

**TOWARDS A SUSTAINABLE CIVIL LIABILITY AND COMPENSATION  
REGIME FOR OFFSHORE OIL RIG POLLUTION IN AFRICA**

**By**

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## **Dedication**

To the Divine Trinity: **GOD JEHOVAH, JESUS** and **THE HOLY SPIRIT** and those who lost the breadwinners of their family on the verge of starting their university education.

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## Abbreviations

AIMS	-	Africa's Integrated Maritime Strategy
AMD	-	Africa's Maritime Domain
AMTC	-	African Maritime Transport Charter
CLC	-	International Convention on Civil Liability for Oil Pollution Damage
CLEE	-	Convention on Civil Liability for Oil Pollution Damage resulting from Exploration and Exploitation of Seabed Mineral Resources
CLCS	-	Commission on the Limits of the Continental Shelf
CSC	-	Continental Shelf Convention, 1958
EEZ	-	Exclusive Economic Zone
HSC	-	High Seas Convention, 1958
ILC	-	International Law Commission
IMO	-	International Maritime Organisation
IOPC	-	International Fund for Compensation for Oil Pollution Damage, 1971
ISA	-	International Seabed Authority
ITLOS	-	International Tribunal of the Law of the Sea
LMO	-	Living Modified Organisms
LNG	-	Liquefied Natural Gas
MARPOL	-	International Convention for the Prevention of Pollution from Ships, 1993
OPA	-	Oil Pollution Act, 1990
OPOL	-	Oil Pollution Liability
OPRC	-	International Convention on Oil Pollution Preparedness, Response, and Cooperation, 1990
OSPAR	-	Convention for the Protection of the Marine Environment of the North Atlantic 1992
P&I	-	Protection and Indemnity Club
SDR	-	Special Drawing Rights

TSC	-	Territorial Sea and Contiguous Zone Convention, 1958
UNCLOS	-	United Nations Convention on the Law of the Sea, 1982
UNEP	-	United Nations Environmental Programme
UNTS	-	United Nations Treaty Series
USA	-	United States of America



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## **Abstract**

Notwithstanding that civil liability for pollution damage as well as compensation is emphatically recognised and established under international treaty, there is a conspicuous absence of a single comprehensive regional framework as well as universal treaty that address this issue with regards to offshore oil and gas exploration. The reason for this might not be unconnected to the occasional occurrence of offshore platform and oil well blowouts. Meanwhile, offshore operations pose a constant threat to the marine environment particularly in the face of new and continuous technological advancement as well as human quest for energy-oil supply, which has encouraged ultra deep exploration of oil and gas, therefore making ecological disaster imminent. The adoption of regional arrangement has been the trend adopted to tackle this predicament and this has been made more pronounced by the International Maritime Organisation (IMO) by its declaration that ‘as much as bilateral and regional agreements are in view, global one is not’ coupled with the deafening silence of other related United Nations’ organs on the issue.

So in the light of this, this study argues that Africa’s single and comprehensive regional treaty on offshore oil rig regulation is long overdue.

## Chapter One

### Introduction

#### 1.1 Background to the study

Offshore oil rig pollution, which is the focus of this research, is a source of marine pollution.<sup>1</sup> An insight into the importance of the sea will aid the proper understanding of the discourse of offshore oil rig pollution. Notwithstanding that, the sea accounts for over 70 per cent of the earth surface, with total square kilometers of 140 million in volume,<sup>2</sup> the sea is also a medium of commerce, trade and investment, and a wellspring of hydrogen and carbon from where oil is derived.<sup>3</sup> It is instructive to state that offshore oil business history dates back to 1890s, when it began off the coast of California and 1909 - 1910, when oil wells were drilled in Ferry Lake in Caddo Parish, Louisiana.<sup>4</sup> The recent influx of offshore installations was necessitated by the intensive use of the oceans and the rapid demands for marine energy resources.<sup>5</sup>

Today, the rate of offshore oil production and the use of offshore oil rigs has increased tremendously and has thereby extended to many regions namely: Persian Gulf; the Mediterranean; the Baltic sea; the Nordic area; West and Central Africa; the East Africa; the Caribbean; the Pacific; the Black Sea; the North Sea; United States and Mexico among others.<sup>6</sup> Even at that, the shipping industry has been the subject of major global and international agreements that addresses the issue of civil liability as well as compensation for damage arising from oil spills.<sup>7</sup>

Given the fact that Africa is the second biggest continent with a surface of 43 million-km<sup>2</sup>

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<sup>1</sup> Other sources of marine pollution are shipping pollution, dumping, land based and atmospheric pollution. RR Churchill & AV Lowe *The law of the sea* (1999) 329-330.

<sup>2</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 6 Cornell Law School Graduate Student Papers 11.

<sup>3</sup> M Gavouneli *Pollution from offshore installations* (1995) 1.

<sup>4</sup> H Esmaceli *The legal regime of offshore oil rigs in international law* (2001) 11.

<sup>5</sup> M Gavouneli *Pollution from offshore installations* (1995) 9.

<sup>6</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 6 Cornell Law School Graduate Student Papers 16 – 26.

<sup>7</sup> International Convention on Civil Liability for Oil Pollution Damage, 1969, 973 U.N.T.S. 3 (CLC) and International Fund for Compensation for Oil Pollution Damage, 1971, 1110 U.N.T.S. 47 (IOPC).

covering ‘one-fifth of the total surface of the earth,’<sup>8</sup> Africa’s total coastline, including its islands, spans over 26,000 nautical miles.<sup>9</sup> Thirty-eight (38) African countries are either coastal or island states’,<sup>10</sup> and there were about 22 offshore rigs operating in Africa as at January 2011.<sup>11</sup> According to British Petroleum statistical review of 2012, Africa held approximately 37% of the world’s oil reserves, and only 10.9% of these reserves have been prospected so far, with particular focus now on Africa, to increase the ratio in order to meet consumers demand in the United Kingdom.<sup>12</sup> The Africa region should be proactive and not be contented with the existing sectional-regional and national legislations, which is majorly present in the West, Central and East Africa Region,<sup>13</sup> to regulate this sphere. Notwithstanding regional division of the sea, its diverse components possesses physical as well as landscape unification, with the divisions only existing in imagination and finds their explanation in convenience, as a major oil spill in one state can seep into others causing major damages in its wake.<sup>14</sup>

## 1.2 Problem statement

Shortly after the Second World War, industries that were engaged in offshore drilling only drilled around 10 metres of waters.<sup>15</sup> But due to technological advancement, it is now common for offshore oil drilling to extend to 2 kilometres depth.<sup>16</sup> This quest for ultra deep water drilling has brought with it tragedies, as were evident in the fairly recent accident in Australia- Montara on the 21<sup>st</sup> of August, 2009, United States- Deepwater Horizon blowout on 20<sup>th</sup> April, 2010, China-Penglai 19-13 on the 4<sup>th</sup> of June, 2011, the Brazil P-34 platform,

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<sup>8</sup> African Union ‘2050 Africa’s Integrated Maritime Strategy’ (2012) 8.

<sup>9</sup> African Union ‘2050 Africa’s Integrated Maritime Strategy’ (2012) 8.

<sup>10</sup> African Union ‘2050 Africa’s Integrated Maritime Strategy’ (2012) 8.

<sup>11</sup> Unpublished: N Scicluna ‘A legal discussion on the civil liability for oil pollution damage resulting from offshore oil rigs in the light of the recent *Deepwater Horizon* incident’ unpublished LLM dissertation, International Maritime Law Institute 2011 59.

<sup>12</sup> ‘The impact of energy security on oil production in Africa’ Oil Voice 17 February 2014

[http://www.oilvoice.com/n/The\\_impact\\_of\\_energy\\_security\\_on\\_oil\\_production\\_in\\_Africa/059041d451ad.aspx#gsc.tab=0](http://www.oilvoice.com/n/The_impact_of_energy_security_on_oil_production_in_Africa/059041d451ad.aspx#gsc.tab=0) (accessed 19 February 2014).

<sup>13</sup> Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central Africa Region, Abidjan, 23 March 1981 & Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 21 June 1985.

<sup>14</sup> K Agyebeng ‘Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration’ (2006) 6 Cornell Law School Graduate Student Papers 11.

<sup>15</sup> J Rochette ‘Towards an international regulation of offshore oil exploitation’ (2012) 5 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

<sup>16</sup> J Rochette ‘Towards an international regulation of offshore oil exploitation’ (2012) 5 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

which occurred on the 15<sup>th</sup> of March, 2012 and the North Sea's Elgin/Franklin on the 25<sup>th</sup> March, 2012 barely ten days after the Brazil incident.<sup>17</sup> Since the sea has no clear-cut delineation, in the event of any mishap, pollution in one area will invariably seep into the other, as was apparent particularly in the *Deepwater Horizon case*,<sup>18</sup> as well as the *Montara's*.<sup>19</sup> The consequence of this given that transboundary offshore oil rig pollution spurns widely and it is hard to attribute it to a particular state; regulation of the territorial waters or Exclusive Economic Zone (EEZ) is useless if pollution from the areas beyond national jurisdiction can affect EEZ or Territorial Waters and vice versa.<sup>20</sup>

The obvious lack of specific and comprehensive international legal framework that effectively deals with offshore oil rig pollution issue<sup>21</sup> might be partly due to the occasional occurrence of offshore oil well blowouts. This view has since been enveloped by the technological advancement that now allows greater oil well depth and increase in offshore oil rigs to cater for the world hunger for oil.<sup>22</sup> Research has also shown that, offshore oil rig operations constitutes a perpetual risk to the marine environment since the threat of blowout leading to a major environmental catastrophe is always imminent, as was shown in the same *Montara* as well as the *Deepwater Horizon case* which happened not too long apart from each other in Australia and the United States respectively,<sup>23</sup> the facts will be discussed in detail below.

The common trend to tackle the offshore oil rig pollution has been states adoption of measures stipulated by United Nations Convention on the Law of the Sea (UNCLOS), to protect and preserve the marine environment, while exploiting its natural resources,<sup>24</sup> and

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<sup>17</sup> J Rochette 'Towards an international regulation of offshore oil exploitation' (2012) 5 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

<sup>18</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 6 *Cornell Law School Graduate Student Papers* 1.

<sup>19</sup> S Bosman 'Regulation for marine pollution arising from offshore oil and gas facilities' (2012) 89 *Australia and New Zealand Maritime Law Journal* 26.

<sup>20</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 6 *Cornell Law School Graduate Student Papers* 10 12.

<sup>21</sup> J Allen 'A global stain: international convention for liability and compensation for oil exploration' (2011) 104 *Australia and New Zealand Maritime Law Journal* 25.

<sup>22</sup> J Allen 'A global stain: international convention for liability and compensation for oil exploration' (2011) 104 *Australia and New Zealand Maritime Law Journal* 25.

<sup>23</sup> J Allen 'A global stain: international convention for liability and compensation for oil exploration' (2011) 104 *Australia and New Zealand Maritime Law Journal* 25.

<sup>24</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 192

also to prevent, reduce and control marine pollution either jointly or individually from any source,<sup>25</sup> as not to cause damage by pollution, to other states and their environment,<sup>26</sup> which as stated earlier is useless since pollution from the areas beyond national jurisdiction can affect Exclusive Economic Zone or Territorial Waters and vice versa.<sup>27</sup> In light of the fact that national arrangements stipulated by UNCLOS for the states to control marine pollution fall short of universal applicability,<sup>28</sup> the case has consistently been made for the adoption of an all embracing international treaty on the subject, even more recently by Indonesia,<sup>29</sup> to the International Maritime Organisation at its 97<sup>th</sup> Legal Committee session,<sup>30</sup> due to the Montara platform blowout.<sup>31</sup> The arguments canvassed in support of developing an international comprehensive treaty for regulating offshore oil rig regime is that

- (i) incidents involving transboundary pollution damage from offshore platforms might occur in any part of the world and not every country is able to tackle the problem on its own accordingly, international regulation is advisable,<sup>32</sup> and
- (ii) oil pollution knows no borders and accordingly, it seems important to have a mechanism in place to compensate victims.<sup>33</sup>

While those opposed to the development posited that

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<sup>25</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 193

<sup>26</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 194 & 208.

<sup>27</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 55 56 & 81.

<sup>28</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 6 Cornell Law School Graduate Student Papers 11.

<sup>29</sup> Unpublished: N Scicluna 'A legal discussion on the civil liability for oil pollution damage resulting from offshore oil rigs in the light of the recent *Deepwater Horizon* incident' unpublished LLM dissertation, International Maritime Law Institute 2011 12.

<sup>30</sup> IMO LEG 97/14/1 'Proposal to add a new work programme item to address liability and compensation for oil pollution damage resulting from offshore oil exploration and exploitation' Submitted by Indonesia.

<sup>31</sup> Unpublished: N Scicluna 'A legal discussion on the civil liability for oil pollution damage resulting from offshore oil rigs in the light of the recent *Deepwater Horizon* incident' unpublished LLM dissertation, International Maritime Law Institute 2011 31.

<sup>32</sup> On-going discussion at IMO on matters concerning liability and compensation for oil pollution resulting from offshore exploration and exploitation activities' 5 December 2013

[http://www.rempec.org/admin/store/wywigimg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG\\_34\\_2%20\\_INF\\_%204%20-%20-%20Ongoing%20discussions%20at%20IMO.pdf](http://www.rempec.org/admin/store/wywigimg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG_34_2%20_INF_%204%20-%20-%20Ongoing%20discussions%20at%20IMO.pdf) (accessed 11 February 2014).

<sup>33</sup> On-going discussion at IMO on matters concerning liability and compensation for oil pollution resulting from offshore exploration and exploitation activities' 5 December 2013

[http://www.rempec.org/admin/store/wywigimg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG\\_34\\_2%20\\_INF\\_%204%20-%20-%20Ongoing%20discussions%20at%20IMO.pdf](http://www.rempec.org/admin/store/wywigimg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG_34_2%20_INF_%204%20-%20-%20Ongoing%20discussions%20at%20IMO.pdf) (accessed 11 February 2014).



- (i) the IMO cannot duplicate, for the offshore oil sector, the liability rules applicable to oil leaks caused by ships because offshore oil exploration and exploitation activities only in few cases have an international impact while shipping normally involves many jurisdictions and may potentially affect any country;<sup>34</sup> and
- (ii) the issue of trans-boundary pollution damage arising from offshore oil activities would be better addressed through bilateral or regional agreements.<sup>35</sup>

The international community tends to concentrate on regulation after major disaster, which has been dubbed ‘disaster reaction syndrome’ and this can be seen in all the major maritime disasters, from *Torrey Canyon* to the *Exxon Valdez* incidence.<sup>36</sup> The latter was the greatest oil spill up to the time of the *Deepwater Horizon*, thus led the United States of America to promulgate the Oil Pollution Act (OPA) in order to forestall future occurrences.<sup>37</sup> The fairly recent *Deepwater Horizon* (offshore) incident, which occurred on the 20 April 2010, resulted in the death of 11 people and injury to a number of others.<sup>38</sup> Although the rig was fully evacuated following the blast and attempts were made to contain the fire, estimates show that approximately 206 million gallons of oil (4.9 million barrels) were released before the well was contained on 15 July (the well was not officially declared ‘dead’ by the US Government until 19 September 2010).<sup>39</sup> This would make *Deepwater Horizon* the largest oil spill ever seen in United States coastal waters (the 1989 Exxon Valdez, which spill at 11 million gallons was the largest before then) and possibly the largest peace-time

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<sup>34</sup> On-going discussion at IMO on matters concerning liability and compensation for oil pollution resulting from offshore exploration and exploitation activities’ 5 December 2013  
[http://www.rempoc.org/admin/store/wywigimg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG\\_34\\_2%20INF\\_%204%20%20-%20Ongoing%20discussions%20at%20IMO.pdf](http://www.rempoc.org/admin/store/wywigimg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG_34_2%20INF_%204%20%20-%20Ongoing%20discussions%20at%20IMO.pdf) (accessed 11 February 2014).

<sup>35</sup> On-going discussion at IMO on matters concerning liability and compensation for oil pollution resulting from offshore exploration and exploitation activities’ 5 December 2013  
[http://www.rempoc.org/admin/store/wywigimg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG\\_34\\_2%20INF\\_%204%20%20-%20Ongoing%20discussions%20at%20IMO.pdf](http://www.rempoc.org/admin/store/wywigimg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG_34_2%20INF_%204%20%20-%20Ongoing%20discussions%20at%20IMO.pdf) (accessed 11 February 2014).

<sup>36</sup> N Gaskell ‘Compensation for offshore pollution: ships and platforms’ in M Clarke (ed) *Maritime law evolving* (2013) 63.

<sup>37</sup> TJ Schoenbaum ‘The deepwater horizon oil spill in the context of public international law regime for protection of marine environment: A comparative study’ (2012-2013) 25 *University of San Francisco Maritime Law Journal* 2.

<sup>38</sup> Unpublished: N Scicluna ‘A legal discussion on the civil liability for oil pollution damage resulting from offshore oil rigs in the light of the recent *Deepwater Horizon* incident’ unpublished LLM dissertation, International Maritime Law Institute 2011 26.

<sup>39</sup> T James; ‘The implications of the Deepwater Horizon oil spill in the Gulf of Mexico’ (2010) 30 *Library Note for the House of Lords* 5.

oil spill in history.<sup>40</sup> Prior to the *Deepwater Horizon* incident, in August 2009, the Wellhead Platform of Montara, located 650 kilometres west of Darwin, had an ‘unstoppable outburst of hydrocarbons’ that subsequently led to a fire in November 2009. Fortunately there were no casualties, however oil pollution from the blowout contaminated 70 000 square kilometres of ocean and took over ten weeks to cap the unrestrained oil on the sea floor.<sup>41</sup>

These events triggered series of issues, amongst which were environmental and legislative.<sup>42</sup> It also called into question state obligation with respect to offshore exploration and exploitation protection as well as corporate accountability,<sup>43</sup> which were brought to fore in the Deepwater Horizon incident report of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling set up by the President Obama’s administration on the 22<sup>nd</sup> of May, 2010.<sup>44</sup> The mandate of the Commission was to:-

- (i) determine the causes of the tragedy, (ii) evaluate the containment and clean up responses, and (iii) advise the President and the nation on how future energy exploration should take place responsibly in environmentally sensitive and more challenging deepwater area.<sup>45</sup>

The Commission at the end of their inquiry found out that the:

Disaster was foreseeable and preventable, that errors and misjudgments by three companies (BP, Halliburton and Transocean) played key roles in the disaster and that government regulation and regulators were remarkably ineffective. In particular, the Commission pointed out that the blowout was the product of human errors, engineering mistakes and management failures.<sup>46</sup>

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<sup>40</sup> T James; ‘The implications of the Deepwater Horizon oil spill in the Gulf of Mexico’ (2010) 30 Library Note for the House of Lords 5.

<sup>41</sup> J Allen ‘A global stain: international convention for liability and compensation for oil exploration’ (2011) 90 *Australia and New Zealand Maritime Law Journal* 25.

<sup>42</sup> TJ Schoenbaum ‘The deepwater horizon oil spill in the context of public international law regime for protection of marine environment: A comparative study’ (2012-2013) 25 *University of San Francisco Law Journal* 2.

<sup>43</sup> J Rochette ‘Towards an international regulation of offshore oil exploitation’ (2012) 15/12 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 6.

<sup>44</sup> ‘DEEPWATER: The gulf oil disaster and the future of offshore oil drilling’ vi.

<sup>45</sup> J Rochette ‘Towards an international regulation of offshore oil exploitation’ (2012) 15/12 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 6.

<sup>46</sup> J Rochette ‘Towards an international regulation of offshore oil exploitation’ (2012) 15/12 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 6.

This research explores the nature of states obligations to regulate their offshore oil rig environment, both in content and enforcement particularly as it relates to Africa in light of UNCLOS 82 being the major regulatory framework that demand states to cooperate globally and regionally in formulating international rules and standards for the protection of the marine environment,<sup>47</sup> enforce effective international standards,<sup>48</sup> and establish adequate compensation for damage caused by pollution to the marine environment.<sup>49</sup>

The 2050 Africa Integrated Maritime Strategy, which major focus is the realisation of Africa developmental objectives, synergising its objectives with the effective offshore oil rig regulation will serve as a tool for enhancing sustainable development and competitiveness which will promote more wealth creation from Africa's oceans, seas and inland waterways. It will further aid in developing a thriving maritime economy that will help realise the full potential of sea-based activities in an environmentally sustainable manner. It also common knowledge that the effective preservation of Africa's marine environment is essential to growing its Gross Domestic Product, share of global and regional trade, competitiveness, long-term growth and employment.<sup>50</sup>

Also the Revised African Maritime Transport Charter 2010 will be called to focus, which although not all-inclusive as it hampered more on compensation while ignoring establishment of liability, without which there cannot be compensation. The provision stipulates that:

States Parties commit themselves to the creation of a sustainable compensation regime to cover marine incidents of pollution of the sea that are not covered by existing international compensation regimes.

