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Offshore Oil Platforms Which Pollute the Marine Environment: A Proposal for an International Treaty Imposing Strict Liability

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Comments

OFFSHORE OIL PLATFORMS WHICH POLLUTE THE MARINE ENVIRONMENT: A PROPOSAL FOR AN INTERNATIONAL TREATY IMPOSING STRICT LIABILITY

This Comment considers the legal ramifications of an offshore oil well explosion which spills oil into the marine environment of another nation. The Comment suggests that no effective international law exists to govern the legal issues spawned by these incidents—including questions of liability, damages, and compensation—and proposes the conclusion of a new international treaty imposing strict liability on a nation when an offshore structure within its jurisdiction causes transnational oil pollution. The current utilization of the strict liability concept in various sources of "customary" international law supports this standard of liability.

INTRODUCTION

Offshore oil drilling has become an important source of revenue from the oceans. Over the past two decades, nations have built a growing number of offshore oil platforms. Many of these wells have been involved in accidents resulting in oil spills into the surrounding waters. These incidents have demonstrated the potential for transboundary pollution in the marine environment of neighboring nations.

No effective international law exists to govern the legal issues

2. These have occurred in the North Sea, the Gulf of Mexico, and the Persian Gulf. See infra note 12 and accompanying text.
3. Only one incident, Ixtoc I, actually resulted in transnational pollution. Several oil spills in the North Sea and Persian Gulf almost resulted in transnational pollution but were stopped in time. See infra note 12 and accompanying text.
which inevitably follow these transnational disasters. These issues include questions of liability, compensation, damages, and enforcement.

The Ixtoc I disaster illustrates the need for international legal responsibility for accidents involving offshore oil wells. On June 3, 1977, the Ixtoc I oil well in the Bay of Campeche, Gulf of Mexico, exploded. Sedco, Inc. (a United States based drilling company) owned the well. Sedco had leased the rig to "Permargo" (a private Mexican drilling contractor), who was operating under its own drilling contract with "Pemex" (Petroleos Mexicanos, the Mexican national oil company). The explosion discharged over three million gallons of oil into the Gulf of Mexico. The resulting oil slick extended along part of the Texas coast and damaged private beaches, public parks, and the local tourist and fishing industries.

The incident triggered a complicated series of lawsuits. The United States government sued Sedco for damages resulting from the contamination of its waters and resources, and for cleanup expenses. Mexico denied any liability for the spill. The United States was unable to sue the Mexican government, even though Permargo and Pemex had acted under Mexican authority.

4. Some international law applies to offshore oil pollution disasters, but such law is neither clearly defined nor effective. See infra note 8.
5. See infra text accompanying notes 8-11, discussing the problems surrounding the Ixtoc I disaster.
6. Note, Trouble Over Oiled Waters: Pollution Litigation or Arbitration—The Ixtoc I Oil Well Blow-Out, 4 SUFFOLK TRANSNAT'L L.J. 281, 281 (1980) (the well was being used for exploratory drilling operations. The spill was not capped until over nine months later). See L.A. Times, Mar. 3, 1983, at 1, col. 4.
7. Comment, Domestic and International Liability for the Bay of Campeche Oil Spill, 6 INT'L TRADE L.J. 55, 56 (1980).

There exists no international responsibility which anyone could exercise against Mexico for the blowout of Ixtoc I in terms of conventional international law. No article on conventional international law obligates Mexico to pay any reparations to a state because of pollution caused by Ixtoc I. According to existing international law, only an illegal international act requires some action, but Mexico has committed no illegal act nor has it violated any international obligation. To this date there exist 33 international conventions covering marine pollution, but none of them apply to Ixtoc I. Therefore, there is no existing international law which is applicable. UNCLOS III asserts that it is the sovereign right of each state to exploit its natural resources in conformity with the obligation to protect and preserve the marine environment. Mexico has made every effort, at extreme cost, to contain the blowout to avoid damage to marine ecology or to other states. In so doing, Mexico has complied with international law.

Id. at 20.

For a narrative of the efforts undertaken by Pemex to cap the oil well, see Informe de los Trabajos Realizados Para el Control del Pozo Ixtoc I, el Combate del Derrame de
its agents (Pemex and Permargo) acted negligently or illegally in operating the well.\textsuperscript{10} No domestic or international law existed to deal with blowouts occurring on the high seas.\textsuperscript{11}

The \textit{Ixtoc I} case illustrates the lack of effective international law for offshore oil explosions producing transnational damage, as well as the problems with using the traditional tort theory of negligence in this area. The need for international rules to determine liability and compensation following such an incident is clear.\textsuperscript{12}

This Comment will analyze the problem of determining liability for transnational environmental harm resulting from offshore oil disasters. It will argue that the best solution is to convene an international conference to produce a multinational treaty. This treaty should provide for the strict liability of any State which has an offshore oil platform operating under its jurisdiction. In drafting the treaty, the conference should use the recent work of the International Law Commission (ILC).

