LIABILITY FOR OIL POLLUTION DAMAGE RESULTING FROM OFFSHORE OPERATIONS

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INTRODUCTION[1]

As long as there is no specific legislation or international convention in force, a pollution incident will be governed by the ordinary rules of civil liability. The same applies to the jurisdiction of courts. Whether a court in a given country regards itself as competent to deal with an incident will depend on whether there is a forum for the dispute according to its national law. And the court will apply the legal system indicated by its rules on private international law. Whether liability is to be limited or unlimited, whether it is to be strict or based on fault, will in its turn be decided on the basis of the existing general rules and principles of civil liability in the legal system thus applied.

A judgment in favour of the injured party does not, as is well known, automatically mean that the latter will obtain compensation in practice. Here one is faced with the questions of whether any assets exist in the country of the forum belonging to the party liable, whether that party is willing to fulfil the judgment voluntarily, and whether there is any system of execution and recognition of judgments which may be applied in regard to assets in a foreign state.

Unification of Rules in the Matter of Liability for Pollution from Offshore Operations—Some General Comments

From an overall viewpoint, the existence of a diversity of municipal laws may not cause any extreme disadvantage to the industry, or to the parties which may sustain pollution damage. The need for unification of national rules may seem to be somewhat less marked than in the field of shipping. Many pollution incidents will be purely national in character. Offshore

[1] The author is indebted to Sverre Erik Jebens, research assistant at the University of Oslo, and Elsa Skarprud, librarian, Alfred Nobel Foundation, Oslo, for valuable assistance in the preparation of the present paper. The paper incorporates views put forward by the author in a lecture given in a Conference on Risk Management in Offshore Oil Recovery held in London March 5–6, 1975, as well as in a lecture on "Liability and compensation" at the Offshore North Sea Conference and Exhibition in Stavanger, September 1974 (see O.N.S. papers, published by the Norwegian Society of Chartered Engineers, 1974).

drilling is carried out under the jurisdiction of a certain coastal state. In many cases it will be that same coastal state and no other which is likely to be the victim of an accident.

There is, however, need for unification, or at least some kind of international regulation, when we come to what may be called *international* pollution, i.e. the case where oil from the continental shelf of state A drifts over to the shore of state B and causes damage there. Such cases of international damage may lead to the rather unfortunate practice of "forum shopping": victims may try to concentrate their actions at places where they think the possibilities of obtaining favourable judgments and executing them are the greatest. Further, one may encounter difficult legal and practical questions as a result of conflicting laws and judgments in several states.

More important, however, than these niceties of legal theory and technique is the possibility that victims will be denied compensation because the damage has been caused by installations under the jurisdiction of a foreign state. Or at least, they may be subjected to hardship, uncertainty and great expense because any effective judgment against the companies involved will have to be obtained before a foreign court.

The geographical situation of the North Sea continental shelf is such that, if a major pollution incident should occur, the possibility of international pollution, involving two or more countries, is considerable. This was the background of the discussion at the Intergovernmental Conference in London in March 1973, and the subsequent convening of a working group in order to examine the prospects of a regional convention.[2]

SYSTEM OF LIABILITY—ITS RELATION TO THE EXTENT OF LIABILITY

As far as substantive law is concerned, there is no *a priori* reason why the existing general principles on civil liability should not be satisfactory in relation to the question of offshore operations, from the viewpoint of the industry as well as from that of the victim.

[2] The Conference was intended as a preliminary discussion among North Sea States on matters of safety and pollution and has led to the convening of another Conference to deal with the question of liability for pollution in particular. The first session of this Conference took place in London from October 20 to 31, 1975, between delegations from Belgium, Denmark, France, the Federal Republic of Germany, Ireland, the Netherlands, Sweden, the United Kingdom and Norway (with the present author as head of the Norwegian delegation). It is expected that the Conference will continue at a second session, possibly in June 1976.

In a purely general way, this may also be said to apply to the question of limitation. Further, it may at this stage be pointed out that a limitation of liability to any fixed amount is not likely to apply on the basis of existing law.[3] A limitation would in most cases require statutory provisions in that direction. Whether or not there will be strict liability will vary from state to state.

The traditional system of European law has been that of liability based on fault. This is combined with rules on vicarious liability, so that the owner of an enterprise will be liable not only for his own personal faults but also for those of his employees. The difference between such a system and the system of strict liability is to be found where there is no person to blame for the accident, or where the person to be blamed has not acted within the organization of the licensee or operator, if the action is directed against such licensee or operator. In cases where there is a third party, i.e. someone not belonging to the organization of the licensee or operator, who is at fault, there would in the first instance seem to be no need for strict liability. Where such a third party is concerned, however, it is not certain that sufficient financial means will be available; therefore, some system of strict liability on the part of the licensee or operator would seem to suggest itself even in this case.

In addition to the fault principle, combined with vicarious liability, most European systems also provide for some kind of strict liability according to more or less general rules or principles. To what extent such rules or principles may be applied to the oil industry is open to some doubt. In the United Kingdom, strict liability is imposed for such use of land as creates risks for the neighbourhood, following the judgment in *Rylands* v. *Fletcher* concerning risk-creating use of land.[4] The view has been put forward that this would not apply to offshore operations, since these are not carried out on "land". Whether this way of distinguishing the case is tenable would, however, seem to be open to discussion.

In Norwegian law rules on strict liability have been developed by the courts. It seems fairly clear that these rules on strict liability would also cover pollution damage resulting from offshore activities. General considerations on the creation of risk and the need for protection of the victim apply. There is no fixed limitation on such liability.

[3] A reservation must here be made for cases where the operator of a drilling platform may be regarded by courts as operating a vessel, with the consequence that his liability may be limited in accordance with the existing legislation on the limitation of shipowners' liability.

[4] 1866, L. R. I Ex. 55. On the *Rylands* v. *Fletcher* rule and subsequent practice, see, *inter alia*, Fleming, *The Law of Torts*, 4th ed. 1971, pp. 280 ff., *Clerk & Lindsell on Torts*, 13th ed. 1969, paras. 1481 ff., *Winfield on Torts*, 8th ed. 1967, pp. 408 ff., and *Salmond on Torts*, 15th ed. 1969, pp. 401 ff.

The Royal decree of December 8, 1972, sec. 51, prescribes that "Norwegian law" shall be applicable in cases of damage. The decree does not in itself lay down any substantial rule as to the system and extent of liability, with the exception of a rule to the effect that if a person has caused damage, his employer and the licensee shall be jointly and severally liable. In consequence the ordinary Norwegian rules on civil liability will be the ones which govern the matter, at least as far as Norwegian courts are concerned.[5] It may be noted that as such the decree is only concerned with operations on Norway's own continental shelf and the legal consequences thereof.

In addition to the fault principle, Norwegian law provides for vicarious liability making the employer liable for faults committed by a person in his service. This rule is now embodied in an Act on torts of June 13, 1969.

The principle of strict liability, which has been developed by courts in the form of separate rules additional to those of fault and of vicarious liability, connects liability to activities creating a risk. The courts' reasoning in deciding whether a certain enterprise should carry the costs of damage caused by its activity embraces several factors. Such factors are, *inter alia,* the likelihood of damage, the extent of potential damage, and the feasibility of insurance. The general principle is that an activity creating a more or less permanent risk to its environment, exceeding the risks and the types of damage one may otherwise expect to encounter in ordinary daily life, should bear such risks rather than should the injured parties, who are not responsible for the activity undertaken and do not have the same possibilities of avoiding damage or protecting themselves against it, or even calculating it as one of the expenses of the activity, as has the enterprise itself.

At the Intergovernmental Conference in London in 1973 it was pointed out by the Dutch delegation that the aim of a convention should be to secure the best protection possible for an injured party without putting an unreasonable burden on the licensee. It was proposed that strict liability should be the basis of a convention. There was general agreement among the delegations on this point. The same has been the case in the further work carried out on the drafting of a proposal for a regional convention at the intergovernmental level.

On the other hand, opinions have differed with regard to the question whether there should be any limitations of liability corresponding to those in several conventions concerning shipowners' liability. As regards the two most important continental shelf countries in the North Sea area, the government of the United Kingdom has been strongly in favour of limiting the operator's or licensee's liability to some 20–25 million US dollars, while the Norwegian Government is in favour of unlimited liability (but might possibly accept an international convention on a certain limitation of liability on a

[5] A special Act on liability for pollution from offshore operations incorporating the existing principle of strict and unlimited liability will probably be proposed in the latter part of 1976.

reciprocal basis for cases of international pollution; provided that the freedom to legislate is retained in so far as domestic cases are concerned, i.e. where persons within Norwegian territory or jurisdiction sustain damage as a result of operations which are carried out within Norway's own jurisdiction, in other words the case of a "Norwegian" victim *versus* a "Norwegian" licensee).

What would strict liability imply compared with liability based on fault? There may seem to be some fundamental differences concerning the very approach to the question. For a lawyer who is used to a domestic system where the rule on fault is the *alpha* and *omega* of the matter, it may seem natural to regard the acceptance of strict liability as a concession, which, in its turn, would demand some kind of consideration or compensation, in the form of a limitation on liability or certain exceptions to strict liability, or both. The views as to what is an advantage or a disadvantage in relation to the present situation may, however, differ: for the victims an extension from fault to strict liability will be considered as a move in their favour; for representatives of the industry it will be the opposite. If acceptance by the industry or their representatives were a condition for the coming into being of a convention—which, in principle, should not be the case as regards civil liability—it might be natural for them to demand a *quid pro quo*. At the 1969 Brussels Conference on oil pollution from ships this was indeed the situation. As there existed an earlier system of fault liability combined with a limitation (with the exception of the fault or privity of the owner himself), it was necessary to obtain the agreement of shipping states (or states concerned to a large extent with the interests of the shipping industry). A compromise was here required.

