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The Development of International Conventions
Relating to Marine pollution:
An Appraisal Using the TASCOI Method
of Organisational Practice in Reference
to Torrey Canyon

Master thesis
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Summary

This thesis deals with the development of international conventions that relate to marine pollution, after the occurrence of a big oil pollution incident. In order to facilitate the description of the different stages, the approach used is the TASCOI method. This is a model used in organisational practice for the purpose of establishing how a process occurs and defining the role of different entities involved in the process. TASCOI stands for Transformation, Actors, Suppliers, Customers, Owners and Interveners. Transformation includes the whole process of making new conventions in the sense that the term stands for Input, that is to say existing conventions that have proved inadequate, the Learning System, where the forming of the new convention occurs, and finally the Output resulting in the finished text. Actors are the people closely associated with the Transformation since they take active part in the Learning System by producing the Output. Suppliers are the entities that supply the Learning System and therefore the Actors with materials that aid the discussions when forming a new convention. Customers are the beneficiaries of the outcome of the Transformation. The Owners include the entity that has complete overview of the Transformation and can decide to change the Actors or reject the proposed Output. The Interveners are an interesting group in the sense that, although not being directly involved in the process, they include the outside environment that is affected by the Output of the Transformation. In this thesis the TASCOI-method provides the analytical framework for describing the development of the new conventions and for establishing the different groups of people involved in the decision-making process that leads to a new convention.

In order to better comprehend the tensions arising between Actors during the Transformation process it is important to remember the contradictory attitude between creating international law and guarding national sovereignty. The objective when creating international law is to harmonise national rules into one consistent international regime that is to be followed by the states that ratify it. Upon ratification, however, the state in fact gives up its national right as an independent law-maker in this field and so over-all its sovereignty is somewhat curtailed with respect to that issue. The international organisations in shipping that have law-making powers are the International Maritime Organization (IMO), which is the most important one, and the International Labour Organization (ILO). The Comité Maritime International (CMI) was previously a law-making body, but now it acts in consultative capacity. Thus, although the IMO deals mostly with regulatory conventions and public conventions it has also taken over the private sphere in maritime law, that was initially considered to be the area where CMI was the law-maker. This is due to the Torrey Canyon incident of 1967, when the Legal Committee within the IMO was established. The IMO and CMI are very important especially in relation to the Transformation made in the
Diplomatic Conference of 1969, which dealt with issues arising as a result of this incident and therefore is the Learning System of the Transformation process.

Before embarking on an in-depth study of the Torrey Canyon it is important to note the importance of litigation after a major oil pollution disaster. The litigation of Argo Merchant, Amoco Cadiz, Exxon Valdez and Erika, show the practical application of existing law in those cases and the legal consequences produced. The outcomes make it clear that litigation has helped to uncover other problems not immediately seen when giving Outputs of transformations. In other words, these litigation processes give signals to the Transformation that the Output is not satisfactory and should therefore be referred back to the Learning System.

The Torrey Canyon incident is the first oil pollution catastrophe in modern times and as such the incident together with the instruments it produced stands for the development of modern international pollution regimes. The Transformations made at the Diplomatic Conferences of both 1969 and 1971 directly afterwards were first attempts to make significant progress relating to the right of intervention for coastal states on the high seas in cases of oil pollution casualties that might threaten their shoreline. Also the question of liability regimes and limitation of liability was addressed and settled. The Transformation produced the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (Intervention Convention), the International Convention on Civil Liability for Oil Pollution Damage (CLC) and the International Convention on the Establishment of an International Compensation Fund for Oil Pollution Damage (Fund Convention).

The analytical framework in the form of the TASCOI method used in this thesis proved to be adequate in defining the different stages that lead up to the formation of the three conventions resulting from the Torrey Canyon incident. The applicability of the model in relation to the other occurrences referred to was also established in Chapter 4. Furthermore it is of importance to notice that the scheme used in order to depict the Transformation process does not have to include real life occurrences in order to be useful for creating learning systems.

As for the Transformation resulting from the Torrey Canyon incident, there are certain areas that need more development in the light of the objectives put forward by the IMO in terms of harmonisation. There is also a need to eliminate grey areas so that there are clear regulations with no possibility of forum shopping and other legally questionable actions. It is clear though, when looking at Torrey Canyon, that had the conventions been in force during the time of the incident, the international community would have reacted quite differently to the British bombing of the ship since Britain would have had the authority needed to justify their actions under the Intervention Convention, due to the imminent danger of pollution at hand.
Furthermore, Great Britain together with France would have received more from the shipowners than the actual amount of 7 million francs for the damage caused to their coasts and the clean-up costs due to the CLC and Fund Convention. Lastly, the handling of pollution would not have involved the spraying of detergents, but would probably have been done in some other, more environmentally friendly form. In other words, there were many valuable lessons learned from the incident and important Transformations occurred in the aftermath of it.

So in order to provide comfort for the poor wreck of the Torrey Canyon, although forever cursed as the ship always to be remembered by providing the first environmental disaster, a lot of good has come out of the misery she created. Therefore, although she is at rest somewhere near the Scilly Islands in what is today part of the British territorial seas, the ship and the people close to her during the time of the incident, can exhale knowing that her loss did not go by unnoticed and that her name will not be forgotten.
Preface

My deepest gratitude goes to Professor P.K Mukherjee whose kind guidance and understanding has not only provided me with great insights but also with inspiration to continue in this field of law.

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Justine Wene
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Abbreviations

ASCOI-Actors, Suppliers, Customers, Owners, Interveners

CLC 69/92- International Conventions on Civil Liability for Oil Pollution Damage, 1969 and 1992

CMI-Comité Maritime International

CRISTAL-Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution

DWT-Dead Weight Tonnage

Fund Convention 71/92-International Conventions on the Establishment of International Funds for Compensation for Oil Pollution Damage, 1971 and 1992

GT-Gross Tonnage

ICAO- International Civil Aviation Organisation

ILO-International Labour Organization

IMCO-Inter-Governmental Maritime Consultative Organization

IMO- International Maritime Organization

Intervention Convention- International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties

ISM Code- International Safety Management Code

LLMC- International Convention on Limitation of Liability for Maritime Claims

LOF-Lloyd’s Open Form

MARPOL- International Convention for the Prevention of Pollution from Ships

MEPC-Marine Environment Protection Committee

MSC-Maritime Safety Committee

OECD- Organisation for Economic Co-operation and Development
OILPOL-International Convention for the Prevention of Pollution of the Sea by Oil, 1954

OPRC-Convention on Oil-Spill Preparedness, Response, and Co-operation

P&I Clubs-Protection and Indemnity Clubs

SAR- International Convention on Search and Rescue

SCOPIC- Special Compensation Protection and Indemnity Clause

SDR-Special Drawing Rights

SOLAS- International Convention on Safety Of Life At Sea

TASCOI-Transformation, Actor, Supplier, Customer, Owner, Intervener

TOVALOP- Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution

1 Introduction

1.1 General

The shipping industry has greatly expanded over the last fifty years in response to the growth in world trade. Due to the recognition in the 1960’s of its ever increasing importance as a tool for getting supplies to the different continents, and the question that arose was how to cope with the ever increasing flow of interest in this market. The answer has been a development in terms of constructing larger ships as well as designing them to meet new requirements to keep other competitors on their toes. This, however, has, except for the obviously good side of competition and means of transportation, also a negative aspect. It is estimated that seaborne trade in crude oil was in 1993, a total of 1356 million tonnes, most of it coming from the middle east (719 million tonnes) and heading for western Europe (totally from all sources consuming 406 million tonnes), Japan (total consummation of 212 million tonnes) and USA (total consumption of 368 million tonnes), but also originating from the Caribbean (172 million tonnes), North Africa (104 million tonnes) and west Africa (131 million tonnes). In other words traffic on the seas and in the coastal areas became more concentrated, thus increasing the risk of collisions, stranding and other casualties that can result in major oil pollution considering the enormity of today's tankers, but also of other even more dangerous pollutants like toxic and other hazardous cargoes. Furthermore, due to high competitiveness, sometimes great risks are taken against safety issues in order for the tanker to arrive at the port in time since otherwise there might be a delay for some days until the ship can get on the move again. This also leads to actions that include taking routes across channels and quiet seas not used and navigate on these thereby risking a higher rate of grounding, since the navigational aids for that area might be insufficient or defective. The hard commercial traits also put shipbuilding standards, repairs of old ships and human operational standards aside, favouring the commercial standpoint by tight schedules in order to beat the competition. These low standards on important measures that are designed to help prevent major incidents and other problems include poor port practises when loading and unloading dangerous cargo or oil.

The general public hears about the occurrence of a major oil pollution incident through the media and the emotions triggered by seeing damaged nature and marine life suffering as a result of oil pollution usually culminates into a general statement of concern for the environment in the

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1 The numbers were taken from a scheme prepared by Feamleys, Oslo, showing the amount of oil production from exporting countries and the amount of oil received by the oil receiving countries.

2 Captain Wilf Lusted MBE, ExC, FNI, marine consultant writer; “Marine Pollution: risks and constraints”, p.12, in Seaways November 1996
immediate vicinity of the oil spill. The news of maritime casualties that actually reach the general public are, however, only the tip of the iceberg. For every one serious accident that comes to public’s view, according to H.W Heinrich’s scheme, there are approximately thirty minor accidents, three hundred near misses and three thousand unsafe acts and conditions. Some of these incidents in the two later steps have probably never been reported. Looking at these statistics and keeping in mind that the rate of total losses per year is 0.2 to 0.3% of the world merchant fleet the equation means that in every ten thousand ships there are thirty total losses. The total accident rate then amounts to 5-10 percent.3

Another issue that arises, when looking through conventions and other regulatory mechanisms, is the finding that rapid progress in order to combat different sort of issues, that have been prior to an incident sadly ignored, has only been promoted when a major incident occurs in European waters or in those of the United States and Canada. Two sad incidents that illustrate this are the fate of the Philippine passenger ship the Dona Paz and the English vessel Herald of Free Enterprise. The Dona Paz collided on December 29th 1987 with an oil tanker Vector, which lead to a big explosion with the result that the tanker broke in two and sank immediately while the passenger ship sank after 2 hours. It is estimated that more than 3000 people lost their lives that night, and yet this incident is not known to any great extent by the general public, and above all, no international regulations appeared as an aftermath of the incident.4 The tragedy occurring with a English vessel the same year, the Herald of Free Enterprise and the loss of 190 lives, however, immediately put the international legislators at work, concerning themselves with issues about Ro-Ro vessels and other safety measures on board ships that might have helped Dona Paz and her passengers.5 In the area of oil pollution, however, the first ever incident to cause widespread environmental pollution was the Torrey Canyon in 1967, whose cargo damaged the coasts of England. The first regulations regarding oil pollution and liability, therefore, have not been subjected to this discrimination process that can be detected in the making of regulations regarding safety.

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4http://greatshipwrecks.com/dona.html The passenger ship with a legal capacity of 1800 people was highly overcrowded and only 24 people onboard the ship survived the incident. There were only two survivors from the tanker, that was operated by underqualified personnel and had no radio operator.
5The question arising is whether the shipping industry isn’t applying the same idea as the aviation industry, namely valuing individuals depending on where they come from. see notes taken on Aviation Insurance in EC Air Law dated 010309.
1.2 Purpose and Issues

Oil pollution has become an increasingly interesting issue in the world of environmental protection and has therefore become highly debatable over the last 30 years. As the international community acknowledges the fact that pollution is spreading, it is also recognising that the time has come to resume constructive action regarding the situation before it becomes too late. The issues addressed in this thesis are primarily, what regulations have been developed in the aftermath of oil pollution disasters in the world of shipping and how the world’s first major oil pollution incident the Torrey Canyon resulted in the adoption of conventions that deal with actions taken after the incident has occurred. The thesis will describe the background, development, and the provisions of three conventions namely the International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, The Convention on Civil Liability for Oil Pollution Damage and the Convention on the Establishment of an International Oil Pollution Compensation Fund. There was also a fourth convention concluded as a result of the incident, the MARPOL Convention, dealing with technical matters and preventive measures. This convention will, however, not be dealt with in this thesis since the convention does not relate to events likely to occur in the aftermath of the incident. The layout of the thesis and the discussions in Chapter 6, all go back to a special analytical framework, described in Chapter 2, namely the TASCOI-method which is the acronym for Transformation, Actors, Suppliers, Customers, Owners and Interveners. The main emphasis in relation to the regulations made in reaction to the incidents will be put on the Transformation process of this method. Realising also that there are other areas in shipping that were directly affected and triggered to produce associated instruments (i.e. TOVALOP etc), and also areas that were indirectly concerned with these conventions such as salvage, marine insurance and maritime safety, this thesis will refrain from discussing these matters. This is because the three conventions discussed are considered to be the primary international legal instruments that evolved out of the Torrey Canyon incident.

1.3 Methodology

Chapter 2 will closely describe the TASCOI method and the Learning System used in the Transformation process by a schematic drawing of the mode used throughout this thesis. In Chapter 3 there will follow a description of the apparent contradictions between national sovereignty and the harmonisation of national rules according to international law. The focus will then turn to the international organisations in shipping that produce regulations and finally show the different kinds of legislation in a legal framework, with examples of conventions taken from maritime law.
The fourth chapter will describe major incidents and what kind of legal measures have resulted from them. The list put forward is by no means complete, and involves only incidents involving oil pollution damage. The Chapter is an example of how a specific part of the Transformation scheme works. Other major Maritime casualties that have resulted in regulations dealing with safety issues can be seen in Supplement A.

The fifth chapter of this thesis will deal with the Torrey Canyon, and the problems and solutions that came out of this incident will be studied more in-depth. This study will be conducted by first referring to general international and in some parts national cases that have helped to formulate a satisfactory outcome applicable to the maritime industry. After that, the issues that came up immediately after the incident will be described, looking at conference documents and gaining an understanding of who were the different parties to the conference. By displaying how international law sees the problem generally and then coming into the narrower shipping industry and the conventions regarding particular areas of law, the thesis tries to illustrate how the different conventions have been constructed by the help of these general principles and the regulations.

In the above context it is important to comprehend the proper use of the term legislation. In domestic parlai, legislation usually refers to primary and secondary written laws that are enacted or promulgated by national law making bodies. In the international arena, however, the term ‘legislation’ has a much wider connotation. One writer has described it in the maritime context in the following words:

“International maritime legislation is but one sector of the huge mass of what is metaphorically called “international legislation”, whereby nations, by way of treaties or conventions agree under international law to give effect, either on their own part or that of their subjects, to such additions or changes in selected areas of social behaviour or practice as they see fit to endow with legal sanction”.

Another author refers to law making treaties, which are of universal or general application. Such law-making treaties fall within the scope of international legislation. In this thesis the term legislation is often used in the wider international sense.

In Chapter 6 there follows a discussion on Transformation in relation to the findings in Chapter 5 and other problems seen by the aid of an analytical model and other cases referred to in the thesis. In other words, a discussion will be presented of the legislation formed, as a result of the conventions

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following the *Torrey Canyon* incident, to determine whether they are deficient or inadequate.

### 1.4 Research Material

The material used in this thesis is mostly out of books from different well-known experts in the maritime field such as Colin de la Rue “Shipping and the Environment”, and J.W Abecassis “Oil Pollution from Ships”. Other material also includes articles from different journals i.e. the CMI yearbooks but also handouts and papers written by people from the World Maritime University in Malmö, Sweden. Other sources have been websites and important documents from the IMO regarding the conferences that took place as a result of the *Torrey Canyon* incident, and books published by the OECD on oil pollution. Very valuable information has also kindly been given to me in the form of lecture and meeting notes from my different visits to the World Maritime University in Malmö, Sweden, through personal guidance by Professor P.K. Mukherjee and in the form of lecture notes by Dipl. Ing. Schröder’s classes in shipping and environmental principles.
2 TASCOI- The analytical framework

2.1 Introduction to the TASCOI-method

Generally, identity and self perception are important for the formation of a group, especially when the group is tasked deal with not only international issues of great complexity but also of great urgency and relevance to the present. The people that are to be involved in the process of generating a useful outcome for international society, need to become aligned around a common set of procedural rules and agreed inputs to the collective work of proposing or amending a convention. The process of building a group is seen as proceeding in four stages, namely that of forming, storming, norming and performing. The forming stage reflects the initial stage of the physical formation of the group itself either through outer forces or spontaneous internal connections. The storming process is the second sub-stage where the individual aims of the people are confronted, discussed and formed in order to be able to unite into one aim in the third sub-stage of norming. Finally, the fourth sub-stage of performing reflects the situation when the aims of the group as a whole are clear to every individual inside the group and there is a common will to settle the matter at hand, and produce a satisfying end-result. In organisational practice, the TASCOI method is used to aid the process in the storming and norming stages. The method stands as an acronym for Transformation, Actors, Suppliers, Customers, Owners and Interveners. For the purpose of this thesis it is used to characterise the outcome from these stages and thus the tasks and organisations involved in the performing stage. In Chapter 5, TASCOI provides the tool for summarising conclusions regarding transformations and allocation of roles to different groups from the analysis of conference inputs and activities.

2.2 T-Transformation

The main category that depicts the change of the legal framework under the TASCOI method is the T for Transformation. This is true because it illustrates every stage of the process, the raw material, meaning the input to the project, the middle stages where the different groups are performing the

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norming stage, and finally it represents the end-result, the output that was the initial aim of the project. The relationship of the legal framework before the Torrey Canyon catastrophe and how international and national law aided the progress towards making new conventions should be considered quite important. This is because formation of new law usually coincides with a generally acknowledged need that there is a lack of regulations in a particular area or the realisation that the old conventions no longer satisfy the requirements. Examples are the Civil Liability Convention (CLC), which was a concept largely based on new principles, and international and national cases, and the 1954 OILPOL convention, which proved to be unsuccessful for the bigger oil tankers constructed in the 1960’s and the potential threats caused by them. Although CLC was new in the shipping field in the sense that there was no preceding convention dealing with liability for oil pollution damage, it was still based on existing legal principles and in some instances on case law. The OILPOL convention was the predecessor to MARPOL. This is the definition of transformation; seeing how the input of existing legal instruments and frameworks transform themselves when they prove to be unsuccessful in the key area that they are supposed to act in, and result in the output of new conventions.

2.3 ASCOI- The Identifying of Groups

TASCOI is referred to as a method of “naming the system”, and provides a taxonomy for the persons or organisations who control and influence the Transformation. Identifying such subgroups and their roles in the process is important because their view implicate different aspects of the problem. Their particular situation influences their notion of what a credible solution would be and also states their level of influence in the decision-making process itself.

Individuals or groups of individuals influencing the Transformation are sorted into five main categories according to their relation to the Transformation: Actors, Suppliers, Customers, Owners and Interveners-ASCOI. In order for a satisfactory outcome of the project as a whole, meaning the group of people selected in order to find the solution to a problem, inputs have to be transformed into something so that value is added to the output. In other words they have to draw the necessary conclusions to make a successful transformation of the situation at present to something that will be valued, approved and applicable by others once the end-result is presented. The Actors are thought of as being the people immediately involved with the task and are developing and solving the problem at hand. The next three groups, that is to say, the Suppliers, Customers and Owners are all part of the external groups that influence the outcome of the internal group's Transformation. The Suppliers bring input to the task by handing over the necessary input to the Actors that they need in order to make the correct assumptions to begin with and so to facilitate for
themselves. The Customers are people that have asked for the group's existence and are also the group that gain the most from the eventual output of the transformation forwarded by the Actors. The most important external group, however, are the Owners which are the only people that not only have complete overview of the transformation at any given time, but can also as a result of being in this position function as the destroyers of the group, being able to change the Actors and also comment on the progress or the final outcome of the Transformation. Lastly, the Interveners are the outside environment and therefore not directly involved with the process itself, but can change the context of the group. Thus the difference between the external groups like the Suppliers, and the external environment that consists of the Interveners is that while the external groups are directly involved with the people working on the Transformation through supplying materials, the external environment consists of different organisations or individuals who are interested in the outcome or are benefited through the transformation.

### 2.4 Chapter 2- Summary

The Transformation process can be defined by the following figure:

![Figure 1. Transformation of an international legal regime](image)

Figure 1 is a schematic diagram pointing to the main occurrences in the formation of a new regulation. As seen the main arrow points to the Input, meaning the existing legal material relating to the subject under Transformation, and the Output, the result of the Learning Systems findings in relation to the Transformation. There is, however, a very important stage
where incidents and litigation occur, that questions the effectiveness of the existing and transformed international framework. If at this stage it is proved that the framework is unsatisfactory, the process of Transforming the unsatisfactory legislation into a satisfactory one goes back to the Learning System, where the authorised body to deal with this part of the Transformation initiates the process once more.

The categories of groups (ASCOI) involved in making the Transformation can be identified by answering the following questions:9

- **Actors**: Who carries out the activities entailed by the transformation?
- **Suppliers**: Who are, or would be, the suppliers of inputs to make possible the transformation? “Inputs” are products that are not only necessary to perform the transformation, but are also directly negotiated by the actors in the system.
- **Customers**: Who are, or would be, the immediate beneficiaries of the input of the transformation?
- **Owners**: Who have or would have an overview of the transformation?
- **Interveners**: Who define or would define the context for the transformation? Interveners are people who affect the scope of the transformation because they allocate resources for it, are competitors or are concerned by some of the secondary effects of inputs or outputs, e.g., its ecological effects. Since the number of interveners can be large, only the most important ones should be recognised.

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9 Espejo et al, p. 219
3  The Institutional Framework

3.1 National Sovereignty vs. International Legal Stability- the Relationship

Public international law has to principle sources. The first is customary law, which is binding on all states. In contrast, treaty law is only binding on those states that become parties to a treaty. Often customary law is codified into treaty law. Conversely, the existence of a treaty or convention is evidence of custom or state practise.\(^\text{10}\) Treaties are by their very nature, contractual instruments that require state parties to comply once they subscribe to them by a process of ratification or accession.

