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International Law and Liability for Catastrophic Environmental Damage

Citation for published version:

Boyle, A 2011, 'International Law and Liability for Catastrophic Environmental Damage' Proceedings of the American Society of International Law, vol 105, pp. 423-427., 10.5305/procanmeetasil.105.0423

Digital Object Identifier (DOI):

[10.5305/procanmeetasil.105.0423](https://doi.org/10.5305/procanmeetasil.105.0423)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher final version (usually the publisher pdf)

Published In:

Proceedings of the American Society of International Law

Publisher Rights Statement:

© Boyle, A. (2011). International Law and Liability for Catastrophic Environmental Damage. Proceedings of the American Society of International Law, 105, 423-427. 10.5305/procanmeetasil.105.0423

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Introductory Remarks by Alan Boyle

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Source: *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 105 (March 23-26, 2011), pp. 423-427

Published by: [American Society of International Law](#)

Stable URL: <http://www.jstor.org/stable/10.5305/procannmeetasil.105.0423>

Accessed: 17/03/2014 11:38

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INTERNATIONAL LAW AND THE LIABILITY FOR CATASTROPHIC ENVIRONMENTAL DAMAGE

This panel was convened at 3:00 p.m., Friday, March 25, by its moderator, Marie Soveroski, ASIL International Environmental Law Interest Group Chair, who introduced the panelists: Tullio Treves of the International Tribunal for the Law of the Sea; Alan Boyle of Edinburgh University; Peter Sand of the University of Munich; Monika Hinteregger of the University of Graz; and Gunther Handl of Tulane University School of Law.

INTRODUCTORY REMARKS BY ALAN BOYLE*

This panel will address international law on liability for catastrophic environmental damage, with the *Deepwater Horizon* oil rig disaster in the Gulf of Mexico in mind.¹ *Deepwater Horizon* is largely a U.S. disaster rather than an international one—save for the cost of cleaning up the marine environment, which has largely been borne by BP. But if *Deepwater Horizon* had caused massive pollution in Mexico or various Caribbean Islands, it would show, as a case study, the limitations of current international law on liability, especially in respect of oil drilling at sea, currently unregulated by a treaty regime.²

International law on liability for catastrophic environmental damage is not fundamentally different from international law on liability for damage in general—we can consider the law of state responsibility for breach of obligation by states or the law of civil liability of private actors, in particular the regimes established by civil liability treaties. Catastrophic damage—damage on a scale large enough to result in very substantial claims—is legally problematic because of the likelihood that (a) the relevant operator cannot fund the loss; and (b) mass compensation claims may result.

The key issues are: Who should be liable for the damage? And what process is best suited to deal with claims resulting from transboundary harm?

RESPONSIBILITY OF STATES FOR ENVIRONMENTAL DAMAGE

State responsibility will cover claims for loss or damage resulting from a breach of obligation in international law, including pollution damage and damage to the environment.³ There are very few instances of such international claims; they include the *Trail Smelter Arbitration*⁴ and UN Security Council Resolution 687 holding Iraq responsible for damage caused by the invasion of Kuwait.

The key obligation is codified in Principle 2 of the 1992 Rio Declaration on Environment and Development, which refers to the state's "responsibility to ensure that activities within

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¹ For details, see Nat'l Comm'n on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deepwater: The Gulf Oil Disaster and the Future of Offshore Drilling: Report to the President* (Jan. 2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf.

² A 1977 European Convention on Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources has never entered into force, and would have applied only to the North Atlantic, North Sea, and Baltic Sea. Liability for oil pollution from ships is covered by the 1992 IMO Convention on Civil Liability for Oil Pollution Damage, and the 1992 IMO Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, although the United States is not a party.

³ Rep. of the Int'l Law Comm'n, Articles on State Responsibility (ILC Articles) 43–365, GAOR A/56/10 (2001), reprinted in JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* (2002).

⁴ *Trail Smelter Arbitral Tribunal Decision*, 33 AM. J. INT'L L. 182 (1939); 35 AM. J. INT'L L. 684 (1941).

their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.” The two leading authorities are the 2010 ICJ *Pulp Mills* case⁵ and the 2011 ITLOS Advisory Opinion on Activities in the Seabed Area.⁶

The *Pulp Mills* judgment cites the *Corfu Channel case*⁷ and the *Nuclear Weapons* advisory opinion,⁸ and reaffirms that “A State is thus obliged to use all of the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another state” (para. 101). It reflects the draft articles of the ILC on prevention of transboundary harm.⁹ The ICJ confirms that the obligation is one of due diligence: an obligation of conduct rather than result. It specifically rejects Argentina’s argument to the contrary (para. 187). This is not surprising: it fully accords with the precedents and the leading textbook writers.¹⁰

The same view is taken by ITLOS in its Advisory Opinion on Seabed Activities: “The sponsoring State’s obligation ‘to ensure’ is not an obligation to achieve, in each and every case, the result that the sponsored contractor complies with the aforementioned obligations. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result.” (para. 110). ITLOS cites with approval the ICJ *Pulp Mills* judgment (para. 111). The Tribunal observes that “while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law.” (para. 112). It goes on to note: “From the wording of article 139, paragraph 2, of the [1982 UN LOS] Convention, it is evident that liability arises from the failure of the sponsoring State to carry out its own responsibilities. The sponsoring State is not, however, liable for the failure of the sponsored contractor to meet its obligations.” (para. 172)

States will thus be responsible under international law for damage caused by their own failure to act with due diligence, but they are not guarantors of last resort for the defaults of industry or business.¹¹ They will not be responsible for damage if they have acted with due diligence: there is no consensus in favor of international liability of states without fault.¹² The Tribunal also reiterates that “there must be a causal link between the failure of that State and the damage caused by the sponsored contractor” (para. 181).

