritime oil pollution, it is one of the cases that have been considered very important in the evolution of environmental law, and the principle used therein has developed over time. Even though this case did not need the establishment of liability because Canada had accepted liability for causing environmental harm in the territory of the United States, the tribunal’s duty was, therefore, to establish the compensation in relation to the damages that had been suffered.\textsuperscript{144} The tribunal, in this case, made reference to national laws of the USA, and that proves that in some cases domestic

\textsuperscript{140} Ibid, Brown, 1970
\textsuperscript{141} Ibid, Brown, 1970
\textsuperscript{142} \textit{Trail Smelter Arbitration} (1941), 111 U.N.R.I.A.A. 1905.
\textsuperscript{143} Ibid, \textit{Trail Smelter Arbitration} 1941
\textsuperscript{144} Ibid, \textit{Trail Smelter Arbitration} 1941
laws can also be used in reference to international legal issues and by extension, international law.\textsuperscript{145} Domestic law can, therefore, serve as a subsidiary to international law in certain cases. The implication for transboundary maritime oil pollution is that parties involved can also use domestic laws that guard such acts in international tribunals.

A similar case which served as a milestone in the development of international law is the \textit{Corfu Channel Case} in which state responsibility and corresponding damage which comes from a state’s jurisdiction or territory were dealt with\textsuperscript{146}. The ICJ was called upon to handle with the case of state responsibility, and it held that; “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.”\textsuperscript{147} The Corfu Channel Case was not about environmental pollution, but it reaffirmed the responsibility of the state not to allow any kind of damage that will likely affect other nations. Thus, the case confirmed the responsibility of the states going by the statements which were given by the Court.\textsuperscript{148}

The third case that was also instrumental in the development of International Environmental Law was the \textit{Lac Lanoux Case}\textsuperscript{149} where the arbitral tribunal held that;

\begin{quote}
“...when one examines whether France, either during the discussions or in her proposals, has given sufficient consideration to Spanish interests, it must be stressed how closely linked together are the obligation to take into consideration, in the course of negotiations, adverse interests and the obligation to give a reasonable place to these interests in the solution finally adopted. A State is ... not relieved from giving a reasonable place to adverse interests in the solution it adopts simply because the conversations have been interrupted, even though due to the intransigence of its partner. On the other hand, in determining the manner in which a scheme has taken into consideration the interests involved, the way in which negotiations
\end{quote}

\textsuperscript{145} \textit{Ibid}, Trail Smelter Arbitration 1941
\textsuperscript{146} \textit{[1949] I.C.J.R. 1} Corfu Channel Case
\textsuperscript{147} \textit{Ibid}, I.C.J.R. 1949
\textsuperscript{148} \textit{Ibid}, I.C.J.R. 1949
\textsuperscript{149} XII U.N.R.I.A.A. 303, 1957
developed, the total number of the interests presented the price which each Party was ready
to pay to have those interests safeguarded, are all essential factors in establishing the merits
of the scheme.”

The cases above have been very instrumental to the evolution and the development of
International Environmental Law and in extension the Public International Law. They have
been used as the benchmarks in other cases and as opinio juris. This means that they have
also been considered as sources of law because they established facts that had not been
exclusively handled prior. This is clear that when talking about transboundary maritime oil
pollution, these are some of the sources of law that will be applicable in each case that may
come up and even those that have occurred are judged on this basis.

2.3 CHAPTER SUMMARY
The international law on transboundary pollution has evolved largely from an ad hoc approach to
a more deliberate approach to the governance of pollution\textsuperscript{151}. The regulatory instruments which
have been established over years of dealing with issues in transboundary pollution comprise of
prevention, reduction, control and liability, and compensation\textsuperscript{152}. The international law on
transboundary pollution, having a basis in customary law, has now been supplemented by universal
and treaty regimes which seek to establish the regulation of pollution\textsuperscript{153}. A substantive aspect of
treaties, conventions and other forms of international agreements on the Prevention of Pollution,
or, Maritime Safety, or, Liability in the case of Pollution, all involve State and non-State actors,
such that they become subject to liability regimes, and so that the public receives rights, under
international law, on the preventive and the remedial side of transboundary pollution regulation\textsuperscript{154}. The establishment of The Rio Declaration has directed this development since 1992. This defines
a developmental pathway for future regulation of transboundary pollution\textsuperscript{155}.

\textsuperscript{150} *Ibid*, XII U.N.R.I.A.A 1957
\textsuperscript{151} Röben, 2015
\textsuperscript{152} *Ibid*, Röben, 2015
\textsuperscript{153} *ibid*, Röben, 2015
\textsuperscript{154} *ibid*, Röben, 2015
\textsuperscript{155} *ibid*, Röben, 2015
This chapter has established some of the resources and literature which are relevant to environmental law and particularly to the discussion on maritime oil pollution. The chapter has established that international law, and particularly, International Environmental Law provides the legal basis governing international actions taken over international seas and oceans. States are protected by several international statues on sovereignty and territorial integrity. Meanwhile, the idea of state responsibility and liability, which has also been established in various international treaties and conventions, holds states accountable for their actions and also stipulates the consequences matching those actions.

Subsequently, we will delve into the issue of transboundary damage in international law where will examine the international legal instruments which have been established for the protection of the marine environment from oil pollution and how the obligations arising from these are being enforced.
Chapter 3

BACKGROUND

3. International Public Law as the basis for cooperation in Resolving Transboundary Pollution

All International Public Law, also, International Law, derive from the same sources- Treaties, Customary International Law and General Principles of law. It is therefore, important to reiterate, as mentioned in previous chapters that the evolution of International Environmental Protection laws also have the same sources as International Law.\textsuperscript{156} International law as the basis for cooperation in resolving transboundary pollution lies in the establishment and recognition of sets of agreements, treaties, or conventions by the states who are parties to these agreements.\textsuperscript{157} Presently, there are numerous bilateral and regional treaties on the subject of environmental protection, but there is still opportunity to formulate a global model in the near future.\textsuperscript{158}

Customary International Law- as opposed to treaty law, establishes a more obligatory mandate on all states, regardless of adherence to treaty or convention, this seems more beneficial to the enforcement of laws regarding pollution as opposed to treaty laws that require accession and ratification- which are considerably long strenuous and often politicised procedures.\textsuperscript{159} However, the application of customary international rules require: proof of consistent general practice and, accepted law, this could provide authoritative guidance in applying such laws.

3.1 TRANSBOUNDARY DAMAGE IN PUBLIC INTERNATIONAL LAW

The discussion has already pointed out that the large industrial and technological activities that take place in one territory can have adverse environmental effects in the territory of another country and these issues may cause certain problems that can be handled under international law\textsuperscript{160}. The conflicts and issues arising out of transboundary damage have led

\textsuperscript{156} \url{http://www.imo.org/en/About/Conventions/Pages/Home.aspx} \\
\textsuperscript{157} Bugge H. C., \textit{Sustainable Development in International Law}, Europa Publishing 2008. Pg. 61 \\
\textsuperscript{159} Sands and Peel, 2012, pg.111 \\
\textsuperscript{160} Hanquin, 2003
to various theories about state responsibility, liability and a renewed focus on remedial rules. The discussion on transboundary damage in public international law in this chapter will provide the basis for the discussion of specific issues in maritime oil pollution. This chapter provides the legal framework for transboundary maritime oil pollution.

The scope and subject of international law have experienced a rapid expansion in the last few years, partly due to the progressive development of international law in the fields of state responsibility, liability and international environmental law. These issues that have led to the development and evolution in international law will be further discussed, specifically- how they are affected by and influence certain issues in transboundary maritime oil pollution.

There are various international agreements that deal with oil pollution. Some of these agreements only have general provisions and do not specifically address issues of implementation and monitoring. It is increasingly evident that there is a need for environmental protection regulations and laws that support the compensation of affected parties of transboundary oil pollution, this will require detailed rules and agreements. The evidence is in the increase of offshore Hydrocarbon operations ongoing on the continental shelves and territorial waters, these activities increase of pollution. The Large Marine Ecosystem in South-East Asia is host to over 1300 hydrocarbon platforms, this is more than double the number of platforms recorded in the North Sea as at 2012.

\[ ^{161} \text{Ibid, Sands and Peel, 2012, pg.111} \]
\[ ^{162} \text{Ibid Sands and Peel, 2012, pg.112} \]
\[ ^{163} \text{Ibid Sands and Peel, 2012, pg.112} \]
\[ ^{164} \text{Ibid Sands and Peel, 2012, pg.112} \]
\[ ^{165} \text{Ibid, Lyons, 2012} \]
\[ ^{166} \text{Ibid, Lyons, 2012} \]
\[ ^{167} \text{Lyons Y. 2012} \]
of oil and gas productions in the European Economic Areas come from offshore explorations and prospecting.\textsuperscript{168}

There have been calls to adopt the principle of strict liability (liability without proof of fault on the part of the actor) as a general principle of international law which will be applicable to transboundary damages and, hence, maritime oil pollution.\textsuperscript{169}

While many national and international laws have adopted the principle of strict liability, there are some glaring loopholes in practice. These have caused international lawyers to question the type of responsibility a state ought to bear under international law in order to prevent causing damage to other states\textsuperscript{170}. The developments of legal framework, meant to manage transboundary environmental pollution stemming from hydrocarbon activities have led to changes in international and regional laws by focusing on the prevention of damages at the source rather than the traditional approach of focusing the harm caused and compensation\textsuperscript{171}. Most often, recognised frameworks for managing transboundary pollution are results of historical evolution of agreements which now focus on International and Regional instruments as opposed to International Customary Law within the scope of compliance.\textsuperscript{172} It is restricted by the physical relationship between the specific activity causing pollution, the damage caused, anthropological causes, threshold of sovereignty, and the nature of transboundary migration of harmful effects.

