

# International Law and Marine Plastic Pollution: Holding Offenders Accountable

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## 1. Executive Summary

Marine plastic pollution (MPP), and its severe, multifarious impacts on marine wildlife and ecosystems, is by now a well known problem. The topic has been the topic of numerous reports, abundant press coverage, TV documentaries and feature films, and was recently highlighted at the United Nations [Ocean Conference](#) in New York.

And yet: while a growing number of countries, businesses and non-governmental organisations (NGOs) are taking commendable actions to reduce the volume of plastic waste reaching the oceans, and to clean up what is already there, it is predicted that the problem will increase. The main cause is the rising trend of plastic use, especially in developing economies that lack adequate mechanisms of waste collection and recycling or disposal.

It has been estimated that 8 million tonnes (Mt) of waste plastic waste reaches the ocean each year, and that volume is projected to double by 2030, and double again by 2050.

Accordingly serious measures are needed to force further and additional actions well beyond those currently planned or contemplated. This initiative explores the potential of international law to force or persuade countries and commercial entities generating MPP to substantially reduce their waste plastic emissions to the marine environment.

A thorough review of existing international law as it applies to MPP has been conducted and leads to the clear conclusion that the release of plastic wastes into the oceans is already forbidden by numerous international conventions of both global and regional scope, and by Customary Law.

But while the law is (reasonably) simple, its enforcement is not. Only countries have the necessary standing to raise disputes under international law, however many of those are suffering the worst impacts of MPP, while contributing little MPP of their own, are small island states that will be fearful of confronting the generally larger, more powerful countries responsible for the problem. They also have good reason to fear the costs implications which may be considerable for small, developing nations, even they are ultimately successful.

Fortunately, civil society has an important part to play in overcoming these difficulties. First, the fact that countries that are generating MPP on a large scale are likely to be in breach of international law and solemn commitments made, adds extra moral and political force to campaigns on governments and corporations to take decisive and effective action to tackle the problem. Second, there is an important role for NGOs and individuals in supporting and advising any countries courageous enough to consider taking legal action, and helping them to exploit their moral advantage against the principal ocean polluters.

The immediate purposes of the Ocean Plastic Legal Initiative are therefore:

- to promulgate the legal position as set out in this report to campaigners, NGOs, corporations, governments, and the wider public;
- to assemble a coalition of countries minded to act on MPP, together with funding organisations, legal experts, scientists, campaigners and others able to make a tangible contribution to their efforts.

This coalition will then be able to move forward collectively, following a series of steps that will:

- generate publicity around the issue;
- create pressure for countries to reflect the hazardous nature of plastic wastes in their own domestic laws and practices;
- publicise the illegal behaviour of the major MPP generating states;
- highlight the irresponsible behavior of companies where it is contributing to MPP (and examples of successes too), with a view to raising the level of corporate performance;
- put social and political pressure on the major MPP generating states to reform their waste management laws and practices;
- communicate best practice in reducing MPP generation;
- put pressure on international funding organisations, such as multilateral development banks, to provide finance on concessionary terms to poor countries to put in place measures to reduce their contributions to MPP;
- create the situation in which MPP suffering countries are empowered by a broad base of financial, legal, political and diplomatic support to take legal action under international law to sanction MPP producers.

At this stage Artists Project Earth, the publisher of this paper and originator of the OPLI, is seeking partnership with individuals, organisations, countries and potential funders to take the initiative forward. Additional details on OPLI are to be found in the pages that follow.

*Oliver Tickell for [Artists Project Earth](#).*

## 2. Introduction

The rising volume of [waste plastic](#) in our seas and oceans has become a problem of global proportions. It would be hard to find a beach, coral reef or hectare of open sea anywhere in the world that does not contain at least some visible plastic waste, both floating in the water and settled on the seabed.

A [report published at the 2016 World Economic Forum](#) stated that by 2050, on current trends, there would be as much plastic in the ocean as fish. In excess of 8 million tonnes of plastic waste enters the ocean each year, equivalent to a garbage truck full every minute. This is expected to double by 2030, and double again by 2050.

Estimates of the volume of mismanaged plastic waste (MPW) produced on a per country basis were [published in Science in 2015](#), revealing the [top 20 offenders](#) in 2010 to be (in order, first greatest): China, Indonesia, Philippines, Vietnam, Sri Lanka, Thailand, Egypt, Malaysia, Nigeria, Bangladesh, South Africa, India, Algeria, Turkey, Pakistan, Brazil, Burma, Morocco, North Korea, USA. The total volume of MPW produced per year was estimated to increase as follows: 2010 - 31.9Mt; 2015 - 36.5Mt; 2020: 41.3Mt; 2025 69.9Mt. *[Note: while MPW will correlate with MPP, the proportion of MPW converted into MPP is not fixed and will vary by country; this paper estimates 15% to 40%.]*

Plastic is not an ugly but essentially passive presence in the oceans, but causes considerable ecological harm. Lost and discarded fishing equipment can entrap fish, turtles, cetaceans, sea birds and other marine animals, causing great suffering and high mortality. The [ingestion by diverse species of plastic objects](#) from cigarette lighters to tiny 'microplastic' beads clogs their digestive systems and imparts toxins concentrated into the plastics from seawater, while reducing the nutritional value of their food. Plastics fetched up on beaches disrupts littoral ecosystems and may prevent, for example, the nesting of turtles. It may also form into 'rafts' that facilitate the [movement of invasive marine species](#) into areas in which they are not native, creating ecological havoc.

Plastic pollution is also highly persistent, potentially lasting for a century or more. While plastic objects degrade in the ocean environment under the action of sun and waves, the main effect is simply to break down into [ever small pieces](#). These smaller pieces are all the more effective at

concentrating persistent organic pollutants such as PCBs that are present at low concentrations, and are eaten by smaller fish and plankton as they resemble food items, contaminating marine food chains from the bottom up.

There is now a broad consensus that MPP poses a severe hazard to ocean life, and of the need to drastically reduce the volumes of plastic entering the oceans. This was most recently reiterated at the UN Ocean Conference in New York in June 2017, which resulted in [178 commitments](#) to act on MPP; 36 governments (see below) made commitments ranging from education and awareness campaigns, to substantive and important actions.

As UN Secretary-General António Guterres said in his [opening address](#): *"Now we need concrete steps, from expanding marine protected areas, to the management of fisheries; from reducing pollution, to cleaning up plastic waste. I call for a step change, from local and national initiatives to an urgent, coordinated international effort."*

His sentiments were reflected in the '[Our Ocean, Our Future: Call for Action](#)' final declaration which included commitments agreed by all 193 member states of the UN to take strong, effective action on MPP - set out in detail below.

### 3. What next? Legal measures?

The voluntary commitments made at the UN Ocean Conference and its final declaration represent encouraging progress, and especially with some of the world's major MPP polluters, China, Vietnam and India, setting out substantive programmes. Prior to the Conference Indonesia also set out its ambitious aim to [reduce its MPP by 70% by 2025](#). These add to impressive commitments made by numerous countries both unilaterally and through multilateral agreements.

However this leaves considerable scope for additional actions by governments, NGOs and others concerned about ocean plastic to drive forward positive initiatives aimed at accelerating progress; monitoring the progress of states in honouring their commitments; and 'holding toes to the fire' of the more backward and recalcitrant states, including the 135 countries made no promises on ocean plastic.

While there was some discussion of a new legal instrument to control MPP, this idea did not appear in the final declaration. And even it were present, it would still (based on past experience) take a decade or more before it could be agreed and take effect. This has not discouraged two advocates of such a new Convention, Simon Nils and Maro Luisa Schulte of the [Adelphi](#) think tank, from advancing their case in their 2017 report '[Stopping Global Plastic Pollution: The Case for an International Convention](#)'.

But for those interested in applying the power of the law to control MPP in the short to medium term, any legal action must be based on the existing body of international law. This includes the following instruments of global scope:

- United Nations Convention on the Law of the Sea (UNCLOS)
- London Convention
- MARPOL Convention
- The Basel Convention
- Customary Law.

And these Conventions of regional application:

- Bamako Convention (Africa)
- OSPAR Convention (North Atlantic)
- Cartagena Convention (Caribbean)
- Tehran Convention (Caspian Sea)

- Kuwait Protocol (Gulf Area)
- Helsinki Convention (Baltic Sea)
- Barcelona Convention (Mediterranean Sea)
- Bucharest Convention (Black Sea).

And the following laws applicable within the EU:

- EU Waste Framework Directive
- EU Water Framework Directive
- EU Marine Strategy Framework Directive.

Also of relevance are a number of 'soft law' declarations, etc, from UN General Assembly, UN conferences, and other authoritative fora of the international community. While it is impossible to take legal action against countries in breach, these instruments nonetheless: have moral force; declare the consensus will of the international community; where referred to in 'hard law' Conventions, provide guidance on the intention of those Conventions and how they should be interpreted; and may be taken into account in Customary Law cases. They include:

- World Charter for Nature
- UN General Assembly Resolution 2749
- Declaration of the United Nations Conference on the Human Environment
- Washington Declaration on Protection of the Marine Environment from Land-based Activities
- Global Programme of Action for the Protection of the Marine Environment from Land-based Activities
- Agenda 21 Chapter 17
- Our Ocean, Our Future: Call for Action
- The Honolulu Strategy
- Convention on Migratory Species Resolution on Marine Plastic.

So the key question for us is: does the existing body of international law provide the necessary legal means to bring about the reductions we seek on MPP generation?

## 4. Review of existing 'hard law' instruments of global scope

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

The United Nations Convention on the Law of the Sea ([UNCLOS](#)), which governs the use of the world's oceans, is the outcome of the third United Nations Conference on the Law of the Sea which took place between 1973 and 1982. It came into force in 1994, replacing four earlier treaties, and by June 2016 Parties included 167 countries and the European Union. UNCLOS provisions relevant to MPP include:

- Article 1.4: *"pollution of the marine environment' means the introduction by man, directly or indirectly, 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 use of sea water and reduction of amenities;"*
- Article 194.1, which requires states to *"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"*.
- Article 194.2 additionally states: *"States shall take all measures necessary to ensure that*

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

- Article 194.3 continues with: *"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 by dumping".* By any standards ocean plastic has to be considered both 'harmful' and 'persistent'.
- Article 194.5 contains a specific requirement to protect marine wildlife: *"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."*

Disputes are subject to arbitration as set out in the rather complex provisions of [Part XV](#) which include the possibility of referral to the International Court of Justice, the [International Tribunal on the Law of the Sea](#), or a special purpose tribunal. Advice received from international lawyers and [documentary sources](#) indicates that these mechanisms are widely considered to be slow, expensive and unsatisfactory.

It is also worth noting that in June 2015 the UN General Assembly adopted [UNGA resolution 69/292.2](#) on 'Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (BBNJ). Under the resolution, the General Assembly:

*"Decides to develop an international legally-binding instrument under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction ... [N]egotiations shall address the topics identified in the [package agreed in 2011](#), namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures, such as area-based management tools, including marine protected areas, environmental impact assessments and capacity-building and the transfer of marine technology."*

A [submission by Greenpeace International](#) sets out a 'wish list' that summarises potential gains that could be made in this new instrument. The proposals do not include measures to reduce MPP but could, in principle, do so.