There is, however, in international law also a degree of “supragovernmental”\(^\text{11}\) state legislation, meaning that the international institutions make laws that the national states have to follow. There is an institutionalism about the international decision-making organs where in certain circumstances national sovereignty has to give way to the binding instruments promulgated by the supra governmental institution to which the state has become a party. The reason for this is that when states initially agree to join the international community, they put themselves under the institution and so implicitly agree to follow any legislation that the institution deems necessary.\(^\text{12}\) This phenomenon is more pronounced in cases of supra national legislation such as that created by the relevant law-making institutions of the European Union, than conventions created by bodies such as the International Maritime Organization (IMO) or International Labour Organization (ILO)\(^\text{13}\). As indicated above in the latter cases, the binding force is not automatically activated even where the monistic method of treaty implementation is applicable.\(^\text{14}\)


\(^{11}\) The term is used to differentiate between legislation adopted by an international or regional organisation that is automatically binding on member states of the organisation, and that of legislation promulgated by inter-governmental bodies where states have decided to follow that law. For an example that could justify the use of this term see Henry, Cleopatra Elmira, “The carriage of dangerous goods by sea: The role of the International Maritime Organisation in international legislation”.p.6, Frances Pinter, London, England, 1985, particularly the section dealing with OECD where the author confirms that the organisation, although having the participation of sovereign States, still acts as a separate entity meaning that it makes laws that the Member States have to follow.

\(^{12}\) Bring, Ove; Mahmoudi, Said, ”Sverige och Folkrätten”,pp16-17,Norstedts Juridik AB, Stockholm, Sverige, 1998

\(^{13}\) The Organization is a U.N. agency that promotes social justice and internationally recognized human labour rights. See http://www.ilo.org/public/English/about/mandate.htm

\(^{14}\) Mukherjee, P.K; “Maritime Legislation” pp.175-184, World Maritime University, Malmö. Sweden, 2002
It can be stated metaphorically that there are two sides to the coin of international treaty law. On the one hand international conventions come into existence by negotiations and compromises between sovereign states, where the result of the negotiations becomes a legally binding instrument following ratification. This situation is obviously driven by policy considerations at the national level which are related to political, economic, environmental and other advantages within the framework of international co-operation. On the other hand, this leads to some level of sacrifice of national sovereignty of the state concerned. There is thus a state of perpetual tension between the integrity of national sovereignty and its diminution in favour of wider national interests within the international sphere. As indicated an example of this is the European Union and how their strive for harmonisation between the individual states has lead to the European Court of Justice laying down the most fundamental principle in EC law, namely that community law has supremacy over national legislation. This reasoning was especially established in the case Van Gend en Loos\(^{15}\) where it was made clear that community law was to have a direct effect in national courts and that these community laws had to have equal footing in all of the member states.\(^{16}\)

When speaking of national legislation, there are three prerequisites that have to be fulfilled. First, the law must be unilateral, meaning it must be generated by a body that has the power to create laws. Secondly, the law must have the force that obliges the public to adhere to it. Thirdly, the law must be of general application. When dealing with international organisations that act as legislative bodies, however, this definition of legislation changes. International organisations use different methods when creating legislation, whether it is binding or is only persuasive. The latter is often referred to as soft law or para droit.\(^{17}\)

In the case of supra national legislation, the law-making body in question can unilaterally generate law that automatically creates an obligation for member-states. An inter-governmental organisation, can adopt multilateral treaties within it’s own framework as international legislation, meaning that states consent to the treaty and together with other consenting states puts the treaty into existence. In the case of supra national legislation, unilateral acts are binding when a vote is taken where the majority decides whether the legislation should be adopted. This form of international law making runs counter to the concept of the dualistic method of treaty implementation where the national lawmaking body must give its approval before the international law in question has any binding effect within it’s jurisdiction.\(^{18}\)

\(^{15}\) Van Gend en Loos v. Nederlandse Administratie der Belastingen (Case 26/62) [1963] ECR 1, [1963], CMLR 105

\(^{16}\) Craig, Paul; Burca de, Grainne: “EU Law: texts, cases and materials”, pp. 255-256, Oxford University Press, New York, USA, 1998 2\(^{nd}\) edition

\(^{17}\) Mukherjee p.165-166

\(^{18}\) ibid p. 180-183
Multilateral treaties must go through a three fold process before it can become effective law. The convention or treaty must first be signed by states who participate in its development. Secondly, a requisite number of states must ratify or accede to the treaty in order to bring it into force internationally. Thirdly, the individual states who are parties to the treaty must take the appropriate steps under their respective constitutions, to implement the treaty within the national legislative domain. This is achieved by adopting the monistic or dualistic method of implementation.19

3.2 CMI and IMO- Their Structure and Governing Body

When dealing with the international maritime community, it is important to realise that there no sole legislative maritime institution like e.g the ICAO20 in the aviation industry.21 Although the IMO (International Maritime Organization) is the main legislative body there is also another organisation that takes part in developing the legal framework, namely the CMI (Comité Maritime International) that deals with matters concerning the private sphere of law.22 This organisation was, before the establishment of the IMO, the main initiator in the development of new maritime conventions. The development was done through diplomatic conferences where draft conventions on the subject under discussions were provided by CMI. The IMO took over the drafting of regulatory maritime conventions, but following the Torrey Canyon incident in 1967 and the resulting establishment of IMO’s Legal Committee, the drafting of non-regulatory conventions was also taken over by the Organization.23 Relating to the developments immediately after this particular incident, however, the CMI and IMO, working together, formed a civil liability convention (CLC) after the Torrey Canyon incident.24

The CMI is a non-governmental international organisation whose objective is to unify maritime law, and to this end co-operates with other international organisations, such as the IMO. The members of the organisation are national maritime law associations whose memberships are open to lawyers closely involved with maritime law.25 If there is no national association, the country that wants membership can suggest an organisation and the CMI can

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19 Mukherjee p.175-183
20 International Civil Aviation Organisation
22 ibid, p.281, note 483
23 supra note 19, p.167-169, 171-173
25 supra, note 19, pp. 181-182
welcome it into the organisation providing the suggested body has the same objective as the CMI. The organisation's assembly consists of all the members of the organisation and of the executive council and usually meets once every year.\textsuperscript{26}  

The IMO is an international organisation under the United Nations. The purpose of the Organization is to facilitate co-operation between governments when it comes to regulations relating to the technical aspects of shipping such as safety issues, prevention and protection of the environment, and efficiency in other areas of shipping.\textsuperscript{27} It is also encourages removal of national restrictions that are discriminatory and ineffective in the field of international sea-borne trade.\textsuperscript{28} As a law-making body, the organisation is to provide draft conventions, agreements or other instruments and then present them to the governments and to other international organisations before convening an international conference to deal with the issue.\textsuperscript{29} Furthermore the organisation can also recommend the members to adopt regulations and other guiding instruments in the fields of safety and prevention of marine pollution. There are three types of recommendations issued, namely, those of general natures, recommendations concerning the suitability of the adoptions of certain legal instruments and those that deal with settlements of disputes.\textsuperscript{30}  

The bodies within the CMI are the Assembly, President, Secretary General and the Executive Committee. The Assembly’s responsibility is to approve agendas and outcomes of International Conferences while the President presides over all meetings that the CMI convenes. The Secretary General organises the preparations for conferences, seminars and other meetings of the CMI, while the Executive Committee proposes agendas for these international conferences. The conferences, being held for the purpose of discussing working points approved by the Assembly, consist of members of the CMI and Observers approved by the Executive Council.\textsuperscript{31}  

The main IMO bodies are the Assembly, Council and three main committees namely the Maritime Safety Committee (MSC), the Marine Environment Protection Committee (MEPC) and the Legal Committee. The Assembly is the highest authority within the organisation and consists of all the member states, meeting once every two years but can convene sooner under extraordinary circumstances. The Assembly is, among other things, responsible for recommendations issued to states and electing the Council. The Council has to consist ten states that are the largest in providing international shipping services, ten other states that have the largest interest in international sea-borne trade, and twenty other states that have an interest in

\begin{footnotes}
\item[26] http://www.comitemaritime.org
\item[27] Convention of the International Maritime Organisation (IMO Convention) Article 1
\item[28] Henry, p.39
\item[29] supra note 27, Art. 2b
\item[30] supra, note 28, p.76
\item[31] http://www.comitemaritime.org
\end{footnotes}
the maritime field and geographically represent a large part of the world. The Council is responsible under the Assembly, for the work that the Organisation is undertaking by co-ordinating the activities of all its organs, appointing the Secretary General and entering into agreements concerning the relationship with other organisations. The Council is, however, not allowed to make recommendations to governments on the subjects of maritime safety or pollution prevention.

The committees are very important for the work of the IMO. The MSC deals with technical issues that all relate to safety. A so-called expanded MSC can also make amendments to SOLAS (Safety Of Life At Sea Convention) and in these instances includes all countries that have signed the convention itself, regardless of whether or not if they are members of the IMO. The MEPC considers any matter relating to prevention and control of pollution from ships, in particular when it has to do with adopting and amending conventions and other regulations to ensure enforcement of the related conventions. The Legal Committee deals with any legal matters that fall within the scope of the organisation.32

3.3 International Pollution: Concepts and Regimes33

3.3.1 Public v. Regulatory v. Private

The legal framework and all the legislation produced can traditionally be divided into three main areas; that of public law, regulatory law and private law. The area of public law in general terms consists of matters involving the relationship between the state or the government and the individual. It focuses on legislation concerning constitutions and other acts describing the formation of state organs and their functions, competency and the vertical relationship with the individual. 34 In contrast, public international law involves the relationship among states in the multilateral as well as bilateral sense; and also the relationships with international organisations. The function and mandates of such organisations also fall within the domain of public international law. The vertical relationship should therefore also apply to the relationship between international organisations and individual member states, since the international organisations are the higher authority.

32 http://www.imo.org
33 This scheme was kindly drawn by Professor P.K Mukherjee of the World Maritime University during discussions of the different fields part of the legal framework for environmental law protection in Maritime Law, especially when dealing with pollution.
34 Bergström, Sture; Hästad, Torgny.; Lindblom, Per Henrik; Rylander, Staffan; “Juridikens Termer,” p.162, Almqvist & Wiksell, Falköping. Sweden, 1997
When considering public law there are mainly two instruments; namely the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), and the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969 (the Intervention Convention). Chapter XI of UNCLOS has particularly the characteristics of public law since the chapter refers to the different organs of the International Sea-Bed Authority and what functions they have between themselves and in relationship with the states.\(^{35}\) The Intervention Convention deals in some of its articles with the relationship between the IMO, in particular its Secretary-General, and the member states signatory to the convention.\(^{36}\)

Regulatory law denotes legislation that imposes certain obligations or prohibits certain actions. Maritime conventions that fit under this heading are the International Convention for the Prevention of Pollution from Ships (MARPOL 1973/78), the Convention on Oil spill Preparedness, Response, and Co-operation (OPRC 1990), and the Convention on Prevention of Maritime Pollution by Dumping of Wastes and other Matter (Dumping Convention 1972).

Private law regulates matters that deal with the internal issues between individuals or between co-operations and individuals, i.e. when dealing with claims for liability and compensation.\(^{37}\) In maritime law the conventions that are to be found in this field are The International Convention on Civil Liability for Oil Pollution Damage (CLC 1969/92), The International Convention on the Establishment of an International Fund for Compensation of Oil Pollution (Fund Convention 1971/92), and The International Convention on Liability and Compensation for Damages in Connection with Carriage of Hazardous and Noxious Substances by Sea (HNS 1996).

### 3.3.2 Deliberate v. Operational v. Accidental

There are different kinds of acts that can result in oil pollution, namely deliberate, operational and accidental acts. In order to prevent or minimise pollution and provide remedial means in the event of failure to so prevent or minimise there are a number of conventions that deal with these three areas. Deliberate acts include disposal of wastes into the sea, which is known as dumping. The convention relating to these situations is the London Dumping Convention of 1971 that sets out the responsibility of the state parties for controlling and regulating this form of pollution.\(^{38}\) Operational pollution is caused by discharges of pollutants from ships that are necessary as a matter of course for the ship to operate. Operational discharges include the disposal of tank washings from tankers and oily mixtures from bilges

\(^{35}\) For further details see part XI the Area. Section 1 etc in UNCLOS 1982  
\(^{36}\) see Article XV in the UNCLOS 1982  
\(^{37}\) Bergström et al, p.32  
\(^{38}\) The convention has been completely revised by a Protocol of 1996.
and machinery spaces. Operational discharges are regulated almost exclusively by the MARPOL convention. The OPRC is regulatory in scope, and as the name suggests deals with preparedness response and co-operation in relation to oil spills. By their very nature oil spills are considered to be accidental. They are neither deliberate of operational but may well occur as a result of negligence. Accidental pollution i.e. oil spills usually result from incidents such as collisions and groundings or strandings. The conventions that deal with accidental spills are the OPRC from a regulatory point of view and the CLC and Fund Conventions, which provide the international regime for liability and compensation arising out of oil pollution damage.

### 3.3.3 Prevention v. Remedy

There is quite a difference between preventing pollution and remedying it. Preventing pollution in the sense of hindering the damage to occur or trying to minimise the pollution is either an act made prior to the voyage to ensure that oil-pollution doesn’t occur or an immediate act following the incident and dealing with the oil spill on sight. The conventions that deal with the process of preventing pollution are MARPOL and, partly, OPRC. MARPOL deals with treatment facilities and outside port terminals but also with the monitoring of the number of discharges made and the amount of oil that goes with it. Another good characteristic of this convention is that it defines places are special areas or very delicate ecosystems and for these places more stringent ways for dealing with the discharging of pollution are put forward.\(^{39}\) The second convention of interest is OPRC, which sets forward actions on how to handle oil pollution emergencies. It encourages states to maintain a level of preparedness and to also co-operate and seek assistance from each other in cases of big oil pollution incidents. The convention forwards actions that should be taken by the personnel onboard a ship if an oil spill does occur and how port states should act after a report about an incident has been received. An interesting point about this convention is that it specifically delegates the responsibility of facilitating the requirements made in the convention to the IMO, which in practise has the responsibility that the objectives of the convention are carried out.\(^{40}\)

Remedying for an oil spill is paying for the cost to clean-up the water, beaches and animals and also providing compensation to the different industries that have suffered losses because of the incident. The most commonly affected industries are the fishing and the tourist industry although, other less obvious potential victims have also been known to be

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\(^{40}\) De la Rue, Colin; Andersson, B. Charles; "Shipping and the Environment", pp.826-827, LLP, London, Great Britain, 1998
affected. The conventions that deal with these matters are primarily CLC and the Fund Convention. CLC regulates apportionment of liability but also the limitations regarding liability and the exoneration grounds from liability while the Fund Convention concerns itself with compensation issues in terms of paying the amount that is exceeding the limitation of liability under the CLC. The OPRC is also of interest in this aspect in that it deals financing of costs when another state assists the state in need.

There is however also another field in maritime that has conventions and other agreements that relate to pollution prevention and compensation issues namely salvage. The salvors under the Salvage Convention of 1989, the LOF42 and SCOPIC43 agreements are obliged to try and do what they can to prevent or minimise the oil pollution when they arrive at a sight of an oil-spill. They are allowed to receive compensation for all the costs they’ve accumulated in trying to prevent the pollution but can also in some cases be liable for damages if it is proven that they haven’t done all they could.

### 3.4 Chapter 3- Summary

There is, as seen, a natural contradiction between a national state, guarding its sovereignty, and international law, which is an apparatus to create harmonisation between states in order to build up a system of general international norms in form of conventions and other legal documents. In order for international law to gain momentum and respect the individual states have to, in some areas of importance, abstain from their sovereignty in the light of the greater good. These areas sometimes also include specific fields of law that are traditionally considered to be national concerns. The process through which this contradiction is erased and harmonisation develops can be very painful in terms of conducting conferences in order to stage discussions where compromises and different viewpoints are aired. Furthermore there is a pressure on agencies, such as IMO in the shipping industry, to provide solutions that create an interest and a willingness of as many states as possible to participate in the convention, since the goal of international harmonisation is best reached by the convention’s applicability to a great number of states. With all these matters that need deep consideration and a great deal of diplomatic delicacy as a starting point, there is no need to point out that the negotiations take a great deal of time and effort from all sides until a final solution can be reached. This is especially true when states are involved that are considering the possibility

41. See the plaintiffs in *Amoco Cadiz* where one of them was a cosmetic industry using seaweed in their products.
42. Lloyd’s Open Form (Lloyd’s Standard Form of Salvage Agreement), see Rue de la et al, pp.561-612
of being a future party to the outcome of a Transformation, irrespective of what category the regulation falls under.

In regards to the field of maritime law the IMO together with the CMI hold principle places in the development of regulations for shipping in all areas including environmental law. While CMI was founded already in 1897 with the prevailing task of harmonising international law in the maritime field, the development of IMO’s current standing in the shipping industry can be traced back to the action it took together with the CMI after the Torrey Canyon incident. This is confirmed by the fact that although IMO was formed in 1948, the creation of the Legal Committee, which is presently the main international maritime legislator, was a result of the incident.\textsuperscript{44} The Organization took on the role of examining the draft convention concerning civil liability submitted to the organisation by the CMI. The IMO, however, didn’t agree with CMI’s draft convention on some of the important issues, among them whether liability should be based on fault or be strict, and therefore set out making it’s own draft convention as alternative to the CMI convention.\textsuperscript{45}

The task of viewing these draft conventions, together with a draft convention relating to the intervention of the high seas and deciding on the final outcome, was done at the Conference in Brussels in 1969 (see Chapter 5). It is this Conference and the Conference of 1971 to which the TASCOI method will be applied. When the IMO conferences are convened, most of the first two stages and a major part of the third stage in the group building process have already taken place. Selection of delegates and observers, setting up agenda and procedural rules, drafting convention texts, formulating national positions relative to proposed convention articles, are all activities happening before the conferences. All this preparatory work preceding the conference and an organisational analysis of their importance for building up a stable international legal regime is certainly of considerable interest in policy science. However, the Inputs to the conferences from the preparations and the negotiation of national positions within conferences resulting in final convention texts provide the primary material for obtaining insights into the legal meaning of the conventions. In Chapter 5, the focus of the description of the process is therefore on the conferences. The norming before the conference means that there is agreement on conference procedures, but most importantly on the input to the conferences and on the type of output expected from the conference. The Actors at the conference are aligned and agree on what Transformation should be made, that is what Input should be turned into what Output. By using the TASCOI method there will be an attempt to distinguish the different roles of the parties to the conference, and their position and influence in the decision-making process.

\textsuperscript{44} Gold, p.23, \textit{(Journal of Maritime Law and Commerce)}

\textsuperscript{45} Rue de la, et al, pp.14-15
4 Maritime Incidents and Resulting Regulations

4.1 Introduction

During the 20th century there has developed a constant growing awareness that regulations should be made in order to facilitate the application and practising of safety and environmental measures. This has been needed in order to protect both personnel and passengers on ships but also people on land and the environment at large. Usually prior to the task of developing measures like these, there is a general conception among experts in the maritime field that certain questions need to be discussed and that the result of the discussion should conclude with a legislative instrument of some kind. Sometimes, however, situations that need written provisions are not recognised by maritime experts and other law-making bodies until an incident occurs that produces shock-waves high enough for the general population and maritime community to react. The incidents presented below are some of the most catastrophic maritime casualties in relation to oil pollution that have resulted in the formation of important conventions. The Torrey Canyon, being the first disastrous oil pollution incident, is together with its legal consequences referred to and discussed at length below (see Chapter 5). It is, however, still important to briefly mention the incident in this Chapter because of the unprecedented awareness of the problems and complications in relation to oil pollution that it produced. For a brief description of the main maritime incidents that produced safety instruments and amendments to these see Supplement A.

4.2 Oil Pollution- Tankers

4.2.1 Torrey Canyon

The Torrey Canyon incident represents the first major step in the law-making process with regard to oil pollution casualties. The Liberian supertanker stranded in 1967, after taking an inappropriate route in order to minimise the time discrepancy between its actual arrival and the time-table. The ill-fated decision turned out to be the largest oil pollution disaster up to that time. Being one of the world’s largest vessels, the oil escaping from it produced large-scale pollution damage to the sensitive area of the Scilly Islands just outside the British territorial waters. Due to the threat of
immense oil pollution the British government bombed the wreck in order to burn out the remaining oil cargo on board and sink the ship.\textsuperscript{46}

The incident presented a number of legal problems that needed to be addressed. Firstly, the United Kingdom had bombed a foreign vessel outside its own territorial waters raising questions of what should be considered as valid reasons a coastal state to intervene with a foreign ship in the high seas, if the foreign ship was likely to cause pollution. Other problems were the physical and economic losses suffered by fishermen as well as recreational and tourist facilities as a result of the oil pollution. Questions were posed relating to civil liability and compensation matters. Also, a convention was needed that related to oil pollution resulting from purely operational discharges. In the aftermath of the incident, with these issues in mind, no less than four conventions were created that to this day are the most important ones in the field of environmental pollution. The Intervention Convention, which is a public law convention, deals with the coastal state’s right to intervene with another ship on the high seas if its coastline is threatened by oil pollution. The CLC, being of a private law nature and providing a remedy to accidental pollution victims, gives compensation to the damage done to property and deals with issues of limitation of liability. The concept of limiting liability has proved very important in other areas of law i.e. the aviation industry’s conventions that were created using the same idea that CLC is based on.\textsuperscript{47} The Fund Convention provides compensation from the cargo owners, thereby supplementing CLC. MARPOL deals with the operational aspects of pollution. It is a counterpart to SOLAS, having the same characteristics in terms of being a regulatory convention dealing with operational and preventive measures.