\textsuperscript{168} Civil Liability, Financial Security and Compensation, claims for Offshore Oil and Gas Activities in the European Economic Area- Final Report, August 2014: 

\textsuperscript{169} Ibid, Final Report, August 2014


\textsuperscript{171} Ibid, Budianto, 2008

3.1.1 The Physical Relationship between the Activity and the Damage

When discussing pollution, it is important to establish a link between the activity and damage, particularly so if issues of responsibility and liability are to be established under the existing legal frameworks. In order to prove that transboundary damage has occurred, there must be a physical linkage between the activity referred to and the damage that has occurred.\(^{173}\) This means that when there is a need for offshore exploration and exploitation of oil, and there is a need for structures to be installed in the sea, the normal marine conditions will be disturbed and thus putting the neighbouring countries at risk. This is an example of an activity that will possibly cause harm in another country. Some people argue that international liability for injurious offences arising out of acts not prohibited by international law should only include environmental damage.\(^{174}\) Through the approval of the UN General Assembly, the International Law Commission reached a verdict not to include activities that are economical and financial in nature or even trade-related activities as they are of a different nature and hence should be addressed by different laws.\(^{175}\) The discussion above on the physical relationship between the activity and the damage caused by it is also relevant to transboundary maritime oil pollution. Transboundary maritime oil pollution can occur due to the activities that are located close enough to the maritime boundary with another state or activities located in areas subject to overlapping maritime claims.\(^{176}\)

3.1.2 The Requirement of Victims

The requirement of victims is the second defining element when discussing transboundary damage\(^ {177}\), and this will be directly applicable to the current research on transboundary maritime oil pollution. It is important to understand that there are environmental damages that may affect more than one state and they are human-caused.\(^ {178}\) There are several natural

\(^{173}\) Ibid, Dixon and ors. 2011

\(^{174}\) Studies on transboundary pollution and environmental damage carried out by the Organization for Economic Cooperation and Development (OECD): OECD Legal aspects of Transfrontier Pollution (Paris, OECD, 1977)

\(^{175}\) MB Akehurst, International Liability for Injurious Consequences Arising out of acts not prohibited by IL pp 3-16

\(^{176}\) Transboundary Pollution from Offshore Oil and Gas Activities in the seas of Southeast Asia

\(^{177}\) Ibid, Schachter, International Law in Theory and Practice, 1991

\(^{178}\) Ibid, Schachter, International Law in Theory and Practice, 1991
factors that may also lead to environmental damage in different territories such as hurricanes, floods, volcanoes and earthquakes. The clause of force majeure is usually included in the conventions that absolve states from liability to such damages. In such cases, there should be reasonable evidence to prove that the damage is caused by human activities and not natural causes. This is also important because remedial steps can only be initiated when there is legal right under international law.

It is also important to note that the law has developed quite fast and even damages that are done within the global commons – areas that are located beyond any national jurisdiction or territory, can also be protected under international law. Even though there is no particular state which can claim damages for its interests in the global commons, communal interest can be expressed and recognised in many legal spheres. It is, therefore, necessary to note that transboundary manage does not only refer to cases that arise between a few states as may be implied by the term, but it comprises damages that may emanate from national territories to the global commons. The requirement of victims is extremely relevant to transboundary maritime oil pollution because offshore oil activities can also be interfered with through natural causes and hence causes pollution.

3.1.3 Threshold Criteria
It has been discussed briefly above that not all transboundary damages can give rise to international liability, but a certain threshold has to be established. The issue of threshold has been debated for a long time even though international lawyers all agree that the cases

181 Glennon, Michael J. "Has international law failed the elephant?" American Journal of International Law 84.1 (1990): 1-43.
182 Ibid, Glennon and Michael J. 1990
184 Ibid, Wilkinson D. 1993
of transboundary environmental damage ought to meet a certain level of severity.\textsuperscript{185} This brings the question of strict liability in international law and how strict this should be.\textsuperscript{186} The severity of environmental damage is a difficult subject to approach from a general point of view and therefore should be dealt with on a case basis. This implies that the threshold criteria should be established according to the specific circumstances of a prevailing case.\textsuperscript{187}

Various terms have been used in the international discussion aimed at determining the threshold of a particular issue such as appreciable damage, substantial damage, significant damage and serious damage.\textsuperscript{188} The choice of such terms is usually based on the need to ensure that international liability is revoked and to describe the level of damage caused. It is quite difficult to arrive at a specific level of damage that is accepted in legal spheres, but the effect should not be anything that causes mere disturbance or insignificant harm which can be tolerated in normal circumstances.\textsuperscript{189} It is therefore important that such issues are left to be handled based on the specific circumstances of the case. This discussion becomes relevant to transboundary maritime oil pollution in that there must be a threshold that should be determined in the event that oil pollution occurs and affects the environment of another state or the waters. In the process of determining the legal capacity of a particular case, it is important to know the kind of damage and the specific issues surrounding that case.

3.1.4 Transboundary Movement of Harmful Effects

The transboundary movement of harmful effects refers to the movement of effects between different states and hence giving meaning to transboundary damage. It is imperative that transboundary damage can only occur when the harmful effects of a particular activity are transferred from one state to the other. In transboundary maritime oil pollution, the media

\textsuperscript{185} Ibid, Schachter, International Law in Theory and Practice, 1991
\textsuperscript{186} Ibid Schachter, International Law in Theory and Practice, 1991
\textsuperscript{189} Ibid, Wilkinson D. 1993
for movement of harmful effects is water, and this has adverse effects on different countries.\textsuperscript{190} It is the boundary crossing nature of these effects that make it possible for the initiation of a case under international law.\textsuperscript{191} Marine pollution of the high seas can also occur from land-based sources such as oil refineries that are set close to the marine environment.

The issue of harmful effects transfer was considered in The Hague Conference on Private International Law. The civil liability for environmental damage made a comparison between transboundary cases and international, and it stated that:

“...the “international” case involves the situation where human activity carried out in one country produces damage to the territory of another country. The “transnational” case is where the activity and the physical damage all occurs within one country, but nonetheless there is a transnational involvement, for example, because capital (including technological know-how) has been exported from another country in order to make possible the activity which has caused environmental damage and, presumably, any profits realized from such exported capital will be returned in one way or another to its country of origin.” \textsuperscript{192}

Even though this may be in relevance to private international law, it is also a clear indication that transnational also refers to the fact that the effects are spread to other territories.\textsuperscript{193} The discussed elements above create a framework and scope of transboundary damage which embodies a particular category of environmental damage.\textsuperscript{194} This section is relevant to the research on transboundary maritime oil pollution in that it shows the transnational nature of such effects and the method and manner in which they to be regarded as transboundary. It,

\begin{flushleft}
\textsuperscript{190} \textit{Ibid}, Wilkinson D. 1993  \\
\textsuperscript{191} \textit{Ibid}, Wilkinson D. 1993  \\
\textsuperscript{192} Verheyen, Roda. \textit{Climate change damage and international law: Prevention duties and state responsibility}. Vol. 54. Martinus Nijhoff Publishers, 2005.  \\
\textsuperscript{193} Kreuzer, Karl. "Environmental disturbance and damage in the context of private international law." \textit{REDI} 44 (1992): 57.  \\
\textsuperscript{194} \textit{Ibid}, Kreuzer K. 1992
\end{flushleft}
therefore, gives a clear illustration on how the harmful effects of pollution move from one territory to another hence transboundary.

3.2 PERSPECTIVES OF TRANSBOUNDARY HARM

It is important to do an analysis of the kind of damages that occur so that the thesis has a clear presentation of the various kinds of harm and their classifications. Transboundary harm can occur from various perspectives namely; accidental damage,\textsuperscript{195} non-accidental damage,\textsuperscript{196} and damage to the global common areas.\textsuperscript{197}

3.2.1 Accidental Damage

In transboundary pollution discourse, accidental damage refers to damage that arises from the sudden and generally unforeseen occurrence of an event.\textsuperscript{198} The liability can be established whether the damage is as a result of an accident or cumulative harmful effects.\textsuperscript{199} The international law discourse has been keen on creating a difference between accidental and non-accidental damage so as to afford different legal treatments to sudden and gradual occurrences.\textsuperscript{200} Transboundary maritime oil pollution by its nature is usually accidental due to structural or operational failure, and most current conventions are by nature targeted at accidental damages.\textsuperscript{201}

Damage can also be restricted to one or several occurrences that emanate from a common origin, and in maritime oil pollution, one or several damages may result from a single issue but affects several areas.\textsuperscript{202} The ILC in its consideration of the issue of international liability has also given the view of different consideration in accidental and non-accidental damages


\textsuperscript{196} \textit{Ibid}, Craig and ors. 2011

\textsuperscript{197} \textit{Ibid}, Craig and ors. 2011

\textsuperscript{198} (Hanquin, 2003)

\textsuperscript{199} \textit{Ibid}, Hanquin, 2003

\textsuperscript{200} \textit{Ibid}, Hanquin, 2003

\textsuperscript{201} \textit{Ibid}, Hanquin, 2003

\textsuperscript{202} Sand, Peter H. \textit{Lessons Learned in Global Environmental Governance} (1990): 213.
and hence different legal status.\textsuperscript{203} The ILC has, therefore, put its focus on the mitigation of such issues and prevention rather than compensation as it was traditionally.\textsuperscript{204} This section is relevant to the thesis and the succeeding specific discussion because it presents the varied types of damages that can be suffered and the classification for legal purposes. In transboundary maritime oil pollution, therefore, international law will focus on the damage type in determining liability.

\subsection*{3.2.2 Non-Accidental Damage}
Under this classification, the consequences from the injury are slow and gradual, and they occur over a period of time such as continuous but minimal oil leak or dumping of oil wastes into the maritime environment.\textsuperscript{205} The source of such harmful effects can be continuous or repeated acts that cause environmental damage. Due to the nature of some damages, International Environmental Law has not been able to deal with all the emerging cases.\textsuperscript{206} This example highlights the need for constant review of these laws, there has been extensive focus by the ILC and subsequent approval by the General Assembly on developing effective principles of prevention and mitigation in relation to transboundary damage.\textsuperscript{207}

The discussion of non-accidental damages is imperative because of the debate around substantive and procedural issues. When a state gets involved in the proper and accepted way of conduct and by the principles, and there is still damage, there is need to assess the extent of the damage and establish liability, but this does not mean that the state in question may not be held accountable because the damage is considered unconditional.\textsuperscript{208} This is to say that even if a state follows the right procedures in conducting its activities during offshore

\begin{footnotes}
\item \textsuperscript{203} S. A. Williams and A.L.C. de Mestral, Introduction to International Law, chiefly as Interpreted and Applied in Canada (1979), 251.
\item \textsuperscript{204} Ibid, S. A. Williams and A.L.C. de Mestral, 1979
\item \textsuperscript{205} Auburn, \textit{Offshore Oil and Gas in Antarctica}, 20 German Y.B. Int'l L. 139 (1978).
\item \textsuperscript{206} Birnie, Patricia W., and Alan E. Boyle. \textit{International law and the environment}. 1994.
\item \textsuperscript{208} Ibid, McCaffrey and Stephen C. 1976
\end{footnotes}
oil drilling or shipment, but there is still transboundary pollution, the state will still be held liable.\textsuperscript{209}

