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THE LAW OF THE SEAS

TOPIC:

THE LAW OF THE SEAS AND THE REGULATION OF MARINE POLLUTION

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**WRITTEN BY:
MICHAEL I. IGBOKWE Esq.
LLB. [Hons] BL, PGD ML.
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THE LAW OF THE SEAS AND THE REGULATION OF MARINE POLLUTION.

1.0 INTRODUCTION.

The historical functions performed by the seas for trade¹, navigation and as a medium of communication and its contents of living and non-living resources, have induced the international development of legal rules for its delimitation, usage and exploitation in the course of which the marine environment had been exposed to pollution and damage. Maritime safety is related to maritime pollution because unsafe, un-seaworthy or substandard vessels involved in accidents during ship operations or maritime transport are some of the vessel-sources of marine pollution.

It was the deaths of 1,500 out of 2,200 crew members and passengers on board the big passenger vessel called the “*Titanic*” when it collided with an iceberg on her maiden journey in 1912 and the international in character of maritime transport that caused the international community to feel the need for and to start working on international collective efforts and arrangements on maritime safety in the nature of treaties instead of leaving the regulation of maritime safety to individual countries through the applications of their municipal laws. In the same vein, it was the marine pollution caused by the Liberian vessel, the *Torrey Canyon* in 1967 that brought about more international concern and collective arrangements for the regulation and enforcement of regulations on marine pollution for the protection and preservation of the marine environment. Attempts to solve marine pollution on national levels were equally inadequate since it occurs mainly on the high seas (an area used by all states) and therefore concerted international efforts were necessary for a successful solution to marine pollution.

The highly publicised marine disasters like the *Amoco Cadiz* [1978], the *Exxon Valdez* [1989]² have also in recent times caused the international community to realise that even though the seas have, or the marine environment has, capacity to take large amounts of contamination, they are not a “black hole” into which contaminants disappear forever and that the most serious threat to the world’s seas is not from what man takes from their waters but from what they put into them due to human activity. The damage to the environment and resources caused by oil spill from oil tanker disasters have all contributed to sensitising the international community as to the need for collaborative efforts and cooperation in instituting regulatory framework in terms of rules and standards, and in the establishment of a specialized international agency for the prevention, reduction, control and prevention of pollution of the marine environment in order to preserve and protect the marine environment and resources from the effects of vessel and other sources of marine pollution. The international community has also realised that even though there is freedom of the high seas, unrestricted introduction of pollutants into the sea without adverse effects on the marine environment is impossible.

In a wider perspective, there has arisen the global concept of integrating environmental and developmental aims through the notion of sustainable development defined by the World Commission on Environment and Development [the Brundtland Commission] in 1987 as a development that meets the needs of the present without compromising the

¹ Eighty per cent of international trade takes place over the oceans.

² These are regarded as “vessel-source pollution” and albeit different from dumping this includes pollution from vessels involved in navigation and transportation and may be deliberate or accidental. Accidents are said to cause 10% whilst operational discharges cause 80% of vessel-source pollution by oil. Other vessels that caused major marine pollution include the *Diamond Grace* [1997] the *Erika* [1999].

ability of future generations to meet their own needs. This is because it has been realised by developed nations that there is a connection between development and the environment and that the latter can hinder the former if not properly used and protected.

This paper will therefore look *inter alia* at the meaning of marine pollution, its sources, its regulation and enforcement provisions in the United Nations Convention on the Law of the Seas 1982, other relevant regulations made by competent international organisations that are recognised by the United Nations Convention on the Law of the Sea in the regulation of marine pollution including the status of non-convention-sized vessels, the present position of Nigeria in maritime pollution regulation and enforcement, and also make suggestions for the future. The marine pollution regulation and enforcement provisions of the United Nations Convention on the Law of the Sea will be considered together in this paper because they cannot be divorced from each other.

1.1. The Making of the United Nations Convention on the Law of the Sea III [1982].

Like international law, marine environmental law which marine pollution is a part of, derives its source from treaties, customs, general principles of law and judicial decisions although its main source is international conventions. Under customary international law, states are required to do things that will be necessary to control and regulate all sources of pollution within their territories and promote routing systems designed to protect and preserve the marine environment. The United Nations Conference on the Law of the Sea convened in 1973 and after 8 years, the Conference completed the Convention on the Law of the Sea at Montego Bay on 10th December 1982 but it entered into force on 16th November 1994 for the 65 States that deposited their instruments of ratification. It is also known as the UN Third Law of Sea Conference or UNCLOS [III] or UNCLOS 1982, there having been Geneva Conventions for the Law of the Sea I and II in 1958 and 1962 respectively.

The UNCLOS 1982 [hereinafter called UNCLOS], devotes its Part XII entitled, “International Rules and National Legislation to Prevent, Reduce, and Control Pollution of Marine Environment”, to the protection and preservation of marine environment by regulatory and enforcement measures on marine pollution although UNCLOS is only one of the Conventions regulating the prevention and protection of marine environment³. The United Nations established a specialised agency called the International Maritime Organisation [IMO]⁴ that is mainly dedicated to making rules and monitoring and enforcement of regulations for maritime safety and pollution and goes by the slogan,

³ Other relevant international conventions on marine pollution are, International Convention on the High Seas in Cases of Oil Pollution Casualties, 1969; Convention on Intervention on the High Seas, 1967; Convention on Civil Liability for Oil Pollution Damage, 1969; Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; Convention on Prevention of Pollution of the Seas by Oil, 1954; Convention for Prevention of Marine Pollution by Dumping from Ships and Aircraft, 1971; London Convention on Dumping of Wastes at Sea, 1972; Convention for the Prevention of Pollution from Ships, 1973/78 and the Paris Convention for the Prevention of Marine Pollution from Land-Based Sources, 1974.

⁴The IMO, an international organisation of 158 member states and 2 associate members, was set up pursuant to the Convention on the Inter-Governmental Maritime Consultative Organisation adopted on 6/3/48 by the UN Maritime Conference that entered into force on 17/3/58 and became known as IMO in 1982, is *inter alia* to provide machinery for cooperation among Governments in governmental regulation and practices relating to all technical matters affecting international shipping, to encourage and facilitate the general adoption of the highest practicable standards in maritime safety, efficiency of navigation and prevention and control of marine pollution from ships and to deal with administrative and legal matters relating to them.

Safer Ships, Cleaner Seas. Happily, Nigeria is a member of both the United Nations and IMO⁵ and is a signatory to the UNCLOS and IMO Convention, but to what extent Nigeria has ratified or acceded to, domesticated and implemented the provisions of UNCLOS and IMO Conventions⁶ on marine pollution and the implications on Nigeria as a maritime and coastal State, of the status of Nigeria vis-à-vis the relevant IMO Conventions, either by commission or omission, remains to be seen later in this paper.

It is noteworthy that before UNCLOS, there were series of conferences which brought about four 1958 Conventions on the Law of the Sea⁷. Among other things, the UN Conference on the Law of the Sea was held as a result of economic, political and strategic factors and in order to maintain a balance between the interests of the developing and developed countries as to the exploitation of the seabed and freedom of the high seas. It was also to balance the interests of both the coastal and maritime states, and for the study, protection and preservation of the maritime environment. Although many of its provisions repeat principles contained in the earlier 1958 Conventions, UNCLOS shall prevail over the 1958 Conventions as between States Parties⁸.

The 1958 Convention on the High Seas provides that States should make regulations to prevent the pollution of the seas by the discharge of oil or the dumping of radioactive waste⁹ whilst the Convention on the Fishing and Conservation of the Living Resources of the High Seas declares that states have a duty to adopt and cooperate with other states in adopting measures necessary for the conservation of the living resources of the high seas¹⁰ and they have as such prepared the grounds for fuller provisions on such matters in UNCLOS, 1982 for regulating marine pollution.

1.2 Meaning of Marine Pollution.

Outside UNCLOS, pollution has been defined as “Waste material in the form of liquids, dust, solids, odour, etc., which create inconvenience to the general public as a whole. This can cause air, sea and soil pollution to the detriment of the health of human beings”¹¹ and as an interference presumably unjustifiable, with acquired possession and/or enjoyment of property, be it land or sea and liability for which under common law can be one or more of the following torts namely, trespass, public nuisance, private nuisance or negligence¹². From the above, marine pollution can be described as the contamination of the environment relating to the sea such as marine life, by different sources including hazardous substances, organic wastes and toxic chemicals.

However, under UNCLOS, marine pollution or what the UNCLOS prefers to call “pollution of the marine environment” is “the introduction by man, directly or indirectly,

⁵ Nigeria’s instrument of acceptance of the IMO Convention was delivered on 15th March, 1962.

⁶ See Appendix I as to Nigeria’s status in respect of IMO Conventions as at March, 2001.

⁷ The 1958 Convention on the Territorial Seas and Contiguous Zone which came into force in 1964, the 1958 Convention on the High Sea which came into force in 1962, the 1958 Convention on Fishing and Conservation of Living Resources which came into force in 1966 and the 1958 Convention on the Continental Shelf which came into force in 1964.

⁸ Article 311(1) UNCLOS 1982. Where some states are not signatories to the 1982 UNCLOS but are signatories to the 1958 Conventions, they will be bound by the provisions of the latter but if they are signatories to both of them, they will be bound by the 1982 Convention.

⁹ Article 24.

¹⁰ Article 1.

¹¹ Eric Sullivan’s Marine Encyclopaedic Dictionary, Sixth Edition, LLP, 1999, page 343.

¹² Christopher Hill, Maritime Law, 5th Ed. LLP [1998].pp. 418-419.

of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for the use of sea water and reduction of amenities.”¹³ [underlining is by me for emphasis].

From the above definition, [which is a good attempt by UNCLOS to provide a comprehensive meaning of marine pollution], to amount to marine pollution, a pollutant or contaminant [substance or energy] must have been introduced by a *human* being whether directly or indirectly; the location to which the substances or energy are introduced must be in a marine environment including estuaries [mouths of rivers]; the substances or energy so introduced must result in or be likely to result in, such deleterious effects as harming living resources and marine life, human health, hindering marine activities including fishing and other legitimate uses of the sea and impairment of quality use of sea water. It is submitted that from the definition, UNCLOS intends that to amount to the pollution of the marine environment, it is enough for the substances or energy to be indirectly introduced by man through some other medium [e.g. vessel or aircraft, or other fixed or floating platform] and that they need not actually result in deleterious effects to marine life, human beings, fishing etc, it being enough if when introduced by man, the substances or energy are merely likely to occasion any of the listed damages or hindrances to, the enjoyment of, the marine environment. It is also instructive that it will not amount to marine pollution if the substance or energy was introduced say, by an animal on board a ship and not by a human being.

It is obvious from the above sources of marine pollution recognised under UNCLOS, that *natural* sources of marine pollution such as volcanic eruptions and earthquakes¹⁴ are not taken cognisance of by the definition of marine pollution under UNCLOS. This is understandable since the UNCLOS’ definition recognises only marine pollution introduced by *human activity*. Therefore, the meaning of marine pollution under UNCLOS, is restricted and not as wide as marine pollution outside it. Under UNCLOS, States have the obligation to protect and preserve the marine environment.¹⁵

2.0. SOURCES OF MARINE POLLUTION UNDER UNCLOS.

The sources of marine pollution can be classified into two major ones, namely land-based and sea-based sources. They can also be categorised according to the type of human activity such as, disposal of domestic sewage, industrial and agricultural wastes, deliberate and operational discharge of shipboard pollutants or accidental discharge of oil by tankers, exploration and exploitation of marine minerals interfering with the marine environment, disposal of radioactive waste consequent on peaceful uses of nuclear energy and tests and military uses of the seas.