## 4.2 London Convention

The 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter ([London Convention](#)) and its 1996 Protocol restrict the dumping of wastes at sea. It entered into force in 1975, and as of September 2016 there were 89 Parties to the Convention.

While the main purpose of the London Convention is to prevent the deliberate dumping of wastes at sea that would damage the marine environment, its scope as set out in the 1996 Protocol is considerably wider:

- Article 1.10: *" 'Pollution' means the introduction, directly or indirectly, by human activity, of wastes or other matter into the sea which results or is likely to result in such deleterious effects as harm to living resources and marine ecosystems, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities."*

- Article 2: *"Contracting Parties shall individually and collectively protect and preserve the marine environment from all sources of pollution and take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter. Where appropriate, they shall harmonize their policies in this regard."*

A plain reading of these Articles indicates that they forbid states from causing or permitting MPP from both marine and terrestrial sources. States are required to *"protect and preserve the marine environment from all sources of pollution"*, where pollution means *"the introduction, directly or indirectly, by human activity, of wastes or other matter into the sea which results or is likely to result in such deleterious effects as harm to living resources and marine ecosystems ..."*

The fact that the waste may not be directly dumped into the sea, but washed into the sea from land by the action of wind, rain, streams, rivers, is no excuse because the law includes the introduction of waste both *"directly or indirectly"* from *"all sources"*. Also there is no doubt of the harm inflicted by MPP to marine wildlife and ecosystems.

Interpretation should also be guided by the Preamble, which includes the statements:

- *"Stressing the need to protect the marine environment and to promote the sustainable use and conservation of marine resources";*
- *"Taking into account relevant international agreements and actions, especially the United Nations Convention on the Law of the Sea, 1982, the Rio Declaration on Environment and Development and Agenda 21";*

Enforcement takes place by means of arbitration under the procedures set out in Article 16 and Annex III of the 1996 Protocol. The judgments arising from such process are binding in nature.

### 4.3 MARPOL Convention

The 1973 International Convention for the Prevention of Pollution from Ships ([MARPOL Convention](#)) was developed by the International Maritime Organization in order to prevent of pollution of the marine environment from ships by waste dumping, oil spillage and air pollution. It came into force on 2nd October 1983. As of April 2016, 154 states, representing 98.7% of the world's shipping tonnage, are parties to the Convention.

Most relevant to MPP is Annex V, 'Regulations for the Prevention of Pollution by Garbage from Ships', which came into force in 1988. In 2013 a revised Annex V came into force banning all garbage dumping at sea subject to specific exemptions. [Dumping of plastic waste is specifically banned](#), and Parties are obliged to provide adequate garbage reception facilities at ports and terminals.

There is good reason to believe that MARPOL has been effective at reducing, if not entirely eliminating, MPP arising from ships dumping garbage at sea. However it has no application to the broader problem of MPP originating from land.

### 4.4 Basel Convention

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ([Basel Convention](#)) is an international treaty designed to reduce the movements of hazardous waste between nations, and to prevent transfer of hazardous waste from developed to less developed countries. It came into force in 1992 and has 184 signatories. The USA has signed but not ratified.

Its aim (in Preamble) is *"to protect, by strict control, human health and the environment against the adverse effects which may result from the generation and management of hazardous wastes and other wastes"*. Also the Preamble refers to the [World Charter for Nature](#) (see below), adopted by the

UN General Assembly in 1982, as *"as the rule of ethics in respect of the protection of the human environment and the conservation of natural resources"*, providing guidance as to its interpretation.

Article 2 defines 'Transboundary movement' as *"any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one State to or through an area under the national jurisdiction of another State or to or through an area not under the national jurisdiction of any State, provided at least two States are involved in the movement."*

Article 9.1 goes on to say that *"any transboundary movement of hazardous wastes or other wastes: (a) without notification pursuant to the provisions of this Convention to all States concerned; or (b) without the consent pursuant to the provisions of this Convention of a State concerned; ... shall be deemed to be illegal traffic."*

A plain reading of these two articles indicates that if one state allows wastes to move across international boundaries into the territory of another state in any way, without both notifying and obtaining the consent of the receiving state, that is 'illegal traffic'. But in fact, the terms 'hazardous wastes' and 'other wastes' both have specific meanings as set out over a number of articles and annexes. Thus Article 1 Clauses 1 & 2:

*"1. The following wastes that are subject to transboundary movement shall be 'hazardous wastes' for the purposes of this Convention: (a) Wastes that belong to any category contained in Annex I, unless they do not possess any of the characteristics contained in Annex III; and (b) Wastes that are not covered under paragraph (a) but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the Party of export, import or transit."*

*"2. Wastes that belong to any category contained in Annex II that are subject to transboundary movement shall be 'other wastes' for the purposes of this Convention."*

Annex I does not include the mixed plastic waste that engenders MPP. Annex II includes the category 'Y46 Wastes collected from households'. This appears to apply to only to wastes that have been collected, not to those randomly thrown away into the environment, however in many cases this is known to take place, eg with riverside dumps in Indonesia that are swept away by rivers in the rainy season. So at least some MPP may qualify as 'other wastes'.

The clearest opportunity for action comes in Article 1.1(b) (above). All a country has to do, therefore, is to define miscellaneous plastic waste (MPW) as 'hazardous waste' in its domestic legislation, for it to be able to take action against the state from which MPP is originating.

Article 3 on 'National Definitions of Hazardous Wastes' also sets out notification requirements for defining wastes as hazardous: the state concerned must inform the Basel Secretariat, the Secretariat must inform the Parties, and the Parties must inform their exporters.

Article 9.2 places obligations on the state in which the waste is produced, and provides remedies to the receiving state: *In the event of "illegal traffic as the result of conduct on the part of the exporter or generator, the State of export shall ensure that the wastes in question are: (a) taken back by the exporter or the generator or, if necessary, by itself into the State of export ... "*

Disputes under the Basel Convention are resolved under Article 20 and Annex VI, providing for reference to the International Court of Justice (ICJ) or arbitration. This includes the possibility of participation by civil society NGOs: *"Any Party that has an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal."*

## 5. Customary Law

### 5.1 Transboundary harm

Customary law is the international version of 'common law' which reflects the accrued norms of behaviour between states. An understood precept of customary law is a prohibition of transboundary harm from one state to another [see for example [this](#), [this](#) and [this](#)]. MPP from the land of one country to the shores of another is a clear example of a transboundary harm.

### 5.2 Public Trust Doctrine

Another relevant precept of Customary Law (elegantly set out in Deborah Wright's '[Conserving the Great Blue](#)' (Marinet 2014)) is The Public Trust Doctrine (PTD), based in the Roman law of Emperor Justinian, which states that governments must manage commons (such as the high seas) and natural resources solely in the interests of present and future citizens. Under PTD governments are trustees of these resources assigned with their prudent management; and beneficiaries can hold the trustees accountable for their mismanagement and degradation.

Application of the PTD is well established in a dozen countries either through their constitutions, or in statute law, where it has served as an important instrument for environmental protection: India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, Canada and the USA ([Bloom & Guthrie](#), 2014).

The PTD may also apply in the UK as an element of common law, at least in the opinion of India's Supreme Court, which in 1997 ruled that PTD was part of Indian law because Indian jurisprudence was inherited from English common law, which prevented the *"aesthetic use and the pristine glory of the natural resources, the environment, and the ecosystems of our country ... [from being] eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in the public interest to encroach upon the said resources."* The court has since rooted the PTD in natural law holding since *"time immemorial"*, so insulating it from statutory or constitutional change.

Similar views have emerged in the US where the PTD is considered rooted in English common law. [It is also argued that](#) while PTD in the UK has long been neglected, it [nonetheless applies](#) and should be revived.

### 5.3 Common Heritage of Humankind

A further (closely related) precept of customary law is the Common Heritage of Humankind, which states that the global commons, beyond national domain, are humanity's common heritage to be held in trust for the benefit of all and for future generations. This doctrine was assimilated into the UNCLOS (in Preamble), but in a restricted form which applied only to the seabed, giving effect to the 1982 UN [General Assembly Resolution 2749](#):

*"Desiring by this Convention to develop the principles embodied in resolution 2749 (XXV) of 17 December 1970 in which the General Assembly of the United Nations solemnly declared inter alia that the area of the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction, as well as its resources, are the common heritage of mankind, the exploration and exploitation of which shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States,"*

### 5.4 Popular sovereignty?

The application and binding nature of Customary Law in regulating affairs between states is beyond

dispute, however what is less clear is [how to give it practical effect](#).

The greatest problem is that the only mechanism for bringing legal action under Customary Law is to seek referral to the [International Court of Justice](#) by a competent body, which would almost certainly be the UN General Assembly. It would require considerable diplomatic effort to bring about such a referral so this possibility is not one to be pursued at this time.

As a general point of international jurisprudence, only states that are parties to a Convention can have recourse to the dispute / enforcement mechanisms of that Convention. Likewise with Customary Law, it is up to UN-recognised states to use it in search of seek redress for alleged wrongs.

However this raises an important question. Who is to defend the 'Common Heritage of Mankind' where harm is being committed to global commons (such as the high seas) through the action or inaction of states? Who is to enforce the Public Trust Doctrine in Customary Law if states will not do so? Is there scope for a substantial congregation of global citizens to assert their right to defend the collective interest of present and future generations? As Prue Taylor argues in her essay '[The Common Heritage Of Mankind: a bold doctrine kept within strict boundaries](#)':

*"CHM is also relevant to the wider debate on transforming the role of the state from exclusive focus on protection of national interests to include responsibility to protect ecological systems, wherever they are located, for the benefit of all. States might be reticent to embrace the possible applications of CHM, but international law is no longer the sole province of states and international lawyers. Global civil society is playing an increasing role in the development of, and advocacy for, concepts such as CHM. It is linked to renewed interest in cosmopolitanism, global constitutionalism, global ecological citizenship and justice, and the search for shared ethical principles to guide progress towards a more peaceful and sustainable future for all ([Earth Charter Initiative 2000](#))."*

There is certainly an powerful argument that a large coalition of individuals and civil society representatives proclaiming widely held opinion from around the world should be able to assert their collective will as guardians of what is legally recognised as their 'common heritage', and to be effective this must include its standing to initiate a legal process against those abusing that common heritage.

Indeed this would be a powerful expression of the principle of '[popular sovereignty](#)' principle: that the authority of states and governments is rooted in the popular will and the consent of the governed: it is 'we the people' that constitute the ultimate foundation of legitimate political power.

This principle is embodied in the constitution of the US, which states that *"Governments are instituted among Men, deriving their just powers from the consent of the governed"*. It is also affirmed in Article 21 of the 1948 [Universal Declaration of Human Rights](#), which states that *"The will of the people shall be the basis of the authority of government"*. Article 28 follows this up with *"Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."*

The way must therefore be open - at a philosophical and jurisprudential level - for the peoples of the world to assert their popular will by overwhelming declaration reflecting widespread popular opinion. If their will to do so is frustrated by the lack of existing organisations and procedures, then they are entitled to create them. The popular will, whether at a national or global level, is sovereign.

