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MARPOL Annex 1 Hypothetical Scenario Exercise

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Anthony Morrison, PhD (amorriso@uow.edu.au)
Research Fellow, Australian National Centre for Ocean Resources and Security (ANCORS)



Prosecution General Principles

- first element in the prosecution of any offence under any international convention is to establish that the State undertaking the prosecution has in fact adopted the provisions of the Convention into its national law.
- one cannot be punished for doing something that is not prohibited by law.
- court must then be satisfied that it has jurisdiction over the alleged offender

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Presumption of Innocence

- The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.
 - Art 14(2) of the International Covenant on Civil and Political Rights (ICCPR)
 - Art 11 of the Universal Declaration of Human Rights

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- The burden or obligation of proof of the guilt of the accused is placed squarely on the prosecution.
- That burden never shifts to the accused, unless legislation says otherwise
- The obligation that rests upon the prosecutor is to prove the elements of the charge
- Where the proof of any matter is on an accused person, the accused needs only to establish what the accused relies upon to a lower standard of proof i.e. on the balance of probabilities

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What is meant by “beyond reasonable doubt”?

- does not mean that there is absolutely no doubt about his or her innocence
- the phrase means that the established facts of the case lead the court to only one logical conclusion: that the defendant is guilty of the charges against him or her.
- A reasonable doubt exists where after a comparison and consideration of all the evidence the mind of the judge or the minds of the jurors are not convinced that it is almost certain that the accused committed the crime with which he is charged.

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- **Article 353 of the French Code of Criminal Procedure**
 “Before the assize court retires, the president reads out the following instruction which is also put up in large type in the most visible part of the deliberation chamber: “The law does not ask the judges to account for the means by which they convinced themselves; it does not charge them with any rule from which they shall specifically derive the fullness and adequacy of evidence. It requires them to question themselves in silence and reflection and to seek in the sincerity of their conscience what impression has been made on their reason by the evidence brought against the accused and the arguments of his defence. The law asks them but this single question, which encloses the full scope of their duties: are you inwardly convinced?”

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Enforcement under LOSC

- Article 211
 - (1) States...shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States.

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- (2) States shall adopt laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels flying their flag or of their registry
.....
- (4) Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall...not hamper innocent passage of foreign vessels.

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Flag States-

- Arts 211(2) and 217 –
 - 217(2) non compliant ships prohibited from sailing
 - 217(3) ships must have certificates
 - 217(4) obligation to investigate violations
 - 217(8) penalties must be sufficiently severe

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Port States

- Art 218
 - 218(1) port States to institute proceedings for violations in the internal waters, territorial sea or EEZ of that State
 - 218 (2)-(4) port States to institute proceedings for violations in internal waters, territorial sea or EEZ of another State only on request of flag State or any other affected State
- Art 219 – detention of unseaworthy vessel

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Coastal State

- Art 220(1) can institute proceedings for violations in its territorial sea and EEZ
- Art 220(2) right to inspect ship in its territorial sea where suspected of violations on voyage
- Art 220(3) right to request information from ship in its EEZ where suspected of violations on voyage
- Art 220(5) (6) where evidence of spill in its territorial sea or EEZ, coastal State may physically inspect, institute proceedings, detain the vessel.

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Australian Commonwealth Legislation

- Protection of the Sea (Prevention of Pollution from Ships) Act 1983
- Adopts MARPOL and all six Annexes
 - Pollution by oil – Part II
 - Pollution by Noxious Liquid Substances – Part III
 - Pollution in Packaged form – Part IIIA
 - Pollution by Sewage – Part IIIB
 - Pollution by Garbage – Part IIIC
 - Air Pollution – Part IIID

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Oil Pollution – Part II

- Strict liability (s. 9(1B))
 - prohibits the discharge of oil into Commonwealth waters or anywhere in the world if the ship is an Australian flagged ship.
 - Prosecutor must prove four elements:
 - A discharge
 - Of oil
 - From a ship
 - Into Commonwealth waters

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- "Ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air cushion vehicles submersibles, floating craft and fixed or floating platforms.
- Relevant waters are set out in the section itself. This section reflects the OCS by the term "outer territorial sea" which is defined as the sea outside 3 nautical miles
- must prove that the substance is "oil" as listed in Annex 1 of MARPOL which sets out what is an oil for the purposes of MARPOL.
- must prove that the oil escaped from the ship i.e. there was a discharge.

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Operational Discharges (s.9(4); MARPOL Regulation 9)

- (i) the ship has a gross tonnage of equal to or greater than 400;
- (ii) the ship is proceeding en route;
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- (iv) the oil content of the effluent without dilution does not exceed 15 parts in 1,000,000 parts;
- (v) if the ship is an oil tanker--the oily mixture does not originate from the cargo pump room bilges of the ship and is not mixed with oil cargo residues

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• Defences available (ss.9(2), (3), (3A) (Art 11 MARPOL)

- (a) for the purpose of securing the safety of a ship or saving life at sea,
- (b) if the oil or oily mixture, as the case may be, escaped from the ship in consequence of damage to the ship or its equipment, and all reasonable precautions were taken after the occurrence of the damage or the discovery of the discharge for the purpose of preventing or minimising the escape of oil or oily mixture, as the case may be,
- (c) in the case of an oily mixture, if the discharge was for the purpose of combating specific pollution incidents in order to minimise the damage from pollution and was approved by a prescribed officer, or
- (d) if the discharge was authorised by the Minister for training purposes.

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• What is meant by “damage to the ship or its equipment”?

- Morrison v Peacock and Roslyndale Shipping Company Pty Ltd [2002] HCA 44
 - 10-20 litres of hydraulic fuel from a crane on the deck of the ship at Lord Howe Island (World Heritage site)
 - the defendants argued that the term also included “wear and tear”
 - High Court found “damage” means a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event, whether the event was external or internal to the ship or its equipment.”

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• New Defence

- S.9(2)(d)... if the oil or oily mixture, as the case may be, escaped from the ship in consequence of non-intentional damage to the ship or its equipment, and all reasonable precautions were taken after the occurrence of the damage or the discovery of the discharge for the purpose of preventing or minimizing the escape of oil or oily mixture, as the case may be;

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• S.9 (3) For the purposes of paragraph (2)(d), damage to a ship or to its equipment is not non-intentional damage if the damage:

- (a) arose in circumstances where the master, the charterer or the owner of the ship:
 - (i) acted with intent to cause the damage; or
 - (ii) acted recklessly and with knowledge that the damage would probably result; or
- (b) arose as a result of the negligence of the master, the charterer or the owner of the ship.

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• Penalties

- MARPOL Art 4 – “penalties... shall be adequate in severity to discourage violation of the present Convention...”
- Penalties under Australian legislation up to maximum of A\$3.6 million for individuals and up to maximum of A\$18 million for corporations.

• Port State Powers

- Powers of inspectors (s.27)
- Power to detain for pollution offences (s.27A)

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