ANALYSING THE INTERNATIONAL CIVIL LIABILITY REGIME FOR OIL POLLUTION DAMAGE CAUSED BY SHIPS AND ALIGNING WITH IT THE SOUTH AFRICAN CIVIL LIABILITY REGIME FOR OIL POLLUTION DAMAGE CAUSED BY SHIPS

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TABLE OF ABBREVIATIONS

1969 CLC	The 1969 International Convention on Civil Liability for Oil Pollution Damage
1971 Fund convention	The 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage
1992 CLC	The 1992 protocol which amended the 1969 CLC
1992 Fund Convention	The 1992 protocol which amended the 1971 Fund Convention
Administrations Act	The Merchant Shipping (International Oil Pollution Compensation Fund) Administrations Act 35 of 2013
Bunkers convention	The 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage
Contributions Act	The Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013
DEAT	Department of Environmental Affairs and Tourism
DOT	Department of Transport
HNS convention	The 1996 International Convention on Liability and Compensation for Damage in connection with the carriage of Hazardous and Noxious substances by Sea
IOPC Fund Act	The Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013
MARPOL 73/78	The 1973 International Convention for the Prevention of Pollution From Ships, as modified by the Protocol of 1978.
MLA	The Maritime Law Association of South Africa
MPCCLA	The Marine Pollution (Control and Civil Liability) Act 6 of 1981
MSCLC Act	The Merchant Shipping (Civil Liability Convention) Act 25 of 2013
MTA	The Maritime Traffic Act 2 of 1981
MZA	The Maritime Zones Act 15 of 1994
NEMA	The National Environmental Management Act 107 of 1998
NPA	The National Ports Act 12 of 2005
SA	South Africa
SAMSA	South African Maritime Safety Authority
SAMSA Act	The South African Maritime Safety Authority Act 5 of 1998
SARS	South African Revenue Services
Supplementary Protocol	The 2003 protocol which created a supplementary fund to the 1992 Fund
The Constitution	The Constitution of the Republic of South Africa Act 108 of 1996
UNCLOS	The 1982 United Nations Convention on the Law of the Sea

CHAPTER 1: INTRODUCTION - OIL POLLUTION DAMAGE CAUSED BY SHIPS

1.1 Introduction

> 'Millions of organisms will suffer and die an agonising death every year as a result of the lethal effects of oil pollution and man himself may ultimately suffer the consequences of his indifference to the destruction of the environment.'[1]
>
> - Paul Dempsey

This powerful statement captures the inevitable realities associated with marine oil pollution. In this context, this dissertation adopts an anthropocentric approach in the examining of the respective civil liability regimes in place to address pollution caused by the accidental discharge of oil by ships. This approach focuses on the needs of people that are provided for by the environment through ecosystem goods and services.

The purpose of this dissertation is to analyse and compare the International and the South African civil liability regimes on oil pollution damage caused by ships. This comparative analogy will be done with the view of ascertaining whether the legal regime of South Africa (SA) is in line with the international civil liability regime and to ascertain what improvements can be made to SA's civil liability regime. During this analysis, any inadequacies identified in these regimes will be addressed briefly.

In December 2013, SA updated and revised its domestic marine pollution laws with a series of amendment laws as outlined in Chapter 3 below. These aim to update and align SA's domestic legal regime with the international civil liability regime. This dissertation serves to explore these laws against the backdrop of the relevant International Conventions including the United Nations Convention on the Law of the Sea which provides a general framework. Prior to these amendment laws, SA's regime was outdated and provided insufficient compensation for a major oil spill.

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[1] Dempsey P.S "*Compliance and Enforcement in International Law – Oil Pollution of the Marine Environment by Ocean Vessels*" 1984 (6) *Nw.J.Intl.L&Bus* 463.

1.2 Background

Oil-fouled beaches, dying seabirds and severe economic loss from the closure of fishing grounds and holiday resorts is the picture painted by oil spills, and these consequences often arouse public outrage.[2] Oil spills cause extensive damage to the marine environment and to human society.[3] Indeed, the economic consequences are often extensive, and it is for this reason that the internationalisation of a civil liability regime for oil pollution damage was initially proposed.[4] The first move towards an international civil liability regime came when states which were affected by an unprecedented oil spill made it clear that individual states could not cope alone with these negative effects.[5] The tanker held responsible for the oil spill which has been described as 'the greatest peace-time menace ever to have confronted Britain's shores' was Liberian-registered tanker, the *Torrey Canyon*.[6]

1.3 The Development of the International Regime

On Saturday, 18 March 1967, the *Torrey Canyon* was *en route* to Milford Haven with a full cargo of 119 328 tonnes of crude Kuwaiti oil.[7] Her Italian master, anxious not to miss high tide at Milford Haven, attempted a short-cut between Seven Stones and the Scilly Isles and misjudged his position, causing the Torrey Canyon to run aground Pollard Rock.[8] Approximately 30 000 tonnes of oil spilled at the time of the grounding, a further 20 000 tonnes spilled during the following seven days of high seas and gale force winds until 26 March when the ship's back was broken on the

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[2] de La Fayette L.A "*New Approaches for Addressing Damage to the Marine Environment*" 2005 *IJMCL* 2(1) 167.
[3] Hui W *Civil Liability for Marine Oil Pollution Damage* Doctorate thesis Erasmus University Rotterdam (2010) 2.
[4] Gurumo T.S "*Civil Liability Issues Arising from Spills of Oil Cargo: Are International Agreements the Best Solution" for Common Problem?* 2013 *IJSSH* 3(1) 52.
[5] Ibid.
[6] Sheail J *"Torrey Canyon: The Political Dimension*" 2007 *JCH* 42(3) 4862007 *JCH* 42(3) 486.
[7] Ibid.
[8] Burrows *et al* 1974 *Scottish Journal of Political Economy* XXI(3) 237-255.

rocks, releasing a further 50 000 tonnes.[9] Drifting oil polluted the beaches of Brittany, France and the Channel Islands.[10] Prevailing winds at the time caused a ripple effect of oil pollution that was eventually felt in at least six countries; this exemplified the scale of the problem of marine pollution.[11] The situation was further complicated by uncertainty as to which jurisdiction and law would be applicable in this unique case of accidental oil pollution.[12] The *Torrey Canyon* was registered in Liberia, owned by a Bermudian company whose officers resided in New York; she had been on a time-charter to a US oil company which, in turn, had sub-chartered her to a Britain oil company for the fateful voyage.[13] There was, furthermore, considerable uncertainty surrounding a state's right to intervene in such an incident.[14]

This is a tale of political conflict, of commercial tensions between the shipping, oil and insurance industries, and, finally, of grave economic and ecological damage.[15] The seabirds were the worst sufferers of the oil pollution, with total casualties estimated to be 20 000 guillemots and 5 000 razor bills.[16] In a study, a Plymouth laboratory found that the oil, apart from the serious effects on seabirds, was not lethal to flora and fauna of the marine environment.[17] The detergents used by the British government to disperse oil during the clean-up of oil-fouled beaches, however, proved to be highly toxic to marine life.[18] Studies show that as little as one part of detergent per million parts of seawater is lethal to planktonic growth.[19] The legal uncertainties translated into confusion and left the British government overwhelmed and severely criticised. The estimated cost to the British government, excluding the ecological damage, was three million pounds.[20] The French government had a less chaotic experience than that of the

[9] Ibid.
[10] de la Rue C and Anderson CB *Shipping and the Environment* (1998) 11.
[11] Tanaka Y *The International Law of the Sea* (2012) 254; Heyne 1969 *CILSA* 292.
[12] de la Rue (n10) (1998) 12.
[13] Ibid.
[14] Ibid.
[15] de la Rue (n10) (1998) 7-8.
[16] Walsh J "*Pollution: The Wake of the Torrey Canyon*" (1968) *AAAS* 160(3824) 167-169.
[17] Ibid.
[18] Ibid.
[19] Ibid.
[20] Ibid.