On the other hand, a lawyer who is used to a system of strict liability without limitations will consider this the natural system to apply to oil pollution damage resulting from offshore operations. For such a lawyer, there will be no *prima facie* indication that strict liability should be compensated by limitations or exceptions.

TANKER CONVENTIONS

Strict liability, with certain exceptions and rules on limitation, has been laid down in the Brussels Convention of November 29, 1969, on Civil Liability for Oil Pollution Damage. The Convention liability is limited to an aggregate of 2 000 so-called Poincaré francs for each ton of the ship's tonnage. This aggregate amount must not, however, exceed 210 million francs (approximately Nkr 100 million or, according to the then existing rates of exchange, US $14 million). The 1969 Convention is supplemented by the

Convention of December 18, 1971, on an International Fund for Compensation for Oil Pollution Damage. According to this Convention, liability may go up to a maximum of 450 million francs (approximately Nkr 215 million or, according to the then existing rates of exchange, US $30 million). Basically the Fund has to take care of damages above the ceiling of the shipowners' liability. To some extent it also relieves the shipowner of the additional burden imposed by the 1969 Convention as compared with traditional maritime law.[6] In what follows these two conventions are called the Tanker Conventions of 1969 and 1971.

There is no limitation on shipowner liability in case of the shipowner's personal "fault or privity".

The development in regard to pollution from ships, and more particularly, pollution by oil from tankers, presents us with some rather special and perhaps peculiar aspects. To understand this we must remember that the starting point was the traditional principles of maritime law: in short, shipowner liability based on fault, by the owner himself or by persons in his service, and limitation of liability by statute and by international conventions according to the ship's tonnage, with unlimited liability only in case of "fault or privity" of the owner.

The next stage in the development was the stranding of the *Torrey Canyon* on March 18, 1967. The accident served to demonstrate that existing rules on maritime law, and more particularly the law on tort liability, were not adequate. Both the system of liability—strict *versus* fault—and the amount were taken up for consideration by the IMCO Legal Committee, which indeed was set up as a direct result of the initiative by the United Kingdom Government following upon the *Torrey Canyon* incident. Civil liability was one of two main items which were proposed for consideration by this new body. The other was that of intervention on the high seas in cases of oil pollution casualties. The two conventions on civil liability and on intervention which resulted from the preparatory work of the Legal Committee, and which were adopted at the diplomatic conference in Brussels in November 1969, are, perhaps not very accurately, often referred to as the civil-law and the public-law convention, respectively.

To understand the relationship between different interests which led to the Tanker Convention of 1969, it is necessary to look upon the case of tanker accidents as involving three parties: the victims, the shipowners, and the cargo owners or oil companies. Possibly one might add as a fourth party the consumers, who will eventually have to carry the costs of produc-

[6] See art. 5 of the 1971 Convention (the amount lies between 1 500 and 2 000 francs for each ton of the ship's tonnage, or between 125 and 210 million of the aggregate amount).

tion, transportation and distribution of oil in the form of prices calculated to cover the damage to third parties which is caused by transportation and liability therefor. In the case of pollution from an oil well the situation is perhaps less complex. There is only the oil industry on one side and the victims on the other. Here, too, one might possibly add the consumers. However, there is also a certain difference of interests and of opinions between the owners of oil rigs (often actually shipowners who have gone into the drilling business as a result of the offshore development in the North Sea) and the oil companies as owners or concessionaires of an oilfield; a difference which may be looked upon as a parallel to the conflict of interests between the shipping and the oil industry in regard to tanker liability. But the situation is not the same. There seems to be no serious doubt that the main subject of liability must be the oil company or companies, which will also have the main economic interest in the operations carried out, and not the owner of the drilling rig involved. Another question, the answer to which however does not seem equally clear, is whether liability should be placed on the licensee or licensees as such, or on the company which has been designated as operator of the field by and on behalf of the licensees.

Of course, one cannot say that the representatives of states are exclusively the representatives of either the victims, the oil industry or the shipping industry. A fairly complex case in the IMCO Legal Committee was that of the United Kingdom, whose shoreline and whose inhabitants had been the victims of the *Torrey Canyon* incident, but which also had important interests to consider with regard to its shipping industry and oil companies as well. Norway did not then have the same direct interests as far as oil companies were concerned. On the other hand, both the need to protect the Norwegian fishermen and the interests of the shipping industry were important considerations, although it has been said that the main emphasis was put on the latter.[7]

> The background of the compromise in relation to tankers is rather complex. The preparatory work for the liability convention was—in my opinion wrongly—left to a large extent to the Comité Maritime International, which is a non-governmental body. Consequently, private lawyers and others representing the various domestic maritime law associations came to play a role in this field which was not wholly in proportion to the interests at stake (those of national policy, in regard to possible pollution disasters and the costs of governmental clean-up operations, the need to protect fisheries and recreational values, etc.). The inclination to remain in the paths of traditional

[7] Herber, "Das internationale Übereinkommen über die Haftung für Schäden durch Ölverschmutzung auf See", *Rabels Zeitschrift* 1970, pp. 223 ff., at pp. 237 f.

maritime law may have been too strong. In the view of the present author, the Tanker Convention of 1969 was a frustrating outcome of this approach, only partly mitigated by the 1971 Convention on the International Fund for Compensation for Oil Pollution Damage.

In addition to the Conventions of 1969 and 1971, two private arrangements should be mentioned. Under TOVALOP (Tanker Owners Voluntary Arrangement Concerning Liability for Oil Pollution) of January 7, 1969,[8] a shipowner who is a party to the agreement undertakes to pay up to US $10 million in the event of an oil pollution incident. This liability is based on fault, with the reversal of the burden of proof. Under CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution) of January 14, 1971,[9] an oil company which has accepted the agreement will contribute to a fund. In each case compensation may be paid out up to a maximum of US $30 million (including what is paid under TOVALOP or under the rules of domestic law). The system is, as will have been noticed, fairly similar to that of the Brussels Convention on an International Fund of December 18, 1971.

It should be noted that the initiative for TOVALOP was taken by oil companies, although they acted in their capacity of tanker owners.

In my opinion it might be argued that this voluntary agreement on shipowners' liability among tanker owners, which was initiated by tanker owners who also had large interests at stake as cargo owners, has in fact contributed to the conserving of the traditional principles of maritime law, particularly on shipowners' liability instead of cargo owners' liability. If so, the TOVALOP agreement may have had the effect of limiting the chances of finding new solutions which—perhaps—might have been more adequate in this field of environmental protection. This is, however, a pure hypothesis. And the system of TOVALOP and the 1969 Brussels Convention has not prevented the combined solution from also incorporating a kind of cargo liability established within the framework of the later CRISTAL agreement as well as the 1971 Convention on the International Fund.

For better or worse, the oil companies have been in the lead in the efforts to establish new schemes and new rules in the field of environmental protection through civil liability. This may also be the situation in respect of pollution from offshore operations.

On the one hand, the other parties—including states and victims—should welcome the initiatives taken and the acknowledgment of responsibility thus shown by the oil companies. On the other hand, it is only natural that the companies must at the same time look after their own interests—they are under an obligation towards their shareholders to do so—and that the solutions proposed may therefore to some extent deviate from what would be the optimum in the eyes of the other parties or from an "objective viewpoint" (if such a thing does indeed exist).

[8] 8 *International Legal Materials* 497 (1969).
[9] 10 *International Legal Materials* 137 (1971).

Relevance of the 1969 and 1971 Tanker Conventions as Precedents in Relation to Pollution from Offshore Drilling

The value of *the 1969 Tanker Convention* as a precedent in the matter of offshore drilling may be open to some doubt. First, the Convention is a result of a compromise reached on the basis of two main interests, that of the shipping states and that of the coastal states exposed to damage. Secondly, the 1969 Convention must be regarded as a compromise in relation to traditional rules of maritime law. Rules of maritime law, laid down in international conventions, were already based on a certain system of liability. The development of new rules in regard to oil pollution was dependent upon the willingness of shipping states to accept changes in relation to the existing conventional regime. If shipping states should, nevertheless, find themselves willing to accept a change from fault to strict liability for oil pollution caused by ships, this would have to be balanced against a limitation of liability and certain exceptions to the no-fault principle.

Thirdly, the 1969 Convention must be viewed in regard to insurability and the financial capabilities of the party liable, the shipowner. His economic potential will usually not be of the same magnitude as that of a large oil company. Nor will there be the same financial backbone, so to speak, that can be found in the oilfield which is the cause of a spill. Fourthly, the Convention was built on the possibilities of obtaining insurance on the then existing insurance market, especially the London market, a forum not immediately relevant in relation to offshore operations. At any rate, the 1969 Convention is combined with the 1971 Convention on an international fund. The 1969 Convention is therefore only "half the truth". As was envisaged already at the Brussels Conference in 1969, the 1971 Convention supplements that of 1969 both by filling in the loopholes in the 1969 Convention and by raising the limit of liability. The conclusion is therefore quite clear as regards the 1969 Convention in regard to the matter here before us, namely that the 1969 Convention alone cannot be invoked as a precedent.

Another question is whether *the combined system of the 1969 and the 1971 Conventions* can be viewed as a precedent. This question may likewise be answered in the negative, as here, too, we have a system based on the special situation of the carriage of oil in bulk as cargo, which is not the same as that of offshore oil recovery. On the other hand, one may point to the facts that ultimately the costs imposed by the two Conventions together will have to be borne by the cargo owners and by the consumers; that the oil companies are behind the operations of drilling as well as the owners of the oilfields or the holders of concessions; that there is no such splitting-up

of interests and of liability as exists between transporters and cargo owners in regard to pollution from tankers; and that the combined system of the 1969 and the 1971 Conventions demonstrates the capacity to pay compensation at least up to the amounts specified therein. In other words, the situation of offshore oil extraction may be viewed as an analogy to the case of tanker liability, where the oil industry both is the owner of the tanker and is responsible through the international fund created by the 1971 Convention, a situation which, in fact, is not uncommon.