Under Article 194 of UNCLOS, States shall take measures to prevent, reduce and control pollution of the marine environment and States are responsible for the fulfilment of their

¹³ Article 1(4). This good attempt to provide a comprehensive broad meaning of marine pollution was first proposed by the Joint Group of Experts on Scientific Aspects of Marine Pollution in 1969, approved by the Intergovernmental Oceanographic Commission of UNESCO, adopted by the 1972 Stockholm Conference on the Human Environment and incorporated in UNCLOS in a modified form.

¹⁴ It is obvious from the definition of “pollution of marine environment” in UNCLOS that only human sources are considered whilst natural sources of pollution are excluded. This accounts for the exclusion of natural sources of pollution from Article 194, UNCLOS.

¹⁵ Article 192.

international obligations concerning the protection and preservation of the marine environment and shall be liable in accordance with international law. States shall also ensure that there are provisions in their legal systems for prompt and adequate compensation in respect of damage caused under their jurisdiction and provide criteria for payment of adequate compensation.¹⁶

An Article that is significant for bringing out the sources of marine pollution recognised by UNCLOS is Article 194 which provides as follows:

1. *States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.*

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

3. The measures taken pursuant to this Part shall *deal with all sources of pollution of the marine environment*. These measures shall include, inter alia, those designed to *minimize* to the fullest possible extent:

(a) the release of toxic, harmful or noxious substances, especially those which are persistent, from *land-based sources*, from or through *the atmosphere* or *dumping*;

(b) *pollution from vessels*, in particular measures for preventing accidents and dealing with emergencies, ensuring the *safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels*;

(c) *pollution from installations and devices used in exploration and exploitation of the natural resources of the sea-bed and subsoil*, in particular measures for preventing accidents and dealing with emergencies, ensuring safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices;

(d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.

4. In taking measures to prevent, reduce or control pollution of the marine environment, States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties with this Convention.

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life. [underlining and italics are supplied by me for emphasis].

From Article 194, it can be said that UNCLOS adopted a different classification of sources of marine pollution into five, namely,

[a] activities on the land [land-based] sources including contaminants introduced by rivers, pipelines and outfall structures]¹⁷,

[b] exploration and exploitation of sea-bed resources [including activities in the “Area”],

[c] dumping of wastes [or materials] at sea [or “ocean-dumping”]¹⁸,

¹⁶ Article 235.

¹⁷ More than 80% of marine pollution originates from land-based sources which are primarily industrial, agricultural and urban.

[d] shipping [or vessel-source] pollution¹⁹ and
[e] pollution from or via the atmosphere²⁰.

Notwithstanding that UNCLOS did not recognise natural sources of marine pollution in its definition of the pollution of the marine environment, it is a departure from previous international conventions and regulations on marine pollution like the International Convention on Pollution of the Sea by Oil, 1954, Civil Liability Convention/FUND Convention and MARPOL 73/78 which are concerned with only vessel-induced marine pollution.

2.1 Regulation and Enforcement of LAND-SOURCES OF MARINE POLLUTION.

Article 207 of UNCLOS provides obligations generally imposed on States Parties in respect of land-based sources of marine pollution as follows:

1. States shall adopt laws and regulations to prevent, reduce and control *pollution of the maritime environment from land-based sources*, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.
2. States shall take other measures as may be necessary to prevent, reduce and control such pollution.
3. States *shall endeavour to harmonise their policies in this connection* at the appropriate level.
4. States, *acting especially through competent international organizations or diplomatic conference, shall endeavour to establish global and regional rules, standards and recommended practices and procedures* to prevent, reduce and control *pollution of the marine environment from land-based sources*, taking into account characteristic regional features, *the economic capacity of developing States and their need for economic development*. Such rules, standards and recommended practices and procedures shall be re-examined from time to time as necessary.
5. Laws, regulations, measures, rules, standards and recommended practices and procedures referred to in paragraphs 1, 2 and 4 shall include those designed to minimise, to the fullest extent possible, the release of toxic, harmful or noxious substances, especially those which are persistent, into the marine environment.

Although Article 207 UNCLOS provides a framework within which States Parties are to operate in order to protect the marine environment from *land-based sources* of marine pollution through adoption of national laws and establishment of global and regional rules, yet the details of what the laws should exactly contain [apart from their taking into account internationally agreed rules, standards and practices], are not stated in Article 207(1). What the laws and rules should exactly cover have thus been left to individual State Governments to decide²¹. There are also other regional agreements to fight pollution of sea areas from land-based pollutions²².

Article 213 which deals with enforcement with respect to land-based sources of marine pollution requires State Parties to first enforce their laws and regulations adopted in

¹⁸ This is usually garbage in the form of shipboard waste comprising paper, plastics, metals, glass etc and dumping of radioactive waste from nuclear weapon testing, nuclear fuel cycles systems, nuclear accidents and waste from electric power production.

¹⁹ This includes oil pollution from ship accidents and marine casualties. Two main international conventions on vessel-source pollution are the International Convention for the Prevention of Pollution from Ships [MARPOL] 73/78 and UNCLOS.

²⁰ Article 194, *infra*.

²¹ Nigeria appears to have followed this process in making the Federal Environmental Protection Act, 1988; The Harmful Waste [Special Criminal Provision etc] Act, 1988 and The Environmental Impact Assessment Act, 1992.

²² E.g. 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, The 1976 Convention for the Protection of the Mediterranean Sea Against Pollution and Others.

accordance with Article 207 and secondly, to adopt laws and regulations and take other measures necessary to implement applicable international rules and standards established through competent international organisations or diplomatic conference²³. Even though “the competent international organisations” are not named in UNCLOS, yet it is generally accepted that the IMO and UNEP are some of them. There may however be complexities in enforcement if a vessel whose flag state is not a member to a particular regional treaty, violates a provision of UNCLOS whose application of enforcement falls under regional treaties. Article 207[3] shows the need for States to endeavour to harmonise their policies at the appropriate regional level. By Article 207[4], in adopting the national laws and global and regional rules, States are to “consider the economic capacity of developing states and their need for economic development” in which case, differential or favourable standards are allowed and applicable between developed and developing [or technologically less developed] States. It is submitted that this Article recognises that rules to fight marine pollution from land-based sources should not impair the economic development of the developing States or be a burden on their economies.

However, the prescription by Article 207[5], that the national laws, global and regional rules shall include “*those designed to minimize ... the release of toxic, harmful or noxious substances... into the marine environment*” [which tacitly permits the release of such substances] without prescribing banning them outright, gives a leeway for the occurrence of such pollution.

2.2 Regulations and enforcement of SEA-BED SOURCES OF MARINE POLLUTION.

Regulations of pollutions from *sea-bed activities* and from artificial islands, vessels, installations and structures subject to the national jurisdiction of coastal and other States are in Article 208 which enables them to adopt laws and international rules similar to those in respect of land-based sources of marine pollution. These sea-bed activities include exploration and exploitation and conservation of the natural resources including oil in the upstream and off-shore, involving fixed and floating platforms in the sea-bed and the subsoil, which are common in the territorial waters of oil producing coastal states. Consequently, Nigeria as a coastal state ought to adopt laws and regulations and take other measures to prevent, reduce and control marine pollution arising from such sea-bed activities, artificial islands and structures subject to its national jurisdiction that would be as effective as international rules, standards, recommended practices and procedures. In Article 214, a coastal state is empowered to enforce such laws and regulations adopted in accordance with Article 208.

The coastal state’s adoption of national laws to combat marine pollution in its waters due to sea-bed activities involving off-shore exploitation and exploration of crude oil especially activities in the “Area” is relevant to Nigeria but regrettably, its Petroleum Act, 1969 and regulations under it are outdated, inadequate and ineffective to battle marine pollution from sea-bed activities. Regulation 25 of the Petroleum [Drilling and Production] Regulations 1969 directs holders of oil exploration licences to take all practicable precautions to prevent the pollution of inland waters, rivers, water courses, territorial waters or the high seas by oil, mud or other substances and where pollution has occurred, they are to take prompt steps to control and if possible, end it. Sections 19 and 20 of the Oil Pipelines Act, cap 338 empowers the magistrates to award any

²³ See also Article 207[4] UNCLOS on “competent international organisations or diplomatic conference”. One of the most recently held diplomatic conferences is the UN/IMO Diplomatic Conference on Arrest of Ships, 1999.

compensation payable forthwith for damage due to breakage or leakage from pipeline or ancillary installation but bearing in mind the limits of the jurisdiction of the magistrates, it is doubtful if the compensation here can be much. However, by virtue of Section 1 of the Admiralty Jurisdiction Act, 1991 claims for compensation for oil pollution damage can now be filed in the Federal High Court whose jurisdiction to award any particular amount is not limited.

Article 209 mandates States to adopt laws and regulations to prevent, reduce and control marine pollution from activities in the Area²⁴ undertaken by vessels, installations, structures and other devices flying their flag, or of their registry or operating under their authority.²⁵ However, international standards for the prevention of marine pollution adopted by the International Sea-Bed Authority, must have priority in the “Area”.

2.3 Regulations and enforcement of DUMPING-INDUCED SOURCES OF MARINE POLLUTION.

Article 210 empowers State Parties to adopt laws and regulations to prevent, reduce and control marine pollution by *dumping* but such national laws must ensure that dumping is carried out with the permission of competent authorities of States. If the dumping is within the territorial sea, the exclusive economic zone or onto the continental shelf, it must be after the express prior approval of the coastal state. UNCLOS²⁶ defines “dumping” as:

- (i) any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea.
 - (ii) any deliberate disposal of vessels, aircraft, platforms or other man-made structures at sea,
- but does not include:
- (i) the disposal of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transpired by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or structures;
 - (ii) placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Convention.

Some types of *dumping* are operational dumping, or [accidental or] emergency dumping or marine dumping of wastes. Operational dumping results from the normal operation of any type of equipment and entails automatic dumping of pollutants in the course of operation of the equipment and some deliberate dumping due to normal exploitation [e.g. cleaning cargo tanks]. To reduce or control such dumping, there are laid down rules and standards for the design, construction and maintenance of the equipment and in order to eliminate deliberate dumping, sanctions are provided against those responsible for them. Accidental dumping are those caused by collision, grounding, drilling accidents and cannot be banned by law but are then regulated with a view to adopting measures to prevent them or minimize their effects through stated standards for design and maintenance, training of personnel and measures to fight their effects.

²⁴ The “Area” is defined in Article 1[1] UNCLOS as the sea-bed and ocean floor and its subsoil beyond the limits of national jurisdiction beyond the outer limit of the continental shelf, whilst “activities in the Area” mean all activities of exploration for, and exploitation of, the resources of the Area, [see Article 1[3].

²⁵ General Provisions governing the Area are contained in Part XI and show inter alia that the resources in the Area are for the benefit of mankind, no State has sovereign rights there and it should be used exclusively for peaceful purposes. It is under the International Sea-Bed Authority.

²⁶ Article 1(5)

Therefore, legal regulations are used to prohibit dumping of harmful pollutants and direct permits are to be obtained for the dumping of other wastes so as to control them. It appears that only the dumping of high-level radioactive waste [i.e. product of spent nuclear fuel having a half-life of 24,100 years] is no longer permitted in the oceans while the dumping of low-level radioactive waste is still permitted.²⁷ Party States and coastal states are given powers of enforcement of regulations and laws against dumping.²⁸

Interestingly, marine pollution does not result from large scale dumping but from some dumping in small amounts of wastes consequent to legitimate activities that cannot justifiably be described as pollution, e.g. the testing of nuclear weapons in the atmosphere and outer space and under water activities banned under international law that may not be classified as marine pollution in advance.