States Parties shall seek to implement a common policy aimed at preventing and combating marine pollution from ships and other sources of pollution.<sup>51</sup>

In line with the foregoing gap of comprehensive regulation, the International Maritime Organisation (IMO) rose from their 108<sup>th</sup> session on 1<sup>st</sup> of May, 2012,<sup>52</sup> with a

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<sup>47</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 197.

<sup>48</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 214&215.

<sup>49</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 235(2).

<sup>50</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012) 10.

<sup>51</sup> African Maritime Transport Charter 2010 (AMTC) art 28 (3)&(4).

<sup>52</sup> Consideration of the report of the legal committee: Note by the Secretary-General' 1 May 2012.

communiqué on their decision on developing an international liability and compensation regime for offshore oil rig pollution and states that:

Bilateral and regional arrangements were the most appropriate way to address this matter and that there was no compelling need to develop an international convention on this subject.<sup>53</sup>

The Committee also through its Chairman in workshop on the Regional Response Capacity and Coordination to Major Oil Spill in the Mediterranean Sea, in Athens, Greece on the 12<sup>th</sup> of December, 2013 went further to reiterate their position that:

Whilst the development of principles for bilateral and regional agreements appears to be in sight, a global legal framework at present is not. The only additional comment I would like to add is that the Legal Committee tackled this complex issue with sensitivity. The compromise decision not to develop a new international treaty regime, but, instead, to look into the possibility of developing guidance to assist States in entering into bilateral or regional arrangements, appears to be the best possible outcome.<sup>54</sup>

It is noteworthy to state that despite the above pointer to the feasibility of a regional regulation, Africa region is yet come up with a comprehensive regulatory regime to protect its coastline from any major offshore oil rig disasters despite it being imminent and trans-boundary in nature.

### 1.3 Thesis statement

This study argues that an effective global and regional regulation of the offshore oil and gas exploration and exploitation, particularly as it relates to civil liability and compensation will provide more legal certainty, as well as help prevent spills, provide greater security and clarity for managing cleanups, while providing for compensation after any major spills in

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[http://www.marsati.org/IMO/meetings/IMOMeeting2012/Council/C%20108-8%20-%20Note%20by%20the%20Secretary-General%20\(Secretary-General\).pdf](http://www.marsati.org/IMO/meetings/IMOMeeting2012/Council/C%20108-8%20-%20Note%20by%20the%20Secretary-General%20(Secretary-General).pdf) (accessed 9 April 2014).

<sup>53</sup> ‘Consideration of the report of the legal committee: Note by the Secretary-General’ 1 May 2012 [http://www.marsati.org/IMO/meetings/IMOMeeting2012/Council/C%20108-8%20-%20Note%20by%20the%20Secretary-General%20\(Secretary-General\).pdf](http://www.marsati.org/IMO/meetings/IMOMeeting2012/Council/C%20108-8%20-%20Note%20by%20the%20Secretary-General%20(Secretary-General).pdf) (accessed 9 April 2014).

<sup>54</sup> ‘On-going discussion at IMO on matters concerning liability and compensation for oil pollution resulting from offshore exploration and exploitation activities’ 5 December 2013 [http://www.rempec.org/admin/store/wytwiglmg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG\\_34\\_2%20\\_INF\\_%204%20-%20-%20Ongoing%20discussions%20at%20IMO.pdf](http://www.rempec.org/admin/store/wytwiglmg/file/News/Forthcoming%20Meetings/MEDEXPOL2013/E-Information%20Docs/E%20-%20WG_34_2%20_INF_%204%20-%20-%20Ongoing%20discussions%20at%20IMO.pdf) (accessed 11 February 2014).

Africa.

## 1.4 Research questions

In response to the statement above, the following questions will be answered:

1. What is the regulatory framework and ocean governance for offshore oil rig pollution in Africa?
2. What are the existing global and regional regulatory civil liability and compensation regime for offshore oil rig pollution?
3. How can Africa create a sustainable civil liability and compensation regime to combat offshore oil and gas pollution?

## 1.5 Significance of the study

There are three main reasons why offshore regulation is significant. First, as earlier stated, the sea constitute over 70 per cent of the earth surface, with total square kilometers of 140 million total in volume,<sup>55</sup> and given the importance of oceans' resources as the common heritage of humankind, unregulated offshore exploration activities are carried out in this sector with little or no international regulatory regime.<sup>56</sup> It thus become imperative in the light of the importance of the sea, both to human sustenance and living organism, that offshore oil activity are properly protected by a comprehensive regulatory framework for pollution damage in case of any mishap that might occur as a result of offshore oil rig operation.<sup>57</sup>

This is coupled with the fact that it is only the areas within state parties that are covered by national agreement, while the high seas and areas beyond the limits of national jurisdiction are not properly regulated particularly given the dichotomy between developed and

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<sup>55</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 6 Cornell Law School Graduate Student Papers 11.

<sup>56</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 6 Cornell Law School Graduate Student Papers 11.

<sup>57</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 64 65.

developing states concerning the freedom of the high seas and its resources.<sup>58</sup>

Secondly, as also stated earlier the African sea is very strategic given that its coastline, including its islands, is over 26,000 nautical miles and thirty-eight (38) of its countries are either coastal or island states, and also that the ‘sea is one big collection of water with the exception of the closed seas’<sup>59</sup> this puts the region in precarious state in the event of an oil rig major blowout as pollution in one area will invariably escape into the other despite the fictitious partition, given that the division of seas is imaginary and find their explanation only in convenience as there is no major barrier to ocean current.<sup>60</sup>

Thirdly, an inquiry into the regulatory regime of offshore exploration and exploitation contributes to the discourse on the growing concern of Africa as spelt out in the 2050 Integrated Maritime Strategy.<sup>61</sup> This AIM Strategy recognises, among others, energy exploitation, climate change, environmental protection, conservation and safety of life and property at sea as the major drive in the realization of developmental objectives.<sup>62</sup>

Research has it that the world mostly waits for a major disaster to occur before the regulation or tightening of noose in most sectors. Just as the *Exxon Valdez* accident led to the enactment of the United State’s Oil Pollution Act 1990 (OPA),<sup>63</sup> a stronger regulatory regime that transformed the tanker industry, so, too will the *Deepwater Horizon* disaster change the way the offshore drilling industry does business.<sup>64</sup>

This is evident in the way the United Kingdom and Europe are upgrading their laws to forestall similar occurrences in their offshore environment,<sup>65</sup> which in the former’s case, is the upgrade of the Oil Pollution Liability (OPOL), although it is a discretionary agreement;

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<sup>58</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 56 60 80 & 81.

<sup>59</sup> African Union ‘2050 Africa’s Integrated Maritime Strategy’ (2012) 8.

<sup>60</sup> K Agyebeng, ‘Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration’ (2006) 6 Cornell Law School Graduate Student Papers 11.

<sup>61</sup> African Union ‘2050 Africa’s Integrated Maritime Strategy’ (2012) 8 9 11 12.

<sup>62</sup> African Union ‘2050 Africa’s Integrated Maritime Strategy’ (2012) 8 9 11 12.

<sup>63</sup> TJ Schoenbaum ‘The deepwater horizon oil spill in the context of public international law regime for protection of marine environment: A comparative study’ (2012-2013) 25 *University of San Francisco Maritime Law Journal* 2.

<sup>64</sup> Unpublished: N Scicluna ‘A legal discussion on the civil liability for oil pollution damage resulting from offshore oil rigs in the light of the recent *Deepwater Horizon* incident’ unpublished LLM dissertation, International Maritime Law Institute 2011 29.

<sup>65</sup> T James ‘The implications of the Deepwater Horizon oil spill in the Gulf of Mexico’ (2010) 30 Library Note for the House of Lords 16-18.

however in practice its membership is indispensable by any offshore operator in the United Kingdom, as an operator cannot be chosen by licensees without obtaining the consent of the Department of Energy and Climate Change.<sup>66</sup> Therefore, being a member of OPOL by the operator is a condition precedent for obtaining such consent.<sup>67</sup> Shortly after the Macondo blowout, the United Kingdom Department of Energy announced on the 8<sup>th</sup> of June 2010, in a press release 10/067 a planned review of the indemnity and insurance requirements for operating on the UK Continental Shelf. But up till date, the proposed changes to the existing statutory regime still remains uncertain.<sup>68</sup> In essence, the OPOL has been reinforced by the introduction in all joint operating agreements that:

The operator must establish and maintain its financial capability to meet claims that arise under OPOL by producing evidence of insurance, self-insurance or other satisfactory measures, with the financial responsibility to meet such capability allocated contractually between the operator and non-operators under a joint operating agreement.<sup>69</sup>

The European Union in her case has through the European Union Commission developed a new proposal for the regulation of the European Parliament and of the Council that would cover any discharge from any offshore installations that affects any European Union member nation.<sup>70</sup>

Article 197 of UNCLOS encourages ‘states to cooperate on a global basis, and as appropriate, on a regional basis for the protection and preservation of the marine environment’,<sup>71</sup> taking into account regional characteristic features. This is a leeway for Africa to take proactive steps in creating a sustainable civil liability and compensation regime in the offshore oil rig exploration sector, as failure to do so will be an open window for multinational corporations who have been largely responsible for unsustainable oil exploration in other part of the globe to destroy the continental ecological environment with

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<sup>66</sup> S Bosman ‘Regulation for marine pollution arising from offshore oil and gas facilities’ (2012) 89 *Australia and New Zealand Maritime Law Journal* 96.

<sup>67</sup> Petroleum (Production) (Seaward Areas) Regulations 1988 (UK) cl 23(9).

<sup>68</sup> DECC, ‘UK increases North Sea rig inspections’ (Press Release, 10/067, 8 June 2010).

<sup>69</sup> ‘Offshore Pollution Liability Limited, Offshore Pollution Liability Association Limited Rules’, 27 June 2013 <http://www.opol.org.uk/rules.htm> (accessed 10 April 2014).

<sup>70</sup> Safety of Offshore Oil and Gas Prospection, Exploration and Production Activities, COM (2011) 688 final (Oct. 27, 2011).

<sup>71</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 197.

impunity.<sup>72</sup>

There has always been a divide between states seeking a legally binding civil liability regime as against those opposed to it, as it was evident in the negotiation of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, which according to Article 1, seeks to regulate the transboundary movement of living modified organisms (LMOs) in order to safeguard the conservation of sustainable use of biological diversity, while taking into account health concerns.<sup>73</sup> The same line was towed by developing countries during the negotiation of the 1989 Basel Convention on the control of Transboundary Movement of Hazardous Wastes and Their Disposal.<sup>74</sup> This is basically typical of the argument by the North, typified by developed countries, who normally argue for regional approaches, while the south, which are developing countries and whose stands are mostly for global regulatory regime in order to ensure compliance.<sup>75</sup> In essence, regional as against global approach makes cooperative action easier, where stakeholders with diverse interests make negotiation impossible.<sup>76</sup>

The *Deepwater Horizon* has demonstrated the efficacy of regional regulation which will be ‘a stitch in time’ for Africa, as the cleanup costs of over \$42 billion dollars has been incurred so far by the British Petroleum on the incident<sup>77</sup> (this was made possible because United State of America has the Oil Pollution Act of 1990 in place)<sup>78</sup>. This is amount in far excess of most African States budgets, should the mishap of such magnitude happen along Africa’s incomprehensively regulated offshore oil rig sector. This could be put to better developmental use.

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<sup>72</sup> M Sornarajah *The international law on foreign investment* (2010) 225.

<sup>73</sup> D Tladi ‘Civil liability in the context of the Cartagena Protocol: To be or not to be (binding)?’ (2010) 10 *International Environmental Agreements: Politics, Law and Economics* 16.

<sup>74</sup> D Tladi ‘Civil liability in the context of the Cartagena Protocol: To be or not to be (binding)?’ (2010) 10 *International Environmental Agreements: Politics, Law and Economics* 16

<sup>75</sup> D Tladi ‘Civil liability in the context of the Cartagena Protocol: To be or not to be (binding)?’ (2010) 10 *International Environmental Agreements: Politics, Law and Economics* 24.

<sup>76</sup> J Rochette & L Chabason ‘A regional approach to marine environmental protection: The “regional seas” experience’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 115.

<sup>77</sup> A Monaghan ‘BP welcomes US court of appeal ruling on Gulf of Mexico oil spill’ *The Guardian* 03 October 2013 <http://www.theguardian.com/business/2013/oct/03/bp-us-court-appeal-ruling-deepwater-horizon-oil-spill> (accessed 17 November 2013).

<sup>78</sup> R Perry ‘The deepwater horizon oil spill and the limits of civil liability’ (2011)89 *Washington Law Review* 50.



## 1.6 Research methodology

Descriptive, analytical and comparative approaches will be deployed in this research, primarily because offshore oil rig pollution civil liability and compensation regime has not been extensively explored globally. This research will rely on primary and secondary sources and in particular, desktop information and library resources that are pertinent to the study. In discussing the offshore civil liability and compensation regime in Africa, the United Nations Convention on the Law of the Sea 1982,<sup>79</sup> will be utilised.

Furthermore, policies of regional and international maritime institutions, such as International Maritime Organisation, as well as host of other global and regional agreements on offshore oil rig pollution, civil liability and compensation regime will be discussed. The provisions of the Revised African Maritime Transport Charter<sup>80</sup> and 2050 Africa Integrated Maritime Strategy<sup>81</sup> as they relate to offshore oil rig pollution will be explored respectively.

## 1.7 Delineation of study

As earlier stated, this research focuses primarily on civil liability and compensation regulation of offshore oil rig transboundary pollution and not marine pollution in its entirety. This research is also limited to regional as well as global responsibility with respect to the regulation.

## 1.8 Literature review

The proper understanding of offshore oil rig pollution cannot be divorced from the understanding of ocean governance and legal framework which was brought to light by the discourse of Freestone et al,<sup>82</sup> who examined ocean governance in the light of pre and post United Nations Convention on the Law of the Sea. Similarly the work of Tladi, Momanyi

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<sup>79</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS).

<sup>80</sup> African Maritime Transport Charter 2010 (AMTC).

<sup>81</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012)

[http://pages.au.int/sites/default/files/2050%20AIM%20Strategy%20%28Eng%29\\_0.pdf](http://pages.au.int/sites/default/files/2050%20AIM%20Strategy%20%28Eng%29_0.pdf) (accessed 17 November 2013).

<sup>82</sup> D Freestone et al *The law of the sea: Progress and prospects* (2006) 1, 40, 63.

and Chabason,<sup>83</sup> on fragmented regulatory framework of ocean governance, coordinated fight against land-based sources of pollution in the Western Indian region and international regulation of offshore oil drilling will be drawn upon. It should however be kept in mind that discourse on regulation of offshore oil rig pollution has centred majorly on coastal waters<sup>84</sup> in relation to high seas, and there have been attempts to define the issue as a “transboundary” concern, which has gained major importance.<sup>85</sup> In this regard, the work of Dzidzornu is instructive.<sup>86</sup> According to the author, ‘transboundary pollution might erode any efforts at regulation in the area that suffers the damage. In other words, “the resources of the [sea] constitute one proprietary unity in a physical sense’.

While his view is instructive as earlier stated, it falls short of not stipulating how transboundary pollution should be controlled given the leg dragging of the responsible global regulation institutions. This gap shall hopefully be addressed by this study. Pirtle sheds light on geomorphology of the ocean and opines that ‘[i]n spite of the common but highly deceptive practice of dividing the world ocean into a discreet set of seven seas’,<sup>87</sup> ‘the world’s seas are in reality part of a single interconnected world ocean’<sup>88</sup> This is related to the fact that there is no actual delineation of the seas. However he also failed to show the importance of regulating the seas regionally or globally as his argument was geared more towards drawing attention to the seas rather than proffering solution to the gap within. It is also on this point that this research will draw inferences in addressing the evident regulation gap as it relates to Africa.

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<sup>83</sup> D Tladi ‘Ocean governance: A fragmented regulatory framework’, A Momanyi ‘The western Indian ocean region and the coordinated fight against land-based sources of pollution’, L Chabason ‘Towards international regulation of offshore oil drilling?’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 100 130 216.

<sup>84</sup> T Scovazzi ‘Maritime accidents with particular emphasis on liability and compensation for damage from the exploitation of mineral resources of the seabed’ in A. de Guttry et al. (eds) *International disaster response law* (2012) 289-290.

<sup>85</sup> I Stefankova International regulation v national regulation on offshore exploitation – the USA as an example (2013) III *Elsa Malta Law Review* 126.

<sup>86</sup> D Dzidzornu ‘Marine pollution control: The evolving international law’ (1995) 2 *Australasian Journal of Natural Resources Law and Policy* 122.

<sup>87</sup> The Arctic, Antarctic, Indian, North Atlantic, South Atlantic, North Pacific, and South Pacific Oceans.

<sup>88</sup> CE Pirtle ‘Military uses of ocean space and the law of the sea in the new millennium’ (2000) 31 *Ocean Development and International Law* 21.

In considering the regional co-operation of regulations of the sea, Saltas argues that<sup>89</sup> there is need for the protection framework of the marine environment through the promotion of international and regional cooperation under the United Nations Convention, giving credence to the fact that the pollution of the seas and oceans has become the ultimate world issue. The author also highlights the fact that marine pollution has no borders and that the nature of contemporary pollutants has surpassed the capabilities of any advanced technology in dealing with them directly and efficiently. He ultimately stresses for regional cooperation in combating the effects of marine pollution and also recognizes the importance of regional co-operation. However the author did not show that the states possess the final discretion to regulate offshore oil rig pollution and that will be brought to the fore by this research particularly as it relates to Africa.

This research in whole differs from the above with respect to its regional regulatory focus away from the tendency to focus on international obligations, and also situates the sustainable civil liability and compensation regime for offshore oil rig pollution in the context of binding obligations on the African states. Although there are scattered international law rules regulating this area, they are yet to be assembled into a comprehensive and binding international convention.

Other scholars like Gavouneli, Dubais, Balkin, Churchill and Lowe, Pickering, Esmaeli, Taverne, Dugard, and Honein,<sup>90</sup> have discussed law of the sea, ocean governance, offshore pollution and the need for comprehensive regulation from different perspectives, which did not differ in most respect from the earlier literature. Though they seem to have mapped the road for offshore civil liability and compensation regime internationally, this regime is

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<sup>89</sup> G Tsaltas 'Towards a world protection framework of the marine environment through the promotion of international and regional cooperation under the UN Convention on the Law of the Sea' in A Strati et al (eds) *Unresolved issues and new challenges to the law of the sea: Time before and time after* (2006) 73-79.

<sup>90</sup> G Maria *Pollution from Offshore Installations* (1995) 1; BA Dubais 'Compensation for oil pollution damage resulting from exploration and exploitation of hydrocarbons in the seabed' (1975) 6 *Journal of Maritime Law and Commerce* 571-573; RR Churchill & AV Lowe *The law of the sea* (1999) 329-330; H Pickering 'A New Era for the Offshore Oil and Gas Industry on the UKCS' (1999) 23 *Marine Policy* 329 338; B Rosalie 'The Rise and Rise of IMO's Liability and Compensation Regimes' in T.F. Ndiaye and R.Wolfrum (eds) *Law of the sea, environmental law and settlement of disputes* (2007) 687 at 703; E Hossein *The Legal regime of offshore oil rigs in international law* (2001)11; T Bernard *Petroleum industry and governments: A study of the involvement of industry and governments in the production and use of petroleum* (2008) 305; J Dugard *International law: A South African perspective* (2011) 366 367; HE Salah *The international law relating to offshore installations and artificial islands* (1991)1.

therefore too inadequate to regulate the entire seas particularly in the light of IMO recent declaration that regions should develop their own regulatory regime.<sup>91</sup> There is therefore a need for an inquiry into the sustainable civil liability and compensation for offshore oil rig pollution regulatory regime in Africa. Hence, this study argues for sustainable Africa civil liability and compensation regime for offshore oil rig pollution.

## 1.9 Outline of chapters

This dissertation will have four substantive chapters as well as an introductory and concluding chapter.

Chapter one lays down some introductory information about the offshore oil rig industry, defines key terms of the study and sets out the platform for developing a sustainable civil liability and compensation regime for offshore oil rig pollution in Africa.