LIMITATION OF LIABILITY

(a) General Comments

To the extent that the rules of maritime law may be applicable, a limit on liability to a fixed amount may be laid down even under existing law. It does not seem probable, however, that a drilling rig in operation—still less a platform—could be regarded as a ship. In any case, the limitation following from such a viewpoint would only apply to the owner or operator of the rig, not to the licensee or owner of the oilfield, and here we are mainly concerned with the licensee or the owner.

From a general point of view, it seems that provisions should be made for compensation to the victim for all damage sustained as a result of the operations. The reasoning behind the principle of strict liability is that the damage caused by a given activity should be borne by the owner or operator as a cost of the activity, rather than by the unfortunate victim who may happen to suffer damage. The same general principle has, *inter alia* in the Council of Europe, found general acceptance as the so-called "Polluter-Pays Principle". This principle may be said to apply whether or not damage is above a certain fixed limit.

The historical precedent of the limitation of shipowners' liability is not necessarily relevant to offshore operations, where there is no similar traditional system of limited liability creating expectations of continuity.[1] Here, there are reasons to apply our general considerations with regard to the question who should carry the burden of the expenses of the industry.

The objection might be made, from the view of equity, that it may be too severe a burden upon the industry to make it strictly liable without any

[1] It would be going beyond the scope of the present paper to discuss the reasons for the existing rules on limitation of shipowner liability and their feasibility under modern conditions. As suggested in the text, there may be some justification for the present system in the maritime law so long as it is applied to shipping, although this would not be so in the case of the oil industry, which has little to do with "ships".

limitation. This argument has indeed a *prima facie* validity, as the imposing of a severe burden of liability is never equitable in itself. On the other hand, we must ask whether it would be more equitable to let the burden lie on the third party which happens to suffer such damage—quite frequently major damage—as may often be the result of an oil spill.

A second reason for limited liability in this field is of a purely practical and political nature. It may be that the risk of unlimited liability will deter oil companies, or at least certain companies, from taking part in operations on the continental shelf.

> Whether there is any substance in such objections is a question that can only be answered on the basis of practical experience. It seems that the situation of the North Sea shelf is here particularly relevant. Oil companies have had to conform to the present Norwegian rules on strict liability, and even to confirm the principle of strict and unlimited liability in their acceptance of the conditions for oil and gas concessions. Nevertheless, there has been no tendency for companies to refrain for this reason from operations on the Norwegian shelf or to withdraw therefrom. It seems a tenable contention that the rules on civil liability have little relevance for decisions as to whether or not a company shall take part in operations on a certain continental shelf and apply for a certain licence.
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> In this connection it must be borne in mind that most countries, even if they do not practice strict liability, will have rules on vicarious liability. Such liability will in practice be unlimited. With the exception of shipowner liability, there is usually no legal ground for limiting the liability of a master so that he will only be liable for part of the damage caused by one of his servants. No oil company has any guarantee that some employee or other may not be at fault in connection with an accident, or at any rate that a court may not find that this is the case. One may even say that there is a presumption of fault if something goes wrong, causing a major accident, as this should not have happened if everybody on the platform had done what he was supposed to. If the risk of heavy costs as a result of unlimited liability was sufficient to cause a company to refrain from offshore operations, or in other words if the leaders of oil companies slept that badly at night, one might have expected that they would have withdrawn from any operation anywhere in the world as long as there existed the principle of vicarious liability for faults committed by servants. Indeed the difference between strict liability and liability based on fault may not be very great in regard to the number of cases leading to liability under the two different systems. For example, it has been said that Danish courts tend to establish liability by finding negligence in most cases where, if the case had come before a Norwegian court, the general principles on strict liability (which are not formally recognized in Danish law) would have been applied.[2] Therefore, one cannot expect that a country with unlimited fault liability will be much more attractive to the oil industry than will a country with unlimited strict liability. This difference does not constitute an important factor in

[2] Cf. Trolle, "På vej mod det objektive ansvar—eller tilbage til naturen", *Norsk Forsikringsjuridisk Forenings Publikasjoner,* no. 51 (1965).

serious considerations by the industry as to whether or not a certain possible oilfield or natural-gas source should be developed and as to what amounts should be invested for this purpose.

Secondly, a reason for limited liability is that unlimited liability may cause unnecessary expenses in the way of insurance, etc., where this is not justified by any practical need for the protection of victims. Whether this view is tenable is open to doubt, as it is difficult to establish in advance what may be the possible consequences of a major oil spill, in particular as far as clean-up expenses are concerned. (Cf. below.)

As for the implications in relation to insurance, it seems clear that an obligation upon the owner, operator or licensee to insure against damage must be confined to a certain limit (even if the owner, etc., is himself liable without any limitation).

The practical effect of a limitation would be that any damage caused by the operations in excess of the fixed limit would have to be borne by the victim or by the Government, while the company or companies involved would at the same time be able to take out the profit from the field. This would apply, having invoked the limitation, if an accident should indeed occur which resulted in losses exceeding the limitation figure. In cases where the aggregate losses come below that figure, the limitation has no practical effect whatsoever—liability might as well have been unlimited. Compensation is paid *in toto*. It may be said that it is inherent in the character of a limitation on liability—viewed from the *ex post facto* angle, after the accident has happened—that it will always and *per se* curtail the rights of the victims and enable the responsible party to take profits from his operations without paying the expenses involved in full.

On the other hand, a limitation will be of some practical interest in the *ex ante* situation, before an accident has happened. It relieves the company of the risk as such. However, this is only one of several risk factors, of vast economic importance, which are involved in the oil business. The value of installations, which may also be lost as a result of an accident (not necessarily involving pollution), may be far greater than the amounts which can reasonably be expected to be involved in legal actions on civil liability. Also the amounts which are knowingly spent on a far less than even chance of making a discovery of a commercial oil or gas deposit are far greater than those which may be imposed through liability for pollution. There is no possible way of relieving the oil and gas industry of the vast financial risks involved in their operations which they would have to face in any case, with whichever system.

An important consideration may be that of the day-to-day costs of operations, including insurance. The larger the amount which is insured,

the greater the expense. But there is no compelling reason why all liability which a company may incur should be covered by insurance. If a reasonable ceiling is put on the obligation to insure, it is for the company to choose whether it should insure above that limit on a voluntary basis or carry the risk itself. No necessary day-to-day expenses are involved in regard to the tort liability of the oil company for damages exceeding the ceiling as opposed to that which it is obliged to cover by insurance.

It may be asked whether this liability above the amount covered by insurance is of practical interest to the victims. The answer, clearly, is yes. Reference may be made to the value of installations and of the oil and gas present in the field and belonging to the company by virtue of the concession. Of course this would depend on the circumstances of each particular case.

A main reason why the fixing of a definite maximum of liability may seem difficult is, further, that as yet we have only a limited knowledge both of the possible consequences of a major pollution incident and of the possible ways and means and, consequently, the costs of containing and removing spilled oil. Boesch[3] puts it this way:

> Except in a few highly specialized areas—offshore oil well drilling among them—business and government have devoted far less capital expenditure to ocean engineering than to other fields of engineering. For this reason, ocean engineering is a backward field in the sense that many potential areas for technological development have not been pursued to the extent possible. The containment, removal and cleanup of spilled oil is one such area. The application of modern technology to this problem did not begin on any large scale until the aftermath of the *Torrey Canyon* disaster in 1967.
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> There are many reasons why oil spill cleanup problems are so difficult. There is a lack of understanding of the physics and chemistry underlying some of the pollution control difficulties. Some oil slicks cover tens of square miles. Currents and waves generate enormous forces. The logistics of dealing with something so large and so mobile in the face of the large forces of the sea are staggering. The area of the earth susceptible to an oil spill is large, and spills occur at random.

We ought perhaps not to forget that drilling may start also in Arctic regions, not only off Alaska but also in the waters of Northern Europe, in particular around Spitzbergen. Oil spilled in the Arctic may, owing to the prevailing temperature conditions and low bacteriological activity, last as long as fifty years.[4]

In the international discussions among representatives of North Sea

[3] Boesch, *Oil Spills and the Marine Environment*, 1974, p. 85.

[4] See Schachter and Serwer, "Oil pollution and remedies", *American Journal of International Law* 1971, pp. 84 ff., p. 89, with references.

states the suggestion has been advanced that liability could be limited to some 20–25 million US dollars. It is understood that these estimates claim to be asked on fairly thorough studies of the damage which may result from operations in the North Sea. In particular, it has been argued that the oilfields are located at such a distance from the shore that an oil spill will not have the same catastrophic consequences for the shorelines as in the case of the *Torrey Canyon*. An oil spill will be fought at sea, before the beaches have been contaminated. On the other hand, it may, perhaps, be argued that there is not sufficient experience of containing oil slicks in the open sea, and especially under such rough weather conditions as may here be expected, to justify the acceptance of a lower ceiling of liability with reference to the feasibility of anti-pollution measures at sea. As for the *Santa Barbara* incident of 1969, it seems that the success of clean-up operations was to a large extent due to the personnel and equipment which were available at the shore and could be used for operations there. One does not know whether the same favourable conditions would exist in a North Sea accident or, even worse, in an accident taking place in Arctic waters.

There may be some arguments of principle against basing an international convention on the *existing* knowledge of oil fields and their distance from the shores of the respective countries. A convention is normally supposed to remain in force for a number of years. Furthermore, experience shows that several years may pass before such an instrument is ratified by the requisite number of states for it to enter into force. In the case under discussion much will change even before the convention can begin to perform its function. In Norway it is expected that drilling on the continental shelf off the northern coast in areas fairly close to the land will start in 1977. In other words, the basic assumption for the estimates, namely that pollution will be fought and contained in the open sea, may become invalid already at a fairly early date.