The assertion of this popular will at a global level would represent a profound disruption of the established order, but none the less legitimate for that. And of course it could go way beyond the question of MPP, potentially to encompass the failure of states to tackle global warming, get rid of nuclear weapons, prevent genocide and ecocide, stamp out slavery, place limits on corporate power, or reform the global financial system.

## 5.5 Ecocide law

In this context it is worth mentioning the existence of a growing campaign, founded by barrister and campaigner Polly Higgins, for an international law to [criminalise 'ecocide'](#) - the deliberate or reckless destruction of nature on a large and irrevocable scale. The chosen mechanism for bringing this law into being is the Rome Statute, the governing document for international criminal law, to which 124 states are parties. As explained on the [Mission Force](#) website:

*"Any signatory Head of State can propose an amendment - to add Ecocide to the list of international crimes. When two thirds of States sign up, it becomes law. There is no veto, no time limit, and all State parties (however small) have an equal vote. Small, climate vulnerable states therefore have a unique incentive to put forward this amendment. This is the legal fast lane, but it costs money those small states don't have. But between us, we do."*

An alternative mechanism through which to realise an ecocide law is to assert that it already exists by virtue of the three provisions of customary law set out above. The nature of the problem would then shift from trying to persuade states to propose and sign up to an ecocide law, to promulgating its existence and putting it to the test in an appropriate court or tribunal.

Also note that since the harm done by MPP is objectively ecocidal, an ecocide law - however created or asserted - would also be applicable to the generation of MPP.

## 6. Review of existing regional Conventions

### 6.1 Bamako Convention

The African Union's 1994 Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa ([Bamako Convention](#)) is modelled on the Basel convention for application to African needs, specifically to explicitly prohibit the import of any hazardous waste, including radioactive waste. It came into force in 1998 and now has [35 signatories and 27 Parties](#).

As under the Basel Convention, Parties can also define classes of wastes as 'hazardous' in their domestic law (as set out in Articles 2, 3) and so bring them under the scope of the Bamako Convention. The meaning of the term 'transboundary movement' (Article 1.1) is also identical to that in Basel.

However the Bamako Convention adopts a much wider definition of hazardous waste than Basel. Under Article 2, wastes are automatically considered as hazardous if they possess any of the qualities listed in Annex II. These qualities include *"9 H12 Ecotoxic Substances or wastes which if released present or may present immediate or delayed adverse impacts to the environment by means of bioaccumulation and/or toxic effects upon biotic systems."*

This definition appears to fit very well with MPP, which is known to bioaccumulate both at a microscopic level, with microplastic particles being ingested by small fish, barnacles and other shellfish; and at a macro-level with seabirds and cetaceans frequently found to have large numbers of plastic objects in their digestive tracts. While MPP may not fit with the normal understanding of 'toxic' as applied to poisonous chemicals, there is a strong argument that it exhibits acute toxicity at an ecosystem or 'biotic system' level.

Article 9 also states that *"any transboundary movement of hazardous wastes under the following situations shall be deemed to be illegal traffic: (b) if carried out without the consent, pursuant to the provisions of this Convention, of a State concerned; ..."*. In such a case the source country is required to accept the return of the wastes in question and take *"appropriate legal action"* against contravenors.

Article 4 also requires *"The Adoption of Precautionary Measures"* to protect people and the

environment:

- *"(f) Each Party shall strive to adopt and implement the preventive, precautionary approach to pollution problems which entails, inter-alia, preventing the release into the environment of substances which may cause harm to humans or the environment without waiting for scientific proof regarding such harm. The Parties shall co-operate with each other in taking the appropriate measures to implement the precautionary principle to pollution prevention through the application of clean production methods, rather than the pursuit of a permissible emissions approach based on assimilative capacity assumptions;*
- *"(g) In this respect Parties shall promote clean production methods applicable to entire product life cycles including:*
  - *raw material selection, extraction and processing;*
  - *product conceptualisation, design, manufacture and assemblage;*
  - *materials transport during all phases;*
  - *industrial and household usage;*
  - *reintroduction of the product into industrial systems or nature when it no longer serves a useful function;*

It therefore appears that the prevention of MPP is already mandated on a precautionary basis, and that countries should be redesigning entire product life cycles, for example of plastic bags, bottles, etc, to prevent MPP.

The Bamako Convention therefore creates the opportunity for a dispute to be raised against an MPP source country by an MPP-polluted country (both of them Bamako Parties), with no need for it to define MPP as a hazardous waste in its domestic legislation. Naturally it would be well advised for the country taking such action to be able to demonstrate its exemplary record in controlling its own generation of MPP.

Dispute resolution takes place by arbitration or by the ICJ as set out in Article 20 and Annex V.

It is regrettable that several African Union members that might be taking action on MPP have not yet become Parties to the Bamako Convention. These include Madagascar, Seychelles, and São Tomé and Príncipe.

## **6.2 OSPAR Convention**

The Convention for the Protection of the Marine Environment of the North-East Atlantic ([OSPAR Convention](#)) exists to protect the marine environment of the North-East Atlantic Ocean around Europe, and is the successor to the Oslo and Paris Conventions. It comprises 15 states (Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom) and the EU, and entered into force on 25 March 1998, replacing the Oslo and Paris Conventions.

Under Article 2, 'General Obligations', Contracting Parties shall

- *"take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected."*
- *"apply: (a) the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects; (b) the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by*

*the polluter."*

- *"adopt programmes and measures which contain, where appropriate, time-limits for their completion and which take full account of the use of the latest technological developments and practices designed to prevent and eliminate pollution fully ... ensure the application of best available techniques and best environmental practice as so defined, including, where appropriate, clean technology."*

Under Article 3, 'Pollution From Land-based Sources', *"The Contracting Parties shall take, individually and jointly, all possible steps to prevent and eliminate pollution from land-based sources in accordance with the provisions of the Convention, in particular as provided for in Annex I."* However Annex I, 'Prevention and Elimination of Pollution from Land-based Sources', is so phrased as to contain no additional binding requirements on member states.

Article 21, 'Transboundary Pollution', states that *"When pollution originating from a Contracting Party is likely to prejudice the interests of one or more of the other Contracting Parties to the Convention, the Contracting Parties concerned shall enter into consultation, at the request of any one of them, with a view to negotiating a cooperation agreement."* In the event of inability to agree, or failure to abide by an agreement, however, no further recourse is provided.

Annex V, 'Protection and conservation of the ecosystems and biological diversity of the maritime area', adds little if anything of a compulsory or binding nature additional to those specified in Article 2.

Article 32, 'Settlement of Disputes', sets out procedures for arbitration.

The strongest wording from an MPP perspective is thus found in Article 2 which requires Parties to take *"all possible steps to prevent and eliminate pollution"* and *"the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems."*

Additionally it applies both the precautionary principle, setting a low standard of proof that MPP is damaging to marine ecosystems, and the 'polluter pays' principle, forcing the polluter to carry the full costs of rectifying pollution, and to restore damage. States are also obliged to *"adopt programmes and measures ... which take full account of the use of the latest technological developments and practices designed to prevent and eliminate pollution fully"* This would, on a plain language reading, require Parties to take serious and effective action to reduce MPP and its impacts. Any state failing to do so would be in breach of its obligations.

The greatest difficulty is likely to be finding a state suffering from MPP on its beaches that would be willing to invoke the dispute mechanism against a nearby or neighbouring state causing the pollution. In addition, some might question the value of such an action when no European state figures among the top 20 global MPP producers.

### **6.3 Cartagena Convention**

The Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region ([Cartagena Convention](#)), implemented in 1986 and ratified by 25 UN member countries, is a legally binding environmental treaty for governing marine debris in the wider Caribbean. It governs the marine environments of the Gulf of Mexico, the Caribbean Sea and parts of the Atlantic Ocean, but excludes the 'internal waters' of the parties.

Member governments commit to protect, develop and manage their common waters, individually or jointly, and to adopt measures to prevent, reduce and control pollution from ships, dumping, seabed activities, land-based activities and airborne pollution.

Under Article 6, 'Pollution caused by dumping', *"The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by dumping of*

*wastes and other matter at sea from ships, aircraft or manmade structures at sea, and to ensure the effective implementation of the applicable international rules and standards."*

Under Article 7, 'Pollution from land-based sources', *"The Contracting Parties shall take all appropriate measures to prevent, reduce and control pollution of the Convention area caused by coastal disposal or by discharges emanating from rivers, estuaries, coastal establishments, outfall structures, or any other sources on their territories."*

These provisions have been supplemented by the 1999 Protocol Concerning Pollution from Land-based Sources and Activities to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region ([1999 Protocol](#)), adopted by 20 countries.

Article 23 defines procedures for the resolution of disputes, requiring states to seek to negotiate peaceful solutions at all stages of disputes. Provision is made for arbitration in its Annex.

While it would be possible for countries to take action against polluting countries, these would be limited to countries that are party to the Cartagena Convention. Most parties are island states that are far more likely to be afflicted by MPP than major sources of MPP. The main sources of regional MPP among members are likely to be the mainland or larger island states: Colombia, Dominican Republic, Haiti, Honduras, Nicaragua, Mexico, Venezuela, USA. Of these only the US is in the world's 'top 20' MPP producers and it may be surmised that few Cartagena Parties would actively seek confrontation with so powerful a state for fear of counter-measures.

## 6.4 Tehran Convention

The Framework Convention for the Protection of the Marine Environment of the Caspian Sea ([Tehran Convention](#)) came into force in 2013 and its aim is *"the protection of the Caspian environment from all sources of pollution including the protection, preservation, restoration and sustainable and rational use of the biological resources of the Caspian Sea."* (Article 2.)

The Convention itself contains little by way of enforceable law, however the 'General Obligations' (Article 4) commits Caspian Sea countries to *"individually or jointly take all appropriate measures to prevent, reduce and control pollution of the Caspian Sea"* and to *"individually or jointly take all appropriate measures to protect, preserve and restore the environment of the Caspian Sea"*.

Article 5 (Principles) also asserts:

- the precautionary principle, *"by virtue of which, where there is a threat of serious or irreversible damage to the Caspian Sea environment, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent such damage";*
- the 'polluter pays' principle, *"by virtue of which the polluter bears the costs of pollution including its prevention, control and reduction";*
- the 'principle of accessibility of information' which obliges the parties to *"provide each other with relevant information in the maximum possible amount."*

In Article 7, 'Pollution from Land-Based Sources', the parties *"shall take all appropriate measures to prevent, reduce and control pollution of the Caspian Sea from land-based sources"* and *"shall cooperate in the development of protocols to this Convention prescribing additional measures for prevention, reduction and control of pollution of the Caspian Sea from land based sources."*

Thus the 'Protocol for the Protection of the Caspian Sea Against Pollution From Land-based Sources and Activities to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea' ([Moscow Protocol](#)) was negotiated in 2012, and contains many useful provisions in the fight against MPP. However it is not in force owing to non-ratification by two states.

Provisions for dispute resolution are also notably weak (Article 30): *"In case of disputes between Contracting Parties concerning the application or interpretation of the provisions of the present*

*Convention, the Contracting Parties will settle them by consultations, negotiations or by any other peaceful means of their own choice.*" This effectively confers the Tehran Convention 'soft law' status due to its unenforceability.