Chapter two gives a brief history of the sea; discusses some of the resources within it as the common heritage of mankind. It will also examine the freedom of the high seas, some of the offshore disasters that have occurred in the high seas and attempts to regulate them while setting out the need for Africa to develop a regulatory framework for offshore oil exploitation and exploration.

Chapter three attempts to answer the first research question and discusses the regulatory framework and ocean governance for offshore oil rig pollution in Africa. It will explore the nature of ocean governance in light of the United Nations Convention of the Law of the Sea, especially as it relates to the territorial sea and contiguous zone, continental shelf, exclusive economic zone and high seas, while examining the inherent gaps within its framework as well as other likely competing norms in the law of the sea. It will also consider attempts by Africa as a region at regulating her offshore oil rig sector in light of UNCLOS and in the event of pollution or mishap.

Chapter four takes on the second research question with particular focus on the existing global as well as regional regulatory civil liability and compensation regime for offshore oil

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<sup>91</sup> T Scovazzi 'Maritime accidents with particular emphasis on liability and compensation for damage from the exploitation of mineral resources of the seabed' in A. de Guttry et al. (eds) *International disaster response law* (2012) 132-133.

rig pollution. This chapter will also touch on the legislative initiatives that has followed major offshore oil rig incidence, noting that the main problem revolves around the skeletal or non-existent nature of international instruments which regulate offshore oil exploration and exploitation activities and the need for regional as against global regulation.

Chapter five, addresses the final research question, and proposes an offshore regulatory regime for Africa, particularly as it relates to sustainable civil liability compensation regime for offshore oil rig pollution. It will also look through existing regional arrangements that attempt to deal with the issue effectively. This chapter also dwells on the more important question on who is liable and who is to pay compensation to the victims that are affected by offshore incidents in Africa.

The final chapter will conclude by summarising the arguments in this research as well as offer a number of recommendations and opinions on going forward.

## Chapter Two

### Ocean Resources as the Common Heritage of Mankind

#### 2.1 Introduction

Since the foundation for the regional regulation of the offshore oil rig sector has been laid in the previous chapter, an insight into the importance of the sea will aid the proper understanding of the discourse of offshore oil rig pollution, given that the sea accounts for over 70 per cent of the earth surface and thus represents its most extensive but least understood ecosystem.<sup>1</sup> The sea, apart from being a medium of commerce, trade and investment, is a birthplace of hydrocarbons, where oil is derived from; it also plays a major role in climate change, food production, industry, transportation, leisure, species conservation and technological innovation.<sup>2</sup>

Shortly before discovery of the sea, particularly the deep-sea as a medium of commerce and technological innovation, humanity's disposition to the deep-sea was characterised largely by myth fuelled by ignorance. They portray the deep sea as being filled with evil omen. The deep sea was designated the abyss, from the Greek words 'a', meaning 'without', and 'byssos' denoting 'bottom' – another word for dark infinities and inherent chaos.<sup>3</sup> The interest in the deep sea and what is beneath it dates back to more than 2000 years. Nonetheless, between the period of the ancient Greeks and the work of the Challenger Expedition in the nineteenth century, knowledge of the biodiversity of the deep sea was largely a matter of speculation.<sup>4</sup>

By the mid-nineteenth century, work by the Norwegian naturalist, G.O. Sars, suggested that the deep-sea was home to more than just mythical sea monsters. He identified almost 100 kinds of invertebrates living at the bed greater than 600 metres. In contrast to Sars findings, Edward Forbes proposed the concept of the "azoic zone", that is, the depth greater than 0.6 kms below which no life was believed to exist. This generated a lot of controversy for

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<sup>1</sup> P Birnie et al *International law & the environment* (2009) 702.

<sup>2</sup> P Jaquet et al 'An emerging world' in P Jacket et al (eds) *Oceans the new frontier* (2011) 17.

<sup>3</sup> DK Leary *International law and the genetic resources of the deep sea* (2007) 7.

<sup>4</sup> DK Leary *International law and the genetic resources of the deep sea* (2007) 13.

several years as to the accuracy of their findings. The Challenger Expedition from 1872 to 1876 eventually settled this dispute.<sup>5</sup> This expedition of extraordinary magnitude, covering 69,000 nautical miles, hauled samples from the ocean floor at 240 different locations. After almost three and half years at sea and a thirty four-volume report, it substantiated the fact that the deep sea was not a zone of zero life. Despite this development, the range of species diversity in the deep sea is still uncertain.<sup>6</sup>

## 2.2 The ocean resources

In the twentieth century, the frontiers of the ocean faded into the distance due to humanity pushing deeper and further into the vast marine territories that led to humanity access to the entire ocean.<sup>7</sup> Hence, the distance from the coast no longer pose impossible barrier; therefore the human community consistently pushes the oceans' limits in the quest to exploit their diverse resources like fuels, fisheries, minerals and genetic material. As a result of this, the ocean frontiers are insistently redefined by modern technology, industrial demands, scientific researches, national strategies as well as ecological imperatives; no sea eludes these demands.<sup>8</sup> The discussion of the ocean resources like fuels, fisheries, minerals and genetic materials will be attempted to give a further insight into the common heritage of humankind in the ocean.

### 2.2.1 Fossil Fuel

Before the World War II, the oceans' accounted for little oil but today, the oceans supply 30% of the world's fossil fuels consumption.<sup>9</sup> Therefore, the sea satisfies the ever-increasing population's energy demands by means of oil extracted from wind turbines and the ultra deep waters.<sup>10</sup> It is instructive to note that before the advent of fossil fuel, whale oil was one of the earliest forms of energy derived from the ocean and mostly used in lamps

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<sup>5</sup> DK Leary *International law and the genetic resources of the deep sea* (2007) 14.

<sup>6</sup> DK Leary *International law and the genetic resources of the deep sea* (2007) 14.

<sup>7</sup> R Jozan et al 'Oceans: The new frontier' in P Jacket et al (eds) *Oceans the new frontier* (2011) 17.

<sup>8</sup> R Jozan et al 'Oceans: The new frontier' in P Jacket et al (eds) *Oceans the new frontier* (2011) 17.

<sup>9</sup> R Jozan et al 'Oceans: The new frontier' in P Jacket et al (eds) *Oceans the new frontier* (2011) 17.

<sup>10</sup> R Jozan et al 'Oceans: The new frontier' in P Jacket et al (eds) *Oceans the new frontier* (2011) 18.

as well as candle wax. This proved quite lucrative until it became unsustainable due to high level of whale hunting and rapid growth of the oil and gas industry.<sup>11</sup>

The growth in oil industry brought about offshore oil drilling which also stimulated the construction of offshore terminal for the storage and delivery of liquefied natural gas (LNG). While offshore oil and gas sector continues to grow, it is not without its unsustainability as the global fossil fuel reserve is also diminishing, and unexploited deposits are estimated to be limited.<sup>12</sup> A contemporary report indicated the global proven and predictable reserves to be between 854 and 1,255 gigabarrels, which would be enough for 30 to 40 years' demand if growth in economy were to be halted immediately.<sup>13</sup> But recent forecast suggests that these reserves might reduce more rapidly than previously calculated given the rise in world energy consumption.<sup>14</sup>

### 2.2.2 Fisheries

The ocean is also home to fishes and they can be found in all areas of it, be it the exclusive economic zone, continental shelf and the high seas, while some are migratory as they move from one end of the sea to the other. The concern here is on the fish within the high seas given that it is open to use by all states. This freedom of access is limited as it is mostly to the benefit of states that has the capital and technological wherewithal to harvest the fishes.<sup>15</sup> However, the United Nations Fish Stocks Agreement<sup>16</sup> enjoins coastal States and States fishing on the high seas to take conservation measures using best scientific

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<sup>11</sup> J Appiott 'The oceans: An inexhaustible source of energy' in P Jacket et al (eds) *Oceans the new frontier* (2011) 53.

<sup>12</sup> J Appiott 'The oceans: An inexhaustible source of energy' in P Jacket et al (eds) *Oceans the new frontier* (2011) 54.

<sup>13</sup> J Appiott 'The oceans: An inexhaustible source of energy' in P Jacket et al (eds) *Oceans the new frontier* (2011) 54.

<sup>14</sup> J Appiott 'The oceans: An inexhaustible source of energy' in P Jacket et al (eds) *Oceans the new frontier* (2011) 55.

<sup>15</sup> RR Churchill & AV Lowe *The law of the sea* (1999) 285.

<sup>16</sup> Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, entered into force on 12 December 2002.



evidence,<sup>17</sup> minimizes pollution,<sup>18</sup> protect biodiversity<sup>19</sup> while implementing and enforcing effective monitoring, control and surveillance.<sup>20</sup>

Fish and fishing are very important to human existence both economically and for means of subsistence. This has however, led to the phenomenal rise in fish catches and now represent a major threat to marine biodiversity as well as the sustainable use of marine resources.<sup>21</sup> In 1938, the total world marine catch was 15 million metric tones (MT); by 1958 it had increased to 28mt; in 1978 to 64mt; and by 1993 to 90mt. However, by 2000 it witnessed a decline and has remained so till date. The reason for the increase was due to investment in fisheries of the developing countries and technological improvements<sup>22</sup> while the decrease in recent years is mainly due to unsustainable overexploitation of most commercially exploitable fish stocks,<sup>23</sup> and in some instance marine pollution. This was evident in the Niger Delta area of Nigeria.<sup>24</sup>

### 2.2.3 Other forms of sea resources

The other major forms of seas resources relevant to the study are renewable energy-wind energy, wave energy, tidal energy, ocean current energy and ocean thermal energy conversion. While these forms of offshore energy resources are presently being put to use commercially, a handful of potential resources may take the centre stage in future such as: methane hydrates, salinity gradient, energy from marine biomass and hydrogen fuel from deep-sea hydrothermal vents.<sup>25</sup>

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<sup>17</sup> Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, entered into force on 12 December 2002. Art. 5 (b).

<sup>18</sup> Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, entered into force on 12 December 2002. Art. 5 (f).

<sup>19</sup> Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, entered into force on 12 December 2002. Art. 5(g).

<sup>20</sup> Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, entered into force on 12 December 2002. Art. 5(i).

<sup>21</sup> P Birnie et al *International law & the environment* (2009) 703.

<sup>22</sup> P Birnie et al *International law & the environment* (2009) 703.

<sup>23</sup> RR Churchill & AV Lowe 'The law of the sea' (1999) 279.

<sup>24</sup> PC Nwilo & OT Badejo 'Impacts and management of oil spill pollution along the Nigeria coastal areas'

<sup>25</sup> J Appiott 'The oceans: An inexhaustible source of energy' in P Jacket et al (eds) *Oceans the new frontier* (2011) 57 58 59 63 64.

### 2.3 Freedom of the high seas

A century ago, the law pertaining to the high seas comprised almost in every respect of customary law, founded on the fundamental principle of freedoms and exclusive jurisdiction of flag states over ships on the high seas.<sup>26</sup> In the last 100 years, the regime of the high seas has witnessed four major types of developments. The first being the major reduction in the area of the high seas given that the coastal state allowable jurisdictional limits from the coast has been extended, as a result of which the area of the high seas has been proportionately reduced.<sup>27</sup> The second development was the codification of most of the customary law of the high seas in the form of the Geneva Convention on the High Seas. This brought better clarity as well as certainty to the law, even though there are still some omissions concerning the limits of national jurisdiction in the overall Geneva regime.<sup>28</sup>

The third has to do with the growth of detailed regulation of activities on the high seas through the adoption of international conventions particularly for the past 30 years.<sup>29</sup> Finally, the fundamental review of the entire law of the sea that led to the revision of the High Seas Convention was set in motion by late 1960 by the Third United Nations Conference. This gave birth to the United Nations Convention on the Law of the Sea (UNCLOS) which contains many important provisions directly and indirectly affecting the high seas,<sup>30</sup> like navigation, fishing, cable and pipeline laying, and overflight as well as the construction of artificial islands and installations.<sup>31</sup>

### 2.4 Case study of some high sea disasters

The High Seas Convention as well as article 87 of the UNCLOS guaranteed freedom of states to the unrestricted use of the high seas in relation to fishing, cable and pipeline laying, construction of artificial islands and installations with a caveat that this freedom

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<sup>26</sup> D Freestone et al *The law of the sea: Progress and prospects* (2006) 327.

<sup>27</sup> D Freestone et al *The law of the sea: Progress and prospects* (2006) 328.

<sup>28</sup> D Freestone et al *The law of the sea: Progress and prospects* (2006) 328.

<sup>29</sup> D Freestone et al *The law of the sea: Progress and prospects* (2006) 328.

<sup>30</sup> D Freestone et al *The law of the sea: Progress and prospects* (2006) 328.

<sup>31</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 87.

shall be exercised by all states with reasonable regard to the interest of other states in their exercise of the freedom of high seas.<sup>32</sup>

The principle of state responsibilities obligate the states to be accountable for breaches of international law and such breaches of customary international law vest in the injured state the right to maintain a claim against the injuring state.<sup>33</sup> This is either through diplomatic action or by recourse to international mechanism concerning the subject matter.<sup>34</sup> Customary Law on the other hand, imposes quite a number of fundamental obligations on states in the sphere of environmental protection,<sup>35</sup> which has served as a curtailment to the absolute sovereignty principle derived by states under international law and thereby forbids states to do as they wish not minding the consequences on other states.<sup>36</sup> The fundamental obligation upon states is not to act as to cause injury or affect the rights of other states.<sup>37</sup>

Civil liability and compensation for pollution damage may safely be said to have been established under international custom,<sup>38</sup> because under customary international law,<sup>39</sup> the rule *sic utere tuo ut alienum non laedas*, which means ‘one must use his own so as not to damage that of another’. Although this rule finds its reason in good neighbourliness sense;

its international law origin can be traced to the Trail Smelter Arbitration,<sup>40</sup> where it was held that “no State has the right to use or permit the use of its territory in such a manner as to cause injury...in or to the territory of another or the properties of the persons therein.” Similar conclusions were reached in the later decisions in the Corfu Channel,<sup>41</sup> Lake Lanoux<sup>42</sup> and Nuclear Tests cases that involved France and Australia as well New Zealand respectively.<sup>43</sup>

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<sup>32</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 87(2).

<sup>33</sup> MN Shaw *International Law* (2003) 760.

<sup>34</sup> MN Shaw *International Law* (2003) 760.

<sup>35</sup> MN Shaw *International Law* (2003) 760.

<sup>36</sup> MN Shaw *International Law* (2003) 760.

<sup>37</sup> MN Shaw *International Law* (2003) 760.

<sup>38</sup> K Agyebeng ‘Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration’ (2006) 6 Cornell Law School Graduate Student Papers 9.

<sup>39</sup> K Agyebeng ‘Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration’ (2006) 6 Cornell Law School Graduate Student Papers 9.

<sup>40</sup> Trail Smelter Arbitration (United States v. Canada), (1931-1941), 3 R.I.A.A. 1905

<sup>41</sup> Corfu Channel Case (United Kingdom v. Albania) I.C.J. Reports 1949, p.4 at p.22

<sup>42</sup> Lake Lanoux Arbitration (France v. Spain), (1957) 12 R.I.A.A. 281.

<sup>43</sup> K Agyebeng ‘Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration’ (2006) 6 Cornell Law School Graduate Student Papers 9 10.

However, despite improvements in regulations and equipment standards, the risk in offshore oil and gas is always imminent and has led to numerous disasters in most cases with devastating environmental and socio-economic impacts. Notable among these disasters in offshore petroleum exploitation include the following:

#### **2.4.1 Deepwater Horizon**

This is an explosion in the deepwater horizon offshore drilling which occurred on the 20 April 2010 in the Gulf of Mexico. It killed 11 crew men and left open a deepwater well that released into the ocean 4.9 million barrels of crude oil before it was shut down on 4 August 2010.<sup>44</sup>

#### **2.4.2 Nigeria Niger Delta**

The Niger Delta is an area in the southern part of Nigeria measuring about 70,000 square kilometers in size, through which river Niger and river Benue flows into the Atlantic Ocean. It is a low lying ground adjacent to a river formed primarily by years of silt washed down by the rivers Niger and Benue and intersected by a web of creeks that connects the main rivers of Benin, Bonny, Brass, Cross, Forcados, Kwa-Ibo, Nun and other streams.<sup>45</sup>

Several cases of marine pollution has been recorded in Nigeria, there are however two outstanding cases namely: the Funiwa-5 oil well blow-out of 1980 which, more than 400,000 barrels of crude spilled into the marine environment of Nigeria, as well as Mobil's Qua Iboe oil spillage of 1998 which resulted in the spillage into the marine environment of about 40,000 barrels of crude oil. The Funiwa-5 oil well blowout will be the focus of this study given its magnitude.<sup>46</sup>

##### **2.4.2.1 *The Funiwa A-5 (Texaco) oil well blowout***

This happened on January 17 1980, when the Texaco (Funwa-5) oil well blew out,

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<sup>44</sup> J Appiott 'The oceans: An inexhaustible source of energy' in P Jacket et al (eds) *Oceans the new frontier* (2011) 56.

<sup>45</sup> B Ordinioha & S Brisibe 'The human health implications of crude oil spills in the Niger delta, Nigeria: An interpretation of published studies' <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3644738/> (accessed 7 June 2014).

<sup>46</sup> SO Aghalino & B Eyinla 'Oil exploitation and marine pollution: Evidence from the Niger Delta, Nigeria' (2009) 28(3) *Journal of Human Ecology* 177 178.

releasing about 400,000 barrels of crude oil into the marine environment. The blow out occurred during completion operation by the semi- submersible drilling rig, Sedco 135C. It has since gone down in history to be the worst nightmare in Nigeria oil sector, particularly in the Niger Delta. It must be noted that even though the Funiwa-5 oil well blowout is devastating and had deleterious impact on the environment, there are still various oil spill that occurred in the Niger Delta.<sup>47</sup> It was reported not long after the *deepwater horizon* incident, that the amount of spill that has occurred in the Niger Delta dwarfs that of the Gulf of Mexico. No better way to say this than to quote the author verbatim:

In fact, more oil is spilled from the delta's network of terminals, pipes, pumping stations and oil platforms every year than has been lost in the Gulf of Mexico, the site of a major ecological catastrophe caused by oil that has poured from a leak triggered by the explosion that wrecked BP's Deepwater Horizon rig. That disaster, which claimed the lives of 11 rig workers, has made headlines round the world. By contrast, little information has emerged about the damage inflicted on the Niger delta. Yet, the destruction there provides us with a far more accurate picture of the price we have to pay for drilling oil today.<sup>48</sup>

Also on 1 May 2010, a ruptured ExxonMobil pipeline spilled over one million gallons into the delta in Akwa Ibom state of Nigeria. It took over seven days before the leak was stopped. The people of the community demonstrated against the company but security guards attacked them. Even though the Community leaders are still demanding the sum of \$1bn in compensation for the illness and loss of livelihood suffered, their chances of succeeding is slim.<sup>49</sup>

Shortly after the Ibeno spill in Akwa Ibom state, thousands of barrels of oil were also spilled when rebels attacked the Shell Trans Niger pipeline. A few days after that, a large oil slick was also found floating on Lake Adibawa in Bayelsa state and another in Ogoniland,<sup>50</sup> which forced some of the of the indigenes to lament that:

We are faced with incessant oil spills from rusty pipes, some of which are 40 years old, oil companies do

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<sup>47</sup> SO Aghalino & B Eyinla 'Oil exploitation and marine pollution: Evidence from the Niger Delta, Nigeria' (2009) 28(3) *Journal of Human Ecology* 178.

<sup>48</sup> J Vidal 'Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it' *The Observer* 30 May 2010 <http://www.theguardian.com/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 5 June 2014).

<sup>49</sup> J Vidal 'Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it' *The Observer* 30 May 2010 <http://www.theguardian.com/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 5 June 2014).