\subsection*{4.2.2 Argo Merchant}

\subsubsection*{4.2.2.1 Background}

The \textit{Argo Merchant}, a Liberian tanker, ran aground outside of Nantucket Island, USA on December 15th of 1976 and started to spill her cargo of 28,000 tons of heavy fuel oil. The captain’s request for dumping oil in order to try and free the vessel from the area was denied by the U.S authorities, while pumps used to try to lighten the ship proved unsuccessful.\textsuperscript{48} The vessel had started her journey from the Puerto de Las Cruz (Venezuela) and was heading for Salem, Massachusetts with a total of 38 crew members of which 15 remained on board after the grounding until the weather worsened, trying to salvage the ship. Eventually the vessel broke into three parts with the stern and the middle section sinking while the bow section was blasted in

\begin{itemize}
\item \textsuperscript{46}http://www.cornwall-online.co.uk/msw/torrey--canyon.htm
\item \textsuperscript{48}McFarland, Bob; “\textit{International Maritime Conventions-Introduction to MARPOL},” p.4, WMU 120, July, 2-3, 2001
\end{itemize}
order to avoid it from becoming a navigational hazard.\textsuperscript{49} The \textit{Argo Merchant}, although being a relatively small tanker, caused considerable concern to the American public since the pollution it produced threatened resorts in New England and the Georges Banks fishing grounds.\textsuperscript{50} Fortunately, however, the currents and harsh weather forced the spilled oil away from the beaches and instead, due to the temperature of the water, the heavy fuel oil sank and formed large platters of hardened oil on the seabed.\textsuperscript{51}

\subsection*{4.2.2.2 Litigation}

The ship's captain and six other officers were questioned about the circumstances that lead to the stranding of the ship. The master and one of the officers blamed it on various mechanical failures such as gyro-compass and boiler malfunction, and records show that there had been continuous problems with the boilers on board the \textit{Argo Merchant} during the last six months before the stranding. On these grounds the cargo insurers made claims against the shipowners on the basis of negligence since maintenance of the ship is the shipowners responsibility and the \textit{Argo Merchant} showed a history of deficiencies. Also, two groups of fishermen brought actions against the shipowners claiming 60 million dollars each.\textsuperscript{52}

\subsection*{4.2.2.3 Results-New Legislation}

Fuelled by the incident, the USA, being keen on international preventive measures for oil pollution, asked the IMO Council for further regulations on tanker safety that would curb accidental and operational oil pollution. The suggestion on behalf of the USA for further regulations lead up to the Tanker Safety and Pollution Prevention (TSPP) Conference of 1978, for which the basic documents had been prepared by the MSC and the MEPC. The deliberations of the Conference lead to two sets of Protocols, one amending the SOLAS convention and the other amending the MARPOL convention. The SOLAS amendments dealt with improvement of the structural integrity of tankers. Under the MARPOL amendments, a number of features were introduced such as the requirement of segregated ballast tanks, dedicated ballast tanks and the use of crude oil washing (COW) and the use of inert gases to clean tanks after discharging oil. Also, the load on top method was introduced through this Protocol.\textsuperscript{53} An interesting observation is that although the oil spill did not result in widespread damage

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{49}] The dimensions of the hull were 195.5 meters length, 25.68 meters width and 13.42 meters height. see Hooke p.59
\item[\textsuperscript{50}] IMO, p. 5 note 12
\item[\textsuperscript{51}] McFarland, p.5
\item[\textsuperscript{52}] Hooke, p. 59
\item[\textsuperscript{53}] For further details of this method see Abecassis et al, pp.24-32
\end{itemize}
\end{footnotesize}
as initially predicted, Americans still tend to mention this incident when asked to name large oil pollution disasters. This is because the media at the time of the oil spill continuously reminded the American people that the Argo Merchant incident was a maritime disaster polluting American waters and coasts.  

4.2.3 Amoco Cadiz

4.2.3.1 Background

The Liberian flag tanker Amoco Cadiz was the worst case of oil pollution until 1978. Measuring 334.02m x 51.06m x 26.19m, with a gross tonnage (GT) and dead weight tonnage (DWT) of 109 700 and 233 690 respectively, the ship loaded crude oil at Kharg Island terminal in the Persian Gulf and sailed on Feb. 7th 1978 bound for Rotterdam with a stop in Lyme Bay. On March 16th, after having navigated for two days in very rough seas, the vessel suffered a breakdown of the steering gear, consequently losing all steering control. Immediately after the malfunction was detected on board, the captain ordered a "not under command" (NUC) signal to be displayed together with a warning to other ships in the area stating the situation of the Amoco Cadiz. The master then contacted the Brest-Le Conquet Radio, confirming that the steering gear was in fact broken and that the requested tug assistance was badly needed. Upon the arrival of the tugs, a towing line was immediately secured between the tug and the tanker due to the existing danger of the ship being driven aground. At that point in time, the ship had not as yet entered into a salvage contract with the salvor. The master of the tug had offered a Lloyd’s Open Form (LOF) of salvage agreement for the master of the Amoco Cadiz to sign, but the latter declined to do so as he had not received specific instructions to that effect from his superiors ashore. As a result assistance rendered by the salvor was considerably delayed. The subsequent grounding of the vessel and the resulting pollution damage would probably have been avoided had the salvage contract been entered into when it was first offered by the salvor. The rope during this towage attempt eventually broke because of the heavy seas and with a second attempt proving futile the heavily loaded tanker struck ground on March 16th causing major damage to the ship and forcing evacuation of the crew. The vessel broke in two on March the 17th, resulting in the escape of 223 000 tons of oil causing heavy pollution that affected holiday resorts, the fishing industry and the cosmetics industry, which used cultivated seaweed in their products. The Amoco Cadiz broke in three on March 28th, after being

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54 Corkhill, Mike; “Oil spills-fact and fiction”, p.14, in Bimco Weekly News, 22 October 1997, NO. 43
55 Hooke, p. 37
56 Usually the contract is entered into before the salvors commence their services but in cases where there is very little time as in the Amoco Cadiz incident procedures to secure the ship naturally come first.
continuously battered by heavy seas. The next day the French Navy dropped depth charges from helicopters releasing the rest of the oil cargo remaining on the ship and blew the vessel to pieces.  

4.2.3.2 Litigation

The master of the ship was questioned and later released pending trial, while the cargo owners, not having insured the cargo according to standard procedures, received no compensation for their losses. The clean-up efforts, lasting more than six months, involved the transportation and deployment of equipment from all over France, and resulted in claims against shipowner totalling to 800 million francs. The French, being party to CLC (but not to the Fund Convention), received only 15% of the total sum that should have been paid for damages caused due to the shipowners right to limit their liability according to the convention.

This unsatisfactory outcome prompted the French government, together with hoteliers and fishermen, to bring claims against defendants situated in USA. Proceedings were commenced against Standard Oil Company of Indiana, the parent company, and Amoco International Oil Corporation, subsidiary company responsible for the Amoco tanker fleet. Under the CLC there was no possibility of making claims against these parties since they were not the registered owners of the ship. However, in such situations, the application of the common law of torts is not precluded. The problem is that where the action is brought under the common law the limitation provisions of the convention can not be involved. Where the domestic law of the forum provides for limitation the relevant provisions can be applied. As it turned out both the defendants were found liable by the US court but neither of them were able to limit their respective liabilities because the limitation of liability legislation of the United States was also applicable to the shipowners.

The litigation ended in January 1992, 14 years after the incident’s occurrence. The court awarded 61 million US dollars to the claimants plus interest. The quantum of damages was the subject of criticism to the point where it was questionable as to whether the court had thoroughly and adequately analysed the circumstances of the case. Questions were also raised as to whether the court deliberately avoided the much lower limits prescribed under the CLC. As a consequence of this decision the objective of CLC to be an international uniform and predictable liability regime failed.

57 Hooke, pp.36-38
58 Hooke, p.38
59 Rue, de la et al, pp. 31-32
It became apparent that the decision provided the impetus to victims to indulge in forum shopping.\textsuperscript{60}

4.2.3.3 Results- New Legislation

Before the grounding of the *Amoco Cadiz*, there had been concerns that the high inflation in the seventies had made compensation limits prescribed by the CLC and Fund conventions too low. At the time the private compensation scheme of the oil industry, CRISTAL provided compensation to pollution victims even when dealing with much smaller cases of oil pollution than what had been intended. The *Amoco Cadiz* incident and later the *Tanio*\textsuperscript{61} brought this situation into focus and a new conference, aimed at raising the limits through Protocols to the CLC and the Fund convention and thereby heightening the limits, was convened in 1984. In particular the conference attempted to arrive at limitation figures that would be appropriately apportioned between the shipping industry and the oil industry.

The fact that the USA, the largest oil importer, was not a party to the conventions, made Japan, the second largest oil importer in the world, unjustly stand for the major part of the compensation sum arrived at by the conference. This, not being an option, resulted in the increase of the limit of liability being dependent on whether the USA would enter into the conventions as formulated under these Protocols. At the conference the USA indicated that it supported the objectives of the conventions in principle but it was clear that it was not in agreement with the limitation regime. The 1984 protocols to the CLC and Fund Convention failed to enter into force even though considerably higher limits were established after a compromise was reached. The aggregate limit was 135 million SDR (Special Drawing Rights)\textsuperscript{62} with a total limitation extension up to 200 million SDR. For small tankers up to 5000 tons it was agreed upon that the shipowner’s limit would not go below 3 million SDR.

The *Amoco Cadiz* incident was evidence of the need for the new measures that were established in the 1978 Protocols to SOLAS and MARPOL. These measures included requirements for steering gear on tankers, carrying radar and collision avoidance aids on board, and introducing stricter regimes

\textsuperscript{60}Forum shopping means that the claimants can go to the country whose law system gives the best outcome in favour of the victim.

\textsuperscript{61}March 1980 the *Tanio* broke in two in heavy weather outside the shores of Brittany causing a pollution of 125 miles of French coast with 13,500 tons of fuel oil escaping from the ship. Claims represented amount up to 527 million francs. With the Fund Convention being in force after interim measures the 70% of the amount of claims were paid within a total of three to five years as opposed of Amoco Cadiz fourteen year battle of claims. The case, however, never went to litigation. See Rue, de la et al, pp.32-33

\textsuperscript{62}Special Drawing Rights
concerning certification and unscheduled inspections. Other important amendments were also that inert gas systems became mandatory for all crude oil tankers having a DWT of at least 20,000, although there where interim measures for ships that had a DWT less than 70,000. The international community understood the importance of the MARPOL 1978 Protocol, and so by October 1982 sufficient states had ratified MARPOL in order for the Protocols to enter into force. Another development was that some countries, lead by the French Government, opted for an amendment to the Intervention Convention where the coastal states would have rights to intervene also on their territorial sea. It was, however, considered that the coastal states already had the powers through their sovereignty rights over their territorial waters, so the discussion was put to rest. Other consequences of the incident included the realisation that changes were needed to the international salvage regime, which had proved to be inadequate at the time of the incident.

4.2.4 Exxon Valdez

4.2.4.1 Background

So far the cases referred to, all happen to involve Liberian flag tankers. An All-American motor tanker stranding in Prince William Sound, Alaska, however, is responsible for the most famous and disastrous environmental pollution incident in the USA in March 1989. The Exxon Valdez, measuring 300.85m*50.65m*26.83m and having a GT of 95,169 and a DWT of 214,861, sailed with her 20 man crew from the Valdez terminal fully loaded on the evening of March 23rd, 1989. Four minutes past midnight on March 24th she struck ground while reportedly trying to avoid ice growlers and therefore in an area outside the ship lanes and off limits to tankers. The ship was just turning back into the normal lane when she hit a reef, tearing up a 197 meters long hole and thereby rupturing eight cargo holds and three ballast tanks. The person operating the vessel at the time of the incident was the
third mate who was later considered not qualified to navigate the Sound. According to the Coastguard, report the master had tried to take the ship off the reef for nearly an hour before calling for assistance and consequently had risked sinking the ship. The ship’s stability was highly questionable due to the magnitude of constructional damage suffered. Oil had come out of the ship for three hours before the Coastguard realised the enormity of the incident and during March 24th another vessel was brought alongside the Exxon Valdez to pump aboard the remaining cargo of the wrecked ship. Meanwhile emergency-clean up crews were faced with a difficult task. The only way to the polluted area was by boat or plane, and the calmness of the sea proved the dispersants ineffective, because rough seas are needed to mix the dispersants with the oil.70 The clean-up efforts lasted three years, mainly during the spring and summer seasons since the conditions due to the climate were better.71

4.2.4.2 Litigation

The master of the Exxon Valdez was criminally indicted and faced three charges, namely operating the vessel while intoxicated, reckless endangerment and negligent discharge of oil. However, he was later only convicted of being negligent of discharging oil. Reports after the trial insinuated that this made it easier for the victims of the oil spill to demand compensation for the damage done. In 1996 charges were brought against him again by the Court of Appeals, which considered that the previous trial had been based on civil and not criminal negligence,72 but the Alaska Supreme Court reversed the decision by stating that there was proof of ordinary civil negligence. There was also the issue of who was going to pay for the damage caused by the incident. The Exxon Corporation, the cargo owners, settled all issues and paid a total of $1.1 billion in criminal fines, restitution, civil settlements and for future damage not yet discovered that could result from the incident. Furthermore a federal jury awarded commercial fishermen $286.8 million in damages plus punitive damages of $5 billion to fishermen, Alaskan natives and property owners. The municipalities and native co-operatives received $9.7 million for environmental damage done to the area. There was also litigation between Exxon and its underwriters when the latter failed to pay, but after a series of manoeuvres from both parties, this was also finally settled.73

70 Hooke, p.208
71 McFarland, p.11
72 Hooke, pp.210-211
73 Rue, de la et al, p. 55-58
4.2.4.3 Results- New Legislation

The Exxon Valdez incident caused turmoil in the international maritime community, mostly due to the USA’s decision not to accept the 1984 Protocols to the CLC and Fund Convention, which resulted in the collapse of those Protocols. Two instruments emerged, both of a regulatory nature. The first was the OPRC Convention which established rules that provided for better co-operation among states in terms of responding to a serious pollution incident.74 The second was an amendment to MARPOL, which made double hull a mandatory requirement. This evoked protests from the oil industry since there were large costs involved in refitting existing single hull tankers, and some IMO members put forward the possibility that other designs might also be accepted as equivalents.75 As a result, a major study in this area was initiated with funding from the oil and tanker industries. In 1992 double hull constructions were made mandatory and other constructions approved by the IMO were to be considered as equivalent. The 1992 amendments to MARPOL applied to new tankers, while existing tankers were to comply with the double-hull or other construction requirement no later than 30 years after their delivery date.76

In direct response to the Exxon Valdez oil spill, the US unilaterally enacted national legislation in the form of the Oil Pollution Act, 1990 (OPA 90). In effect, this Act created an alternative international regime with virtually unlimited liability for oil pollution damage. It purported to minimise the risk of oil pollution by improving tanker construction and making promoting preparedness for an oil spill.77 The Act contains nine main titles. The most important ones are the liability and compensation regime for tankers, the provisions relating to the standards of watchkeeping, training and qualification standards for national and foreign vessels,78 and the establishment of double hull requirements for all tankers with a GT 5000 or above entering American waters. There are, however, possibilities for single hull tankers to unload their cargo at deepwater ports or other designated areas until 2015.79

Even without the support of the US, the international community eventually revised the limits of liability of the CLC and Fund Convention through Protocols produced by the deliberations of an IMO Diplomatic Conference in 1992. The 1992 Protocols, also referred to as the CLC 1992 and the Fund 1992 Convention, brought about the desired changes to the international regime of liability and compensation for oil pollution damage. The limits of

74 Gold, Edgar; “Cases and Material in Canadian Law”, p.487, compiled by Edgar Gold, Faculty of Law, Dalhousie University, Halifax, Nova Scotia, Canada, 1996
75 Mukkadayil, John P.; “Tanker Accidents; Double Hull is not the only viable alternative “, Unpublished Dissertation, World Maritime University 2001, [MSEP Course 2001]
76 IMO,pp.7-8  This date was changed after the Erika incident (see 4.3.5.3).
77 McFarland, p.11-12
78 supra note 73, pp. 65-66
79 McFarland, pp.11-12
liability and the associated formulae are virtually the same as those proposed in 1984. The 1992 Protocols entered into force 1999, after the requisite number of ratifications.

4.2.5 Erika

4.2.5.1 Background

The incident of the motor-tanker *Erika* is undoubtedly different from the other oil pollution incidents referred to above in the sense that her foundering did not result from any grounding or collision. The Malta registered ship measuring 184.45m*28m*15m with a gross tonnage of 19 666 and a DWT of 37 283, broke in two in Bay of Biscay off the French coast while encountering heavy seas on December 12th 1999. Departing from Dunkirk, France on Dec. 8th with 26 crewmembers, for her destination Milazza, Italy (later changed to Livorno, Italy), the vessel carried 30 884 tonnes of fuel oil. While sailing through the heavy weather on Dec. 11th, the master noticing a list to the starboard side ordered deballasting of cargo in a cargo tank in order to try and correct the listing. There was also established, upon inspection by the crew, that there were cracks in some of the sections, and water in one of the ballast cargo tanks. The master, after giving a distress alert at 14.10 hours, decided to bring the vessel into the nearest port of refuge and accordingly altered course. The deballasting of the tanks helped correct the listing and consequently the distress call was cancelled at 17.24 hours that afternoon. At midnight again a list was detected. Deballasting the tanks a second time proved unsuccessful, resulting in increasing difficulties of manoeuvring the ship. It was also discovered that the cracks spotted that afternoon were widening. On the morning of December 12 at 03.45 hours, oil was observed escaping the ship and just after 05.00 hours, the plating of one of the ballast tanks on the side of the ship was torn and barely remained attached to the ship. An hour later a distress alert was made and the evacuation of the crew started after another two hours. Finally on December 12th the *Erika* split in two. The bow section sank that night and the stern section sank the day after while being towed out to sea. The incident caused major oil pollution damage to the French coast.80

According to the report, the incident was a result of a combination of faults. The largest factor is thought to be corrosion, which resulted in the development of cracks on the side of the ship adjacent to one of the ballast tanks just above the water line, meaning that every time the ship crashed into the waves, water could enter the ballast tank since the sea surface went

80 Malta Maritime Authority, “*Report of the Investigation into the loss of the motor tanker Erika on Sunday 12th December 1999*” Merchant Shipping Directorate pp. 18-19, 21 This source will be noted as ‘Erika Report’ when referring to it further.
higher than the opening. These cracks together with the exposed cracks seen the afternoon before the incident lead most probably to the complete separation of a large sector of the side shell structure, eventually splitting the ship in half. The heavy seas, testing the ship, could also have assisted in speeding up the process by causing a local failure through a little crack that progressed until collapse was unavoidable. Furthermore poor repairs before the incident could have also contributed to the incident, by initiating the development of the cracks. Another factor that deserves mentioning is that Erika had a history of groundings before the incident where no major damages had been detected and therefore no repairs had been undertaken.

An interesting point is that the vessel’s sister ships were experiencing the same problems with corrosion that the Erika had, even though they had been relatively new ships; 10-15 years old, which might lead to the conclusion that the material used when building the ships was faulty. Corrosion protection of tank surfaces has not until now been regarded as an important issue and therefore was not compulsory at the time of the incident. IMO, however, has now changed this, making it compulsory for all seawater ballast tanks on new ships to have corrosion protection.

4.2.5.2 Litigation

In the aftermath of the Erika incident, a lengthy report by the French parliament was written in order to determine the issues at hand. There have been many actions taken by the police and legal authorities including finding the parties responsible for the incident. So far about 10 people have been charged (mise en examen), including the master, the shipowners, three responsible persons at the Maritime Authorities in Brest and the Deputy Director of the Marine Rescue Co-ordination Centre ETEL. Furthermore, on the 7th of November TotalFinaElf, the cargo owner, was charged as an accessory for endangerment of other peoples’ lives and marine pollution (complice de mise en danger de la vie d’autrui et pollution maritime). The company has been ordered by the court to provide a bond (caution) of 50 million francs before Dec. 15th. It has also been forbidden to transport nr.2 fuel oil in tankers older than 15 years.

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81 The ship had travelled for many days in heavy seas before the incident occurred.
82 Erika Report pp.70, 89, 99-107
83 Paul, Daniel; Drian, Ie, Jean-Yves, “Apres I’Erika l’urgence-Tome 1 Rapport” Assemblee Nationale, July 5th, 2000
84 Le Figaro, 5 Nov, 2001
85 For definition nr.2 Fuel oil see Erika Report p. 23
86 Figaro, 11 Dec, 2001
4.2.5.3 Results- New Legislation

The legal outcome of the Erika incident is that there has been a follow up in the MSC and MEPC on what kind of steps need to be taken in order to prevent repetitions of such occurrences. The EU is producing an Erika package I and II consisting of, among other legal regulation, of a rule regarding double hull.

The Maltese investigation report concluded that had the Erika been double hulled at the time of the incident, the outcome would not have been any different. Double hulls are supposed to prevent or minimise oil pollution when an incident such as a collision or grounding has occurred, in the case of the Erika, however, the collapse was due to progressive failure and not by incidental contact with other objects.\(^{87}\) Both the French government and the EU has decided however, that the main issue at hand is to accelerate the phase-out of single hull tankers so that it would coincide with the rate that the USA has established in OPA 90. EU introduced this idea to the IMO after gaining considerable industry support since the EU knew that the suggestion would have a strong impact on the tanker fleet.

In a meeting of the MEPC it was agreed that by 2015 most single hull tankers\(^ {88}\) must disappear from the seas. The timetable providing for this is an amendment to MARPOL, which will enter into force on September 2002. Although delegations of some states have doubts in this scheme and analysts consider the regulations more lenient than intended by the EU and in relation to the OPA 90, there is also optimism regarding the scheme since it gives incentives to owners to maintain their ships. The general view, however, is that further steps need to be taken in this area of maritime law. One of the recommendations the Maltese investigation report offered to IMO was, in the light of OPRC, to identify safe ports along each country’s coast, equip them and make them recognised ports of refuge in the area\(^ {89}\).

4.3 Chapter 4- Summary

Figure 2 is a schematic diagram pointing to the central role of the IMO Committees and of the Diplomatic Conferences convened by IMO in transforming an international legal regime for maritime oil pollution. This Chapter has showed that large tanker incidents are important drivers for the process since their occurrences and the resulting litigation processes, establish if the existing regulations are satisfactory. According to the scheme it has therefore particularly concerned itself with the “green point”, before

\(^{87}\) Erika Report, p. 100
\(^{88}\) Newer single hull tankers will be granted exceptions by their flag states if they are in line with some technical specifications. These ships will be allowed to sail until they become 25 years old.
\(^{89}\) Erika Report, pp. 115-116
the output is a fact, and has then hinted at the learning system before the resulting output has been described. The process itself, its inputs and outputs and the work in the learning system is the subject in Section 5, using the *Torrey Canyon* incident, which forced the international community to make major efforts towards common legal regimes for maritime oil pollution, as a case study.

**Learning Systems:**
- IMO Conferences
- IMO Committees
  (Legal Committee,
   Marine Safety Committee,
   Marine Environment Protection Committee)

**Input:**
Existing Conventions & Cases

**Output:**
New Conventions & Amendments

**Incidents:**
- Torrey Canyon
- Argo Merchant
- Amoco Cadiz
- Exxon Valdez
- Erika

*Figure 2. Transformation of the international legal regime for maritime oil pollution*

To conclude this chapter the following scheme\(^9\) is presented giving the results when the Transformation regarding these incidents has been

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\(^9\)The chosen incidents in the scheme were taken from another scheme drawn by Dipl. Ing. Schröder
completed. The litigation processes, being the practical test whether the legislation is satisfactory, comes as a result of the incident, and should therefore are considered under the heading “Ship Incidents”. The section on tanker incidents in the late 1970’s, hasn’t been referred to previously due to the fact that the legislation that resulted from these incidents cannot be based on any one incident. They are however, still of interest in the scheme since they show that it might take time and a number of incidents before regulations actually are developed, as was the case with Ro-Ro vessels (see Appendix).