## 6.5 Kuwait Protocol

The 1990 Protocol for the Protection of the Marine Environment Against Pollution from Land-Based Sources ([Kuwait Protocol](#)) expands on the provisions of the 1978 [Kuwait Regional Convention for Cooperation on the Protection of the Marine Environment from Pollution](#). Its application is limited to the marine environment in the region shared by Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

This Protocol is applicable to MPP, applying as it does to pollution from land-based sources, as stated in the pre-ambule: *"Recognizing the danger posed to the marine environment and to human health by pollution from land-based sources and the serious problems resulting therefrom in coastal waters of many Contracting States, principally due to the release of untreated, insufficiently treated and/or inadequately disposed of domestic or industrial discharges;"*

The definition of 'pollution', given in the Kuwait Convention, also clearly includes plastic wastes: *"marine pollution means the introduction by man, directly or indirectly, of substances or energy into the marine environment resulting or likely to result in such deleterious effects as harm to living resources, hazards to human health, hindrance to marine activities including fishing, impairment of quality for use of sea and reduction of amenities;"*

The main emphasis of the Protocol is on research, monitoring, information exchange and cooperation in solving pollution problems, and the application of environmental impact assessment to projects to prevent marine pollution. It also provides the legal basis for states to curtailing polluting activities (Annex 1): *"consideration should be given to the control and progressive replacement of products, installations and industrial or other processes causing significant pollution to the Marine Environment."* Particular attention is to be given to:

- a. Curtailment and/or regulation of import, transportation, manufacturing or processing of certain harmful substances.
- b. Change of raw materials.
- c. Change of manufacturing processes.
- d. Good operating and housekeeping practices.
- e. Segregation of waste streams and minimization of pollutant dilution prior to treatment.
- f. Recovery, re-use and recycling.

The Protocol's Article XIII requires member states to:

- *"ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the Marine Environment by natural or juridical persons under their jurisdiction."*
- *"formulate and adopt appropriate procedures for the determination of liability for damage resulting from pollution from land-based sources."*

This actually appears to be the most important element of the entire Protocol since it promises those suffering from marine pollution the ability to recover damages against responsible persons / entities within the member states. The Convention (Article XXV) also offers member states the means to ensure compliance by others via the Judicial Commission for the Settlement of Disputes established under the Convention.

The Kuwait convention therefore has some very strong points but given the fraught politics of the Gulf Region, it is not proposed to pursue its application.

## 6.6 Helsinki Convention

The Convention on the Protection of the Marine Environment of the Baltic Sea Area ([Helsinki Convention](#)) was signed in Helsinki on 9 April 1992, replacing a similar earlier Convention applying to the Baltic. It was signed in 1992 by Czechoslovakia, Denmark, Estonia, the European Community, Finland, Germany, Latvia, Lithuania, Poland, Russia and Sweden, and came into force in 2000.

The Convention places binding commitments on contracting parties as can be seen by the frequent use of the word 'shall', which indicates compulsion. In Article 3, for example:

1. *"The Contracting Parties shall individually or jointly take all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance.*
2. *"The Contracting Parties shall apply the precautionary principle, i.e., to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea even when there is no conclusive evidence of a causal relationship between inputs and their alleged effects.*
3. *"In order to prevent and eliminate pollution of the Baltic Sea Area the Contracting Parties shall promote the use of Best Environmental Practice and Best Available Technology. If the reduction of inputs, resulting from the use of Best Environmental Practice and Best Available Technology, as described in Annex II, does not lead to environmentally acceptable results, additional measures shall be applied.*
4. *"The Contracting Parties shall apply the polluter-pays principle."*

Likewise Article 5 (Harmful substances): *"The Contracting Parties undertake to prevent and eliminate pollution of the marine environment of the Baltic Sea Area caused by harmful substances from all sources, according to the provisions of this Convention and, to this end, to implement the procedures and measures of Annex I."*

Article 6, 'Principles and obligations concerning pollution from land-based sources': *"The Contracting Parties undertake to prevent and eliminate pollution of the Baltic Sea Area from land-based sources by using, inter alia, Best Environmental Practice for all sources and Best Available Technology for point sources."*

And Article 15 on 'Nature conservation and biodiversity': *"The Contracting Parties shall individually and jointly take all appropriate measures with respect to the Baltic Sea Area and its coastal ecosystems influenced by the Baltic Sea to conserve natural habitats and biological diversity and to protect ecological processes."*

The Convention applies to land-origin pollution - including MPP - as made clear in Article I in which:

- 'Pollution' is defined as the *"introduction by man, directly or indirectly, of substances or energy into the sea, including estuaries, which are liable to create hazards to human health, to harm living resources and marine ecosystems, to cause hindrance to legitimate uses of the sea including fishing, to impair the quality for use of sea water, and to lead to a reduction of amenities;"*
- 'Pollution from land-based sources' is defined as *"pollution of the sea by point or diffuse inputs from all sources on land reaching the sea waterborne, airborne or directly from the coast."*
- 'Harmful substance' means *"any substance, which, if introduced into the sea, is liable to cause pollution;"*

- 'Hazardous substance' means *"any harmful substance which due to its intrinsic properties is persistent, toxic or liable to bio-accumulate;"*

Annex I on 'harmful substances' also sets down criteria for their evaluation *"based on the intrinsic properties of substances, namely: persistency; toxicity or other noxious properties; tendency to bio-accumulation, as well as on characteristics liable to cause pollution, such as ... transboundary or long-range significance; risk of undesirable changes in the marine ecosystem and irreversibility or durability of effects; ..."*

It also sets out 'priority groups of harmful substances' to which the Contracting Parties *"shall, in their preventive measures, give priority"*. The list includes *"persistent materials which may float, remain in suspension or sink"* - a category which may even be aimed specifically at MPP.

Annex III on 'Criteria and measures concerning the prevention of pollution from land-based sources' requires that *"limit values for emissions containing harmful substances to water and air shall be stated in special permits"; and that "pollution from diffuse sources, including agriculture, shall be eliminated by promoting and implementing Best Environmental Practice."*

Under Article 26 on 'Settlement of disputes':

1. In case of a dispute between Contracting Parties as to the interpretation or application of this Convention, they should seek a solution by negotiation. If the Parties concerned cannot reach agreement they should seek the good offices of or jointly request mediation by a third Contracting Party, a qualified international organization or a qualified person.
2. If the Parties concerned have not been able to resolve their dispute through negotiation or have been unable to agree on measures as described above, such disputes shall be, upon common agreement, submitted to an ad hoc arbitration tribunal, to a permanent arbitration tribunal, or to the International Court of Justice.

The Helsinki Convention is therefore a powerful legal instrument - containing firm legal definitions, imposing specific and demanding legal obligations on its contracting parties, and including credible enforcement mechanisms. Moreover a number of the state parties have strong records on the environment and may therefore be prepared to consider action to ensure its full implementation.

## 6.7 Barcelona Convention

The Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean ([Barcelona Convention](#)), was adopted in Barcelona on 16 February 1976 and amended to its current form in 1995. Its initial purpose was to prevent pollution of the Mediterranean Sea by dumping from ships and aircraft, but its mandate was widened in 1995 to include the integrated management of the coastal region. This final version came into force in 2004. and its

It also includes several important Protocols, including:

- Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources ([LBS Protocol](#)) (adopted in 1980, amended in 1996 amendment entered into force in 2008).
- Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal ([Hazardous Wastes Protocol](#)) (adopted in 1996, entered into force in 2011). This Protocol is modelled on the Basel Convention and operates in very much the same way, creating the same opportunities for parties to declare mixed plastic wastes as 'hazardous' in their domestic law.
- The Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean ([SPA Protocol](#), adopted in 1995) and Annexes (adopted in 1996, amended in 2009, 2012 and 2013). The obligations on parties created by this protocol could be used to protect vulnerable wildlife and habitats where under threat from MPP.

But of greatest significance for MPP is the Regional Plan on Marine Litter Management in the Mediterranean in the Framework of Article 15 of the Land Based Sources Protocol ([Marine litter regional plan in the Mediterranean](#)), which falls under the LBS Protocol. This is the only binding legal instrument of which we are aware that specifically targets marine litter (including MPP) from land-based sources.

Under Article 3, *"Marine litter, regardless of the size, means any persistent, manufactured or processed solid material discarded, disposed of or abandoned in the marine and coastal environment."*

Under Article 4, *"The main objectives of the Regional Plan are to:*

- a. *"Prevent and reduce to the minimum marine litter pollution in the Mediterranean and its impact on ecosystem services, habitats, species in particular the endangered species, public health and safety;*
- b. *"Remove to the extent possible already existent marine litter by using environmentally respectful methods;*
- c. *"Enhance knowledge on marine litter; and*
- d. *"Achieve that the management of marine litter in the Mediterranean is performed in accordance with accepted international standards and approaches as well as those of relevant regional organizations and as appropriate in harmony with programmes and measures applied in other seas."*

Article 8 further states: *"For the purpose of implementing the Regional Plan, the Contracting Parties shall adopt as appropriate the necessary legislation and/or establish adequate institutional arrangements to ensure efficient marine litter reduction and the prevention of its generation."*

And under Article 9: *"In conformity with the objectives and principles of the Regional Plan the Contracting Parties shall:*

1. *"By the year 2025 at latest, to base urban solid waste management on reduction at source, applying the following waste hierarchy as a priority order in waste prevention and management legislation and policy: prevention, preparing for re-use, recycling, other recovery, e.g. energy recovery and environmentally sound disposal.*
2. *"By the year 2019 implement adequate waste reducing/reusing/recycling measures in order to reduce the fraction of plastic packaging waste that goes to landfill or incineration without energy recovery.*
3. *"By the year 2017 explore and implement to the extent possible prevention measures related to: (a) Extended Producer Responsibility strategy by making the producers, manufacturer brand owners and first importers responsible for the entire life-cycle of the product with measures prioritizing the hierarchy of waste management in order to encourage companies to design products with long durability for reuse, recycling and materials reduction in weight and toxicity; ...*
4. *"By the year 2020 take necessary measures to establish as appropriate adequate urban sewer, wastewater treatment plants, and waste management systems to prevent run-off and riverine inputs of litter."*

This Regional Plan is of considerable potential importance in the fight against MPP. It creates binding, timetabled obligations on the contracting parties (note widespread use of 'shall') beginning in 2017 and continuing into 2025. And as (apparently) the only binding legal instrument specifically designed to address MPP, it may set an important example to be followed in other international agreements and treaties.

## **6.8 Bucharest Convention**

The Convention on the Protection of the Black Sea Against Pollution ([Bucharest Convention](#)) was

signed by the six Black Sea countries (Bulgaria, Georgia, Romania, Russia, Turkey, Ukraine, in Bucharest (Romania) on 21 April 1992 and entered into force on 15 January 1994. The implementation is managed by the Commission for the Protection of the Black Sea Against Pollution ([Black Sea Commission](#)). It obliges the Contracting Parties to prevent, reduce and control the pollution in the Black Sea in order to protect and preserve the marine environment, marine biodiversity and the marine living resources.