<sup>50</sup> J Vidal 'Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it' *The Observer* 30 May 2010 <http://www.theguardian.com/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 5 June 2014).

not value our life; they want us to all die. In the past two years, we have experienced 10 oil spills and fishermen can no longer sustain their families. It is not tolerable.<sup>51</sup>

Oil spill is common fallout of oil exploitation and exploitation in the Niger delta region, with an estimated total of over 7000 oil spill incidents reported over a 50-year period with an average of 240,000 barrels of crude oil being spilled every year, mainly due to unknown causes (31.85%), third party activity (20.74%), and mechanical failure (17.04%).<sup>52</sup>

Saddled with 606 oil fields, the Niger delta supplies some percentages of the United States crude oil imports and is also the world capital of oil pollution. These pollution incidents have affected life expectancy in its rural communities, majority of which have no access to clean water, for little more than 40 years over the past two generations. Indigenes and community leaders blame the oil that pollutes their land and this blame-game should be contrasted with the steps taken by British Petroleum and the United States government to try to stop the Gulf oil leak and to protect the Louisiana shoreline from pollution.<sup>53</sup> This was the dismay of Ben Ikari, a member of the Ogoni people (the people of Niger Delta that agitates for sustainable oil mining environment) when he said:

If this Gulf accident had happened in **Nigeria**, neither the government nor the company would have paid much attention; this kind of spill happens all the time in the delta.<sup>54</sup>

### 2.4.3 Argo Merchant

This occurred on 15 December 1976 when the Argo Merchant ran aground 29 nautical miles in south east of Nantucket Island, Massachusetts in high wind and ten-foot seas spilling its entire cargo of 7.7 million gallons of oil.<sup>55</sup>

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<sup>51</sup> J Vidal 'Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it' The Observer 30 May 2010 <http://www.theguardian.com/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 5 June 2014).

<sup>52</sup> B Ordinioha & S Brisibe 'The human health implications of crude oil spills in the Niger delta, Nigeria: An interpretation of published studies' <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3644738/> (accessed 7 June 2014).

<sup>53</sup> J Vidal 'Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it' The Observer 30 May 2010 <http://www.theguardian.com/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 5 June 2014).

<sup>54</sup> J Vidal 'Nigeria's agony dwarfs the Gulf oil spill. The US and Europe ignore it' The Observer 30 May 2010 <http://www.theguardian.com/world/2010/may/30/oil-spills-nigeria-niger-delta-shell> (accessed 5 June 2014).

<sup>55</sup> J Appiott 'The oceans: An inexhaustible source of energy' in P Jacket et al (eds) *Oceans the new frontier* (2011) 56.

#### 2.4.4 Amoco Cadiz

This polluted almost 200 miles of the French coastline on 16 March 1978, after the Amoco Cadiz ran aground in inclement weather off the coast of Brittany releasing its entire cargo of 68.7 million gallons of oil.<sup>56</sup>

#### 2.4.5 Exxon Valdez

On 24 March 1989, the Exxon Valdez on Bligh Reef in Prince William Sound, Alaska ran aground spilling 10.8 million gallons of oil into the Sound and severely affected more than 1,100 miles of Alaskan coastline as well as the fishing industry and wildlife.<sup>57</sup>

### 2.5 Past offshore compensation regime

As far back as 1967, the international community has had to contend with series of legal and practical problems in providing compensation to the victims of oil pollution at sea. In order to identify the basic solutions that have been embraced, it is apt to discuss it in respect of ships so that there will be basis for discussing oil rigs blowouts.<sup>58</sup>

The compensation issue became apparent due to the pollution of the coast of England and France on a scale that had never been seen before. This was as a result of the grounding of ‘*Torrey Canyon*’ off Cornwall in March of the same year. With laudable fervour, the member-states of the International Maritime Organisation (IMO) came up with the 1969 International Convention on Civil Liability for Oil Pollution Damage (the CLC Convention), and shortly afterwards, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (the 1971 Convention).<sup>59</sup> These conventions evolved gradually over the years since their

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<sup>56</sup> J Appiott ‘The oceans: An inexhaustible source of energy’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 56.

<sup>57</sup> J Appiott ‘The oceans: An inexhaustible source of energy’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 56.

<sup>58</sup> N Gaskell ‘Compensation for offshore pollution: ships and platforms’ in M Clarke (ed) *Maritime law evolving* (2013) 63.

<sup>59</sup> R Shaw ‘Pollution of the sea by hazardous and noxious substance-Is a workable international convention on compensation an impossible dream?’ in M Clarke (ed) *Maritime law evolving* (2013) 43.

adoption and have provided prompt and adequate compensation to victims of oil pollution that occurred as a result of spills on the sea.<sup>60</sup>

The CLC and Fund regime only cover oil tankers as it is set out in the CLC 1992, Fund Convention 1992 as well as the Supplementary Fund Protocol 2003. The CLC, amongst other things provides for strict liability with limited defences for oil pollution damage.<sup>61</sup> Liability in the case of the CLC is channeled to the registered ship owner only and not the salvors, pilots, crewmembers or charterers.<sup>62</sup> It does not apply to liabilities arising from blow out of oil and gas wells or explosion from oil rig platforms. The only explanation for this could be historical given that the fund system was designed to deal with carriage of oil on ships at such a time when offshore oil drilling is of little importance as it is today.<sup>63</sup>

It should be noted however that the international community is yet to come up with a single all encompassing convention that provides for liability for pollution, be it from ship, land, seabed wells or from any whatever pollutant-oil, chemicals or nuclear materials. Even where there seems to be something close, they have to contend with the problem of: who is liable; the pollutants covered; the basis of liability and defences; insurance; jurisdiction and recognition of judgments; and limitation of liability.<sup>64</sup>

One can deduce from the above that there is a lack of a single and binding global instrument that addresses civil liability and compensation in relation to offshore oil and gas exploration and the possibility of an offshore disaster is always imminent.<sup>65</sup> Although several rules on civil liability and compensation are located in various international agreements, like the International Convention for the Prevention of Pollution from Ships, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other

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<sup>60</sup> R Shaw 'Pollution of the sea by hazardous and noxious substance-Is a workable international convention on compensation an impossible dream?' in M Clarke (ed) *Maritime law evolving* (2013) 43.

<sup>61</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 66.

<sup>62</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 66.

<sup>63</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 70 71.

<sup>64</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 66.

<sup>65</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 65.



Matters, there is no consistency and conclusiveness in their meanings and application.<sup>66</sup>

Even where these factors, civil liability and compensation for offshore pollution are present, the rules on them either lack international application or there are overlaps, hence unclear on how these apply to offshore oil rig explorations.<sup>67</sup> The likely effect of freedom in this area due to non effective global regulation will encourage non-state actors to cause environmental harm with impunity, like the high seas dichotomy on biodiversity between the developing and the developed countries on it being the common heritage of mankind.<sup>68</sup> This will simply reverberate ‘tragedy of commons’ as postulated by Garrett Hardin that, finite resources in the areas open to all will eventually be depleted if each actor is free to consume the resources without regulation, as short term interest will dictate overexploitation, which will be in no one’s long-term interest.<sup>69</sup>

## 2.6 Conclusion

It is however mind boggling that, despite the above pointers and direction for regional offshore oil rig regulations, which other regions like the North Atlantic, Mediterranean Sea, Baltic Sea and the Persian Gulf have done by adopting various liability regulatory framework like the Convention for the Protection of the Marine Environment of the North Atlantic 1992; Convention for the Protection of the Mediterranean Sea against Pollution 1976; and Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992,<sup>70</sup> Africa as a region, is yet to develop a comprehensive regional offshore oil rig civil liability and compensation regime, particularly in the light of the very recent offshore drilling being carried out by Ophir Energy on the Ntsina block in Gabon, which is located in a water depth of approximately 835m and has a planned total depth of 3,500m true vertical depth sub sea,<sup>71</sup>Eni in the Marine XII Block located approximately 17 kilometers

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<sup>66</sup> N Gaskell ‘Compensation for offshore pollution: ships and platforms’ in M Clarke (ed) *Maritime law evolving* (2013) 65.

<sup>67</sup> N Gaskell ‘Compensation for offshore pollution: ships and platforms’ in M Clarke (ed) *Maritime law evolving* (2013) 64.

<sup>68</sup> V Germani & C Salpin ‘The status of high seas biodiversity in international policy and law’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 196.

<sup>69</sup> G Hardin ‘The tragedy of the commons’ (1968) 162 *Science* 1243-1248.

<sup>70</sup> CL Hagerty & JL Ramseur *Deepwater horizon oil spill: Selected issues for Congress* (2010) 39.

<sup>71</sup> ‘Ophir Energy announces that drilling operations have now commenced on the Padouck Deep-1 well on the Ntsina Block, offshore Gabon’ Oil Voice 18 February 2014

offshore in Congo,<sup>72</sup> and Africa Oil Corp in Kenya and Ethiopia respectively,<sup>73</sup> which although are situated in territorial waters, but the effect of offshore oil rig mishap knows no bound, as it is transboundary in nature and will easily seep into other seas.

Flowing from the analysis above, if the roadmap for regional regulation is not gotten right by Africa at this stage, the consequences might be dire and incalculable given also that offshore oil-rig pollution is transboundary in nature like the earlier negotiated conventions have alluded to in the previous chapter. Also that, regional arrangements can influence defiant countries, as was revealed in the Greek sea turtle story (its about egg laying sea turtle and their resettlement due to noise from the airport and light oceans installations, which was later done due to pressure from Non Governmental Organisations and the European Union).<sup>74</sup> It could also lead the regional community to watch over the environment as well as compel effective national policy making.<sup>75</sup> While not disputing that, there are instances where regional regulation cannot be as effective as global. These instances were revealed in the divide during the high seas biodiversity negotiations on marine genetic resources, climatic geo-engineering of the ocean like iron fertilization and carbon sequestration, which require international community response globally.<sup>76</sup>

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[http://www.oilvoice.com/n/Ophir\\_Energy\\_announces\\_that\\_drilling\\_operations\\_have\\_now\\_commenced\\_on\\_the\\_Padouck\\_Deep1\\_well\\_on\\_the\\_Ntsina\\_Block\\_offshore\\_Gabon/15128b9e514f.aspx#gsc.tab=0](http://www.oilvoice.com/n/Ophir_Energy_announces_that_drilling_operations_have_now_commenced_on_the_Padouck_Deep1_well_on_the_Ntsina_Block_offshore_Gabon/15128b9e514f.aspx#gsc.tab=0) (accessed 19 February 2014).

<sup>72</sup> ‘Eni make important new discovery in offshore Congo’ Oil Voice 13 February 2014

[http://www.oilvoice.com/n/Eni\\_make\\_important\\_new\\_discovery\\_in\\_offshore\\_Congo/6f678e15b1cc.aspx#gsc.tab=0](http://www.oilvoice.com/n/Eni_make_important_new_discovery_in_offshore_Congo/6f678e15b1cc.aspx#gsc.tab=0) (accessed 19 February 2014).

<sup>73</sup> ‘Africa Oil provides operations update’ Oil Voice 12 February 2014

[http://www.oilvoice.com/n/Africa\\_Oil\\_provides\\_operations\\_update/c6623ee935ef.aspx#gsc.tab=0](http://www.oilvoice.com/n/Africa_Oil_provides_operations_update/c6623ee935ef.aspx#gsc.tab=0) (accessed 19 February 2014).

<sup>74</sup> J Rochette & L Chabason ‘ A regional approach to marine environmental protection: The “regional seas” experience’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 115.

<sup>75</sup> J Rochette & L Chabason ‘ A regional approach to marine environmental protection: The “regional seas” experience’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 115.

<sup>76</sup> J Rochette & L Chabason ‘ A regional approach to marine environmental protection: The “regional seas” experience’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 118.

## Chapter Three

# The Regulatory Framework for Oceans Governance for Offshore Oil Rig Pollution in Africa

### 3.1 Introduction

The previous chapter while examining the oceans' resources as the common heritage of mankind laid the foundation for the need for offshore oil rig pollution regulation in Africa that is due to the visible comprehensive regulatory gaps that exist in the sector globally as well as in Africa. It will however be inadequate to explore the need for sustainable civil liability and compensation regime for offshore oil rig pollution in Africa without a proper understanding of the regulatory framework for the governance of oceans.

This chapter will discuss with oceans' regulatory framework as it is relevant to oil rig pollution, and this will be done by examining the four Conventions,<sup>1</sup> adopted before the United Nations Convention on the Law of the Sea (UNCLOS). These are: the governance of the sea in light of the governing authorities created by UNCLOS; the International Seabed Authority (ISA); the Commission on the Limits of the Continental Shelf (CLCS); and the International Tribunal of the Law of the Sea (ITLOS).<sup>2</sup>

The major legal framework for protection of the marine environment is the 1982 United Nations Convention on the Law of the Sea (UNCLOS), also referred to as the modern constitution of the oceans.<sup>3</sup> Signed in Montego Bay in Jamaica, it came about as a result of compromise between the developed and developing states from 1973 to 1982<sup>4</sup>. Its aim is to create a legal order for the seas and oceans, in order to promote the protection and preservation of marine environment. UNCLOS with 320 articles and nine annexes, reiterated the 1958 Conventions (details of which will be discussed below) and also

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<sup>1</sup> Geneva Conventions on the Territorial Sea and the Contiguous Zone, the High Seas, the Continental Shelf and the Fishing and Conservation of the Living Resources of the High Seas.

<sup>2</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 156, art (1) annex II & VI.

<sup>3</sup> D Freestone et al *The law of the sea: Progress and prospects* (2006) 1,

<sup>4</sup> J Dugard *International law: A South African perspective* (2011) 367.

facilitated the promulgation of new rules to govern future ocean developments.

The adoption of UNCLOS did not in any way mark the foundation of the law of the sea as the evolution of the law of the sea is as old as the history of international law itself. The freedom of the seas has since being advocated by the Netherlands on the advice of Hugo Grotius in 1604, which later resulted in the writing of *Mare Liberum* in 1609 at the instance of the Dutch East India Company.<sup>5</sup>

The International Law Commission (ILC) in 1945, adopted a set of draft articles that were used by the first and second Conferences on the Law of the Sea in 1958 and 1960,<sup>6</sup> namely; Geneva Conventions on the Territorial Sea and the Contiguous Zone (TSC), the High Seas (HSC), the Continental Shelf (CSC), and the Fishing and Conservation of the Living Resources of the High Seas;<sup>7</sup> the Exclusive Economic Zone (EEZ) though not part of the Conventions. Despite inadequate success, these conventions were ratified in mid 1960s by a respectable number of states, they did not resolve a number of issues, prominent among which are the extension of exclusive fishing zones and mining rights on the deep sea bed. These gaps eventually resulted in Third United Nations Law of the Sea Conference and later adoption of UNCLOS.<sup>8</sup>

In order to further place this discussion in context, discussion of the regulatory framework before the adoption of UNCLOS will be appropriate.

### **3.2 Pre-UNCLOS oceans regulatory framework**

Twenty-two years before the advent of UNCLOS, the Geneva conferences on the Law of the Sea adopted four Conventions to regulate different areas of the seas, and these are the Territorial Sea and the Contiguous Zone, the High Seas, the Continental Shelf and the

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<sup>5</sup> D Tladi 'Ocean governance: A fragmented regulatory framework' in P Jacket et al (eds) *Oceans the new frontier* (2011) 99 100.

<sup>6</sup> D Tladi 'Ocean governance: A fragmented regulatory framework' in P Jacket et al (eds) *Oceans the new frontier* (2011) 99 100.

<sup>7</sup> 515 UNTS 205; (1958) 52 *American Journal of International Law* 834, 450 UNTS 82; (1958) 52 *American Journal of International Law* 842, 499 UNTS 311; (1958) 52 *American Journal of International Law* 858, 599 UNTS 285; (1958) 52 *American Journal of International Law* 851.

<sup>8</sup> J Dugard *International law: A South African perspective* (2011) 366 367.

Fishing and Conservation of the Living Resources of the High Seas. However, for the purpose of this research, discussion will revolve around all the Conventions except for the convention on Fishing and Conservation of the Living Resources of the High Seas.

### **3.2.1 Territorial Sea and the Contiguous Zone<sup>9</sup> (TSC)**

The Geneva conferences of 1958 and 1960 could not agree on the width of the territorial sea due to opposition to the traditional three-mile limit, and a compromise for a six-mile territorial sea, with a fishing zone for additional six mile also fell through by one vote to secure the two third majorities.<sup>10</sup> However, UNCLOS was able to resolve the impasse by extending territorial sea to 12 nautical miles from the baseline.<sup>11</sup> It also went further to repose the right over the territorial sea, airspace, seabed, and subsoil in the coastal state.<sup>12</sup>

The contiguous zone on the other hand, was recognised under the 1958 Geneva Convention as 12 miles from the baseline from the territorial sea within which a coastal state might exercise control.<sup>13</sup> It was however retained by UNCLOS, but extended to 24 nautical miles from the baseline of the breadth of the territorial sea and subjected to the control of the coastal state as well.<sup>14</sup>

### **3.2.2 Exclusive Economic Zone<sup>15</sup> (EEZ)**

This was not part of the Geneva Conventions, but it was one of the most hugely debated issues at the third Law of the Sea conference. Discussion on it at this point is germane as it links both the territorial and the high sea together. During the conference, there was huge pressure for the recognition of a fishing zone outside the territorial sea to help developing nations prevent over exploitation of their marine resources by major fishing countries.<sup>16</sup>

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<sup>9</sup> 515 UNTS 205; (1958) 52 *American Journal of International Law* 834.

<sup>10</sup> J Dugard *International law: A South African perspective* (2011) 371.

<sup>11</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 3.

<sup>12</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 2.

<sup>13</sup> 515 UNTS 205; (1958) 52 *American Journal of International Law* 834 art 24.

<sup>14</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 33.

<sup>15</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 55.

<sup>16</sup> J Dugard *International law: A South African perspective* (2011) 375.

The agreement reached was that the EEZ would be 200 nautical miles measured from the baseline of territorial sea<sup>17</sup> within which the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of the water superjacent to the seabed and of the seabed subsoil whether living or non living.<sup>18</sup> However, going by the decision of ITLOS in *Saint Vincent and Grenadines v Guinea*, the coastal state does not have right to enforce its custom laws in the EEZ.<sup>19</sup> Even though the water of the EEZ do not enjoy the status of the high seas, other state reserves the rights of navigation and overflight as well as laying submarine cable and pipelines.<sup>20</sup> The states have come to widely accept the EEZ on the heels of the declaration of the International Court of Justice in *Libya v Malta*, that ‘the institution of the exclusive economic zone... is shown by the practice of states to have become a part of customary law.’<sup>21</sup>

### 3.2.3 The High Seas<sup>22</sup> (HSC)

The high seas are those parts of the seas not included in the exclusive economic zone, the territorial sea, or internal waters.<sup>23</sup> No state may acquire sovereignty over the high seas as they are open to all states, either coastal or landlocked.<sup>24</sup> This notion has however generated a lot of controversy between the developing countries and the developed ones, particularly as regards marine bio diversity beyond the national jurisdiction.<sup>25</sup> Like the EEZ, freedom of the high seas includes navigation, overflight, fishing and scientific research, also the freedom to lay submarine cables and pipelines as well as construct artificial islands and other installations permitted by international law.<sup>26</sup>

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<sup>17</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 57.

<sup>18</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 56.

<sup>19</sup> Judgment of ITLOS (1999) 38 ILM 1323 at 1351 (para 127).

<sup>20</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 58.

<sup>21</sup> 1985 ICJ Reports 13 at 33.

<sup>22</sup> 450 UNTS 82; (1958) 52 *American Journal of International Law* 842.

<sup>23</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 86.

<sup>24</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 87&89.

<sup>25</sup> V Germani & C Salpin ‘The status of high seas biodiversity in international policy and law’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 196.

<sup>26</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 87.

### 3.2.4 The Continental Shelf Convention<sup>27</sup> (CSC)

There was little known of the continental shelf before the International Law Commission adopted the set of draft articles that later became the Geneva Conventions. However, when oil and natural gas drilling became feasible on the continental shelf due to technological advancement, legal recognition was given to these advances in the Truman declaration, which provided that the continental shelf should be regarded as an extension of the land mass of the coastal state and thus naturally appurtenant to it.<sup>28</sup> Other states followed the example of the United States and later got significant body of state practice in support of ceding exclusive rights of exploration and exploitation on the continental shelf,<sup>29</sup> which practice was later reflected in the 1958 Geneva Convention on the Continental Shelf.<sup>30</sup>

The continental shelf was defined by the CSC as ‘the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where depth of the superjacent waters admits of the exploitation of the natural resources of the said areas’.<sup>31</sup> While giving the coastal state the sovereign rights to explore and exploit the natural resources of the continental shelf, the CSC made the rights inherent and not dependent on express proclamation.<sup>32</sup> This was also restated in International Court of Justice (ICJ) words that... ‘the submarine areas comprising the continental shelf may be deemed to be actually part of the territory over which the coastal state has dominion...’<sup>33</sup>

UNCLOS reiterates the provisions of the CSC on the rights of the coastal states over the continental shelf,<sup>34</sup> the indefinite definition of natural resources,<sup>35</sup> and the legal status of the superjacent waters and airspace above those waters,<sup>36</sup> but varies majorly in its demarcation

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<sup>27</sup> 499 UNTS 311; (1958) 52 *American Journal of International Law* 858.