It has been argued that the dumping of pollutants is legitimate if it does not occasion actual pollution and that absolute prohibition of dumping is unnecessary because the current level of technological development makes it impossible to completely stop dumping and so warrants dumping of wastes consequent to human activity. The question however is whether the wastes cannot be processed into usable harmless states rather than being dumped and whether it is not the cost of such processing that is considered more expensive than damage to the marine environment by dumping. It is therefore suggested that whilst the dumping of less deleterious substances should be restricted the dumping of the extremely harmful pollutants should be completely banned.

One major problem of enforcement here however is the lack of transparency on the part of ship operators who rather than use reception facilities at ports of call, dispose the pollutants at sea and claim that they disposed of their sewage, packages, oil wastes, garbage at the previous port or incinerated them. There is also the difficulty being had by ports states in verifying their stories and the lack of centralised record-keeping including means of tracking and regulating such discharges.

2.4 Regulations and Enforcement of VESSEL-SOURCED MARINE POLLUTION.

The international nature of maritime navigation makes it imperative to adopt global standards to prevent marine pollution from ships. Consequently, after the 1954 International Convention for the Prevention of Pollution of the Sea by Oil was adopted, other international cooperative efforts aimed at reducing or controlling pollutants from ships were connected with and under the auspices of IMO. Article 211 provides for the prevention and control of marine pollution by vessels and the promotion of the adoption where necessary, of a routing system for minimizing accidents²⁹ which can cause marine pollution, adopting national laws that will produce similar effects as those of generally accepted international rules and standards applicable to vessels flying their flag or of their registry that are established through the competent international organization or general diplomatic conference³⁰. Although the ‘competent international organisation’³¹ is not

²⁷ It has been suggested that contained nuclear waste should be dumped in the deep sea but there are fears that their leakages and failure will still occasion devastating marine pollution.

²⁸ Article 216.

²⁹ The “vessel-source pollution” albeit different from ‘dumping’, includes pollution from vessels involved in navigation and transportation and may be deliberate or accidental. Accidents cause 10% whilst operational discharges cause 80% of vessel-source pollution by oil. Other vessels causing major marine pollution in recent are the *Diamond Grace* [1997] the *Erika* [1999].

³⁰ Article 211[2].

³¹ The expression also appears in other Article including, 217[1].

defined or specially mentioned in the UNCLOS, it is generally seen by maritime states as meaning the IMO.

An author³² has concluded that Article 211 raised unanswered questions which make it ambiguous in that, the meaning that should be ascribed to “generally accepted international rules and standards” is not clear. If the IMO is the “competent international organisation” and it is therefore arguable that the requirements of IMO’s conventions including MARPOL 73/78, IMO Codes including International Safety Management Code of Part IX of SOLAS³³ and other relevant international guidelines are incorporated into Article 211, does it mean that if a State party to UNCLOS has not ratified those IMO’s conventions it will be bound by their standards as international customary law?³⁴ Other questions are that, if a state has not ratified the MARPOL 73/78 and SOLAS but has ratified the UNCLOS, can the rules and standards of MARPOL 73/78 and SOLAS be considered to be “generally accepted as to be applicable to and by the State”? Will it not discourage Party States to UNCLOS from ratifying IMO Conventions? Even if the IMO rules are taken to be “generally accepted”, what is the meaning of the qualifying phrase, “shall at least have the same effect” and what is meant by “general diplomatic conference” in the context of UNCLOS since UNCLOS did not define the expressions?³⁵ It is humbly submitted that correct answers to the questions posed are necessary in understanding the implications and intentions of UNCLOS especially under its Article 211.

Article 211 also imposes duties on States to publicise pollution control requirements meant as conditions for foreign vessels’ entry into their ports or internal waters or their off-shore oil terminals and imposes some duties on coastal states participation in regional vessel-source pollution control. Coastal states are empowered to adopt national laws to prevent or control pollutions by foreign vessels within their territorial waters [even when they are exercising rights of innocent passage] and apply national rules that are in conformity with international rules to vessels in their exclusive economic zones. States are also mandated to notify the international organization of certain regulations made against vessel-source marine pollution within certain defined areas of their exclusive economic zones. One criticism of UNCLOS is that it requires a state to undertake measures to control vessel-source pollution “*to the fullest possible extent*” whilst not defining a state’s responsibility clearly and stating the standards of the measures to be undertaken.³⁶

Another important provision of UNCLOS on enforcement of regulations of vessel-sourced marine pollution by flag and other States needing setting out is Article 217 which states that:

1. *States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference and with their laws and regulations adopted in accordance with this Convention for the prevention and control of marine pollution from vessels and shall... adopt laws and take measures for their implementation.*

³² Z. Oya Ozcayir, supra at page 168.

³³ The International Convention on the Safety of Life at Sea.

³⁴ A state cannot be bound by a convention it has not ratified and may not want earlier conventions to be binding on it just because it has ratified the UNCLOS.

³⁵ Z. Oya Ozcayir, supra at page 168.

³⁶ Ibid, at page 166.

Flag states shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

2. *States shall*, in particular, take appropriate measures in order to *ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements in respect of design, construction, equipment and managing of vessels.*

3. States shall ensure that vessels flying their flag or of their registry carry on board certificates required by and issued pursuant to international rules and standards referred to in paragraph 1. States shall ensure that *vessels flying their flag are periodically inspected in order to verify that such certificates are in conformity with the actual condition of the vessels. These certificates shall be accepted by other states as evidence of the condition of the vessels and shall be regarded as having the same force as certificates issued by them, unless there are clear grounds for believing that the condition of the vessel does not correspond substantially with the particulars of the certificates.*

4. If a vessel commits a violation of rules and standards established through the *competent international organisation or general diplomatic conference*, the flag state, without prejudice to Articles 218, 220³⁷ and 228³⁸, shall provide for immediate investigation and where appropriate institute proceedings in respect of the alleged violation irrespective of where the violation occurred or where the pollution caused by such violation has occurred or has been spotted.

5. Flag states conducting an investigation of the violation may request the assistance of any other State whose cooperation could be useful in clarifying the circumstances of the case. States shall endeavour to meet appropriate requests of flag states.

6. States shall upon the written request of any state, investigate any violation alleged to have been committed by vessels flying their flag. If satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, flag states shall without delay institute such proceedings in accordance with their laws.

7. Flag states shall promptly inform the requesting state and the competent international organisation of the action taken and its outcome. Such information shall be available to all states.

8. Penalties provided for by the laws and regulations of states for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.

This Article³⁹ shows generally that it is for the flag State to either on its own volition or on the request of other states, to investigate and prosecute its flagged vessels involved in the pollution of the marine environment and to thereafter send reports of the actions taken to the requesting State[s] and IMO and other States. It is submitted that UNCLOS has in this Article adopted provisions similar to the provisions in other IMO Conventions, e.g. SOLAS and Article 5 of MARPOL 73/78 for safe navigation and inspection of equipment and certificates of ships, with a view to preventing, controlling and reducing of marine pollution. Article 217 provides the action required of Nigeria as a flag state to ensure compliance by vessels flying its flag with applicable international rules and standards for the prevention, reduction and control of marine pollution including preventing an offending vessel from proceeding to sea. It also requires Nigerian vessels to carry on board relevant certification relating to the condition of the vessels, carry out investigations and where necessary, file actions against vessels in respect of violations of international rules and standards and penalties adequate in severity to discourage violations wherever they occur.

Not only does oil spillage from ships affect the environment, its clean-up measures which involve mechanical and chemical measures, also affect the environment and have substantial effects and serious damages on the ecosystem, ports and marinas, fisheries

³⁷ This Article deals with the powers of the coastal state to enforce its anti-pollution laws on vessels within its territorial sea or exclusive economic zone.

³⁸ This Article deals with the conditions under which there should be suspension and restrictions of proceedings against foreign vessels by coastal and other states for violating pollution regulations in their territorial sea and the prevention of institution of actions.

³⁹ There are more comments on Article 217 under flag state control at page 17 of this paper.

and marine animals, marine birds and other resources⁴⁰. Apart from maritime accidents, tanker operations by dumping oily bilges, ballasting, disposal of fuel oil sludge and terminal operations/dry docking are major causes of marine pollution and the damage to the environment and resources caused by oil spill from oil tanker disasters have all contributed to sensitising the international community as to the need for collaborative efforts and cooperation in instituting regulatory framework in terms of rules and standards, and in the establishment of a special agency for the reduction, control and prevention of the pollution of the marine environment and also to preserve and protect the marine environment and resources from the effects of marine pollution.

2.4 Regulations and Enforcement of ATMOSPHERIC-SOURCE OF MARINE POLLUTION.

Under Article 212, States are to adopt national laws applicable to air space, vessels flying their flag or vessels or aircraft of their registry taking into account internationally agreed rules, standards and recommendations, practices and procedures and the safety of air navigation in order to prevent, reduce and control atmospheric pollution of the marine environment. The prevention of the pollution from or through the atmosphere is said to have so far failed to be reflected substantially in any international law. To some extent it was tackled by an international cooperation in the 1979 Convention on Long-Range Transboundary Air Pollution concluded by the US, Canada and EU. The IMO has recently adopted regulations made as Annex VI to the MARPOL 73/78 for the prevention of air pollution from ships in order to deal with this source of marine pollution.

One major cause of atmospheric pollution in Nigeria is natural gas flaring associated by oil exploration and exploitation in the Niger Delta of Nigeria. It is argued that due to the lack of gas utilization infrastructure, Nigeria flares 75% of the natural gas it produces and re-injects 12% for enhanced oil recovery. The Federal Government of Nigeria has through its Minister of Environment now put in place a policy for oil companies operating in Nigeria to gather and utilize all associated gases by 2004 although some of the oil companies are already saying they are not in a position to do so until 2008.

Gas flaring contributes to both the production of acid rain and increased carbon emissions into the atmosphere. However, realising that marine pollution is transboundary and so requires a cooperative effort, Nigeria has encouraged the Gulf of Guinea Large Marine Ecosystem Project⁴¹, a project sponsored by the Global Environment Facility and a joint effort among scientists from Nigeria, Benin, Cameroon, Cote d'Ivoire, Ghana and Togo created to address the highly polluted inland water body of the Lagos Lagoon.⁴² Under the Petroleum Act 1969, the Minister is empowered to make regulations for the prevention of pollution of water courses and the atmosphere.

⁴⁰ "Oil Transportation: Effects on Marine Environment", Prof. Babajide Alo, Dean of Post Graduate Studies, University of Lagos, presented at the Seminar on Maritime Capacity and Resource Development: The Role of the National Maritime Authority, organised by the National Maritime Authority in collaboration with Petersen Consulting, 2nd-4th April, 2001 at Eko Hotel, Victoria Island Lagos.

⁴¹ There is also the Gulf of Guinea: Water Pollution and Biodiversity Conservation, funded by the UN Development Programme, Global Environment Facility and US Oceanic and Atmospheric Administration in order to protect and restore the health of the Gulf of Guinea Large Marine Ecosystem and its natural resources.

⁴² See, the paper entitled, "Nigeria: Environmental Issues", published by United States Energy Information Administration in April, 2000.