It clearly forbids the creation of MPP through the following provisions:

Article II.1: *"Pollution of the marine environment' means the introduction by man, directly or indirectly, 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, hazard to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities."*

Article V.2: *"The Contracting Parties shall take individually or jointly, as appropriate, all necessary measures consistent with international law and in accordance with the provisions of this Convention to prevent, reduce and control pollution thereof in order to protect and preserve the marine environment of the Black Sea."*

Article VII: *"The Contracting Parties shall prevent, reduce and control pollution of the marine environment of the Black Sea from land based sources, in accordance with the Protocol on the Protection of the Black Sea Marine Environment Against Pollution from Land-Based Sources which shall form an integral part of this Convention."*

Under its Protocol On Protection of the Black Sea Marine Environment against Pollution from Land Based Sources (Article 4), *"The Contracting Parties undertake to prevent and eliminate pollution of the marine environment of the Black Sea from land-based sources by substances and matter listed in Annex I to this Protocol."* ('Hazardous Substances and Matter') - which includes *"Persistent synthetic materials which may float, sink or remain in suspension."*

This all looks very promising, in particular the clear classification of plastic wastes as 'hazardous matter' and the obligation of parties to *"prevent and eliminate"* MPP. However Article XV offers only feeble measures of redress in the case of breaches: *"In case of dispute between Contracting Parties concerning the interpretation and implementation of this Convention, they shall seek a settlement of the dispute through negotiations or any other peaceful means of their own choice."* As such the Bucharest Convention has moral force but no legal teeth.

## 7. EU Directives

### 7.1 EU Waste Framework Directive

The EU's [Waste Framework Directive](#) (2008/98/EC) of 19 November 2008 establishes the legislative framework for the handling of waste within the EU. It applies a number of obligations on EU member states that are relevant to the control of MPP, including:

- Article 4: *"1. The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy: (a) prevention; (b) preparing for re-use; (c) recycling; (d) other recovery, e.g. energy recovery; and (e) disposal. 2. When applying the waste hierarchy referred to in paragraph 1, Member States shall take measures to encourage the options that deliver the best overall environmental outcome. ... Member States shall take into account the general environmental protection principles of precaution and sustainability, technical feasibility and economic viability, protection of resources as well as the overall environmental, human health, economic and social impacts, in accordance with Articles 1 and 13."*

- Article 8: *"In order to strengthen the re-use and the prevention, recycling and other recovery of waste, Member States may take legislative or non-legislative measures to ensure that any natural or legal person who professionally develops, manufactures, processes, treats, sells or imports products (producer of the product) has extended producer responsibility. Such measures may include an acceptance of returned products and of the waste that remains after those products have been used, as well as the subsequent management of the waste and financial responsibility for such activities. These measures may include the obligation to provide publicly available information as to the extent to which the product is re-usable and recyclable."*
- Article 10: *"Member States shall take the necessary measures to ensure that waste undergoes recovery operations, in accordance with Articles 4 and 13. 2. Where necessary to comply with paragraph 1 and to facilitate or improve recovery, waste shall be collected separately if technically, environmentally and economically practicable and shall not be mixed with other waste or other material with different properties."*
- Article 11.2: *"In order to comply with the objectives of this Directive, and move towards a European recycling society with a high level of resource efficiency, Member States shall take the necessary measures designed to achieve the following targets: (a) by 2020, the preparing for re-use and the recycling of waste materials such as at least paper, metal, plastic and glass from households and possibly from other origins as far as these waste streams are similar to waste from households, shall be increased to a minimum of overall 50 % by weight;"*
- Article 12: *"Member States shall ensure that, where recovery in accordance with Article 10(1) is not undertaken, waste undergoes safe disposal operations which meet the provisions of Article 13 on the protection of human health and the environment."*
- Article 13: *"Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular: (a) without risk to water, air, soil, plants or animals; ... and (c) without adversely affecting the countryside or places of special interest."*

Under Article 3.2, Hazardous Waste is defined as waste that has any of the properties set out in Annex III, including *"H 14 'Ecotoxic': waste which presents or may present immediate or delayed risks for one or more sectors of the environment."* This would seem to include plastic waste.

However the formal classification is delegated to [Annex VI of Council Directive 67/548/EEC](#) of 27 June 1967. Under Annex VI's 5.2.1.2. *"Substances shall be classified as dangerous for the environment in accordance with the criteria set out below. Risk phrases shall also be assigned in accordance with the following criteria: ... R53 May cause long-term adverse effects in the aquatic environment. Substances not falling under the criteria listed above in this chapter, but which, on the basis of the available evidence concerning their persistence, potential to accumulate, and predicted or observed environmental fate and behaviour may nevertheless present a long-term and/or delayed danger to the structure and/or functioning of aquatic ecosystems."* Again, plastic waste conforms to this definition.

Article 7 also refers to a '[List of Waste](#)' established under Decision 2014/955/EU which *"shall be binding as regards determination of the waste which is to be considered as hazardous waste."* It includes plastics of various forms and origins including *"150102 plastic packaging"* (under 'Waste packaging; absorbents, wiping cloths, filter materials and protective clothing not otherwise specified') and *"200139 Plastic"* (under 'Municipal wastes (household waste and similar commercial, industrial and institutional wastes) including separately collected fractions').

This inclusion in the List of Waste is helpful as it means that, provided plastic waste conforms to one or more Annex III criteria, it should be considered hazardous EU-wide with no further action needed.

The provisions for the special treatment of hazardous waste are actually quite weak (especially as

Article 20 provides wide exemptions to "*mixed waste produced by households*"), but the classification is nonetheless helpful as (subject to serving of notice on the Basel Secretariat) it brings plastic waste within the scope of the Basel Convention.

This offers campaigners the opportunity to lobby MEPs and EU officials to serve such notice, so leading the way among Basel Parties.

## 7.2 EU Water Framework Directive

The [EU Water Framework Directive](#) (2000/60/EC) of 23 October 2000 establishes a framework for EU action in the field of water policy. The first clause of the Preamble notably declares that "*Water is not a commercial product like any other but, rather, a heritage which must be protected, defended and treated as such.*" This assertion essentially asserts that water is a commonly-owned resource under the Public Trust doctrine across the EU.

The intention is to "*establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which ... (c) aims at enhanced protection and improvement of the aquatic environment, inter alia, through specific measures for the progressive reduction of discharges, emissions and losses of priority substances and the cessation or phasing-out of discharges, emissions and losses of the priority hazardous substances; ... and thereby contributes to: ... the protection of territorial and marine waters, and achieving the objectives of relevant international agreements, including those which aim to prevent and eliminate pollution of the marine environment, by Community action under Article 16(3) to cease or phase out discharges, emissions and losses of priority hazardous substances, with the ultimate aim of achieving concentrations in the marine environment near background values for naturally occurring substances and close to zero for man-made synthetic substances.*"

'Priority substances' and 'priority hazardous substances' are actually listed in the [Environmental Quality Directive](#) (EC/105/2008) of 8th December 2008 and this list is comprised entirely of toxic chemical pollutants. As such, plastic waste is not included.

However there is a strong argument that plastic waste should be so designated in the Commission's quadrennial update of the two lists. Under Article 16, "*The Commission shall submit a proposal setting out a list of priority substances selected amongst those which present a significant risk to or via the aquatic environment. Substances shall be prioritised for action on the basis of risk to or via the aquatic environment, identified by: ... targeted risk-based assessment (following the methodology of [Regulation \(EEC\) No 793/93](#)) focusing solely on aquatic ecotoxicity and on human toxicity via the aquatic environment ...*

*"When necessary in order to meet the timetable laid down in paragraph 4 [for inclusion in the quadrennial review], substances shall be prioritised for action on the basis of risk to, or via the aquatic environment, identified by a simplified risk-based assessment procedure based on scientific principles taking particular account of: evidence regarding the intrinsic hazard of the substance concerned, and in particular its aquatic ecotoxicity and human toxicity via aquatic exposure routes, and evidence from monitoring of widespread environmental contamination, and other proven factors which may indicate the possibility of widespread environmental contamination, such as production or use volume of the substance concerned, and use patterns.*

Given the 'ecotoxicity' of plastic in the marine environment, MPP campaigners should consider lobbying MEPs and EU officials to have plastic wastes listed as either 'priority substances' or 'priority hazardous substances' under the Environmental Quality Directive, so requiring states to take more proactive steps in controlling them.

## 7.3 EU Marine Strategy Framework Directive (Marine Directive)

Adopted in June 2008, the [Marine Directive](#) aims to ensure that the EU's marine waters achieve

'good environmental status' by 2020, while protecting the resource base upon which marine-related economic and social activities depend. It is the first EU law for the protection of marine biodiversity.

The Directive establishes four European marine regions (the Baltic Sea, the North-east Atlantic Ocean, the Mediterranean Sea and the Black Sea) located within the boundaries of the existing Regional Sea Conventions (Helsinki, OSPAR, Barcelona and Bucharest Conventions, respectively), and envisages both the support of these Conventions by EU members states and utilisation of their mechanisms to foster cooperation and deliver its objectives.

'Good environmental status' is achieved (Article 3.8) when marine waters *"provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations ..."*

Specific criteria are listed in Annex 1, notably including item 10, that *"Properties and quantities of marine litter do not cause harm to the coastal and marine environment."* As such, where member states permit the generation of marine litter beyond 2020, they are in breach of their obligation to achieve the good environmental status of their marine waters.

Compliance by states will therefore require them already to be developing policies and measures for the control and remediation of marine litter at this time, and this offers a useful 'pressure point' for campaigners to urge governments into action.

## 8. Review of existing 'soft law' instruments

'Soft law' is a term that encompasses a wide range of multilateral treaties, agreements, declarations, documents and statements arising from authoritative fora, in most cases with the imprimatur of the United Nations, but that are not binding or compulsory in nature and lack coercive mechanisms and means or redress for non-compliance.

Their non-binding nature does not, however, mean that they lack influence. For example, take the [Paris Agreement](#) on climate change, negotiated in December 2015, which came into force in November 2016. Even though it is non-binding, and thus constitutes 'soft law', it is highly authoritative and every country in the world has signed up to it. The USA alone has given notice that it will withdraw from the agreement, so triggering a major international furore.

In addition, soft law instruments may be referred to or invoked in 'hard law' (binding) treaties or conventions, thereby giving them more powerful effect.

Soft law as it relates to MPP is therefore not to be ignored as weak or irrelevant. It may be used, for example, to add to the moral force of campaigns aimed at both governments and corporations, and to guide the interpretation of hard law where this is in doubt. The following soft law instruments are all applicable to MPP.

### 8.1 World Charter for Nature

Adopted by United Nations General Assembly in October 1982, the World Charter for Nature proclaims five *"principles of conservation by which all human conduct affecting nature is to be guided and judged"* together with eight Functions and eleven points of Implementation. Among these, the following are of relevance to MPP:

- *"11. Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used; in particular: (a) Activities which are likely to cause irreversible damage to nature shall be avoided."*
- *"21. States and, to the extent they are able, other public authorities, international*

*organizations, individuals, groups and corporations shall: ... (d) Ensure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction; (e) Safeguard and conserve nature in areas beyond national jurisdiction."*

The WCN has only 'soft law' status but nonetheless offers guidance to the interpretation of hard law Conventions especially where specifically cited. An example of this is in the Basel Convention (see above), which declares the Parties as *"Mindful of the spirit, principles, aims and functions of the World Charter for Nature ... as the rule of ethics in respect of the protection of the human environment and the conservation of natural resources"*.