<sup>28</sup> US Presidential Proclamation No 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, done at Washington on 28 September 1945.

<sup>29</sup> J Dugard *International law: A South African perspective* (2011) 386.

<sup>30</sup> 499 UNTS 311; (1958) 52 *American Journal of International Law* 858 art 2(1).

<sup>31</sup> 499 UNTS 311; (1958) 52 *American Journal of International Law* 858 art 1.

<sup>32</sup> 499 UNTS 311; (1958) 52 *American Journal of International Law* 858 art 2(3).

<sup>33</sup> *North Sea Continental Shelf Cases* 1969 ICJ Reports 3 at 31.

<sup>34</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 77(1) & (3).

<sup>35</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 77(4).

<sup>36</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 78(1).

of the outer limit of the continental shelf.<sup>37</sup> The reason advanced for this divergence of outer limit, was the recognition of 200 nautical miles EEZ by UNCLOS, which bestows on all coastal states, regardless of the expanse of their continental shelves, exclusive rights to both the sea and the seabed of the EEZ.<sup>38</sup>

### 3.3 United Nations Convention on the Law of the Sea

The focus here is on the protection and preservation of the marine environment. The convention contains important general obligations that are binding on the 166 states that are parties to it,<sup>39</sup> of which 49 are African countries.<sup>40</sup> UNCLOS seems to provide an all-inclusive set of principles that obligate states to protect the marine environment against all forms of pollution.

Having set out six major sources of ocean pollution namely: land based and coastal activities, potential seabed mining, vessel source pollution, ocean dumping, pollution from the atmosphere and continental shelf drilling,<sup>41</sup> the Convention lays down fundamental obligations on states to protect and preserve the marine environment,<sup>42</sup> while observing their sovereign rights to exploit the natural resources in line with their environmental policies.<sup>43</sup> In obligating states to preserve their marine environment, it urges them to prevent, reduce and control marine pollution from all sources and to ensure that such pollution does not spread beyond national jurisdictions.<sup>44</sup> States are also obligated not to transfer either directly or indirectly, damage or hazards from one area to another or even transform one form of pollution into another.<sup>45</sup>

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<sup>37</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 76.

<sup>38</sup> J Dugard *International law: A South African perspective* (2011) 387.

<sup>39</sup> United Nations Convention on the Law of the Sea, UN TREATY DATABASE, 9 April 2014, [https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREA%20TY&mtdsg\\_no=XXI~6&chapter=21&Te%20mp=mtdsg3&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREA%20TY&mtdsg_no=XXI~6&chapter=21&Te%20mp=mtdsg3&lang=en#EndDec) (accessed 9 April 2014)

<sup>40</sup> United Nations Treaty Collection 'United Nations Convention on the Law of the Sea' 10 December 1982, [https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXI~6&chapter=21&Te%20mp=mtdsg3&lang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Te%20mp=mtdsg3&lang=en) (accessed 19 February 2014).

<sup>41</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 194 (3)(a)(b)(c)&(d)...

<sup>42</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 192.

<sup>43</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 193.

<sup>44</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 194 (1)&(2).

<sup>45</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 195



In order to achieve the purposes highlighted above, UNCLOS enjoins states to cooperate both globally and regionally either directly or through competent international organisations in formulating and elaborating international rules and procedures insofar as it is consistent with the convention.<sup>46</sup> They are directed further to notify one another of any imminent danger to the marine environment or pollution damage, particularly the state that is most likely to be affected by such incidents as well as a competent international organization.<sup>47</sup>

As alluded to earlier, despite UNCLOS's seemingly effective marine environment protection and preservation principle, one of its major albatross is the principle of the freedom of the high seas. The principle simply states that the high seas is open to all states and that the freedom is exercised under the conditions laid down by this convention.<sup>48</sup> This ordinarily contemplates the obligation of the states to protect and preserve the marine environment. It also goes further to state that in exercising the freedom, due regard should be paid to the interest of other states in exercise of their high seas freedom.<sup>49</sup> This has not been the case and might not be the case inasmuch as the developed countries still possess the technological wherewithal to harvest the benefits of the high seas. The only way to resolve this is through the framework of the United Nations resolutions. Until that is done, the dichotomy will exist for long and might jeopardise the equality principle behind the UNCLOS principle.<sup>50</sup>

From the above, one could safely conclude that UNCLOS's environmental protections are insufficient and needs reinforcements. Perhaps the only reason why UNCLOS has not done enough to address the fragmentation issues in oceans governance is due to the absence of an overarching institution with the authority to develop the provisions further.<sup>51</sup> It has also been argued elsewhere that the Convention compounded the fragmentation problem with

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<sup>46</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 197.

<sup>47</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 198.

<sup>48</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 87(1)

<sup>49</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 87(1) & (2).

<sup>50</sup> V Germani & C Salpin 'The status of high seas biodiversity in international policy and law' in P Jacket et al (eds) *Oceans the new frontier* (2011) 196.

<sup>51</sup> D Tladi 'Ocean governance: A fragmented regulatory framework' in P Jacket et al (eds) *Oceans the new frontier* (2011) 104.

the creation of more institutions with potential areas of competence overlap.<sup>52</sup> These institutions- the International Seabed Authority (the Authority), the Commission on the Limits of the Continental Shelf (the Commission) and the International Tribunal of the Law of the Sea (the Tribunal)-will be examined in line with these claims and in relation to oceans governance.

### **3.4 International Seabed Authority<sup>53</sup>(the Authority)**

The International Seabed Authority, which sits in Jamaica, was established in accordance with Part XI of UNCLOS.<sup>54</sup> The Authority's main function is to control and manage activities in the seabed beyond the national jurisdiction termed 'the area', in line with article 136, which states that the area and its resources are common heritage of mankind.<sup>55</sup> It is interesting to note that there exists a sharp divide between developing countries and the developed ones on the common heritage of mankind; the former hold the view that the common heritage not only apply to mineral resources in the area but the biological as well, while the latter believes common heritage of mankind encompasses mineral resources only and that marine genetic resources fall under the high seas regime set out in Part VII of the Convention.<sup>56</sup>

Another major form of disintegration is seen in article 145 which provides that the Authority should adopt measures to ensure effective protection for the marine environment from harmful effects, which may arise from the activities in the area. The effect of this on the high seas is that any activities on the high seas with impact on the seabed would fall within the Authority's mandate. Not only did the Convention not identify the legal regime that applies in the area, it also suggests a deficiency in logic in the reasoning of the

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<sup>52</sup> D Tladi 'Ocean governance: A fragmented regulatory framework' in P Jacket et al (eds) *Oceans the new frontier* (2011) 104.

<sup>53</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 156.

<sup>54</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 156.

<sup>55</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 136.

<sup>56</sup> V Germani & C Salpin 'The status of high seas biodiversity in international policy and law' in P Jacket et al (eds) *Oceans the new frontier* (2011) 196.

Convention, due to the fact that the Authority's mandate does not extend to the water column above the seabed.<sup>57</sup>

Finally, it also creates institutional difficulty because UNCLOS's zonal approach does not sufficiently reflect the effects of the events in the EEZ on the high seas, and also the impact of the water column (high seas) on the seabed underneath (the area), as the Authority's mandate in the area does not cover the water column above seabed.<sup>58</sup>

### **3.5 International Tribunal for the Law of the Sea<sup>59</sup>(the Tribunal)**

The ITLOS, with its seat in Hamburg, Germany, was established by UNCLOS, as a body for the settlement of disputes relating to the law of the sea and may sit and exercise its functions elsewhere it considers desirable.<sup>60</sup> UNCLOS also recognizes other competent disputes settlement bodies and mechanisms, particularly the ICJ as well as other arbitral bodies.<sup>61</sup> The fall out of this is that the Convention does not provide a hierarchy among these bodies, which mostly result in the competent bodies giving conflicting interpretations, hence, this raises question of probable fragmentation.<sup>62</sup>

### **3.6 Commission on the Limits of the Continental Shelf<sup>63</sup> (the Commission)**

The function of the Commission is to further the implementation of UNCLOS provisions in respect to the establishment of the outer limits of the continental shelf, beyond 200 nautical miles from the baselines of the territorial sea.<sup>64</sup> The Convention stipulates that, the coastal

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<sup>57</sup> D Tladi 'Ocean governance: A fragmented regulatory framework' in P Jacket et al (eds) *Oceans the new frontier* (2011) 105.

<sup>58</sup> D Tladi 'Ocean governance: A fragmented regulatory framework' in P Jacket et al (eds) *Oceans the new frontier* (2011) 105.

<sup>59</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) annex VI.

<sup>60</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) article 1annex VI.

<sup>61</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 287.

<sup>62</sup> D Tladi 'Ocean governance: A fragmented regulatory framework' in P Jacket et al (eds) *Oceans the new frontier* (2011) 105.

<sup>63</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 1 annex II

<sup>64</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 3 annex II

State shall establish the outer limits of its continental shelf where it extends beyond 200 miles, based on the Commission's recommendation.<sup>65</sup> Therefore, it is the Commission's mandate to make recommendations to coastal States on matters related to the establishment of those limits and its recommendations and actions shall not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts.<sup>66</sup>

The twist to this is well reflected in the report of the eleventh meeting of state parties to the law of the sea convention, where some delegations pointed out that there was no legal consequence stipulated by the Convention if a State did not make a submission to the Commission. Several other delegations also underscored the principle that the rights of a coastal State over its continental shelf were inherent, and that non-compliance with the 10-year time period specified in Article 4 of annex II would not adversely affect those rights which did not depend on occupation, effective or notional, or any express proclamation, as stated in Article 77, paragraph 3, of the Convention.<sup>67</sup>

The potential fragmentation to this is the indecisive issue of who has the final authority in the establishment of the outer limit of the continental shelf. Although the Convention makes it clear in article 76(4)(a) and article 7 annex II that it is the state who can establish such, the power of review and recommendation vests in the Commission in article 4 annex II. In line with foregoing, one could safely conclude that the role of the Commission evolves in a particular way based upon the submitting states and other states' willingness to interact with it in good faith in achieving an accord.<sup>68</sup>

Notwithstanding UNCLOS being the international framework for safeguarding the world's oceans, as well as its commendable achievements in some areas, the Convention did not in all its 320 articles and 9 annexes adequately guarantee protection to states whose waters and shores are polluted by oil spills from offshore platforms in another state's waters; it also did not specifically impose an international legal responsibility to guarantee functional

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<sup>65</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 7 annex II

<sup>66</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 9 annex II

<sup>67</sup> 'Report of the eleventh meeting of state parties' 14 June 2011, (para 75) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/411/52/PDF/N0141152.pdf?OpenElement> (accessed 16 April 2014).

<sup>68</sup> TL McDorman 'The role of the Commission on the limits of the continental shelf: A technical body in a political world' (2002) 17 *The International Journal of Marine and Coastal Law* 306.

compensation in the event of an offshore oil rig explosion.<sup>69</sup> One could safely conclude that UNCLOS creates the regulatory framework for the administration of offshore oil activities but falls short of stipulating any definite rules that would apply to the prevention of marine pollution, liability and compensation in the event of offshore oil drilling mishap.<sup>70</sup>

This probably explains why some countries are not party to the Convention but have gone on to promulgate their own regulatory mechanisms, such as the Oil Pollution Act (OPA). In essence, the Convention lacks definitive procedures for determining liability,<sup>71</sup> but encourages states to guarantee compensation, and enforce the adoption of international rules in this area.<sup>72</sup>

This lack of definitive procedure for determining liability and guaranteeing compensation, and also the provision of the Convention which encourages states to cooperate both globally and regionally in formulating international rules and procedures consistent with the convention,<sup>73</sup> accounted for the reason why Africa came up with some offshore regulatory mechanisms, which will be examined below.

### **3.7 The Revised African Maritime Transport Charter**

Article 28 of the Revised African Maritime Transport Charter, among other provisions in the Charter, deals with the protection and preservation of the marine environment and impose on the states parties to it, to intensify efforts both at regional and international levels to ensure the protection and preservation of the marine environment.<sup>74</sup>

The parties to the Charter also committed themselves to the creation of a sustainable compensation regime to cover marine incidents of pollution of that sea that are not covered

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<sup>69</sup> MB Cates 'Offshore oil platforms which pollute the marine environment: A proposal for an international treaty imposing strict liability' (1984) 21 *San Diego Law Review* 694.

<sup>70</sup> I Stefankova 'International regulation v national regulation on offshore oil exploitation – The USA as an example' (2013) III *Elsa Malta Law Review* 130.

<sup>71</sup> MB Cates 'Offshore oil platforms which pollute the marine environment: A proposal for an international treaty imposing strict liability' (1984) 21 *San Diego Law Review* 694.

<sup>72</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 235.

<sup>73</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 197.

<sup>74</sup> The Revised African Maritime Transport Charter 2010 (AMTC) art 28 (1).

by the existing international compensation regimes,<sup>75</sup> while seeking to implement a common policy aimed at preventing and combating pollution from ships as well as other sources of pollution.<sup>76</sup> In order to fully implement the provisions of Article 28 of the Charter that deals with marine pollution, the state parties promised to ensure the acceptance, ratification and implementation of marine environment protection conventions as well as instruments. They also undertook to strengthen the mechanisms for national, bilateral, sub-regional, regional and international cooperation in order to prevent and combat pollution from all sources and the dumping of toxic wastes in African waters. Besides, the state parties also undertook to establish the mechanisms that will control and monitor activities in the African maritime domain while developing national and regional contingency plans for marine pollution preparedness and response in partnership with the oil industry at national, regional and international levels.<sup>77</sup>

This Charter was adopted in Kampala, Uganda on the 26<sup>th</sup> July, 2010 and made to abrogate the former (African Maritime Transport Charter) adopted in Addis Ababa, Ethiopia on the 13<sup>th</sup> December, 1993. Despite the time lag, nothing concrete has been done so far to safeguard the marine environment particularly as regards offshore oil rig pollution, let alone the creation of a sustainable compensation regime referred to in subsection (3). Instead, it sought succor under the UNCLOS as regards offshore oil rig regulation in Article 45 stating that:

Nothing in this Charter shall prejudice the rights and obligations of any State Party under the United Nations Convention on the Law of the Sea, 1982, and under the customary international law of the sea.<sup>78</sup>

Going by the above, it is evident that the Charter has not and might not be able to fill the gap that exist in the offshore oil rig pollution sector in Africa, particularly in light of any major offshore or marine pollution occurrence and nothing has yet been done in this regard till date. A cursory look at the provisions of the Charter also suggest that it is more concerned with sustainable compensation regime for marine pollution but nothing on establishment and attribution of liability. It remains to be seen how compensation would be

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<sup>75</sup> The Revised African Maritime Transport Charter 2010 (AMTC) art 28 (3).

<sup>76</sup> The Revised African Maritime Transport Charter 2010 (AMTC) art 28 (4).

<sup>77</sup> The Revised African Maritime Transport Charter 2010 (AMTC) art 28 (5).

<sup>78</sup> The Revised African Maritime Transport Charter 2010 (AMTC) art 45.

arrived at without the establishment of liability.

Flowing from the above, the examination of the last offshore oil rig regulatory regime in Africa which is in the West and Central Africa as well as the Eastern Africa region, will give pointer to the research topic of whether Africa should have a sustainable civil liability and compensation regime as a whole, or should be content with what is currently available.

### 3.8 West, Central and East Africa Regional Regulations

The Western and Central Africa, being important regions for oil and gas activities, including offshore, adopted a regional co-operation in 1981 to secure their coastal environment.<sup>79</sup> The rationale for the co-operation is based on the Abidjan Convention (the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region) and its Emergency Protocol.<sup>80</sup> Apart from the Convention imposing a duty on the parties,<sup>81</sup> to take necessary measures in preserving their marine environment,<sup>82</sup> state-parties also undertook to co-operate in the formulation and adoption of appropriate rules on the issue of liability and compensation for pollution damages.<sup>83</sup> The parties to the Convention supposedly made a major milestone in addressing oil spills, by encompassing oil platforms, during their Co-operation in Protection (COP) meeting held from April 1<sup>st</sup> 2012 in Accra Ghana, which is a far cry from actually establishing a liability and compensation scheme and thus put it in the same stead with the Maritime Transport Charter. Among the actions taken at the meeting were:

- Creation of Regional Centre for Cooperation in case of emergency, which was done by amendment of the 1985 Protocol concerning cooperation in combating pollution

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<sup>79</sup> J Rochette 'Towards an international regulation of offshore oil exploitation' (2012) 10 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

<sup>80</sup> J Rochette 'Towards an international regulation of offshore oil exploitation' (2012) 10 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

<sup>81</sup> Angola, Benin, Cameroon, Cape Verde, Congo, Cote d'Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mauritania, Namibia, Nigeria, Sao Tome and Principe, Senegal, Sierra Leone and Togo.

<sup>82</sup> Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central Africa Region, Abidjan, 23 March 1981. Art 4(1).

<sup>83</sup> Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central Africa Region, Abidjan, 23 March 1981 art 15

- in cases of emergency in the Western and Central African region;<sup>84</sup>
- Adoption of a Regional Contingency Plan to organise a prompt and effective response to oil spills affecting or likely to affect the region; and<sup>85</sup>
  - The Contracting-Parties committed themselves to “build national capacity in oil and gas development to manage the sector; elaborate and adopt appropriate national policies; conduct Strategic Environmental Assessments and social or Environmental Impact Assessments; enact national legislation to address liability, compensation, safety and security-related matters for offshore platforms.”<sup>86</sup>

The Nairobi Convention,<sup>87</sup> and its two Protocols,<sup>88</sup> governs the East African Region. Although drafted along the lines of the Abidjan Convention, the Nairobi Convention imposes a general duty upon the parties to take steps in preventing pollution resulting from the exploration and exploitation of the seabed and its subsoil.<sup>89</sup> It also requires states to cooperate in the formulation of pollution damage liability and compensation principles in accordance with internationally laid down principles.<sup>90</sup> However, the two subsequent Protocols to the Convention contain no material provision with respect to liability.<sup>91</sup>

From the foregoing, it is evident that it is only West, Central and East Africa in the entire African region, but for Libya, Morocco and Tunisia, who are party to the Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (details of which are deferred to the next chapter), that have regulated their marine environment in relation to

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<sup>84</sup> J Rochette ‘Towards an international regulation of offshore oil exploitation’ (2012) 12 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

<sup>85</sup> J Rochette ‘Towards an international regulation of offshore oil exploitation’ (2012) 12 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

<sup>86</sup> J Rochette ‘Towards an international regulation of offshore oil exploitation’ (2012) 12 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

<sup>87</sup> Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 21 June 1985.

<sup>88</sup> Protocol concerning Co-operation in Combating Marine Pollution in Cases of Emergency in the Eastern African Region, Nairobi, 21 June 1985; Protocol concerning Protected Areas and Wild Fauna and Flora in the Eastern Africa Region, 21 June 1985.

<sup>89</sup> Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 21 June 1985, art 8.

<sup>90</sup> Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 21 June 1985, art 15..

<sup>91</sup> K Agyebeng ‘Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration’ (2006) 21 *Cornell Law School Graduate Student Papers* 11.



offshore oil rig pollution. The reason might be that they are major oil producers in the region as well as being closely knitted to the major oil producers.<sup>92</sup>

The possibility of this sectional regional regulation standing the test of time and the pressure of a major oil rig disaster is slim, as oil rig pollution in most cases spurns widely and erode piecemeal legislation given that the sea has no clear cut demarcation and thus allow pollution in one area to seep into others,<sup>93</sup> knowing fully well that offshore oil rig pollution is majorly transboundary in nature. The perfect example of this was the two offshore incidents, the *Deepwater horizon* incident and *Montara* blowout that released 4.9 million barrels of oil into the gulf of Mexico in United States and contaminated 70 000 kilometres of the oceans as well as spreading into East Timor in Australia respectively.<sup>94</sup> The occurrence of such incidence in Africa may not only stop in the West, Central nor East Africa, but may traverse the entire of length of Africa's 26,000 nautical miles, with her thirty-eight (38) coastal or island states.<sup>95</sup> The gaps left in the instruments discussed so far have so far been noticed regionally and there seems to be an attempt to address it in the 2050 Africa Integrated Maritime Strategy discussed below.

### 3.9 2050 Africa Integrated Maritime Strategy (AIM Strategy)

One of the main objectives for developing the Africa Integrated Maritime Strategy is to provide a broad framework for the protection and sustainable exploitation of Africa's Maritime Domain (AMD) for wealth creation.<sup>96</sup> This was well reflected in the spirit of the AIM strategy on how Africa should manage her waterways, oceans and seas, realising they are the major pillars for economic and social development and vital in the fight against poverty and unemployment, while recognizing the imperative to develop a sustainable blue

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<sup>92</sup> J Rochette 'Towards an international regulation of offshore oil exploitation' (2012) 12 *Institut Du Developpement Durable Et Des Relations Internationales Working paper* 15/12.