British because they had more time to prepare, and they had also learned from the mistakes made by Britain.[21] The French banned detergents and used powdered chalk to get rid of the oil and this was less detrimental to the marine environment.[22] In retrospect, the estimated number of expenses incurred globally was 14 million pounds.[23] After considerable difficulties in obtaining compensation from the owners of the *Torrey Canyon* (who initially denied liability), the British government detained one of the *Torrey Canyon's* sister ships which was released only in exchange for a three million pound security.[24] The French followed suit and, eventually, after protracted negotiations, the owners settled out of court with three million pounds to be divided between the United Kingdom, Guernsey and France.[25]

The *Torrey Canyon* incident raised a number of issues, including the issue of civil liability. Many questions remained unanswered and, accordingly, there was a call for the international regulation of the complex issues of civil liability and compensation, and the states affected by the *Torrey Canyon* disaster were at the forefront of the requests for assistance. Consequently, the world and the international community began to address the problem more vigorously.[26] There is little doubt that the international regime on oil pollution received its impetus from the *Torrey Canyon* disaster which highlighted various legal problems.[27]

Up until the *Torrey Canyon* incident, the protection of the marine environment from pollution was fairly undeveloped in terms of international law.[28] As a result, states were left with wide discretion with regard to polluting the oceans.[29] According to Tanaka, this was owing to a general lack of awareness of environmental protection.[30] This meant that victims of oil

[21] Ibid.
[22] Ibid.
[23] Burrows *et al* (n8) (1974) 237-255.
[24] Ibid.
[25] Ibid.
[26] Tanaka (n11) (2012) 254.
[27] Hui (n3) (2010) 2; Gurumo (n4) (2013) 52.
[28] Tanaka (n11) (2012) 254.
[29] Ibid.
[30] Ibid.

spills had to rely on ordinary fault-based liability.[31] Apart from it being extremely difficult to prove fault in such cases, jurisdictional uncertainty arising from the international nature of oil transportation made it practically impossible for victims to obtain justice.[32] In the 1960s, however, the introduction of supertankers increased the chances of major shipping disasters, and the *Torrey Canyon* was the unfortunate supertanker which caused the international law to develop into the comprehensive marine pollution regime which exists today.[33] Other shipping disasters such as the *Amoco Cadiz, Exxon Valdez, Erika* and the *Prestige* also had an influence on the international regime and are dealt with in Chapter 2 below.

At the very beginning, and of paramount importance, is the 1982 United Nations Convention on the Law of the Sea (UNCLOS) which is known as the "framework" or "umbrella" convention in the international law of the sea and which is dealt with at the beginning of Chapter 2 below. The 1973 International Convention for the Prevention of Pollution From Ships, as modified by the Protocol of 1978 (MARPOL 73/78) to address pollution prevention, the 1969 Intervention Convention to deal with emergency response, the 1969 International Convention on Civil Liability for Oil Pollution Damage (1969 CLC), and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971 Fund convention) were enacted after the *Torrey Canyon* disaster, once it was clear that the international regime was not sufficient to deal with such an immense oil spill.[34] The 1969 CLC and 1971 Fund convention were then substantially amended by the 1992 protocols of amendment.[35] This regime was then further developed after certain gaps were identified in its application, and when it was realised that there was a need to extend the scope of the substances which were covered internationally. In 1996, the International Convention on Liability and

[31] Wu "*Liability and Compensation for Oil Pollution Damage: Some Current Threats to the International Convention System*" (2002) *Spill Science & Technology Bulletin* 7(1–2) 105–106.
[32] Ibid.
[33] de la Rue (n10) (1998) 10-11.
[34] Tanaka (n11) (2012) 254; de La Fayette (n2) (2005) 177.
[35] Ibid.

Compensation for Damage in connection with the carriage of Hazardous and Noxious substances by Sea (the HNS convention) was enacted to account for pollution by hazardous substances other than oil.[36] The International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunkers convention) was then enacted in 2001, and it extends the international regime to bunker (fuel) oil.[37] Bunker oil is the oil that is used, or intended to be used, for the operation or propulsion of the ship and the residue of such oil.[38]

All of the above respective conventions aim to adopt uniform international rules with regard to adequate liability and compensation; the Bunkers convention then goes even further and reaffirms the international duties imposed by articles 194 and 235 of UNCLOS, the framework convention with standardised rules on the international law of the sea, intended to bring uniformity.[39] The aforementioned articles of UNCLOS respectively provide that states shall *take measures* to prevent, reduce, and control pollution, as well as, *co-operate* in the further development of the international rules providing for adequate compensation for pollution damage (own emphasis).[40]

1.4 The South African Civil Liability Regime

About 6 000 nautical miles south of Pollard rock, which was struck by the Torrey Canyon in 1967, lays the Cape of Good Hope, SA. The route that runs through the Cape of Good Hope is one of the busiest oil tanker routes in the world and this contributes to the large volume of oil traffic in this

[36] Tanaka (n11) (2012) 296; the HNS Convention 35 ILM 1415 (1996).
[37] Bunkers convention 40 ILM 1493 (2001).
[38] Article 1(5) of the Bunkers convention.
[39] Preamble of Bunkers convention.
[40] Preamble of Bunkers; articles of UNCLOS.

route.[41] The Cape of Good Hope is also known as the 'Cape of Storms' and many vessels have faltered off this hazardous coastline of SA.[42]

In 1983, the *Castillo del Bellver*, a Spanish supertanker and one of the largest tankers lost in South African waters, ran aground about 14 nautical miles offshore of Saldanha Bay, Western Cape. The *Castillo* broke in half, spilling 175 000 tonnes of crude oil, which subsequently ignited. After a rescue mission was conducted, the remains of the *Castillo were* towed 300 miles out to sea where it was allowed to sink to a depth of approximately 3 000 metres.[43]

More recently, in 1994, an iron ore carrier known as the *Apollo Sea* broke up in heavy seas close to Cape Town, spilling 2 400 tonnes of heavy bunker fuel oil.[44] The devastating consequences included oil contaminated beaches that took months to clean, 7 500 seabirds that had to be rescued and cleaned, and a further 1 500 birds were known to have died from oil contamination.[45] The cost of the clean-up operation which followed the *Apollo Sea* disaster was R27 million.[46] Since then there have been countless other major oil spill incidents, including the *Treasure* which sank in the year 2000 near Melkbosstrand, Cape Town.[47]

Undoubtedly, the effects of oil pollution on the marine environment are catastrophic, and the costs to rectify the devastation are immense. Notwithstanding the fact that pollution damage is often irreversible and full rectification might not be possible even where funds are made available. In addition, oil spills have a major impact on industries such as fisheries, aquaculture and tourism.[48] Experience confirms that hotels, shops,

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[41] National State of the Environment Report – South Africa available at http://www.ngo.grida.no/soesa/nsoer/issues/coast/driver.htm (accessed 17.07.2014).
[42] Glazewski J "Pollution of Marine and Coastal Waters" in *Environmental Law in South Africa* (2013) 25-3.
[43] Glazewski (n42) (2013) 25-5.
[44] "PEOPLE AND THE COAST: POLLUTION" http://www.capetown.gov.za/en/EnvironmentalResourceManagement/publications/Documents/Coastcare%202F-Pollution.pdf (accessed 09.03.2014); Glazewski (n42) (2013) 25-8.
[45] Ibid.
[46] Ibid.
[47] Ibid.
[48] Hui (n3) (2010) 2.

restaurants and other tourist establishments suffer both a loss of demand and a loss of income as a result of reduced tourism.[49] It has, furthermore, been accepted in some cases that even establishments outside the area directly affected by the oil spill could suffer economic losses from the oil spill.[50] All coastal states should, therefore, strive towards attaining a comprehensive civil liability regime for marine oil pollution damage.