Going back to the Tanker Conventions of 1969 and 1971, it may seem reasonable that any scheme for limited liability in regard to offshore operations should at least be equal to that applicable to tankers; which means that liability should at least go up to 30 million US dollars—or rather to something like 40 million, in view of the depreciation of the American currency which has taken place since then. This figure would correspond pretty well to what seems to be insurable under present conditions on the insurance market. In addition there should be a certain amount to be paid by the responsible companies themselves.

An argument against a fixed limitation is always that circumstances may change; in particular this will apply to the coasts involved and to monetary

values. Even the use of the gold (Poincaré) franc as the unit of the 1969 and 1971 Conventions is not here sufficient to ensure that adequate protection is obtained by the victims. Even at this early stage in the life of the Brussels Conventions[5] it has been reported in the press[6] that the maximum amount provided for in Brussels in 1971 would not be sufficient. The incident concerns the stranding and spillage of oil by the Dutch tanker *Metula* in August 1974 off the Tierra del Fuego (Chile). If clean-up operations were to be undertaken, they would involve expenses of some 50 million US dollars.[7] If such reports are correct, we have here an incident where even the combined liability of the 1969 Convention on Civil Liability and the 1971 Convention on an International Fund would not be adequate. Of course, one may ask if such huge amounts should be spent on remote areas whose value and usefulness to human interests is perhaps rather low; or may be considered as such by the government responsible for the area. This seems to be a difficult question.[8]

> As to the actual amounts, it should be observed that the states parties to the 1971 Convention on the International Fund have foreseen not only the maximum liability for a single tanker accident of 450 million Poincaré francs, i.e. approximately 30 million US dollars or Nkr 215 million according to then existing rates of exchange. They have also undertaken to accept a majority decision (by a three-quarters majority, see art. 33) to increase the maximum up to 900 million francs, or 60 million US dollars according to then existing rates. At the same time it should be stressed that the agreed maximum (before any increase under art. 4, para. 6) corresponds to the $ 30 million agreed to voluntarily by oil companies under CRISTAL, January 1971.
>
> As these amounts must in fact be borne by the oil industry in relation to tanker transportation, it seems that the agreements supply evidence that the same amounts could also be made available in cases of pollution from offshore operations. Further, the amount of US $30 million must as evidence of possible coverage be increased owing to factors such as changes in monetary values in general (inflation), the increase of the aggregate oil transport and consumption and consequently of the total financial capabilities of the industry, the formal devaluation of the US dollar, etc.
>
> It should be noted that the reference to gold francs does not take care of the inflation factor and lead to an automatic increase of the liability in accordance with the value of gold on the commercial market. The conventions must be read as referring to the official rates of exchange.

[5] The 1969 Liability Convention entered into force on June 19, 1975.

[6] Cf. *Dagbladet*, Oslo, of February 17, 1975, quoting from the *Washington Post*.

[7] Such figures and such reports must be regarded with a great deal of scepticism; what are the bases for such calculations? Still, it may be pointed out that the existing limits with regard to oil pollution from ships, which have been based on, *inter alia*, the capacity of the London insurance market in 1969 (i.e. as far as the 1969 Convention is concerned), are not entirely satisfactory from the victim's point of view. And they will be even less so as the size of tankers and the number of ULCCs (Ultra Large Crude Carriers, above 300,000 tons) and VLCCs (Very Large Crude Carriers, above 200,000 tons) increase and inflation continues to soar.

[8] See below.

(b) Some Questions with regard to Possible Types of Damage and Limitation of Liability

Even if liability is not limited to a fixed amount on the basis of legislation or an international convention, a limitation may follow from general principles of law. One item which is particularly interesting here is the costs which are necessary to restore the environment, especially if such costs go beyond what may be considered as the economic value or market value of the property which has been damaged.

In English law the general principle is that all damage caused by an incident for which the industry is responsible should be paid for. *Winfield on Torts*[9] puts it thus:

> As we have seen, the basic principle for the assessment of damages is that there should be *restitutio in integrum*, and in cases of loss of or damage to property this principle can be more fully applied than in cases of personal injury. It is, in fact, the dominant rule to which the subsidiary rules which follow must conform.

The view of French law is the same:

> Le grand principe qui règne ici est celui de l'adéquation de la réparation au préjudice. La réparation doit être égale au préjudice et, pour être égale, elle doit forcément être intégrale, sauf dans les hypothèses ou la loi ou les parties ont prévu une limitation.[1]

Even though the starting point is clearly that compensation must be paid in full for all losses involved, including the costs of clean-up operations by or on behalf of the owner of the damaged property, it may not be that the victim has an unlimited right to undertake such operations and charge the expenses to the oil company which is responsible for the accident. In existing law this may be a difficult question.

Winfield[2] mentions that if "a ship is damaged while on its way to the breaker's yard, it is submitted that the cost of repairing the ship could not be recovered, for that cost would not represent the true reduction in the value of the ship". This example is not relevant here. It is clear that an environment may contain values which are truly being subject to "reduction", even if there is no corresponding reduction in the market value, in particular with respect to what can be obtained by selling the beaches to third parties. To some extent the problems involved may be solved by regarding the damage to the environment as resulting in a "loss of use". But neither this formula nor the formula of "market value" can give us a

[9] *Winfield on Torts*, at p. 687, 8th ed., by J. A. Jolowicz.
[1] Tourneau, *La Responsabilité civile (ancien Lalou et Azard)*, Dalloz 1972, p. 258.
[2] *Op. cit.*, p. 700.

satisfactory basis for the calculation of the "environmental value" of the damaged property, nor of the extent to which it may be accepted that the property owners or the government are entitled to spend money in order to restore the environment, with the result that the licensee or operator is made responsible for the expenses incurred.

The American scholars Harper and James[3] take as their point of departure that "where personal property has been injured or destroyed, the fundamental measure of damages is the difference between the reasonable market value of the property immediately before the injury and immediately after the injury at the time and place where the damage was occasioned". It is clear that this simple test is not very well suited to the questions here before us. Harper and James go on to say that "difficulties are encountered where the property can be restored by repair to substantially the condition in which it was before the accident".

It is mentioned that in this situation three different rules have emerged. Some courts still apply the diminution in value rule, but allow the cost of reasonable and necessary repairs as evidence of the amount of diminution. Other courts treat the reasonable and necessary cost of repairs as constituting the measure of damages. But this is made subject to a limitation, namely that the cost of repairs and other allowable expenses may not in the aggregate exceed the value of the article before the accident. The third rule is that the plaintiff has an option to recover either the diminution in value or the reasonable and necessary cost of repairs.

This third rule "seems best calculated both to afford an owner full compensation for the pecuniary loss he actually incurs, and to encourage him to take active reasonable steps to minimize the loss".[4] It may be added that it is also the rule which is best suited to take care of the special case of environmental damage, both with regard to the reparation of such damage, and with regard to the preventive effect of the rules of liability. A rule to the effect that the cost of repairs or restoration may be claimed without any limitation on the market value of the property will be best suited to protect and preserve the environment in conformity with the solemn obligations which states have undertaken, in particular in the 1972 Stockholm declaration of the UN Conference on the Human Environment.[5]

[3] Harper and James, *The Law of Torts*, vol. 2 (1956), pp. 1310 ff.

[4] Harper and James, *op. cit.*, p. 1313. This third rule would seem to be the one most in conformity with Norwegian law.

[5] See, in particular, Principle no. 1, first sentence: "Man has the fundamental right to freedom, equality and adequate conditions of life in an environment of quality that permits a life of dignity and well-being and bears a solemn responsibility to protect and improve the environment for present and future generations."

The Declaration is not *per se* legally binding, but may—and should—be taken as evidence of general principles of international law.

> It should further be mentioned that the market value, which is the general standard, is "not always the starting point for measuring damages". Quoting from a decision of 1927, Harper and James state[6] that "while the market value of the property is generally found to provide adequate compensation to the owner, yet there are cases in which such market value does not indicate the real value to the owner, and others where the property has no real 'market value'". As examples are mentioned "household goods, such as furniture, bedding and wearing apparel, kept for use and not for sale. These fall within the exception that the market value does not indicate "the real value".[7] Further there are cases where there is no real market value, such as property "devoted to a special use by the owner where there was no market for the property for that use". "In such cases the owner will be allowed to show other factors, such as replacement cost and depreciation, which tend to indicate its economic (but not its sentimental) value to him".[8]

However, the right of property owners or third parties, such as the government, to incur expenses which are to be reimbursed by the licensee or the operator cannot be unlimited. It seems that we may have three bases for curtailing an otherwise unreasonable and unlimited right of property owners and of states:

First, the expenses incurred must be "reasonable". This limitation has, indeed, its basis in traditional and existing law. The very reason for allowing a plaintiff to claim the cost of repairs beyond the market value of the property is that such repairs are "reasonable and necessary".[9] There is no legal basis for recovering expenses without any qualification. But this does not solve the whole issue. We are still faced with difficult questions as to what can be considered "reasonable and necessary" in order to restore a certain environment in a concrete situation.

Secondly, loss incurred in the form of expenses by the owners or the state which go beyond a certain amount may be regarded as damage caused by the owners or the state themselves, and not by the licensee or operator. We have here the traditional tests of causation. One may say that "the chain of causation has been interrupted or broken by some independent intervening cause: that the defendant remains liable for all consequences until such an interruption or breach frees him for further liability".[1] When the expenses exceed a certain amount, they may be regarded as caused by an independent cause, namely the decision by the government or the owners to go beyond that amount in using funds for the restoration of the property which has been damaged.

[6] Harper and James, *op. cit.*, p. 1314.
[7] *Ibid.*, p. 1314.
[8] *Ibid.*, p. 1314.
[9] Harper and James, *op. cit.*, p. 1312.
[1] *Salmond on Torts*, 15th ed. by Houston, 1969, p. 720.