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\textit{Petroleo y Determinacion de sus Efectos Sobre el Ambiente Marino} (Report on the works undertaken to control the oil well \textit{Ixtoc I}, to fight back the oil spill and to determine its effects on the marine environment), Programa Coordinato de EstudiosEcologicos en la Jorda de Campeche, Mexico, 1980. Mexico created this commission in response to the \textit{Ixtoc I} oil spill. Interview with Jorge A. Vargas, Mexican-American Law Institute at the University of San Diego School of Law, in San Diego (Nov. 1, 1983).

\textsuperscript{10} Bath, \textit{supra} note 8, at 19-20. There was no specific "finding" of non-negligence on the part of the Mexican government. The United States government believed insufficient legal support for their claim existed; the United States chose not to sue Mexico. Proving that Mexico's negligence caused damage would be difficult. \textit{Id.} at 21.

Traditionally, a State was held responsible for the environmental damage it inflicted on another State only if negligence could be established. \textit{Id.} at 21. Under this negligence theory of State liability, certain elements had to be proven. Problems arise in using this traditional negligence standard in the case of offshore oil well accidents. Difficulties include agreeing on a proper standard of care for the well operator and proving a causal relationship between the operator's conduct and the injury.

\textsuperscript{11} See \textit{supra} note 8. In March, 1983, Sedco, Inc. agreed to pay the United States two million dollars to settle its portion of the suit. This offer was accepted. L.A. Times, Mar. 3, 1983, at 1, col. 4. No decision on the merits of this case has been reached. Leigh, \textit{Judicial Decisions}, 77 Am. J. Int'l L. 144, 151 (1983).

\textsuperscript{12} For example, as recently as February, 1983, an Iranian offshore oil well exploded in the Persian Gulf. Subsequently, Iraq attacked the oil field by air and worsened the damage, creating a severe oil spill in the Gulf. The slick threatened environmental damage as it floated closer to several Persian Gulf countries. Cleanup crews could not begin work because of the ongoing Iraq-Iran war. Thus, a war thwarted the containment of the spill, even though there was a danger of significant damage to the marine environment. L.A. Times, Mar. 30, 1983, at 11, col. 1. Iranian experts tried to repair the damage during the subsequent months, while under constant fire from Iraq. Eventually, the slick began to dissipate. In September, 1983, Iranian workers succeeded in sealing off the remaining leakage. Telephone interview with Mr. Moge at the Mission of Iran to the United Nations, in New York City (Sept. 27, 1983). See Financial Times, Sept. 22, 1983.
A model for the new treaty could be the 1971 Convention on International Liability for Damage Caused by Space Objects. This treaty assigns strict liability to the State within whose jurisdiction the harmful activity originates. Similarities exist in the need for and the policies behind both this treaty and the one proposed in this Comment. Additionally, such a conference may rely on domestic law which considers oil drilling an ultrahazardous activity subject to strict liability. Before these issues are taken up, the failure of existing conventional international law to govern offshore oil drilling is discussed.

FAILURE OF NEW 1982 CONVENTION TO REGULATE OFFSHORE OIL POLLUTION

The Third United Nations Conference on the Law of the Sea (UNCLOS III) was established in 1973 by a United Nations General Assembly resolution calling for an international regime governing law of the sea issues. After many years of work, UNCLOS III has completed the treaty (1982 Convention).

The 1982 Convention includes a section on protection of the marine environment. This purports to be a worldwide framework for protecting the world’s oceans, yet fails to impose the international legal responsibility necessary to guarantee effective compensation due to an offshore oil explosion which results in transnational damage. Despite its laudable achievements, the Convention fails to guarantee protection to States whose waters and shores are polluted by oil spills from platforms in another State’s waters. The Convention lacks definitive procedures for determining liability, guaranteeing compensation, and enforcing the adoption of international rules in this area.

The 1982 Convention imposes a general obligation on all States to protect and preserve the marine environment. In regulating pollution from offshore oil drilling, the Convention directs coastal States to adopt national laws, and global and regional rules, which are to be reviewed periodically. International minimum standards for pollu-

16. Part XII is entitled, “Protection and Preservation of the Marine Environment.” Id. arts. 192-237.
17. Id. art. 192.
18. Id. arts. 207-209. The international rules promulgated at the direction of the
tion from offshore activities will be produced by international organizations and diplomatic conferences. Yet none of the Convention's provisions establish substantive rules regulating pollution; therefore, no international pollution standards exist. The Convention merely establishes who should create these rules, and leaves the substance for future negotiations.

Although the individual States are responsible for enforcing their national laws and implementing the minimum international standards after they are established, the 1982 Convention does not provide an international procedure to enforce these States' obligations. This lack of an international mandatory enforcement mechanism undermines the success of the Convention's provisions because there is no guaranteed uniformity of enforcement. No international system exists to regulate whether the measures the States adopt are sufficient.

The Convention calls on States to fulfill their international obligations. If a State violates one of these obligations, it will incur liability in accordance with international law. Yet the Convention fails to establish any true penalties in international law for these violations.