1.4.1 South African Marine Pollution Legislation

As elaborated in Chapter 3 below, SA gave effect to the 1969 CLC and the 1971 Fund convention by enacting the Marine Pollution (Control and Civil Liability) Act 6 of ***1981*** (MPA)(own emphasis). SA, however, only acceded to the 1992 protocols of amendment on 1 October ***2005*** (own emphasis) and, subsequently, did not implement these amendments domestically.[51] Eight years later, the government finally updated the domestic law by providing for the domestic enactment of the provisions as contained in the 1992 protocols. In December ***2013*** (own emphasis), the Merchant Shipping (Civil Liability Convention) Act 25 of 2013 ("MSCLC act"), the Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013 ("the IOPC act"), the Merchant Shipping (International Oil Pollution Compensation Fund) Administrations Act 35 of 2013 ("Administrations act"), and the Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013 ("Contributions act") was enacted by Parliament.

The acts were then signed into law by the President, and the commencement dates are listed as 30 May 2014 for the MSCLC Act and the IOPC Fund Act, and 1 May 2014 for the Administrations Act and the

[49] Huang *Recoverability of pure economic loss* Germany 209-211.
[50] Ibid.
[51] CLC and Fund http://www.gard.no/ikbViewer/Content/72868/CLC%20compilation.pdf (accessed 26.04.2014).

Contributions Act.[52] These Acts seek to bring SA's liability regime into line with the international liability regime.

1.5 Legal Problem

Now that the origin and development of the international and South African civil liability regimes have been addressed, the legal problem of this dissertation may be understood more clearly.

In August 2013, public hearings were held in the process of enactment of the recent marine pollution laws.[53] The Maritime Law Association of SA (the "MLA") announced that, as matters stood, SA would be terribly exposed in the event of a major oil spill, given the low limits of liability contained in the MPA.[54] The MLA further declared that it is simply imperative that both the 1992 CLC and the Fund Convention are given force of law as soon as is reasonably possible so as to ensure that SA's limits of liability are increased from the unacceptably low levels contained in the MPA and to ensure a claimant's access to the 1992 Fund.[55] The words of the MLA clearly illustrate the urgency of the long awaited and heightened protection that the recent marine oil pollution Acts should bring about. This liability regime is of great importance to victims whose livelihoods could be instantly destroyed by a single oil spill incident. It is, moreover, essential to ensure that there are sufficient funds to deal with the catastrophic environmental damage and degradation caused by oil spills. The legal problem explored in this dissertation relates, therefore, to the adequacy of SA's regime and the identification of its inadequacies by comparing it with the predominantly successful international regime.

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[52] GNR34 in GG 37687 of 26 May 2014 and GNR35 in GG 37696 of 29 May 2014; http://www.cliffedekkerhofmeyr.com/en/news/press-releases/2013/environmental/Update-Changes-in-the-regulation-of-marine-protected-areas-to-improve-protection-from-oil-spills-and-other-marine-pollution.html (accessed 12.08.2014).

[53] http://www.timeslive.co.za/politics/2013/08/14/oil-pollution-bills-delayed-due-to-oversight *(accessed 25.06.2014).* Full statement available from: www.pmg.org.za/files/130814marine.pdf (accessed 25.06.2104).

[54] Ibid.

[55] Ibid.

Just as the *Torrey Canyon* identified legal gaps in the international law, subsequent tanker accidents have identified legal problems in the existing international regime. These problems will be discussed briefly during the analysis of the international regime in Chapter 2, and, since the South African civil liability regime is directly based on the international regime, the possible inadequacies will also be of significance for SA's regime.

1.6 Research Aim and Questions

The main aim of this dissertation is to assess the adequacy of the South African civil liability regime applicable to oil pollution caused by tankers and to ensure that these are aligned with its international obligations in particular the various civil liability conventions outlined in Chapter 2. In so doing accurate solutions to any inadequacies that are identified are proposed. To achieve this aim, it will be necessary to analyse the newly-enacted marine pollution laws and ascertain how these affect the South African legal regime.

The primary research question of this dissertation is: Is SA's civil liability regime consistent with, aligned with and adequate in light of, the international civil liability regime?

1.7 Structure

In order to answer the abovementioned research question, this dissertation adopts the following structure: It is divided into five chapters which will follow one another as the civil liability regime is being unpacked and analysed.

This Chapter 1 includes an introduction, background, and sets out the scope and limits of this topic; It furthermore provides a brief literature review on civil liability to aid in understanding the main topic of this dissertation.

In Chapter 2 it will be beneficial to look at the brief history behind the international regulation of marine oil pollution in order to grasp the reasoning behind the existing international regime. Therefore, the international history will first be addressed, and thereafter a comprehensive analysis of the various conventions that make up the international regime will be done. There will also be an indication of certain inadequacies which may be contained therein, before concluding and moving the focus to SA in the next chapter.

It will then be of importance to address SA's liability regime critically. In Chapter 3 the new marine pollution acts are dissected whilst keeping in mind the broad themes that originate in the international conventions. This third chapter also addresses whether the MSCLC act has strengthened the South African regime and whether SA will have access to the compensation funds after the enactment of the IOPC Fund Act.

Chapter 4 will accordingly look at the laws of general application in SA with a view of ascertaining how these laws complement the civil liability regime and how reliance on them could improve the South African regime. Furthermore, recommendations will be made with regards to improving SA's regime.

Finally, this dissertation will come to a conclusion in Chapter 5 which will also briefly summarise the findings of the previous chapters.

1.8 Methodology

A desktop study method was used to conduct research for this dissertation which included a comprehensive textual analysis of domestic legislation, international conventions and current news articles. Political meeting minutes also proved a useful insight into this 'under-reported' topic.

1.9 Literature Review on Civil Liability

A brief introduction to civil liability is helpful to set a context for the following chapters. Civil liability is governed in SA by the law of delict, which is known as tort law in European legal systems. For purposes of this dissertation, the common law of delict will be looked at due to the fact that there is a focus on SA. The law of delict falls under private law and is part of the law of obligations.[56] In terms of a delictual obligation, the 'wrongdoer' has a personal duty to compensate the victim for the harm caused, and, similarly, the victim has a personal right to claim reparation of harm done from the wrongdoer.[57] Owing to the growth of industrialisation and the environmental risks associated with it, it is important to have a delictual system in place which designates liable parties for potential damages caused by harmful activities such as oil pollution from ships. Such a delictual system is provided for in a global civil liability regime.

Boberg broadly defines a delict as a civil wrong.[58] More narrowly, Van der Walt and Midgley define it as wrongful and blameworthy conduct which causes harm to a person.[59] In general, the delictual elements must be satisfied for a claim to be successful. These are an act/omission, wrongfulness, causation, fault, and harm/damage.[60] Gleaning from this brief overview, it is clear the civil liability is very private in nature, whilst international matters fall under public law. The use of a civil liability regime for oil pollution which is inevitably an international act is, therefore, unusual but is nonetheless accounted for by the various principles that make up the law of delict. The various elements of delict including intent, strict liability and causality underlie both international liability conventions, as well as, domestic law giving effect to such liability regimes and these are elaborated on in Chapter 2 below.

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[56] Van der Walt and Midgley *Principles of Delict* 1.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Van der Walt op cit (n56) 2.