<table>
<thead>
<tr>
<th>Existing Convention</th>
<th>Year Of incident</th>
<th>Ship Incident</th>
<th>Learning System</th>
<th>Output</th>
<th>Year Into Force</th>
<th>Type</th>
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</thead>
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<tr>
<td></td>
<td></td>
<td></td>
<td>IMO Conference, 1969</td>
<td>CLC</td>
<td>1975</td>
<td>Private Accidental Remedy</td>
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<td></td>
<td></td>
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<td>MARPOL</td>
<td>1983</td>
<td>Regulatory Operational Prevention</td>
</tr>
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<td>MARPOL’73</td>
<td>1989</td>
<td>Exxon Valdez</td>
<td>IMO Conference, 1990</td>
<td>OPRC</td>
<td>1995</td>
<td>Regulatory Operational Prevention Remedy</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>IMO Conference, 1992</td>
<td>MARPOL-am ’92</td>
<td>1995</td>
<td>Regulatory Operational Prevention</td>
</tr>
<tr>
<td></td>
<td></td>
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<td>OPA’90</td>
<td>1990</td>
<td></td>
</tr>
<tr>
<td>SOLAS’74</td>
<td>1990’s</td>
<td>Bulker Accidents</td>
<td>1997</td>
<td>SOLAS-Chapter XI</td>
<td>1999</td>
<td>Regulatory Operational Prevention</td>
</tr>
<tr>
<td>MARPOL’73</td>
<td>1999</td>
<td>Erika</td>
<td>IMO and E.U.</td>
<td>Cont. MSC and MEPC Erika Package I&amp;II</td>
<td>----</td>
<td>(Operational Regulatory)</td>
</tr>
</tbody>
</table>
5 Torrey Canyon- Case Study

5.1 Background

The Torrey Canyon, a Liberian registered tanker, owed its size of GT 61 263 tons and DWT 118 285 tons to a decision made by her owners to have her lengthened in size, and so increase her dead weight tonnage by 52 365 tons. The newly lengthened ship became through her measurements of 297m*38m*21m* one of the largest ships of that time, in 1965. The voyage that resulted in the largest oil-spill disaster around the United Kingdom until the present day and the sixth largest world-wide, started from Mina al Ahmadi Kuwaiti oil terminal on February 18th, 1967.

The Torrey Canyon bound for Milfordhaven with her cargo of 119 328 tons of crude oil sailed of with an all-Italian 36-man crew. The master altered course on March the 14th to arrive at the scheduled time, since otherwise, the tanker would have to wait five days before she could enter port due to tidal conditions. On a heavily loaded ship such as the Torrey Canyon the tidal factor made a significant difference which would then have effected the smooth schedule of the ship. This was to be the reason for the stranding of that ship on March 18th between Land's ends and the Isles of Scilly. Because of the alternation of the route the ship proceeded into waters where the depth had not been adequately charted and there were no aids to navigation. The stranding took place in a waterway that was hardly used by ships navigating in that area. Helicopters that arrived after two hours on the scene realised that this was to be the greatest threat to the environment through oil pollution until that date. Navy boats and other personnel started to combat the oil spill that was spreading by spraying detergents. It was thought that this was the best way to disperse the oil on the sea, while preparations were being made to deal with the pollution on the beaches and other coastal areas.

By this time salvors had arrived on the scene and had boarded the ship. Only the master and three of the crewmembers had remained on board. By March 20th it was clear that 30 000 tons of oil had been spilled into the sea. As the first wave of the immense oil-slick started hitting the beaches an explosion occurred on the stranded ship, which caused the death of one of the salvors and injured eight others. This, however, did not set back the salvage operation. While four tugs on March 26th tried to pull the Torrey Canyon off the rocks, the ship split into two sections that settled themselves at a ten degree angle to each other, gradually sinking and eventually growing to three separate sections as the forward section split later into two sections. The salvage contract ended on March 28 as there was no hope of any further success. The British Government subsequently ordered the ship to be destroyed by bombing so that the remaining cargo on board would perish.
The bombing continued until March 30th when it was considered that all the oil on board had burned up. The wreck was then left to nature’s forces.\footnote{Hooke, pp. 635-636}

The blame for the stranding of the ship was put entirely on the Italian master because he had decided to alter course without prior consultation with anyone else on the ship. Furthermore, he had not given any signs of his intentions in advance when he ordered the alteration of course. On the basis of this, the Liberian government concluded that he did not have sound judgement and failed to exercise the practice of good seamanship. The inquiry also concluded that there had been no mechanical failure on board the ship and that therefore the cause of the oil pollution disaster could only be attributed to human error alone. The outcome of the hearing was that the master lost his license. He never sailed again and the ship itself was proclaimed the largest wreck ever up until that time.\footnote{Hooke, pp. 635-636}

\section*{5.2 Torrey Canyon- Problems Highlighted}

Following the \textit{Torrey Canyon} disaster, three problems were highlighted. First was the practical combating of oil pollution. Second, there was the legal issue of the United Kingdom’s bombing action of a ship which had officially grounded on the high seas. Third the need was recognised for the establishment of international rules to deal with liability and compensation issues.

When dealing with the combating of oil pollution it became obvious that the spraying of detergent had not aided the cleanup efforts but rather worsened the situation, doing and did more damage to the environment than the oil itself. The positive outcome of this unsuccessful attempt was, however, that a lot was learned out of the mistakes made in combating pollution at the time of the incident.\footnote{http://www.cornwall-online.co.uk/msw/Torrey-canyon.htm} In later years, due to increased knowledge, science has caught up with the problems that oil pollution presents and has forwarded several methods of combating pollution, one of which is the use of dispersants, meaning chemicals that clean up oil when sprinkled into water by aircraft. The problem with this method, however, exemplified by the \textit{Exxon Valdez} disaster, is that the rougher the seas are, the better it works since the chemicals need waves in order to spread throughout the oil. In the \textit{Exxon Valdez case}, the sea was calm until the third day, which made it difficult for the dispersants to spread and therefore this procedure failed. A more effective and advanced method of cleaning up oil spills is that of "bioremediation", where the chemicals nitrogen and phosphorus are sprayed on the oil-contaminated areas and act as catalysts for the growth of micro-organisms that naturally break down the oil particles.
and thereby protect the environment. This advancement, although reducing negative effects resulting from oil-pollution and being highly significant for the issue of environmental protection is outside the scope of this thesis and will not be discussed further.

As stated in the introduction, this Chapter will also refrain from further discussion of MARPOL, even though it was a very important convention that emerged as an aftermath of the incident. MARPOL, as indicated earlier, regulates mostly technical matters and precautionary measures and is therefore beyond the scope of this thesis.

5.3 Intervention Convention

5.3.1 Input- General International Law

The Torrey Canyon incident showed that there exists a need for coastal states to be able to intervene on the high sea with a vessel of another flag state if there is an immediate threat of oil pollution to the territory of the coastal state. United Kingdom’s right in the action it took by bombing the vessel was regarded as questionable since the vessel had technically grounded outside of United Kingdom’s territorial waters, and had been flying the flag of a friendly foreign state. Under the international law of the sea the jurisdiction of the flag state is virtually exclusive in respect of a vessel to the high seas. This principle has prevailed over many centuries. The only exceptions concerning intervention on the high seas by another state is based on two doctrines, namely that of self-defence and necessity.

In order to exercise the right of self-defence the state has to be subjected to a wrongdoing as stated in law by another state that through it’s action violates rights by law of the state acting in self defence, like for example it’s territory. For the action to fall under the doctrine of necessity, however, there need not be a wrongdoing involved that by its occurrence violates the rights given to a state by law. Based on this definition it is reasonable to assume that it is the doctrine of necessity that supports the rights of a state other than the flag state to intervene with a ship on the high seas in the case of oil pollution. This is only applicable if the interests or rights are clearly threatened, the danger is imminent and the measures taken under the doctrine are proportional. In all other cases the flag state has exclusive jurisdiction over it’s ships, even when it enters other states territorial or internal waters of another state.

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94 http://www.american.edu/projects/mandala/TED/exxon.htm
95 Rue, de la et al, p.816
96 Absecassis, et al, p.116
98 The doctrine of flag state jurisdiction can be found in the High Seas Convention from 1962 Art 6
There are traditionally seven instances, according to international law and these doctrines, where an intervention on the high seas by a warship with a merchant vessel could be justified. The first instance is if the ship is stateless, meaning that it carries no visible flag of recognition. The problem with interfering in these circumstances is that the state of the shipowner of the interfered ship can make a claim against the state that destroyed the ship. The second basis for an intervention on the high seas is hot pursuit. The coastal states’ ship may continue pursuing a foreign ship into the high sea if it is trying to avoid arrest by escaping to an area outside of the territorial waters of the coastal state. The point to remember, however, is that the term ‘right of hot pursuit’ does not include the right to sink a ship deliberately, although an accidental sinking while trying to arrest the ship though might be right according to law. Another measure of intervention that is acceptable is the boarding of a merchant ship by a warship when there is sufficient evidence to believe that the merchant ship of the same state is carrying out a wrongful act on the high seas. Such actions by a warship may be instigated by the merchant ship by hoisting a different flag or no flag at all. There are bilateral and regional treaty arrangements that allow the law enforcement ships of one state to board commercial ships of another member state in relation to matters such as interdiction, trafficking of narcotics, illegal immigration and other criminal offences. Other acts that constitute the right of intervention by a warship through boarding a foreign ship are piracy and warfare. Lastly the United Nations can decide whether a particular sort of action needs to be taken, and then may authorise one of the nations to take it.

The most versatile and uncertain, however, are those acts under self-defence and the doctrine of necessity that do not fall into any of the seven instances referred to. Among the cases that illustrate the uncertainty of these situations is France’s attempt to justify their actions as right of self-defence, when it seized foreign merchant ships that were carrying arms to the rebels in Algeria in the 1950’s. Most flag states however, contrary to France considered this to be illegal both in terms of self-defence and necessity. On

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99 The territorial seas are waters within 12 nautical miles of the coastline. see UNCLOS 1982 Section 2 Article 3
100 The internal waters is the sea closest to the land when baselines between two points at the coast are measured in order to further determine the territorial waters
102 Examples of this are the so called ‘shiprider agreements’ between the United States and many of the countries of the Carrabian region.
103 If a warship has grounds to believe that a merchant ship is involved in piracy it has the right to board the ship regardless of what nationality the merchant ship is. If the suspicions are truthful the persons should be arrested and the ship seized.
104 At a time of war, a warship belonging to a belligerent state can seize an enemy merchant ship and also in some cases neutral merchant ships are trading trade with the enemy.
the other hand the Torrey Canyon incident proved that it is highly possible that a state that is threatened by heavy oil-pollution as the United Kingdom was, has the right to seize or destroy the ship to prevent additional spreading of pollution. The difference between the French action taken in regard to Algerian ships and the British in the case of the Torrey Canyon lies in that while France could have waited for the ships to enter French territory before arresting them, the destruction of a tanker aids the effort of preventing further oil pollution. The International Law Commission found that Britain’s action against the vessel had been within the frame of the doctrine of necessity. A legal document, supporting the idea of acting according to the doctrine of necessity in pollution cases is ILC’s Draft Articles on International Responsibility of States Art. 33(1a).

5.3.2 Learning System: Conference on Marine Pollution Damage, 1969 – General

The conference set to discuss the legal problems that had emerged during the Torrey Canyon incident was not to take place until November 1969 in the shape of the “International Legal Conference on Marine Oil Pollution Damage”. It dealt with two main issues, namely that of rightful intervention on the high seas and liability for damage caused to third parties. Due to the incident, IMO (in those days IMCO International Maritime Consultative Organization) established a new committee, namely the Legal Committee to deal exclusively with legal issues. The Organization also set up a programme consisting of eighteen points expressing issues regarding marine pollution as a result of maritime casualties. The formulation of the point concerning intervention on the high seas given to the Committee by the Council was the following:

"The extent to which a state directly threatened or affected by a casualty which takes place outside its territorial sea can, or should be enabled to, take measures to protect its coastline, harbours, territorial sea or amenities, even when such measures may affect the interests of shipowners, salvage companies and insurers and even of a flag Government." 108

The point issued concerning civil liability was stated as follows:

“all questions relating to the nature (whether absolute or not), extent and amount of liability of the owner or the operator of the ship

106 During wartime this should be considered a legitimate act even though the flag state still does have the jurisdiction over the ship.
107 Malanczuk, pp.186-190
or the owner of the cargo (jointly or severally) for damage caused to
third parties by accidents suffered by the ship involving the discharge
of persistent oils or other noxious or hazardous substances and in
particular whether or not it would be advisable a) to make some form
of insurance of the liability compulsory
b) to make arrangements to enable governments and injured parties
to be compensated for the damage due to the casualty and the costs
incurred in combating pollution of the sea and cleaning polluted
property.”

The participants included 48 countries, and six more countries took as
observers. There were also observers from certain agencies within the
United Nations, namely, International Labour Organisation and the
International Atomic Energy Agencies, and other inter-governmental
agencies such as the Organisation for Economic Co-operation and
Development (OECD), and the International Institute for the Unification of
Private Law. There were a great number of observers also from
organisations that were non-governmental, the most obvious being CMI that
had submitted the first draft to the two conventions that were under
discussion. Other organisations included the International Chamber of
Shipping, the International Chamber of Commerce, Permanent International
Association of Navigation Congresses, the International Law Association
and the International Confederation of Free Trade Unions. Lastly there were
also delegates from the IMO Secretariat.

After receiving advice from the Legal Committee and consulting the
Government of Belgium, the Secretary-General was instructed by the
IMO\textsuperscript{109} to plan the structure of the conference in terms of committees and
other bodies. The final outcome after discussions with the relevant advisers
was that a plenary with representation from all delegations. There were six
committees to forward the process, the two important ones being the
Committee of the Whole 1 dealing with the public law convention, i.e the
Intervention Convention, and the Committee of the Whole 2 dealing with
the private law convention, i.e. CLC. These committees consisted of
representatives from all countries attending the conference. Aside from these
there was a Drafting Committee dealing with the over-all drafting of what
the two committees decided and also the final act of the conference. Also a
Credentials Committee was established to examine the rights of
representatives to sign and deliberate on behalf of their states, and a
Committee on the Final Clauses to prepare these for each convention. Lastly
there was to be a Co-ordinating Committee to deal with the reviewing,
organisation and the progress of the conference but it was never set up.
There were also, in the original scheme, supposed to be sub-committees
under the Committees of the Whole 1 and 2, dealing with special issues like

\textsuperscript{109} In the Conference Records the IMO is referred to its old name IMCO, International
Maritime Consultative Organisation, in this thesis, however, the Organization will continue
to be denoted as the IMO.
arbitration and conciliation for the Intervention Convention and limitations of liability and insurance matters for the civil liability convention. It was decided in the first plenary session that the Committees of the Whole 1 and 2 would independently set up sub-committees if it was needed and appoint the members themselves. The conference, after holding seven plenary meetings, 22 Committee on the Whole 1 meetings, and 20 Committee on the Whole 2 meetings, successfully adopted the two conventions, and started the work for the establishment of an international fund that would lead up to the Conference of 1971 for the adoption of the Fund Convention.

5.3.3 Learning System: Committee of the Whole I—Discussions Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties

During the meetings of the Committee of the Whole 1 that was assigned to deal with the draft articles of the Intervention Convention, there were especially three questions that raised uncertainty and division between the participants. These questions included whether the convention should only be limited to oil pollution though there was admittedly a need for a convention dealing with other dangerous pollutants as well. Other questions included whether a definition of oil should be incorporated and if so should oil be defined in the same terms as in the private law convention. Finally, the question of whether the convention should be extended to the territorial seas and if so what would be the consequence of this was considered.

The Committee decided to set up a Working Group to tackle the issues involved in the questions concerning incorporating pollutants other than oil into the convention. The members of the working group were Cameroon, France, Netherlands, USSR, U.K, and USA. Most states appreciated the fact that the convention would be acceptable to more signatories if it only dealt with pollution; this being highly urgent and was the original proposal of the draft conventions, and that it would be difficult to name other pollutants because of lack of sufficient studies. On the other hand, some states deemed that it was wrong to abstain from this difficult task only because studies of had not been completed, since there was a need for a regime addressing other pollutants even more harmful than oil. The solution of the working group was a resolution recommending that the IMO expedite the process for an intervention regime for pollutants other than

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110 OR 69, LEG/CONF/7, pp.56-58
111 OR 69 LEG/CONF/C.1/SR.3
112 ibid, p.289
113 OR 69 LEG/CONF/C.1/SR.1 see Poland, Italy’s, USSR, Brazil’s, Greece’s and Norway’s delegations
114 OR 69 LEG/CONF/C.1/SR.2 see Guatemalan, Cameroon’s and Canadian delegation
This later became the Protocol Relating to Intervention on the High Seas in Cases of Oil Pollution by Substances Other than Oil, 1973.

The second of the three main problems under discussion was the definition of oil. After establishing that there was a need for a definition of oil, since the convention as drafted dealt with oil, the question was whether the term would be subject to the same definition as in the private law convention. The Swedish delegation that had put this amendment up for discussion wanted, together with delegates from Canada, to refrain from using the word ‘persistent’ when referring to oil since this would not include all oils that would be considered dangerous. This was accordingly done.

The third question concerned the possibility of extending the convention to include territorial waters. The Canadian delegation argued that the sovereignty granted to the coastal state over its territorial waters by right of international law would be hampered if the convention was to extend this far, since the coastal state had broader jurisdiction over that area at that time than it would have under the convention. The United Kingdom delegation, however, considered it inappropriate to have two separate regimes, one on the high seas that limited the ability to intervene and another on the territorial sea where there wasn’t any limitation on the rights of the coastal states except that of innocent passage. The matter was settled by a roll-call vote where the proposal that the United Kingdom wanted and that the Danish delegation had submitted was rejected, meaning that the convention remained only applicable to oil pollution in relation to the high seas. At the final 22nd session of the committee, the draft convention put forward by the drafting group that had been appointed by the committee was amended.

Although all the countries at the conference had been represented in the Committee of the Whole there were also countries that gave in written proposals for amendments of the articles on which most of the discussions of the articles were based. These were: Sweden, South Africa, Netherlands and Italy with three amendments each, Spain, Canada, and Romania with two each and Syria, Japan, Ghana, France, Belgium, Denmark, USSR, Australia, Liberia, Germany and New Zealand with one each.

115 OR 69 LEG/CONF/C.1/SR.18 p. 401 and OR 69 LEG/CONF/C.1/SR.19
116 OR 69 LEG/CONF/C.1/SR.19 pp. 407-408. After it was confirmed that the Committee of the Whole II working on the private law convention i.e. CLC had decided to define oil in that convention, the Committee on the Whole I decided to go the same way and write a definition for oil.
117 ibid
118 LEG/CONF/C.1/SR.8 p. 324. For definition of persistent oil see Abecassis et al pp. 196-197
119 OR 69 LEG/CONF/C.1/SR.19 pp. 408-409
120 ibid,
121 supra. Note 119, p.411
5.3.4 TASCOI applied on Conference on Marine Pollution Damage, 1969 and the Committee of the Whole I

The TASCOI method is, as seen in Chapter 2, a system of naming different entities in a decision-making process. It is highly convenient for trying to establish the functions and importance of the varying entities taking part in a decision-making process where input should be transformed in order to become a valuable output. The different entities of the conference will be established by indirectly asking the questions formulated in section first relating to the matter of Transformation.

5.3.4.1 T-Transformation

When looking at the Transformation that created the Intervention Convention it is difficult to establish if the input from general international law had an effect on the discussion. There are certain facts, however, that point in this direction. Firstly, an over all view of the convention indicates that the doctrine of necessity was taken into account when forming the convention, since according to general international law an intervention of another ship in the high seas can only be justified by the doctrine of necessity or of self-defence. One can exclude the self-defence as the primary thought behind the convention when looking at the definitions of the two doctrines. Another reference to general international law was the discussion held by the Committee on the Whole I concerning the Intervention Convention’s applicability on the territorial waters, which was eventually voted down.

5.3.4.2 ASCOI- The Identifying of Groups

The first entity in need of identification are the Actors of the conference, the person or group carrying out the activities needed for the transformation to occur. In relation to both of the conventions discussed at the conference the answer to this question would have to be the Committee of the Whole I in regards to the Intervention Convention and the Committee of the Whole II for the CLC (see. The delegates in the two committees, moved the discussion forward thereby reconciling the differences of opinion and forming a united view about what changes had to be made to the existing law in order to form a basis for a widely acceptable convention. The Suppliers of the conference were many; the most important ones being the IMO and the CMI, who together had tried to come up with solutions after the Torrey Canyon incident so that there would in the future be adequate compensation for third parties suffering damage caused by oil pollution emanating maritime incidents.122

122 OR 69 LEG/CONF/SR.6 p.121
A considerable amount of work had been done in terms of discussions and the preparation of draft conventions, before the conferences commenced. It was these two organisations working together that supplied the two sets of draft conventions that were discussed by the actors at the conference. 123 There were also, however, other suppliers in the form of the governments and the delegations of the states participating, that had through their written proposals of amendments to the conventions started serious discussions among the members of the Committees. The immediate suppliers during the conference days were the established working groups, particularly the Drafting Group that made the changes in the draft conventions under discussion that the Committees deemed necessary. The amended drafts were then returned to the Committees for a further overview, so in a sense the Drafting Group was a supplier more than once.

The Customers of the conference were the governments represented among the participants in the Committees. They held the primary interest in the outcome of the conference, since it was their responsibility to endorse the conventions once they were formed. Furthermore they were the parties who wished to harmonise the international rules concerning maritime and oil pollution in order to bring the international maritime community closer together. IMO, being the organisation that convened the conference and provided a draft convention and a scheme for the conduct of the conference and also the organisational questions concerning the bodies at the conference, is the Owner. This is supported by the fact that the IMO Deputy General-Secretary stepped in when it was clear that some delegations thought it preferable that instead of rushing through the principles on the CLC, another conference should be convened within a six month period. He came in and explained that the budgeting of the organisation prevented the holding of another conference in such a short period. The delegates would have to wait for another conference until the end of 1971. Furthermore the organisation was not free to allocate the budget as it wanted due to it being under the United Nations. 124 This last part recognising the involvement of the United Nations in the work of the organisation raises the question whether the UN itself is an owner to the conference. This question would have to be answered in the negative due to the fact that although they do keep the IMO’s budget in check it does not mean that the UN is they are involved with the work of the IMO, which as a specialised agency is semi-autonomous within the UN family.