The Convention's pollution articles are primarily concerned with treaty will represent a minimum level of protection, and will be binding on States in enacting their national rules on marine pollution. 2 G. TIMAGENIS, INTERNATIONAL CONTROL OF MARINE POLLUTION 604 (1980).

Coastal States "shall adopt laws" to control pollution, and these laws "shall be no less effective than international rules." States shall "harmonize their policies at the appropriate regional level," and "shall establish global and regional rules." 1982 Convention, supra note 15, art. 208, para. 5.

19. "States are left to their own devices and little is said of any standards of pollution, provisions for pollution control, or for enforcement procedures." Bath, supra note 8, at 18. "[A]n effective regime to prevent pollution of the oceans requires, in addition to the imposition of obligations on parties that use the oceans, the establishment of an authority to enforce these obligations with respect to violations which occur outside the jurisdiction of any particular state." Levantino, Protection of the High Seas from Operational Oil Pollution: A Proposal, 6 FORDHAM INT'L L.J. 72, 89 (1982).

20. 1982 Convention, supra note 15, art. 214, is entitled, "Enforcement with Respect to Pollution from Sea-bed Activities." States "shall implement applicable international rules and standards established through competent international organizations or diplomatic conference" to control pollution deriving from seabed activities in their jurisdiction. This is arguably a mere suggestion to States, and not a mandatory order.

21. 1982 Convention, supra note 15, art. 235 is entitled, "Responsibility and Liability," and affirms: "States are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law." This provision is "[d]esigned to provide a framework for future action. It sets out fundamental principles but leaves considerable latitude as to their implementation." DeMestral, The Prevention of Pollution of the Marine Environment Arising from Offshore Mining and Drilling, 20 HARV. INT'L L.J. 469, 501-02 (1979).
the control of oil pollution from vessels. The incidence of oil pollu-
tion from vessels is far greater than that from offshore oil rigs, and
has received more international attention. Yet, as the number of
offshore oil disasters increases each year, the dangers from them be-
come more apparent. When an offshore oil structure explodes, there
is a great danger of severe pollution to the surrounding coastal areas.
This source of pollution did not receive effective detailed treatment
in the 1982 Convention.

SOURCES OF STRICT LIABILITY IN INTERNATIONAL LAW

Due to the failure of the 1982 Convention to impose international
legal responsibility for offshore oil disasters, no "conventional" interna-
tional law is available to determine liability and guarantee compen-
sation. However, the various sources of "customary" interna-
tional law reflect the emergence of the doctrine of strict liability and

22. Schneider, Codification and Progressive Development of International Environ-
mental Law at the Third United Nations Conference on the Law of the Sea: The
Environmental Aspects of the Treaty Review, 20 COLUM. J. TRANSNAT'L L. 243, 248,
257 (1981). Many of the articles specifically deal with vessel-source pollution. E.g., 1982
Convention, supra note 15, art. 211, para. 5.

23. Traditionally, the sea did not belong to any particular State. Over time, States
have increased their claims over the world's waters. Borgese, The Law of the Sea, 248
of jurisdiction and control over the oceans. For example, the 1982 Convention
establishes 12 nautical miles as the maximum breadth of the territorial sea. 1982 Con-
vention, supra note 15, art. 3. The contiguous zone is extended to 24 miles. Id. art. 33.
The continental shelf and the exclusive economic zone both extend 200 miles from the
coast. Id. arts. 57 & 76. The latter is a new addition to international claims over the sea.

24. The two main sources of international law are treaties ("conventional" interna-
tional law) and custom ("customary" international law). Gamble, The Treaty/Custom
on party States. I. Brownlie, Principles of Public International Law 2 (1979). A
 treaty is usually first adopted by an international conference. It then enters into force
through ratification by a certain number of States. When a State that was a party to the
convention ratifies the treaty, it becomes binding on that State. 2 G. Timagenis, supra
note 18, at 605. Theoretically, "customary" international law is an expression of the
general consensus of States. I. Brownlie, supra, at 2. Each of these two main sources of
international law can affect the development of the other. Multilateral treaties are often
considered codifications of existing principles of customary law. Conversely, treaties can
form the basis of customary international law in a specific area. Gamble, supra, at 313.
An advantage of treaties over custom is that the former clearly set forth the existing law
in an area. Customary international law can be determined only by analyzing the atti-
dudes and consensus of States.