A special form of liability has been adopted to govern oil pollution matters and this is strict liability. Strict liability imposes automatic liability on the defendant without the necessity of proof of fault.[61] It is a deviation from the underlying principle of delict that fault is imperative to found liability. It expresses a different morality in that society determines that the nature of, or risk associated with, the conduct is such that the responsible person should compensate anyone who suffers harm as a result of the conduct.[62] The basis of this liability has developed primarily through modern legislation which concerns activities which involve a considerable risk of harm.[63] Pollution impairs private interests where a subject is damaged through the environmental media, i.e. material pollution of the sea water.[64] This in turn warrants compensation of damage to individuals from polluters.[65] It is, however, noted at the outset that in this instance an anthropocentric approach to environmental damage is adopted. Therefore the focus of this dissertation will be on the effect of the environmental damage on the lives of humans and on the services that the environment provides to humans.

1.10 Conclusion

It is apparent that the South African civil liability and compensation regime for many years lagged behind its international law obligations. By domesticating the relevant conventions, however, the first step has been taken towards closing this gap. In order to assess SA's regime in the light of the international legal regime, it is necessary, firstly, to analyse comprehensively the international regime which will be done in the following chapter.

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[61] Loubser *et al The law of delict in South Africa* (2009) 376.
[62] Ibid.
[63] Loubser (n61) (2010) 381.
[64] Von Bar *European law of torts* (2000) 425.
[65] Ibid.

CHAPTER 2: THE INTERNATIONAL CIVIL LIABILITY AND COMPENSATION REGIME FOR OIL POLLUTION DAMAGE CAUSED BY SHIPS

2.1 Introduction

> "It is a curious situation that the sea, from which life first arose, should now be threatened by the activities of one form of that life. But the sea, though changed in a sinister way, will continue to exist; the threat is rather to life itself."
>
> - Rachel Carson, *The Sea Around Us*

The above quotation illustrates the interconnection between man and the sea, between the activities of man and damage to the sea, and between the existence of the ocean and the existence of man. This chapter will address the international civil liability regime with the view to clarifying what recourse is available to victims of oil spills in line with the anthropocentric approach taken in this dissertation. It must, however, be acknowledged that the protection of the sea itself (biocentrism) is also of importance for the lives of human beings in general, not only as an apparent source of food, but as well as for its aesthetic value.

The international oil pollution civil liability regime is seen as a "precedent for several conventional regimes governing liability for transnational environmental damage".[66] It is accepted by a countless number of authors that the *Torrey Canyon* disaster is what set in motion the process that led to the adoption of this regime which has come to be known as both revolutionary and comprehensive.[67] The *Torrey Canyon* alerted the thinking of legislators and brought to the surface glaring legal impracticalities, and it is therefore, associated with the inception of national and international efforts to improve the regime governing liability for oil pollution.[68] This chapter will therefore seek to explore this comprehensive international regime and make

[66] Doeker and Gehring 1990 *JEL* 2(1) 4.
[67] Farahani "*Liability and Compensation Regime for Oil Pollution Damage under International Conventions"* 2011 LLM thesis Lund University 4.
[68] Churchill and Lowe *The Law of the Sea* (2003) 328.

an assessment of its effectiveness. Before, however, divulging the international regime, it is important to look at the law of delict and its relationship with pollution which follows hereon.

2.1.1 The Interrelation between Pollution and the Law of Delict

As mentioned in paragraph 1.9 above, the relation between the law of delict and pollution control is worth exploring. The common law of delict is an imperative branch of law as it underlies contemporary pollution control law.[69] In order for liability to arise on the part of an 'environmental wrongdoer' the five elements of delict must be satisfied:- there must be an *act or omission* on the part of a person, which act or omission is *wrongful* and *causes* harm or *damage* to another person or property due to such respective person's *fault* (own emphasis). For example, in the context of environmental pollution, the spillage of a harmful substance may be an unlawful and thus wrongful act that causes harm, however, causation always proves to be a difficult element to satisfy and there is an inherent difficulty in placing a monetary value on the environment in order to prove loss or damages.[70] Therefore, environmental statutory provisions have modified, refined and/or erased some of these elements[71] in relation to environmental pollution. Each of these elements will now be dealt with below in the context of pollution and pollution control.

2.1.1.1 An Act or Omission

As stated above, the spillage of a harmful substance such as oil would constitute an act, however, the controversy comes in with regards to an omission and whether acts of omission in the environmental context such as failure to check a stop-cock which results in a toxic spill, constitutes a delict. Glazewski confirms that the matter is considered to be settled in that an act of omission will constitute a delict only where there is a legal duty to act.[72]

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[69] Glazewski (n42) (2013) 20-12.
[70] Nabileyo (2009) LLM North-West University 3.
[71] Glazewski (n42) (2013) 20-12.
[72] Glazewski (n42) (2013) 20-13.

Therefore failure to act when there is a legal duty imposed to act will constitute an act of omission and satisfy this delictual element. Liability for an act of omission is, however, more restricted as the law is generally reluctant to impose such duties.[73]

2.1.1.2 Wrongfulness

The test for wrongfulness is known as the "*boni mores*" test and assesses wrongfulness based on the legal convictions of the community and what is considered to be objectively reasonable from case to case. Thus, an act is wrongful if it violates the legal duty to take care, and/or results in an unjustified infringement of the legally protected interests of another.[74] Establishing wrongfulness may seem easy enough, however, it must be borne in mind that there may be certain infringements which may be justified which is why this test is somewhat inexact.[75]

A fine example by Glazewski to illustrate such an instance in which a wrongful act may be justified is the generation of pollutants which may be necessitated and thus allowed as a legitimate economic activity.[76] Various factors should be considered to determine the objective reasonableness of an infringement, including but not limited to:

- The nature and extent of the harm caused;
- The value of the loss to the aggrieved person and/or society;
- The cost and effort of mitigation
- Other economic considerations; and
- A defence in statutory authority (which if existent, renders the act in question reasonable and justifiable).[77]

[73] Glazewski (n42) (2013) 20-14.
[74] Ibid.
[75] Ibid.
[76] Glazewski (n42) (2013) 20-15.
[77] Ibid.

2.1.1.3 Fault

Fault refers to the general blameworthiness of a person which justifies such a person being legally reprimanded. This element contains two sub-elements, namely, intention and negligence.[78] In the context of pollution, we are mainly concerned with the element of negligence and whether a person acted negligently in the running of his/her operations which as a result causes pollution and/or whether a person acted negligently where there was a legal duty on such person to take reasonable care.[79]

The test for negligence is known as the '*reasonable person test*' and determines whether a reasonable person in the position of the defendant: -
(a) would have foreseen the reasonable possibility of his conduct injuring another's person or property and causing such person patrimonial loss; and
(b) would have take reasonable steps to guard against such occurrence;
- where the defendant failed to take such steps.[80]

Applying such a test to environmental matters may prove to be inherently difficult. The impracticalities associated with proving that the consequences of a particular act would result in pollution damage, is what makes environmental liability claims so complex.[81] This is therefore, addressed in certain environmental legislation, such as in the case of oil pollution damage whereby the 1969 CLC provides for strict liability on the part of polluter and not the traditional fault-based liability. Strict liability thus has the effect of labelling the activity itself, one which is harmful to the environment and from which liability will ensue in ordinary cases where damage is caused. This does not, however, mean that there is unqualified and unrestricted liability and naturally, there are still other general provisions and limitations to liability which may apply.

[78] Glazewski (n42) (2013) 20-22.
[79] Ibid.
[80] Glazewski (n42) (2013) 20-23.
[81] Glazewski (n42) (2013) 20-24.

2.1.1.4 Harm or Damage

This element of delict deals with the compensation of victims for the harm they have suffered.[82] In the context of environmental pollution, this poses two problems:

(a) The inherent difficulty of placing a monetary value on environmental harm[83]; and
(b) The underlying premise of compensating a victim is to place them in the position they were in before the harm has occurred, however, it is clear that such a position is often impossible in environmental pollution cases as the damage may be irreversible.