## **8.2 UN General Assembly Resolution 2749**

Adopted by the UN General Assembly in 1982, the 'Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction' ([UNGA Resolution 2749](#)) declares that *"The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind."*

It continues: *"States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, inter alia: The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment; The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment."*

These and other matters set out in UNGA 2749 were adopted in UNCLOS (see above), and as such provide illumination as to the intent of UNCLOS where unclear. While UNGA 2749 has only 'soft law' status it nonetheless offers a strong statement of states' obligations to protect the marine environment arising from Customary Law (see below), applicable to MPP, that could be cited in diverse contexts.

## **8.3 Declaration of the United Nations Conference on the Human Environment**

The [Declaration of the United Nations Conference on the Human Environment](#), which arose from the eponymous [Conference on the Human Environment](#) in Stockholm, June 1972, *"calls upon Governments and peoples to exert common efforts for the preservation and improvement of the human environment, for the benefit of all the people and for their posterity."*

It sets out 26 Principles, of which the following are of particular relevance to MPP:

- Principle 6: *"The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of ill countries against pollution should be supported."*
- Principle 7: *"States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea."*
- Principle 21 *"States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."*
- Principle 22: *"States shall cooperate to develop further the international law regarding*

*liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."*

While the Declaration has only 'soft law' status, this is nonetheless an important statement of the duties and responsibilities of states in regard to the environment that may be cited in support of other legal actions taken. It could also be considered as adding substance to the provisions of Customary Law (see below), for example as regards transboundary harm.

#### **8.4 Washington Declaration on Protection of the Marine Environment from Land-based Activities**

Governments participating in the UN Conference held in Washington from 23 October to 3 November 1995 agreed on the Washington Declaration on Protection of the Marine Environment from Land-based Activities, in which they state as their common goal

*"sustained and effective action to deal with all landbased impacts upon the marine environment, specifically those resulting from sewage, persistent organic pollutants, radioactive substances, heavy metals, oils (hydrocarbons), nutrients, sediment mobilization, litter, and physical alteration and destruction of habitat".*

Action to tackle MPP is clearly included in these aims. But perhaps more importantly, the Washington Declaration sets out specific mechanisms for doing so, including the following on financing and the role of multilateral development banks and other agencies, which would be highly applicable to tackling MPP.

- *"9. Encouraging and/or making available external financing, given that funding from domestic sources and mechanisms for the implementation of the Global Programme of Action by countries in need of assistance may be insufficient;*
- *"10. Promoting the full range of available management tools and financing options in implementing national or regional programmes of action, including innovative managerial and financial techniques, while recognizing the differences between countries in need of assistance and developed States;*
- *"11. Urging national and international institutions and the private sector, bilateral donors and multilateral funding agencies to accord priority to projects within national and regional programmes to implement the Global Programme of Action and encouraging the Global Environment Facility to support these projects;*
- *"12. Calling upon the United Nations Environment Programme, the United Nations Development Programme, the World Bank, the regional development banks, as well as the agencies within the United Nations system to ensure that their programmes support (through, inter alia, financial cooperation, capacity-building and institutional-strengthening mechanisms) the regional structures in place for the protection of the marine environment;"*

#### **8.5 Global Programme of Action for the Protection of the Marine Environment from Land-based Activities**

[The GPA](#) was created in 1995 when over 108 governments declared "their commitment to protect and preserve the marine environment from the impacts of land-based activities, through the Washington Declaration (see above). Setting as their common goal sustained and effective action to deal with all land-based impacts upon the marine environment, specifically those resulting from sewage, persistent organic pollutants, radioactive substances, heavy metals, oils (hydrocarbons), nutrients, sediment mobilization, litter, and physical alteration and destruction of habitat."

It operates principally as a means of communication and sharing of knowledge and expertise among governments, international organisations and NGOs. For an example of its work on marine litter,

see the [report of its thematic session on marine litter](#) at its conference in October 2013 in Montego Bay, Jamaica. Further meetings are taking place in October 2017 and [marine litter is strongly on the agenda](#) for action.

## 8.6 Agenda 21 Chapter 17

Chapter 17 of the 1992 *Report of the United Nations Conference on Environment and Development* (Agenda 21), '[Protection of the Oceans, All Kinds of Seas, Including Enclosed And Semi-enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of Their Living Resources](#)', addresses the marine environment, including the oceans and all seas and adjacent coastal areas, from a sustainable development perspective.

Section B on Marine Environmental Protection begins with 17.18, 'Basis for action', states that *"land-based sources contribute 70 per cent of marine pollution"*, while litter and plastics are listed among the contaminants that *"pose the greatest threat to the marine environment"*. It concludes: *"Many of the polluting substances originating from land-based sources are of particular concern to the marine environment since they exhibit at the same time toxicity, persistence and bioaccumulation in the food chain. There is currently no global scheme to address marine pollution from land-based sources."*

Under 17.22, states *"in accordance with the provisions of the United Nations Convention on the Law of the Sea on protection and preservation of the marine environment, commit themselves, in accordance with their policies, priorities and resources, to prevent, reduce and control degradation of the marine environment so as to maintain and improve its life-support and productive capacities. To this end, it is necessary to: (a) Apply preventive, precautionary and anticipatory approaches so as to avoid degradation of the marine environment, as well as to reduce the risk of long-term or irreversible adverse effects upon it; (b) Ensure prior assessment of activities that may have significant adverse impacts upon the marine environment; (c) Integrate protection of the marine environment into relevant general environmental, social and economic development policies; (d) Develop economic incentives, where appropriate, to apply clean technologies and other means consistent with the internalization of environmental costs, such as the polluter pays principle, so as to avoid degradation of the marine environment; ... "*

In 17.23, *"States agree that provision of additional financial resources, through appropriate international mechanisms, as well as access to cleaner technologies and relevant research, would be necessary to support action by developing countries to implement this commitment."*

## 8.7 Our Ocean, Our Future: Call for Action

[This document](#) agreed by 193 UN member states at the 2017 Ocean Conference in New York, commits countries to:

- *"Accelerate actions to prevent and significantly reduce marine pollution of all kinds, particularly from land-based activities, including marine debris, plastics and microplastics ... and abandoned, lost or otherwise discarded fishing gear";*
- *"Promote waste prevention and minimization, develop sustainable consumption and production patterns, adopt the 3Rs- reduce, reuse and recycle- including through incentivising market-based solutions to reduce waste and its generation, improving mechanisms for environmentally-sound waste management, disposal and recycling, and developing alternatives such as reusable or recyclable products, or products biodegradable under natural conditions";*
- *"Implement long-term and robust strategies to reduce the use of plastics and microplastics, particularly plastic bags and single use plastics, including by partnering with stakeholders at relevant levels to address their production, marketing and use."*

The declaration also gives repeated support to sustainable Development Goal 14, to *"Conserve and sustainably use the oceans, seas and marine resources for sustainable development"*, which includes 14.1, to *"By 2025, prevent and significantly reduce marine pollution of all kinds, in particular from land-based activities, including marine debris and nutrient pollution"*.

## 8.8 The Honolulu Strategy

In March 2011, NOAA co-hosted the Fifth International Marine Debris Conference (5IMDC) in cooperation with the United Nations Environment Programme and other agencies and organizations. The conference brought the marine debris community together to develop and create a document known as the [Honolulu Strategy](#).

The Honolulu Strategy is a framework for a comprehensive global effort to reduce the ecological, human health, and economic impacts of marine debris. It is intended for use as a planning tool, common frame of reference for collaboration, and a monitoring tool on global, regional, national, and local levels. As a framework document, it *"provides a focal point for improved collaboration and coordination among the multitude of stakeholders across the globe concerned with marine debris"*, involving civil society, government, intergovernmental organizations, and the private sector. As such it does not provide targets or timetables, instead setting out three goals and a [series of strategies](#) to be put into effect by governments.

The Honolulu Strategy Goals are:

- A. *"Reduced amount and impact of land-based sources of marine debris introduced into the sea";*
- B. *"Reduced amount and impact of sea-based sources of marine debris, including solid waste; lost cargo; abandoned, lost, or otherwise discarded fishing gear (ALDFG); and abandoned vessels, introduced into the sea";*
- C. *"Reduced amount and impact of accumulated marine debris on shorelines, in benthic habitats, and in pelagic waters."*

The document is in fact highly informative on the entire problem of MPP and presents excellent strategies for dealing with the problem, making it highly recommended reading. However it may produce limited results since it includes no elements of compulsion that are binding on states or corporations.

## 8.9 Convention on Migratory Species Resolution on Marine Plastic

This [Resolution on Marine Plastic](#) was made under the legally binding [Convention on Migratory Species](#) at its Tenth Meeting in Bergen, November 2011. However it imposes no mandatory requirements on the parties to the Convention, instead *"requesting"*, *"encouraging"* and *"recommending"* them to take various beneficial actions, hence its listing under 'soft law'.

## 8.10 Stockholm Declaration

- Principle 2: The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.
- Principle 3: The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.
- Principle 21: States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas

beyond the limits of national jurisdiction.

## 8.11 Rio Declaration

The Rio Declaration on Environment and Development ([Rio Declaration](#)) was produced at the 1992 United Nations Conference on Environment and Development (UNCED), also known as the Earth Summit. Signed by over 170 countries, it comprises 27 principles intended to guide countries in future sustainable development. Relevant principles include:

- Principle 2: *"States have the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."*
- Principle 7: *"States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. ... "*
- Principle 11: *"States shall enact effective environmental legislation. ... "*
- Principle 13: *"States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."*
- Principle 14: *"States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health."*
- Principle 16: *"National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment."*
- Principle 19: *"States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith."*

## 9. Conclusions of legal review

### **Creating Marine Plastic Pollution is already against international law!**

The conclusion of this foray into international law is clear, and positive. A state that allows its plastic waste to contaminate the oceans, or the territories of another state, is already in apparent breach of three separate legally binding international Conventions of global scope, in addition to Customary Law, Conventions of regional scope such as OSPAR, Barcelona and Cartagena, and numerous 'soft law' declarations.

There is therefore no need to go through the effort of campaigning for a new law to forbid the pollution of our seas and oceans with waste plastic, since it is forbidden already.

Each of the three global Conventions, and most of the regional Conventions, also provide specific avenues of legal redress against countries that allow their plastic rubbish to contaminate the oceans. It should therefore be possible for a state A, that is suffering substantial harm from marine plastic pollution, and where a large part of that pollution can be identified as originating from another state B, whose efforts to limit its waste emissions are transparently inadequate, to invoke dispute proceedings against state B. In general the first stage should be to seek an amicable resolution of the dispute, but should that fail, mechanisms are in place for take legal action in an appropriate court or tribunal.

The choice of which Convention to apply to a given situation may not be a straightforward one. One may offer greater legal clarity in establishing the fault of state B. But another may offer more effective, lower cost, faster acting or more certain legal mechanisms through which to pursue a claim or complaint. And of course both states A and B would need to be parties to the chosen Convention.

As regards the application of Customary Law, this is by no means an easy option. To seek a UNGA referral to the ICJ would be a monumental diplomatic task. However If MPP moves further up global priorities for action in the future it may become an appropriate option, while also engaging many states in the effort to control MPP.