The Statute of the International Court of Justice, Article 38, enumerates the sources
of international law. I.C.J. STAT. art. 38 [hereinafter cited as I.C.J. Statute]. That artic-

If one can read, and see, is inevitably an important
source; a treaty is a tangible piece of evidence of the law.
support its application in transnational offshore oil accidents.\textsuperscript{25}

The sources of customary international law include treaties,\textsuperscript{26} the domestic laws of individual States, and the discussions of the United Nations International Law Commission.\textsuperscript{27}

\textbf{Treaties}

Treaties are evidence of customary international law.\textsuperscript{28} Although they bind only the States which are parties to them and govern only a limited substantive area, they can be used as support in analogous areas of dispute. For example, the 1982 Convention reflects the worldwide concern for protection of the marine environment.\textsuperscript{29} The detailed provisions regulating oil pollution from vessels could serve as models of reference when drafting a new treaty regarding oil pollution from offshore installations.\textsuperscript{30}

Another example is the 1976 Convention on Civil Liability for Oil Pollution Damage from Offshore Operations, a regional treaty regulating liability in offshore oil accidents.\textsuperscript{31} Only the nations bordering the North Sea, Baltic Sea, or North Atlantic Ocean may become parties to this convention by acceding to it. This Convention reflects the trend towards strict liability for offshore accidents. It subjects offshore installation operators to strict liability for damage caused by oil released during offshore operations.\textsuperscript{32} Thus, if transnational oil

\textsuperscript{25} "[W]hile offshore oil drilling is not subject to a strict liability convention of global applicability, a non-fault standard of liability might nevertheless be argued on the basis of an emerging norm of customary international law." Handl, \textit{The Case for Mexican Liability for Transnational Pollution Damage Resulting from the Ixtoc I Oilspill}, 2 \textit{Hous. J. INT'L L.}, 227, 235 (1979).

\textsuperscript{26} Gamble, \textit{supra} note 24, at 313.

\textsuperscript{27} See \textit{infra} notes 28, 61, and 73 and accompanying text.

\textsuperscript{28} Gamble, \textit{supra} note 24, at 313.

\textsuperscript{29} See 1982 Convention, \textit{supra} note 15, Part XII.

\textsuperscript{30} In the General Assembly's Sixth Committee meeting of 1981, one member commented on the International Law Commission's [hereinafter cited as ILC] "International Liability" discussions (see \textit{infra} note 79 and accompanying text) by suggesting that the international rules on this topic be formulated by studying the various multilateral and bilateral treaties on this subject over the past twenty years. 36 U.N. GAOR C.6 (52d mtg.) at 3, U.N. Doc. A/C.6/36/SR.52 (1981) (statement of Mr. Bouony, Tunisia).

\textsuperscript{31} Convention on Civil Liability for Oil Pollution Damage from Offshore Operations, \textit{reprinted in} 16 I.L.M. 1450 (1977) [hereinafter cited as 1976 Convention]. Offshore operations in the North Sea and the risk of oil pollution were developing rapidly. The parties wanted to establish a liability standard similar to that provided by the International Convention on Civil Liability for Oil Pollution Damage. See \textit{infra} note 34.

\textsuperscript{32} 1976 Convention, \textit{supra} note 31, art. 3. The operator is strictly liable except in
pollution occurs, the victims are guaranteed compensation by the operator or the insurer of the structure. The claimant may bring the action in any State where pollution damage occurs, or in the State which had jurisdiction over the oil operations.33

The 1976 Convention reflects the gradual departure from common law concepts of fault-based liability in favor of the doctrine of strict liability.34 The scope of this agreement, however, is limited to the North Sea nations. The international community needs other similar regional agreements or a single international conference on a broader geographical scale.

Other evidence of customary international law can be found in the 1971 Convention on International Liability for Damage Caused by Space Objects (Space Treaty).35 The treaty is concerned with transnational harm from falling space objects launched by States.36 This treaty utilizes a strict liability standard for transnational environmental harm.37 It reflects the gradually increasing acceptance of this standard in international law.

The Sixth Committee of the United Nations’ General Assembly convoked the international conference which produced the Space

the event of war, natural phenomena of an exceptional character, or the negligence of the claimant. According to Article 1 of the treaty, an “operator” is the person designated as such, for the purposes of this treaty, by the State within whose jurisdiction the offshore activities are taking place. In the absence of such designation, it is the person in overall control of the offshore activities. DeMestral, supra note 20, at 494.

33. 1976 Convention, supra note 31, art. 1.

34. Other efforts to regulate transnational oil pollution liability have resulted in successful treaties. For example, the International Convention on Civil Liability for Oil Pollution Damage of 1969 established limited strict liability on owners of oil-polluting vessels. See International Convention on Civil Liability for Oil Pollution Damage, done November 29, 1969, 973 U.N.T.S. 0, reprinted in 9 I.L.M. 45 (1970). Many of these efforts have been developed under the auspices of the International Maritime Consultative Organization.


36. Dembling, A Liability Treaty for Outer Space Activities, 19 Am. U.L. Rev. 33, 34, 40 (1970). Strict liability has not been a popular concept in international law. International Law Commission, Fourth Report on “International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law,” U.N. Doc. A/CN.4/373, at 44 (1983) Nevertheless, strict liability was adopted in this 1971 treaty which focused on a specific topic of international law. See Space Treaty, supra note 35, art. II. If a space object launched by one State fell and caused damage within the jurisdiction of another State, the cause of the damage would be obvious. In the case of marine pollution from offshore oil explosions, the questions of damage and causation are not as easily resolved. Perhaps this difficulty explains States’ reluctance to impose strict liability in offshore oil pollution. The issues are more complex and ambiguous, and States are hesitant to accept absolute responsibility in international law for the resulting damage. Nevertheless, the urgent need for international responsibility today is apparent; a multinational treaty imposing this international responsibility is desperately needed.