The third rule which may be invoked is that of remoteness of damage, including such tests as reasonable foreseeableness, etc.

Defences which are closely connected with these three are those of contributory negligence and of mitigation of damage. If the government goes beyond what is reasonable in spending money for the preservation of a certain environment, or if it takes steps that are not sufficiently justified, it may itself be said to have contributed to the damage suffered by not exercising sufficient care in the protection of its interests.[2]

Some further questions which may cause difficulties in practice may be mentioned:

Pollution may often damage resources which are regarded as having no direct economic significance. In a major accident it may ruin the holidays and the expectations of thousands of people. Should compensation be paid for such types of damage, and how should it be calculated? Some legal systems, like that of Norway, restrict compensation to a so-called "economic loss". What can be termed an "economic loss" is often uncertain. The owner of a beach house who intended to sell it or to rent it to other people during the summer, but who is deprived of his profits because of the oil sticking to his shoreline, will have no problem in proving his loss and sustaining his claim for compensation. But what about the owner who would have used his beach house and enjoyed the sun and the scenery himself but whose enjoyment has now been greatly reduced?

Questions as to what parties are regarded as having the right of compensation and legal standing to sue for damages are also important. To some extent, varying from one legal system to another, the law of compensation would be limited to the protection of owners of property. Undoubtedly there are sometimes reasons for limiting the types of rights or interests which may be the basis for legal action and compensation, while, on the other hand, the distinction and its results would not always appear equitable upon first consideration. In the course of the work in the Legal Committee of the Intergovernmental Maritime Consultative Organization on new rules of compensation after the *Torrey Canyon* incident in March 1967, one delegation suggested that "damage to natural resources" should be a subject for consideration in addition to the classical case of "damage to property". Clearly, this is an important and relevant question; for instance, what should happen if a stock of fish is destroyed, with a definite economic loss to the fishermen who would otherwise have exploited that stock and to the coastal state as such, but no *property* is involved? The proposal put forward was, however, dismissed for the time being by the following rather ironical comment by another representative, whom I quote from memory:

[2] *McGregor on Damages*, 13th ed. 1972, para. 1061.

"Now, we come to the case of damage to natural resources. This is indeed an interesting question. For who would then be the plaintiff?"

To illustrate some of the problems here before us, it may be mentioned as an example that in English law the opinion has been that as a rule only the person in possession or occupation of the land affected has the necessary standing to sue on the basis of the rules on nuisance.[3] It seems clear enough that the right of protection must be extended beyond those rights or interests which are primarily affected by the damage. The fact that the rationale of the tort's existence is primarily the protection of one particular interest does not exclude it from secondarily protecting some other interest once the primary interest has been infringed. Here the term "parasitic damages" has been used.[4] But it is difficult to establish how far one can go in this direction, in the different legal systems, in particular where there is a third party whose interests have been affected.

Questions of proof—including the rules on evidence—may need special consideration. We all know that pollution across state boundaries and the long-term effects thereof are problems of paramount importance in our age. Against this background, it may seem surprising that the only well-known international decision with regard to pollution across nation–state boundaries is that of the *Trail Smelter,* going back to 1941.[5] The reason is, however, obvious enough. In the *Trail Smelter* case we had a single enterprise responsible for the damage, and a clearly defined group of victims, situated in a narrow valley which because of prevailing winds and other reasons was exposed to fumes which all derived from one single cause. Such a fairly simple case may indeed exist also in regard to a major pollution accident caused by an offshore operation. But usually cases of international pollution are of a more complex nature.

Among the difficult problems is the general deterioration of the marine environment as a result of several oil spills over the years from oil rigs as well as from ships, leading perhaps to a reduced yield from that environment in fishing or other traditional activities. It has been suggested that there should be set up some kind of a fund which might be empowered to sue polluters for the damage caused. Although each single fisherman might be unable to go to law and prove that he has sustained a certain economic loss as a result of the changes in the environment, such a fund

[3] *Clerk & Lindsell on Torts,* 13th ed. 1969, para. 1414. In the law of Canada it has been suggested as possible, but doubtful, that a claim based on nuisance may be a remedy for "non-negligent interference with the use and enjoyment of land", cf. Supreme Court of Canada, *City of Portage La Prairie* v. *B. C. Pea Growers Ltd.,* 1966 Dominion Law Reports, 2nd, 503, S. C. R., 150. Cf. William M. Ross, *Oil Pollution as an International Problem,* 1973, pp. 80 and 106.

[4] McGregor, *op. cit.,* p. 118 (para. 164).

[5] *U.N. Reports of International Arbitral Awards,* vol. III, pp. 1905 ff.

representing, *inter alia,* the interests of the fishing industry *in toto* would be able to prove that a certain economic loss had been inflicted upon those interests. Similar proposals may warrant consideration in relation to single accidents also.

In Norwegian common law, the situation has not been regarded as wholly clear where there is a question of expenditure incurred by some other party, in particular the Government, in order to protect the interests of the owners of private property and to restore such property and the environment to the state it was in before the pollution occurred.[6] Therefore, it has been said *expressis verbis* in sec. 11 of the Act of March 6, 1970, (no. 6) on Protection against Oil Pollution Damage that expenses incurred either by municipal authorities or by the fund set up under the Act shall be covered by the party who is liable for the damage according to ordinary principles of liability law. This provision envisages protective measures taken at the shore, in relation to oil pollution in general, and the 1970 Act is not designed to regulate the specific problems of offshore pollution as such. The right to recover expenses has also been provided for in sec. 267 of the Act of December 20, 1974, incorporating the 1969 and 1971 Tanker Conventions in domestic law, by amendments to the Maritime Law of July 20, 1893.

As for the use of "reasonableness" as a qualification in relation to clean-up expenses, there has been a certain disagreement in Norway between the Ministry of Justice and the Ministry of the Environment. In connection with the amendments in our maritime legislation which were required to incorporate the 1969 and 1971 Tanker Conventions, it was proposed by the Ministry of the Environment that the word "reasonable" should not appear as a qualification of the expenses necessary to reinstate the environment. This proposal was not accepted by the Ministry of Justice, in particular because the restriction to "reasonable" appears in the definition of "preventive measures" in art. I, para. 7, of the 1969 Tanker Convention.[7]

During the preparations for national legislation in Norway on liability for pollution from offshore operations it has been proposed by the

[6] For views on the matter, see *NOU* 1973: 8, on liability for pollution damage from offshore operations, p. 38, where it is maintained that it follows from general principles of law that the Government or other parties undertaking clean-up operations will have a right of action against the party responsible for the incident. See, further, *NOU* 1973: 46, concerning liability for oil pollution from ships, where it is only said that opinions differ in relation to the existing legal situation (p. 11, cf. p. 18). See also the quotation in *NOU* 1973: 46, p. 11, of a statement by the Ministry of Justice. See Fredrik Stang, *Skade voldt av flere,* 1918, pp. 331 f., and Jørgen Øvergaard, *Norsk erstatningsrett,* 2nd ed. 1951, p. 310.

[7] Cf. *Ot. prp.* no. 48 (1973–74) (Norwegian Parliamentary Papers). Cf. also sec. 267 of the Maritime Act of July 20, 1893 (amended), which incorporates the formula proposed by the Ministry of Justice in accordance with the Brussels Convention.

Ministry of the Environment, and will probably be accepted by the Government and by the National Assembly, that the law shall contain a provision stating expressly that liability shall cover the expenses necessary to bring the environment back to its previous state.[8] Whether or not the word reasonable will appear in the text of the Act is yet uncertain. If it is omitted, however, this would not imply that the right to recover expenses is virtually without any limitation; cf. what has been said above on the principles of contributory negligence, breach in the chain of causation, etc. Such principles will also apply under Norwegian law.

(c) Some Restrictions on the Basis of Positive Law: to "Pollution Damage", to Damage Sustained in the "Territory" of Certain States, etc.

The two Tanker Conventions, the 1969 Liability Convention and the 1971 Fund Convention, are both confined to "pollution damage" which is defined in art. I, para. 6, of the 1969 Convention as "loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures". According to art. I, para. 1, of the 1971 Convention, the term "pollution damage" means the same as in the 1969 Convention; this seems quite natural, as the 1969 Convention is supplemented by that of 1971. However, as the 1971 Convention has also the aim to give victims compensation in cases not falling under the rules of 1969, one might also have envisaged a different system for cases excluded by the 1969 definition.

As the situation is, cases outside the conventional regime will be covered by the ordinary rules of civil liability, including the ordinary rules on limitation of the shipowner's liability.

"Pollution damage" has also been suggested as a basis for the obligation to pay compensation under a prospective international convention on pollution from offshore operations among the North Sea states. Further, it has been suggested that the definition should be analogous to that of the 1969 and 1971 Conventions and should be formulated as follows: "Pollution damage" means "loss or damage caused by contamination outside the installation resulting from the escape or discharge of oil from the installation and includes the costs of preventive measures and further loss or

[8] In relation to offshore liability, also, the right of the Government or other third parties to claim compensation in respect of clean-up operations will be stated expressly, to remove any possible doubt, see *NOU* 1973: 8, at p. 38.

damage caused by such measures". As in the 1969 Convention, the use of the word "contamination" might seem to exclude damage caused by fire, explosion, etc.

But the effects are not necessarily the same. Both for the Tanker Conventions and for an offshore convention the cases left outside would fall under the ordinary rules on civil liability. In both instances the damage caused by fire, etc., would not be included within any limitation scheme. The amount prescribed would be available exclusively for "pollution damage". For shipowners, other types of damage would have to be covered according to other rules on limited liability, with a lower ceiling for the explosions, fires etc. On the other hand, the owner or operator or licensee of an offshore installation would in such cases be subject to unlimited liability under general principles of law.