Interveners are usually the hardest category to distinguish because of the wide scope of interests that can be represented due to this characterisation. They are the parties who jointly affect the outcome by pointing out the role of the output and being concerned with some of the practical effects it will

123 Although the discussion at the conference mostly concerned the draft provided by the IMO there were delegates referring to the draft convention provided by the CMI see OR 69LEG/CONF/C.2/SR.13 p.697 the Japanese delegation
124 OR 69 LEG/CONF/C.2/SR.12, p. 683
produce in different areas, thereby usually accumulating into an ever larger group. The structure of the conference, however, facilitates this distinguishing process quite substantially.

The parties that should be regarded as interveners at the conference are the observers invited to attend the conference, ranging from different countries and organisations. An example of the observer’s capacity of intervening is when the observer from the International Atomic Energy Agency (IAEA) came into the discussion regarding the extending of the Intervention Convention to other pollutants in the form of a protocol. IAEA, being responsible for the prevention and control with regards to radioactive pollution, asked the Committee of the Whole I if it meant to incorporate this kind of pollution into the Protocol as well. He proceeded to say that if this was the case it was to be pointed out that article IV of the draft convention would not be able to include this kind of pollutant as it read at the time. He also expressed his views concerning the Protocol itself. In other words IAEA expressed through its observer the concerns of the agency if radioactive substances would be included as a pollutant.

Another example of an intervener to the conference, but this time in the form of a non-attending organisation, is the International Union for Conservation of Nature and Natural Resources that submitted comments to the draft conventions through a written statement. This suggests that in order to be an intervener the party does not have to be physically present at the place where the transformation is occurring.

5.3.5 Output- The Intervention Convention

The International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties entered into force on May 6th 1975. The preamble to the convention clarifies that the parties to the convention realise the need for protecting people’s interests against consequences of major oil pollution spills and exceptional measures might be needed on the high seas to protect these interests. These measures should not, however, unduly impinge on the principle of freedom of navigation on the high seas Coastal states should be allowed to intervene on the high seas in cases of

125 OR 69 LEG/CONF/C.1/SR.2 p.283
126 OR 69 LEG/CONF/WP.1, pp.58-59
127 In this section only a number of Articles of the Convention will be referred to, including those that were under discussion during the conference.
128 IMO; “International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969) and Protocol Relating to Intervention on the High Seas in Cases of Pollution by Substances Other than Oil”, p. 5 IMO, London, England, 1984. This source will be denoted as “Intervention Convention” followed by the number of the relevant Article
Art. 1 being the most important provision one sets up the conditions under which states can intervene. It provides that contracting parties can take measures on the high seas to prevent, mitigate or eliminate grave or immediate danger to the coastline or other related interests when there is a threat that a particular incident could result in major oil pollution with harmful consequences. The phrasing of the article clarifies that it is very closely related to the doctrine of necessity, although greater precision is involved in the sense that intervention is only acceptable when there is a threat of or there is actual pollution that is likely to be a major disaster. There is however no mention of how far out into the high seas a coastal state can go in order to prevent oil pollution coming onto its shores. This might be seen as a flaw in the convention. The question is important since in the case of a grounding or collision on the high seas at a considerable distance from land, the coastal state’s right to intervene, within the scope of the convention without violating the rights of freedom on the high seas, has to be clarified. The problem during the conference on this point was that under the emerging law of the sea the width of the territorial sea had not yet acquired any uniformity. According to some states it was a 3- nautical mile limit, others had 12- nautical miles and even yet others, up to a 200- nautical miles. Subsequently under UNCLOS the territorial sea has been established as 12 nautical miles, and the Exclusive Economic Zone at 200 nautical miles. The high seas lie beyond the Exclusive Economic Zone (EEZ).

The interests referred to in Art. 1 are specified in Art. 2 as fishing activities, which constitute a major means of livelihood for the persons who have suffered the damage, tourism and the well being of marine resources of wildlife. The interests must be directly affected or threatened by an oil pollution incident, in order to be accepted as a cause for intervention. On this basis, under the convention there is sufficient reason to intervene if the only threat is to the environment. There need not be an actual threat to property or financial losses. The term ‘ship’ includes sea-going vessels and floating rafts. Installation or devices used for the exploration and the exploitation of the resources of the sea-bed and the ocean floor, such as oil rigs, are not included in the convention. Oil is defined by the convention

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129 Abecassis et al. p.123
130 Intervention Convention Article 1
131 supra note 129, p. 120
132 Abecassis et al. p.121
133 OR 69 LEG/CONF/C.1/SR.3 see Indian delegation pp. 292-293
134 The Exclusive Economic Zone is the sea outside the territorial waters within 200 nautical miles away from the coast
135 Intervention Convention Art. 2
136 Abecassis, p.122
as crude oil, fuel oil, diesel oil and lubricating oil, as the Conference of 1969 decided it would.

Art. 3 describes how the right of intervention should be exercised. Measures should only be taken after consultation with other states or persons who have interests in the ship and the pollution, particularly the flag state, and this should be done in all cases except those regarded as highly urgent.\footnote{Intervention Convention Art. 3} This regulation is of importance since it establishes the right to information and therefore effectively prevents coastal states from abusing their rights.\footnote{supra, note 136, p.124}

To safeguard the misuse of powers that can be taken into the convention, states can consult with independent experts all over the world from a list set up by the IMO for this purpose.\footnote{Intervention Convention Art. 4} Where the case is highly urgent the coastal states should intervene but use high caution in order not to injure or risk the lives of the crew.\footnote{Intervention Convention Art. 3} Art. 5 forwards the proportionality principle by stating that the measures taken according to and within the scope of the convention should be appropriate to the damage that is actual or is threatening to occur. These measures should not go beyond what is reasonable and necessary to achieve and should end as soon as the goals have been reached.\footnote{Intervention Convention Article 5}

Art. 6 deals with compensation matters in relations to the measures that can be taken according to the convention. If the measures go beyond the scope of the convention, according to Art. 5, they can become liable to pay for the damage so caused. This principle also prevails in general international law under the concept of necessity and for that reason was probably included in the convention.\footnote{Oppenheim L: “it is a fact that in certain cases violations committed in self-preservation are not prohibited by the law of nations. But nevertheless, they remain violations may therefore be repelled and indemnities may be demanded for damages done” International Law 8th Edition, London 1955, p.298, in Abecassis et al p. 124 note 29} The end result is an annex to the convention stating that the only way to gain compensation is through conciliation and arbitration. This means that the party who seeks compensation cannot obtain it if the government does not take up the case, unless the coastal state voluntarily agrees to negotiate and settle directly with the claimant.\footnote{Abecassis, et al, p.125}
5.4 The CLC

5.4.1 Input- Preceeding Conventions

The third issue that arose out of the Torrey Canyon was the need to repair the deficiencies in the present system concerning liability and compensation matters as a result of an oil pollution disaster. Before the incident the liability regime was mainly represented through national rules of tort law of each state, although there did exist some conventions on the international scene. The first two conventions with this aim were already formed in 1924 and 1957 respectively, namely the International Convention for the Unification of Certain Rules Relating to the Limitation of the Liability of Owners of Sea-going Vessels and the International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships. Another conference was also held after the adoption of the CLC and Fund convention, which established the Convention of Limitation of Liability for Maritime Claims in 1976 (LLMC), making the 1924 and 1957 conventions virtually obsolete.

Although the two pre-CLC conventions dealt with liability resulting from oil pollution damage, the general conception was that oil pollution was not a major problem that needed special attention. The shipowner’s right to limitation of liability meant low compensation sums, leaving the victim to bear the costs of any damage done to his property above this limit.\textsuperscript{144} When the 1976 convention was adopted the CLC and Fund convention had already gained momentum, so the LLMC has a special article\textsuperscript{145} excluding all claims arising out of oil pollution incidents that are within the scope of the CLC.\textsuperscript{146} This means that not only are shipowners not allowed to limit themselves under the LLMC, but also that other potential defendants due to an oil pollution incident cannot limit their liability under the LLMC. Thus if there was a claim against a charterer he would not have any way of limiting his liability.\textsuperscript{147} With this in mind it should be said that the LLMC and its predecessors is part of a global limitation regimes\textsuperscript{148}, being counterpart to the specific limitations regimes\textsuperscript{149} provided by the CLC and the Hazardous and Noxious Substance Convention. This indicates that although the conventions of 1924 and 1957 were part of the input leading up to CLC, the convention of 1969 is still unique by embodying a regime that only

\textsuperscript{145} see Art 3b in the Convention on Limitations of Maritime Claims (LLMC)
\textsuperscript{146} Abecassis et al, pp. 187-188
\textsuperscript{147} Rue, de la et al, pp .640-641
\textsuperscript{148}Global limitation regimes are existing conventions or other legal frameworks that specify one kind of action that can be taken generally in any area of law i.e purchasing, and specifies the procedure in one particular area i.e Maritime law.
\textsuperscript{149} Specific limitation regimes deal with only one sort of legal action particular to a certain area of law i.e CLC that deals specifically with limited liability for shipowners.
addresses oil pollution. It is clear that both the global and specific regimes are necessary since it is not possible to have separate regimes for different claims that arise. The LLMC as a global regime is needed, although specific regimes are also needed that solely concentrate on special types of damage and their ensuing claims.

5.4.2 Input-Case Law

There are also national and international cases that have affected maritime law. Among these are two English cases and an international arbitration case between USA and Canada, from which the members of the conference possibly could have drawn inspiration. It is important to remember that the most common way of determining liability is when it is based on fault, that is to say that the plaintiff must prove that the damage occurred due to the defendant’s fault or negligence. This is the case also in the field of traditional maritime law, the exception being the CLC that has a strict liability regime, meaning that regardless of fault the person or entity causing the damage is liable.\(^\text{150}\) The international case has been chosen in order to demonstrate what responsibilities one country has towards the other in light of environmental pollution. The two national cases are referred to because both of them put forward principles that are believed to have been the basis of discussion at the conference on civil liability, that is to say that of strict liability and liability based on fault, and the interesting views of the courts in these cases.

5.4.2.1 International Cases- the Trail Smelter Arbitration

The Trail Smelter arbitration was commenced to settle claims of the United States due to damage done to US crops, pasture lands, trees, agriculture and livestock, as a result of emitted sulphur dioxide fumes from a smelting plant of the Consolidated Mining and Smelting Company of Canada, which was situated at Trail, British Columbia, near the border of Washington State, USA. The sulphur fumes had increased after the company had enlarged the plant. The two states recognising the problem in 1928 asked the U.S-Canada Joint Commission\(^\text{151}\) for help. Its solution, however, was not approved by either state. In 1935 the case was submitted to a tribunal consisting of a neutral jurist, one Canadian and one American, together with the assistance of two scientists, one from each country. One of the questions the tribunal had to answer was whether any damage had been caused to Washington State from the Trail smelter in 1932 and if so what indemnity should be paid. The tribunal held that under the principles of international law, no state

\(^{150}\) Mukherjee et al, p.73 in Chaumel

\(^{151}\) The commission was set up in 1909 by a treaty between the two states with the aim of solving upcoming problems between them
has the right to permit the use of its territory in such a manner that it causes injury to another state by fumes or damage within its territory to properties or persons. This is especially the case when serious consequences are expected as a result of the damage and it is clearly evident that a damage has occurred. According to international standards Canada was responsible for the company’s actions. The tribunal quoted a Professor Eagleton in that" A state owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction." 152 The Trail Smelter arbitration, being a public law case, recognised the international law doctrine of state responsibility. The decision is also viewed as supporting a no fault liability regime in respect of environmental damage. Later the International Court of Justice also recognised that the environment "is not an abstraction but represents the living space, the quality of life and the very health of human beings, including the generations unborn. The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national controls are now part of the corpus of international law relating to the environment".153

5.4.2.2 National Cases

*Rylands v. Fletcher*, an English case from 1868, illustrates the notion of strict liability at common law. The details of the case are as follows; John Rylands, a successful entrepreneur, needed an additional source of water for his steam-powered textile mill. For this purpose he hired a contractor to dig a large ditch and so create a reservoir. In 1860, this reservoir burst through an abandoned coal-mining shaft that was adjacent to a neighbouring coal mine, which was active and owned by Thomas Fletcher. The water from the reservoir flooded the mine so that any further activities in it were rendered impossible. Fletcher sued Rylands and lost in the first instance due to the fact that none of the actions of trespass, negligence or nuisance had been committed, and therefore according to common law there was no remedy available. The Exchequer Chamber, in the second instance, decided in favour of Fletcher, by establishing a broad (meaning strict) liability. Blackburn J. held:

“[T]he person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.”

152 Trail Smelter Case (1938), RIAA III 1905
153 Malančuk, note 83 p.246, for more cases see Lake Lanoux arbitration from 1956, regarding the diversion of water from the lake to the river Ariège, and whether this would be considered to be an injurious act to Spain.
Blackburn J., however, limited his opinion later by stating that it was only applicable when a defendant had introduced a foreign substance on his property. Rylands appealed on the basis of this to the House of Lords, where Lord Cairns confirmed the principle put down by Blackburn J. He also clarified that the activity causing the damage was extra hazardous, and therefore the defendants liability should be strict. It was an unnatural use of land that was likely to be harmful\textsuperscript{154}.

Another case that is regarded as important for the development of international maritime law is the \textit{Southport Corporation v. Esso Petroleum} (1956) that deals with, among other things, compensation based on proof of fault. The vessel \textit{Inverpool} suffered problems with her steering mechanism after encountering heavy weather. The master’s decision to hold the course even though this included going through a dangerous channel ended in the grounding of the vessel. While trying to lighten the ship to ensure her and the crews safety, much of the cargo, consisting of oil was allowed to escape into the sea. This oil damaged the property of Southport Corporation causing the company to sue the owners of the vessel, Esso Petroleum, and the master of the ship. In this case, as with Rylands v. Fletcher, the grounds for compensation were made according to the principles of trespass, nuisance and negligence. The outcome of the case was the following: According to Devlin J., having property by the sea was to be considered in English law to have the same affect as having property beside a highway and therefore the owners of this property risk that damage to their property by users of this ‘highway’ i.e. the sea. He also stated that the safety of the crew was a defence of the action in unloading the oil into the sea, in other words, the court in the first instance decided for the defendants. The decision was however reversed by the Court of Appeal which held that the defendants had not proved that the relieving the oil into the sea had arisen without any fault on their part. In the House of Lords the final conclusion was in favour of the defendants. The court decided that deciding that if human life had been saved at the expense of the oil, then that was sufficient to answer claims based on trespass or nuisance, and that furthermore there had not been an act of negligence.\textsuperscript{155}

\textsuperscript{154} Rylands v. Fletcher [1868] L.R. 3 H.L. 330
\textsuperscript{155} Southport Corporation v. Esso Petroleum [1955] 2 Lloyd’s Rep.655; [1956] A.C. 218 (HL). For more cases see the Wagon Mound case [1961] 1 Lloyd’s Rep. 1 (P.C) where a ship while at harbour leaked oil which consequently ignited by the help of sparks from working equipment and set two other ships on fire. The principle that emerged from this case was the test of foreseeability, i.e liability is based on whether the damage could have been reasonably foreseen.
5.4.3 Learning System- The Committee of the Whole II-Discussions Relating to Civil Liability

The Committee of the Whole 2 dealing with the formation of the CLC formulated eight points as the basis for discussions. The points were the following: Should the basis of liability be strict liability or liability based on fault with the burden of proof shifted to the shipowner? Should there be an imposition of liability on the cargo or on ship, and if the second then on the owner or on the operator? Furthermore there was the question of limitation of liability, i.e. the principles of it and the amounts that should be stated. Should there be compulsory insurance or a financial guarantee, in terms of what system should be used, what amount should be on the insurance/guarantee and the question of direct claims? There were also problems that needed to be highlighted concerning damages to be covered, especially the problem of indirect damages. Other issues that arose were whether the convention should be applicable to government ships, if the scope of the convention should be extended to other pollutants than oil and what kind of treatment should be given to non-contracting states. The final general point for discussion was judicial competence and the arbitration and the recognition of decisions made according to this instrument. The discussion in this section will be limited to questions concerning liability.156

Concerning the nature of liability, whether it should be strict or by fault, was the source of long discussions together with the question of whether it should be imposed on the shipowner or the cargo owner. Up until the time of the conference liability had mainly been based on fault, which had lead to the victim sometimes failing to receive any remedy for the damage suffered.157 The division among participating states was evident because coastal states wanted strict liability while maritime states wanted liability based on fault.158 Naturally coastal states were afraid of the damage that an oil pollution incident can cause on their coastline. On the other hand the maritime states did not want strict liability because it would hamper the shipping industry and burden the shipowners. Other reasons for keeping the liability based on fault were considered. Most incidents that had caused pollution damage had been done by the fault of the shipowner or the operator, and the main aim of the convention was to ensure compensation for material damage while other conventions in maritime and aviation had strict liability because there was the threat of physical injury.159 The positive aspect of strict liability was that it was the effective way of compensating

156 Although it is interesting to see how the other questions were tackled, in particular the treatment of non-contracting states considering the adoption later of the LLMC, and the insurance issues, this will not be commented on further.
157 OR 69/LEG/CONF/C.2/SR.2 Ireland p. 623
158 OR 69/LEG/CONF/C.2/SR.5 Ireland p.640
159 OR 69/LEG/CONF/C.2/SR.3 USSR p. 630

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victims that had suffered damage from oil pollution\textsuperscript{160} and potentially shorten the litigation process after a maritime casualty.\textsuperscript{161}

Regarding the issue of the imposition of liability on the ship owner, the operator and/or the cargo owner, this subject was taken adjacent to the basis of liability question.\textsuperscript{162} The main reason for putting liability on the cargo owner, was that it was his goods that had caused the oil pollution,\textsuperscript{163} and that the oil industry, being most of the time the owners of the cargo had enough money to handle any claims arising.\textsuperscript{164} The countries voting in favour of the shipowner being liable in the convention considered that the allocation of liability should correspond with ordinary maritime law\textsuperscript{165}, and because most of the oil pollution disasters in recent years had been a result of negligence by the persons responsible for the ship. It was thought that by putting the liability on the shipowner it was an incentive for them to do everything within their power to prevent incidents from happening.\textsuperscript{166} Canada’s suggestion was that the ship and cargo owners should be jointly liable since they both were responsible for the maritime voyage undertaken that had consequently caused the oil pollution.\textsuperscript{167}

In the middle of these discussions a working group was formed consisting of Belgium, Canada, France, Ghana, Greece, India, Ireland, Italy, Liberia, Netherlands, Norway Portugal, Spain and the United Arab Republic. The working group was to concentrate itself on the forming of an international fund and the different problems with establishing this instrument. The aim of the fund was to incorporate the oil industry in order to split the liability between the shipowner and the industry. The findings of the working group was later to be given to IMO which on the basis of this convened a conference in 1971 that created the Fund Convention.\textsuperscript{168}

The final vote regarding these questions was 25 to 13 for liability on the ship, 25 to 7 with seven abstentions for liability on the ship combined with liability on a fund, and finally 22 to 17 with three abstentions voted for strict liability as opposed to liability based on fault.

The third issue raised questions about the limitation of liability, meaning the highest amount of compensation that could be paid out to victims from a particular incident. When the point was first raised during the session of the Committee of the Whole II there were differences of opinion whether the question could be discussed, since the working group at that stage was still

\textsuperscript{160} ibid. United Arab Republic p. 628-629, and USA p.630
\textsuperscript{161} OR 69 LEG/CONF/C.2/SR:4 France p.632
\textsuperscript{162} OR 69LEG/CONF/C.2/SR.2 p. 623
\textsuperscript{163} ibid pp.623-624
\textsuperscript{164} OR 69 LEG/CONF/C.2/SR.4 p.634 Swedish delegation and OR 69 LEG/CONF/C.2/SR.5 French delegation pp..638-639
\textsuperscript{165} LEG/CONF/C.2/SR.5 French delegation p. 639
\textsuperscript{166} OR 69 LEG/CONF/C.1/SR.5 USSR at p. 640
\textsuperscript{167} OR 69 LEG/CONF/C.2/SR.7 p.651
\textsuperscript{168} OR 69 LEG/CON/C.2/SR.20 p.762.
looking into the possibility of creating an international fund. The result of the working group concerning the fund was important since there were issues as to whether the fund or the shipowner had primary liability.\(^{169}\) The early discussions regarding the limitation of liability proposed the amount of $10 million or $15 million depending on whether the liability was to be based on strict liability or liability by fault.\(^{170}\)

These numbers, however, changed and the discussion mostly revolved around the U.K delegation’s proposal to put the limit at 1900 francs ($125) per ship’s tonnage with a ceiling of 210 million francs ($14 million).\(^{171}\) This new amount was strongly endorsed by many of the delegations attending the meeting,\(^{172}\) although there were some countries that voiced their concern for uncertainty regarding the figures.\(^{173}\) The state most notably against these figures was Canada who considered that the amount was not large enough for pollution damages caused to coastal states. Regarding incidents of similar magnitude as the *Torrey Canyon* this would only amount to a total compensation of $8 million. The Canadian delegation stated that it could not vote for the convention if these sums were to be in the final draft of the convention.\(^{174}\)

A roll-call vote took place after the U.K delegation decided to extend the 1900 francs to 2000 francs, with the result that the U.K proposal was adopted with 35 votes to three with three abstentions.\(^{175}\)

It was not only the U.K delegation who submitted written proposals to be discussed and possibly amended to the convention. Overall, the spread of states wanting to make adjustments was higher during the making of this convention than of the Intervention Convention, with 29 of the 48 participants making joint or individual suggestions for amendments relating to the drafting of the convention. The states showing the most interest through their participation were the U.K and the Netherlands, each submitting nine documents during the course of the conference. They were

\(^{169}\) OR 69 LEG/CONF/C.2/SR.8

\(^{170}\) OR 69 LEG/CONF/C.2/SR.12 UK delegation, see also LEG/CONF/C.2/SR:11 p. 681, the Norwegian delegation arguing for liability based on fault

\(^{171}\) OR 69 LEG/CONF/C.2/WP.35 p.596.

\(^{172}\) OR 69 LEG/CONF/C.2/SR.17 p. 727 where United Kingdom announced that the Committees of Germany, France, Ghana, Ireland, India Italy, Netherlands Spain and USA had agreed with the proposal put forward by the United Kingdom.