**3.2.3 Damage to the Global Commons**

Damage to the global commons becomes relevant for the current study because the offshore exploration and exploitation of oil has increased in the recent past and thus it has become important to know the legal standpoint in cases of transboundary maritime oil pollution. These places also become very relevant to the environmental law discourse because of the fact that no country can lay claim hence states may not take the necessary steps to mitigate and prevent pollution. This has allowed for international law to ensure that states which are involved in natural resource exploitation in such areas are held responsible for any damages.\textsuperscript{210}

The activities within the global commons are examples of the non-accidental damages because they occur over time and like mentioned earlier, oil exploration, exploitation and shipping can also cause non-accidental damages over time.\textsuperscript{211} The effects that occur gradually if not controlled at the right time may also lead to environmental damages to the communities that are around such areas.\textsuperscript{212} The other issue with the global commons is that the remedies taken by one state to prevent pollution may not be helpful if the other states involved in other activities within the area do not undertake the same remedies.\textsuperscript{213}

The Rio Conference, therefore, came up with a number of agreements that were meant to help in taking environmental action in such areas so as to effectively deal with the complex nature of environmental issues.\textsuperscript{214} The difference in the approach that these agreements took

\textsuperscript{209} \textit{Ibid}, McCaffrey and Stephen C. 1976
\textsuperscript{210} UN Doc. A/CONF.151/26 (vol. I); 31 ILM 874 (1992)
\textsuperscript{211} Transboundary damage in IL
\textsuperscript{213} \textit{Ibid}, Cymie P. and Peter. S, 2011
\textsuperscript{214} Note 150
is in relation to control. The agreements focused more on mitigation and prevention of such effects rather than the traditional approach of dealing with the consequences.\textsuperscript{215}

The discussions above have also served as a clear basis for the research question by giving the various classification of damages and stating clearly how such damages are classified under international law. Environmental law is a subset of public international law, and therefore it becomes important to understand that in the event of trying to understand transboundary maritime oil pollution, environmental law takes centre stage and energy law will only apply to the specific discussions. Therefore, damages become very necessary when having the discussion of transboundary maritime oil pollution so that in the next chapter it becomes easy for the reader to understand that damages that may be caused by offshore oil activities are different in a legal sense.

\textbf{3.3 MARITIME OIL TRANSPORTATION AND THE RISK OF TRANSBOUNDARY OIL POLLUTION}

Transboundary maritime pollution is one of the specific issues that should be discussed in order to clarify what the channels are leading to oil pollution in the high seas. Besides oil drilling and continuous exploration, maritime transportation poses the next biggest threat to maritime oil pollution. Due to the need to reduce the congestion that was experienced in the 1960s in the international navigational courses, the size required for the oil tankers were increased, but there were spills that led to the reversal of such a decision.\textsuperscript{216}

There have been massive oil spills even in recent history that are attributed to maritime transportation. An example is the Exxon Valdez oil spill in the region of Alaska in March 1989. It is remembered as one of the worst oil spills in the history of maritime industry where out of 58 million gallons, 10.9 million gallons was spilt to the Alaskan coastline.\textsuperscript{217} The

\textsuperscript{215} Note 151
\textsuperscript{216} J Willisch, State Responsibility for Technological Damage in International Law pg.9
\textsuperscript{217} Major Oil Spills of the Maritime World http://www.marineinsight.com/environment/11-major-oil-spills-of-the-maritime-world/
environmental damage that resulted in the Prince William Sound region was both extensive and devastating, affecting wildlife such as harbour seals, salmon and more.\textsuperscript{218}

The physical environmental cleaning ended after some time, but the suits that followed the spill were numerous and left many people seeking compensation. This was mainly because the spill in itself changed the way of life of the people living around Alaska’s coastline.\textsuperscript{219} The spill resulted in more than 30,000 claims which brought in over 200 lawsuits. Most of the people affected were the fishermen, coast workers, oil companies, motorists who claimed that gasoline prices went high because of the spill, lodging owners and more.\textsuperscript{220} The spill also led to one of the largest court settlement in environmental history when the US sued the owners of Exxon Valdez shipping company and received a settlement of 125 million dollars.\textsuperscript{221}

On March 16\textsuperscript{th}, 1978, a supertanker transporting oil, known as Amoco Cadiz, poured most of its 60.7 million gallons of crude oil into the sea on the coast of Brittany, France. This oil spill was a record mark in maritime pollution.\textsuperscript{222} The oil disaster caused extensive damage to the industries relying on the sea; business such as tourism, fishing and wildlife were affected resulting in a massive economic effect on coastal states.\textsuperscript{223} Besides the environmental pollution that occurred, the accident cost France millions of dollars to clean up the sea and to compensate the victims.

Maritime oil pollution has been caused by other oil activities besides shipping. An instance is a blow out of Ixtoc One, a drilling platform in the Gulf of Mexico in 1979. This accident

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\item \textsuperscript{218} Nagendra S, International Maritime Law Conventions, 1983
\item \textsuperscript{219} Ibid, Nagendra S, 1983
\item \textsuperscript{220} Ibid, Nagendra S, 1983
\item \textsuperscript{221} Michael Parrish, Exxon reaches 1 billion spill settlement bill, Los Angeles Times October 1991
\item \textsuperscript{223} Ibid, Conan and Ors, 1982
\end{itemize}
\end{footnotesize}
resulted in what has been described as the worst accident in the history of the oil disaster.\textsuperscript{224} The oil spill continued for nine months and caused massive and extensive damage to the coasts of United States. This resulted in hazardous effects for major industries which relied on the water in the region for their livelihood\textsuperscript{225}. There were concerns with the blow out that it would have had global impacts if the oil was sucked into the Straits of Florida and subsequently to the Gulf Stream.\textsuperscript{226} This would have led to even more devastating effects around the world and has gone to show how much such occurrences can lead to disasters that are widely transboundary in nature.

After several accidents that threatened the marine environment and especially from the oil spills, there were various agreement that were reached on the best way to prevent and regulate any further environmental damage. This was done particularly for the shipping operations and other emergency situations.\textsuperscript{227} The extent of the effects of pollution on the marine environment has led to many states adopting treaties on how the issues would be solved.\textsuperscript{228} The effects on marine diversity, human health, reproduction hindrance, interference with the tourism industry and other effects have led to various changes in the legal paradigm.\textsuperscript{229} For instance, it was after the Torrey Canyon disaster of 1967 that the International Convention for Civil Liability for Oil Pollution Damage (CLC Convention)\textsuperscript{230} came up with the international regime for civil liability caused by oil pollution.\textsuperscript{231} It has been consequently noted by the United Nation General Assembly that the treaties which have created a framework of international law on oil pollution have helped in reducing the number of such cases and hence the development of the law in ensuring the protection of the environment.\textsuperscript{232}

\textsuperscript{224} Victor P. G., \textit{Recovery for Economic Loss following the Exxon Valdez Oil Spill}, Journal of Legal Studies p.1
\textsuperscript{226} Ibid, Transboundary Damage in Int'l Law
\textsuperscript{227} Rumel Bulska and Osako
\textsuperscript{228} M. Bartels, Bibliography on Transnational Law of Natural Resources (1981).
\textsuperscript{230} International Convention for Civil Liability for Oil Pollution Damage (Brussels, 1969)
\textsuperscript{231} Ibid, International Convention for Civil Liability for Oil Pollution Damage, 1969
\textsuperscript{232} Ibid, Transboundary damage in Int'l Law
3.4 NATURE AND FOUNDATION OF INTERNATIONAL LIABILITY

It is necessary to understand the nature and the basis for international liability because the thesis seeks to establish the major issues of transboundary maritime oil pollution in relation to public international law. Therefore, in order to have a proper understanding of how transboundary issues are managed, there is a need to ensure that the thesis gives an analysis of international liability.

It has been proven in practice and theory that legal rules cannot stand on their own and they have to be set within specific institutional frameworks.\(^{233}\) There seems to be an indication that legal paradigms are developing quicker in theory than in practice\(^ {234}\). One of the cases that have been cited in all academic and legal discourses is the *Trail Smelter case* and how it shows that there has been a slow development of the legal practice in the international sphere.\(^ {235}\) International liability in international law is one of the core issues when discussing transboundary damage, and that is why there have been several attempts to explain it\(^ {236}\). The general principal of Liability in environmental pollution is that, the polluter bears the liability.\(^ {237}\) Victims’ claims can be on the basis of negligence or intent. Liability traditionally extends to economic loss, personal injury or loss of life but the Environment is held as a medium for damage as also an object of damage.\(^ {238}\)

Some environmentalists and international lawyers have argued that theories have been developed mainly to protect various interests and trade-offs, while others in a bid to get away with environmental damage focus on the economic benefits that are associated with some of

\(^{233}\) Ibid, Transboundary damage in Int’l Law
\(^{234}\) Ibid, Transboundary damage in Int’l Law
\(^{235}\) Ibid, Trail Smelter Case
\(^{237}\) Xinbao Z, Legislation of Tort Liability Law in China, pg. 133
\(^{238}\) Klein S. P, Liability and Compensation Due to Transboundary Pollution caused by offshore exploration and exploitation: IMO Competence and Development Guidelines, 2016. World Maritime University Dissertations. 531, pg. 66-69 [http://commons.wmu.se/all_dissertations/531]
the activities and also to escape liability. It is the basis and nature of liability that shows the commitment by states to put restrictions on their conducts and the willingness to protect the environment. Even though there is a general consensus on the direction that should be taken with regard to environmental protection and transboundary damages, the discrepancy in national laws on how to deal with such issues proves that there is still no harmonised way of dealing with the issues.

Due to technological advancement and increasing natural resource exploration in sea waters, there is also need for international law to harmonise laws that can adequately deal with transboundary maritime oil pollution even though it will prove to be difficult in the face of diversity in opinions among various states. There have been steps made to that end, and that is the origin of fault liability and strict liability. Even though attempts have been made, it is not easy to deal with the issue of international liability because of the need for proof by states of their faults. It, therefore, becomes very difficult to formulate the rules of liability and non-liability. International public law in this sense should be able to distribute fairly the losses that are occurred and ensure there is fair judgement even though this is never as easy in practice because each case is unique. Therefore there is a need to set a standards from which the courts or the tribunals are able to make the fair distribution of liabilities.