37. See Space Treaty, supra note 35, art. II.
Treaty. As the building of artificial satellites and other space ships proliferated, international concern increased over the possibility that a space object launched by one State could fall in the territory of another State and cause damage. Although few incidents of transnational harm actually occurred, the potential for harm was recognized.

The Space Treaty provides that a launching State is absolutely liable for damage caused by its space object to another State. The preamble of the treaty recognizes that damage from space objects may occur even if the launching State has acted with due care. It also recognizes the need for effective international law to guarantee compensation for this damage.

Offshore oil drilling is analogous to man’s use of space; therefore, the strict liability concept formulated for space is similarly applicable to ocean oil drilling. Space is a complex environment; man has only limited knowledge of its physical characteristics. Similarly, the sea presents a hostile unknown environment. Like space, the sea can accurately be described as “remote, esoteric, unconfined, and inaccessible.” Moreover, Exxon Corp., one of the world’s major private oil companies admits, “the geology of deep water offshore areas is not yet well known.”

Space exploration involves the use of advanced technology in an

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40. See id.

41. Space Treaty, supra note 35, art. II.

42. Id. at preamble. The launching State must pay compensation to the injured State (the State within whose jurisdiction the damage occurred). This treaty is at the public international level (not private international law) and thus only States are parties to it (not private individuals). Id. at preamble. The injured State makes the decision to allocate the compensation it receives to the injured individuals within its jurisdiction. See Dembling, supra note 36, at 43.


44. Id.

45. Id. at 595-96.

unknown environment. Strict liability was established in the Space Treaty, in part, because of this use of technological equipment. Drafters acknowledged that advanced technology renders a negligence theory of liability impotent because determining the exact malfunction causing injury is difficult, and because determining negligent use or construction of advanced equipment is also difficult.

Offshore oil drilling equipment is similarly complex. Although oil-well-blowout-preventers have been established, Exxon admits continued drilling requires technology not presently available. The Ixtoc I disaster, previously discussed, demonstrates similar concerns in an offshore oil drilling context—high technology equipment made negligence liability impractical. Because a primary reason for adopting strict liability in the Space Treaty similarly applies to offshore drilling, the Space Treaty rule—strict liability—should be applied to offshore oil drilling.

The Space Treaty's procedure for asserting a claim can be applied in the offshore oil drilling context. The Space Treaty allows a launching State, after paying compensation, to present a claim for indemnification to other States which participated in the launching, because they are jointly and severally liable.

A similar provision would be desirable in an offshore oil pollution treaty, allowing a State who has already repaired the damage to seek indemnification against a private multinational oil corporation who owned or operated the offshore oil structure which exploded and caused the damage.

47. Dembling, supra note 36, at 35.
48. Id. A strict liability standard relieves the claimant of proving negligence. This is helpful in the area of space object activities because showing reasonable conduct is difficult due to the limited experience available from which to formulate a standard. See id. at 36, 37.
49. Id. at 208, 352.
50. See supra notes 8, 10.
52. This would induce States to impose stricter regulations and control over offshore oil operations. Lay, Pollution From Offshore Oil Wells, in 3 New Directions in the Law of the Sea 105 (R. Churchill ed. 1973). The oil company could be forced to pay as part of its risk in producing oil. Id. There would be no distinction between nationally owned and privately owned oil companies. Regardless of oil rig ownership, the State would be held responsible in the international arena because the oil corporation is legally authorized to act under that State's legislation.

This Comment proposes a solution to transnational oil pollution at the level of public international law. A State will be responsible for activities occurring within its jurisdiction or control which injure another State, regardless of whether it is a government-sponsored activity. If the State permits the activity, it will be held liable for any resulting damage. Two international cases support this approach. See Levantino, supra note 14, at 91. The Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4, establishes direct State responsibility for personal injury, and can be analogized to cases of environmental injury. Id. Also, the Trail Smelter Arbitration, 3 R. Int'l. Arb. Awards 1905 (1949) imposed direct State liability for the extraterritorial environmental injury caused by a private
Under the Space Treaty, a claim for compensation can be made through diplomatic channels or through the United Nations Secretary-General. If no settlement is reached after one year, the parties establish a Claims Commission. The commission decides on the merits of the claim. It then determines the amount of compensation due. The compensation shall be determined in accordance with international law to provide reparation to the condition which would have existed if the damage had not occurred. The parties may agree in advance that the commission’s decision will be binding. If they do not, the decision will represent a recommendatory award for the parties to consider in good faith.

The Space Treaty has special provisions to determine which State is liable and the amount of compensation due. This is necessary for the effective redress of transnational harm.