Another restriction found in the two Tanker Conventions is that compensation can only be claimed for damage caused on the territory of a contracting state (and for preventive measures taken to prevent or minimize such damage).[9] This would in many cases exclude damage to fishing gear (and also damage to the natural resources as such).

The restriction to damage sustained in the territory, including the territorial sea, of states has been defended on the following ground:

> Cette restriction est naturelle. En l'état présent du droit international, aucun Etat ne peut être admis à faire valoir la part de dommage qui'l aurait subi du fait de la déterioration de la richesse commune de la haute mer.[1]

The Tanker Conventions are the results of the wish of governments to take action in regard to the specific risks presented by the carriage of oil in bulk, in particular in large tankers, and to cover only certain clearly defined types of damage. The restrictions have also been said to represent "le symbole d'un stade de l'évolution du droit international".[2]

However, one might expect that this part of international law is already on the move. In particular, reference should be made to principle 22 of the UN Declaration on the Human Environment:

> States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by the activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

[9] Cf. art. II of the 1969 Liability Convention, cf. also art. 3, paras. 1 and 2 of the 1971 Convention on the International Fund.

[1] Lucchini, "La pollution des mers par les hydrocarbures: Les Conventions de Bruxelles de novembre 1969 ou les fissures du droit international classique", *Journal du droit international* 1970, pp. 795 ff., at p. 815.

[2] Lucchini, *op. cit.*, p. 815.

Further, it has long been admitted in public international law that a state may claim compensation from another state because of the unlawful interference of the latter not only with the territorial rights of the first-mentioned state but also with its right to make use of an international waterway. This was recognized by the International Court of Justice in its 1949 Judgment in the Corfu Channel Case.[3]

A state which takes measures to protect the high sea from pollution is, in effect, acting in the interest of the international community as a whole. Compensation should therefore not be excluded.

> L'intérêt individuel de tout Etat de se protéger contre les suites dommageables des pollutions est universel et international en ce sens qu'il est commun à tous les Etats qui ont un littoral maritime et même, d'un point de vue spécial, à tous les Etats du monde en ce qui concerne la protection et la conservation des ressources naturelles marines dont la jouissance appartient aussi aux Etats sans littoral. L'intérêt national est donc aussi international puisqu'il est commun à tous les Etats.[4]

(d) The Role of Insurance and Its Relation to Liability

In relation to shipowner liability it has been regarded as a convincing argument that the limits of liability must be kept within the limits of insurability. In the view of the present author this principle does not apply to offshore operations.

Perhaps more important here is the aspect of possible reparation. As early as 1971, oil companies in CRISTAL, a purely voluntary agreement, promised to pay up to US$30 million in respect of any one pollution accident involving a tanker. Even if insurance in its strict sense, in the form of contractual obligations entered into by insurance companies, might not be available up to such an amount, the existence of CRISTAL gives ample evidence that protection up to US$30 million may be obtained through underwriting by oil companies. There is also reason to suggest that the figure of $30 million may be increased, owing to such factors as the following: inflation in the years which have passed since January 1971 or since the figure of CRISTAL was originally established as being within the scope of what could be agreed to, which must have been at some time prior

[3] *United Kingdom* v. *Albania*, I.C.J. Reports 1949, pp. 4 ff. It was found that Albania was responsible under international law, while the assessment of the amount of compensation was left to further consideration. See, on the rights of states in regard to the high seas and international waterways, Fleischer, "Pollution from seaborne sources", *New Directions in the Law of the Sea*, vol. III (1973), pp. 78 ff.

[4] "Etude des mesures internationales les plus aptes à prévenir la pollution des milieux maritimes, Rapport provisoire présenté par M. Juraj Andrassy", *Annuaire de l'Institut de Droit International* 1969, pp. 574 ff., p. 579. The considerations set forth apply to "les mesures que l'Etat riverain intéressé peut prendre, soit pour prévenir les accidents, soit pour éliminer ou réduire leurs suites dommageables".

to the formal signature; the depreciation in the value of the US dollar; and the fact that CRISTAL was established on a voluntary basis by the participating companies themselves and therefore does not necessarily reflect the maximum amount which may be obtainable through obligations imposed by legislation.

A practical solution might also be the underwriting of oil companies on a mutual basis, or by oil and insurance companies in combination. This is, after all, no more than a classical form of insurance. Another possibility is a combination of underwriting by oil companies and insurers and the establishment of a fund which might take care of the liability up to a certain amount vis-à-vis the victims, or which might indemnify, up to a certain point, the actual oil companies or insurers which had been made liable.

I should stress that the case of a fund, such as that established by the 1971 Convention and by the CRISTAL agreement, is not altogether analogous to the case of liability of individual companies or ordinary insurance. But if necessary—or if found practical by the parties involved on the debtor side, viz. both the oil companies and the insurance companies—a solution along the lines of a fund may also be chosen in regard to offshore liability.

An important factor which makes it less convincing to restrict the liability of operators or licensees in accordance with the maximum of insurance in regard to offshore operations than in regard to ships is the following. If a major pollution accident is caused by a ship, it will in practice be the result of a stranding or a collision. The value of the ship was—compared with a major oilfield—rather limited before the incident and is reduced, perhaps to zero, as the ship goes down. Whether or not the shipowner in question has other assets to cover pollution liability in excess of that of the insurer is purely a matter of chance.[5] For the offshore industry the situation is radically different. A major oil spill can only have been caused by an existing oilfield, which usually will be the property of the defendant or at least subject to a concession held by him. The value of a large field, such as the Ekofisk,[6] can easily be a hundred or in extreme cases even a thousand

[5] When considering the *Torrey Canyon*, registered in Liberia and owned by a Bermuda company, we see that there was another vessel owned by the same company, which could and was in fact subjected to measures of execution (arrest). Apart from reasons of taxation one may wonder why shipowners should register more than one ship as owned by a single company.

[6] Cf. *Ot.prp.* no. 26 (1974–75), on taxation of profits derived from the extraction of submarine petroleum, at p. 23, where it is expected that the total revenue which will be received by the state from the *Ekofisk* operations is in the order of Nkr 60–65,000 million (including royalties); which again is considered to be around 70 % of the total income of the companies from the *Ekofisk* field (before royalties and taxation). This would amount to a total income (before royalties and taxation) of close on Nkr 100,000 million.

times greater than such "trifling"—if the reader will excuse this rather blunt and not entirely adequate characterization—amounts as US $14 million or the maximum liability for a shipowner under the 1969 Tanker Convention.

From the viewpoint of the victims and as such also the states, or at least states with an exposed coastline, one might advocate strong rules on an obligation to insure and propose that the maximum of insurance should be set at a very high level.

However, in my opinion a more flexible approach may seem to indicate itself. It should be remembered that an obligation to insure must necessarily imply an increase of the day-to-day costs of operations in the North Sea, costs which are increasing at an uncomfortable rate already, as a result of other factors than the one here before us, and which are the subject of great concern on the part of oil companies as well as of governments. At the same time the financial resources represented by the larger oil companies and in particular by the value of the oil fields which may be the cause of damage are important reasons for not restricting the rights of victims vis-à-vis the companies. The considerations given by the Committee which I have chaired concerning legislation in Norway on this matter are the following: "The company which has obtained a licence will often not itself have sufficient means to cover the liability which it may incur vis-à-vis the victim. To safeguard the interests of the victim it is therefore necessary to establish security. Security may, e.g., be established in the form of a guarantee by a parent company, if this is considered to have sufficient financial power. Other possibilities are insurance or bank guarantees. Other alternatives may also be feasible. Hence, the Committee is of the opinion that a rule on security should be made fairly flexible, and that the Ministry of Industry should be empowered to decide whether security must be established, and in what way and for what amount this should be done."[7] An important consideration here is that the increase in the day-to-day costs which would follow from compulsory insurance would seem not to be called for if, e.g., a guarantee by a parent company could be relied upon as sufficient to cover possible damage caused by its subsidiary during operations.

A guarantee by a parent company can, on the other hand, very well be without any limitation. This can be regarded simply as one way of "piercing the corporate veil". The fact that companies and governments, for practical reasons connected with taxation, finance, jurisdiction, etc., allow operations to be carried out in the name of, e.g., a company which is registered under the laws of the coastal state but which is a wholly-owned

[7] *NOU* 1973: 8, at p. 28.

subsidiary of a large international oil company having its domicile in another country constitutes no *a priori* reason why liability for major pollution incidents should not attach to the parent company itself.

As for the limits of insurance—the actual amounts—this is a matter which cannot be settled solely on the basis of the need to protect the victim and the financial capabilities of the licensee or operator. Complex questions relating to the capacity of the insurance market are involved, as well as the terms which are currently accepted and which may be found acceptable in the future by insurers.

One point seems certain. The obligation of insurers must be limited to a fixed amount. There must be a ceiling on liability, i.e. on the amount for which the insurer is liable. Of course, this does not preclude a system of unlimited liability on the part of the owner or operator.

> In domestic Norwegian law there is at present unlimited liability for insurers in regard to damage to persons caused by automobiles.[8] This case, however, is not comparable to the one before us. Liability for car accidents normally only covers an amount in excess of what is paid to the victim in the form of social insurance. Further, these excess amounts are in no way comparable to the far greater losses which may be incurred as a result of an oil pollution incident in the North Sea.

During the negotiations for an international agreement among the North Sea states it has e.g. been advocated that insurance may today be available up to US $40 million.

An important consideration in the field of insurance is that what can be insured at a given time is subject to the prevailing conditions in the insurance market, and to negotiations between oil companies, insurers and insurance brokers. A responsible insurer will have to take account of the fact that the damage involved in a single accident may be not only that of pollution, but also such things as the wrecking of the installation itself; and possibly also, to take an extreme example, the loss of a large tanker and its cargo after a collision between a tanker and an oil rig. Through the mechanisms of reinsurance, all those risks will be more or less covered by the same companies, who must also face the fact that not only one but several accidents may occur.