States are also to directly or through competent international organisations monitor through scientific means, the risks or effects of marine pollution and keep under surveillance, the effects of any activities likely to pollute marine environment⁴³. States shall also assess the potential effects of their planned activities under their jurisdiction or control which may cause substantial pollution or significant harmful changes to the marine environment⁴⁴ and publish or send the reports of the monitoring activities and assessment to the competent international organisations⁴⁵. It is noteworthy that whilst some Articles of UNCLOS set regulatory standards for the protection and preservation of the marine environment, Articles 213 to 222 are rules for the enforcement of those standards.

Apart from attempting to provide a comprehensive framework of conventional rules that cover all and any sources of pollution of the marine environment, there are certain provisions of Article 194 of UNCLOS that require further consideration.

Paragraph 2 of Article 194 is an acceptance of a standard rule of customary international law that States have the duty not to cause damage to the environment of other States and of jointly used areas⁴⁶. States are also not to allow measures taken by them within their jurisdiction to affect foreign states and the foreign states are not to interfere with such measures. Paragraph 3 of Article 194 of UNCLOS recognises and permits the application by States of the provisions of IMO Conventions including the SOLAS regulating the construction, design, equipment, operation, and manning of vessels and safety operations to fight marine pollution.

The obligations of States in paragraph 1 of Article 194 of UNCLOS singularly or jointly “*to use the best practicable means at their disposal and in accordance with their capabilities*” for preventing, reducing or controlling marine pollution mean that since the capabilities of States are not equal, what is for a technologically advanced developed State “the best practicable means” according to its capabilities, may not be “the best practicable means” for a technologically backward developing State. It therefore allows differential or preferential and non-uniform standards for States to fight marine pollution. It means that if the best practicable means applied by a technologically backward or developing State in reducing, preventing or controlling marine pollution is far below the reasonably expected measure adopted by a particular State in the circumstance, the State will not be held liable to have violated UNCLOS. This is a particularly serious situation because many of the marine pollution occurring within developing States where the means of fighting marine pollution are inadequate or outdated, are caused by the activities of the developed States or their interests e.g. multi-national oil companies engaged in oil exploration and exploitation, merchant ships/liners but their marine environments suffer the damage as a result of poor control or combating any marine pollution that occurs.

It is argued that the vaguely defined standards, such as “best practical means” and empty instructions that States “shall endeavour” to adopt harmonious policies, fall short of defining a clear course of state-coordinated action. This is one of the reasons why it has been argued that whilst UNCLOS creates an extensive framework for taking and

⁴³ Article 204.

⁴⁴ Article 206.

⁴⁵ Articles 206 and 205.

⁴⁶ This standard was confirmed in the Declaration on the Human Environment adopted by the UN Stockholm Conference in 1972.

enforcing measures on different sources of marine pollution and strongly clarifies the duties the breach of which induces state responsibility, it is vague when it comes to the definition of liability as a result of a violation.⁴⁷ Article 194 is also criticised for being general and not specific on standards thereby making it impossible to implement its provisions in an objective manner and not defining a state's responsibility sufficiently⁴⁸.

Regional Cooperative Efforts on Marine Pollution.

Under Article 197 there is room for cooperation by States on a global or regional basis directly or *through competent international organisations* in formulating international rules and standards and recommended practices and procedures consistent with UNCLOS for the protection and preservation of the marine environment⁴⁹ and not only shall states notify other states who are in imminent danger of being affected by pollution cases in their areas but also states in the areas affected shall “in accordance with their capabilities and the competent international organisations cooperate in eliminating the effects of pollution and preventing or minimizing the damage by contingency plans of response.”⁵⁰ Moreover, international rules and standards, established through...competent international organizations or general diplomatic conferences are those that come out of the numerous uncoordinated regional treaties of UNEP and larger IMO treaties such as MARPOL 73/78 and SOLAS and though not named, some of the competent international organisations are IMO and United Nations Environment Programme⁵¹ [UNEP].

However, the IMO is powerless in monitoring and collecting information regarding marine pollution where contrary to the requirements of MARPOL's self-policing provisions in cooperating in submitting information, States do not submit such information and IMO is unable to enforce member state compliance and its inability to regulate warships and government or State-owned vessels not engaged in commercial use, whilst UNEP is hampered because it does not have an executive authority and is financed by voluntary contributions from UN members.

It is obvious from the language of Articles 194 and 197 that whilst *elimination* of the effects of marine pollution is expected of State parties in regional cooperative efforts, prevention, reduction and control of marine pollution are expected of State parties by UNCLOS. The Bonn Agreement [Agreement for cooperation in dealing with pollution of the North Sea by Oil 1969, was the first regional oil pollution prevention agreement which was concluded as a result of the Torrey Canyon incident. UNEP was in 1974

⁴⁷ Z. Oya Ozcayir, “Liability for Oil Pollution and Collisions”, page 166, published by LLP, 1998.

⁴⁸ Ibid, page 166.

⁴⁹ Some of the global cooperative Conventions are International Convention for the Prevention of Pollution of the Sea by Oil [Oilpol 1954], Intervention Convention, 1969, International Convention on the Dumping of Wastes as Sea, 1972; MARPOL 73/78. Some of the cooperative regional conventions on preservation and protection of the marine environment are The South Asian Seas Agreement 1995, The North West Pacific Agreement 1994, The UNEP Regional Seas Programme and Convention for the Protection of the Mediterranean Sea Against Pollution 1976[Barcelona Convention], Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden 1974, The Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area 1974 and the Helsinki Convention 1992.

⁵⁰ Article 199.

⁵¹ It may facilitate the settlement and mediation of disputes among conflicting treaties, but it gathers and disseminates information on environmental matters. It is a UN subsidiary organ without an executive, but having a 58 member governing council and a secretariat of 200 environmental professionals, funded under the general UN budget although its Environment Fund, a separately supported entity maintained by voluntary contributions from UN members, funds more specific projects. However, UNEP has no record-keeping or monitoring measures for the practices of military vessels.

initiated to endorse a regional approach to the control of marine environment and the management of marine coastal resources and to encourage the promotion of sub-regional cooperation to enhance national capabilities in marine emergency preparedness and response. The UNEP programme currently involves 13 areas. UNCLOS also allows States to cooperate with themselves or through competent international organisations for the purpose of undertaking programmes of scientific research and exchange of information and data acquired about marine pollution and in establishing appropriate scientific criteria for the formulation and elaboration of rules, standards and recommended practices for the control of the pollution of the marine environment.⁵²

Coming under cooperative efforts on combating marine pollution as envisaged by Article 197, is the 1981 Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African sub-region [and its protocol] to which Nigeria is a party. It became operational in 1984 Article 5 of which mandates member states to take appropriate measures in conformity with international law to prevent, reduce, combat and control pollution of the marine environment, coastal zones and related inland waters. It adopts the meaning of the “pollution of the marine environment” and the sources of such pollution as contained in UNCLOS. Under its Article 8, multinational companies operating within national jurisdiction are obliged not to pollute the environment and the coastal states of where they operate and have a primary duty to ensure no pollution results from their operations. Although this treaty does not grant immunity to warships and state ships as in UNCLOS, not having been domesticated by Nigeria, its provisions are not yet enforceable in Nigeria.

States shall directly or through competent international organisations render programmes of scientific, educational, technical and other assistance to developing States in terms of training of their scientific and technical personnel, facilitating their participation in relevant international programmes, supplying them with necessary equipment and facilities, enhancing their capacity to manufacture such equipment, and providing appropriate assistance to developing countries for minimising the effects of major incidents and preparation of environmental assessments.⁵³ UNCLOS recognises that developing States are to be granted favourable treatment by international organisations in the allocation of appropriate funds and technical assistance and utilization of their specialized services.⁵⁴ The favourable treatment granted to developing states here is welcome in view of the technical advantage which developed states have and the fact that marine pollution in a developing State may affect a neighbouring developed state.

Nigeria is in a position to benefit from the above favourable treatment but regrettably; it has not made appreciable efforts in attracting such technical assistance and funds from developed States, UNEP and IMO due to what seems to be nonchalant or carefree attitude or complacency.

3.0 FLAG STATE, COASTAL STATE AND PORT STATE CONTROLS AND ENFORCEMENT ON MARINE POLLUTION UNDER UNCLOS.

Under UNCLOS, anti-pollution national laws can be enforced under the coastal and flag state jurisdictions of a State. Even though UNCLOS recognises the primary jurisdiction

⁵² Articles 200 and 201.

⁵³ Article 202.

⁵⁴ Article 203.

of the flag state in this regard, it also recognises the roles of coastal and port states in the supervision and enforcement of international maritime law. The coastal state that has sovereign powers in its territorial sea, retains jurisdiction over pollution and may enforce its pollution laws on its territory, ports, internal waters, territorial waters and to protect and preserve the marine environment within its exclusive economic zone⁵⁵. Regulations on pollution from land-based sources and sea-bed activities are enforced by states.⁵⁶ The coastal state [if it is within its territorial sea, or exclusive economic zone or onto its continental shelf], the flag state [if it is with regards to vessels flying its flag or vessels or aircraft of its registry] and any state [if it is with regards to acts of loading of wastes or other matter within its territory or off-shore terminals], are respectively given powers of enforcement of laws and regulations against dumping adopted in accordance with UNCLOS and applicable international rules and standards established through competent international organisations or diplomatic conference for the prevention, reduction and control of marine pollution.⁵⁷

3.1 Flag State Control

Under Article 217 UNCLOS empowers States to exercise what is generally referred to as “flag state control” by enforcing compliance by their flag or registry vessels with applicable international rules and standards established through competent international organisations or diplomatic conference and with their laws and regulations adopted in accordance with UNCLOS to prevent, reduce or control marine pollution from vessels. It is a confirmation and incorporation of the traditional power of enforcement that States have on vessels flying their flag or of their registry. But if a foreign vessel causes pollution beyond the limits of a state’s territorial sea or jurisdiction, a State cannot exercise jurisdiction (unless under port-state jurisdiction.⁵⁸ Only monetary penalties [fines] may be imposed by states against foreign vessels that infringe their national pollution laws or international rules and standards for pollution beyond their territorial sea or within their territorial sea⁵⁹ [except that in the latter if it was a wilful and serious act of pollution, some other penalties may be imposed⁶⁰ although the accused must be accorded all his recognised rights. One would have expected that as a result of the devastating effect that marine pollution has on the marine environment and human life, stiffer penalties to deter marine pollution should have been prescribed by UNCLOS. The present position now is that where it will be cheaper to discharge pollutants than recycle them, the foreign vessel will rather discharge and escape or if caught, get penalised monetarily. What a way of supporting what ought to be banned or deterred from. One other problem here is the dilemma of jurisdiction and enforcement in a case where a vessel whose flag state is not a member to any regional treaty violates UNCLOS when under Article 217 the enforcement falls under regional treaties to which it is not a party.

3.2 Port State Control.

⁵⁵ As a coastal state, the limits of Nigeria’s territorial waters is 12 nautical miles from its baselines [Territorial Waters Amendment Decree, 1998] and its exclusive economic zone is 200 nautical miles from its baselines [see, The Exclusive Economic Zone Decree of 1978 and Article 57 of UNCLOS].

⁵⁶ Articles 213 and 214 respectively.

⁵⁷ Article 216.

⁵⁸ Article 218. It is popularly known as “port state control”. Flag State and Port State Controls are major topics on their own the full treatment in this paper of which will make it unwieldy. Port state control is to ensure that whilst foreign ships are trading in Nigerian ports, they have met minimum international safety and pollution standards.