In general, there is a distinction between 'patrimonial or monetary loss' and 'non-patrimonial loss'.[84] In the environmental pollution context, an oil pollution victim will generally have a claim for patrimonial loss for loss or damage caused to his property, however, he/she might also have suffered mental distress from the pollution incident.[85] In the common law and South African context however, the claims for patrimonial and non-patrimonial loss are under founded under two different actions and a pollution victim may then have to claim monetary loss under the *acquilian* action and non-patrimonial loss under the *actio inijuriarum.*[86] It must, however, be noted that there are still restrictions and limitations in terms of who may recover for pollution damage (the type of damage recoverable) and the ultimate quantum of damages that may be claimed.[87]

2.1.1.5 Causation

Finally, this element consists of two sub-elements, namely, factual causation and legal causation. In the environmental context, the consequential damages are often far-reaching and in some instances the

[82] Glazewski (n42) (2013) 20-24.
[83] Glazewski (n42) (2013) 20-27;Nabileyo (n70) (2009) LLM 3.
[84] Glazewski (n42) (2013) 20-27.
[85] Ibid.
[86] Ibid.
[87] Glazewski (n42) (2013) 20-28 to 20-30.

damages are unforeseen damages.[88] It is important to note that a polluter is not liable simply because his actions caused harm, there must also be legal causation to limit situations of remoteness.[89] There is no general unanimity by the authorities regarding the test for remoteness[90] and this dissertation doesn't serve to delve into these delictual elements into detail save for providing a general overview and highlighting the interrelation between the law of delict and pollution.

Now that an overview of the law of delict has been provided, we may now begin the analysis of the international regime which starts with the history in the following paragraph.

2.2 Background

The international oil pollution civil liability was showcased in the 1969 CLC, which was later amended by a protocol in 1992 (the 1992 CLC).[91] The system provided for in the 1969 CLC represented a radical change from the international norm at the time.[92] The most extraordinary element it contained was the concept of imposing strict liability on the ship owner, which, in essence, gives effect to the 'polluter pays' principle.[93] Consequently, the burden of proof was shifted from victims to owners in the shipping industry, which speaks to the underlying premise on which the regime is based, which is a strengthening of the compensation payable to the victims suffering loss or damage from oil spills.[94] It is important to note, however, that shipowners do not incur unlimited liability.[95] The 1969 CLC limits ship owners' liability to certain stipulated amounts.[96] The other unique element that this regime

[88] Glazewski (n42) (2013) 20-34.
[89] Ibid.
[90] Ibid.
[91] The International Convention on Civil Liability for Oil Pollution Damage was adopted in November 1969, entered into force 19 June 1975, text at 973 UNTS 3 and 9 ILM 45; Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage adopted in November 1969, entered into force 30 May 1996, text at 1956 UNTS 255.
[92] Farahani (n67) (2011) 5.
[93] Doeker (n66) 7.
[94] Doeker (n66) 5.
[95] Glazewski (n42) (2013) 25-25.
[96] Ibid.

contains is that of compulsory insurance or financial security.[97] Lastly, the negotiations which lead to the adoption of the 1969 CLC called for the establishment of an additional fund which was done through the Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (1971 Fund Convention).[98] The purpose of the 1971 Fund Convention is to provide additional compensation to victims where there is inadequate compensation available to them in terms of the 1969 CLC.[99]

As global industrialisation boomed, the world began to hunger after the fuels necessary to satisfy its demanding appetite.[100] This inevitably meant an increase in the size and volume of tankers and of hazardous cargoes-in-transit.[101] The capacity of the oceanic highways was being tested, and the years to come saw 'mother nature' unleash her wrath on various unfortunate vessels.[102] In addition, various vessels fall victim to accidents owing to the failure of their man-made parts. One of the ill-fated vessels was the *Amoco Cadiz* which carried 220 000 tonnes of crude oil and suffered a failure of her hydraulic steering gear off the Brittany coast in 1978.[103] The *Amoco Cadiz* was significant as it revealed the insufficiency of the limits prescribed in both the 1969 CLC and the 1971 Fund Convention.[104] In the light of this, the 1969 CLC was amended by protocols in 1976 and 1992.[105] The 1971 Fund Convention was also amended in 1992.[106] Once again, international efforts were triggered by the occurrence of a major oil spill disaster.

This is not the end of the chronicle as more incidents had to occur before it was realised that further international action had to be taken. Various oil pollution disasters struck after 1992, but it was particularly the

[97] Ibid.
[98] Gurumo (n4) 2013 *IJSSH* 3(1) 53.
[99] Glazewski (n42) (2013) 25-28.
[100] Lee 2010 *TMLJ* 295.
[101] Ibid.
[102] Ibid.
[103] Farahani (n67) (2011) 5.
[104] Ibid.
[105] Ibid.
[106] Ibid.

Erika in 1999 and the *Prestige* in 2002 which became the driving forces behind the addition of an extra tier to the oil pollution liability regime.[107] Subsequently, the Protocol of 2003 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992 (Supplementary Fund Protocol) was adopted.[108] The Supplementary Fund Protocol is a voluntary system that increases the total amount of compensation available per incident of oil pollution damage.[109] The current regime consists of the 1992 CLC, the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1992 Fund Convention) and the Supplementary Fund Protocol.[110]

On another plane, negotiations concerning a general framework convention for the international law of the sea were also taking place.[111] This framework emerged from three conferences held at specific times with the first one beginning in 1958 and the last one ending in 1982.[112] The United Nations Convention on the Law of the Sea 1982 (UNCLOS) was the result of these negotiations.[113] The UNCLOS also brought about innovative changes to the international law of the sea. This dissertation will address it as the broad framework within which all other conventions relating to the law of the sea must operate.

2.3 The United Nations Convention on the Law of the Sea, 1982 (UNCLOS)

In general, the UNCLOS is regarded as the 'most comprehensive environmental treaty in existence'.[114] More significantly, it symbolises a

[107] Ibid.
[108] Glazewski (n42) (2016 edition) 25-28.
[109] Ibid.
[110] 1992 Protocol to amend the 1971 Fund Convention was adopted in November 1992 and entered into force 30 May 1996, text at 1953 UNTS 330.
[111] Tanaka (n11) (2012) 20-30.
[112] Ibid.
[113] UNCLOS, opened for signature 10 December 1982, 1833 U.N.T.S. 397, 457 (entered into force 16 November 1994).
[114] Franckx 1995 *IJMCL* 10 253.

major highpoint in the development of the legal regime relating to marine pollution.[115] When compared with its antecedent conventions, it is clear that Part XII of the UNCLOS, concerning the protection and preservation of the marine environment, introduces positive, fundamental transformations to the international law of the sea.[116]

On the contrary, certain provisions contained in the UNCLOS are often referred to as 'ambiguous' and 'vague'.[117] According to Franckx, this is not attributed to poor draftsmanship, but was rather the result of its being purposely drafted in such a manner so as to reflect the only compromise among all the parties involved.[118] At the time, there were growing environmental concerns, and the interests of shipping states and coastal states often collided.[119] In response to this state of affairs many novel concepts were established.[120]

As time goes by, however, and environmental studies are furthered, there are more in depth analyses of the environmental provisions in UNCLOS, and it is recognised that the law is constantly developing.[121] Specifically in the marine pollution context, it has been illustrated how various shipping accidents prompted international law to develop and be updated. On this note, the coming into force of the UNCLOS is certainly a major achievement for the international community of states, but, at the same time, it should not be considered to be a final document leaving no room for further developments.[122] The significance of the UNCLOS is accurately described by Boyle as a fundamental shift from a power to protect the environment to a duty to protect it.[123] Certain relevant provisions of the UNCLOS will now be examined.