The rules governing transboundary damage are supposed to be normative and binding on all the parties involved including states and private entities. There are three dimensions to the

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239 Ibid, The Environment, Risk and Liability in International Law
240 Ibid, The Environment, Risk and Liability in International Law
241 Ibid, The Environment, Risk and Liability in International Law
243 P Keeton, Robert Keeton, G Kreating and Lewis Sargentich, Cases and Materials on Tort and Accident Law, 1998
244 Ibid, Keeton P. and Ors. Cases and Materials on Tort and Accident Law, 1998
245 Ibid, Keeton P. and Ors. Cases and Materials on Tort and Accident Law, 1998
discussion of international liability that should be taken into consideration so as to provide the proper framework for discussion; these are normativity, equity and efficiency.\textsuperscript{246}

Normativity in international law is used as a binding force and guidance to the acceptable ways of living and the approved standards and can also be referred to as legality and legitimacy.\textsuperscript{247} It is important to note that rules are normative in nature and therefore it is necessary to ensure that states accept the normative nature of laws in order for them to respect and accept to be bound by such rules.\textsuperscript{248} The normative rules are usually as a result of the conventions or treaties or even customary international law that is accepted by states, and hence they follow such rules without coercion.\textsuperscript{249}

Normativity is established when society and community have generally accepted the standard way of life. When there is an accepted standard, then everyone who is involved in that kind of activity is expected to act according to such standards and hence follow the rules that have been set.\textsuperscript{250} When one decides to go against the set standards or the accepted way of doing things, it may threaten public interest, security, safety, health, social interest and other spheres of societal life.\textsuperscript{251} It is, therefore, necessary to regulate the behaviour of people and to ensure that they follow the accepted codes of conduct. This same principle applies to internationally accepted standards of behaviour in various discourses including transboundary damage. It is important to note that it is easier to enforce laws and regulations at the national level and there are many ways that it can be achieved by the state. However, the same cannot be said of international legal systems as they are usually very general in nature and difficult to enforce and monitor.\textsuperscript{252}

\textsuperscript{246} Ibid, T.M. Franck, Fairness in the International Law and Institutions
\textsuperscript{247} Ibid, T.M. Franck, Fairness in the International Law and Institutions
\textsuperscript{248} T M Franck, Fairness in Intl Legal and institutional system
\textsuperscript{249} (Schachter, 1977)
\textsuperscript{250} Ibid, Schachter, 1977
\textsuperscript{251} Ibid, Schachter, 1977
\textsuperscript{252} H. Lauterpacht, Private Law Sources and Analogies of International Law. p60
In international law, it is very important for the states to consent to all the standards and to voluntarily commit to obey them. The binding nature of the agreements that states reach in order to give normativity to laws as stated;

“There is no better evidence of the legal conviction of governments than those international acts and agreements in which States formulate the law to be followed by international judicial tribunals.”253

States are usually more predisposed to solve any issues that arise out of transboundary damages through normal diplomatic negotiations rather than through liability and the law.254 This opportunity has also been recognised in international law, and therefore states have the prerogative of reaching agreements through diplomatic negotiations and such negotiations are usually done on an ad-hoc basis based on each situation.255 States are also not forced to accept certain facts as normative or as normally binding when they do not necessarily agree with such rules. It is therefore within the powers of the state to accept that certain ways or standards of life hence normative rules. Due to the issue of liability and the fact that states are not bound by certain agreements, the ICJ has been involved in lengthy discussions about the relationship between treaties and customary international law, various state practices and judicial decisions256.

The ICJ pointed out that in order to claim that a treaty provision has become general international law, the state in question should be able to show that the provision in question is norm creating, the provision has been accepted, recognised and it is approved by other states as a general principle of international law. A good number of state practice has shown that opinio juris and the states in question consider the provision as legally binding to them.257 It is therefore important to note that when states formulate laws, their paths are

253 (Hanquin, 2003)
254 Ibid, Hanquin, 2003
255 Ibid, Hanquin, 2003
256 Ibid, Hanquin, 2003
257 North Sea Continental Shelf, at 46–47, para. 85. also Delimitation of the Maritime Boundary, note 4, at 293, para. 91.
determined by the social, economic and political needs of the country, and hence they do not formulate such laws on the basis of harmony with neighbours. That is the main reason it becomes necessary to ensure that there are international legal systems that can control the selfish interests of states in the interest of environmental protection. The states that enter into international agreements, therefore, do not do so because of their need for idealism but because they face imbalance in their own interest and they need to protect them through such agreements.258 It is therefore in instances when the interests of the state meet that they come together to form laws or regulations that will lead to the pursuance of such interests.259

The major difficulty that is presently faced in determining an international liability regime for transboundary damage or pollution is that when human capacities are unable to control or avoid all injurious consequences of various activities, the law lacks the certainty to indicate the course of action that the said states should take when pursuing or allowing such activities, and the limits that should be observed.260 In this scenario, therefore, one of the most intriguing issues is the application of general principles, postulates, and maxims, by international courts and tribunals in damage cases such as “every violation of an engagement involves an obligation to make reparation,”261 and abuse of rights,262 good neighbourliness,263 and many more. It is imperative to question whether these principles are concrete and determinate enough so as to have acquired general normativity in all cases of transboundary damage.264

Going by the available judicial decisions, it may be difficult to argue that the principles are not sufficient but taking a deeper analysis of certain cases, the courts or the tribunals may have filled a gap in law by inserting general principles without explicitly declaring the issue

258 Ibid, Schachter, 1977
259 Ibid, Schachter, 1977
260 Bernhardt R. Encyclopaedia of Public International Law, 1992
261 Ibid, Bernhardt R. 1992
262 Ibid, Bernhardt R. 1992
263 Ibid, Bernhardt R. 1992
264 Schachter, International Law pg.51
Historically, individual states relied and have continued to rely on Treaty Laws and Regional regulatory framework or directives, for the management and protection of their territorial waters against effects of offshore activities such as scientific research or hydrocarbon exploration activities. However, the major challenges with such instruments are: the refusal of relevant states to sign such instruments as treaties, conventions and agreements; secondly, the process of ratifying treaty laws, directives and regulations are often times tedious and politicised, this slows down implementation and hampers the effect of the objective of the instruments.

The other issue that also falls under normativity of law is the fact that it should be applied in a consistent manner so that it is quite predictable. One of the principles of law is fairness and to be fair, the law must treat all those under it alike. Consistency is a very important factor in law because it allows for the treatment of the entities under it in equal measure and this is necessary for the development and authority of the law because if there is lack of equal treatment, then states would not accept such international laws. This is the same issue when dealing with the customary international law. When there is an accepted custom or practice that is recognised by states, it is important that all states adhere to it and also agree to the consequences of any kind of breach in equal measure.

This will be very applicable and relevant in transboundary maritime oil pollution, for instance, if the ‘polluter pays’ principle is adopted as the main principle in marine pollution, it is expected that all the states will face the same consequences in the event of any breach.

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265 Ibid, Schachter, International Law pg.52
266 Ibid, Schachter, International Law pg.52
267 Ibid, Transboundary damage in Int’l Law
268 TM Franck, Fairness in Int’l Law and institutions
269 Ibid, TM Franck, Fairness in Int’l Law and institutions
270 Jacob Austin, Canadian - United States Practice and Theory Respecting the International Law of International Rivers: A Study of the History and Influence of the Harmon Doctrine, Canadian Bar Review, vol. 37 (1959), p. 393, at p. 408. Disapproving the Harmon doctrine, the Legal Advisor of the Department of State of the US, discussing the uses of shared water resources with Mexico, said: ‘‘we are precluded from assuming a dog-in-the-manger attitude.'
that may occur.\textsuperscript{271} For instance, in the event of transboundary damage/pollution case, if a State claims for damage caused by the other neighbouring state on the grounds of international law principles, the former should be prepared to accept the same legal consequences of its activities causing pollution damage to the other state being accused.\textsuperscript{272} This is even more relevant in the case of international waters or the seas. With the increasing offshore oil exploration, exploitation/drilling, and shipping, it is important that states ensure that pollution is well contained. Due to the elevated nature of risks that are involved in maritime oil exploitation and the nature of the environment which can easily affect other jurisdictions, it is important for the states to accept the agreed rules and apply them consistently. The normativity of law is therefore very important in ensuring the success of international law because this success depends majorly on voluntary compliance by the states and acceptance of the said rules.\textsuperscript{273}

International liability also requires equity, and in essence, this means fairness and justice in allocating such liabilities.\textsuperscript{274} It is very important that in the process of determining the liability of the polluter, the shift of loss to the victim should be reasonable and the polluter should also not compensate unreasonable damages not corresponding to the level of damage caused.\textsuperscript{275} The normal social order can only be maintained by international law in the event that both parties are treated justly and fairly and hence the importance of equity. This principle has been used in law discourse to avoid certain issues that may arise due to the

\textsuperscript{271} Ibid, Austin J. Canadian Bar Review, 1959

\textsuperscript{272} Ibid, Austin J. Canadian Bar Review, 1959

\textsuperscript{273} Ibid, Austin J. Canadian Bar Review, 1959


\textsuperscript{275} Ibid, Richard B. S. \textit{Administrative Law in the Twenty-First Century}, 2003
general nature of the environmental principles that are used by the international courts or the tribunals.\textsuperscript{276} The allocation of loss is usually just and fair, but this may not be the case all the time when the law is applied in a very rigid manner. This may happen when the law is not sufficient or when the states that reach an agreement do not envision any kind of situation or deadlock when making the agreement.\textsuperscript{277} Laws have to be applied on a case-by-case basis and formulated laws cannot have everything covered initially. There are other issues that are usually unseen, and the law has to develop and grow within the context of arising issues.\textsuperscript{278} Aristotle states that;

“...all law is universal, but there are some things about which it is not possible to speak correctly in universal terms . . . So, in a situation in which the law speaks universally, but the issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his statement. Such a rectification corresponds to what the lawgiver himself would have acted if he had known. That is why the equitable is both just and also better than the just in one sense. It is not better than the just in general, but better than the mistake due to the generality. Moreover, this is the very nature of the equitable, a rectification of its universality.”\textsuperscript{279}

\textsuperscript{276} \textit{Ibid}, Richard B. S, \textit{Administrative Law in the Twenty-First Century}, 2003

\textsuperscript{277} For instance, in the Judgment in the Barcelona Traction case of February 5, 1970, the Court held that, in certain circumstances, equity ought to intervene to ensure a reasonable application of the law: ICJ Reports (1970), p. 3, at p. 48, para. 93. However, the Court deemed equity inapplicable in the particular circumstances of that case. In the Case Concerning the Continental Shelf (Tunisia / Libyan Arab Jamahiriya), the Court considered itself “bound to decide the case on the basis of equitable principles”: ICJ Reports (1982), p. 17, at p. 59, para. 70. For a positive view on the application of equity in international law, see Christopher R. Rossi, \textit{Equity and International Law: A Legal Realist Approach to International Decision-making} (Irvington, Transnational Publishers, 1993), and Xue, Hanqin. \textit{Transboundary Damage in International Law}, Cambridge University Press, 2003. ProQuest EBook Central. Created from UEF-ebooks on 2017-07-01 08:04:32.