Likewise it would represent an enormous effort to successfully assert the 'popular sovereignty' doctrine of the people's right to defend their common heritage. That is something that is only likely to be achieved in the context of a much wider demand for revolutionary changes in global governance.

The considerable volume of 'soft law' is also effective in setting out the will of the international community over a period of decades, and in providing guidance for the interpretation of 'hard law' - both Conventions and Customary Law.

## **10. Next steps**

### **10.1 Harnessing the moral power of law**

International law is of immense importance for global governance in regulating the behaviour of states. But while its importance stems from the binding nature of the obligations that it confers upon participating countries, legal action to enforce those obligations is relatively rare. Most of the time, international law works through its moral power to shame law-breakers and thus deter them from illegal actions (or inactions). The presentation of credible, substantiated allegations of breaches of international law often constitutes an effective deterrent or coercive tool in its own right with no need for actual litigation.

On those relatively rare occasions when inter-state litigation under international law does take place, it is generally as the culmination of a long dispute process marked by severe intransigence by one or indeed both parties. Even when litigation does take place and binding judgement is handed down by the applicable court or tribunal, actual outcomes are often disappointing.

The immediate short-term value of the immense body of international law applicable to MPP is not, therefore, that it will render an offending state immediately liable to legal action. Most important is its moral and persuasive force. And while only states can litigate against other states for alleged breaches of international law, access to that moral and persuasive force is far more widespread, including to individuals and NGOs.

For example, in the context of an NGO campaign to persuade a government to step up to the mark on MPP, that campaign can only be enhanced if the campaign demonstrates that the government is in breach of solemn and binding international legal obligations, and that deadlines for action are looming under additional treaties. Calling on a government to adhere to treaty obligations and asking what plans it has to enter into compliance in a timely fashion adds an powerful additional campaign punch over and above a simple request.

The same applies to campaigns aimed at corporations that are directly or indirectly responsible for MPP, for example soft drink producers who use non-returnable plastic bottles, supermarkets who provide customers with free plastic bags, and other companies located in less public view in supply chains. While they may not be directly responsible for implementing international agreements and conventions, where they flout the clearly expressed intention of the international community through their actions, that fact may be used to shame them into taking responsibility for their

impacts.

It is therefore hoped that this report will empower campaigners around the world in convincing governments and corporations to take decisive and effective action on MPP, without recourse to actual litigation.

## **10.2 Preconditions for taking legal action**

None of the above is to rule litigation out where the moral force of treaty obligations has proven insufficient to improve a state's performance on MPP. But before taking such action, there are important pre-conditions that should be met.

As is always the case when points of law are being tested for the first time, it is important to be able to make a case which is absolutely clear and un-muddied. We would accordingly be looking for the following before encouraging any country to raise a dispute process. The party or parties taking or considering legal action (the Appellant) should:

- have selected the most appropriate legal instrument under which to take action, based on: the obligations it imposes on its parties; the procedures for raising and pursuing disputes; the likely costs that will or could be incurred; and the remedies available;
- have irrefutable scientific evidence as to the ecological and other harm caused by MPP;
- have clear evidence that it is suffering serious damage (financial and/or environmental) from MPP, a substantial part of which is caused by waste plastic arising from the territory of the country it is considering action against (the Respondent);
- have made exhaustive efforts to seek a satisfactory agreement with the Respondent to solve the problem, and be able to prove that these efforts have been made and ended in failure;
- be able to demonstrate that actions taken by the Respondent to limit its MPP, if any, are inadequate to the scale of the problem, and fall well short of best or even good environmental practice;
- be in a position to demonstrate beyond question its own good environmental practice as regards MPP;
- have prepared a clear, simple legal argument demonstrating that the Respondent is in breach of its legal obligations under the chosen legal instrument;
- have decided what remedies it is seeking from the Respondent, for example the symbolic return of waste plastic objects, monetary compensation, and/or changes in policy and waste management practise to be undertaken by the Respondent;
- have sufficient resources, or assurance of future incoming resources, to finance the costs of the dispute through to its conclusion;
- have assembled a support network of NGOs, other countries, individuals, journalists, media partners, etc, willing and able to spread the word about the dispute through the internet, traditional media, social media, etc, and so raise publicity about the entire MPP issue and garner public support for any action taken.

## **10.3 Identifying states that may be willing to seek legal redress**

Dispute mechanisms under international law may only be by states that are parties to a treaty against other state parties to the treaty in question. Experience suggests that few countries will be willing to seek immediate legal redress against those that are the main sources of MPP, even where they may have a compelling case for doing so and a fair chance of victory. Most of the countries suffering from MPP are small and poorly resourced, and will be nervous of risking scarce funds with no certainty of return, and of antagonising the larger, wealthier and more powerful states from which most MPP arises.

A number of states already stand out for their willingness to take action unilaterally on MPP and on

wider environmental issues including climate change. These are the states that should in the first instance be approached with a view to asking them to define miscellaneous plastic waste (MPW) as 'hazardous' within their domestic legislation.

A first place to look to identify states that may be willing to engage in a legal process to tackle MPP is the list, below of states that made significant voluntary commitments at the UN Ocean Conference. Note that some states have made more than one commitment, and that some commitments have been made in association with other states.

- [Albania](#): voluntary charge on plastic bags.
- [Algeria](#): public awareness / education.
- [Antigua & Barbuda](#): ban on T-shirt plastic bags.
- [Aruba](#): plastic bag ban, may extend to Curacao and St. Martin.
- [Austria](#) plastic bag restrictions, awareness-raising.
- Belgium: prepare cosmetics sectoral agreement to eliminate microplastics from consumer products; substitute plastic microbeads used to exfoliate or cleanse the human body from rinse off cosmetic products present on the Belgian market.
- [Cambodia](#): improve environmental waste management practices in coastal areas.
- [Canada](#): prevention / elimination of marine pollution from dumping at sea, microplastics research.
- [Canada](#): Microbeads in Toiletries Regulations due in summer 2017 will prohibit the manufacture, import and sale of all toiletries that contain plastic microbeads including cosmetics, non-prescription drugs and natural health products.
- [China](#): take effective actions to prevent the discharge of waste into sea, conduct joint monitoring and technological research on marine debris (micro-plastics).
- [Estonia](#): public awareness / information.
- [EU](#): establish Union-wide reduction target for marine litter. The proposal for an EU Plastic Strategy will contribute to this effort and will comprehensively address the problems caused by the leakage of plastic, including microplastics in the marine environment and is to be finalized by the end of 2017.
- [Fiji](#): introduce regulations to reduce the use of single use plastic bags.
- [Finland](#) committed to aim to ban no later than June 2020, the placing on the market of rinse off cosmetic products that contains plastic microbeads that are intended to be used to exfoliate or cleanse the human body.
- [Flanders](#): comprehensive, wide ranging action plan to combat marine litter.
- [France](#) committed to aim to ban no later than June 2020, the placing on the market of rinse off cosmetic products that contains plastic microbeads that are intended to be used to exfoliate or cleanse the human body.
- [Iceland](#): commitment to reduce marine litter in its waters over the next three years, reducing the use and increase recycling and appropriate treatment of all plastics, especially single-use items and used fishing gear. Focus on the prevention of marine litter entering the ocean from land-based and sea-based sources.
- [Iceland](#) committed to aim to ban no later than June 2020, the placing on the market of rinse off cosmetic products that contains plastic microbeads that are intended to be used to exfoliate or cleanse the human body.
- [India](#): research, awareness and local measures to reduce MPP production.
- [Indonesia / Denmark](#): Denmark to support Indonesia's National Marine Debris Action Plan, launching in June 2017. The plan aims to reduce plastic waste in the coastal areas and hereby reduce the plastic discharge in to the oceans with up to 80%, prioritising collection of plastic waste through National Solid Waste Management Programme.
- [Ireland](#) committed to aim to ban no later than June 2020, the placing on the market of rinse off cosmetic products that contains plastic microbeads that are intended to be used to

- exfoliate or cleanse the human body.
- [Ireland](#): Microbead ban in cosmetics and other household products.
  - [Kenya](#): protection of environment through implementation of ban (terms unspecified) on use of plastics.
  - [Luxembourg](#) committed to aim to ban no later than June 2020, the placing on the market of rinse off cosmetic products that contains plastic microbeads that are intended to be used to exfoliate or cleanse the human body.
  - [Maldives](#): avoid as much as possible the use of plastics in all fishing vessels, and to intercept all plastic waste that are produced by fishing vessels cruising in the Indian Ocean.
  - [Maldives](#): introduce legal framework to reduce plastic pollution. Progressive phasing out of non-biodegradable plastic bags, bottles and packaging, and promote the use biodegradable plastics.
  - [Monaco](#): reduction of plastic waste in the marine environment through plastic bags ban measures and 2020 ban on plastic utensils.
  - [Nauru](#): a one week nation-wide awareness and beach clean-up campaign.
  - [Netherlands](#): commitment to take action against marine litter through a dedicated programme of measures; main focus on prevention, through an source reduction.
  - [Norway](#): stepping up efforts to reduce the amount of microplastics ending up in the ocean; main focus will be on land-based sources of microplastics including wear and tear of car tires, artificial turf, paint and textiles.
  - [Norway](#) committed to aim to ban no later than June 2020, the placing on the market of rinse off cosmetic products that contains plastic microbeads that are intended to be used to exfoliate or cleanse the human body.
  - [Panama](#): work with United Nations Environment to finance and produce a National Action Plan on marine litter.
  - [Samoa](#): unspecified measures to reduce MPP.
  - [Samoa](#): measures to improve waste segregation, storage and disposal at source.
  - [Seychelles](#): full ban on import, use and trading of plastic carrier bags, styrofoam take-away boxes and plastic utensils (spoons, forks, knives, plates, bowls and cups to take effect in July 2017; establish centralised recycling center on the main island of Mahe for different waste streams including plastic.
  - [Singapore](#): upstream controls include integrated solid waste management system; anti-littering laws; waterways clean-up measures ensuring that land-based litter is prevented from entering oceans. Working towards becoming a Zero Waste Nation by reducing consumption, and reusing and recycling materials.
  - [St Vincent and the Grenadines](#): ban on the import of expanded polystyrene (Styrofoam) food service products took effect 1st May, 2017. Use of Styrofoam food service products will be strictly prohibited after 31st January, 2018.
  - [Sweden](#): deposit system for PET bottles; all littering punishable by fine or imprisonment; distributors of plastic carrier bags to inform consumers about the environmental impact of plastic carriers bags, the benefits of reduced consumption of plastic carrier bags, and measures to reduce consumption; map sources and reduce pollution from micro plastics; governmental commission to reduce the negative environmental impact from plastics, and map the environmental impacts of plastics throughout their life cycle and propose measures to reduce these impacts.
  - [Sweden](#) committed to aim to ban no later than June 2020, the placing on the market of rinse off cosmetic products that contains plastic microbeads that are intended to be used to exfoliate or cleanse the human body.
  - [Thailand](#): launch a Plastic Debris Management Plan comprising fiscal and financial tools for plastic debris management; promoting and encouraging eco-packaging design and eco-friendly substitutes for plastic materials; developing a material flow of plastic containers and

packaging inventory; implementing 3Rs (Reduce-Reuse-Recycle) strategy for plastic debris management; promoting education for relevant stakeholders; actively participate and cooperate with countries in the region including international and intergovernmental organizations to reduce plastic debris in the ocean.