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[115] Ibid.
[116] Ibid.
[117] Franckx (n114) (1994) 254.
[118] Ibid.
[119] Ibid.
[120] Ibid.
[121] Franckx (n114) (1994) 256.
[122] Ibid.
[123] Boyle 1985 *AJIL* 79 350.

2.3.1 General duties

The break-through development for international environmental law is contained in Article 192. Article 192 places a general obligation on states to protect and preserve the environment. The UNCLOS is the first treaty that explicitly conferred this duty on states.[124] Another important broad obligation is that states must take all appropriate measures to prevent, reduce and control pollution from any source, and to do so with the best practicable means available to them.[125] States should, furthermore, "endeavour" to harmonise their policies in this regard.[126] These articles go further than merely establishing a primary duty of states in marine environmental matters; they provide the foundation of a more complex and wide-ranging structure of powers and duties that cover various facets within marine pollution matters.[127]

The next obligation on states is derived from customary international law and calls on states to ensure that activities under their control do not cause pollution damage to other states and their environment.[128] Where the occurrence of an incident results in pollution, states must ensure that the pollution does not spread beyond their respective area of national jurisdiction.[129] This obligation against transboundary pollution has been confirmed as a duty under customary international law in numerous cases including the *Trail Smelter* case.[130] To this effect, states must take measures which include, *inter alia*, those designed to minimise pollution from vessels, in particular measures for preventing accidents and dealing with emergencies and the regulation of the design, construction, equipment, operation and manning of vessels.[131]

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[124] Glazewski (n42) (2016 edition) 25-14.
[125] Article 194(1) of UNCLOS.
[126] Ibid.
[127] Boyle (n123) (1985) 350.
[128] Article 194(2) of UNCLOS; Glazewski "Pollution of fresh water and freshwater resources" in *Environmental Law* (2013) 24-4.
[129] Ibid.
[130] *Trail Smelter Arbitration* (*US v Canada)* 33 AJIL (1939) 182 and 35 AJIL (1941) 684 respectively.
[131] Article 194(3) of UNCLOS.

2.3.2 The prevention, reduction and control of pollution

In the light of the various duties to regulate, minimise and eradicate pollution it is important to reproduce the definition of marine pollution provided in the UNCLOS. This definition is regarded as comprehensive and all-encompassing and has accordingly made its way into various other source-specific treaties.[132] Article 1 defines "pollution of the marine environment" as:

The introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

A closer analysis of this definition reveals that it consists of both an ecocentric and an anthropocentric approach. It takes into account ecological factors and the need to ensure that marine ecosystems are not altered in any way, and, on the other hand, it acknowledges humanity's use of the sea and its resources. In addition, it is an open definition which includes all sources of marine pollution, which means both existing and new sources.[133] This leaves room for developments outside of the six sources identified in the UNCLOS.[134] It is, therefore, within this context that the duties specific to marine pollution must be applied.

As mentioned, article 194(1) of the UNCLOS obliges states to take all appropriate measures to prevent, reduce and control pollution from any source and to do so with the best practicable means available to them. This is important in the context of marine pollution as it marks a move away from the permissive power to regulate pollution, which was the position prior to

[132] Micha Lau, lecturer at the University of Cape Town, Institute of Marine and Environmental law.
[133] Tanaka (n11) (2012) 255.
[134] Tanaka (n11) (2012)256.

the UNCLOS where states were left with a wide discretion to pollute the oceans. The powers and duties relating to marine pollution from ships may, however, be stricter than "generally accepted international standards" which indicates that some discretion of states is still present.[135] This provision allows states to enact laws that are more stringent than international laws.

2.3.3 Responsibility and liability

Article 235 of the UNCLOS is a key provision for matters concerning liability for marine (oil) pollution incidents and is dealt with hereafter. Boyle argues that it comes into play upon breach of the general duties to protect the marine environment. The significance of article 235 is that it imposes state responsibility where there is damage to the marine environment 'unconnected to loss or damage to the interests or environment of other states'.[136]

Article 235(1) provides that states are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment.[137] States shall be liable in accordance with international law and must ensure that recourse is available within their legal systems for compensation and other relief in respect of pollution damage caused by their nationals.[138] With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, article 235(3) obliges states to cooperate in the implementation of existing international law and the further development of international law relating to liability in this field.[139] Article 235 adds a new dimension to the duties of states regarding liability and compensation for the pollution of the marine environment. It clarifies the duty of states to fulfil their international obligations and to implement domestic laws regarding liability and compensation.

[135] Boyle (n123) (1985) 353.
[136] Boyle (n123) (1985) 367.
[137] Tanaka (n11) (2012) 291.
[138] Articles 235(1)-(2) of the UNCLOS.
[139] Tanaka (n11) (2012) 291.

2.3.4 Concluding remarks

The general obligations in the UNCLOS both develop and confirm the customary international law on the law of the sea. The UNCLOS, furthermore, sets out a general framework for marine pollution caused by ships/vessels. The various provisions on marine pollution in the UNCLOS are amongst the most innovative changes brought about to the international law of the sea. As a whole, the UNCLOS represents a fundamental shift from the permissive power of states to regulate pollution to a primary duty on states to protect the marine environment and to reduce and control pollution. SA ratified the UNCLOS on 23 December 1997, and many of its provisions are incorporated in The Maritime Zones Act 15 of 1994.[140] It is now of importance to address the conventions that add flesh to the general rights and duties concerning liability provided for in the UNCLOS. It will also be necessary to assess the progression of these conventions.

2.4 The Catalytic Torrey Canyon which gave rise to the International Convention on Civil Liability for Oil Pollution Damage, 1969 (1969 CLC)

The International Legal Conference on Marine Pollution Damage was convened in Brussels from 10 to 29 November 1969 in order to formulate a new international regime for oil pollution damage.[141] 48 countries sent delegates to participate, while six additional countries and various international organisations were present as observers.[142] The 1969 CLC was the initial legislative response of the international community after the Torrey Canyon.[143]

In 1978, the *Amoco Cadiz* prompted the international community to contemplate amendments to the 1969 regime. In response, an international conference was held in 1984 with the intention of adopting two protocols to

[140] Glazewski (n42) (2010) 25-15.
[141] Hui (n3) (2010) 57; **hereafter referred to as 'the Brussels conference'**.
[142] Ibid.
[143] Lee (n100) (2010) 296.

amend the 1969 CLC and 1971 Fund Convention.[144] The entry into force of the 1984 protocols was, however, dependent on the participation of the United States of America (USA).[145] The refusal of the USA to accept the international regime meant that these protocols never came into force.[146] Then, in 1989, the brisk stride of the *Exxon Valdez* obliterated everything in its path and polluted the pristine waters of Alaska.[147] The *Exxon Valdez* was the largest oil spill in the USA, and it resulted in the USA's unilaterally implementing its own regime which was stricter than the international regime.[148] The Exxon Valdez tragedy, nevertheless, brought to light the conspicuous gaps in the existing international regime and the need for further amendments. This mandated a speedy response from the international community, and the International Maritime Organisation (IMO) was forced to find another way to implement changes to the regime without USA participation. In 1992, after some procedural changes were made, the main content of the 1984 protocols were included in the 1992 protocols and implemented under the auspices of the IMO.[149]

The 1969 CLC will be addressed here with a view to highlighting the way it differs from the 1992 CLC. This comparison will be done by addressing the conceptual elements of a functional civil liability regime which is the standard of care, scope of application, definition of damage, responsible person, available defences, liability limits, exclusion of limits, and insurance. The main features of the 1969 CLC and the 1992 CLC will be addressed under the headings of these elements.