⁵⁹ Article 230

⁶⁰ Article 230[2]

Under Article 218 [which is subject to the safeguards in Article 228], subject to certain conditions, a port state may exercise jurisdiction over by investigating and instituting proceedings against foreign vessels voluntarily in its ports or off-shore terminals. In order to apply the jurisdiction, the foreign vessel should have either discharged pollutants on the high seas in infringement of “*applicable international rules and standards*” established through competent international organisations or general diplomatic conference or must have discharged pollutants outside the internal waters, territorial sea or exclusive economic zone⁶¹ of that state. A state can also enforce such rules in respect of discharge outside its exclusive economic zone only if it causes or threatens to cause, damage within its internal waters, territorial sea or exclusive economic zone⁶². A vessel voluntarily within a port or at an off-shore terminal of a state must comply with the requests for investigation of a discharge violation believed to have occurred in, caused or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting state or upon a request for investigation made by the flag state irrespective of where the violation occurred. The Article also allows the records of investigation made by the port state and the records of proceedings, evidence, and bond or financial security of any suspended instituted action upon request to be transmitted to the flag state or to the coastal state.

A State within whose port or off-shore terminal is voluntarily a vessel, shall as far as practicable comply with requests from any state or flag state for the investigation of such vessel’s discharge violation referred to in paragraph 1 of Article 218 believed to have occurred in, caused, or threatened damage to the internal waters, territorial sea or exclusive economic zone of the requesting state⁶³. *It should however be noted that the powers of enforcement against foreign ships may only be exercised by officials or by warships, military aircraft or other government ships or aircraft identified as being on government service and authorised to so do*⁶⁴ and not merchant or other vessels⁶⁵.

Upon the request of the flag state or coastal state, records of the investigation carried out by a port state shall be transmitted to it by the port state and subject to section 7, any instituted proceedings may be suspended at the request of the coastal state when the violation has occurred within its internal waters, territorial sea or EEZ and records of proceedings therein transmitted to the coastal state.⁶⁶ Under Article 226 states are directed not to delay a foreign ship longer than is necessary for the purposes of the investigations allowed and which gives the extent and limits of physical inspection of a foreign vessel by a port state. The physical inspection of a foreign vessel is limited to an examination of such certificates⁶⁷, records or other documents as the vessel is required to carry by *generally accepted international rules and standards*⁶⁸ or of any similar documents which it is carrying and further inspection may be carried out if there are clear grounds to believe that the condition or equipment of the vessel does not correspond

⁶¹ Waters outside the maritime zones of internal waters, territorial sea or exclusive economic zone of a state can be regarded as waters within and outside the exclusive economic zone of a state.

⁶² Article 218[2].

⁶³ Article 218(3).

⁶⁴ Article 224.

⁶⁵ Quære, does a vessel owned by an agency or parastatal of government or an agency or parastatal of government charged with maritime safety and pollution control, qualify under UNCLOS to enforce such pollution provisions against foreign vessels?

⁶⁶ Article 218(4)

⁶⁷ Similar to provisions of Annex I of MARPOL 73/78.

⁶⁸ This italicised expression has been commented upon earlier in this paper.

substantially with the particulars of those documents, or if the contents of the documents are insufficient to verify or confirm a suspected violation or if the vessel is not carrying valid certificates.

It is interesting however that if the investigation shows a violation of applicable laws and regulations or international rules and standards for the protection and preservation of the marine environment, the vessel shall be promptly released if it enters into a bond or other appropriate financial security.⁶⁹ This shows that the detention of the vessel cannot be indefinite since vessels make money by being on the move. But should the applicable municipal law prescribe terms of imprisonment would the master or crew not be liable to be prosecuted and imprisoned? Under Article 226[1][c], if the release of the vessel would cause an unreasonable threat of damage to the marine environment, its release may without prejudice to applicable international rules and standards, be refused or made conditional upon its proceeding to the nearest appropriate repair shipyard and its flag state promptly informed which may seek its release peacefully according to Part XV⁷⁰ of UNCLOS.

However, by virtue of Article 219, and subject to section 7 of UNCLOS, a State may take *administrative measures* to prevent a vessel from sailing from its port or off-shore terminal or permit it to sail to the nearest repair yard where the vessel is “in violation of applicable international rules and standards relating to *seaworthiness* of the vessel and thereby threatens damage to the marine environment” and upon removal of the causes of the violation, permit the vessel to continue immediately. It is submitted that *applicable international rules and standards relating to seaworthiness* may include the rules in Chapter 1, Regulation 19 and Resolution A. 787 [19] of SOLAS relating to inspection of ships and its documents under which port state control is also enforced⁷¹. Under Article 221, coastal states are allowed to take measures beyond their territorial seas to avoid pollution from maritime casualty. Article 221 preserves the right of States under international law [both customary and conventional] to take measures beyond their territorial seas in order to protect their coastline or related interests⁷² including fishing, from pollution or threatened pollution following a maritime casualty⁷³ or acts relating to it.

Another important part of regulation of marine pollution deserving serious comments are the UNCLOS’s provisions on warships and government ships. As comprehensive as the provisions of UNCLOS on marine pollution are, they do not apply to *warships*⁷⁴, *naval auxiliary and other vessels or aircraft owned or operated by a state and used at the*

⁶⁹ Article 226(1)[b].

⁷⁰ Part XV of UNCLOS imposes an obligation on parties to settle disputes by peaceful means in accordance with Articles 2[3] and 33[2] of the Charter of the United Nations.

⁷¹ See also MARPOL 73/78. The Nigerian-flagged MV Trainer was in 1999 arrested and detained in Alabama, US by US Coast Guard and released only after meeting certain conditions including payment of substantial fine for non-compliance with applicable international rules and standards on seaworthiness. It has been argued under Articles 218, 224 and 226 and Article 5(4) of MARPOL 73/78 a substandard Nigerian vessel which it allows to sail to a foreign port may be detained by the foreign port under its port state control.

⁷² This Article recognises the London Intervention Convention which was consequent to the Torrey Canyon incident of 1967.

⁷³ “Maritime casualty” has been defined as a collision of vessels, stranding or other incident of navigation or occurrence on board or external to a vessel resulting in material damage or imminent threat of material damage to a vessel or cargo”.

⁷⁴ A warship is defined in Article 29 of UNCLOS as a ship belonging to the armed forces of a state under the command and with crew under regular armed forces discipline.

material time only on government non-commercial service. Each state shall however adopt measures not impairing operations or operational capabilities of such vessels or aircraft and *must act in a manner consistent so far as is reasonable and practicable*, with UNCLOS.⁷⁵ Any anti-pollution measures taken by states must not affect the operations or operational capabilities of such vessels. This Article 236 of UNCLOS recognises the sovereign immunity principle in international law of sovereign states and their assets that are not involved in commercial but state business. However, UNCLOS has been criticised as having a “good faith” provision which is problematic and that the use of the term “reasonable and practicable” gives no clear guidance as to the degree of compliance acceptable.⁷⁶ The only rationale behind absolute immunity given to warships or State ships in respect of marine pollution enforcement is the security interest of the States owning them but when weighed against the background of the marine pollution caused by such ships worldwide⁷⁷, it is debatable whether the immunity should not be waived or removed entirely so that such ships would be subject to similar marine pollution regulations and enforcements that merchant vessels are subject to.

Article 235 deals with state responsibility for the fulfilment of their international obligations on protection and preservation of the marine environment and the states and natural and juridical persons’ liability in accordance with international law. However, UNCLOS has been criticised for having detailed provisions but weak in relation to issues of state responsibility and liability.⁷⁸

4.0 Other international regimes for regulation of marine pollution by competent international organisations.

Part XII of UNCLOS will not affect the specific obligations of States arising from special conventions and agreements concluded *previously* [to UNCLOS] which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles in the UNCLOS, but such obligations should be carried out in a manner consistent with the general principles and objectives of the UNCLOS⁷⁹. Pursuant to Article 237, the duties of States under their signed pre-UNCLOS compatible and consistent treaties which of course include some IMO treaties⁸⁰ on marine pollution, are preserved. By these rules, the importance of these compatible treaties are recognised by IMO as a source of international obligations for the protection and preservation of the marine environment.

As already indicated previously in this paper, IMO and UNEP are some of the competent international organisations referred to by UNCLOS. Various provisions of UNCLOS making references to “applicable international rules and standards established through the competent international organisation or general diplomatic conference” is a recognition

⁷⁵ Article 236. See also Articles 95 and 96 UNCLOS on the sovereign immunities of warships and government ships.

⁷⁶ See, paper entitled, “Vessel-source pollution and public vessels: sovereign immunity v. compliance, implications for international environmental law”, by Jeffrey S. Dehner

⁷⁷ Jeffrey S. Dehner in his paper, *supra* disclosed that, US alone has over 2, 000 vessels including 600 Navy ships, with over 300,000 crew members, each of who is estimated to generate about 3 pounds of garbage per day and dumped into oceans because of a lack of adequate onboard disposal facilities. In 1991, crew members of USS Raleigh dumped many bags of garbage into North Carolina coastal waters whilst the USS Carl Vinson did the same in the Pacific Ocean recently.

⁷⁸ Z. Oya Ozcayir, *ibid* at 170.

⁷⁹ Article 237.

⁸⁰ See, footnote 6 *supra*.

that the provisions of UNCLOS were intended to operate as merely a framework treaty and that many of the details had already been in or would be picked up in other international regimes which could be established through specific treaties or resolutions or decisions of organisations such as IMO⁸¹, or UNEP. It is submitted therefore that a discussion of the regulation of the marine environment under UNCLOS will not be complete without a consideration of the impact of the treaties made and signed under the auspices of these competent international organisations which though unnamed in UNCLOS, yet are widely accepted to include, and are incorporated and applicable by reference by UNCLOS and UNEP, on the regulations of marine pollution. Their salient provisions and application will be discussed below.

4.1 OILPOL 1954.

This International Convention for the Prevention of the Pollution of the Sea by Oil, 1954 as amended in 1962, 1969 and 1971 has now been superseded by MARPOL 73/78 but its provisions are important not only because of its historical significance as one of the earliest IMO Conventions through collective international concern for marine pollution, but also because until date it is the only IMO convention on marine pollution which Nigeria has ratified and which provisions Nigeria has enacted as a part of its municipal law by virtue of the Oil in Navigable Waters Act of 1968 by its Legislature. OILPOL 1954 is therefore applicable in Nigeria only to the extent to which it has been enacted into Nigerian law.⁸²

This Act however deals with only intentional and not unintentional or accidental discharge⁸³ of crude oil, lubricating oil, fuel and heavy diesel oil into the sea.

It bans the deliberate discharge of oil and oil mixtures from all seagoing vessels except tankers of under 150 gt and other ships of less than 500 gt in areas called “prohibited zones” and contracting states are to provide at their ports, oil reception facilities for the reception of oil residues and mixtures without delaying ships at their ports. However, it is not clear whether Nigeria has provided the requisite oil reception facilities in compliance with its provisions.

4.2 INTERVENTION CONVENTION.

The Convention was brought about by the Torrey Canyon incident of 1967 after which there was a general consensus that there was a need for a new regime which while recognising the right of states to intervene on the high seas in cases of grave emergency, it restricted that right to protect other legitimate interests.

The 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties is to protect States against the consequences of maritime casualties which result in oil pollution of the sea and the coast. States Parties are to take such measures on the high seas as may be necessary to prevent, reduce or eliminate grave

⁸¹ References to the status of Nigeria in respect of IMO Conventions considered below are as at 31st March, 2000.