If these provisions were adopted in a new offshore oil treaty, compensation would be guaranteed for a State injured by offshore oil activities of another State. The defendant State would be strictly liable for this damage. The Ixtoc I incident illustrates that without these specific rules and procedures, there is a danger of inadequate compensation, multiple suits, and delayed settlement.
Domestic Law of States

Evidence of customary international law can also be obtained from the domestic law of States. Article 38 of the Statute of the International Court of Justice sets forth the sources of international law.60 One such source is "the general principles of law recognized by civilized nations."61 The practices of States often contribute to the development of international law, by representing the "custom" in a particular area of law.62 A domestic law concept will often be adopted as international law if the policies behind the concept are present in the international arena.63

The strict liability doctrine should be utilized in public international law because the concept is now accepted in nations throughout the world. For example, in the United States, strict liability is imposed on one who undertakes an "abnormally dangerous activity."64 Courts have determined that activities which pose a high degree of risk of harm are "abnormally dangerous" in this context.65 In these cases, the negligence (fault or wrongful intent) of the defendant need not be proven. It is sufficient that the defendant knowingly engaged in, or permitted, the abnormally dangerous activity.66

Various states have considered drilling oil wells on land an "abnormally dangerous activity."67 In Green v. General Petroleum Corp.,68 the defendant driller was held liable for damage resulting

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60. I.C.J. Statute, supra note 24.
61. Id. art. 38.
64. Restatement (Second) of Torts §§ 519, 520 (1977).
65. Id.
66. Id.
68. 205 Cal. 328, 270 P. 952 (1928). See W. Prosser, supra note 67, at 510. In Green, the defendant was legally drilling for oil in a residential district in Los Angeles when a blowout occurred. Although the defendant had used due care in drilling the well, he was held liable for the damage to the plaintiff's adjoining land.

The Green case has been approvingly cited in several subsequent California decisions. Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948) (Green states a principle of public policy in supporting strict liability for certain activities which are hazardous to the general public; Green applies to both property damage and personal injury); Henderson Bros. Stores, Inc. v. Smiley, 120 Cal. App. 3d 903, 174 Cal. Rptr. 875 (1981) (Green is presently interpreted as imposing strict liability on the basis of an abnormally dangerous activity); Avner v. Longridge Estates, 272 Cal. App. 2d 607, 77 Cal. Rptr. 633 (1969)
from an oil well blowout, even though he had not acted negligently. California considers oil well drilling an “abnormally dangerous” or “ultra hazardous” activity because of the potential risk of harm to lands, waters, fish, and property.\footnote{Walmsley, Oil Pollution Problems Arising Out of Exploitation of the Continental Shelf: The Santa Barbara Disaster 9 SAN DIEGO L. REV. 514, 550 (1972).} Although Green involved oil drilling on land, offshore oil drilling poses almost identical risks.

Strict liability should be imposed when extrahazardous activities are involved because, by definition, a high risk of serious injury exists notwithstanding the use of reasonable care. In international law, these policies are expressed in the “Space Treaty.” The creator of an abnormally great risk is strictly liable because, between the creator and the innocent victim, the one who engages in the dangerous profit-making activity is best able to predict and allocate the risk of loss. The enterprise can spread the loss through slightly higher prices to consumers whereas an innocent victim cannot.\footnote{See generally Smith v. Lockheed Propulsion Co., 247 Cal. App. 2d 744, 56 Cal. Rptr. 128 (1967) (discusses policy behind strict liability for abnormally dangerous activities).}

The policies underlying strict liability in domestic law have been similarly articulated in international law. Strict liability was adopted in this treaty, in part, because “[t]aking into consideration that, notwithstanding the precautionary measures to be taken by States and international intergovernmental organizations involved in the launching of space objects, damage may on occasion be caused by such objects. . . .”\footnote{Space Treaty, supra note 35, preamble.} Just as launching objects into space is an extrahazardous activity,\footnote{Dembling, supra note 36, at 37.} offshore oil drilling is extrahazardous. Because domestic law recognizes strict liability for oil drilling, and because the policy underlying the rule is recognized in international law, liability for international offshore oil drilling accidents should be founded on strict liability.
Finally, the work of the International Law Commission (ILC) can function as a source of international law. The draft articles and discussions are evidence of customary international law. Ideally, these ILC reports express the majority opinion of the world's nations. In addition, all State representatives have the opportunity to comment on the reports when the United Nations General Assembly discusses them at their annual meetings.

The ILC can produce conventional international law as well. Its draft articles on a particular topic may be used by the General Assembly as the basis for calling a conference to develop a convention/treaty.

73. The International Law Commission (ILC) was established by the United Nations General Assembly to codify existing international law and to promote the progressive development of international law. W. Friedman, Transnational Law in A Changing Society 38 (1972). To achieve the latter, the ILC Statute directs the commission to prepare draft articles for conventions on areas which are not regulated by international law, or areas in which the law has not been fully developed in State practice. Id. at 38. The ILC's members are experts in international law elected by the General Assembly with the goal of representing all of the world's major legal systems. M. Sorensen, supra note 62, at 141.