\textsuperscript{279} \textit{Ibid}, Christopher R. R, \textit{Equity and International Law}, 1993
The importance of the equal application of the law is one of the most important and accepted facts among the states, and its relevance cannot be underestimated in the international law discourse. This can also further be proved by the Statute of the International Court of Justice Article 38(2) that clearly states that the enumeration of the sources of law that are to be applied by the court “shall not prejudice the power of the court to decide a case ex aequo et bono, if the parties agree thereto.”

The issue of equity has therefore been an important factor in the international law regime and matters of arbitration and treaty law. The equity principle is a factor that is necessary a case basis, and its application can neither be fixed or general because it can be used to avoid strict or rigid application of law or it can also serve to supplement the existing principles or in the event of any gap in the law.

### 3.5 LIABILITY AND COMPENSATION FOR OIL POLLUTION DAMAGE AT SEA

There are three international conventions that focus on liability. It is important to look into the issue of liability because it forms the legal basis for any redress that a state may seek after transboundary oil pollution. There is no major difference between liability and responsibility as they both refer to the legal consequences that follow a breach of international obligations.

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280 Article 38(2) of the Statute of the International Court of Justice, reprinted in Henkin, et al., Basic Documents, p. 129.

281 The Judgment in the *Barcelona Traction case* of February 5, 1970, the Court held that, in certain circumstances, equity ought to intervene to ensure a reasonable application of the law: ICJ Reports (1970), p. 3, at p. 48, para. 93. However, the Court deemed equity inapplicable in the particular circumstances of that case. In the Case Concerning the Continental Shelf (Tunisia / Libyan Arab Jamahiriya), the Court considered itself “bound to decide the case on the basis of equitable principles”: ICJ Reports (1982), p. 17, at p. 59, para. 70. For a positive view on the application of equity in international law, see Christopher R. Rossi, Equity and International Law: A Legal Realist Approach to International Decision-making (Irvington, Transnational Publishers, 1993).


283 United Nations, 1970
The word responsibility in this sense is used with the same meaning in UN General Assembly Resolution 2749 (XXV) of December 17, 1970, paragraph 14: “Every State shall have the responsibility to ensure that activities in the area ... shall be carried out in conformity with the international regime to be established.” Barboza states that “[A]t times, publicists and judges may employ the two terms (responsibility and liability) almost interchangeably or synonymously.” He added that:

“in certain general contexts, legal responsibility and legal liability may be given, in ordinary language, the same meaning, to say that a man is legally responsible for some act or harm is to state that his connection with that act or harm is sufficient, according to law, to render him liable to his victims for the consequences of his act or for the harm he has caused.”

Going by the statements above, it is clear that in legal spheres these two words can be used interchangeably, but when considered at a deeper level, they contain a difference whereby responsibility refers to something ‘wrongful’ while liability is ‘lawful’.

The current and prevailing international regime that focuses on the compensation of pollution damage that is caused by oil spills from tankers is based on two treaties that were ratified under the banner of International Maritime Organization (IMO), namely: International Convention on Civil Liability for Oil Pollution Damage (1992 Civil Liability Convention) and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention). The Civil Liability Convention and the Fund Convention succeeded two other similar Conventions adopted in 1969 and 1971 respectively.

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284 Ibid, UN 1970
285 Barboza, Julio. The Environment, Risk and Liability in International Law, BRILL, 2014. ProQuest EBook Central
286 Ibid, Barboza, Julio. The Environment, Risk and Liability in International Law, 2014
The above mentioned Civil Liability Convention focuses on the liability of ship-owners for oil pollution damage.\textsuperscript{290} It establishes the common principle of strict liability for the ship-owners and creates a system of compulsory liability insurance.\textsuperscript{291} Ship-owners are usually entitled to limit their liability to an amount which is linked to the tonnage of their ships. The Civil Liability Convention coupled with the Fund Convention, both of 1992, led to the establishment of an inter-governmental Convention known as the International Oil Pollution Compensation Fund (1992 Fund) which was aimed at supplementing the compensation to oil pollution victims in the event that the compensation from Civil Liability Convention is not sufficient.\textsuperscript{292} By becoming a member of the 1992 Fund Convention, a state inadvertently becomes a member of the International Oil Pollution Compensation Fund (Fund).\textsuperscript{293}

The sum of the available and approved compensation under the 1992 Conventions for any single incident is 203 million Special Drawing Rights (SDR) of the International Monetary Fund (USD 300 million as at 2006 exchange rates),\textsuperscript{294} and this included the sum that is payable by the ship-owner under the Civil Liability Convention of 1992.\textsuperscript{295} On 1 November 2006, 115 States were already parties to the Civil Liability Convention of 1992 and 98 States were parties to the 1992 Fund Convention.\textsuperscript{296} Since coming into force, the Fund Convention and the succeeding 1992 Fund Convention have been involved in 136 incidents that have occurred across 25 different countries, and they have paid compensation summing to approximately GBP 550 million (USD 1,000 million) to tens of thousands of victims.

\begin{itemize}
\item \textsuperscript{290} Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 421–423 ©2007 Koninklijke Brill NV. ISBN 978 90 04 16156 6. Printed in the Netherlands
\item \textsuperscript{291} Ibid, Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 2007, pg. 424
\item \textsuperscript{292} Ibid, Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 2007, pg.425
\item \textsuperscript{293} Ibid, Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 2007, pg.426
\item \textsuperscript{294} SDR has been converted into United States dollars at the rate of exchange applicable on 1 November 2006 (i.e., 1 SDR = USD 1.485280), today, November 14,2018, 1 SDR = USD 1.38
\item \textsuperscript{295} Ibid, Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 2007, pg.427
\item \textsuperscript{296} Ibid, Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 2007, pg.428-429
\end{itemize}
Most of the compensation claims above have been settled out of court, and a limited number of actions have been taken against the respective funds.\textsuperscript{298}

There was the formation of the third tier of compensation which was in the form of a supplementary fund that was established on 3 March 2005 by means of a Protocol to the 1992 Fund Convention adopted in 2003.\textsuperscript{299} Currently, there are up to 20 States that have ratified the Protocol to the 1992 Fund Convention adopted in 2003.\textsuperscript{300} The Supplementary Fund Protocol, therefore, brings the total amount available for compensation of pollution damage within the member states that have ratified the Protocol for any one incident to 750 million SDR (USD 1,100 million).\textsuperscript{301} The three different compensation funds discussed above, the 1992 Fund, the 1971 Fund and the Supplementary Fund are normally referred to together as the IOPC Funds, and they are all under a single secretariat that is headed by a director.\textsuperscript{302}

\textbf{3.6 CHAPTER SUMMARY}

This chapter set out to establish the discussion of transboundary damage within the field of public international law. Specific legal issues within maritime oil pollution were discussed in order to provide setup transboundary maritime pollution within a legal framework. First, we expanded on the notions of liability and responsibility which were previously established. The findings of the chapter point to a lack of consensus on the method of assigning liability and responsibility. It was stated that the traditional method of focusing on harm and compensation had been shifted to an approach focusing on prevention of damage in the first place.

\textsuperscript{297}\textit{Ibid}, Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 2007, pg.430
\textsuperscript{298}\textit{Ibid}, Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 2007, pg.431-31
\textsuperscript{299}\textit{Ibid}, Ndiaye and Wolfrum (eds), Law of the Sea, Environmental Law and Settlement of Disputes, 2007, pg.433
\textsuperscript{302}International Oil Pollution Compensation Supplementary Fund, Director’s Comments on the Financial Statements for the Financial Period 1\textsuperscript{st} January to 31\textsuperscript{st} December 2009
Subsequently, the chapter assessed the practice establishing responsibility and liability through ascertaining the physical relationship between the activity concerned and the damage caused, the role of human causation, establishing a threshold of sovereignty that and the transboundary movement of harmful effects. It was established that with respect to transboundary maritime oil pollution, damage could occur when damage-causing activities are located close enough to the maritime boundary with another state, close to areas subject to overlapping maritime claims. In such a case, the physical relationship between an activity and damage caused will not be hard to establish.

In the same vein, the requirement of human causality is important to transboundary maritime oil pollution. Since natural causes are also able to cause marine pollution, it is important that a link is established between the damage-causing activity and human causation in order to seek legal redress. The determination of threshold is relevant for determining the specific level of damage that is accepted. This is also useful for determining the legal consequence of damage, however.

The chapter also assessed various types of damages, including accidental and non-accidental damages. We also established that damage to the global commons is considered when discussing the legal implications of the transboundary maritime law. Subsequently, the chapter presented examples of oil accidents and the legal and economic implications these accidents have had.

Finally, the chapter considered the nature of liability and the international standards for liability and compensation of transboundary oil pollution. The chapter provided a look at the international conventions and funds which have been set up specifically for dealing with oil pollution in the high seas.

The next chapter provides an overview of some of the relevant regulatory frameworks in transboundary oil pollution, and the subsequent chapter concludes the research.
Chapter 4

4. DISCUSSION

4.1 REGULATORY FRAMEWORKS FOR OFFSHORE OIL POLLUTION

The preceding chapters have provided elaborate and insightful discussions into the issue of transboundary damages and the liabilities under it. Various sections have gone further to show the types of liabilities and the types of incidences that are likely when conducting oil activities in the high seas and the relevant conventions which have come into place to help control such conflicts. So far, the thesis has also looked into issues to do with states and how much they are of central role when talking of transboundary pollution and public international law.