It is not obvious that such considerations should determine once and for all the amount recoverable by the victims of pollution. The liability of an insurance company must be limited to the amount it has actually undertaken to pay on a contractual basis and it will be impossible for the

[8] See Act of May 25, 1973, no. 26, amending the Act of February 3, 1961, on Liability for Motor Vehicles.

legislator to demand that the mechanism of traditional insurance shall be used to cover risks which cannot effectively be included in the contracts which private insurers are willing to enter into. But this does not solve the problem of the liability of the oil company for damage caused by its installation in excess of the amount covered by insurance. There is no compelling reason why lack of insurability deriving from present conditions in the insurance market should be an exception to the liability of the oil company for its activities. On the other hand, the financial resources present in the oilfield itself may present a rather strong argument to the effect that liability should not be limited in this way.[9]

ATTEMPTS AT INTERNATIONAL REGULATION

(a) OPOL (Offshore Pollution Liability Agreement, September 4, 1974)

OPOL is a voluntary agreement between oil companies, similar to those (TOVALOP and CRISTAL) which have been entered into by private parties with regard to damage caused by the carriage of oil in ships. OPOL establishes an overall maximum liability of 16 million US dollars. This ceiling will of course not prevail over the liability following from general rules of civil liability; according to art. VII of OPOL the payment of claims is, however, if accepted by the claimant, to be considered full compensation.

(b) An Intergovernmental Agreement for the North Sea Area

Work for an international agreement is in progress. It is as yet uncertain whether agreement will be reached on a limitation of liability—possibly with special reference to "international" cases of pollution, i.e. cases where operations under the jurisdiction of state A have caused damage within the territory or jurisdiction of state B—and on the amount to which liability might be limited.

In my opinion, there can be no serious doubt that even if there is an agreed limitation on liability where oil from the continental shelf of state A causes damage within the jurisdiction of state B, each state must retain its

[9] It goes without saying that this argument also applies to a possible agreement on limited liability for international pollution: the amount recoverable should at least be that which can be covered by insurance, *plus* a certain amount which may be borne by the licensee or operator.

right to establish unlimited liability or a higher figure of limitation in cases which are of a purely domestic nature—cases where oil from the continental shelf of A causes damage to the shore of A itself. This is mainly a matter for domestic law. A more detailed examination will be given under (c) below.

As to actual figures which have been suggested, it may seem that there is not sufficient experience to justify so low a figure as 16 or 20 million US dollars, which is considerably lower than those amounts already proved coverable by companies in the CRISTAL scheme of January 1971.

(c) Further Analysis of the Significance of an International Agreement

As we have now considered the question of limitation of liability in some detail, we may revert to the possible effects of an international agreement on this matter.

We shall here examine in somewhat greater detail the situation that exists between a country which traditionally has had unlimited strict liability, and still tends to favour such a system, and another country which starts from the assumption that there should be a limitation of liability, and which possibly may also take liability based on fault as its point of departure. What can be obtained by an international agreement between two such countries, and what will be the impact of the agreement in relation to possible accidents involving oil-pollution damage?

It should be noted at the outset that an international agreement on the unification of legal rules has two aspects. First, it will lay down a certain set of substantive rules, which the contracting parties, i.e. the states, are to follow. Secondly, the agreement will give each party a legal claim under international law that the rules laid down shall be adhered to by the other party in the event of an accident. An international agreement creates rights and obligations between the parties, which are the states as subjects of international law.[1]

This raises an important issue as regards the scope of an agreement. It is necessary to distinguish sharply between two different situations: (1) the case of "international pollution", where oil emanating from the exploration or exploitation of the continental shelf of state A floats over to the continental shelf or the shore of state B, causing damage there, and (2) the case of purely "domestic pollution", where damage is sustained within the

[1] With the exception of treaties on human rights, etc., international instruments do not as such form the basis of individual rights and obligations. For the individual the treaties only have effect in so far as there is a basis therefor in the domestic legal system which is applicable.

state which has jurisdiction over the operations which have led to the accident.

There may be reason to suggest that the second case is purely a matter for domestic legislation, not for international agreements. The extent to which companies carrying out operations on the continental shelf of a certain state are to bear the burden of liability, and the extent to which victims in that same state are to be protected, is mainly a matter for the domestic law and policy considerations of that state. It does not seem evident that other states have any call to intervene in this matter.

There seems to be one reason, however, for the view that even such situations should be included within the scope of an international treaty. This reason is the practical importance, *inter alia* in the field of insurance, of having similar or identical rules in several countries. As has been said earlier, the advantages of having identical legal systems in several countries must not be overrated. It may seem that the advantage of a unification is not so great that it can be accepted as a reason for what might be considered a substantial concession on the part of potential victims in case of international pollution.

In this connection it may be remembered that, in case of domestic pollution, the principal victim may in fact be the state itself, which may be in the position of having spent very large amounts in clean-up operations as a result of the accident. The effect of an agreement where the state had pledged itself to apply only a certain limited rule on liability vis-à-vis companies operating under its jurisdiction will be that the state is faced with having to cover a substantial part of the clean-up expenses in a major "domestic" pollution accident, without any possible recourse to the oil companies.

Let us take as an example the bilateral relationship between the United Kingdom and Norway. In the event of a Norwegian domestic pollution, the UK would, on the basis of such an international instrument, have an international claim to the effect that Norway should not claim more than a limited amount of liability vis-à-vis the company which had caused damage within Norwegian jurisdiction. Of course, the UK could, according to general international law, always waive its rights under the treaty. Norway would then be free to sue the companies for the full amount in accordance with national law. But whether such a waiver can be expected is rather doubtful. The chances that it will in fact be offered cannot be regarded as sufficient to induce the Norwegian Government to enter into an international agreement, which at any rate might have the effect of curtailing the possibilities of obtaining satisfaction for the full amount of the clean-up costs in a case where purely domestic interests, i.e. companies operating on

the Norwegian shelf and victims situated in Norway, were involved. The case of "international pollution", to which I shall revert a little later, is different.

The situation would be even more complicated and difficult to handle for the state which would have to meet the clean-up costs, in the first instance, if the agreement should be multilateral. Not only one but several foreign states would have international claims to the effect that companies operating under the jurisdiction of the first-mentioned state should not be sued for more than a given amount, and that the state itself should cover the expenses beyond that amount. This might mean that the state would be dependent on all contracting parties for their waivers in order to obtain full compensation for its expenditure.

> We may now look for a moment at the general principles of international law regarding the effects of nationality. It is accepted that a state can only claim rights under international law, including ordinary treaty law (an expression which here covers all treaties, except very special cases such as modern treaties on human rights), in cases where its interests and, more particularly, the interests of its nationals are at stake. If an international agreement existed, and Norway, for instance, were to go beyond the rules of that agreement by claiming unlimited liability vis-à-vis a French company, this would be an infringement of the rights of France and not those of the UK. It would be for France to take the matter up before an international tribunal, and it would be for the French authorities to decide whether they should waive their right on behalf of the company to limited liability. Other states would not have any competence in the matter. As for the nationality of companies, it should be noted that the International Court of Justice in its well-known decision of 1970 in the *Barcelona Traction Case* has declared that it is the nationality of the company as such, and not the nationality of the shareholders, which is relevant.[2] In its judgment the Court found that Belgium could not on the basis of the Belgian nationality of shareholders entertain an international claim against Spain for alleged breaches of international law in relation to the assets of a company registered in Canada, under Canadian law and with its principal office in Canada. The Belgian government had no standing in the matter.
>
> If we apply these general principles to the question here before us, we see that the impact of an international agreement on the legal situation in regard to "domestic pollution" might be rather slight. First, it may be noted that to a very large extent the operations are carried out by companies registered and domiciled in the state which has jurisdiction over the continental shelf areas in question. If such operations should lead to damage in that same state, no foreign state would have any claim under international law that the liability of the company involved should be kept within certain limits. According to the Barcelona Traction decision, this would seem to apply even if the company carrying out the operations was a subsidiary, wholly owned by another company registered and domiciled in another state. If, on the other hand, the

[2] I.C.J. Reports 1970, pp. 4 ff. (*Belgium* v. *Spain*).

> licence to produce petroleum from the fields of state A has been given directly to a legal person having the nationality of state B, the question of the amount of expenses which could be recovered from the company would, according to the agreement, be solely a matter for the two states A and B, without any right for states C, D, etc., to interfere.

The conclusion would be that the relationship between the oil industry on its own continental shelf, on the one hand, and the victims being situated in that same state, on the other, is mainly a matter for domestic considerations. For the state it must be regarded as a primary interest that the necessary amount may in fact be spent to restore its own environment if a major pollution accident should in fact occur, and that there is no fixed limitation on the possibility of restoring the environment to its previous state.

More persuasive reasons can be found for the acceptance of an international agreement, including an agreement on limitation of liability, if we restrict ourselves to the case of international pollution—without limiting the freedom of states to legislate in regard to their own domestic interests. As regards international pollution, domestic legislation is certainly not sufficient by itself: the state of the victim cannot by its law alone secure compensation.

> To avoid any misunderstanding it should be added, however, that it is perfectly possible that the national legislation of the state where damage has been sustained will be sufficient. In particular this is the case where the responsible company has assets in that state, and such assets may be the subject of execution of judgments there obtained according to the national law in question. But it is obvious that one cannot base oneself on the assumption that this situation will exist in all cases. Consequently, an international agreement seems required, in particular between states which are situated around the North Sea or other areas where pollution, when occurring, is likely to have the character of international pollution.