\(^{173}\) ibid. p.730 France’s question if heightened liability to 2000 francs was acceptable, which proved to be the final number adopted in CLC, while the Russian delegation considered all the proposed limitations of liability too high, pp. 731-732. This was also the standpoint of the Scandinavian delegations of Denmark, Norway, Sweden and Finland by judging their proposals for amendments to the convention see LEG/CONF/C.2/WP.38. The Indian delegation expressed some concerns that the amount proposed would be hard for smaller ships although very good for the big tankers, p.733.

\(^{174}\) ibid. p.731 France and the United Kingdom had received compensation of $7 million dollar as a result of the *Torrey Canyon* the real sum amounted however to at least double that amount.

\(^{175}\) ibid.p.738
closely followed by Norway submitting seven, with Sweden and Germany submitting six documents each.

The Committee of the Whole II recognised through the outcome of the conference that due to hazards and other activities on board ships the shipowner was entitled to a limitation of liability since he usually was not present on the ship himself and therefore was not in immediate control of everyday procedures and decision-making that could eventually lead to a casualty resulting in an oil spill. Furthermore, because of these extra hazardous activities that occurred on board, there should be a possibility to hold cargo owners liable since it is the cargo of oil that ultimately results in the pollution. Therefore, the members of the Committee realised that there should be a shared burden between the cargo owners and the shipowners in terms of liability for oil pollution. The problem that presented itself was that up until then in both civil law and common law countries there were no legal mechanisms that addressed the responsibility of cargo owners in matters relating to cargo causing pollution.

The solution to this problem according to the Committee was what could be termed as a ‘moral responsibility’ implying that the cargo-owners were in fact liable for the damage caused by the cargo they had sent on board. This moral responsibility should then be transformed into a justifiable legal regime that the cargo owners would abide by and accept. This liability, imposed on the cargo owner, would also have the affect of relieving the shipowner of some of his financial burdens and thereby settling the potential problem that strict liability on the shipowner might lead to a set back in shipping trade and therefore limit competition. The legal regime that developed in the course of these ideas and actions was the Fund Convention of 1971 that established a special fund to pay for the damage exceeding the liability of shipowners, which was made up by contributions of oil receivers in the contracting states by the imposition of a levy.176

5.4.4 TASCOI Applied on the Committee of the Whole II

In this section only the Transformation in relation to the work of the Committee of the Whole II will be referred to. This is due to the fact that the identifying of groups at the Conference of 1969 has already taken place previously in this Chapter (see 5.2.4)

The Transformation made by the Committee of the Whole II at the Conference of 1969 is a very important one. In the discussions that took place there is a clear relation to the cases and conventions referred to in section 5.3.2 in the sense that the important principles under discussion were the same ones that were present in general international law.

176 Notes taken on Oct 5th during discussions with Professor Mukherjee at the WMU
One of the primary disagreements between the participants of the Committee of the Whole II when debating over CLC was whether the liability should be strict as in Rylands v. Fletcher or if it should be based on fault as in Southport Corporation v. Esso Petroleum. One interesting observation to be made is that the U.K delegation, being positive to liability based on fault, had a delegate who was intimately connected with the occurring transformation. He was none other than Lord Devlin who was a judge in the Southport Corporation v. Esso Petroleum case. This fact, although U.K is a maritime nation as well, makes it easier to understand the view taken by the British delegation on the basis of liability issue since the case famous for Lord Devlin’s statements was judged on the basis of fault. Another point made is that if the case had been taken into consideration when IMO had discussed the drafting of the convention, then Lord Devlin had a unique position as a delegate since he had first hand experience on the practical applicability of liability based on fault, especially in a well known case. Furthermore he had been part of the input, was part of the transformation and therefore dictated together with the delegates the output, meaning the final convention. The questions related to the CLC were, however, also discussed from the viewpoints of the relevant conventions that were in force at the time and whether or not the new conventions should be similar to these.

5.4.5 Output- The CLC

The basic solution the convention provides is to impose strict liability on the shipowner if his ship is involved in an oil pollution incident and only in exceptional cases should he be exempted from this. The preamble states the consciousness of the dangers of pollution due to worldwide maritime carriage of oil in bulk, and a conviction that there is a need for adequate compensation and harmonisation of international rules.

Among the different definitions in Art. 1 is the term ‘ship’ meaning any seagoing vessel or other type of seagoing craft that is actually carrying oil in bulks as cargo. This definition makes the convention only applicable to oil tankers when they are actually are carrying cargo in their tanks irrespectively of whether or not in motion. The thought behind excluding other ships and tankers with ballast tanks from CLC is that the Fund Convention of 1971, used parallel to this convention, is funded by the world’s largest oil receivers and they therefore should not be responsible for

177 Rue, de la. p.75
178 Abecassis et al, p.194
179 International Maritime Organization; ‘International Convention on Civil Liability for Oil Pollution Damage, 1969 and Protocol to the International Convention on Civil Liability for Oil Pollution Damage’, p. 5, Preamble, IMO London, Great Britain, 1982. This source will further on be denoted as CLC and then the relevant Article.
180 CLC Article 1
a vessel causing an incident unless she has cargo on board.\textsuperscript{181} There is, however, no real definition of the term ‘cargo’ in the convention itself, and this has lead to different views on the subject. One opinion is that the term insinuates that goods should be loaded on the ship in order to travel from one point to another, while the official transcripts of the 1969 conference state that the phrase is only to ensure that non-tankers and tankers in ballast are excluded from the convention.\textsuperscript{182} The law governing interpretation of conference records allows interpretations of these when the meaning is unclear and only unreasonable conclusions can be drawn.\textsuperscript{183}

The term "Persons" refers to any person, partnership, public or private body including the state, while the “Owner” is any person registered as the owner of the ship, or in the absence of a registration isn’t made then the persons actually owning the ship. If the ship is owned by the state and operated by a company that is registered as being the operator in the country, he is considered to be the owner. According to the convention the state of the ships registry is the flagstate or the state in which the ship is registered.\textsuperscript{184} This means that the convention applies to the owner even if he is not actively operating the ship and can also make lenders liable although they do not make decisions concerning the management or the operation of the ship. Oil means any persistent oil such as crude, fuel and heavy diesel oil and lubricating whale oil if it is carried on board the ship as cargo or in the bunkers.\textsuperscript{185} The term ‘Pollution damage’ means loss or damage caused outside the ship carrying the oil by contamination resulting from escape or discharge of oil. Included in this definition are also costs and further loss or damage occurring when initiating and doing preventive measures, meaning any measure within reason taken by a person after an incident has occurred in order to prevent or minimise oil pollution damage.\textsuperscript{186} The issue that arose when dealing with this definition is whether or not the convention would apply to measures taken after an occurrence such as a grounding or collision but before the ship actually has started spilling any oil. The CLC makes it clear that the liability of the owner is only evident when there has in fact been an oil-discharge or escape from the ship resulting in the contamination of waters. This means that measures taken before the oil takes to the water cannot be seen as payable under the CLC. This conception changed due to the \textit{Tarpanek}\textsuperscript{187} incident.

\textsuperscript{181}Rue, de la et al p.79
\textsuperscript{182}According to the Conference of 1969, cargo was to be seen as merely the opposite of bunker oil instead of meaning to make a difference between goods being in transport and other goods being in storage. There are, however, differences on opinion whether bunker spills are included. For more see Abecassis et al, p. 195 and Rue, de la et al, on p. 81
\textsuperscript{183}Rue, de la et al, pp. 81-82
\textsuperscript{184}CLC Article 1
\textsuperscript{185}ibid, notice the difference to the definition of the Intervention Convention
\textsuperscript{186}ibid
\textsuperscript{187}The \textit{Tarpanek} capsized after a collision in 1979 outside of England with the Sir Geriant and the costs incurred as a result of the successful operation were very high. See Rue, de la et al, p.85
According to Art. 2 the convention applies to any pollution damage caused on the territory including the territorial seas of a contracting state and to measures taken to prevent or minimise such a damage. The convention thus would not apply to damage done outside the territorial waters of a contracting state or where the pollution spreads into waters of a non-contracting state, even if the ship causing the incident is from a contracting state or another contracting state is threatened by the pollution. Another area where the convention is also not applicable to is oil pollution from river and lake vessels and offshore installations. The question raised was if the Torrey Canyon incident had occurred after the CLC was in force, would the British government still have been able to put their claims forward to the owner of the ship, since the incident after all did in fact occur outside the territorial sea. Through the “Kihnu” incident that happened outside of Finland, it is thought to be widely accepted that the convention is applicable to all oil pollution preventive measures wherever they are taken.

Art 3. tells of the owner’s responsibility if a damage occurs. At the time of the first incident, though it might be one of several, the owner is liable for any oil-pollution that has escaped or been discharged from the ship as a result of the incident. There are, however, three exoneration grounds, namely, when the incident is a result of war, hostilities, civil war, insurrection, or force majeure; when the damage is caused by a act or omission done with intent to cause damage by a third party; and thirdly when the damage has occurred due to negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function. When it comes to natural occurrence, the concept put forward in the convention seems to be narrower than the usual criteria for force majeure in other areas of law. It is thought that tidal waves because of earthquakes might be one of the exoneration grounds but other natural occurrences like hurricanes may not be included since ships are thought of as being able to avoid them. The second exoneration ground is that the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person. This means that if a third party institutes terrorism, sabotage or other malicious act, the owner cannot be seen as liable

188 CLC Art. 2
189 Rue, de la et al, p. 77
190 Abecassis et al, p.193
191 The Finnish Government went into Estonian territorial waters in order to undertake preventive measures on oil escaping from the “Kihnu”. Finland was party to both the CLC and the Fund Convention but Estonia wasn’t. Although the preventive measures had been taken on the territorial waters of a non-contracting state, Finland still got compensation from the Fund because the actions had been taken in order to prevent damage to the Finnish coasts and waters. see Rue, de la et al, p.77 note 8
192 Rue de la et al, p. 77
193 CLC Art. 3
194 Abecassis et al, p.205
195 supra, note 193
for the incident's occurrence. However, there is a chance that the owner might be found liable in these circumstances if the party responsible was able to take these actions due to a breakdown of security precautions.\footnote{Rue, de la et al, p. 89}

When it comes to the breakdown of navigational aids and the government’s failure to deal with them, the owner has to prove that the damage was wholly caused by this negligence on the part of the government. There is speculation that the owner can only be exempt from paying damages, if there is an alternative possibility of obtaining a remedy from the government or the other authority where the fault lies. This would be, of course, the most credible solution, although the government is only considered liable when the damage is caused by its faulty maintenance of navigational aids. Exemption from liability will only be applicable under this convention if there has been a fault by the authorities responsible for maintaining the navigational aids. There is here a difference between improving and establishing aids and the fact that the authorities should maintain them.\footnote{ibid. p. 89-91}

Difficulties on the issues of Article 3c can be seen in a number of cases the most exemplary ones being that of the \textit{Irish Stardust},\footnote{ibid. p. 89-91} and the \textit{Tsesis}.\footnote{The \textit{Irish Stardust} navigating in the Broughton straits in British Columbia ran aground after following a traffic separate scheme implemented by the Canadian department of transport two years before the occurrence. The shipowners claimed damages from the state on the ground that the department had been negligent in accepting a dangerous scheme for that route, and that had deficient sector lights in the area where the ship grounded. The court held that the plaintiffs had not been mislead since everything was put out on the charts and therefore did not have to look for navigational aids that were not there. Furthermore they could not prove that the ship wouldn’t have run aground if that one navigational light had been put where the plaintiffs wanted it. Since there wasn’t any removal of the lights as seen on the separation scheme, and no light had been malfunctioning at the time, there was no reason to believe that one could guide the ship through the strait merely by looking out for the lights. See Rue, de la et al, pp. 91-92} Another significant fact is the use of the word ‘wholly’ which effectively excludes all cases where there was an initial grounding and damage was incurred before an act might have been initiated to damage the ship, i.e. the Torrey Canyon where the government decided to bomb the ship after she had already grounded and consequently caused oil pollution.\footnote{In 1977 the Soviet tanker \textit{Tsesis}, carrying a cargo of 15,778 tons grounded inside the Swedish archipelago, causing considerable structural damage to the ship with the result that 500 tons of oil escaped. The rock on which the vessel had grounded was not marked on the sea charts. The Swedish State sued the shipowner for compensation and clean-up costs. The Swedish Supreme Court, however, held that there hadn’t been any negligence on the part of the vessel, but rather by the Swedish State in its failure to mark the rock. Furthermore the term ‘maintenance’ includes also up-dating sea charts, not only the navigational aids at sea. On the basis of this the shipowner was freed from liability and were also entitled to receive their counterclaim form the Swedish State. See Rue, de la et al, p.p. 89-90} Rounding up Art. 3, is the statement that no claims for compensation can be made against the owner or his servants or agents than in accordance with the convention.
When oil has escaped from two or more ships, the shipowners are jointly and severally liable for the damage caused.\(^{201}\) This Article forwards the concept of strict liability since the claimants do not have to show how the incident occurred or prove the negligence of the shipowner, crew or others on board the ship at the time. This means that the claimants recover compensation even when it is verified that the incident occurred without any fault on the shipowners’ part. The shipowner cannot avail himself by showing that there is in fact another party to blame for the incident unless the prerequisites are fulfilled for him to use the exoneration grounds. There are, however, specific exceptions and limitations that make it easier for the shipowner to pay the amount he has to. (Art. 4)\(^{202}\)

Art. 5 deals with limitation of liability and is therefore one of the core articles in the convention. According to this Article, the owner has the right to limit his liability to the amount of 2000 francs\(^{203}\) for each ton of the ships tonnage\(^{204}\), with the upper limit of 210 million francs, meaning that a vessel exceeding 105 000 tons (which equals DWT 220 000.)\(^{205}\) will not get full compensation.\(^{206}\) If the incident is the shipowner’s fault the rights to limitation evade him. Furthermore the owner has to deposit a limitation fund for the total sum representing his liability to the court or another competent authority in a contracting state where an action against him is brought. This fund is then to be distributed between the claimants according to their established claims. If compensation has already been paid before the fund is distributed then the amount paid shall be transferred to the provider of the insurance or security. The shipowner has the right to make claims against the fund for expenses he has voluntarily used to limit or prevent the pollution, and this claim ranks equally with other claims against the fund,\(^{207}\) meaning that the fund itself isn’t reduced because of the expenses made shipowner to reduce pollution.\(^{208}\)

Article 7 deals with insurance by stating that ships carrying more than 2 thousand tons of oil in bulk as cargo have to provide financial security,

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\(^{201}\) CLC Art. 4
\(^{202}\) Rue, de la et al, p. 87
\(^{203}\) The franc that is mentioned as the sum of limitation of liability is actually the value of gold and the amount mentioned in the first paragraph of the Article should be converted to the national currency of the contracting state that is holding court procedures and where the Fund is being set up for the benefits of the claimants against the owner. This currency was, however, later diverted to SDR by the implementation of a new protocol to the convention added in 1976. see Protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969, 1976.
\(^{204}\) The meaning of the ships tonnage is the net tonnage of the ship where addition of the amount deducted from the gross tonnage on account of engine room space for the purpose of calculating the gross tonnage. If a ship cannot be measured according to this there will be an assumption that the ship’s tonnage is 40% of the weight in tons of which the ship is capable of carrying.
\(^{205}\) Abecassis et al,p.215
\(^{206}\) Rue de la et al, p. 245
\(^{207}\) CLC Art. 5
\(^{208}\) Rue, de la et al, p.112
meaning a bank guarantee or a certificate delivered by an international compensation fund that covers his liability under Art. 5.\textsuperscript{209} Usually the P&I Clubs\textsuperscript{210} stand for this since they specialise in marine insurance. The amount of the insurance equals at least the liability of the owner under CLC, but is usually higher since he might also face claims in states that are not part of the convention and therefore might result in higher amounts.\textsuperscript{211} The contracting state can consult with the state of the ship’s registry if it believes that the insurer or the guarantor is not financially capable of meeting the obligations stated in the convention. Any claim for pollution damage can be brought directly against the insurer or any other person providing financial security for the owner’s liability for pollution damage. In these cases the defendant can, irrespective of his actual fault, avail himself of the liability prescribed in Article 5.\textsuperscript{212}

5.5 The Fund Convention

5.5.1 Learning System-The Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971

The issue that this conference dealt with had already been examined in the conference of 1969, where a working group had been set up under the Committee of the Whole II in order to deal with the prospects of establishing an international fund in order to put some responsibility on the cargo owner.\textsuperscript{213} The proposal for the fund, originally put forward by Belgium, was a major part of the discussion on the issue whether liability should be put on the shipowner or cargo owner. The Committee of the Whole II decided to give a resolution to the IMO, urging them to look into the prospects of establishing this fund and it was the result of this resolution that was to be the subject of the Conference of 1971. Already at the start of the conference two principles had been agreed upon, namely, that victims should be fully compensated under a system of strict liability and that the fund should relieve the shipowner of the burdens created under the CLC convention.

The conference was attended by representatives of 49 countries, with a list of observers from five countries. There were also observers from three intergovernmental organisations: Conseil de l’Europe, European Economic Communities and the International Institute for the Unification of Private Law. The non-governmental organisations rounded up the observers list. They were the Baltic and International Maritime Conference, International

\textsuperscript{209} CLC Art. 7
\textsuperscript{210} Protection and Indemnity Clubs, that provide insurance for shipowners.
\textsuperscript{211} Supra, note 208, p.113
\textsuperscript{212} supra, note 224
\textsuperscript{213} OR 69 LEG/CONF/C.2/SR.12 the Greek delegation
Chamber of Commerce, the International Chamber of Shipping, the International Law Association, Oil Companies International Maritime Forum, Permanent International Association of Navigation Congresses and lastly the CMI. The IMO Secretariat also attended at the conference, being the mind behind the draft convention that was up for discussion.

As was the case with the Conference of 1969 there was a Plenary where all the representatives came together, and a Credentials Committee that had the task of examining the whether the participants from every country were the true representatives of the nation. The Conference established also a Drafting Committee whose task it was to prepare, review and co-ordinate drafts and give advice on the questions of drafting that were presented by the Committee of the Whole or the over-all conference itself. It didn’t, however, have the power to alter the text that had been given to them for drafting. There was only one Committee of the Whole at the Conference since the only issue to be discussed concerned the establishment of an international fund for additional compensation. In total the conference held 26 meetings of the Committee of the Whole and six Plenary meetings before adopting the output of the Conference in the form of the Fund convention.

One of the two principles taken into the draft convention also proved to be the most discussed one at the Conference, namely, the question of the shipowner’s possibility of obtaining relief by the fund for the burdens imposed on him by the CLC.

The first point of discussion in regards to this principle was whether the whole principle of relief to shipowners, although being laid down already at the 1969 Conference, was really the right measure to take. Some delegations proposed that the principle should be disregarded when articulating the convention. The reason for this was that the TOVALOP plan had made the relief of the shipowners unnecessary and the adoption of the Fund Convention on this point would only provide administrative work that could be done without. The UK delegation made it clear that it was unjustifiable to put a financial burden on the oil companies. The argument for retaining the relief of shipowners into the convention, made by the Ireland delegation, was that if this principle was not incorporated into the convention, the countries having large tanker fleets would not ratify the CLC, since the compromise reached during the Conference of 1969 was based on the thought of a fund relieving the shipowner. The oil companies

214 There were also two working groups set up dealing with texts relating to the constitution of the fund and other temporary clauses. These will, however, not be discussed in the context of this section.
216 OR 71 LEG/CONF.2/C.1/SR.1 p.309
had also already acknowledged that they should pay part of the burden.\textsuperscript{217} Eventually it was decided that the convention was to include the aim originally proposed.\textsuperscript{218}

Other problems concerning the relief of the shipowner were the limits within the fund that should indemnify the shipowner. The draft convention under debate had proposed the limits of 1000 to 2000 francs/ton\textsuperscript{219} and although some delegations including the U.K. thought this was a good limit,\textsuperscript{220} others, including the Netherlands and Norwegian delegations, thought that this number was too low in terms of lower limitation, and that instead the numbers of 1500 to 1725 francs should be taken into consideration, while ascertaining that the oil companies and shipowners would also have to discuss the figures.\textsuperscript{221} After several proposals to make the lower limit 1250\textsuperscript{222}, the number that was finally approved was for the lower limit the sum of 1500 francs with an over-all lower limit of 125 million francs.\textsuperscript{223} The upper limit of 2000 francs with an over-all of 210 000 million francs in the draft convention remained unchanged.

What is of particular interest in regards to the Conference of 1971 and to the question of the shipowner’s right to indemnification from the Fund are the comments given in by the Oil Companies International Marine Forum (OCIMF) in regards to IMO’s draft convention on the Fund. The OCIMF strongly believed that there was not need to relieve shipowners of the financial burdens imposed on them through CLC. There were, according to the OCIMF, three reasons that supported their standpoint. Firstly some countries had already on the basis of the conference of 1969, passed national legislation enabling shipowners to limit their strict liability up to the limits given by the CLC and in some cases even to a higher degree. Secondly the insurance industry had confirmed that only amounts over the CLC limit gave difficulties in providing insurance cover and that as long as there is insurance against the risks taken by the shipowner he does not have a financial burden since he recovers additional costs through the freight revenue. The third point was that 90\% of the owners of the world’s combined tanker tonnage had already accepted the TOVALOP plan that gave limits up to $100/gross ton and a maximum of $10 million. The OCIMF recognised however that although they thought that it was time to look over the resolution that had led up to the conference, the participants of the conference might still want to put the resolution with both main principles into effect. If this was the case the TOVALOP scheme was again, according to the OCIMF, a good basis for discussions. Although the scheme

\textsuperscript{217} OR 71 LEG/CONF.2/C.1/SR.1
\textsuperscript{218} OR 71 LEG/CONF.2/C.1/SR.23, and OR 71 LEG/CONF.2/C.1/SR.24
\textsuperscript{219} OR 71LEG/CONF.2/3/Add.1, p.142
\textsuperscript{220} OR 71 LEG/CONF.2/C.1/WP.74
\textsuperscript{221} OR 71 LEG/CONF.2/C.1/SR.22, p.485 Netherlands delegation, Norwegian delegation, and LEG/CONF.2/SR.23 German delegation
\textsuperscript{222} OR 71 LEG/CONF.2/C.1/SR.23 p.497 Polish delegation
\textsuperscript{223} ibid p.496 Danish delegation
is based on negligence with the shipowner having the burden of proof while the CLC is based on strict liability, the shipowners had still accepted responsibility for clean-up costs even when they hadn’t been at fault. Therefore the OCIMF suggested that the limits of liability should not go below the limits given in the TOVALOP scheme. OCIMF together with the International Chamber of Shipping advised the Conference that the lower limits should be 1725 francs/ton and the over-all limit should be set at 150 million francs.\textsuperscript{224}

The Conference had many written proposals submitted before making the final decisions. As in the other Conference these proposals were either submitted individually or jointly. The country to submit the most proposals was the United Kingdom with 29 proposals followed by Norway 15, Sweden 14, Denmark 13, and the Netherlands and Romania each submitting 11.