- [Timor Leste](#): national awareness campaign on MPP.
- [Turkey](#): aim to reach a recycling rate of 65% for packaging waste and 35% for all recyclable waste by 2023. Starting from 1 January 2019 pricing of plastic bags will be on the agenda. continue efforts to prevent both land-based and ship-sourced marine litter.
- [UK](#): small compulsory charges on some plastic bags, ban on microbeads. Plastic bag charges carried out by devolved administrations have proved to be effective, reducing [plastic bag numbers on UK beaches](#) by 50% following introduction.

This judgement is inevitably subjective but in the author's estimation the states whose commitments made above and other roles / qualities indicate the greatest promise as partners in pursuing the 'Ocean Plastics Legal Initiative' are:

- Developed countries: Denmark, EU, Flanders (Belgium), Iceland, Norway (which already has a [deposit scheme on plastic bottles](#) that achieves 96% return) , Monaco, Netherlands, Singapore, Sweden.
- Low income countries suffering from MPP: Fiji, Maldives, Samoa, Seychelles, St Vincent and the Grenadines. Mauritius may also be included since it [banned plastic bags](#) from the beginning of 2016. Palau is also taking a leading role on ocean protection generally. In 2009 it [forbade shark-fishing](#) in its entire exclusive economic zone, and in 2015 it declared 80% of its EEZ a 500,000 sq.km [marine sanctuary](#) closed to all industrial fishing. It also has an exemplary [solid waste management system](#) for its own wastes that includes segregation of recyclable materials including plastics.

Given the preponderance of 'small island states' in the group of low income countries suffering MPP that are taking positive action on oceans, one way to progress the initiative would be through [AOSIS](#), the Alliance of Small Island States (a group which also includes one rich country, Singapore). The main activities of the Alliance to date have been in relation of climate change issues and the threat to its members from sea level rise. However there is nothing to prevent it from acting on MPP, another area of common environmental interest. AOSIS is currently chaired by Ahmed Sareer, the Maldives' Permanent Representative to the United Nations, and operates through the Maldives office at the UN.

There also exist regional partnerships of states concerned with ocean-related issues. These include [SPREP](#), the Secretariat of the Pacific Regional Environment Programme, which has a specific mandate on [waste and pollution issues](#)

We should also consider trying to assemble a broad alliance of states suffering MPP who can share their resources and experience, develop solutions, draft forms of words for domestic legislation, provide mutual political and diplomatic support, and move collectively towards taking action at a measured pace. We might call this group the 'Association of Marine Plastic Polluted States' (AMPPS).

## 10.4 First actions

While opportunities exist for legal action under UNCLOS, the London Convention, the Basel Convention, the Bamako Convention, the OSPAR Convention, the Cartagena Convention, Customary Law and numerous regional conventions, we propose to work initially within the Basel and Bamako Conventions, with AMPPS states being encouraged to designate general plastic waste as 'hazardous' within their domestic law and send the necessary notices to the Basel / Bamako Secretariats.

This step would achieve a number of useful objectives:

- establish among AMPPS states the principle of collective action, preparing the way for further actions in the future;
- bring mixed plastic wastes within the ambit of the Basel & Bamako Conventions, so empowering them to refuse deliberate imports of such wastes;
- encourage other states to follow their example;
- send an unmistakable signal to MPP producing states;
- provide a platform for them to take legal action against MPP producers whose wastes are reaching their territorial waters and shores, individually or collectively, under the Basel Convention or another legal instrument, as may seem most likely of success.

In the event that a state or group of states was to raise a dispute under international law to assert its legal rights to clean seas and beaches, it would surely attract considerable support from environmental NGOs and individuals from around the world. In the event of actual legal action, they could also seek to 'crowdfund' their legal costs by reaching out to this global community.

A legal victory would establish a clear fact that would be reported around the world: for a country to allow its plastic waste to enter the oceans is not just wrong and morally obnoxious, but illegal, and could give rise to claims of financial compensation by a polluted state against polluters. This would add a new, badly needed urgency to international action to tackle the ocean plastic problem.

This action would send out a powerful signal in its own right and solidify an effective, politically resilient coalition of states willing to act to save our oceans.

## 10.5 Potential partners

Existing NGOs operating in the same area will also be essential partners, with considerable knowledge and expertise to offer, and able to reach out to supporters and governments in the countries in which they operate. We hope these would include the following. \* indicates existing APE-UK partners:

- [5 Gyres Institute](#) "*empowers action against the global health crisis of plastic pollution through science, education, and adventure.*" \*
- [Advisory Committee on the Protection of the Sea](#) (ACOPS), established to "*promote strategies for sustainable global development relating to coastal and marine environment through scientific, legal and policy research and advisory and public awareness activities.*"
- [Basel Action Network](#) (BAN), which works to end the trade in toxic wastes and support the aims of the Basel Convention;
- [Birdlife](#) international network;
- US-based [Blue Frontier](#), which "*builds the solution-oriented citizen engagement needed to protect our ocean, coasts and the communities, both human and wild that depend on them.*"
- [Blue Planet Society](#), a self-funded volunteer organisation campaigning for cetaceans, sharks, turtles, sea birds and other.. endangered marine wildlife.\*
- [Client Earth](#), a UK-based charity operating around the world dedicated to harnessing the power of the law to protect our planet;
- [EarthJustice](#), the USA's "*original and largest nonprofit environmental law organization*", committed "*to fight for justice and advance the promise of a healthy world for all.*"
- [End Ecocide](#) campaign, set up by barrister Polly Higgins to campaign for laws to criminalise 'ecocide', the mass destruction of life and ecosystems.
- the [Friends of the Earth International](#) network.
- [Friends of Marine Life](#), which is working to safeguard the marine biodiversity and coastal ecosystems services in South India, documenting and sustaining the traditional and local knowledge of the coastal communities of Kerala and Tamil Nadu. \*

- [Great Whale Conservancy](#) protects the world's great whales and their habitat, providing *"information, ideas and opportunities for people of all ages, all over the world, to join the effort and act on behalf of Earth's Great Whales."* \*
- [Greenpeace](#) international network. \* (GPUK)
- Live Without Plastic. \*
- [Marine Conservation Society](#), which *"champions the need for marine wildlife protection, sustainable fisheries and clean seas and beaches."*
- [Marine Litter Network](#).
- [Marinet](#), a UK-based *"community marine campaigning organisation made up of Members like you"*.
- [Natural Resources Defense Council](#), which *"uses law, science and activism to protect the planet's wildlife and wild places."*
- [Ocean Cleanup](#), which *"develops advanced technologies to rid the world's oceans of plastic. A full-scale deployment of our systems is estimated to clean up 50 % of the Great Pacific Garbage Patch in 5 years."*
- [Ocean Conservancy](#), which *"creates science-based solutions for a healthy ocean and the wildlife and communities that depend on it"*.
- [Ocean Foundation](#), *"a unique community foundation with a mission to support, strengthen, and promote those organizations dedicated to reversing the trend of destruction of ocean environments around the world."*
- [Oceanic Global](#), *"a non-profit that taps into universal passions of art, music and emerging tech to educate individuals on issues impacting our oceans and provide them with solutions for driving positive change."* \*
- [Peace Boat](#), *"a Japan-based international non-governmental and non-profit organization that works to promote peace, human rights, equal and sustainable development and respect for the environment."* \*
- [Pew Charitable Trusts](#), a \$5 billion foundation with a strong record of supporting [environmental initiatives](#), and those aimed at [ocean conservation](#) in particular.
- [Plastic Change](#), working to develop solutions to marine plastic pollution. \*
- [Plastic Oceans Foundation](#), a global non-profit organization dedicated to protecting our oceans from plastic pollution. \*
- [Plastic Pollution Coalition](#), founded in 2009, now comprising over 500 NGO members, whose *"mission is to stop plastic pollution and its toxic impact on humans, animals, and the environment."* At the 2017 Ocean Conference it submitted as a voluntary commitment its [International Working Group Coordination for Plastic Pollution Reduction](#). \*
- [Project Aware](#), with offices in the US, UK and Australia, which works with the diving community on shark conservation and the elimination of ocean debris.
- [Save Our Seas Foundation](#), based in Switzerland, which *"funds and supports research, conservation and education projects worldwide, focusing primarily on charismatic threatened wildlife and their habitats."*
- Searious Business. \*
- [Sea Shepherd Foundation](#), which as well as intervening in the high seas to prevent illegal fishing and protect cetaceans, also works on [combatting ocean plastic in Cabo Verde](#) and other countries.
- [Sea Shepherd Legal](#), a nonprofit public interest environmental law firm led by a team of attorneys dedicated to marine conservation.
- [Surfers Against Sewage](#), which campaigns and organises activities to make the UK's seas and beaches fit for surfers and other users. Originally working to reduce untreated sewage outflows, their remit is now greatly broadened to include wider aspects of ecosystem health.

\*

- [Waste Free Oceans](#), whose "mission is to collect and transform ocean plastic" by collecting and transforming ocean plastic into new beautiful products. Based in Brussels, WFO also operates in the Americas and Asia. \*
- [Whale & Dolphin Conservation Society](#), striving for "*a world where every whale and dolphin is safe and free.*"
- [WWF](#) international network.

A further group that we will need to engage is the academic community working on ocean plastics, international law, and related issues, who will be key in collating evidence of the harm caused by MPP, and providing evidence of where MPP is coming from. Relationships could be formed with institutions (such as the UK's [Plymouth Marine Laboratory](#)) and with individual scientists (such as [Jennifer Lavers](#) of the Institute for Marine and Antarctic Studies, University of Tasmania, founder of [Save Our Seabirds](#) and legal experts such as [Catherine Redgwell](#) of All Soul's College, Oxford, director of the Oxford Martin School's [Sustainable Oceans](#) programme), and [Mary Christina Wood](#), Professor of Law at the University of Oregon.

Other notable individuals who may support the initiative include David Miliband, former chair of the now-closed [Global Ocean Commission](#); and the organisation's other principals, former Costa Rican President José María Figueres, and former South African Finance Minister Trevor Manuel.

## 10.6 Taking OPLI forward

The Ocean Plastics Legal Initiative (OPLI) has emerged from the work of Artists Project Earth (APE), a small UK-based NGO that for all its ideas and energy, lacks the resources to carry it through to completion. The next step in take OPLI forward is therefore to seek wider support and participation from the NGO community, countries, foundations, media organisations, campaigners, academics, other individuals, etc, in order to:

- secure the funds for a small secretariat with dedicated campaign staff, for costs of travel to attend important meetings and conferences, and to confer with actual and prospective partners in diverse parts of the world;
- engage a wide community of partners and supporters;
- serve as a 'hub' / secretariat for an AMPPS organisation should a sufficient number states wish to form one and request us to provide this service;
- commission legal advice from international lawyers expert in maritime, waste and environmental law;
- inform and remind states of their responsibilities under international law regarding MPP as set out above;
- receive and disseminate important relevant information to campaigners and other interested parties;
- provide all necessary support to countries taking or interested in taking action on MPP under international law.

*Oliver Tickell for [Artists Project Earth](#).*