For these international cases one can easily imagine a rational deal between governments on the basis of limited liability. A survey of the main elements which must be considered may be of some interest. Again the situation between a country favouring unlimited liability and a country favouring limited liability may be of particular relevance.

For the country favouring unlimited liability, the acceptance of an agreement on limitation would imply that it gave up its position, and also the right of its inhabitants as well as of the state itself to claim unlimited liability for international pollution according to its own domestic law. On the other hand, the importance of such a concession might not be very great. First, the right to claim unlimited liability for international pollution

under domestic law would have no effect in practice if the companies involved had no assets in the country claiming compensation. Secondly, the state might not be equally interested in preserving the option of unlimited liability in relation to international pollution, as this could entail unlimited liability for companies operating under its own jurisdiction vis-à-vis victims situated in another country, with the result that the income and the taxable capacity of the companies would be reduced in favour of such victims. It might even mean unlimited liability vis-à-vis foreign nationals for the state itself, if it should take part in offshore operations. What has been said is more than sufficient to illustrate the main point, viz. that a state's interest in protecting its own victims, and the interest of placing the burden of liability upon its own concessionaires in relation to damage sustained in other countries, are not the same. Still, the state might regard it as a concession on its part if it accepts that companies operating under the jurisdiction of the other contracting party should have only limited liability in relation to damage sustained by the nationals of the first-mentioned state. It might consider that its acceptance of the system of limited liability should be followed by some sort of compensation; possibly the acceptance by the other party of a higher limit of liability than that party would originally have intended.

On the other hand, for the party which favours the system of limited liability as the general rule, a convention on international pollution that was based on this system would mean that that party had had its view accepted on the international level. For both parties the convention would give victims a right to compensation, within the limits specified in the convention, which had been guaranteed by an agreement and which had earlier been subject only to the domestic legislation of the states involved.

In practice, however, it is not evident that the initial situation of "lawlessness" on the international level, when no agreement has been established, a situation which does not necessarily correspond to lawlessness on the domestic level, would have been too unfavourable for the victims involved. Further, it is not certain that it is less favourable than the position which may be obtained as a result of an international agreement. These aspects must be analysed in further detail.

What, then, can be obtained by the state which waives its right to claim unlimited compensation under its own national law in relation to international cases of pollution (a right which, as mentioned, may be of no great importance in practice)?

In the case of oil-producing countries like Norway and the United Kingdom, with a large number of potential victims and extensive coastlines to protect, it should first of all be observed that such a state cannot obtain

anything from several of the other states as far as the protection of victims is concerned. This follows from the fact that there are other states in the area which do not carry out offshore operations likely to damage the coasts of the UK or Norway. As no operations are carried out off the Swedish coast, the adherence of Sweden to an international agreement for the North Sea is of no consequence whatsoever when it comes to the protection of victims in other countries.

Nor is the case of Sweden relevant in so far as the Norwegian government might have been interested in protecting its own oil companies against excessive liability being imposed upon them for operations within the jurisdiction of other states. However, the government of Norway might have a certain interest in protecting companies operating under Norwegian jurisdiction (and perhaps in particular its own state-owned company, Statoil) against unlimited liability being imposed by domestic legislation in Sweden in a case where an oil slick from a field on the Norwegian continental shelf drifted over to the coast of Sweden. But the probability of such a case is rather slight.

A state in which damage may be sustained as a result of pollution arising from the activities on another continental shelf has, as already mentioned, no guarantee of obtaining any compensation from the responsible party if no international agreement has been reached. If the state does not itself have any operations within its sector, it would seem that it would have everything to gain by an agreement—namely a guarantee for compensation—while the state would not be giving anything of very great consequence in return (except the obligation not to impose liability in excess of the conventional limits by virtue of its domestic law). To be perhaps a little flippant, one might say that such a state ought to sit at the lower end of the table, keep its mouth shut and be satisfied with whatever it gets in the form of an international instrument whereby other parties pledge themselves to assist it in obtaining compensation for the damage which may be caused by the other states or persons acting within their jurisdiction.

Thus, a reasonable deal between countries which both have something to achieve and something to offer can only be obtained between states which themselves both carry out offshore operations and are exposed to the menace of international pollution as a result of operations on the continental shelf of another party. What would be the elements of such a deal?

Taking the case of Norway and the United Kingdom, one may say that Norway would obtain as an advantage an obligation on the part of the UK to apply strict liability where otherwise only liability based on fault would follow from United Kingdom law. In addition to that, Norway may obtain

an undertaking on the part of the UK to recognize and to execute or fulfil judgments, and vice versa. The obligation of other parties in the North Sea area to apply rules on strict liability will also be an advantage from the Norwegian viewpoint; an advantage which, however, is only of practical importance in so far as such states carry out offshore operations with a damage potential in relation to the Norwegian shoreline or other interests. To a large extent the Norwegian interest in the matter is concentrated around the bilateral relationship vis-à-vis the United Kingdom.

The advantage of obtaining strict liability in relation to UK operations may perhaps be a little dubious, as it is not wholly certain that such strict liability does not already exist in UK law. Reference may here be made to the doctrine of *Rylands* v. *Fletcher*.[3] If this doctrine should in effect be extended or understood to cover operations on the continental shelf, and one could rely on the practice of such a doctrine being continued by British courts in cases of international pollution also, the practical importance of an agreement on strict liability in the bilateral relationship between UK and Norway would be virtually nil as far as the system of liability is concerned.

Further, we must remember that British law and indeed most other legal systems accept the doctrine of vicarious liability. The advantage to be obtained by an international convention on strict liability would therefore only cover a certain difference, namely the difference between the cases in which strict liability would apply, with possible exceptions,[4] and the cases which would at any rate have been covered by the principle of fault and vicarious liability. Some scholars have said that only a very small percentage of the cases falling within a doctrine of strict liability are of such a kind that they would not also have been covered by fault or vicarious liability.[5] We do not here have to consider whether such statements are entirely correct. It is sufficient to note that the extension from fault and vicarious liability to strict liability only covers a certain amount of cases in practice.

We may go even further in our observations. We may point to the fact that vicarious liability according to existing law is not limited, with the exception of shipowners' liability.[6] If, for the sake of argument, we presume, in conformity with the view of some writers, that the number of cases falling within the scope of fault and vicarious liability is the greater, as

[3] On the *Rylands* v. *Fletcher* doctrine, see references in note 4, at p. 109, *supra*.

[4] Such as war, etc.

[5] See *supra*, at note 2, p. 117.

[6] An exception which does not here seem particularly relevant, at any rate as regards a fixed production installation in the North Sea, which is rather more comparable to an industry being carried out on land than to ships moving freely about. The characteristics of a drilling rig in the exploratory stage are closer to those of a ship.

compared with the special "difference" cases covered by strict liability and by strict liability alone, the significance of an international agreement on the limitation of liability would seem to be as follows:

For the greater part of the accidents which may occur, unlimited fault or vicarious liability would apply under existing law. If liability is limited under an international agreement, the state representing the victims (in this example presumed to be Norway) would have waived its and its nationals' right to claim unlimited compensation according to existing UK law.[7] As a set-off for this waiver with respect to a certain amount of the losses which may be sustained, there would have been gained the right to present claims on a strict liability basis in a more limited number of cases, where no liability under UK law would have existed independently of the agreement. This liability would, of course, be limited in accordance with the terms agreed to.

On the other hand, Norway would have the advantage of being able to limit its own companies' (Statoil, etc.) liability in a case where damage was sustained within UK jurisdiction.[8]

Here we must end the examination of the different considerations which must apply when a state considers whether to enter into an agreement, and what positions it should take under the elaboration of the provisions thereof. As will have been observed, these considerations do not necessarily lead to any given result. What is deemed most important will vary from country to country. So to speak, the blanks must be filled out through considerations of national policy by the "decision-makers" of the states involved.

What has been said must, however, be sufficient to demonstrate the very complex interplay which here exists between the different interests involved and the "claims and counterclaims" which will be put forward by the representatives of states as well as by the representatives of certain interests within each single state. Consequently, this also demonstrates the very complex nature of the considerations which must be taken into account if the representatives of states are to be able to take up a meaningful attitude in relation to the question of an international agreement.

It seems clear that the wish for unification of rules, which in itself may be a valid argument for trying to achieve an international solution, plays only

[7] This right would at any rate have been subject to changes in UK legislation.

[8] If the agreement would not give Norway this option, but were, for example, to demand that a Norwegian company should have unlimited liability for damage in the UK (even if the UK companies did not have unlimited liability for damage in Norway), in particular where unlimited liability is prescribed for domestic pollution (Norwegian victims *versus* a Norwegian licensee), an international agreement might seem not very reasonable and its attractions rather slight.

a very small part in the matter and in the considerations which must be regarded as relevant by lawyers as well as by politicians.

Unification of laws by international agreement may have had certain disadvantages, not only in the field of offshore operations. Upon first consideration and in the eyes of most maritime lawyers, the international conventions on the unification of the rules of shipowner liability are regarded as a great step forward in legal history and in international cooperation. But it should be remembered that it was precisely this unification that was at the root of the insufficiency of existing maritime rules which was demonstrated by the *Torrey Canyon*. Only some 25 % of the total damage would be covered by the owners of the *Torrey Canyon* under the 1957 Convention on Shipowners' Liability (if fault or privity on the part of the owner himself could not be established). Because of their having worked out and accepted earlier international conventions on shipowners' liability, which did not take account of the special risks presented by oil pollution, states were prevented from undertaking legislation which would be in harmony with present-day needs. By virtue of traditional maritime law made mandatory in international conventions, coastal states were under obligation to allow foreign ships to enter their waters, exposing themselves to the catastrophic consequences of possible oil pollution without any right to claim compensation in full. In fact, they had waived their rights to establish an adequate basis for compensation in domestic legislation, and virtually pledged themselves to leave it to the taxpayers or to the private landowners to carry the burden of clean-up operations.