⁸² Quære: Since MARPOL 73/78 which Nigeria has neither ratified nor acceded to has superseded OILPOL which Nigeria has ratified and domesticated, will MARPOL 73/78 be automatically binding on Nigeria to the extent to which OILPOL has been domesticated in Nigeria?

⁸³ The danger of accidental discharge of oil from vessels came into global fore by the 1967 Torrey Canyon incident.

and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil due to a maritime casualty or acts related to it. Coastal states are to consult with other states affected by the maritime casualty including the flag states or shipowners, or the IMO in exercising the right of intervention. Although they have discretion as to what kind of measures to take, the measures taken must be proportionate to the actual or threatened damage and if the taken measures are contrary to the Convention, compensation must be paid by the intervener although the Convention has a conciliation and arbitration process. The Convention does not apply to warships.

Nigeria is not a signatory to this Convention and does not have any municipal law on the matters dealt with by the Convention.

4.3 MARPOL 73/78.

This is the International Convention for the Prevention of Pollution from Ships, 1973 and its protocols adopted in 1978 entered into force in 1981 with initially five but now, six annexes. It supersedes OILPOL because OILPOL did not satisfactorily deal with marine pollution.

MARPOL is to control harmful discharges from ships and in furtherance of this, it has six annexes setting out detailed pollution standards namely, Annex I[oil], Annex II[noxious liquid substances eg chemicals carried in bulk], Annex III [harmful packages carried by sea], Annex IV [ship-based sewage-but not yet in force internationally], Annex V [garbage-recently entered into force] and the recently adopted Annex VI [prevention of air pollution from ships]. The acceptance of Annexes I and II are compulsory whilst the acceptance of the remaining annexes are optional.

The 1978 MARPOL Protocol was necessitated by the serious tanker accidents of 1977/78 and the need to merge the 1973 MARPOL with the 1978 protocols since members were yet to fully comply with MARPOL 1973 and so except in relation to Annex II, ratification of one of the MARPOL was deemed to be the ratification of the other. The release of harmful substances arising from off-shore exploration, exploitation or processing of harmful substances for research into pollution abatement are excluded from the meaning of “discharge” [release] from a ship including any escape, disposal, spillage, leak, pumping, emission and emptying. State ships like warships and those government ships in non-commercial service are also excluded.

Among other requirements in Annex I, oil tankers are to carry on board certificates that they have complied with the provisions of MARPOL which certificates can be inspected by port states which may prevent the vessel from sailing if it poses an unreasonable threat of harm to the marine environment. It also controls [by regulation 9], prevents [by regulation 10] discharges of oil and regulates [by regulation 13] the construction of oil tankers by requiring new oil tankers of 70,000 tonnes or more to be provided with segregated ballast tanks for the carrying of ballast water. The main aim is to reduce the amounts of oil-water mixtures that have to be discharged and to put in place on shore, reception facilities for receiving the oily wastes that remain. Cleaning is now to be done by crude oil rather than by water and reception facilities must be provided by governments for oily wastes from all ships, not just tankers. To further enlighten members states on their obligations and implementations, in 1995 IMO published *A Comprehensive Manual on Port Reception Facilities* on the technical guidance for

installing them. Since 1993, tankers of over 5,000 dwt were to be fitted with double hulls or an alternative design approved by IMO so as to reduce the risk of oil spillage upon accidents. Thus, it greatly limits the amount of oil which may be discharged into the sea during routine operations but it does not set up a liability and compensation regime when a marine pollution incident occurs.

It has been suggested⁸⁴ that since Article 5 of MARPOL overlaps with Article 226 of UNCLOS on port state's inspection of ship's documents, Part XII of UNCLOS and MARPOL should be interpreted in a way that will avoid inconsistencies in them by pointing out their similarities and differences with their purpose in mind. In this connection, it should be borne in mind that whilst UNCLOS deals with discharges at sea, MARPOL also deals with discharges at sea and non-compliance with preventative measures onboard like documentations whether or not there are illegal discharges. This distinction is important in respect of penalties because whilst by Article 230 of UNCLOS non-monetary penalties are imposed only where there is wilful and serious acts of marine pollution, violations of MARPOL resulting in substandard navigation without both wilful misconduct and polluting discharges can only be sanctioned with monetary penalties.

Contrary to widely held views, Nigeria is not yet a signatory to MARPOL for reasons which are difficult to understand since it is an oil producing country and through whose territorial waters crude oil or refined oil products are transported by oil tankers. One of the dangers of Nigeria not being a signatory to and MARPOL not being in force in Nigeria is that Nigerian vessels on which its provisions are not being enforced stand the risk of being detained when without the requisite conventional documents on board, they sail to foreign ports or off-shore terminals where the provisions of MARPOL are being enforced⁸⁵ and Nigeria will not have the facilities to enforce the provisions of MARPOL/SOLAS on foreign vessels that visit its ports.

However, MARPOL itself though the most important treaty dealing with prevention of marine pollution from ships, has been criticised as being slow to entering into force, for not being ratified by many states especially the developing ones because of its technical details and annexes, for lacking worldwide efficient monitoring and worldwide port state control systems and for contracting parties not having regularly or at all submitted reports to IMO about their application of the Convention. Even though MARPOL convention contains more detailed ship source marine pollution enforcement measures than those in UNCLOS, it is criticised as suffering greatly from built-in self-policing mechanisms, in that despite the port state's right of detention of foreign vessels found with invalid certificates, the vessel's flag state has the ultimate responsibility for imposing fines and penalties on the foreign vessels and the flag state's laws determine the scope of such fines and penalties⁸⁶. The US Coast Guard has resorted to fining erring vessels rather than waiting for responses from their flag states on actions taken on forwarded information and evidence of violation.

4.4 CLC/I.O.P.C FUND.

These are the International Convention on Civil Liability for Oil Pollution Damage [CLC] and the 1971 International Convention on the Establishment of an International

⁸⁴ By Agustin Blanco-Bazan in his paper, "IMO interface with the Law of the Sea".

⁸⁵ Article 5[4] MARPOL 73/78.

⁸⁶ Jeffrey S. Dehner, *ibid.*

Fund for Compensation for Oil Pollution Damage [I.O.P.C. FUND] both of which were amended in 1984 and 1992⁸⁷. They take care of both liability and compensation for oil pollution damage. The CLC/FUND regime covers only damage caused by oil spill at sea but following the diplomatic conference held in April 1996 under the auspices of IMO, a new International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances [NHS e.g. chemicals] by Sea was adopted. Having a two-tier system as the CLC/FUND convention, NHS also covers not only pollution damage as in the former but also risks of fire and explosion including loss of life or personal injury and loss and damage to property. It is yet to enter into force.

The CLC determines the liability of the shipowner for oil pollution damage based on *strict liability* rendering unnecessary the need for the claimant to prove that the shipowner was negligent. The shipowner must have a compulsory liability insurance in return for which the shipowner's liability is limited to an amount linked to the ship's tonnage but the right to limit the liability will be lost if the owner was at fault. It has been argued that the shipowner will be entitled to limit his liability if the oil spillage from his tanker did not result from his actual fault or privity. Under section 383 of Nigerian Merchant Shipping Act the shipowner's liability to compensate for oil spillage is N47 per ton but it is US\$ 168 per ton under the CLC.⁸⁸

However, the two-tier system of compensation recognised by the CLC is such that victims of oil pollution damage can claim from the shipowners whose ship caused the oil pollution damage but where the sum to which the liability of the ship owners is limited is insufficient to compensate the victims because of the enormity of the damage, the victims can recover from the FUND. The liability of the shipowner to pay compensation which is limited to US\$14.6 m or US\$140m per tanker or US\$89m respectively in the 1971 and 1992 FUND, is to make it possible for the shipowner to get insurance cover since no insurance company will want to cover a risk that is unlimited.

The CLC is supplemented by the FUND which makes for the compensation of oil pollution victims when the compensation under the CLC is inadequate and is also predicated on strict liability. The FUND is funded by levies on all persons who have received in a calendar year, more than 150,000 tonnes of crude oil and heavy fuel oil in a state party to the FUND Convention based on reports of the oil receipts of individual contributors.

The compensation under the CLC/FUND is comprehensive and as amended by the 1992 Protocol, it is available when damage is caused in the territory or territorial sea including the EEZ of a contracting party by laden or unladen oil tankers. Compensation is available for damage to property including contaminated fishing boats, fishing gear, yachts, beaches, piers and embankments, cost of cleaning polluted property or its replacement, loss of earnings by those in coastal or sea-related activities like fishermen and hoteliers and restaurateurs at seaside resorts, expenses for clean-up operations at sea or on shore.

⁸⁷ The 1992 Convention was to take over and of the regimes of compensation of national governments by oil tankers owners in respect of oil pollution from ships which were not covered by the 1969 CLC at the time when both TOVALOP [Tanker Owners Voluntary Agreement concerning Liability for Oil Pollution] and the CRISTAL[Contract regarding an interim supplement to tanker liability for oil pollution] had ceased in February, 1997.

⁸⁸ L.N.Mbanefo SAN, "Oil Spillages, Disputes and Compensation: an International Outlook in his book "Essays on Shipping Law Vol 1", p.83

Nigeria is a signatory to the CLC 1969 but is not a signatory to its protocols of 1972 and 1992. Nigeria is a signatory to the FUND Convention of 1971 and is said to have in 2000 acceded to the FUND Protocol of 1992. It is however not a signatory to the HNS Convention of 1996 or OPRC/HNS 2000. Regrettably, none of the conventions ratified have been domesticated nor does Nigeria have national laws adopting the compensation regimes in them even though their provisions are of immense benefits to Nigerians because many persons/ oil companies receive more than 150,000 tonnes of crude oil and heavy fuel oil from Nigeria [an oil-producing State Party] every calendar year and the recipients pay levies on the receipts every year which Nigeria can benefit from in the event of maritime casualty within its territory. Since the oil companies pay the contributions on exported crude or refined oil, it does not place any financial burdens on Nigerian Government. Moreover, if the CLC/FUND has been domesticated⁸⁹, since CLC obliges the shipowners to obtain liability insurance policies against damage arising from an oil spillage, in the event of any oil disaster, the insurance company can be sued directly for compensation. It is noteworthy that the Minister of Environment was quoted on 14th August, 2001 to have stated at an international seminar on oil pollution and environmental management held in Abuja that, the Government has finished work on a document titled “Response Compensation and Liability for Environmental Damage” in Nigeria [RECLEL] to be soon enacted into law.

4.5 OPRC, 1995.

This is a treaty known as the International Convention on Oil Pollution Preparedness, Response and Co-operation that was adopted in 1990 but came into force in 1995. Some of its provisions were the basis of IMO’s response to the major oil pollution in the Persian Gulf resulting from the Gulf Wars of 1991. It is designed to facilitate international cooperation and mutual assistance in preparing for and responding to a major oil pollution incident and to encourage states to develop and maintain an adequate capacity to deal with oil pollution emergencies such as tanker accidents. IMO has established a centre in Malta to coordinate anti-pollution activities in the Mediterranean regional marine pollution emergency information and training centre for the Caribbeans. IMO has also published a *Manual on Oil Pollution* which comprises five sections, Prevention, Contingency Planning, Salvage, Combating Oil Spills and Administrative Aspects of Oil Pollution Response.

In 1996, IMO also adopted the International Convention on Liability and Compensation for Damage in connection with the carriage of hazardous and noxious substances by sea. Although it is yet to come into effect, it establishes a two-tier system for providing compensation up to a total of 75,000 of around 250 million and covers fire and explosion risks apart from oil pollution.