5.5.2 Learning System- TASCOI applied on the Conference on the Establishment of an International Compensation Fund for Oil Pollution Damage, 1971

5.5.2.1 T-Transformation

There are some difficulties encountered when trying to establish the Transformation of this particular conference due to the fact that the concept was so new that there were really no other background cases, doctrines or principles except for the decisions made during the Conference of 1969. In other words, there is a major difference here between the Fund Convention and the other conventions, i.e. the Intervention Convention and the CLC, in the fact that the two conventions being in the centre of discussions at the conference of 1969 had already legislation in related areas in international law and cases. The discussions that took place in the conference of 1969 had a starting point in applicable international legislation or at least in well-known principles and cases. In establishing the Fund Convention, however, the participants had only CLC that wasn’t ratified yet, the Conference of 1969, a general sense of moral responsibility and the draft convention prepared by IMO.

5.5.2.2 ASCOI The Identifying of Groups

As in the Conference of 1969 the Committee of the Whole was the Actor of the Transformation in the Conference of 1971 that was held in order to create the Fund Convention. The participants of the Committee held the

\textsuperscript{224} OR 71 LEG/CONF.2/5 pp.191-192
necessary discussions on the issues of importance knowing that the outcome of their efforts was to form a convention that should supplement the CLC. The conference had two principles that set the aim of the convention, although one was admittedly hotly contested, which the Committee had to sort out in relation to the Fund and to each other. These issues were very important since the delegates knew that some of the countries at the 1969 Conference had agreed on the content of the CLC only because they knew that a Fund was being prepared. The outcome of the discussions as noted above was that both principles were retained. The IMO was the only organisation that made a draft convention for the purpose of bringing input into this conference, therefore it should be regarded as the main Supplier. There was another supplier that had a great effect on the draft convention submitted for inspection at the conference of 1971. This was the Committee of the Whole II at the Conference of 1969, which had formed a prevailing opinion that there should be another mechanism involved that made the oil industry liable after the shipowner had paid according to the established limits of liability under the CLC. Naming the Committee of the Whole II as a supplier also gives a somewhat curious over-all result to the application of TASCOI to this Conference. The curiosity lies in the fact that some members of the conference can be included both in the role of suppliers and of actors due to their participation in both conferences. The governments taking part in the conference through their delegates should once again be considered to be the Customers of the output of the conference. As with the case of the Conference of 1969 they are the entity in each state that has to implement the outcome of the Conference and see to that the convention is followed in the state. They also have to establish and impose a national respect for the Fund as a legal mechanism, in order for it to become a well-working organ. The question to be raised here is whether the oil industry is a customer in regards to the output of the conference. The answer would have to be in the negative because although the convention does apply to the oil receivers in the country it is still the governments and their judicial system that has to enforce the convention and make it applicable to the oil industry in their country. Therefore the governments, having to acknowledge the output, are the immediate customers. IMO once again doing the preparatory work in terms of setting up the frames for the conference and being the organiser of other administrative tasks such as arranging facilities for holding the conference should be considered here to be the sole Owner to the conference. Again the question arises as to whether the United Nations are partially owners, and the answer would have to be the same as when discussing the Conference of 1969, namely that the U.N does not have complete overview of the Transformation and therefore couldn’t be considered an owner.

The Interveners are, as is the case with the Conference of 1969, the observers invited to attend, with the most obvious and important intervener being the OCIMF. This organisation, representing the party that was going to be directly affected by the outcome of conference, provided invaluable information to the participants of the conference. By the observations and
proposals that the organisation submitted, the participants got a clear view of what the oil industry thought about the draft convention that would directly affect it, and what the industry thought would be a good compromise. An example of this is the proposed amount of relief the shipowner should get from the Fund that the OCIMF suggested together with the ISC.

5.5.3 Output- The Fund Convention

The International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage came in 1971 and is one part of a two-tier system together with the CLC. The preamble states that the aim of the convention is to ensure that oil pollution victims receive adequate compensation while at the same time realising that shipowners shouldn’t be the only ones paying compensation but that part of the costs should be borne by the oil industry. The convention under the two-tier system should act as a supplement to CLC ensuring that victims of oil pollution obtain full compensation and that the ship-owners at the same time get relief from the additional financial burdens that the CLC imposes.225

Although most of the definitions in Art. 1 of the convention refer back to the CLC convention, there are some new definitions that have to be considered. The term ‘oil’ should be confined to meaning persistent hydrocarbon mineral oils and the term ‘tonnes’ in relation to oil means the metric standard. ‘Contributing oil’ refers to crude oil and fuel oil, of which the first one is defined as any liquid hydrocarbon mixture occurring naturally in the earth suitable for transportation. Fuel oil means heavy distillates or residue from crude oil or blends of such materials intended for use as a fuel for the production of heat.226 The reason for the descriptive definition of oils that the convention particularly wants to exclude non-mineral oils such as whale oil.227 The term ‘terminal installation’ refers to a site and any off-shore facility linked to a site that is capable of receiving oil directly from a ship and acts as a storage for the oil. Where an incident consists of a series of occurrences it shall be treated as having occurred on the date of the first of such an occurrence.

The product of the convention is formulated in Art. 2, namely the International Oil Pollution Compensation Fund that has the aim of providing compensation for pollution damage to the extent that CLC is inadequate of

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225 International Maritime Organization; “Conference on the Establishment of an International Fund for Oil Pollution Damage” p. 26, Preamble, IMO, London Great Britain, 1972. The is reference will in the future be denoted as Fund Convention and then the relevant Article.
226 Fund Convention, Art.1
227 Abecassis et al. p. 255. Particularly the Japanese delegation wanted during the Conference of 1969 to incorporate whale oil into the convention see LEG/CONF/C.2/SR.14 p. 713
doing and to relieve ship-owners of additional financial burdens imposed on
him by the CLC. There are though, according to the article, certain
conditions that have to be fulfilled in terms of the shipowner complying
with standards regarding safety at sea and other conventions. The Fund is to
be recognised as a legal person capable of assuming rights and obligations,
and of being a party in the legal proceedings before the court of that state.

The convention is only applicable to oil pollution damage caused on the
territory including territorial seas of a contracting state and to measures
taken to prevent or minimise damage. The shipowner can only receive
indemnification according to the convention if the ship is registered in or
flying the flag of a contracting state (Article 3).

Art. 4 relates to the first of the two principles already established before the
conference, namely compensation to oil pollution victims that haven’t
received full compensation for the damage under CLC due to three
circumstances. Firstly the victim has the right to compensation from the
Fund if no liability arises for damages under the CLC. There are basically
only two reasons that can lead to this, namely that the victim cannot identify
the owner of the ship or that the owner is exempted from liability by the
articles that deal with exoneration in the CLC. Secondly the victim should
receive compensation if the owner, although being liable under the CLC, is
not financially capable of meeting the obligations imposed on him, and that
financial security provides insufficient compensation, meaning that the
victim has not been entirely compensated after taking all measures in order
to try and receive full compensation under CLC. A reason for this is that
the owner might not have the compulsory insurance that is needed according
to CLC, since the compulsory insurance only applies to ships with over 2000
tons of bulk as cargo. Thirdly, the victim can turn to the Fund if the
damage exceeds the limitation of the shipowners liability as established in
CLC or any other convention. The last provision in this Art. deals with the
owner’s right to claim compensation from the Fund for any costs of
preventive measures he has had due to the incident.

The Fund, however, is not obliged to pay compensation to victims if it can
prove that the damage resulted from war or other hostilities, or that the
pollution was caused by a warship or another state-owned ship used non-
commercially at the time of the incident. It is also excused from paying if
the claimant cannot prove that the damage was caused by a ship. This
regulation does not mean that the claimant has to point out the particular
ship from which the oil escaped; only that there has to be substantial proof

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228 Fund Convention Art. 4
229 Rue, de la et al, p.135
230 supra, note 228
231 Rue, de la et al, p.138
232 Fund Convention Art. 4
233 supra, note 229
that there was a vessel involved and that oil did escape.\textsuperscript{234} Lastly, the Fund is exonerated if it proves that the damage was done through actions, omissions or negligence of the person suffering the damage, meaning in effect that the extent of the exoneration mirrors that of the shipowner under the CLC.\textsuperscript{235} Unlike the shipowner, however, the Fund is obliged to pay for any claims relating to compensation for the cost of preventive measures.\textsuperscript{236} This means, in effect, that the Fund pays compensation to the victim for the costs of the preventive measures he has taken even if he, by negligence, caused the damage himself.\textsuperscript{237} The total sum provided by the Fund for any one incident should not exceed 450 million francs after adding the amount with the compensation received from CLC. The same sum is the limit in regards to the Fund’s paying compensation for pollution damage as a result of force majeure.\textsuperscript{238} This means that the Fund will have this total limit for all the incidents this force majeure caused together instead of for every individual incident.\textsuperscript{239} If the established claims exceed these 450 million francs, then the principle of proportionality is used when distributing the compensation between the victims. The Fund can change the sum of 450 million francs if it experiences that the amount of damage from incidents combined with inflation is to low. This sum however, cannot be more than 900 million francs.\textsuperscript{240}

Art. 5 deals with the second aim of the convention, namely to relieve the shipowner of some of the financial burden imposed on him by the CLC. It states that the Fund is to indemnify the owner and his guarantor for the amount of the total sum payable that exceeds 1500 francs for each of the ships tonnage or of an amount of 125 million francs whichever is less, but not more than 2000 francs for each ton of the said tonnage.\textsuperscript{241} This means that the shipowner, although having a limitation of liability of 2000 francs per ton or 210 million francs in the CLC, in practice can only limit himself to 1500 francs per ton or 125 million francs, since the Fund compensates him for any sums above this and for the clean-up costs incurred when taking preventive measures.\textsuperscript{242} The Fund, however, does not have an obligation to do this if the pollution damage resulted from wilful misconduct of the owner himself. The Fund can be fully or partly exonerated from relieving the owner if it proves that the ship causing the pollution is, by fault of the owner, not complying with other conventions (i.e. OILPOL\textsuperscript{243} and SOLAS)

\textsuperscript{234} supra, note 229, p.144
\textsuperscript{235} ibid.
\textsuperscript{236} ibid.
\textsuperscript{237} Abecassis et al p.259
\textsuperscript{238} Rue, de la et al, pp.145-146
\textsuperscript{239} ibid p.146
\textsuperscript{240} The sum was eventually changed twice before the new Fund Convention of 1992 was adopted.
\textsuperscript{241} Fund Convention Art. 5
\textsuperscript{242} Abecassis et al, p.261 This is the second of the two principles issued at the Conference of 1969 in reference to the Fund.
\textsuperscript{243} International Convention Relating to Pollution by Oil from Ships, 1959. This convention was the predecessor of MARPOL.
and any amendment in these conventions relating to pollution. This applies when the incident occurred as a direct result of non-compliance with these conventions and regardless of whether the state where the ship is registered is party to the relevant instrument.\textsuperscript{244}

The contributors to the Fund, according to Art. 10, are persons who have received more than 150,000 tons of oil in a year in ports or terminal installations in the territory of a state that otherwise endorses maritime carriage by oil, including if oil prior to coming to the harbour of a contracting state has been discharged in a non-contracting state. If the combined amount of oil received by a person and other associated persons goes over the 150,000 tons limit, the person pays contributions proportionally to the actual amount he has received, even if this amount in fact is smaller than 150,000 tons.\textsuperscript{245} The interesting point of this article is that both international and domestic routes are included, meaning that in practice oil exporting countries can have people contributing to the Fund by being oil receivers within the state before the oil leaves for international routes. The oil might also be counted more than once as contributing oil, since it might be imported from abroad but must be shipped domestically in order to arrive to its final destination.\textsuperscript{246}

\textsuperscript{244} Fund Convention Art. 5
\textsuperscript{245} Fund Convention Art. 10
\textsuperscript{246} Rue de la, et al., p.131
6 Discussions

This discussion will concentrate on the Transformation resulting from the response to the *Torrey Canyon* incident. The chapter will be divided into two main parts. One part will deal with the figures drawn on the basis of the previous chapter, discussing the model and its applicability on the findings in Chapter 5. The second part will deal with grey areas and other problems seen with the aid of the model and other cases referred to in the thesis.

6.1 Resulting Transformation Schemes of the *Torrey Canyon* incident
Figure 3. The Transformation made at the Conference of 1969 with regard to the Intervention Convention and the CLC.

On the basis of Fig. 3 the deduction can be made that the general model drawn up in Chapter 2, is applicable to the Torrey Canyon incident and the changes it produced in the legal framework. There is, however, a factor in the input that was not originally part of the Learning System, namely the doctrines of necessity and self-defence. These doctrines as seen above, laid down the foundations of the Intervention Convention and should therefore be included in the model.

A question that could be asked is whether the conventions and cases acting as Input to the Transformation, had the great effect upon the Learning
System as originally thought. The global limitation conventions of 1924 and 1957 were different because they didn’t deal with a specific area in shipping, while the CLC was a specific limitation regime aiming only to be for victims of oil pollution incidents. The conventions of 1924 and 1957 should however, be considered important despite their difference in character due to the fact that they were the only legislation before the CLC that dealt with the particular issue of limitation and therefore were the starting point (Input) in the development of this area. The cases undoubtedly encompass the two opposing views debated at the conference in regards to shipowner’s liability, which means that although the individual cases might not have been directly discussed at the conference itself, the principles they endorse still make them part of the Input. Although there surely are other English cases dealing with strict liability and liability based on fault, these two cases were chosen to illustrate the two views because they are the best known cases dealing with these issues. The Trail Smelter arbitration, is a part of the Input because it shows how general public international law, viewed the responsibilities of states towards each other and the environment.

As mentioned previously, the Transformation leading up to the creation of the Fund Convention is very special because the Input does not include any established norms or principles, but is based on a conference and a convention adopted barely two years before. The question asked could be the relevancy of the ‘green point’ reflecting the input of the Torrey Canyon into the Transformation. The issue arises because of the fact that the Fund Convention was not an immediate consequence of the incident, such as the question of liability imposed on the shipowner, but rather a thought developed while discussing this issue. On the other hand, the fact that the
Fund Convention was an indirect output of the incident could be considered sufficient to include the incident into the Input and therefore makes the ‘green point’ relevant.

The model used to illustrate the Transformations in this thesis has only dealt with incidents reflected in the ‘green point’, but it is also useful when there are no actual occurrences involved in the learning system. There are two other ways in particular where the model can be and has proved successful. The first is by putting scenarios in the ‘green point’ as part of the Learning System. These scenarios are usually made by experts in the particular area under discussion, and are then presented to the group of actors invited to come with their opinion on the changes that need to be done on the basis of these scenarios. The second workable situation where the model is used is when so called ‘gaming’ occurs. Here experts are the ‘green point’, and act as if a hypothetical occurrence has really happened, and then on the basis of their actions form an opinion whether they acted correctly or whether it is time to change the present system in that particular field.

6.2 Transformation Failure

Looking back at the hard bargains the delegations at the conferences had to accept in order to reach a compromise among themselves, one may wonder whether the right decisions were made and what the outcome would have been had the discussions ended differently. Other questions of importance are also whether the international maritime community has proceeded in the right direction after the adoptions at the conferences. What balance is there between economic and ecological principles in relation to compensation, what grey areas has the CLC left open for the victims to use alternative means of obtaining compensation? Are the conventions being used as they were meant to be? These are some points that deserve mentioning in relation to the complexity and variation that arise when referring to environmental pollution and the maritime community. This discussion will deal with two of these questions relating to the occurring Transformation, namely, what balance was struck between the economic and the ecological principles in relation to compensation, and what grey areas did the Transformation leave open for the victims to make use of.

6.2.1 Economy v. Ecology- Balance of Interests

It was evident that by the 1970’s the concept of environmental protection had grown in all fields of international law where the natural environment was at potential risk due to actions taken. The conferences immediately after the Torrey Canyon disaster issued statements on working toward a global understanding of the importance on safe-guarding the environment for future generations. Among the conferences particularly convened for this purpose
was the United Nations Conference on the Human Environment of 1972 held in Stockholm where the famous environmental principle 21 was coined.247 It practically echoed the decision in the Trail Smelter Arbitration three decades before, generally stating that:

"States have in accordance to the charter of the United Nations and the principles in international law.... the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction".

Another principle issued at the conference particularly interesting is principle 22 that urges states to develop international law more in terms of liability and compensation for the victims of pollution.248 It was also during this time that the term “polluter-pays principle” became internationally recognised at the instigation of the OECD. The principle means that the polluter should bear expenses resulting from controlling pollution and instituting preventive measures in order to ensure that the environment is in an acceptable state,249 and is used when referring to the ideal circumstances that the polluter wholly compensates the victims of the resulting oil pollution.250

The United Nations Conference and the polluter-pays principle together point to the fact that the protection of the environment was important and there was general agreement that someone had to pay for the ecological damage so caused. One can say that at the same time as this need for protection of the environment presented itself there must have also been a necessity to strike a balance between economy and ecology if a pollution incident were to occur. In the shipping industry, as indicated in the discussion, the core of the Learning System, at the 1969 Conference, there were many protests about making only the shipowner liable. It was considered that moral fairness should be taken into account and therefore also make cargo owners liable. The result of this was the creation of the Fund Convention, through the Transformation of 1971. Due to this decision two scales became balanced. The principles of environmental protection prevailed in the sense that the issue received attention under the convention by referring to preventive measures and protection. By splitting the total cost of compensation after an oil spill between the shipowner, being the primary party liable, and the oil industry, the oil pollution regime continued to provide economic incentives for trade to continue. In particular there was demonstrated a continued willingness on the part of the shipowner to engage in maritime trade. Furthermore, another incentive given to the shipowner

247 Bring, Ove et al, p.196
248 Malanczuk, p.242
249Organisation for Economic Co-operation and Development” Polluter Pays Principle-definition, analysis and implementation”p.6 OECD, France,1974
250Gauci, Gotthard; "Oil Pollution at Sea-Civil liability and Compensation for damage",p.3, John Wiley and Sons, Chichester, England, 1997
was to help prevent the pollution, since the costs for this would be covered partly by the Fund. There were also two voluntary agreements that came shortly after the *Torrey Canyon* incident, namely the TOVALOP that has already been mentioned and the CRISTAL,\(^{251}\) that protected a victim’s right for compensation after damages suffered as a result of oil pollution.

The question that arises is whether the community continued to favour this balance and whether any changes were considered necessary. Although the Transformation and therefore Learning System presented in this thesis does not extend itself to the new CLC and Fund Conventions of 1992, it is still of interest to note that except for the obvious change of currency from franc to SDR,\(^{252}\) there was also the fact of total deletion of Art. 5 stating the Fund’s responsibility to indemnify the owner. With this deletion one of the two main principles put forward at the 1969 Conference, and the reason for the creation of the Fund Convention is lost, which raises the question whether a failure was detected when practically applied. If this was the case the ‘green point’ would have signaled that this wasn’t a satisfactory outcome and the Learning System would have been initiated to find an alternative to the present situation.

Looking back at the Conference that dealt with the Fund Convention and keeping in mind that the TOVALOP and CRISTAL schemes, ending in 1997, were only to be interim measures until the convention system became a recognised tool to use in cases of oil pollution, the only logical conclusion, that can be drawn from the Transformation made at 1969, is that the delegations arguing that the burden on the oil industries was unjustified prevailed during the discussions conducted when adopting the new conventions. Another possibility could also be that there was no need to indemnify the shipowners anymore due to the compulsory insurance needed under CLC. This line of action, however, from the viewpoint of only discussing the CLC 69 and the Fund Convention and without having read the documentation or the conference leading up to the new conventions, does seem odd since all the incentives referred to above depended on this regulation. It would, in relation to this article, be interesting to read the line of thought taken at the Conference of 1992 and compare the viewpoints of the delegations according to the countries they came from, to the Conferences of 1969 and 1971, in order to see what circumstances and which countries changed their opinion about the matter that made the outcome different in 1992.\(^{253}\)

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\(^{251}\) *Contract Regarding a Supplement to Tanker Liability for Oil Pollution established by Cargo Owners* see www.itopf.com/comprep.pdf

\(^{252}\) see Art. 5 of Protocol 1976 to CLC 69

\(^{253}\) In fact it was established that since the point of the Conference of 1992 was to raise the limits of liability and that there therefore wasn’t any point in having indemnification rules. Furthermore, the regulation from 1971 dealing with fault or privity was also removed in 1992 producing yet another reason for deletion of this Article.
6.2.2 CLC 1969- Grey Areas

The CLC and the Fund Convention, the Outputs of the two Transformations in 1969 and 1971, were revolutionary instruments created in the field of shipping in terms of compensating victims for oil pollution damage. Even though this two-tier system of compensation has brought a lot of positive changes to the legal framework, it has failed in its attempt to unify national laws into one international regime. Furthermore, it has created grey areas providing alternative means of getting compensation. Examples of this are the litigation process of the Amoco Cadiz and the failure of the protocol of 1984 in connection with the Exxon Valdez incident involved (see Chapter 4).

A significant failure relating to the harmonisation of rules is to be found as a result of the Exxon Valdez incident. The USA has never been party to the CLC and Fund Convention since they came at a time when there were no great oil spills around the American coast, and therefore there was not much concern. During a Transformation attempt at the Conference of 1984 there were efforts to raise the limits of CLC since global inflation made the existing limits too low. The convention could only be workable with higher limits if the USA, as the largest receiver of oil in the world, entered the conventions and accepted the limits. Following the Amoco Cadiz incident the USA was agreeable in principle to the raising of limits but did not consider the limits established by the international community at IMO high enough. It therefore retracted its position and following the Exxon Valdez incident in 1989 produced its own legislation the OPA 1990. The United States government obviously reacted to the strong public opinion concerning the environmental effects of the oil spill. Meanwhile the international maritime community waited another 8 years until the CLC of 92 with the increased limits, was adopted. This was a failure to provide harmonisation internationally since the OPA90 is stricter by being more polluter-pays principle based and requiring double-hull for any ships that enter the waters of the USA. Furthermore, with the largest oil receiver not being party to the CLC and Fund conventions the question remains how authoritative these two conventions (and consequently the Transformation made) really are. Looking at the numbers of signatories to the old conventions, even now there are 66 and 42 countries respectively that act according to their regulations when an oil spill has occurred. This should lead to the conclusion that although the signatory countries only make up about 35% of the world tonnage, the conventions are still quite authoritative even if revised versions of them are now taking over their place.