<sup>93</sup> CE Pirtle 'Military uses of ocean space and the law of the sea in the new millennium' (2000) 31 *Ocean Development and International Law* 21.

<sup>94</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 1 *Cornell Law School Graduate Student Papers* 11.

<sup>94</sup> S Bosman 'Regulation for marine pollution arising from offshore oil and gas facilities' (2012) 89 *Australia and New Zealand Maritime Law Journal* 26.

<sup>95</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012) 8.

<sup>96</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012) 7.

economy, to improve African citizens' well-being and significantly reduce marine environmental risks.<sup>97</sup>

The Africa Union Commission went on to layout the complete mandate of the AIM Strategy in twenty strategies, one hundred and twelve sub-strategies. Little mention was made to offshore oil rig pollution in generic manner under the 'Environmental Crime' in Strategy IV (65) with no mention of liability or compensation in the event of its occurrence, and this was reverberated thus:

The AU shall develop mechanism to detect and prosecute cases of dumping of toxic waste in the Africa Maritime Domain, with the toughest position for compensation. The AU together with relevant partners shall support the NEPAD Joint Implementation Mechanism of the Nairobi 9 and Abidjan 10 Conventions in the implementation of the marine and coastal environment component of the NEPAD.<sup>98</sup>

### **3.10 Conclusion**

Having discussed the regulatory framework for oceans governance for offshore oil rig pollution, as well as the gaps within it which prompted some African countries to come up with sectional regional regulation, it is evident that the Africa's regional offshore oil rig regulatory regime is not sustainable in curbing any future major oil rig disaster both in civil liability, as well as guaranteeing fair and prompt compensation, due to its lack of unification.

Considering that major oil rig blowout disasters are transboundary in nature and devastating in its effects, Africa as a region does not yet have a comprehensive regime, while the sub-regions that have, represents a fragment of the whole and some other countries like Libya, Tunisia and Morocco have sided with other regions outside Africa in regulating their region. Consequently, it will be safe to conclude going by the provisions of the above instruments in relation to civil liability and compensation regime that, there is no comprehensive offshore oil rig regional regulation in Africa like in some other regions, which will be considered alongside the global regulatory regime in the next chapter.

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<sup>97</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012) 9.

<sup>98</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012) 23.

## Chapter Four

### Global and Regional Regulatory Civil Liability and Compensation Regime for Offshore Oil Rig Pollution

#### 4.1 Introduction

Having discussed the regulatory framework for oceans governance in light of the United Nations Convention for the Law of the Sea (UNCLOS), as well as the Geneva conventions before it; it was noted in the discourse that the UNCLOS only provides a fragmented regulation, leaving majority of the oceans subject to the Grotius' old principle of high seas freedom. This also informed the examination of the regulatory regime that operates in Africa, in line with the provision of UNCLOS that allows for regional cooperation directly in formulating international rules and procedures in protecting their marine environment.<sup>1</sup>

The UNCLOS is primarily structured to be implemented through a collection of national and treaty laws.<sup>2</sup> States are the driving force behind the national laws, while the United Nations Environmental Programme (UNEP) and the International Maritime Organisation (IMO) spearhead the treaty laws.<sup>3</sup> The UNEP coordinates the Regional Seas Programme, which comprises of thirteen Regional Seas programmes to safeguard particular ocean areas namely: the wider Caribbean, the Black Sea, The East Asian Seas, The Eastern Africa Seas, South Asian Seas, the Persian Gulf, the Mediterranean, Pacific, the North East Pacific, the South East Pacific, the North West Pacific, the Red Sea and the Gulf of Aden, the Black Sea, and the Western Africa Sea,<sup>4</sup> while the IMO sponsors forty two international

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<sup>1</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 197.

<sup>2</sup> TJ Schoenbaum 'The deepwater horizon oil spill in the context of public international law regime for protection of marine environment: A comparative study' (2012-2013) 25 *University of San Francisco Maritime Law Journal* 6.

<sup>3</sup> TJ Schoenbaum 'The deepwater horizon oil spill in the context of public international law regime for protection of marine environment: A comparative study' (2012-2013) 25 *University of San Francisco Maritime Law Journal* 6.

<sup>4</sup> TJ Schoenbaum 'The deepwater horizon oil spill in the context of public international law regime for protection of marine environment: A comparative study' (2012-2013) 25 *University of San Francisco Maritime Law Journal* 6.

conventions that are in force and designed majorly to protect the marine environment.<sup>5</sup> The ones that are most relevant to this research will be explored.

The creation of a sustainable civil liability and compensation regime for offshore oil rig exploration and exploitation in Africa will be discussed in the next chapter; the existing global and regional civil liability and compensation regime, although mostly fragmented and incomplete in nature, contains precautionary and ‘polluter pays’ principle, which serves as a safeguard in the event of pollution and serves as insurance to both the host countries and the victims against the operators,<sup>6</sup> will be the focus of this chapter. Therefore, a brief discussion of the United Nations Convention of the Law of the Sea (UNCLOS) being the source of other regulations will be an appropriate point to start.

## 4.2 The UNCLOS 82<sup>7</sup>

The UNCLOS provides general principles for the protection of the marine environment, and authorises states to construct offshore installation within safety zones, for example, the Exclusive Economic Zone (EEZ) and exercise jurisdiction over them while taking all necessary measures to prevent and control the pollution of the marine environment in the course of exploration or exploitation of the seabed.<sup>8</sup>

Furthermore it urges the states to adopt regulations regulating seabed activities,<sup>9</sup> cooperate on the global level in developing international standards for the protection of the marine environment,<sup>10</sup> and create standard of compensation for damage caused by pollution to the marine environment.<sup>11</sup> UNCLOS creates the regulatory framework for the administration of offshore oil activities but falls short of stipulating any definite rules that would apply to the prevention of marine pollution, liability and compensation in the event of offshore oil

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<sup>5</sup> <http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx> (accessed 18 April 2014) for the comprehensive list.

<sup>6</sup> I Stefankova ‘International regulation v national regulation on offshore oil exploitation – The USA as an example’ (2013) III *Elsa Malta Law Review* 129.

<sup>7</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS).

<sup>8</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 56.

<sup>9</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 56.

<sup>10</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 197.

<sup>11</sup> United Nations Convention on the Law of the Sea 1982 1883 UNTS 397 (UNCLOS) art 235(2).

drilling mishap.<sup>12</sup>

### **4.3 The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)**

The International Convention for the Prevention of Pollution from Ships also known as MARPOL 73/78<sup>13</sup> is the major global convention under the administration of IMO that applies to the prevention of pollution of the marine environment by ships from operational and accidental causes,<sup>14</sup> and defines a ship as a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms.<sup>15</sup> Therefore, MARPOL applies to fixed as well as floating platforms operating in the marine environment and requires that they are equipped with the same pollution control devices required for certain ships.<sup>16</sup>

Even though MARPOL generally applies to offshore platforms in mobile configuration it does not address majority of other operational aspects of offshore oil and gas, such as the release of harmful substances arising from exploration and exploitation of the seabed minerals, which may cause harm to the marine environment.<sup>17</sup> Also annex 1 of MARPOL, which came into force on 2 October 1983, and deals with the Regulations for Prevention of Pollution by Oil, does not contemplate oil discharge from offshore processing drainage,

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<sup>12</sup> I Stefankova 'International regulation v national regulation on offshore oil exploitation – The USA as an example' (2013) III *Elsa Malta Law Review* 130.

<sup>13</sup> International Convention for the Prevention of Marine Pollution from Ships 1973, 2 November 1973, 1340 UNTS 184 amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, 17 February 1978, 1340 UNTS 61.

<sup>14</sup> I Stefankova 'International regulation v national regulation on offshore oil exploitation – The USA as an example' (2013) III *Elsa Malta Law Review* 130.

<sup>15</sup> International Convention for the Prevention of Marine Pollution from Ships 1973, 2 November 1973, 1340 UNTS 184 amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, 17 February 1978, 1340 UNTS 61, art 2(4).

<sup>16</sup> International Convention for the Prevention of Marine Pollution from Ships 1973, 2 November 1973, 1340 UNTS 184 amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, 17 February 1978, 1340 UNTS 61, annex 1 Regulation 21.

<sup>17</sup> International Convention for the Prevention of Marine Pollution from Ships 1973, 2 November 1973, 1340 UNTS 184 amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, 17 February 1978, 1340 UNTS 61, art 2(3)(b)(ii).

displacement water discharge or production water discharge, which happen to be the forms of pollution that are directly connected to offshore petroleum production.<sup>18</sup>

#### **4.4 International Convention on Oil Pollution Preparedness, Response and Cooperation (OPRC)**

The Convention<sup>19</sup> was designed to combat major incidence of marine pollution as well as to promote international cooperation and mutual assistance in major oil pollution incidents, and also to adequately advance states' developmental capability in dealing with oil pollution emergencies.<sup>20</sup>

While the parties to the OPRC are obligated to initiate measures, for controlling deleterious pollution incidents on national, regional or international level,<sup>21</sup> article 3(3) of the Convention, mandates states to demand of offshore units operators within their jurisdiction to have emergency plans for oil pollution. Despite the OPRC having received wide recognition as the most efficient global instrument on offshore oil rig pollution,<sup>22</sup> it contains no provision on the liability for pollution damage, notwithstanding its appeal for polluter pay principle in the preamble.<sup>23</sup>

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<sup>18</sup> International Convention for the Prevention of Marine Pollution from Ships 1973, 2 November 1973, 1340 UNTS 184 amended by Protocol of 1978 Relating to the International Convention for the Prevention of Marine Pollution from Ships 1973, 17 February 1978, 1340 UNTS 61, annex 1 Regulation.

<sup>19</sup> International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, 30 November 1990, 30 ILM 1991.

<sup>20</sup> International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, 30 November 1990, 30 ILM 1991, Preamble (Para 6).

<sup>21</sup> International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, 30 November 1990, 30 ILM 1991, art 6&7.

<sup>22</sup> H Esmaeli *The legal regime of offshore oil rigs in international law* (2001) 58.

<sup>23</sup> International Convention on Oil Pollution Preparedness, Response and Co-operation 1990, 30 November 1990, 30 ILM 1991, Preamble (Para 7).

## 4.5 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters (London Dumping Convention 1972)

The 1972 London Convention,<sup>24</sup> with eighty-seven signatories, is also one of the earliest global conventions to protect the marine environment from human activities.<sup>25</sup> Like the OPRC, it contributes to the international control and prevention of marine pollution by prohibiting the dumping of certain hazardous materials unless a special permit is procured prior to dumping of certain identified materials, as well as general permit for other waste.<sup>26</sup> It also addresses dumping from offshore platforms and other man-made installations in article 12 (a), (c) and (f) where the parties to the convention pledged to promote measures in protecting the marine environment against pollution caused, among others, by hydrocarbons and waste from offshore operation.<sup>27</sup>

Despite its replacement by the 1996 Protocol,<sup>28</sup> it is still the only one that addresses the issue of civil liability in relation to pollution damage and this was done under its article 10 as follows:

In accordance with the principles of international law regarding State responsibility for damage to the environment of the other States or to any other area of the environment, caused by dumping wastes and other matters of all kinds, the Contracting Parties undertake to develop procedures for the assessment of liability and the settlement of disputes regarding dumping.<sup>29</sup>

As stated in the previous chapter, the state of international treaty on civil liability for pollution from offshore operations leaves much to be desired. The same trend of ignoring the issue is evident in the treaties discussed so far. An attempt to address the issue is either done in a passive manner or rather encourages states to take preventive measures against pollution while liability and compensation issues are mostly deferred for future

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<sup>24</sup> Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters, 29 December 1972, 36 ILM 1.

<sup>25</sup> I Stefankova 'International regulation v national regulation on offshore oil exploitation – The USA as an example' (2013) III *Elsa Malta Law Review* 130.

<sup>26</sup> Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters, 29 December 1972, 36 ILM 1, art iv (b).

<sup>27</sup> Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters, 29 December 1972, 36 ILM 1 article 12 (a), (c) and (f).

<sup>28</sup> 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters 1972, 7 November 1996, 36 ILM 1.

<sup>29</sup> Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matters, 29 December 1972, 36 ILM 1 art 10.

deliberation, perhaps in the event of a major mishap.<sup>30</sup>

The influx of regional agreements can be traced to the common trend in the global conventions of encouraging states to adopt regional instruments in addressing the issue of civil liability and compensation for offshore oil pollution, coupled with the acknowledgement that national laws are supposed to be effective in preventing, reducing and controlling pollution,<sup>31</sup> as the process of achieving international convention is mostly slow and experience has shown that it can take minimum of five years to agree to a convention, but realistically, it can be longer; and 10 years for it to enter into force.<sup>32</sup>

There is no gain saying that there is also a couple of regional agreements that exist like the global ones which address oil pollution in the oil and gas industry in several regions such as the North Atlantic, Mediterranean Sea, Baltic Sea and the Persian Gulf.<sup>33</sup> All these agreements will be examined below.

#### **4.6 Convention for the Protection of the Marine Environment of the North Atlantic 1992 (OSPAR Convention 1992)**

The OSPAR Convention<sup>34</sup> main aim is the prevention of all sources of marine pollution, as well as the protection of the maritime area against marine degradation, except vessel source, fishing and atmospheric pollution,<sup>35</sup> perhaps due to their seemingly effective regulation within other frameworks. OSPAR which has fifteen member government signatories,<sup>36</sup> deals expressly with pollution from offshore oil rig, both floating and fixed

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<sup>30</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 15 Cornell Law School Graduate Student Papers 11.

<sup>31</sup> K Agyebeng 'Disappearing Acts-Toward a Global Civil Liability Regime for Pollution Damage from Offshore Oil and Gas Exploration' (2006) 16 Cornell Law School Graduate Student Papers 11.

<sup>32</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 83.

<sup>33</sup> CL Hagerty & JL Ramseur *Deepwater horizon oil spill: Selected issues for Congress* (2010) 39.

<sup>34</sup> Convention for the Protection of the Marine Environment of the North Atlantic 1992, adopted 22 September 1992, 2354 UNTS 67 1993 (entered into force 25 March 1998) ('OSPAR Convention').

<sup>35</sup> Convention for the Protection of the Marine Environment of the North Atlantic 1992, art 1g(i)&art 1o(iv).

<sup>36</sup> The fifteen Governments are: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and United Kingdom.



installations,<sup>37</sup> while applying precautionary and polluter pay principle.<sup>38</sup> Despite its laudable achievement, the Convention did not provide for liability and clean up for oil spills from oil rigs.<sup>39</sup>

#### 4.7 Offshore Pollution Liability Agreement (OPOL)

OPOL, which was designed as an intervening measure for the Convention on Civil Liability for Oil Pollution Damage resulting from Exploration for and Exploitation of Seabed Mineral Resources ('CLEE 1977'), applied originally to the United Kingdom,<sup>40</sup> however, due to the non-ratification of CLEE '77, OPOL has now been extended to both Norway and the European Union coastal states.<sup>41</sup> It is however not an agreement between states, rather it is between the operators or intending operators of offshore facilities used in exploitation and exploration of oil and gas.<sup>42</sup> Presently, all the operators in the region are party to it and it accepts strict liability for pollution damage while making available remedial measures of up to \$125 million per incident respectively.<sup>43</sup> Even though it is a different type of regime, the interesting thing about the agreement is that it imposes strict liability on the operators as well as the intending operators for pollution damage, which distinguishes it from other conventions examined thus far.

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<sup>37</sup> Convention for the Protection of the Marine Environment of the North Atlantic 1992, art 1(1).

<sup>38</sup> Convention for the Protection of the Marine Environment of the North Atlantic 1992, art.

<sup>39</sup> J Allen 'A global stain: international convention for liability and compensation for oil exploration' (2011) 93 *Australia and New Zealand Maritime Law Journal* 25.

<sup>40</sup> 'Offshore Oil Pollution Agreement 2014' <http://www.opol.org.uk/downloads/OPOL-Agreement-01Jan14.pdf> (accessed 13 April 2014). It came into force on the 1 May 1975 with a later version which took effect on 1<sup>st</sup> of January, 2014.

<sup>41</sup> J Allen 'A global stain: international convention for liability and compensation for oil exploration' (2011) 94 *Australia and New Zealand Maritime Law Journal* 25.

<sup>42</sup> The original members are Amoco (UK) Exploration Co., Burmah Oil (North Sea) Ltd., BP Petroleum Development Ltd., Total Oil Marine Ltd., Conoco North Sea Inc., Esso Exploration and Production U.K. Inc., Gulf Oil Production Co., Hamilton Brothers Oil Co. (GB) Ltd., Mobil North Sea Ltd., Shell U.K. Ltd., Phillips Petroleum Co., Signal Oil and Gas Co. Ltd., Siebens Oil and Gas (U.K.) Ltd., Texaco North Sea Sun Oil Co. Ltd., and Cluff Oil Ltd.

<sup>43</sup> 'Offshore Oil Pollution Agreement 2014' <http://www.opol.org.uk/downloads/OPOL-Agreement-01Jan14.pdf> (accessed 13 April 2014) clause iv A (1)&(2).

## 4.8 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona Convention)

The Barcelona Convention,<sup>44</sup> which governs the Mediterranean Sea that borders 21 states and 3 continents, was adopted 16<sup>th</sup> February 1976, but entered into force two years later on the 12<sup>th</sup> of February 1978.<sup>45</sup> It has twenty contracting parties who undertook to individually and jointly take all necessary measures to contribute to their countries sustainable development.<sup>46</sup> Apart from being one of the earliest regional agreements targeted at protecting the marine environment from pollution, like OSPAR it also covers both precautionary and ‘polluter pays’ principle,<sup>47</sup> while dealing categorically with pollution resulting from the exploration and exploitation of the seabed and its subsoil.<sup>48</sup> The Convention however, did not deal with oil rig like OSPAR, its 1994 Madrid Protocol (Protocol for the protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil), encompasses this, as well as liability and compensation and insurance cover. It entered into force on the 24 March 2011, which is believed by many, was facilitated by the *montara* and *deepwater* incidents.<sup>49</sup> Though it has only been ratified by six countries, only one European Union country, that is the number it required to take effect.<sup>50</sup> The Protocol admonishes all members to make sure operators are held liable for offshore activities damages caused by them, as well as maintain insurance cover and other financial securities in tune with compensation standard.<sup>51</sup> The Convention not only deter operators from willfully causing pollution damage as a result of their activities, it also provides cover for victims as well

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<sup>44</sup> Convention for the Protection of the Mediterranean Sea against Pollution 1976, 16 February 1976, 1102 UNTS 27.

<sup>45</sup> The preamble in page 1 states: The Convention for the Protection of the Mediterranean Sea Against Pollution (the Barcelona Convention) was adopted on 16 February 1976 by the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea, held in Barcelona. The Convention entered into force on 12 February 1978.

<sup>46</sup> Convention for the Protection of the Mediterranean Sea against Pollution 1976, 16 February 1976, 1102 UNTS 27, art 4(1).

<sup>47</sup> Convention for the Protection of the Mediterranean Sea against Pollution 1976, 16 February 1976, 1102 UNTS 27, art 4(3) (a)&(b).

<sup>48</sup> Convention for the Protection of the Mediterranean Sea against Pollution 1976, 16 February 1976, 1102 UNTS 27, art 7.

<sup>49</sup> VS Radovich & JF Zarate ‘Offshore activities: New regulations and contracts’ (2012) 2.

<sup>50</sup> The countries are Albania, Cyprus, Libya, Morocco, Syria and Tunisia.

<sup>51</sup> Protocol for the protection of the Mediterranean Sea against pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil, adopted 14 October 1994, art 27.

financial security to cover any unforeseen expenses that might occur as a result of compensation for personal and economic loss depending on the situation.

#### **4.9 Convention on the Protection of the Marine Environment of the Baltic Sea Area, 1992 (‘Helsinki Convention’)**

The Convention,<sup>52</sup> which entered into force eight years after its adoption on the 17 January 2000. It applies to the Baltic Sea;<sup>53</sup> it is the first time that all sources of marine pollution will be made subject of a single convention.<sup>54</sup> The Convention, among other things, emphasise co-operation, consultation, notification and reporting, outlined a detailed legal framework for strengthening ecological rehabilitation of the Baltic Sea, elimination of pollution from all sources, while reducing the negative effect of human activities on marine ecosystem.<sup>55</sup> Also while defining offshore activities, unit, exploration and exploitation as well as regulating discharges during exploration and exploitation,<sup>56</sup> the Convention directed that abandoned, wrecked offshore units, must be brought to the shore, while discontinued drilling should be plugged.<sup>57</sup> Frank’s view that... “So far, cooperation between the Baltic coastal states has been rather successful, but there are still serious implementation gaps...”<sup>58</sup> better underscores the position of the success and shortcomings of this Convention as regards regulations of offshore activities.