It has been established that there is increasing industrial and technological activity in areas that were initially unexplored and this has led to various environmental concerns and including concern for the marine environment. After decades of onshore exploration have dominated oil production, companies and countries are turning to offshore or deepwater exploration, exploitation and drilling. These activities have the potential to cause extensive damage to the environment and in this case the marine environment. It is, therefore, the responsibility of the states in question to ensure that oil pollution is mitigated as much as possible. Offshore installations of oil and gas can cause blowouts, and it is the sole responsibility of the companies involved to ensure the safety of such so as to avoid devastating environmental damages. Blowouts of such oil wells can always lead to loss of lives, damage of marine ecosystem, loss of biodiversity, extensive economic impacts to the companies that are involved and to the third parties and many more.\footnote{Daniel J. BP Blowout: Inside the Gulf Oil Disaster, 2016, pg. 92} An example is the oil rig disaster which occurred in 1988 when the Piper Alpha oil rig exploded off the coast of United Kingdom causing 167 deaths and massive marine pollution.\footnote{Ibid, Daniel J. BP, Inside the Gulf Oil Disaster, 2016, pg. 92} There have been other oil disasters that have caused deaths and led to marine destruction, and so it has become
important that the regulation of marine oil pollution is primarily made up of both global and national efforts. When this is the case, the laws of a particular state will adequately protect the citizens and the environment from pollution.\textsuperscript{305}

Even though it is understood as such, the exploration of oil in deep waters is a global issue considering that there are no fixed boundaries in the sea. Thus it is important that international law has an influence on the national laws in reference to this issue.\textsuperscript{306} Offshore oil disasters always lead to environmental damages outside the territorial boundaries, and it is important that states cooperate in ensuring that such issues are well handled under the law.\textsuperscript{307} Some disasters or incidences that have happened in one state have also led to legal reviews in other states, and that goes to prove how much the issues of marine oil pollution are global in nature.\textsuperscript{308}

There are catastrophic incidents in offshore oil exploration that have led to a review of national laws, and some of the countries include Australia, the United Kingdom and the United States.\textsuperscript{309} These countries have been keen to make changes to domestic laws that govern offshore oil drilling, and there has been growth in that respect.\textsuperscript{310} Many other countries have also taken heed of the need for viable national regulatory frameworks, but this is not enough considering the complex nature of environmental issues hence the need for international agreements. The European Union (EU) has been in the forefront pushing

\textsuperscript{305} Ibid, Daniel J. BP, Inside the Gulf Oil Disaster, 2016, pg. 92
\textsuperscript{306} Ibid, Daniel J. BP, Inside the Gulf Oil Disaster, 2016, pg. 92
\textsuperscript{307} Ibid, Daniel J. BP, Inside the Gulf Oil Disaster, 2016, pg. 93-94
\textsuperscript{310} Ibid, Richard B. S. 2001
for the internationalisation of regulations that govern oil spills, emergency planning and response and financial liability for oil and gas pollution.\textsuperscript{311} This is due to the need to have a standard for the protection of the oil exploration and exploitation in the seas. The EU has recognised the need for ensuring that there is a regulatory framework for such incidences due to the global nature of such accidents and the need for safety and sustainability in offshore oil and gas exploration.\textsuperscript{312} The states are very keen on ensuring they maintain control of their jurisdictions and therefore there has not been any move to have a single treaty that controls such issues, but there is a need for standardisation of rules.\textsuperscript{313}

On the liability and compensation for transboundary damage that results from offshore oil installations, there are no common global principles as compared to the liability and compensation regime for transboundary damage caused by oil shipping vessels.\textsuperscript{314} The legal committee of the IMO in 2010 agreed to make recommendations to the IMO Council on an amendment to the organisation’s strategic plan to enable the committee to consider the issues to do with liability and compensation.\textsuperscript{315} Two years later in 2012, the legal committee made a decision that there was no compelling need at the moment to set up or come up with an international regime because the regional and the bilateral agreements were sufficient and more effective in handling such issues.\textsuperscript{316}

States have therefore come together to form various groups and forums that are focused on sharing information on dealing with specific issues on offshore oil and gas exploration and exploitation. The International Regulators Forum that was formed in 1994 was mainly for the collaboration in order to move forward the safety and health sector by having joint

\begin{itemize}
  \item \textsuperscript{311} Talus, Kim, ed. \textit{Research handbook on international energy law}. Edward Elgar Publishing, 2014, pg.549
  \item \textsuperscript{312} Commission Decision of 19\textsuperscript{th} January 2012 on setting up of the European Union offshore oil and gas authorities group, 2012 C 18/07, OJC 18/8, 21/01/2012, Art 2(1)
  \item \textsuperscript{314} \textit{Ibid}, Gunther H. \textit{International Accountability for Transboundary Environmental Harm Revisited}, 2007
  \item \textsuperscript{315} International Maritime Organization Legal Committee IMO-LEG 97\textsuperscript{th} session, 15-19\textsuperscript{th} November 2010
  \item \textsuperscript{316} \textit{Ibid}, IMO-LEG 97\textsuperscript{th} session, 15-19\textsuperscript{th} November 2010
\end{itemize}
programs and through the sharing of information.\textsuperscript{317} The forum consists of decision makers from the offshore oil sector in countries such as Brazil, Australia, Canada, Denmark, Mexico, United Kingdom, USA, Norway, Netherlands and New Zealand.\textsuperscript{318} The other forum that was formed is the North Sea Offshore Authority Forum (NSOAF) that was formed in 1989 so as to ensure improvement in health, safety and the environment in the North Sea petroleum activities.\textsuperscript{319} The member countries of NSOAF include; Denmark, Germany, Faroe Islands, Ireland, Netherlands, Norway, Sweden and UK and all these countries are represented by their national offshore oil industry regulatory authorities.\textsuperscript{320} The members of the forum meet once each year, and their work is divided into various issues including the environment.\textsuperscript{321}

The formation of the above forums is quite necessary for the protection of the marine environment in the increasingly complex area of environmental oil pollution because they provide the platforms for emergency planning cooperation and for mutual support in the event of an issue. These kinds of forums are also important as they make it easy for public international law to operate and regulate when states take such initiatives. Transboundary maritime oil pollution can, therefore, be handled at various levels, and regional or bilateral agreements and standardisation or rules are one of the ways in which it can be regulated and any emergencies handled with the understanding and support of other states.

4.1.1 Levels of Regulations Covering Transboundary Regulation
It has been identified and constantly pointed out that there is no single rule that applies to all states when it comes to marine pollution and it is the various treaties and bilateral agreements that cover such issues in addition to other sources of public international law such as the general principles and customary international law. It is therefore important to discuss the

\textsuperscript{317} International Regulators Forum: Global Offshore Safety \url{http://www.irfoffshoresafety.com/about/} accessed on 30\textsuperscript{th} June 2017
\textsuperscript{318} Ibid, Global Offshore Safety \url{http://www.irfoffshoresafety.com/about/}
\textsuperscript{319} Petroleum Safety Authority Norway: Regulations \url{http://www.ptil.no/regulations/category873.html} accessed on 1\textsuperscript{st} July 2017
\textsuperscript{320} Ibid, Petroleum Safety Authority Norway: Regulations \url{http://www.ptil.no/regulations/category873.html}
\textsuperscript{321} Ibid, Petroleum Safety Authority Norway: Regulations \url{http://www.ptil.no/regulations/category873.html}
various levels of regulations and the main actors when it comes to transboundary maritime oil pollution. Our attention now turns to focus on regional regulations and how they interact with international instruments in ensuring marine protection.\textsuperscript{322} It would not be very realistic to study international law and fail to recognise and point out the interplay between the national laws and institutions, regional, sub-regional and global laws.\textsuperscript{323}

There are several and sometimes overlapping agreements from the regional to international level that are aimed at the protection of the marine environment against pollution, and these have to be clearly pointed out and discussed.\textsuperscript{324} It is very important for policymakers to ensure that the regional and global frameworks for the protection of the marine environment are complimentary by understanding the advantages and the disadvantages of the different set of laws.\textsuperscript{325} The issue of regional and subregional regulations, therefore, prove the complexity of international legal systems and the need for a proper analysis before making any general laws.\textsuperscript{326} The issue of transboundary maritime oil pollution will, therefore, require the input of various issues and regulations that are currently in at play in various regulatory levels.

When discussing the levels of regulation in international law, it is important to have some insight on the steps that have been taken and the regulations that set the stage for international law to take pace. There were numerous obstacles that were encountered earlier in the pursuit to have viable regulations, but nations later saw the need and the importance of such regulations in order to protect the environment.\textsuperscript{327} Initially, there were regulatory approaches


\textsuperscript{323} \textit{Ibid}, Vidas, D, Protecting the Polar Marine Environment, 2000

\textsuperscript{324} \textit{Ibid}, Vidas, D, Protecting the Polar Marine Environment, 2000


\textsuperscript{326} \textit{Ibid}, H. Ringbom (ed.), \textit{Competing Norms in the Law of Marine Environmental Protection}, 1997

in order to prevent common intentional oil discharges that occurred at sea and would cause transboundary harm.\textsuperscript{328} According to statistics, in 1953, out of the 250 million metric tons of oil that were transported by sea, 300,000 metric tons were intentionally discharged into the sea.\textsuperscript{329} It is estimated that due to the increasing number of oil transportation by sea over the years, intentional discharges of crude oil at sea ranges up to 5 million metric tons each year.\textsuperscript{330}

These intentional oil discharges at sea represent two-thirds of oil pollution at sea, and therefore it is important that they be covered by Marine Protection Treaties. The issue of intentional discharges at sea happens when ships are on a return journey, and they intentionally dispose of the ‘clingage’ at sea.\textsuperscript{331} This refers to the remains of crude oil that adheres to the walls of tankers like mud after it delivers the cargo. Two standard industry practices were that clingage is mixed with seawater during the return trip in a process referred to as ballast.\textsuperscript{332} This was done in two ways; the filling of the tankers with sea water so as to stabilise the ship for the return trip or the use of high-pressure seawater to clean the clingage.\textsuperscript{333} Such discharges may seem negligible, but they may result in massive pollution problems at sea which would likely cause transboundary damage as well.

The aftermath of the Second World war birthed the worry about the environmental impacts of human activities on the marine environment, including the uncontrolled disposal of wastes into the ocean. This led to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter of 1972, known as the London Convention.\textsuperscript{334} This Convention

\textsuperscript{328} Ibid, Mitchell R. Intentional Oil Pollution at Sea, 2017
\textsuperscript{329} Ibid, Mitchell R. Intentional Oil Pollution at Sea, 2017
\textsuperscript{331} The range of more recent estimates reflects the increase in oil transported and the variance in assumptions that underlie different analyst estimates. There are alternative estimates in the National Academy of Sciences.
\textsuperscript{332} Ronald B. M. Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance, 1994
\textsuperscript{333} Ibid, Ronald B. M, 1994
\textsuperscript{334} https://www.epa.gov/ocean-dumping/ocean-dumping-international-treaties
is one of the first international agreements for the protection of the marine environment from human activities. Contracting Parties to the London Convention and the London Protocol agreed to control dumping by applying regulatory instruments to assess the need for, and the potential impact of, dumping. The London Convention in particular requires that Contracting Parties issue permits for the dumping of wastes and other matter at sea, and generally prohibits the dumping of certain hazardous materials.