2.4.1 Standard of care: The chaotic debate

It is firstly of importance to determine the necessity of having the element of a standard of care within a civil liability regime. A standard of care is necessary in order to have a uniform minimum standard against which

[144] Tan *Vessel-source marine pollution* 2006 313.
[145] Ibid.
[146] Ibid.
[147] Tan (n144) (2006) 320.
[148] Ibid.
[149] Tan (n144) (2006) 328.

liability may be imposed and according to which certain standardized regulations may be enacted. The type of the activity which is being regulated, the nature of the damage or loss that may be caused and the importance of the protection against such damage are all factors which will have an effect on the standard of care to be imposed.

To this end, article III (1) of the 1969 CLC provides that the owner of a ship at the time of an incident or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident. Subject to certain exceptions, this article imposes strict liability on the shipowner.[150] The provision providing for strict liability was retained *verbatim* in the 1992 CLC.[151]

The imposition of strict liability on the shipowner is a departure from the traditional concept of fault-based liability which was the dominant liability system prior to the 1969 CLC.[152] The debate on which form of liability should be applied within this regime was reported to be intense, as well as, the most time-consuming of all the matters discussed at the Brussels conference.[153] The fault-based liability system, however, had already proved to be inadequate.[154] In consideration of the magnitude of the actual and potential environmental damage, the law existing at the time could not provide adequate compensation since it was severely restricted.[155] Moreover, the tanker involved in an accident was not always at fault, and, besides that, proof of fault is extremely difficult to achieve in cases of oil pollution.[156] In addition to the above, the concept of fault varies according to different legal systems, which in turn causes practical problems.[157] The abovementioned factors, along with satisfactory reasons supporting strict liability, such as the

[150] Tanaka (n11) (2012) 292.
[151] Article III (1)-(3) of the 1992 CLC.
[152] Hui (n3) (2010) 55.
[153] Ibid.
[154] Ibid.
[155] Ibid.
[156] Ibid.
[157] Ibid.

inherent risk involved in the activity of shipping, eventually lead to the removal of fault-based liability and the introduction of strict liability on the part of the shipowner.

Another issue at the Brussels conference was whether strict liability should be placed on the shipowner or on the cargo itself (making the owner of the cargo responsible).[158] Part of the argument in favour of strict liability on the cargo itself was as follows: Firstly, the risk was inherent in the cargo goods itself and not in the maritime transport of such goods; Secondly, the increase in the size of tankers was due to the increase in the demand within the oil industry, which in turn, resulted in these 'industrial risks' being taken and the oil industry was ultimately the party who benefited from this process; Thirdly, the victims of oil pollution could not protect themselves from such industrial risks.[159] The maritime states supported this approach because it would reduce the burden of costs on the shipping industry.

The argument in favour of strict liability on the shipowner was as follows: Firstly, the risk of oil pollution is not solely created by the nature of goods but also by the carriage of such goods, i.e. maritime transport;[160] Secondly, although the oil cargo companies possess strong financial capacity, they could still avert claims by legal devices (e.g. the establishment of subsidiary companies to become insolvent), this being a major disadvantage inherent in the cargo liability system which could simply be avoided by making the shipowner liable;[161] Thirdly, in order for a compensation system to be effective, there should be a good deterrent.. If liability were to rest on cargo interests, problems would arise when such cargo was under the complete control of the shipping crew on the high seas and an incident/casualty occurred.[162] The only unit that would be in a position to prevent the casualty or reduce the damage it might cause would be the shipping crew, and they might not exercise their duty of care diligently

[158] Ibid.
[159] Hui (n3) (2010) 58-59.
[160] Hui (n3) (2010) 60-61.
[161] Ibid.
[162] Ibid.

if there is no proper disincentive and if they are aware that full liability was on oil cargo interests.[163]

All of the above concerns were expressed by various parties, and the competing interests at stake made it extremely difficult for the parties to reach a unanimous decision.[164] At each round of votes at the Brussels conference, the first vote which took place on 14 November 1969 and the second vote which required a second preference from the delegates and took place on 17 November 1969, the parties' decisions were divided, with no liability system being an obvious favourite. In an attempt to strike a compromise between the parties, the Belgian delegate proposed a compensation fund.[165] This proposal was received differently by parties - some saw it as a way to overcome the difficulties associated with a specific liability system and a way to share responsibility, while others acknowledged it was a novel concept and should be approached with caution as a new system which requires additional study and exploration.[166]

The chairperson at the Brussels conference then decided to split the final vote on 18 November 1969 in terms of the main questions to be decided, so whether liability should rest on the ship/cargo, whether there should be a shared responsibility and lastly the type of liability to be imposed.[167] After the change of method in the final vote, three principal issues were decided: liability should be imposed on the ship/shipowner; a compensation fund should be established to provide for the sharing of responsibility between the shipping and the oil industry; and the form of liability chosen was strict liability with a slight majority.[168] The success of the strict liability system in oil pollution cases since its implementation, as

[163] Ibid.
[164] Hui (n3) (2010) 58.
[165] Hui (n3) (2010) 63.
[166] Ibid.
[167] Hui (n3) (2010) 65.
[168] Ibid.

compared to fault-based liability, indicates that, despite all the competing interests, the best possible option was chosen.[169]

After the vote it was acknowledged that further studies would be needed to implement the compensation fund and, therefore, a working group to study the fund was decided upon by the parties.[170]

2.4.2 Scope of application

In order to determine when the 1969 CLC applies to a pollution claim, it is necessary to analyse the provisions concerning the scope of application. Before doing so, however, certain definitions are relevant in this respect and provide clarity on words used within the provisions defining the scope of application.[171] These definitions include "ship", "owner", "pollution damage", "oil" and "incident"; only a certain few will, however, be discussed below.

To begin with, the definition of "ship" is of great significance since article III creates the rule that the shipowner is liable for pollution damage caused by the "ship".[172] Accordingly, liability may ensue in terms of article III only if the polluting ship is covered under the definition provided in the 1969 CLC.[173] For purposes of the 1969 CLC, a "ship" is any sea-going vessel and seaborne craft actually carrying oil in bulk as cargo.[174] This means it covers only laden oil tankers. It is argued that the 1969 CLC covers only oil tankers because it was intended to complement the proposed additional compensation fund which later came about in the 1971 Fund Convention, which is funded by the oil industry.[175]

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[169] Daniel '*Civil liability regimes as a complement to multilateral environmental agreements: sound international policy or false comfort?'* RECIEL 12 (3) 2003.
[170] Ibid.
[171] Farahani (n67) (2011) 16.
[172] Ibid.
[173] Ibid.
[174] Article I (1) of the 1969 CLC.
[175] Farahani (n67) (2011) 16.

Two questions then arise. Firstly, do combination carriers qualify as ships? Secondly, would mobile offshore units be regarded as ships?

To answer the first question, it is suggested that the 1969 CLC will be applicable only if the combination carrier is carrying oil in cargo.[176] The answer to the second question is, however, more complicated. It is obvious that these units will be excluded if they are not actually carrying oil as cargo.[177] The ambiguity is, however, created with respect to the lack of a definition of 'cargo'. Offshore units carrying oil for storage purposes may exclude the oil from being 'cargo' if cargo is defined according to trade and being transported from one place to another.[178] In order to shed some light on this matter, Farahani turns to the French version of the convention. The French version states that oil should be loaded for the purpose of being transported, which supports a restrictive interpretation of 'cargo' and will thus exclude mobile offshore units from the 1969 CLC.[179] The definition of 'ship' was then extended in the 1992 CLC to account for the practical problems that were encountered with the 1969 definition.