When referring to grey areas there are also two other examples seen in this thesis that need mentioning, namely the litigation of the Amoco Cadiz and the relationship between the LLMC and the CLC conventions. Regarding the Amoco Cadiz litigation, the claimants not being satisfied with the

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254 Lloyd’s register of shipping 31 December 1999, in Paul et al p.21
outcome of the first process involving CLC went forum shopping and through the American national legal system got more compensation from other defendants. This is a serious flaw in the conventions since it undermines their application of strict liability for the shipowner and offers other potential defendants no protection against litigation. Furthermore this grey area is promoted also by the relationship between the LLMC, being a global pollution regime, and the CLC, a specific pollution regime. The LLMC has a residual effect and acts as a fall-back position for claimants that cannot obtain compensation under the specific limitation regimes such as the CLC. In order for a claimant to get compensation under the CLC there are certain prerequisites that have to be fulfilled. The pollution has to arise from a ship carrying oil in bulk, the oil must be of a persistent nature, and there must have occurred a damage outside the ship by the escape or discharge of oil. If these three criteria are not fulfilled the claimant can forward his claim under the LLMC, although this convention has lower limits that the defendant can apply. Over-all, the relationship between global limitation regimes and specific limitation regimes is that the global conventions have lower limits than the specific limitation conventions. The outcome when looking at the relationship between these two conventions, although this undoubtedly is a grey area by giving victims alternative ways of gaining compensation, the relationship between the two conventions is favourable and they complement each other very well. In conclusion, this means that the Transformations made both at 1969 and 1971, but also 1976 in regards to the LLMC, have succeeded in this maritime area dealing with claims of pollution victims by offering alternative means of receiving compensation in the case that CLC is not applicable.
Supplement A

Passenger ships-SOLAS convention

General

Accidents involving passenger ships have led to major changes in the Safety Of Life At Sea convention, commonly referred to as the SOLAS convention. The convention is the main legislation regarding safety in the maritime field and as such it provides the frame of reference for other maritime conventions. It is of a regulatory nature dealing with operative issues on the ship in order to minimise the loss of life. The following brief presentation concerning incidents that have lead to SOLAS amendments gives an overview of fields where the maritime community has set itself the task to improve safety. It is only meant as a background for the following discussion on oil polluting accidents and their catalytic effect on conventions about maritime pollution. Appendix 1 provides a more detailed presentation of the accidents involving passenger ships and the following changes to the SOLAS convention.

Titanic-the beginnings of SOLAS

The first incident to ever result in a major regulation was the infamous Titanic incident in 1912. The tragic ending of this supposedly unsinkable ocean liner on her maiden voyage and the loss of 1524 lives was a shock to society at large, and the outcry resulted in the forwarding of the SOLAS convention. The first conference was held in 1914 by the proposal of the British government since the incident lead to major questioning of the current safety regulations of that time. This issue was particularly pressing since on British ships alone during this period it was estimated that 800 lives were lost each year. The topics discussed at the conference related the fields of construction, fire protection and that of radiotelegraphy. The convention was scheduled to enter into force in 1915, but because of the outbreak of the first world war this was not done, although some countries did incorporate

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255 On the 14th of April 1912 the Titanic on her ocean voyage struck an iceberg in a dead calm sea south of Greenland. Due to the fact that the ship was thought of as unsinkable the filling of people in the lifeboats started late, furthermore there were not enough lifeboats for all the passengers on the ship. In the tragedy 1524 people lost their lives either through drowning or hypothermia. The time between the collision with the iceberg and the final sinking of the ship is estimated to about 2hours, the arrival of the Carpathia who heard the SOS for help from the Titanic arrived 6 hours later picking up the survivors.

256 http://www.mabl.dtlr.gov.uk/sd/0101/35.htm
some of the rules into their own national legislation. The first SOLAS
convention was to be finished in 1929, 17 years after the incident that
triggered its formation, but it was to be one of the most important
conventions ever adopted and to this day is one of the main legal documents
in maritime law. After the second world war an new version was
forwarded in 1948 but this one was to be replaced by SOLAS 1960, which
was the result of changes that the IMO considered important to make after
looking through the convention of 1948. The last major update on the
SOLAS convention occurred 1974 and it is regarded that from this year on
the convention won’t undertake any great changes but only be amended as
the maritime society deems necessary. This is because already in 1974 there
was an understanding that the process of accepting and ratifying a document
by different states would be very slow if the convention was continually
over-all updated, therefore it was decided that it only would amend in
separate actions, so called tacit acceptance procedure, that would also ensure
that necessary changes where made within a short period of time. The
procedure provides that an amendment enters into force on a specified date,
unless one of the Member States objects. The convention consists today
of eleven chapters that still deal with much of the same issues as the original
conference discussed over 60 years before the present convention entered
into force, such as construction concerning stability, machinery, fire
detection and protection, radio communication and safety of navigation.

Incidents and Amendments to SOLAS after 1974

Ro-Ro ferries

Three of the incidents mentioned in the scheme above include so called Ro-
Ro (roll-on roll-off) ferries and the legal actions emanating from them.
Although the most recent one, the Estonia disaster, very much illustrates the
potential danger that this particular type of construction is subject to, it is
important to mention the other vessels and describe what differences their
fate made on the development of the relevant international law. The
description is also important in order to understand that the maritime
community was in fact increasingly aware of the problems.

The first major incident with Ro-Ro ferries occurred in 1982 when on
December 19 a collision between the Ro-Ro ferries the European Gateway

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257 See notes handed out in Maritime Law, the SOLAS convention, dated 010511
258 Henry, p.64
259 Malmberg, pp. 289-292
260 The name comes from the notion that cargo is rolled in and rolled out through the doors
situated on the bow and the stern of the ship, hence Ro-Ro vessels.
and Speed Link Vanguard took place near Felixstone outside of the English coast, causing six casualties. Due to the collision, the cargo carrying European Gateway capsized, and later upon investigation of the incident it was discovered that the watertight doors below the waterline had been left open for the comfort of the crew.

The second incident was the capsizing of the Herald of Free Enterprise in the Belgian port of Zeebrugge on March 6, 1987. Just after leaving the Zeebrugge harbour to head for her destination, Dover in calm seas, the ship capsized in shallow waters; and only due to a turn to starboard in the last seconds the ship was prevented from sinking in deeper waters. The capsizing of the ship took about 90 seconds and after this it remained lying with its side emerging out of the water. Although there were successful rescue attempts the total death toll was 190, the largest since the Titanic on a British vessel. The authorities later concluded that the Herald of Free Enterprise had left the harbour with its bow doors open, and the ballast tanks had not been quite empty. The ship being immersed lower than normal had started taking in water through the bow doors.

The legal consequences that came out of these two incidents were the amendments to the SOLAS Convention in 1988 and 1990 in terms of stability standards. There are two 1988 amendments to the SOLAS convention, one concluded in April and the other in October. The April amendment deals with the improvement of monitoring doors leading out to cargo areas and the areas themselves, and also improvement of the standard of emergency lighting. The October amendment deals with damage stability of passenger ships and how this should be determined. The amendment also makes it compulsory for ships carrying passengers to undergo inspections every five years to ascertain that it’s stability remains intact regardless of extra weight and other structural changes. Furthermore, the October amendment requires that all cargo-loading doors be locked before the ship leaves berth. The SOLAS amendment of 1990 resulted from a study that made it easier to see in practice where there should be a structural improvement of ships, to improve stability.

The Herald of Free Enterprise incident also resulted in the International Safety Management Code (ISM Code) of 1994, which like SOLAS also is a regulatory instrument. The code applies to both tankers and passenger ships and from July 1st 2002 also includes cargo ships and mobile drilling units with at least 500 gross tonnage. The objectives of the code are to instigate a safety culture on board ships starting at the shore-based management level. The shipowner or whoever is responsible for operating the ship must establish a safety management system (SMS) and then implement a policy to achieve the objectives set up in the SMS. In order to do this there should be

262 http://www.imo.org/Newsroom/mainframe.asp?topic_id=4768doc._id=1347
263 Most of the victims of the incident died from hypothermia
a person on shore that has access to the person that is at the top of the hierarchy of management. He is the ‘designated person’ (DP). All of these procedures should be documented and put together in a special manual of which a copy is to be kept on board at all times.

The latest incident that speeded up the legislation regarding safety issues concerning the Ro-Ro vessels was the *Estonia* incident in 1994. The ship’s scheduled route was between Tallinn in Estonia and Stockholm, Sweden. On the night of September 28th 1994 the *Estonia* sank, taking 852 lives with her. The findings of the investigation were that the locks and hinges of the bow visor had been torn due to large waves crashing against the ship on the night of the sinking. After these parts had been torn off, the visor itself started moving forward and backward taking the ramp with it. Finally when the visor fell into the sea the ramp came all the way out leaving the water to rush freely into the car deck of the ship, which eventually capsized and sank. The estimated time from the impact of the big waves that caused the initial damage to the final disappearance of the ship was around 50 minutes. The investigation concluded that the reason for the locks and hinges being torn was that the ship was not designed to meet such heavy weather and that, together with the ship’s structural fatigue lead, to the eventual disaster. The *Estonia* incident being the greatest maritime disaster in Scandinavia in modern times lead not only to an agreement between the countries who were hardest affected by the incident, but also to a media uproar. The media turning its attention to the shipping industry after the *Estonia* disaster revealed to the general public the content of the *Estonia* inquiry. Between 1975 and 1986 at least sixteen incidents involving bow doors on Swedish and Finnish Ro-Ro vessels had occurred. The *Estonia* tragedy might not have happened if earlier actions had been taken.

As a result of this incident amendments to SOLAS were made in 1995 regarding once again, the stability of Ro-Ro passenger ships, and related back to the 1988 and 1990 amendments. In essence, the 1995 amendments consisted of a phase-in programme that was to include all existing Ro-Ro vessels meaning also those built before 1990, which had not been included in the previous amendment of 1990. Other amendments that where also made to SOLAS included requirements for all passenger vessels to have

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265 There is another ship that also deserves to be mentioned when dealing with Ro-Ro vessels, and that helped to speed up the process for international legislation, and that is the Jan Heweliusz, a polish vessel, that sank outside the German coast in 1993 when encountering hard weather resulting in the loss of 40 people. The vessel was a combined railway and car-taking vessel.

266 Malmberg, pp. 604-605

267 See the Agreement between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden regarding the M/S ESTONIA, which states that the area around the ship is to be considered her final resting place and that any activity around the place constitutes criminal activity. (The wreck is situated just inside Finland’s Exclusive economic zone, which might legally mean that Finland could decide what is to be done.

268 http://www.imo.org/includes/blast_bindoc.asp?doc_id=906&format=PDF
exact information on passengers on board, to have a helicopter landing area, changes regarding radiocommunications, safety of navigation and also an established working language to facilitate communication between crew members and passengers.

Other amendments were made as a result of the Estonia incident, to the International Convention on Maritime Search and Rescue (SAR). The objective of the convention is to develop an international system covering search and rescue operations (so called SAR plans) and states are encouraged to conclude agreements with other neighbouring states in order to facilitate co-operation when accidents occur. The Estonia incident gave rise to the 1998 amendments which clarifies the responsibility of governments and puts a larger emphasis on regional approaches and co-operation between maritime and aeronautical search and rescue services. The amendment requires that the parties to the convention either individually or together with other states establish, among other things, legal frameworks, a responsible authority, communication facilities, and organisation of available resources regarding search and rescue. The parties should also provide co-ordination and operational functions including domestic and international planning and training for these operations. The states are also required to establish special search and rescue regions for which they are to have responsibility when incidents occur.

**Scandinavian Star-Safety regulations regarding fire on board**

Although the SOLAS convention already had regulations concerning the prevention of fires aboard ships this issue was raised once again with the Scandinavian Star incident on March 15, 1988. The ship, en route north-east of Cancun, Mexico, carrying a total of 707 people, caught fire in the engine rooms that lead to the loss of the main generator, the electrical power of the emergency generator and the malfunction of the oxygen system. There was growing concern and confusion as the crew and the passengers could not communicate with each other during the evacuation procedures, leading to the deaths of 165 people. After this incident recommendations were issued on fire safety but before they were implemented another fire was to occur, eerily enough on board the same ship. At this stage the Scandinavian Star had been sold to the V.R. Dano group in order to replace another ship on the route between Frederikshaven, Denmark and Oslo.

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269 http://www.ntsb.gov/speeches/former/hall/jhc990107.htm
270 http://www.imo.org/includes/blast_bindoc.asp?doc_id=906&format=PDF
271 Another ship that might have some importance internationally when coming to fire on board ships but that is particularly interesting for the Swedish maritime industry is the Sally Albatross that caught fire in 1990 while docking for reparation in Stockholm. The fire lasted four days and the ship was totally destroyed. The lesson that the Swedish committee dealing with the accident learnt was that there was a big difference in trying to put out a fire on boats and trying to do it in a high building. The ship was totally destroyed but after repairs was able to commence on a route again. The ship also gained publicity in about a year after the fire since she grounded just outside of Åland which lead to that the passengers had to evacuate the ship.
On the night between April 6 and 7 1990, fire started in a corridor amidst a pile of bedclothes. This fire was put out by the passengers on board the ship but another one set on fire in the same way spread fast reaching the stairwell and the corridor above the origin of the fire in a matter of minutes. The closing of fire proof doors upon identification of where the fire was situated proved unsuccessful since the fire alarm buttons in the sections where the fire was located had not been pressed. There was great confusion among passengers and crew and when the master left the ship and concluded that there was nobody left on board he was proved greatly mistaken. A total of 158 people lost their life in this incident, and in retrospect it was established that if the smoke divers had come earlier they would have saved more lives than the five that they were able to rescue.

The recommendations that came out of the 1988 incident, whose importance was enhanced by the 1990 incident was that passenger ferries should be fitted with an adequate amount of sprinkler systems and well situated smoke detectors. The smoke detectors should be in some way connected to the bridge, so that the crew realises that something is occurring. Furthermore, the crew of a passenger ship should attend courses in safety procedures that are approved by the maritime authorities and they should be subject to inspections, including flying inspections. This was all brought into the SOLAS amendment of 1989. There were also rules adopted concerning restricted use of flammable materials and ready availability of fire-extinguishing appliances.

To summarise the ship incidents and their effects the following scheme is presented:

<table>
<thead>
<tr>
<th>Existing Convention</th>
<th>Year Of incident</th>
<th>Ship Incident</th>
<th>Learning System</th>
<th>Output</th>
<th>Year Into Force</th>
<th>Type</th>
</tr>
</thead>
<tbody>
<tr>
<td>-------</td>
<td>1912</td>
<td>Titanic</td>
<td>Conference after proposal by British Government</td>
<td>SOLAS 1929</td>
<td>1929</td>
<td>Regulatory</td>
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<tr>
<td>SOLAS’74</td>
<td>1982</td>
<td>European Gateway</td>
<td>MSC 1988</td>
<td>SOLAS-am ‘88 (October)</td>
<td>1990</td>
<td>Regulatory Prevention</td>
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<td>SOLAS’74</td>
<td></td>
<td></td>
<td>MSC 1990</td>
<td>SOLAS-am ‘90</td>
<td>1990</td>
<td>Operational</td>
</tr>
</tbody>
</table>

272 http://www.fire.org.uk/marine/papers/scanstar.htm
273 There seems to be some confusion between the authors on the exact date of the commencement of the fire on board, the times range from the 5th to the 8th of April 1990. http://sosweb.sos.se/SOS/PUBL/REFERENG/9303003E.htm
274 Flying inspections mean unscheduled inspections. This is important since some companies owning passenger ferries hire in trained personnel when a scheduled inspection is about to occur in order to pass it then when the inspection is done they hire a crew that would be deemed incompetent if they where to be taken in for an inspection.
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<td>SOLAS’74</td>
<td>1988</td>
<td>Scandinavian Star</td>
<td>MSC 1989</td>
<td>SOLAS-am ’89</td>
<td>1992</td>
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<tr>
<td>SOLAS’74</td>
<td>1994</td>
<td>Estonia</td>
<td>MSC 1995</td>
<td>SOLAS-am ’95 (November)</td>
<td>1997</td>
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<td>SAR-am ’98</td>
<td>2000</td>
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</tbody>
</table>
Bibliography

Books

Abecassis, David W.; Jarashow, Richard L.
“Oil Pollution from Ships-International, United Kingdom and United States Law and Practice”
Stevens & Sons
London, Great Britain, 1985 (First Printed 1978)

Bergström, Sture; Hästad, Torgny; Lindblom Per Henrik; Rylander, Staffan
“Juridikens Termer” 8th Edition
Almquist & Wiksell Förlag
Falkköping, Sweden, 1997 (First Printed 1992)

Bowett, D.W
“Self-defence in International Law”
Manchester U.P
England, 1958

Bring, Ove; Mahmoudi, Said
“Sverige och Folkrätten”
Norstedts Juridik

Craig, Paul; Burca de, Grainne
“EU Law-text, cases and materials” 2nd Edition
Oxford University Press
Oxford, United Kingdom, 1998

Dorton, Ian; Smith, Alex
A Students Guide to Business Studies
Hodder & Stoughton
Sevenoaks, 1992

Espejo, Raul; Schuhmann, Werner; Schwaninger Markus; Bilello, Ubaldo
“Organisational Transformation and Learning-a cybernetic approach to Management”
John Wiley & Sons
Chichester, England, 1996

Gauci, Gotthard
“Oil Pollution at Sea-Civil Liability and Compensation for Damage
John Wiley & Sons Ltd
Chichester, England, 1997
Gold, Edgar
“Cases and Material in Canadian Law”
Complied by Edgar Gold
Faculty of Law, Dalhousie University
Halifax, Nova Scotia, Canada, 1996

Henry, Cleopatra Elmira
“The Carriage of Dangerous Goods by Sea-the role of the International Maritime Organisation in International Legislation”
Frances Pinter Limited
London, Great Britain, 1985

Hooke, Norman
LLP Limited
London, Great Britain, 1997

Inter-Governmental Maritime Consultative Organisation
IMCO

International Maritime Organisation
IMO

International Maritime Organisation
“Conference on the Establishment of an International Compensation Fund for oil Pollution,1971-Final Act of the Conference with attachments including the text of the adopted Convention” with supplement
IMO

International Maritime Organisation
IMO

International Maritime Organisation
IMO
“Haveriutredningar: en rättslig studie över undersökningar i samband med olyckor i luften och till sjöss”
Norstedts Juridik AB
Stockholm, Sweden 2000

Malanczuk, Peter
“Akehurst’s Modern Introduction to International Law” 7th Edition
 Routledge
 London, Great Britain, 1997

Mukherjee, P.K
“Maritime Legislation”
World Maritime University
Malmö, Sweden, 2002

Organisation for Economic Co-operation and Development
“ The Polluter Pays Principle-definition, analysis, implementation”
OECD
Paris, France 1973

Paul, Daniel; Drian Le, Jean-Yves
Les Documents D’Information de l’Assemblee Nationale
Paris, France, 2000

Rue de la, Colin; Anderson, Charles B.
“Shipping and the Environment”
LLP Limited
London, Great Britain, 1998

Starke, J.D
“Introduction to International Law”
10th Edition Buttersworth
London, Great Britain, 1989

Papers

Gold, Edgar
“Pollution of the Sea and International Law: A Canadian Perspective”
Publisher Jefferson Law Book Company

International Maritime Organisation
“Focus on IMO-MARPOL 25 years”
IMO Publishing

McFarland, Bob
“International Maritime Conventions-Introduction to MARPOL
WMU 120
Malmö, Sweden, July 2-3, 2001

Mukherjee, P.K; Lefebvre, R.S
“Fishermen and Oil Pollution Damage: The regimes of compensation”
Chaumel (editor)
Labour Developments in the Fishing Industry

Shah, M.J
“Maritime Law and the Developing Countries: Attitudes and Trends”
6 Ocean Yearbook, 1986

Internet sights

http://greatshipwrecks.com/dona.html

http://www.comitemaritime.org

http://www.imo.org

http://www.maib.dtlr.gov.uk/sd/0101/35.htm


http://www.imo.org/includes/blast_bindoc.asp?doc_id906&format=PDF

http://www.ntsb.gov/speeches/former/hall/jhc.990107.htm

http://www.fire.org.uk/marine/papers/scanstar.htm

http://www.cornwall-online.co.uk/msw/torrey-canyon.htm

http://sosweb.sos.se/SOS/PUBL/REFERENG/9303003E.htm

http://www.american.edu/projects/mandala/TED/exxon.htm


http://www.ilo.org/public/English/about/mandate.htm

**Journals**

Captain Wilf Lusted, MBE,ExC,FNI
Marine Consultant Writer
“Marine Pollution: risks and constraints”
in Seaways, November 1996

Corkhill, Mike
“Oilspills-fact and fiction”
in Bimco Weekly News, 22 October, 1997, NO. 43

Olsen, Richard
“SCOPIC- some potential pitfalls”
in International Tug & Salvage, September/October 1999

**Cases**

Rylands v. Fletchers [1868] L.R. 3 H.L. 330


Trail Smelter case (1938) RIAA III1905


**Conventions**

Convention of the International Maritime Organisation
High Sea Convention

International Convention of Safety of Life at Sea

Notes

010309- Insurance, EC Air Law, Faculty of Law
010511-Maritime Law lecture, Faculty of Law
011002- Shipping and environmental principles, WMU
011005-During discussions with Professor Mukherjee

Schemes

Feamley’s Oslo-Crude Oil Seaborne Trade
Mukherjee-International Pollution Regimes
Schröder- Marine Casualties and legal follow-up

Newspapers

Le Figaro, 5 Nov. 2001
Le Figaro, 11th Dec. 2001

Reports

Malta Maritime Authority
“Report of the Investigation into the loss of the motor tanker Erika on Sunday 12th Dec. 1999”
Merchant Shipping Directorate

Dissertations

Mukkadayil, John P.
“Tanker Accidents: Double hull is not the only viable alternative”
Unpublished, World Maritime University 2001, [MSEP Course 2001]