The ILC has no formal power to create laws. W. Levi, Contemporary International Law: A Concise Introduction 51 (1979). At annual meetings, broad topics of international law are discussed. See id. If and when agreement is reached, the ILC presents a report to the U.N. General Assembly. Id.

Since 1980, the ILC has been discussing the broad topic of the international liability of States for legal activities which produce injury to other States. "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law." See infra note 79. Although the doctrine of strict liability has not been definitively set forth in these meetings, the discussions reflect increasing support for imposing this standard on States which produce transnational injuries. See infra note 86 and accompanying text.


75. The ILC's members are international law experts. M. Sorensen, supra note 62, at 141. This is different from a multilateral conference whose members are representatives of individual nations.

76. Although an I.L.C. report to the General Assembly is not formally binding as law, it carries legal significance. It represents a threshold of consensus, clearly confronting States and requesting their reaction. I. Brownlie, supra note 24, at 2. The General Assembly has no legislative powers; its resolutions are not formally binding on United Nations member States or international law. Schwebel, The Effect of Resolutions of the United Nations General Assembly on Customary International Law, 73 Amer. Soc'y, of Int'l. Law: Proceedings 301, 301 (1979). Yet it provides important evidence of customary international law. I. Brownlie, supra note 24, at 2. States are free to implement or ignore these resolutions. Schwebel, supra, at 302. States use resolutions to create change in their relationships with other States. Adeede, International Law From A Common Law Perspective: A Second Look, 60 B.U.L. Rev. 46, 76 (1980).

77. W. Friedman, supra note 73, at 38-9. Conventions/treaties are the result of a multilateral (or regional) "conference" or bilateral negotiations. M. Sorensen, supra
The ILC's capacity to serve as a source of international law regarding transnational offshore oil accidents is readily apparent. Its recent discussions reveal the potential for producing conventional law in this area. Since 1980, the ILC has been discussing the general topic of the international liability of States for conducting activities which are permissible under international law and yet cause damage in another State. The ILC recognizes that these activities cannot continue without consideration of their potential effects on other states.

The Commission is specifically concerned with those legal activities which, by nature, pose certain "risks" of harm. The ILC plans to treat this as a broad topic, without restricting its application to any particular subject area. Yet the Rapporteur for this topic notes that it is usually discussed in the context of environmental hazards caused by human activity and advanced technology.

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78. See ILC Preliminary Report, supra note 74, at 248. The potential importance of the ILC's discussions on this topic is demonstrated by the ILC's past success. In 1956, the ILC produced draft articles on the general topic of the Law of the Sea, and recommended the General Assembly convene an intergovernmental conference of State representatives to produce one or more international conventions based on the articles. The General Assembly followed the ILC's suggestion and assembled the first UNCLOS. See Johnson, The Preparation of the 1958 Geneva Conference on the Law of the Sea, 8 INT'L & COMP. L.Q. 122, 129, 131 (1959). The General Assembly gave the ILC report to the conference to use as the working basis for codifying the international law in this area. See id. at 137.


79. The title of this topic is "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law." ILC Preliminary Report, supra note 74, at 248. This topic was created specifically to deal with the consequences of acts not prohibited by international law, to be treated separately from the ILC topic of "State Responsibility" for internationally wrongful acts. Id. at 248.


82. ILC Preliminary Report, supra note 74, at 248.

The I.L.C. appointed a "Special Rapporteur," Mr. Robert Quentin-Baxter, to study
In his third report to the Commission, the Rapporteur notes the continued use of the strict liability concept in creating conventional regimes, especially those dealing with activities which have a low risk of accident occurrence yet a high risk of extensive injury if an accident does occur. He realizes an unqualified commitment to strict liability would probably not be accepted; conversely, the doctrine cannot be ignored in drafting pertinent articles.

In his fourth and most recent report, the Rapporteur concedes the practical difficulty of articulating the reasonable standards for States' activities. He agrees, theoretically, that strict liability of States may be the best solution. Only this standard of liability will guarantee compensation of transnational victims and preservation of the environment.

The work of the Rapporteur on this topic of international responsibility for legal activities is not only discussed within the ILC. The Sixth Committee of the General Assembly also discusses the ILC's work at its annual meetings. Within this committee, various nations' representatives believe the concept of strict liability with proper qualifications should be considered as a basis for the ILC's work on this "international responsibility" topic. Other representa-

the topic. A Rapporteur is a legal expert in a particular field who is appointed to take notes and produce reports and/or drafts on the topic. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1883 (3rd ed. 1961). This report includes proposed draft articles. Only a few, broad articles have been included in Mr. Quentin-Baxter's reports. International Law Commission, Third Report on "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law," U.N. Doc. A/CN.4/360, at 24 (1982) [hereinafter cited as ILC Third Report].