Having discussed some of the global and regional regulatory mechanism for offshore oil activities, particularly as they relate to liability and compensation, highlighting their strengths and weaknesses in regulating the sector, it will not be out of place to have a peep

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<sup>52</sup> Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992, 9 April 1992, 1507 UNTS 167 was adopted on the 9<sup>th</sup> of April, 1992.

<sup>53</sup> The countries bordered by the Baltic Sea are Poland, Lithuania, Sweden, Denmark, Estonia, Finland, Germany, Latvia, and Russia.

<sup>54</sup> Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992, 9 April 1992, 1507 UNTS 167 art 2(1-10)

<sup>55</sup> Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992, 9 April 1992, 1507 UNTS 167 art 3(1)(2)(3)(4)(5).

<sup>56</sup> Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992, 9 April 1992, 1507 UNTS 167 annex VI Regulation 1.

<sup>57</sup> Convention for the Protection of the Marine Environment of the Baltic Sea Area 1992, 9 April 1992, 1507 UNTS 167 annex VI Regulation 8.

<sup>58</sup> V Frank *The European Community and Marine Environmental Protection in the International Law of the Sea* (2007) 35.

into the United States Oil Pollution Act 1990, although not an international regulation itself, it is one of the offshore oil rig pollution legislation that has been tested in recent time in the light of the *Deepwater Horizon* incident.

#### **4.10 Oil Pollution Act, 1990 (OPA '90)**

United States promulgated the 1990 Oil Pollution Act,<sup>59</sup> as a result of the non-existence of the global international convention dealing with liability for oil spills from offshore facilities. The OPA 90 as a legal instrument was effectively applied to the fairly recent accident in the Gulf of Mexico. The enactment of the US OPA was triggered off by the 24 March 1989 Exxon Valdez incident, the US flag tanker that ran aground in Prince William Sound in Alaska, which spilled ten million gallons of oil into the sea out of fifty-three million it carried.<sup>60</sup>

The US OPA differs from other earlier discussed convention in the sense that it does not merely deal with civil liability and compensation only, it encapsulates a more detailed regime, integrating different aspects of oil pollution, ranging from prevention of, response to and compensation for marine oil pollution.<sup>61</sup> The Act also often includes civil, criminal and administrative liabilities among its covered liabilities.<sup>62</sup>

The Act as the title suggest, deals with oil pollution only, as against all other forms of pollution.

The Act covers spills from vessels and facilities, distinguished between onshore and offshore facilities, and importantly, the OPA definition of a mobile offshore drilling unit (MODU) is one of the most far-reaching aspects of it, such as the *Deepwater Horizon*, pointing its capability for an offshore facility, subject to being a vessel.<sup>63</sup> The litmus test to

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<sup>59</sup> The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761).

<sup>60</sup> TJ Schoenbaum 'The deepwater horizon oil spill in the context of public international law regime for protection of marine environment: A comparative study' (2012-2013) 25 *University of San Francisco Maritime Law Journal* 2.

<sup>61</sup> The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761) section 1001.

<sup>62</sup> The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761) section 1018 (a)(1).

<sup>63</sup> The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761) section 1001.

its liability limits came in the Gulf of Mexico accident. ‘The OPA also established a system, which consolidates the diverse federal liability provisions, without pre-empting state law,<sup>64</sup> or administering the global convention.<sup>65</sup>

#### 4.11 Conclusion

The discourse on the international and regional framework on offshore oil exploration and exploitation shows that its nature is fragmented and incomplete. UNCLOS provides the legal basis for offshore activities at the global level; however, the well laid out inherent opportunity has not brought any major outcomes. The main issue remains whether the international community should commence the process towards the fleshing out a universal agreement for all aspects of offshore oil activities or to adopt other legal instruments that might be more appropriate for this sphere of law.

The reason for the stalling of the process could be that, first, offshore oil rig pollution contributes very little to the overall pollution of the marine environment in comparison to other sources of pollution, particularly the land-based sources, which is the single largest source of marine pollution,<sup>66</sup> as eighty percent of global marine and coastal pollution and degradation emanates from land-based sources and activities (LBSA).<sup>67</sup> Secondly, there is also staunch resistance from certain countries particularly, the United States of America to the adoption of a universal agreement. Thirdly it may be that every maritime region has its own specific environmental challenges, which demand an exclusive approach to address.

The effectiveness of regional agreements implemented in some regions such as the North Atlantic or Mediterranean Sea, may have confirmed this notion. Nevertheless, lack of funds, poor institutional coordination, disregard of legal instruments and human resources are the challenges that regional regulation must overcome in coming years to preserve its

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<sup>64</sup> The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761) section 2718.

<sup>65</sup> The Oil Pollution Act of 1990 (33 U.S.C. 2701-2761) section 1018 (c)(2).

<sup>66</sup> D Tladi ‘Ocean governance: A fragmented regulatory framework’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 100.

<sup>67</sup> A Momanyi ‘The western Indian ocean region and the coordinated fight against land-based sources of pollution’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 130.

effectiveness under the international ocean governance framework.<sup>68</sup>

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<sup>68</sup> J Rochette & L Chabason ‘ A regional approach to marine environmental protection: The “regional seas” experience’ in P Jacket et al (eds) *Oceans the new frontier* (2011) 111.

## Chapter Five

### Sustainable Civil Liability and Compensation Regime for Offshore Oil Rig Pollution in Africa

#### 5.1 Introduction

The exploration of the global and regional offshore regulatory regime thus far had revealed their areas of strength as well as weakness. One thing that stands out in all the discussion is that, there is a need for global comprehensive regulatory regime for offshore oil rig sector or at best, regional regulation. However, given that there is little hope for developing a multilateral convention anytime soon, a multilateral framework will not only provide for uniformity of rules for industries that have worldwide outreach when developed, it will also make it difficult for such industries or companies to resist international action than national actions.<sup>1</sup> Considering that it takes minimum of five years to agree to a convention, then up to 10 years to enter into force and the potential of risk spreading internationally rather than affecting one state, it is only logical to seek succor in a regional regime.<sup>2</sup>

Since the chances of a multilateral convention are slim, like other regions, Africa has the onus to create a sustainable civil liability and compensation regime for offshore oil rig pollution. Fortunately the 2050 Africa Integrated Maritime Strategy has put in the framework. Apart from being the most recent maritime strategy for the region at the moment its major aim is to provide a broad framework for the protection and sustainable exploitation of Africa's Maritime Domain (AMD) for wealth creation.<sup>3</sup>

Furtherance to the major objective of the 2050 AIM Strategy to develop a tool to address Africa's maritime challenges for sustainable development and competitiveness,<sup>4</sup> the AIM Strategy also seeks to foster more wealth creation from Africa's oceans, seas and inland

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<sup>1</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 86.

<sup>2</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 83.

<sup>3</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012) 7.

<sup>4</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012) 10.

waterways by developing a thriving maritime economy and realizing the full potential of sea-based activities in an environmentally sustainable manner. It goes without saying that the preservation of Africa's marine environment is vital to growing its GDP, share of global and regional trade, competitiveness, long-term growth and employment.<sup>5</sup>

In line with the above, the focus of this chapter will be to interrogate the creation of a sustainable civil liability and compensation regime for offshore oil rig pollution in Africa. This will be achieved by examining the current regulatory framework in continent, the inadequacies inherent in them in the event of a major offshore oil rig disaster, and its effectiveness if there is any in curbing future offshore oil rig disaster, the principle of efficient compensation and liability rules, risk pooling mechanisms, government role in providing compensation, the use of financial and insurance market instruments to cover liability following a major offshore accident, while proposing a standard regulatory framework template for Africa.

## **5.2 The Current Africa Offshore Oil Rig Regulatory Framework**

The current offshore regulatory framework that operates in Africa is the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region and its Emergency Protocol,<sup>6</sup> and Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region,<sup>7</sup> also known as the Nairobi Convention. Although the details of their strength, inadequacies and the effectiveness in curbing future offshore oil pollution have been discussed elsewhere in this research, it will not be out of place to state that, not only are they not comprehensive, they are semi-regional as they apply only to Western, Central and Eastern Africa, which in the face of transboundary oil rig pollution will do little.

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<sup>5</sup> African Union '2050 Africa's Integrated Maritime Strategy' (2012) 10.

<sup>6</sup> Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central Africa Region, Abidjan, 23 March 1981.

<sup>7</sup> Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region, Nairobi, 21 June 1985.



### 5.3 The Principle of Efficient Compensation and Liability Rules

Noting that the main goal of liability rules is to reduce the total sum of accident costs, for the purpose of this research, it is important to state that putting in place an adequate compensation regime, be it through liability rules, fund solution or insurance, the sole purpose should be to prevent pollution in the course of exploitation and exploration.<sup>8</sup> Therefore, compensation of victims should be a means to reach an effective and desirable prevention.<sup>9</sup> In order to fully appreciate this logic, the question: why should there be compensation, will be answered.

#### 5.3.1 Why Compensate?

Posner posits that the question how victims of offshore related damage can be given proper compensation is, in that strict sense, not interesting from an economic perspective but rather Tort law should aim at maximizing welfare through the minimization of accident cost.<sup>10</sup> It was the view of Priest regarding financial compensation that it is one of the principal duties of government to provide disaster relief to the victims of disasters.<sup>11</sup> Therefore, it flows from the above that it will not be compatible with principle of the welfare of the state, to leave the victims of major disaster like offshore installation without any relief. This is evident in most European Union Member-States legal systems, which provide welfare through social security.<sup>12</sup>

The justification for structuring an efficient compensation system for offshore disaster victims and the role which the government should play, can be seen in the fact that major offshore incidents can cause serious political, as well as economic instability, not only for the direct victims, but also the local authorities suffering major damage in coastal areas. This was evident in the *Deepwater Horizon* incident, which occurred in the Gulf of

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<sup>8</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 286.

<sup>9</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 286.

<sup>10</sup> RA Posner *Economic Analysis of Law* (2003) 167-177.

<sup>11</sup> GL Priest 'The Government, the Market and the Problem of Catastrophic Loss' (1996) 12 *Journal of Risk and Uncertainty* 219.

<sup>12</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 286 .

Mexico, United State of America which led to several legal battles, moratorium and compensation both for economic and personal losses.<sup>13</sup>

The provision of compensation for disaster victims is however not without its shortcomings, particularly from the distributional perspective due to the fact that victims who are directly hit by the catastrophe may receive better treatment compared to other victims whose means of livelihood might be affected,<sup>14</sup> like those that depend on the sea for food (personal loss) and those whose business patronage might be affected by the incident (economic loss). This discriminatory treatment defeats the principle of equality, which is the major objective of compensation, the only tenable reason for the disparity might the probable devastating effects of offshore oil rig disasters and the resultant effect on a particular part of the society or apart from political pressure, which some case is the case.<sup>15</sup> This varied compensatory position offers a good opportunity to analyse how the efficient compensation of victims of offshore oil rig disaster could be achieved.

### **5.3.2 Efficient and Fair Compensation**

In achieving efficient compensation, an analysis of the general principle of the strength and weaknesses of compensation regime will have to be considered. The first major principle to be considered in this regard is whether incentives should be provided to potential victims to mitigate resultant damage. It is argued that no matter how organized a compensation regime is, the incentives for the prevention of damage caused by offshore incidents should on every occasion be intact. Meaning therefore that as much as the duty to compensate should rest upon the party who is instrumental to the risk, incentives should also be provided to potential victims.<sup>16</sup> The idea behind this principle is that making individuals pay according to the risk they pose will make them conscious of their exposure to the risk, and thus have a positive impact on their behavioural pattern.<sup>17</sup>

The second principle to consider is whether the duty to compensate should be directly

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<sup>13</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 286.

<sup>14</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 287.

<sup>15</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 287.

<sup>16</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 287.

<sup>17</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 287.

related to the amount that the specific activities of the entrepreneur contributed to the risk. This is particularly important if the compensation is organised on the basis of public or state ownership.<sup>18</sup> The reason behind this risk distinction is to provide incentives for prevention and mitigation of damage and to encourage risk reduction. This, it is argued, will in turn harness compensation efficiency, which include an element of fairness in attribution of costs to avoid the incidence of good risk paying for bad risk redistribution.<sup>19</sup>

The third principle to consider is administration of the compensation regime at the lowest cost possible.<sup>20</sup> This further guarantees efficiency of the system such that most of the costs go towards restoration and compensation as opposed to an economically onerous administrative process.<sup>21</sup> The final principle is the introduction of a competitive market solution instead of government intervention if it is less costly.<sup>22</sup> Due to bureaucracy, the market will normally be able to provide risk coverage at lower costs than state interventions, accepting however that in some exceptional instances, the provision of disaster insurance by the government monopoly could provide better results than competitive markets.<sup>23</sup>

## 5.4 Efficient liability rules

It is practically impossible to give a detailed examination of an efficient liability regime for offshore-related risks.<sup>24</sup> Although, with the aid of tools advanced by the economic analysis of law, it is possible to discuss some essential components from a liability system as regards their workability for offshore related risk liability regime arrangement.<sup>25</sup> In line with this, the following will be discussed: the compatibility of offshore related risk with either strict liability or negligence, attribution of offshore related risk and the introduction of financial limit for offshore related risk, which will be discussed in relation to the United

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<sup>18</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 287.

<sup>19</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 287.

<sup>20</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 287.

<sup>21</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 288.

<sup>22</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 288.

<sup>23</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 287.

<sup>24</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 288.

<sup>25</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 288.

States regime, as it is the most recent effectively tested legislation in the light of *deepwater horizon* oil spill and the solutions adopted thereafter.<sup>26</sup>

#### 5.4.1 Strict and vicarious liability v negligence

The major concern in most offshore liability setting as well as other liability settings is whether offshore-related risks should be based on negligence, vicarious or on strict liability. In understanding this, the examination of the International Convention on Civil Liability (CLC) 1969 and 1992 will be beneficial. The CLC of 1969 adopts strict liability exclusively on the ship owner defined as “the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship.”<sup>27</sup> In some instances, recourse against third party (it is not clear which third parties so long as one could prove a case) is allowed but as a general rule, under this convention, the ship owner is liable for any pollution caused as a result of off-shore activities.<sup>28</sup>

In the CLC of 1992, strict liability is still imposed on ship-owners. There are however some changes that cause certain people to be exempt from oil pollution liability including servants or agents of the owner, the pilot or any other person who is not a member of the crew (and performs services for the ship), amongst others, as provided in the charter.<sup>29</sup> The broadened scope of the list that can be protected from the liability strengthens the effect of “channelling”, meaning therefore that there are less instances where any person other than the ship owner, can incur liability for pollution.

The American OPA as previously discussed is the most comprehensive piece of national legislation that deals with liability for off-shore pollution. It imposes strict liability on the responsible parties, much in the same manner that the international regime of the CLC does. A defence is only available to the responsible parties if the damages or removal costs were caused solely by an act of God, an act of war, or by an act or omission of a third party with no contractual or employment relationship to the responsible party.<sup>30</sup>

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<sup>26</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 288.

<sup>27</sup> The International Convention on Civil Liability for Oil Pollution Damage 1969 CLC, Art. I 3.

<sup>28</sup> The International Convention on Civil Liability for Oil Pollution Damage 1969 CLC, Art. III (5).

<sup>29</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 187.

<sup>30</sup> 33 U.S.C. section 2703 (a).

One significant difference between the OPA and the international regime is that liability is not channelled to shipowners. The OPA identifies responsible parties based on the types of facilities involved and by way of example, for vessels, any person owning, operating or a demise charterer of the vessel can be the responsible party. The OPA also defines the responsible party for onshore facilities, offshore facilities, deepwater ports and pipelines respectively.<sup>31</sup> Thus, unlike in the international regime, as far as vessels are concerned, not only shipowners, but also operators and charters who may actually contribute to the oil pollution risks, can be held liable. However, remarkably, cargo owners can escape liability under the OPA although they benefit from and contribute to the risks of oil transportation as well.<sup>32</sup>

#### **5.4.2 Attribution of offshore related risk**

This section relates to the damages that may be covered as a result of certain offshore related risks. This is an important factor to consider when attempting to delineate the nature of risk that someone should be liable for. The CLC 1992 provides for recovery of costs for pollution damage that happens on a territory, including its territorial waters and the exclusive economic zone of a contracting party (state), and also applies to the preventive measures that should have been taken to prevent such damage.<sup>33</sup>

Pollution damage is defined under the CLC '92 as:

loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; the costs of preventive measures and further loss or damage caused by preventive measures.<sup>34</sup>

This definition is constricted by the word “contamination”, which means that damage caused by fire or explosion following a discharge is not covered. It is very likely that

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<sup>31</sup> 33 U.S.C. section 2701 (32).

<sup>32</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 188.

<sup>33</sup> International Convention on Civil Liability for Oil Pollution Damage 1992 CLC, Art. IX (1).

<sup>34</sup> International Convention on Civil Liability for Oil Pollution Damage 1992 CLC, Art. I (6).

complex issues as to causation would arise where contamination by oil is followed by contamination by fire.<sup>35</sup>

Personal injury is eligible for compensation, but not including exposure to health risks, anxiety and upset resultant from pollution damage as defined above. Damage to property should be “real” and not speculative if compensation is to occur. This means that the damage should be quantifiable in economic terms. Preventive measures that should be taken to mitigate costs of compensation include costs of clean-up and restoration. They are compensable if they are reasonable and if the loss is quantifiable in economic terms. Therefore any claims based on an abstract cost calculation are not admissible under the Act.<sup>36</sup>

This definition of pollution damage delimits the scope of compensable environmental damage meaning the loss of profit from the impairment of the environment is compensable, including both consequential loss and pure economic loss.<sup>37</sup> Additionally, the term “impairment of the environment” is limited to the costs of reasonable measures of reinstatement actually taken or to be undertaken; in spite of this definition, its clear implication has to be understood in practice.<sup>38</sup> This will be examined by the next section.

#### **5.4.3 Introduction of financial limit for offshore related risk**

The determination of the scope and quantification of damage has been an area of concern when compensating for damage to the environment. The OPA attempts to delineate the scope of damage liable for compensation by limiting it to natural resource damage which includes:

- a) the costs of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;
- b) the diminution in value of those natural resources pending restoration; plus
- c) the reasonable cost of assessing those damages.<sup>39</sup>

<sup>35</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 188.

<sup>36</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 188.

<sup>37</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 188.

<sup>38</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 188.

<sup>39</sup> DS Kristel et al *Civil liability and financial security for offshore oil and gas activities* (2013) 195.

While the liability established under the 1969 CLC capped the value of compensation to 210 million francs or 2,000 francs for each ton of the ship's tonnage, the amount is higher than that under the 1957 Convention on the Limitation of Shipowners' Liability, but still far from covering the whole potential damage that can be caused by oil pollution. The shipowner's right of limitation cannot be used if the incident occurred through his fault. The limit of liability under the CLC 1992 has increased to 4.51 million Special Drawing Rights (SDRs) or 89.77 million SDRs, although depending on the size of the ship.<sup>40</sup>

In light of the above, Africa should contemplate the adoption of a fund regime like the 1992 the International Convention on Civil Liability Fund and the Supplementary Fund Protocol, should pollution damage victims fall short of being sufficiently compensated by the owner or operator of installation or whatever compensation regime exist, the victim can make additional claim to the Funds. This fund regime would be such that will get funding from the companies involved in oil exploration and exploitation operations, based on the proportion of oil and gas extracted by such companies.<sup>41</sup>

#### **5.4.4 Compulsory insurance**

The introduction of a compulsory insurance will be a major step in curbing or reducing the effect of the outcome of an oil rig disaster. Notwithstanding the application of the general principle of efficient and fair compensation discussed above, the main factors that will determine the effectiveness of a fund regime as against insurance will be whether a fund would do a better job than compulsory insurance scheme and this relates to the proficiency to apply risk differentiation and the incidental costs. However, it could be argued that risk-sharing contract between the operators or owners of offshore installations could provoke optimal supervision amongst them since they will be in possession of a better-informed position of the devastating effect of an oil rig disaster.