4.6 THE SALVAGE CONVENTION 1989/2000.

Although it is not directly concerned with the prevention or control of marine pollution, it is relevant to the regulation of marine pollution because in regulating salvage operations, its Article 8 requires the salvor, owner or master of the vessel or of the property in

⁸⁹ It seems that under Section 16[3] of the Admiralty Jurisdiction Act, 1991 the agents in Nigeria of the shipowners, charterers, managers or operators of ships violating pollution regulations or polluting the marine environment, may be personally liable irrespective of the liability of their principals for the acts, defaults, omission or commission of the ship in respect of anything done or failed to be done in Nigeria.

danger, in carrying out salvage operations to exercise due care to prevent or minimise damage to the environment. Whilst its Article 9 preserves the right of the coastal state to take measures and give directions to protect its coastline against expected harmful consequences of pollution or its threat due to a maritime casualty, its Article 13 makes room for rewarding a salvor who uses his skill in preventing or minimising damage to the environment.

Its Article 14 encourages salvors to carry out salvage operations in a way that will cause minimal damage to the environment in respect of a vessel which itself or its cargo threatens damage to the environment by providing for a special compensation in the event of failure to earn or receive compensation under Article 13.

Nigeria is not yet a signatory to this Convention and does not have any municipal law on it.

4.7 LONDON DUMPING CONVENTION

This Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, 1972 held in London bans the dumping of certain hazardous materials, and imposes [prior] special permits for the dumping of certain materials. Its definition of the word “dumping” was adopted in the definition of dumping by Article 1 of UNCLOS although it excludes wastes from exploration and exploitation of sea-bed mineral resources and recognises regional arrangements and agreements to prevent and control dumping of wastes.

A protocol to the Convention was adopted in 1996 which is more restrictive and makes the polluter to pay and bear the cost of pollution and it contains a “blacklist” of materials which may not be dumped at all. Dumping is allowed in the case of force majeure or where life or the vessel is endangered. Nigeria is a signatory to the Convention.

4.8 SOLAS

Nigeria is a signatory to the International Convention on the Safety of Life at Sea [SOLAS Convention] 1974 and its Protocol of 1978 but is not a signatory to its Protocol of 1988.

The Convention indirectly concerns prevention of pollution of the marine environment due to its copious regulations of minimum standards for the design, construction, equipment and operation of ships compatible with their safety including fire-safety measures, life-saving appliances, carriage of navigational equipment and other aspects of safety of navigation, carriage of dangerous goods and special rules for nuclear ships which contracting States must prescribe for their vessels⁹⁰.

Primarily, the flag state enforces the provisions of SOLAS by surveying their flagged ships and issuing some certificates to their flagged ships as evidence of compliance with

⁹⁰ Another IMO Convention on safety that indirectly concerns marine pollution is the Convention on the Standards of Training, Certification and Watchkeeping for Seafarers, 1978/95 for the basic training, certification and watchkeeping of seafarers because of the importance of crew standards to safety and pollution prevention. Nigeria is a signatory to the 1978 Convention only but has not enacted it into its municipal laws and has not made the White List of IMO. Its provisions are mainly outside the scope of this paper.

the Convention, but Contracting port states have control through inspection in their ports of the foreign ships and their documents and power to prevent them from sailing to sea until they can do so without danger to passengers and crew if there are discrepancies between the conditions and equipment of the ships and the particulars of any of their certificates or where the certificates have expired or are invalid there is non-compliance with Chapter 1, Regulation 19 of SOLAS.

The **1988 Global Maritime Distress and Safety System [GDMSS]** amendments to SOLAS is to ensure that search and rescue authorities ashore and all ships in the vicinity of the emergency or casualty will be rapidly alerted in the event of an emergency. The GDMSS are to be carried on the high seas to facilitate through the satellite and terrestrial radio, communication and dissemination of meteorological and navigational warnings and urgent information to ships. The maritime industry has also been requested to embrace Vehicle Traffic Service [VTS] systems because it makes shipping safer and reduces the threat of oil spills in congested and narrow waterways through shore control of ships through VTS.

There is also a new chapter IX of SOLAS which entered into force by tacit acceptance on 1st July, 1998, which makes mandatory the **International Safety Management [ISM] Code** adopted by IMO in November, 1993. The ISM Code is to provide for safe practices in ship operation, management and safe working environment, establish safeguards against all identified risks and continuously improve safety management skills of personnel, including preparing for emergencies. The Code requires that “the company” [i.e. owner or manager or operator of the ship] shall set up a safety management system with necessary resources and shore-based support by and have a Safety Management Manual containing the procedures required by the Code, a copy of which shall be kept on board the vessel. The chapter applied to passenger ships and tankers from November, 1993 and to cargo ships and mobile drilling units of 500 gross tonnage and above from 1st July, 2002.

One of the implication of the above ISM-Code of SOLAS is the presence of substandard passenger vessels and coastal and river cargo vessels of less than 500 gt otherwise called “**non-convention-sized vessels**” which are not regulated by IMO Conventions but are or are not regulated by national laws some of which are outdated and which constitute safety and pollution hazards to the marine environment of the coastal and domestic waters where they operate. These non-convention vessels may render worthless a state’s attempts to reduce, control and prevent marine pollution. Since IMO Conventions apply generally to ships on international trade, there may also be substandard vessels larger than 500 gt involved in domestic trade and not regulated by its Conventions. It has been revealed that what IMO did to tackle the problem was to apply its mandate to provide technical assistance in helping and encouraging States to adopt safety standards on regional basis for smaller ships engaged in domestic, local or coastal shipping and this has been done by IMO in the Asian-Pacific region already.⁹¹

4.9 REGIONAL MEMORANDUM OF UNDERSTANDING ON PORT STATE CONTROL

Since 1982, the need has been felt by flag states and port states in regions to enter into cooperative agreements by way of **Memoranda of Understanding on Port State**

⁹¹ Ian Williams, BSc CEng FRINA FHEAust in his paper, “IMO-sponsored work on safety regulations for non-convention vessels, in International Maritime Prize 1999, pages 14-19.

Control [MOU] which are based on the provisions of UNCLOS especially Article 197, that there should be cooperative regional agreements entered into by States to reduce, prevent or control marine pollution. It was also encouraged by the fact that experience showed that port state controls work best when they are organised on a regional basis. The MOUs are to inter alia exchange information about merchant ships, their records and results of inspections carried out on them and their certificates and documents, to monitor substandard vessels identified through such inspections, carry out port states inspections in uniform and harmonised manners with similar standards for detention of ships and training of port state control inspectors in order to ensure compliance with relevant conventions on safety and pollution. Another reason for the MOUs is that no single nation has enough resources to inspect 100% of the ships calling at its ports, but they randomly check from 10 to 25% of foreign ships entering their ports in the course of which well-maintained vessels are unnecessarily inspected in successive ports whilst substandard vessels escape detentions. There was also the realisation that some flag states have for some reasons been unable to meet all their obligations on safety and pollution in all the IMO conventions they signed⁹².

The ISM-Code comprised a series of IMO guidelines compiled due to the sinking of the passenger ferry named, “The Herald of Free Enterprise” in 1987 and was originally a recommendation which was first enacted as an annex to an IMO Assembly Resolution in 1983 and later adopted by IMO as chapter IX of SOLAS, 1994 because it was seen as important in achieving improvement on ship safety and pollution prevention. It is popularly called “the jewel on the crown” of the tacit acceptance procedure of quickly bringing into force, amendments to protocols or conventions⁹³.

To assist in harmonising procedures and standards for port state control all over the world, IMO adopted Assembly resolution no. 787[19] on Procedures for Port State Control.⁹⁴ Nigeria is a signatory to the MOU on port state control in the West and Central African sub-region signed in Abuja in October, 1999⁹⁵ although the effectiveness of the use of the MOU to reduce, control and prevent marine pollution in the sub-region is yet to be noticeable. It is also arguable whether the MOU would have the force of law in Nigeria when an MOU comes within the meaning of a treaty under the Vienna Convention on the Law of Treaties, 1969⁹⁶ without being enacted into law Nigerian law by its National Assembly under section 12 of its 1999 Constitution and whether that section of the Constitution is not inapplicable to the MOU which is a multilateral treaty,

⁹² It was also thought that States [especially developing states], which are yet to ratify or domesticate the SOLAS or MARPOL or other relevant IMO Conventions would indirectly be made or bound to implement and enforce port state control measures in those conventions by being signatories to the respective MOUs thereby ensuring that substandard and un-seaworthy vessels are not diverted to the regions.

⁹³ The IMO’s ingenuous tacit acceptance procedure allows amendments to conventions to take effect on a specified date if on another specified date a certain number of parties to the convention have not objected to the entering into force of the amendments.

⁹⁴ See generally a paper entitled, Port State Control- an Overview presented by Mr. E. O. Agbakoba of the IMO, London at the Sensitisation Seminar on the relevance of concluding a Memorandum of Understanding on Port State Control for West Africa and Central African sub-region held in Lagos in September, 1999.

⁹⁵ Other regional MOUs on port state control include: Paris MOU [1982], Latin-American MOU [1992], Tokyo MOU [1993], Caribbean MOU [1996], Mediterranean MOU [1997], Indian Ocean MOU [1998] and the Black Sea MOU [2000].

⁹⁶ The said Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between states in written form and governed by international law...and whatever its particular designation”.

since the said section 12 concerns bilateral as opposed to multilateral treaties involving Nigeria.

It has also been argued that the duty of state parties to UNCLOS to implement “generally accepted IMO rules and standards”⁹⁷ whether or not they are parties to the treaties providing for them, could discourage States from becoming parties to the main IMO treaties and instead to make the provisions of IMO Conventions as national laws in order to enforce them without complying with the corresponding obligations. For instance some states have enacted MARPOL as municipal laws in order to enforce them against foreign ships but have not provided corresponding reception facilities prescribed under MARPOL⁹⁸. *Nigeria, which has not yet ratified or acceded to MARPOL 73/78 and the 1988 protocol of SOLAS, may opt to enact MARPOL 73/78 and SOLAS 1988 or some of their provisions which are suitable to its national interests or purpose, as municipal laws so as to enforce their provisions against foreign vessels.*

4.10 Overlapping between UNCLOS Part IX and IMO Conventions.

The concept of UNCLOS as an “umbrella Convention” because most of its provisions are general in nature, can only be implemented through specific operative regulations in other international treaties especially IMO Conventions and changes in Part XII of UNCLOS which includes provisions which can be directly implemented and as such that Part XII should be read together with other operative provisions in IMO treaties especially MARPOL. For instance the provisions on the investigations of foreign vessels in Article 226 of UNCLOS are comparable to Article 5 of MARPOL and both show how ships’ certificates should be inspected and the measures to be taken. Both Conventions are for the protection of marine environment but whilst UNCLOS deals more on measures to be taken to prevent and penalize discharges in the oceans, MARPOL deals with illegal discharges and non-compliance with preventive measures applied on ships’ board whether or not discharges take place. Therefore, whilst under Article 230 of UNCLOS penalties like imprisonment other than monetary can be imposed only where there are *wilful and serious acts of pollution* in the territorial sea, substandard navigation without wilful misconduct and polluting discharges can only be punished with monetary penalties under MARPOL. The absence of a MARPOL equipment on board a ship which does not constitute polluting, will not amount to a violation of UNCLOS on pollution and will not be sanctioned by a State signatory to UNCLOS but will amount to a violation of MARPOL which is enforceable by a signatory to or adopted by a MARPOL State.