83. Id. ILC Third Report, at 10-11. Beginning with the 1980 I.L.C. meeting, Mr. Quentin-Baxter has presented four annual reports to the commission on this topic. In 1982 he drafted a general outline for a set of draft articles. Id. at 24. Mr. Quentin-Baxter's reports influence the work of the I.L.C. in their further discussion of this topic. International Law Commission, Report on the work of its thirty-fourth session, 37 U.N. GAOR Supp. (No. 10) at 185, U.N. Doc. A/37/10 (1982). The articles are presented in a form suitable for use as the basis for the conclusion of a future convention. ILC 32nd Sess., supra note 80, at 50.

84. ILC Third Report, supra note 82, at 11.


86. Id. at 44. The Rapporteur discusses the difficulty of articulating "[t]he ordinary standards of State responsibility for wrongful acts and omissions in ways that offer practical solutions to current legal problems. The theoretical answer may be a move to the standards of the strict liability of the State. The Commission will not wish to neglect the reasoned arguments of Handl and others that this is a feasible standard, and the only one which finally discourages the shabby compromises that assail the biosphere and leave the victims of avoidable disasters with inadequate redress." Id.

87. Johnson, supra note 78, at 130, 132. The Sixth Committee, an organ of the General Assembly, discusses legal questions. See id. at 130.


89. See supra note 79.
tives clearly support unequivocal strict liability in international law. These members argue that the principle found in many States' domestic laws should be extended to international law, to promote harmonious relations between States. 90

Furthermore, it is argued that international law should promote in States a general feeling of taking responsibility for their activities. This would discourage a State from acting negligently, or from allowing those acting as their agents to so act. 91

The topic of international responsibility for legal activities within a State's jurisdiction is broad and complex. 92 The ILC's work in this general area does not provide a sufficient basis to call a new international convention. The Commission has not yet completed its discussions. It will take years before a general, unqualified strict liability standard is adopted by the ILC for all transnational injuries resulting from the lawful activities of a State. 93

The dangers of transnational pollution from offshore oil activities exist today. The concept of strict liability has been discussed as a general guideline for States within this broad topic. This concept can be derived from the ILC broad discussions and applied to the problem of offshore oil pollution, and thus accelerate the process of imposing strict liability in international law.

This can be accomplished by calling a new international conference to produce a treaty on this specific topic. An international conference concerning this narrow area is a more feasible solution than


Therefore, the policy reasons underlying the members' support for the strict liability standard in the ILC and the General Assembly's Sixth Committee can be applied to the narrow topic of offshore oil pollution accidents. See supra notes 81-89 and accompanying text. For a discussion of the risks involved in offshore oil drilling, see supra notes 43-48 and accompanying text.


92. This area raises many questions, such as the involvement of private and multinational companies or individuals in owning or operating the legal activity.

93. The ILC required eight years of study to produce the final draft articles on the law of the sea. See Johnson, supra note 78, at 127. The present ILC topic of international responsibility see supra note 79, is even broader than the law of the sea topic. See International Law Commission, Second Report on "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law," A/CN.4/346 (33rd Sess., 1981), at 2. The ILC will probably take years longer to reach agreement on the underlying principles of this topic. See supra note 35, 38 (the United Nations General Assembly created the Committee on the Peaceful Uses of Outer Space in 1958; The Space Treaty imposing strict liability was not produced until 1971).
waiting years for the completed ILC draft articles on the “international responsibility” topic. A narrowly focused forum would provide a more practical method of developing strict liability for transnational offshore oil pollution. This forum should be an international conference, called by the General Assembly, to develop international rules regarding accidents involving offshore oil structures.

CONCLUSION

The doctrine of strict liability in conventional international law is limited to treaties representing a few particular areas. These areas usually involve an allocation of risk associated with highly dangerous activities.\(^94\) Although several sources of “customary” international law support the imposition of strict liability in transnational offshore oil disasters, the creation of “conventional” international law in this area would be the most effective solution. A treaty would formally bind the party States and would clearly provide for the determination of liability, compensation, and enforcement. A multilateral treaty would be a more effective expression of international law than the existing customary international law.\(^98\)

In formulating this treaty, the drafters should consider the various customary international laws relating to this topic.\(^96\) An examination of the 1971 Space Treaty would provide concrete suggestions of certain provisions which should be included in a new treaty governing offshore oil accidents. Oceans are a common resource for the entire planet, and deserve the specific legal attention already given to space.

The International Law Commission reports, and the General Assembly’s comments, reflect increasing recognition of the desirability of imposing strict liability in international law.\(^97\) This concept should be applied in a new international convention specifically focused on the development of rules governing offshore oil accidents with transnational effects. The General Assembly should convocate such a conference before the problem worsens. International law regulating incidents of transnational pollution in the marine environment from offshore oil well accidents is urgently needed.\(^98\)

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\(^{95}\) See supra note 24. The United Nations should convocate a conference to produce this multilateral treaty. This may encourage the development of future regional and/or bilateral treaties in this area which would incorporate the principles from this proposed multilateral convention.

\(^{96}\) See supra notes 24 & 25 and accompanying text.

\(^{97}\) See supra text accompanying notes 83-90.

\(^{98}\) See supra notes 4 & 5 and accompanying text.