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<sup>40</sup> The International Convention on Civil Liability for Oil Pollution Damage 1992, Art. V(1)(2)

<sup>41</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 86.

To ensure guarantee of payment and compensation, compulsory insurance must be developed as with the CLC, although, there exist major differences between the offshore regime and that of tanker.<sup>42</sup> In this regard, the Protection and Indemnity insurance (P&I) club arrangement should be considered, because the international Group of Protection and Indemnity insurance (P&I) club, a mutual insurance association, provides marine insurance cover for its members, who are majorly ship-owners, ship-operators or demise charterers, and sometimes owners and operators of mobile offshore units as well as drilling rig.<sup>43</sup> Since there is no corresponding insurance body for the offshore rig industry, either to represent the insurance interest in international negotiations for a convention, or in provision of an accepted and reliable long term guarantee for States<sup>44</sup> in the light of the volatility that accompanies insurance markets, it is advisable to adopt such arrangement.

The Convention will effectively direct all types of offshore installations or owners to own insurance certificate, as there is the likelihood of smaller owners, in particular, relying on locally issued certificates that might not be worth more than a mere paper. The risk, therefore, is that a state relying on a new offshore liability convention might discover that a certificate has been issued in a small island State where there is no effective regulation. To some extent, this risk can be reduced for platforms operating within Africa as a State is entitled to impose its own licensing requirements for drilling, independently of any offshore liability convention.<sup>45</sup>

## **5.5 Contemplating an off-shore oil rig compensation regime for Africa**

Taking all of the above mentioned into account, one must finally consider therefore the main constitutive elements of what an effective off-shore oil rig pollution compensation regime would look like in an African context. As previously alluded to, the main

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<sup>42</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 86.

<sup>43</sup> S Bosman 'Regulation for marine pollution arising from offshore oil and gas facilities' (2012) 104 *Australia and New Zealand Maritime Law Journal* 26.

<sup>44</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 86.

<sup>45</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 87.



inspiration for this is the American OPA which was developed to regulate the compensation regime for off-shore pollution after the deep water horizon incident.

The main composite elements are therefore:-

**1. That each responsible party for the pollution be held liable for compensation:**

The OPA provides that “each responsible party for a vessel or a facility from which oil is discharged . . . into or upon the navigable waters or adjoining shorelines or the exclusive economic zone is liable for the removal costs and damages . . . that result from such incident.”<sup>46</sup> This is to ensure that all those responsible for the damages incurred are held to book and to act as a deterrent for future instances.

**2. That the responsible party be held strictly liable for compensation:**

The Act holds the “responsible party” for a vessel or a facility from which oil is discharged strictly liable for removal costs and “damages.”<sup>47</sup> In the case of a vessel, the “responsible party” is the owner, operator, or demise charterer of the vessel; in the case of an offshore facility, the “responsible party” is “the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act . . . for the area in which the facility is located.”<sup>48</sup> This provision clearly highlights who should be held responsible for pollution and the nature of their liability which is particularly important in an African context where the potential parties are more often than not international corporations that are not party to the various treaties and thus likely to argue that there lacks a duty to compensate.

**3. That the defences to liability be limited:**

The OPA recognizes three limited defenses to liability. It provides that a responsible party is not liable for removal costs and damages where the spill was caused *solely* by: (1) an act of God; (2) an act of war, or (3) an act or omission of a third party.<sup>49</sup> The first two apply in extremely unusual circumstances. The third (act of a third party) is narrowed down in two critical respects.<sup>50</sup> First, it does not apply where the third party was an

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<sup>46</sup> 33 U.S.C. section. 2702(a) (2006).

<sup>47</sup> 33 U.S.C. section. 2702(a) (2006).

<sup>48</sup> 33 U.S.C. section. 2701(32)(C).

<sup>49</sup> 33 U.S.C. section. 2703(a) (2006).

<sup>50</sup> 33 U.S.C. section. 2703(a)(3).

employee, an agent or a person whose conduct occurs “in connection with any contractual relationship” with the responsible party.<sup>51</sup> Second, the third defense applies only if the responsible party exercised due care with respect to the oil concerned and took precautions against foreseeable acts of third parties and their foreseeable consequences.<sup>52</sup> No defense is available if the responsible party failed or refused to report the incident, provide reasonable cooperation and assistance in connection with cleanup efforts, or comply with orders issued with regard to cleanup.<sup>53</sup>

This in turn will ensure that all responsible parties are liable for the damages caused by their pollution making the instances where one can rely on a defence clear and easily discernable.

- 4. That the liability be limited to removal costs and damages:** The OPA generally limits a responsible party’s liability for removal costs and damages. This is a practice that should be adopted in the development of an off-shore liability regime for oil pollution. For example, the OPA provides that in the case of a discharge from a large double-hull vessel, liability is limited to the greater of \$1900 per gross ton or \$16,000,000.<sup>54</sup> But in the case of an oil spill from an offshore facility, the responsible party’s liability for removal costs (as opposed to damages) is unlimited.<sup>55</sup>

In addition to removal costs, the OPA enumerates six categories of recoverable “damages” which includes<sup>56</sup>

- harm to natural resources<sup>57</sup> (recoverable by a trustee), namely the cost of restoring or rehabilitating the environment and the diminution in value of natural resources pending restoration;<sup>58</sup>
- injury to real or personal property, including consequential economic loss (recoverable by the owner or lessee of the property);

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<sup>51</sup> 33 U.S.C. section. 2703(a)(3).

<sup>52</sup> 33 U.S.C. section. 2703(a)(3) (2006).

<sup>53</sup> 33 U.S.C. section. 2703(c).

<sup>54</sup> 33 U.S.C. section. 2704(a)(1).

<sup>55</sup> 33 U.S.C. section. 2704(a)(3).

<sup>56</sup> 33 U.S.C. section. 2702(b)(2).

<sup>57</sup> 33 U.S.C. section. 2701(20) (defining natural resources as “land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources.”).

<sup>58</sup> 33 U.S.C. section. 2702(b)(2)(A), 2706(d).

- loss of subsistence use of natural resources;
- loss of taxes, royalties, rents, fees or net profit shares (recoverable by the United States or a state);
- loss of profits or impairment of earning capacity due to an injury to property or natural resources;<sup>59</sup> and
- costs of providing public services during or after removal activities. The OPA does not authorize compensation for personal injuries

Under the OPA, statutory limits do not apply if the incident was caused by gross negligence or wilful misconduct of the responsible party.<sup>60</sup> In other words, where it would be possible to recover damages for said pollution under general maritime law, due to the severity of the conduct of the responsible party, the OPA responds to this severity by uncapping the value of the damages that may be claimed. Additionally, the caps do not apply if the responsible party failed or refused to report the incident, to provide reasonable cooperation and assistance in cleanup efforts, or to comply with orders issued with regard to cleanup.<sup>61</sup>

Furthermore, the American regime provides for an Oil Spill Liability Trust Fund (Fund). It has several sources of revenue, the largest of which is a tax collected for every barrel of crude oil received at U.S. refineries, domestic crude oil used in or exported from the United States, and petroleum products brought into the United States.<sup>62</sup> In principle, all claims for removal costs or damages must be presented first to the responsible party. This is a prerequisite for a subsequent lawsuit. If the claim is presented and the responsible party denies liability or the claim is not settled within ninety days, the claimant may elect to commence an action in court against the responsible party or to present the claim to the

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<sup>59</sup> R Perry ‘The *deepwater horizon* oil spill and the limits of civil liability’ (2011) 86 *Washington Law Review* 52. (this category seems to embrace economic losses caused by an injury to natural resources or to property not belonging to the plaintiff; namely relational economic losses. But the OPA does not clarify which classes of claimants are covered by this provision. An aspect that should definitely be considered in the development of the African regime).

<sup>60</sup> an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party; or by violation of an applicable federal safety, construction, or operating regulation by any of these parties.

<sup>61</sup> R Perry ‘The *deepwater horizon* oil spill and the limits of civil liability’ (2011) 86 *Washington Law Review* 54.

<sup>62</sup> 26 U.S.C. section 9509(a) (2006) at 4611

Fund.<sup>63</sup> The claimant may also present a claim to the Fund where full compensation from the responsible party is unavailable.

It must be noted however that even when the statutory conditions for Fund payments are met, the Fund does not guarantee full compensation. First, it can pay up to \$1 billion per incident.<sup>64</sup> This amount may be sufficient in the vast majority of cases, but is clearly inadequate in catastrophic incidents of the *Deepwater Horizon* magnitude. Second, the billion dollar fund may be depleted by payments for harm to natural resources (up to \$500 million) and removal costs. This may leave many individual victims with only a forlorn hope of recovery.

In summary, the OPA is sensitive to the gravity of the defendant's conduct, but it addresses this matter differently. In cases of ordinary negligence or lack of fault, the Act, unlike general maritime law, allows recovery for purely economic losses, but sets rigid liability caps, making the oil spill fund available for the payment of claims in excess of the responsible parties' liability caps. In cases of gross negligence or wilful misconduct, the Act eliminates the responsible party's liability cap and does not allow the responsible party to seek any reimbursement from the Fund. It also does not allow punitive damages.<sup>65</sup> Put differently, while general maritime law responds to severe misconduct by allowing a very exclusive group of successful claimants to obtain extra-compensatory payments, the OPA removes the statutory limit of the defendant's liability to a much more inclusive group of recognized claimants.<sup>66</sup> These elements above are the most applicable in the consideration of an off-shore oil rig pollution compensatory regime in Africa should one ever be developed.

## 5.6 Government intervention

In the event that the government is contemplating direct intervention in offshore oil rig

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<sup>63</sup> 33 U.S.C. section 2713(c) (2006).

<sup>64</sup> 26 U.S.C. section 9509(c)(2)(A) (2006).

<sup>65</sup> R Perry 'The *deepwater horizon* oil spill and the limits of civil liability' (2011) 86 *Washington Law Review* 58.

<sup>66</sup> R Perry 'The *deepwater horizon* oil spill and the limits of civil liability' (2011) 86 *Washington Law Review* 58.

damage compensation, it should be discouraged. This is not to say that the government should not take part in the aftermath of oil rig disaster, it can come in especially in administering relief measures. It can also manage and coordinate the aftermath of such incidents, by setting up a commission of inquiry to determine the responsible parties and the major victims to be compensated.

In the course of the government performing his duties,<sup>67</sup> the liability rules should be designed to put the cost of the intervention on the liable operator or owner of the responsible installation. This principle is in line with the economic principle of costs internalisation and polluter-pays-principle. Also the government playing a role as a last resort reinsurer for offshore oil rig damage is not a preferred option, except if the market situation is significantly failing. Government can do that for terrorism or natural hazards but not for third party liability risk, created generally by industry and particularly related to offshore activities.

## 5.7 Conclusion

Flowing from above, Africa should not wait on the world or the outcome of any multilateral convention before it creates its own regulatory regime, as not only will a new multilateral convention present a legal challenge, it will also bring with it a commercial tussle, given that there would be unavoidable debates about liability limitation, whether there should be limit and if so, what should be the level?<sup>68</sup> As things are now, particularly after the US *Deepwater Horizon* case, it is doubtful if any state will consent to limited liability regime.<sup>69</sup> Considering also that there are few states, which can command the same clout internationally like that of the United States of America (USA), the development of a sustainable regional regime for Africa cannot be more appropriate than now, as the coming

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<sup>67</sup> Either in clean up of the polluted seas, beaches or the environment at large and in the provision of relief to the affected victims, either for economical or personal loss.

<sup>68</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 86.

<sup>69</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 86.

together of African countries to develop such regime will put them in the same stead as USA, in the event of any major offshore oil rig pollution occurrence.<sup>70</sup>

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<sup>70</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 86.

## Chapter Six

### Conclusions and Recommendations

#### 6.1 Summary of findings

As a recap, this research revolves around the need to create a sustainable civil liability and compensation regime for offshore oil pollution in Africa. The reason for this is because there no specific international instrument on civil liability and compensation for pollution damage caused by offshore oil rig operations despite the occurrence of major oil rig disasters, particularly, in the light of the fairly recent deep water horizon incident that occurred in the Gulf of Mexico spilling 4.9 million barrels and causing both personal and economic losses to humans and the marine environment in the pollution area; the Montara blow out in Australia that also brought in its wake disaster as well as diplomatic turmoil between Australia and Indonesia which further propelled the renewed call by the Indonesian delegation to the International Maritime Organisation (IMO) of the need to develop a comprehensive international regulatory regime for offshore oil rig pollution.

The IMO is however reluctant in creating one instead it encourages member states to adopt regional regulation.

This study also pointed out that offshore oil rig pollution could also cause trans-boundary damage given the fact that the ocean has no clear cut demarcation and pollution from one area can easily seep into the other, thus affecting not only coastal States where offshore operations are being conducted, but also the neighboring States that are innocent bystanders and it is hard to attribute it to a particular state. While calling on Africa to develop a comprehensive regional regulatory regime rather than trying to fit in within the framework of the United Nations Convention on the Law of the Sea (UNCLOS), the region should explore its provisions that admonish member-states to protect and preserve its marine environment, while exploiting its natural resources as well as developed a regional framework if the need arises. The *deepwater horizon* incident that caused the British Petroleum the sum of 42 billion dollars before it was halted by the Court of Appeal, an

amount far in excess of most African countries budget, would have been a major problem for the United States of America if not for the Oil Pollution Act of 1990 regulation that was put in place at the time of the incidence.

Chapter 2 set the tone for developing an offshore regulatory regime by outlining the history of the oceans resources as the common heritage of mankind, the freedom of the high seas and the mechanism regulating it while highlighting some of the disasters that have occurred on the high seas. It also discussed the framework for regulating these disasters and the compensation regime that were adopted for them. The principles of civil liability and state responsibilities were discussed and the need for Africa to develop a framework for managing its offshore sector in the light of recent offshore drillings taking place within its coastal areas.

Chapter 3 examined the regulatory framework for ocean governance as a follow up to the principle of state responsibilities in developing an offshore regulatory regime in Africa. It highlighted the four Conventions adopted before the United Nations Convention on the Law of the Sea (UNCLOS); the governance of the sea in light of the governing authorities created by UNCLOS; the International Seabed Authority (ISA); the Commission on the Limits of the Continental Shelf (CLCS); and the International Tribunal of the Law of the Sea (ITLOS), as well as attempts by Africa at regulating its offshore oil rig sector regulation given the perceived shortcomings of UNCLOS fragmented framework.

In chapter 4, the current legal framework covering the civil liability and compensation was examined. The global as well as regional civil liability and compensation frameworks were discussed to establish the need for the creation of a sustainable civil liability and compensation regime for offshore regulation in Africa. In addition to this, the chapter examined the United States 1990 Oil Pollution Act in relation to Offshore Protocol being one of the successful regional efforts carried out to regulate offshore pollution damage caused by offshore activities.

Chapter 5 dealt with the creation of a sustainable civil liability and compensation regime for offshore oil rig pollution in Africa by examining the current regulatory framework in



Africa, the inadequacies inherent in them in the event of a major offshore oil rig disaster, and its effectiveness, if there is any, in curbing future offshore oil rig disaster; the principle of efficient compensation and liability rules, strict and vicarious liability; risk pooling mechanisms; government's role in providing compensation; and the use of financial and insurance market instruments to cover liability following a major offshore accident, while proposing a standard regulatory framework template for Africa.

## 6.2 Conclusions

It has been observed in the course of this study that if the roadmap for regional regulation in the light of past disasters and current offshore drilling is not gotten right by Africa at this stage, the consequences might be dire and incalculable given also that offshore oil-rig pollution is trans-boundary in nature and brings destruction in its wake.

It is also evident in the study that the Africa's regional offshore oil rig regulatory regime is not sustainable in curbing any future major oil rig disaster both in civil liability, as well as guaranteeing fair and prompt compensation, due to its lack of unification and where there are, it is not comprehensive enough like in some other regions.

The discourse on the international and regional framework for offshore oil exploration and exploitation shows that its nature is fragmented and incomplete, and also that the United Nations Convention on the Law of the Sea provides the legal basis for offshore activities at the global level. However, the well laid out inherent opportunity has not brought any major outcomes.

The conclusion is that Africa should not wait on the world or the outcome of any multilateral convention before it creates its own regulatory regime, as not only will a new multilateral convention present a legal challenge, it will also bring with it a commercial tussle, given that there would be unavoidable debates about liability limitation, whether there should be limit and if so, what should be the level?<sup>1</sup> And going by recent

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<sup>1</sup> N Gaskell 'Compensation for offshore pollution: ships and platforms' in M Clarke (ed) *Maritime law evolving* (2013) 86.

developments, particularly after the US *Deepwater Horizon* case, it is doubtful if any state will consent to limited liability regime.

Flowing from the above analysis, it is conclusive that a comprehensive and all encompassing Africa regional convention for offshore oil rig pollution civil liability and compensation regime is the only means of protecting the offshore oil from major disaster and its rippling effects. Like other regions, Africa needs a comprehensive regulation and going by the seemingly helplessness of the International Maritime Organisation (IMO) as well as some United Nations organs to provide an international succor in that regard, it has thus become an imperative for the African states to engage themselves in line with the present sectional frameworks as well as the 2050 Africa Integrated Maritime Strategy and come with a comprehensive regional legal framework for offshore oil rig effective regulation.

### 6.3 Recommendations

In order for Africa to develop and adopt an effective regional regulation for offshore oil and gas exploration and exploitation, particularly as it relates to civil liability and compensation that will provide for legal certainty as well as help prevent spills, provide greater security and clarity for managing cleanups, while providing for compensation after any major spills in the region, the following must be considered:

- 1. Application to all maritime zones:** The arrangement need to possess certain features like its application to all maritime zones, due to the rapid technological advancements taking place in the industry which would permit offshore exploration and exploitation to be undertaken beyond the maritime zones, although subject to national jurisdiction. Such regime should include efficient enforcement mechanism; otherwise, it would simply be a declaration of intentions. Also, it must give a clear-cut definition of an offshore installation, both fixed and mobile installations, while distinguishing it from ships.
- 2. Extent of liability:** Another important feature should be the basis and extent of

liability of the operator or owner, depending on the case of the offshore installation that is responsible for the pollution damage. The principle of strict liability has been employed in other international conventions and has gained wide acceptance. The caveat to this is whether strict liability should apply without any limitation. If the idea of limitation of liability is to apply in offshore oil rig sector, it will be safe to say that the limits of liability should be set as high as possible in order to effectively deal with the claims for compensation by victims of offshore pollution damage.

- 3. Fund regime:** Africa should also consider the adoption of a fund regime like the International Convention on Civil Liability Fund and the Supplementary Fund Protocol (1992), in the event of victim(s) not being adequately compensated by the owner or operator of the installation, the victim could make recourse to these Funds to augment the difference in the compensation amount. This recommended fund regime would be designed to receive contributions from the oil exploration and exploitation companies, proportional to their oil production levels. The reason for this is that the 1992 CLC regime has in many cases proved to be a competent regime at regulating liability and compensation for oil pollution damage from ships and it should be taken as a start up point for the adoption of an African regional regime for offshore activities. But if compensation and insurance are fully developed and made available, there will be no need for fund regime.
- 4. License and insurance certificate:** Since it is not easy for a convention to discriminate between different categories of insurer in different states, the offshore convention should allow for certificates issued by insurers in any contracting state. This was a concern when the International Convention on Civil Liability for Bunker Oil Pollution Damage was negotiated for the first time internationally. The Convention effectively directed all types of seagoing ships to own insurance certificate, as there was the likelihood of smaller owners, in particular, relying on locally issued certificates that might not be worth more than a mere paper. The risk, therefore, is that a state relying on a new offshore liability convention might discover that a certificate has been issued in a small island State where there is not effective regulation. To some extent, this risk can be reduced for platforms

operating within the State's EEZ as the State is entitled to impose its own licensing requirements for drilling, independently of any offshore liability convention. These licensing conditions should provide some protection against paper insurers.

5. **Insurance:** Conclusively, it is reasonable to put in place alongside compulsory insurance, the form of Protection and Indemnity Insurance (P&I) since it is a mutual insurance association that provide marine insurance cover for its members, given also that there is no corresponding body for the offshore rig industry, perhaps to represent the insurance interest in international negotiations for a convention, or in provision of an accepted and reliable long term guarantee for States in the event of major offshore oil rig disaster. This is in consideration of the fact that there is little prospect for developing a multilateral convention despite the fact that it could provide for uniformity of rules for industries that have worldwide outreach, and that it will also make it difficult for such industries or companies to resist international action than national actions; also given the potential of risk spreading internationally rather than affecting one state, as well as compulsory insurance thriving more where reciprocal judgment is visible and achievable.

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