5.0 Nigeria’s status.

As a result of the dumping of toxic waste at Koko, Delta State by an Italian company in 1988, Nigeria promulgated the Federal Environmental Protection Decree of 1988 establishing a Federal Environmental Protection Agency vested with powers to protect the environment and concerned with *all forms of pollution* which of course include marine pollution. Nigeria also promulgated the Harmful Waste [Special Criminal

⁹⁷ The requirement of general acceptance in respect of IMO Conventions is based on a combination of two elements, the number of states parties to them and the condition that the contracting parties represent at least 50% of the world tonnage, and the reflection in the operational IMO Convention of consent to ensure that between 90-99% of the world merchant fleet complies with IMO rules and standards.

⁹⁸ See, “IMO Interface with the Law of the Sea Convention”, by Agustin Blanco-Bazan, being a paper presented at the Seminar on current maritime issues and the work of the International Maritime Organisation, 23rd Annual Seminar of the Center for Ocean Law and Policy, University of Virginia School of Law, IMO, January 6-9, 2000.

Provisions] Decree, 1988 which imposes life imprisonment for the offence of carrying, depositing, transporting harmful waste within the Nigerian territory and the exclusive economic zone. Although oil exploitation in the sea-bed and subsoil is a major source of marine pollution, the Petroleum Act, 1969 did not adopt environmental considerations as part of its control theme and its anti-pollutions provisions are ineffective⁹⁹. Not only are the relevant IMO and regional anti-pollution treaties not yet ratified by Nigeria [as shown above], the provisions of the relevant IMO conventions ratified by Nigeria are not yet enacted by its National Assembly into law [domesticated] so as to have the force of law¹⁰⁰ and Nigeria does not have adequate and up to date anti-marine pollution municipal laws to preserve and protect the marine environment.

One of the consequences of the regrettable situation is that although as a state party to the Conventions that Nigeria has ratified, it is bound by their provisions, yet Nigeria cannot benefit or suffer from their provisions and their provisions cannot have any force of law in Nigeria when they are not yet domesticated or enacted into laws in Nigeria. Even though by Section 20 of the 1999 Constitution, the Nigerian “*State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria*”, because the section is a part of the fundamental objectives and directive principles of state policy¹⁰¹ which are not justiceable or enforceable in the law courts, it is an indication of the lame attitude of Nigeria towards marine pollution prevention, control and reduction. As an oil exploration/exploitation and crude and refined oil transportation and a maritime nation, Nigeria should be in the forefront of States anxious to prevent marine pollution especially from sea-bed and vessel activities, because its marine environment stands to suffer more from any marine casualty but its attitude towards same had been nonchalant or half-hearted and the non-updating of its anti-pollution laws.

It is suggested that as a maritime and coastal State, and in order to ensure that its flagged vessels and citizens benefit from Part XII of UNCLOS and all the IMO Conventions Nigeria must without further delay domesticate and implement those conventions it has ratified and ratify those it has not yet ratified. Nigeria should also as a matter of urgency adopt appropriate national laws and regulations as empowered by Articles 208, 210, 211, and 212 which take into consideration the generally accepted standards and principles in IMO Conventions for the prevention, reduction and control of marine pollution through sea-bed activities, dumping, vessels and the atmosphere¹⁰² so that their implementation will ensure cleaner waters in its territory. Granted that the admiralty jurisdiction of the Federal High Court under the Admiralty Jurisdiction Act 1991 includes actions brought in respect of oil pollution damage,¹⁰³ it can only be brought as actions *in personam* and not *in rem* except where the oil pollution damage is as result of damage done by a ship under section 2(3) of the Admiralty Jurisdiction Act.

The recent assignment to the National Maritime Authority [NMA] of the role of maritime safety administration and marine pollution control in Nigeria and its purchase of 6 boats [and intended setting up of a Coast Guard] to patrol Nigerian coastline and carry out search and rescue and enforce anti-marine pollution regulations, are steps in the right

⁹⁹ See, a paper titled, Corporate Environmental Liability in Nigeria by Professor . Ayo Ajomo [1998].

¹⁰⁰ Section 12 1999 Constitution of the Federal Republic of Nigeria.

¹⁰¹ The judicial powers of courts cannot be exercised in respect of them: Section 6[6][c] 1999 Constitution.

¹⁰² The law to give effect to the Convention may be by all or some substantive provisions of the Convention being translated into terms of national law or national law[s] are amended to conform with the terms of the conventions.

¹⁰³ Section 1(e) Admiralty Jurisdiction Act, 1991.

direction. It has been argued that Section 3[g] and 3[j] of the National Shipping Policy Act, 1987 sufficiently empower the NMA to be recognised as an important stakeholder in matters of marine pollution from oil transportation and as such it should as a sole authority to look after marine pollution be designated the Nigerian focal point for IMO activities on marine pollution, all matters relating to MARPOL¹⁰⁴ and all IMO activities on marine safety, for ensuring their implementation and enforcement for safer navigation and cleaner waters in and on Nigerian waters.

CONCLUSION.

Generally, it is regarded that even though UNCLOS provided comprehensive regulatory framework framed in obligatory terms for states to prevent, reduce and control marine pollution, it does not provide exact explanation of the detailed rules and standards and does not refer to any international body, but considering the regulatory provisions, it has been argued that one can conclude that the Convention keeps its characteristic of an “umbrella” treaty and in its Chapter XII provides general guidelines for an effective oil pollution regime¹⁰⁵. UNCLOS and IMO Conventions are also seen to be suffering from the problem that all treaties face namely, a lack of international executive means of enforcement of the provisions and the attendant cost and duplicity. Through its comprehensive provisions on regulation and enforcement of the marine environment, UNCLOS has been able to codify to a great extent, customary international rules and to lay down guidelines to be followed by states in protecting and preserving the marine environment. This paper has examined as extensively as possible marine pollution regulatory and enforcement mechanisms and regimes put in place under the UNCLOS and the relevant conventions of other competent international organisations. UNCLOS’ omnibus provisions and incorporation by reference of the conventions of competent international organisations like IMO and UNEP not only avoids unnecessary repetition but also achieves mutual support and co-existence with those organisations and the conventions.

Moreover, as a result of all the flaws and inadequacies of UNCLOS which have earlier been highlighted in this paper, especially the kid gloves with which dumping is treated, the absolute sovereign immunity of warships and government ships engaged in non-commercial service to enforcement measures under UNCLOS and MARPOL, the exclusion of non-monetary penalties in major cases, UNCLOS does not seem to have satisfied the aspirations and interests of all the Party States especially the developing State. Moreover, since dumping activities are carried mostly by the developed industrialised states, the developing states whose marine environment suffers pollution from the dumping are not protected. UNCLOS should have banned outright the dumping of wastes and compelled the intending “polluter” to recycle the waste especially from nuclear and electricity plants instead of dumping it in the marine environment.

Jeffrey S. Dehner¹⁰⁶ has in his paper suggested among other things the following actions to be taken in order to have better regulation and efficient enforcement of marine pollution namely:

¹⁰⁴ See paper titled, ‘Oil Transportation and the effects on marine environment.’ By Prof. Babajide Alo ibid. However, his suggestions appear to be limited to only vessel-sources of marine pollution and the activities of some competent international organisations.

¹⁰⁵ Z. Oya Ozcayir, supra at page 168

¹⁰⁶ Ibid,

- (i) Increased education on the provisions of MARPOL and cooperation on information [including setting up more IMO information centres, training and research schools¹⁰⁷ to train the required manpower for the ports and for monitoring vessels' activities], technology sharing [between naval and commercial vessels in providing technical support and funding] to induce a decline in vessel-source pollution since enforcement agencies cannot apprehend all violators,
- (ii) Expansion of the roles of international agencies by empowering UNEP to make binding executive decisions and strengthening it with members' mandatory financial contributions to work meaningfully with coastal and flag states to implement UNCLOS, or member states could share and integrate military technology into UNEP's database capabilities for increased monitoring,
- (iii) IMO to use its information gathering and dissemination capabilities to create a centralized and coordinated system of record-keeping and enforcement,
- (iv) The possibility of empowering port states to fine erring vessels on the spot rather than referring violations to the flag states in view of failures by flag states to respond to forwarded MARPOL infringements,
- (v) Enforcement agencies could deny port access to ships from states which have not adequately responded to forwarded MARPOL violations and the IMO could use its resources to aid states in prosecuting these actions, possibly amending the penalty provisions of MARPOL to provide clearer guidelines for penalties,
- (vi) Military vessels can be fined as assessed by port authorities for pollution violations and port authorities without embarking on or detaining the military vessels and without interfering with their functioning and security interests since their sovereignty and security interests can thus still be preserved,
- (vii) The IMO could address the problem of inadequate shore reception facilities or their under-utilization by providing that fees for refuse disposal usually charged separately should be included in docking or other obligatory ports charges or fees since ships will be more likely to use the disposal facilities if they know they are already paying for them through usual port charges and fees. Using a system of centralized enforcement and record-keeping, the IMO could seek to standardise fees and practices at shore reception facilities,
- (viii) To facilitate IMO's role in [vii] above, member states could cooperate with IMO in improving inadequate facilities and establishing reception facilities where they are needed.

Consequently, IMO would need new protocols to take care of the above suggestions to back up efficient implementation and monitoring of marine pollution measures which new protocols can quickly be brought into force through the mechanism of "tacit consent."

Furthermore, the problems of implementation and monitoring of compliance with party states have made some to say that IMO should be authorised to police the high seas to enforce infringements but this is problematic because of the exorbitant costs of providing patrol boats and crews to police the high seas, reluctance of vessels to allow them to board the suspected ships, duplicity since some governments already have machinery for

¹⁰⁷ IMO helped establish World Maritime University in Malmo, Sweden, IMO International Agency, Trieste, Italy and IMO International Maritime Law Institute, Malta.

such enforcement and monitoring. However, IMO has been authorised to vet the training, examination and certification procedures of parties to the STWC, 1978 which helps it to determine whether a party meets the requirements of STCW so as to avoid being on the White List.

Moreover, another conference on the law of the seas may have to be convened in the nearest future with a view to adopting UNCLOS IV that will look into the flaws in UNCLOS III and make adequate provisions to protect the interests of developing countries, ban dumping totally and correct the shortcomings in Part XII of UNCLOS III. A look at how Nigeria stands in the regulation and enforcement of UNCLOS or relevant convention on marine pollution has revealed the urgent need to address the issue of putting in place a comprehensive legal framework that takes care of all sources of marine pollution for the regulation and enforcement of marine pollution in line with all international Conventions on marine pollution. This may be by enacting their provisions as municipal laws without ratifying them or by ratifying and domesticating them so as to begin to derive not only benefits of clean and safer environment but also civil liability and compensation from pollution damage. However, on the whole, the Part XII of UNCLOS III is a result of bold and commendable efforts of the UN to regulate the protection and preservation and prevent, reduce and control the pollution of the marine environment and which has achieved good results¹⁰⁸.

Notable Updates:

The MARPOL, CLC, OPRC, SEARCH & RESCUE, STCWs already acceded/ratified in May, 2002 by Nigeria, and STCWs domesticated by the Minister of Transport and the 1999 Decree on Mining enacted.

¹⁰⁸ According to a study carried out by the US National Academy of Sciences, oil pollution from ships fell by about 60% during the 1980s while the number of oil spills has also been greatly reduced due partly to the IMO's conventions.