Due to the nature of the sea and the damage that was foreseen by scientists, the effects of such pollution could not be restricted to one territory, and that brings in the issue of transboundary oil pollution and hence the need for states to agree on certain governance levels when it comes to oil pollution. There is no state with the legal authority to regulate international waters, and even if there may be national laws, factors such as discharges at sea are beyond the scope of the national laws hence need for international governance however difficult.335

Under international law, flag states have the jurisdiction to enforce certain laws in relation to sea pollution.336 It is therefore within their powers to monitor, penalise, investigate and charge any tankers that are registered to them despite the location of the violation.337 The other states under international law such as the coastal states have very limited action level or powers in relation to sea pollution, but they can collect evidence of any violation so as to forward to the flag state for prosecution.338 This happens in the event that a tanker causes territorial damages to a state, but then it does not enter any of its ports. It is only when a particular tanker breaches any of the international rules of the sea on territorial waters and then enters the port of the country that the state in question has the jurisdiction to investigate, prosecute and penalise the tanker as stated under international laws.339 Therefore the coastal

335 Ibid, Ronald B. M, 1994
336 Ibid, Ronald B. M, 1994
337 Ostrom, E. Governing the commons, 2015
338 Ostrom, E. Governing the commons, 2015
339 Ostrom, E. Governing the commons, 2015
states usually face very limited options when it comes to pollution caused by such oil tankers in their territorial waters hence the need to ensure they are well protected under international law so that they do not suffer uncompensated damages.\textsuperscript{340}

### 4.1.2 Basics of International Oil Pollution Regulation

Despite the numerous challenges that have been faced in this regard, there are steps that have been taken, and nations have concluded a number of agreements that require governments to implement and enforce regulations that would reduce such oil discharges and hence oil pollution.\textsuperscript{341} One of the first approaches to ensuring control of intentional discharge was the de-alienation of specific places where such discharges could occur away from all the coastlines of countries with the argument that by the time the oil mixed with water reached the main coastlines, the harmful effects would have dissipated.\textsuperscript{342}

OILPOL and MARPOL have zoned points that are considered as requiring of special protection and the points that tankers can conduct the discharge, and it was clearly spelt out in the conventions.\textsuperscript{343} Within the zones that have been specified by the conventions, there are limits that are measured of the possible discharges, and the discharges are prohibited out of the “safe zones”.\textsuperscript{344} MARPOL and OILPOL also adopted the strategy of ensuring that the overall amount of ballast per voyage is limited to a certain amount so that there is an overall reduction of the oil discharged at sea and not only those that go to the demarcated zones.\textsuperscript{345}


\textsuperscript{345} William G Waters, Treavor D Heaver and T Verrier, Oil Pollution from Tanker operations- Causes, Costs, Controls (Vancouver, BC Centre for Transportation Studies, 1980), pg.89-91
There were also other technological restrictions that were put into place that required just certain specifications for the tankers so as to reduce clingage and other wastes as a result of the return trip by tankers.\textsuperscript{346}

Even though in the 1920s environmental concerns were not popular in the public domain, non-governmental organisations in certain countries like the UK and USA at that time focused on the issues and pushed for the regulation of intentional discharges.\textsuperscript{347} Despite the efforts that were put into place by USA and UK for a single treaty to control oil pollution at sea, they were never signed and hence never came to force, but this gave a good basis from which other regulations thrived.\textsuperscript{348} Even though there were no breakthroughs for the formation of a single convention before the 2\textsuperscript{nd} World War, the draft agreements that were reached provided a basis for agreements that took place after such as the 1954 International Convention for the Prevention of Pollution of The Sea by Oil.\textsuperscript{349} There were several claims of increased sea pollution through the oil discharges, and countries like the UK and USA made reports of dead seabirds and destroyed coast beaches which led to increased demand for the regulations that followed.\textsuperscript{350} It was after these reports that a coalition of NGOs including bird protection societies, tourists and hotel organisations, and local governments came together to form the UK Advisory Committee on Prevention of Pollution of the Sea by Oil (ACOPS).\textsuperscript{351}

In the years following that, there were complains of increased oil discharges in the sea by tankers, and once again there was concern that the earlier agreements and regulations were not doing much to prevent pollution of the sea and then came the 1962 amendments.\textsuperscript{352} The

\textsuperscript{346} Ibid, William G Waters and Ors. Oil Pollution from Tanker operations, pg.89-91
\textsuperscript{351} J H Kirby, “The Clean Seas Code: A Practical Cure of Operational Pollution in International Conference on Oil Pollution of the Sea
\textsuperscript{352} Ibid, J H Kirby, The Clean Seas Code
states that surround the Mediterranean Sea were not convinced with the level of regulation, and they convened a conference of 11 states in 1959 that recommended the extension of the zones previously agreed on and the complete banning of operational discharges.\textsuperscript{353} There were several changes later on the provisions of the earlier conventions mainly pushed by the UK and with support from other countries.\textsuperscript{354}

In the 1960s, there was overwhelming evidence on the extensive damage that oil was causing and how long the oil could stay in the sea and the after effects. It was the grounding of the Torrey Canyon in 1967 that led to more push for the control of oil pollution.\textsuperscript{355} Governments raised border concerns over oil pollution and many states within Europe got concerned about marine oil pollution, and this led to the signing of various agreements hence the growth and development of public international law.\textsuperscript{356}

The growing interest in the protection of marine environment took shape in the 1970s with the holding of United Nations Conference on the Human Environment and the London Dumping Convention.\textsuperscript{357} The growing concerns were due to the significant increase in the trade of crude oil in the 1960s and 1970s, and even though the discharges had reduced considerably, there was still the issue of increased oil activities in the maritime zones.\textsuperscript{358} Most countries, therefore, were in the forefront pushing for further regulations that would be stricter than the 1969 amendments. These concerns and continued push from the developed nations with coastal lines such as Canada, New Zealand, and Australia led to the 1973 International Convention for the Prevention of Pollution from Ships.\textsuperscript{359}

\begin{thebibliography}{99}
\bibitem{353} Ibid, J H Kirby, The Clean Seas Code
\bibitem{354} Ibid, J H Kirby, The Clean Seas Code
\bibitem{356} Ibid, Mitchell, R. B. 1994
\bibitem{357} Ibid, Mitchell, R. B. 1994
\bibitem{358} M'gonigle, R. M. (1979). \textit{Pollution, politics, and international law: tankers at sea}. University of California Press., pg.118
\bibitem{359} Ibid, M'gonigle, R. M, 1979
\end{thebibliography}
There were several changes that the convention made in relation to oil activities in the sea and the tankers that were to transport oil. Several agreements were reached on more detailed specifications for the tankers, and hence this development led to several technological changes and advances.\textsuperscript{360} The Tanker Safety and Pollution Prevention conference was held in 1978, and they came up with the protocol to the 1973 convention.\textsuperscript{361} The protocol added a lot of weight to the issue of compliance, and hence it was part of the legal development.\textsuperscript{362}

The topic of compliance became very relevant in the 1980s when the former Intergovernmental Maritime Consultative Organization (IMCO) became the International Maritime Organization.\textsuperscript{363} The proliferation of agreements led to some difficulties in having a proper compliance mechanism, and this led to the IMO General Assembly resolution that the Marine Environment Protection Committee should only consider amendments based on well documented and compelling need.\textsuperscript{364}

### 4.1.3 UNCLOS and Transboundary Oil Pollution

It is necessary to look into the major international regulatory regimes that have been in place for a period of time and how they have managed to influence the growth and development of public international law in relation to transboundary oil pollution. The law of the sea is seen as global and therefore there is little mention of regionalism in the United Nations

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\textsuperscript{360} Ibid, M’gonigle, R. M, 1979

\textsuperscript{361} IMCO Conference on Tanker Safety and Pollution Prevention, Marine Technology, Vol. 15, No. 3, July 1978, pp. 297-307


\textsuperscript{363} International Maritime Organization: Brief History of IMO [http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx](http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx) accessed on 2\textsuperscript{nd} June 2017

\textsuperscript{364} International Maritime Organization: Marine Environment Protection Committee [http://www.imo.org/en/KnowledgeCentre/IndexOfIMOResolutions/Marine-Environment-Protection-Committee-MEPC/Pages/default.aspx](http://www.imo.org/en/KnowledgeCentre/IndexOfIMOResolutions/Marine-Environment-Protection-Committee-MEPC/Pages/default.aspx)
Convention on the Law of the Sea.\textsuperscript{365} The ICJ has been keen not to use regional or sub-regional laws in the adjudications, and therefore it ensures that it gives conclusions based on general principles of law that are accepted by all states.\textsuperscript{366} The UNCLOS has been able to present a clear picture on the need for a comprehensive and a global regulatory framework when it comes to issues arising out of sea use.\textsuperscript{367}

Oil pollution at sea has been an issue and one of the major concerns of environmentalists since 1926, even though attempts to regulate the area failed until 1954 when states agreed to sign the International Convention for the Prevention of Pollution of the Sea by Oil.\textsuperscript{368} It is, therefore, necessary to know some of the relevant provisions of UNCLOS that can directly be applicable to transboundary maritime oil pollution.

The principles of environmental law require that due care is taken when conducting activities that can cause transboundary harm and UNCLOS Article 206 provides for the assessment of potential effects of activities:

\textit{“When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.”}\textsuperscript{369}

\begin{footnotesize}

\textsuperscript{366} Ibid, Vicuna, F. O. pg. 97-127


\textsuperscript{368} International Convention for the Prevention of Pollution of the Sea by Oil, 1954 (London, 12 May 1954)

\textsuperscript{369} United Nations, 1970
\end{footnotesize}
The other relevant section to consider is Article 194(2) of UNCLOS because it gives the explicit clarification that;

“States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

Article 193 allows states the right to develop their natural resources under the consideration of their natural environmental policy. However, the article also emphasises that the responsibility of the state to protect and preserve the marine environment. Other articles, such as Article 192 and Article 194 (1) provide general provisional measures for preventing, reducing and controlling pollution of the marine environment. These are also considered to be a part of the international customary law.