In *Pulp Mills* the Court identified these elements of due diligence:

- “adoption of appropriate rules and measures” (para. 197)
- “a certain level of vigilance in their enforcement”
- “the exercise of administrative control applicable to public and private operators”

⁵ *Pulp Mills on the River Uruguay* (Arg. v. Uru.), Judgment of Apr. 20, 2010.

⁶ Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, ITLOS Seabed Disputes Chamber, 2011.

⁷ *Corfu Channel* (UK v. Alb.), 1949 I.C.J. 1.

⁸ Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, 1996 I.C.J. 226.

⁹ See II(2) Y.B. INT’L LAW COMM’N 144–70 (2001).

¹⁰ See, for example, PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW & THE ENVIRONMENT* (3d. ed. 2009), ch. 3 and literature there cited.

¹¹ See 2002 ILC Articles on State Responsibility, arts. 1 & 2.

¹² See Rep. of the Int’l Law Comm’n, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, GAOR A/61/10, paras. 51–67 (2006); BIRNIE, BOYLE & REDGWELL, *supra* note 10, at ch. 4, section 2.

- “careful consideration of the technology to be used” (para. 223)
- EIA and notification

The ITLOS Advisory Opinion cites *Pulp Mills* (para. 115), and makes the following additional comments:

- Due diligence is a “variable concept,” which may change over time and differ in respect of different risks. (para. 117)
- Measures taken must be “reasonably appropriate.” (para. 120)
- “(T)he precautionary approach is also an integral part of the general obligation of due diligence of sponsoring States, which is applicable even outside the scope of the Regulations.” (para. 131)

We can now apply these elements to the *Deepwater Horizon* case.

U.S. CONGRESSIONAL REPORT 2011

In 2011, a national commission of enquiry reported to the U.S. Congress on the disaster. In addition to its criticisms of BP (the well operator and lessee), Transocean (the rig operator), and Haliburton (the principal contractor), the report gives a damning account of regulatory failure by Congress and the Minerals Management Service (MMS). Among a long catalogue of failures, the following stand out:

- Drilling regulations were well below industry best practice in the North Sea. They were based on a “prescriptive regulation with inspection model” characterized as “fundamentally reactive and therefore incapable of driving continuous improvement in policies and practices.” (p. 69) The report notes that “efforts to adopt a more rigorous and effective risk-based safety regime were repeatedly revisited, refined, delayed, and blocked by industry or sceptical agency political appointees.” (p. 71)
- “MMS became an agency systematically lacking the resources, technical training or experience in petroleum engineering that is absolutely critical to ensuring that offshore drilling is being conducted in a safe and responsible manner.” (p. 57)
- “As drilling technology evolved, many aspects of drilling lacked corresponding safety regulations.” (p. 73)
- Diminished resources meant fewer and less effective inspections. (p. 74) Inspectors were poorly paid, poorly trained, too few in number, too inexperienced. (p. 79) A culture of inspectors accepting gifts from oil companies was prevalent. (p. 78)
- No EIA: MMS lacked resources to carry out “meaningful NEPA review” and exempted Gulf oil drilling, in practice, from NEPA (pp. 81–82). The report refers to a “culture of complacency.” No other agency had the resources or authority to do the job. (p. 84) Notwithstanding “layers of required environmental scrutiny”—by NEPA, OPA, OCSLA, EDSA, CWA—*none* of these laws resulted in site-specific review of the drilling operations.” (p. 84)

It is hard to imagine a better example of the failure by a state to act with due diligence. If other states had been damaged, the U.S. could not easily have defended itself in an international forum.¹³

¹³ Finding a forum could be difficult, given that the United States is not subject to compulsory jurisdiction under the ICJ Statute or the 1982 UN Convention on the Law of the Sea.

CIVIL LIABILITY

The alternative approach would focus on the civil liability of the operator. UNCLOS Article 235(2) requires states to “ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation for damage caused by pollution of the marine environment.” The 2006 ILC Principles for Allocation of Loss take the same view: “States shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control.” (Principle 6.1)

Suing the operator is not a problem for U.S. plaintiffs, since oil rig spills are actionable under OPA and CWA. There is no limit on liability for cleanup costs, although the limit on liability for other damages—a mere \$75 million—is well below the likely scale of damage. BP has waived this limit and made \$20 billion available through a mass claims process. Things might be different if Transocean had been sole operator. The congressional report concludes that the U.S. should consider the likelihood that many oilfield operators lack the resources to fund compensation on this scale (p. 286).