Articles 195 and 197 requires states not to transfer damages and hazards to each other or transform one form of pollution into another. The convention is also important because it lays out the enforcement procedure for the rules on marine pollution prevention, specifically in Article 217. The UNCLOS takes into account the protection of the marine environment during the offshore development of oil as reflected in Article 207. Article 207 allows states to adopt laws and regulations that prevent, reduce and control pollution of the marine environment from land-based sources. The Article admonishes states to take into account internationally agreed rules, standards and recommended practices and procedures when taking the necessary measures needed to prevent, reduce and control such pollution.

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370 Ibid, UN 1970
371 Ibid, Anyanova, 2012
372 Ibid, Anyanova, 2012
373 United Nations, 1970
374 Ibid, UN, 1970
375 Ibid, UN, 1970
Section 5 of Article 236 (Number 3) establishes the rules with regards to liability and responsibility, it states that States and competent international organisations shall be responsible and liable pursuant to Article 235 for damage caused by pollution of the marine environment arising out of marine scientific research undertaken by them or on their behalf. The objective of the provisions in Article 235-236 is relevant and applicable to pollution arising from Hydrocarbon exploration. The harmful effects from offshore pollution during scientific research is of similar nature with harmful effects from offshore oil pollution. UNCLOS, hence, remains relevant in the governing and regulation of maritime activities including protection from transboundary oil pollution. It presents several useful provisions which have aided the reduction and control of transboundary oil pollution. However, these cannot be dealt with individually.

4.2 IMO AND TRANSBOUNDARY OIL POLLUTION
The International Maritime Organization (IMO) is a special United Nations agency that was established by the Convention on International Maritime Organization in 1948 with the current membership at 166. It is one of the recognised bodies that play an important role in international law with a particular focus on maritime issues. Being an agency of the UN, it has the highest mandate given by the states because of the number of states that are members to UN. Article 1(a) of the IMO Convention states;

“To provide machinery for cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships; and to deal with administrative and legal matters related to the purposes set out in this Article”.

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376 Ibid, UN, 1970
377 International Maritime Organization http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx accessed on 2nd June 2018
378 United Nations, 1948
The IMO Convention set out to provide a machinery for co-operation among states in the field of governmental regulation and practices relating all kinds of matters affecting shipping and international trade, as well as the adoption of practicable standards in matters concerning maritime safety, the efficiency of navigation and prevention and control of marine pollution from ships\(^{379}\). While the Convention was established in 1948, it was not until 1975, during the 9th Assembly that the IMO included the prevention of marine pollution as one of its core functions. It was also at this time that the name of the Organization was changed to the International Maritime Organization\(^{380}\).

There are numerous conventions that have subsequently been ratified under the IMO most of which address specific issues. The key conventions include:

- International Convention for the Safety of Life at Sea (SOLAS), 1974, as amended
- International Convention on Standards of Training, Certification and Watch Keeping for Seafarers (STCW) as amended, including the 1995 and 2010 Manila Amendments

### 4.3 EMERGING TRENDS IN TRANSBOUNDARY MARITIME OIL POLLUTION

One of the major issues arising in the research on international law with reference to transboundary pollution has been that of compliance and effectiveness\(^{381}\). It is important to look into issues of compliance and effectiveness so as to establish if MARPOL (International Convention for the Prevention of Pollution from Ships) has been in any way instrumental in the prevention of transboundary maritime. Even though it may be difficult to prove the extent to

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\(^{379}\) *Ibid*, IMO, 2018

\(^{380}\) *Ibid*, IMO, 2018

which international laws are effective, it is possible to have certain thresholds that can help in determining the level of effectiveness and compliance by states.\textsuperscript{382}

Transboundary maritime oil pollution still remains one of the biggest issues facing countries despite the steps that have been taken in the development of international law. It is therefore important that emerging issues such as compliance and effectiveness are looked into critically. OILPOL and MARPOL have been very instrumental in the development of regulatory instruments, and it is obvious that they have led to better transboundary maritime oil pollution, but it remains to be seen how much the agreements that are made under these conventions can be monitored for compliance in the global network.

Some scholars have argued that it is not necessary to have a very high level of compliance mechanism due to the issue of national interests that come into play when negotiating on environmental issues.\textsuperscript{383} It is argued that a high level of compliance does not necessarily mean that the treaties will be successful in controlling transboundary maritime oil pollution. There is a need for increased negotiations on environmental issues and agreement among states at different levels on how to manage transboundary pollution. These negotiations should take place nationally, regionally and internationally. OILPOL and MARPOL have been very instrumental, and at the least, they have been able to mitigate marine oil pollution. These two bodies provided the right platform to regulate and address marine oil pollution from various sources.\textsuperscript{384} The two bodies coupled with the IMO which was always considered by states as the main regulatory framework have been the main frameworks within which to address transboundary maritime oil pollution.\textsuperscript{385}


\textsuperscript{385} Ibid, MARPOL
There are emerging issues that will still require research from various scholars and scientists and this thesis has tried to link transboundary maritime oil pollution and public international law. It is clear that there are other issues within international law that need to be addressed and a few loopholes sealed. The continued growth of international law and the increased maritime oil activities provide the basis for further studies and research into this sensitive area.
Chapter 5

5.1 CONCLUSION

There have been developments in the arena of transboundary pollution and its stance under public international law. Specifically, there has been commendable progress in ensuring that international law adequately and effectively covers transboundary pollution. In the Stockholm Conference on the Human Environment in 1972, the states took progressive steps in liability and compensation for environmental damage that is caused beyond the territory of a state. It has been discussed and demonstrated above how states have made subsequent approaches in ensuring that laws covering transboundary damages were progressive both nationally and internationally.

It is important to understand that globalisation is having an immense impact on international law. The traditional approach in which international law was mainly for relations between countries is fast waning and globalisation is now leading to a more developed international law that multi-layered and complex. Most states are now borrowing or conducting legal transplant more than before, and there are more progressive approaches to increase regulatory frameworks in various areas. The same situation is experienced in transboundary maritime oil pollution, and states have recognised the importance of cooperation in the environmental field. The complexity of the environmental issues and the nature of the environmental realm compel states to come up with common regulatory approaches so as to contain any possible damages to the environment.

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386 The United Nations Conference on the Human Environment (also known as the Stockholm Conference) was an international conference convened under United Nations auspices held in Stockholm, Sweden from June 5-16, 1972. It was the UN's first major conference on international environmental issues, and marked a turning point in the development of international environmental politics.

387 Ibid, UN Conference on the Human Environment

388 Ibid, UN Conference on the Human Environment


Due to the increase in oil activities in deep waters and hence the increased risks of transboundary oil pollution, it is important that the thesis clearly points out at the glaring possibilities and the ways in which they can be handled under international law. Accidents such as the deepwater oil spills led to international legal challenges on the effectiveness of law in such issues. The risks of transboundary maritime oil pollution have been mapped to be higher in areas such as the North Sea, the Gulf of Guinea, the Mediterranean Sea (off Tunisia and Libya), off Greenland, and the Arctic Ocean. It has to be recognised that there are cases in which the law has been very inadequate and lacked the capacity to enforce certain issues such as in 2009 Montara oil spill in the Timor Sea, off the coast of Western Australia. This blow-out at a well operated by an Australian subsidiary of a Thai company caused serious pollution damage in Indonesia. The Australian and Indonesian governments quickly agreed that the rig operator was responsible. Indonesia was not in a position to recover most of the compensation from the private companies, and such incidences pointed to the inadequacies of international law and the subsequent quest for improvements. It has been established that there have been consultations and discussions on the need for a proper international regime on compensation and liability the same way maritime oil transportation has a more cohesive Civil Liability and Fund Conventions regime.

Cooperation on the matters of transboundary maritime oil pollution has become obligations that are considered basic in international law. The only way to know how much such

392 Ibid, Gold E. Pollution of the sea and international law, 1971
394 Ibid, Mason .M, Civil Liability for Oil Pollution Damage, pg.4 - 6
395 Ibid, Mason .M, Civil Liability for Oil Pollution Damage, pg.8 - 12
international rules are being embraced is by looking at the responses by the states involved. The success and affectivity of international therefore depend so much on the regional instruments that have been put in place to ensure that states take responsibility for their actions and the same is the case for transboundary maritime oil pollution. The success of such instrument also depends on the values that these countries practice and accept under international law in reference to the environmental issues.

This thesis has therefore extensively covered the issues around transboundary maritime oil pollution. The thesis has gone into the background of the study and its importance especially at the moment, and it came to the conclusion that such a topic is necessary at the moment due to the increased oil activities in deep waters. It is also important to note that maritime oil pollution is not a very new phenomenon, and this is a subject that has been tackled by various writers in the past, but there are aspects of maritime oil pollution that is quite current. Oil transportation, as the research established, began way back but oil exploration and exploitation in deep waters had not taken root like it has now and therefore it is important that this issue be critically looked into now. The thesis, therefore, gave insights into such useful background of transboundary maritime oil pollution and the likely methods of maritime oil pollution. This provided a viable foundation for the discussion and the development of the whole research.

The thesis then looked at the activities or accidents by the oil companies and the effects that they had on the marine environment and the resultant impact on the development of international law. It, therefore, gave the thrust to discuss international law in this context therefore directly linking the title and giving it relevance. By looking at the oil-related activities that cause marine pollution, the research also gave the opportunity to delve into the development of regulatory frameworks that have been in place since the 1960’s with a view

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to establishing the growth of international law in the realm of marine oil pollution. The research then delved into the issue of international law selectively and then in relation to transboundary marine oil pollution, therefore, getting into the specific details of the research topic. The thesis looked at the various legal regimes that have been put in place nationally, regionally and internationally to control transboundary maritime oil pollution and the rising environmental complexity that requires the cooperation of states.

In conclusion, therefore, it is clear that countries will continue with various negotiations so as to try and protect the marine environment from transboundary oil pollution and this will be done under the auspices of international law. 399 It is also clear that more environmental problems will still crop up in the future forcing states to cooperate and come up with even more viable regulations and with the increased oil activities in the marine environment, the development of public international law is inevitable. The kind of treaties that countries will come up with will only be effective based on the kind of compliance and monitoring systems that will be put in place by such treaties.400 It is also very true that power and political interests have so much to do with the agreements that state make and in having such research, such parameters are considered and briefly discussed. States are sovereign just as mentioned and therefore the interests of the states have so much to do with the development of law in this regard.