Could foreign victims of a *Deepwater* sue successfully in the U.S. for extraterritorial damage? U.S. courts are reluctant to hear cases brought by foreign plaintiffs for extra-territorial damage—the forum non conveniens defense being used successfully in *Bhopal* and other cases.¹⁴ It is not clear that BP could be sued in U.S. courts for extra-territorial damage—the U.S. is out of step with the rest of the world in this. On the evidence of the recent *Trafigura* litigation in the UK, it might be better to sue BP in England where it is registered. The English court would either apply U.S. law or the law of the country where the damage occurred.

Alternatively, it might be possible to sue BP in the U.S. under the Alien Tort Claims Act for a violation of international law; however, the Supreme Court decision in *Sosa v. Machain* limits the scope of this jurisdiction, and a recent 2nd Circuit decision in *Kiobel* bars actions against corporations.

Unlike oil tankers, oil rigs and wells are not covered by any civil liability treaty. As noted earlier, a 1977 treaty on liability for spills from oil rigs is not in force and has no parties. In other contexts, civil liability treaties have been useful in harmonizing national laws and establishing international compensation funds or arrangements to cover catastrophic damage, for examples, oil pollution from ships, and nuclear liability treaties adopted by IMO, IAEA, and OECD. The ILC draft principles of loss allocation adopted in 2006 try to generalize this.

An international liability regime for oil rigs is worth looking at. The North Sea may be better regulated than the Gulf of Mexico, but liability law in the U.S. is more advanced than in the UK or the rest of Europe. It is not even clear that we have strict liability for this type of accident in the UK, although an industry compensation scheme exists. An accident on the scale of *Deepwater* far exceeds the compensation funding available in the UK or the U.S. There may be a case for international harmonization—third countries who are potential victims of these disasters have a strong interest in ensuring the availability of adequate redress and better compensation schemes in accordance with UNCLOS. Otherwise, they may be forced to rely on state responsibility and inter-state claims.

¹⁴ See *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December 1984, 634 F. Supp. 842 (S.D.N.Y. 1986).

The final problem is the absence of any internationally agreed-upon or harmonized mass claims process. The civil liability system relies on national law to facilitate mass claims, a process which is much easier in some jurisdictions—e.g., the U.S. and the UK—than in others. The UN Compensation Commission has provided a successful alternative model, based on state responsibility, facilitating direct claims by nonstate actors.¹⁵ But it is ad hoc: there is no assurance that the UN would or could create a similar process in quite different circumstances. There is thus a strong argument for a permanent body to facilitate mass claims. *Deepwater* is not the only example—the ICJ *Aerial Spraying* case raises the same problem. I will leave to others the debate on how an international court would assess mass claims.

CONCLUSIONS

The U.S. is lucky that the *Deepwater Horizon* accident did not affect other states and that it happened at a BP well. The congressional report shows that the U.S. regulatory system for oil drilling at sea compares favorably only to some of the weaker third-world states. The EU is currently studying possible regulation of EU corporations abroad where the host state's legal system is dysfunctional. Perhaps it might like to start with oil rigs . . .

U.S. liability law is in better shape, but only if one overlooks the scale of the *Deepwater* accident. It dwarfs the existing system, and would be even worse if international claims factored in. There seems to be a clear need to reconsider the 1977 treaty and develop an international liability and compensation scheme for oil drilling at sea.

REMARKS BY GUNTHER HANDL*

Alan Boyle persuasively set out the basic contours of states' accountability under international law for catastrophic transboundary environmental damage. I will comment on some international legal implications of the *Deepwater Horizon/Macondo* oil spill, first noting that even in the absence of serious transboundary effects, the oil spill entailed direct transnational legal or international diplomatic reactions. Early concerns about the Gulf of Mexico's "loop current" prompted fears that areas beyond the U.S. Gulf Coast could be affected, leading to informal discussions between U.S. and Cuban officials. The Mexican states of Veracruz, Tamaulipas, and Quintana Roo have filed claims in U.S. federal court against BP, Halliburton, and Transocean for damages to fisheries and tourism. The federal government of Mexico indicated that it might seek compensation for the costs of monitoring the oil spill and, possibly, preventive measures.

Drilling in the Gulf of Mexico is inherently a matter of international concern, as buttressed by the fact that the *Deepwater* accident is the second catastrophic oil spill there, after the Ixtoc-I blow-out in 1979. As drilling occurs ever further offshore—the Perdido rig operates almost 200 miles from the coast—and in deeper waters, the risks associated with such locations increase. The United States has expressed concern about plans for oil and gas drilling on Cuba's continental shelf and has sought high-level talks with Mexico¹ to strengthen standards governing oil and gas drilling in the Gulf.

¹⁵ See CYMIE PAYNE & PETER SAND, *GULF WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: ENVIRONMENTAL LIABILITY* (2011).

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¹ In June 2010, the two countries agreed to extend until 2014 the ban on drilling in the immediate sea boundary area under the 2000 maritime delimitation treaty.