To account for its previous vagueness, the improved definition provides that a ship is any sea-going vessel or craft of *any type whatsoever constructed or adapted for* the carriage of oil, which will be regarded as a ship only when actually carrying oil in bulk as cargo (own emphasis).[180] The words emphasised above indicate that even mobile offshore units can be regarded as ships if they are moving with oil in bulk as cargo. The definition goes even further and states that a ship is also regarded as such *following* any voyage of carriage of oil unless it can be proven that there is no residue of oil aboard.[181] This means that the definition was extended to include unladen tankers and thus increasing the liability. One can anticipate that the proof of a ship having no residue of oil will be a difficult practical task.

[176] Farahani (n67) (2011) 17.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] Article I (1) of the 1992 CLC.
[181] Ibid.

The substance to which the 1969 CLC and 1992 CLC are applicable is restricted to oil. The definition of oil was expanded in the 1992 CLC by changing it from “any persistent oil...” to “any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, whether carried on board a ship as cargo or in the bunkers of such a ship.”[182] The expansion of and the specifications within the definition of oil will make it easier to determine when a particular incident is subject to the CLC and be of assistance in its practical implementation.

2.4.2.1 Geographical scope and environmental damage

The environmental devastation caused by the *Torrey Canyon* disaster marked one of the first severe oil spills that the world has ever faced, and the response thereto was, at best, quite poor.[183] Writers, such as Lee, have argued that no real efforts were made to assess the environmental damage and/or identify the best method to rectify it.[184] These were the underlying circumstances in terms of which the 1969 CLC was created.

This failure to allocate adequate attention to environmental damage, coupled with the competing interests of states, resulted in a highly restricted geographical scope. Article II provides that the 1969 CLC applies to *pollution damage* on the territory and *territorial sea* of a state, as well as, *preventive measures* taken to prevent or minimise such damage (own emphasis). The reference to preventive measures in this provision is vague but was ordinarily construed as being restricted to any measures taken in the territory of a state.

Looking at this provision in retrospect, the obvious gap is that there is no mention of the Exclusive Economic Zone (EEZ) of a state since this zone was created in the UNCLOS only in 1982.[185] It is trite knowledge that the UNCLOS is considered to have universal participation and, therefore, the

[182] Article I (5) of the 1992 CLC.
[183] Lee (n100) (2010) 296.
[184] Ibid.
[185] Farahani (n67) (2011) 21-22.

concept of the EEZ is of significance. The EEZ is a zone ranging up to 200 nautical miles from a state's baseline within which such state has sovereign rights of exploitation and conservation. The 1969 CLC preceded the UNCLOS and, therefore, its geographical scope was restricted to a contracting state's territory and territorial sea. A much needed extension was brought about by the 1992 CLC to include pollution damage in a state's EEZ or an equivalent designated area.[186]

Important to note, is that, although the CLC regime is widely accepted, the USA refused to adopt the CLC and the CLC's provisions do not apply to the waters of states who have not accepted the CLC. Consequently, oil spills in the waters of non-CLC states, such as the USA, remains uncovered or is subject to domestic laws.[187] Evidently, in cases concerning environmental damage, the non-acceptance of the international regime will bring about certain practical challenges and, not only have economic consequences, but also, possible unregulated pollution damage. Since there can be no borders in the environment or sea, it is possible for the pollution damage to extend into states who have adopted the international regime, and yet they may not be able to hold the appropriate people accountable notwithstanding the fact that environmental damage is often irreversible and accountability is the only deterrent to avoid such damage from occurring.

Finally, the geographical scope of preventive measures has been extended. Article II (b) of the 1992 CLC provides that it applies to "preventive measures, *wherever taken*, to prevent or minimise such damage" (own emphasis). The emphasised words indicate that the 1992 CLC applies to any preventive measures taken anywhere, including outside a state's territory or EEZ. This allows for greater environmental protection and precautions.

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[186] Tan (n144) (2006) 314; Article II (a)(ii) of the 1992 CLC.
[187] Ekaterina Anyanova "*oil pollution and international marine environmental law*" in Sustainable Development – Authoritative and Leading Edge Content for Environmental Management 2012 37.

2.4.3 The definition of damage

The definition of *pollution damage* is of great importance as the shipowner's liability is dependent on what is considered to be pollution damage, and this will further clarify the scope of application (own emphasis).[188] The 1969 CLC defines pollution damage as loss or damage caused outside the ship carrying oil by contamination resulting from the escape of oil, wherever such oil may escape, and includes costs of preventive measures and further loss or damage caused by such preventive measures.[189]

Any legal provision which is not precise and does not clearly define its parameters is likely to encounter interpretation problems, as did this provision. The ambiguity of this definition lead to inconsistency in its application and caused controversy when deciding which claims are admissible against the owner and when exactly the owner is liable.[190] As a means of illustration, personal injury and death seem to be too remote to find application in the definition of pollution damage. If, however, death or injury was caused by preventive measures, it could very well be the basis of a shipowner's liability.[191] In addition, there was considerable uncertainty as to whether, and to what extent, environmental damage may be claimed.[192]

The definition of pollution damage was, therefore, amended in an attempt to clarify any uncertainties created by the previous definition. The following addition was made to the definition: "...provided that compensation for impairment of the environment other than loss of profit...shall be limited to *costs of reasonable measures of reinstatement* actually undertaken or to be undertaken" (own emphasis).[193] This was a poor attempt, as it does not provide any clarity about the extent of environmental damage that may be claimed. It creates a threshold by using the words "reasonable measures",

[188] Ekaterina (n187) (2012) 37.
[189] Article I (6) of the 1969 CLC.
[190] Farahani (n67) 2011 18.
[191] Ibid.
[192] Ibid.
[193] Article I (6)(a) of the 1992 CLC.

but provides no guidance on what is to be considered a reasonable measure.

One thing that was made clear by this amendment is that it is now very difficult for 'pure environmental damage' to find place in this definition. Although 'pure environmental damage' is not formally defined in any legal instruments, it is generally accepted in the International Environmental Law field to mean an impairment to the environment in a narrow or strict sense, which denotes damage to wildlife and other constituent parts and processes of the natural environment, rather than the inability to exploit damaged natural resources which causes economic losses[194] and which is usually the focus in compensation systems.

Indicatively, from an environmental perspective, the international civil liability regime falls short in the area of adequate compensation for damage to the marine environment.

Despite this, with all of the competing interests and tensions at play, it is submitted that the international regime has managed to overcome these potential conflicts and provide common ground in terms of which, at least, the victims of oil pollution may be adequately compensated.

2.4.4 Responsible Person

It is of high importance that the person or entity upon whom liability rests is clearly and unambiguously stated so as to allow for the proper implementation of all of the provisions set in place to achieve the objective of this regime being compensation for oil pollution damage.

Both the 1969 CLC and the 1992 CLC provide that the owner of a polluting ship is the responsible person in the case of oil pollution damage.[195]

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[194] David Ong "The relationship between environmental damage and pollution" in *Environmental Damage in International and Comparative Law* 2002 192

[195] Article III (1) of the 1969 CLC; Article

Who then is the owner? The owner is the "person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship."[196] In the case, however, of a ship owned by a State and operated by a company which is registered as the ship's operator in that State, "owner" shall mean such a company.[197]

The 1969 CLC then provides that compensation against the owner may be claimed only in terms of the convention and, furthermore, no claims may be made against servants or agents of the owner.[198] The 1992 CLC expanded on this and provided that, in addition to servants and agents, no claims may be made against members of the crew; the pilot or any other person who performs services for the ship; any charterer, manager or operator of the ship; any salvage operator; any person taking preventive measures; or the servants and agents of some of these excluded persons.[199]

Other persons or entities may also be responsible through the unique feature of the channelling of liability which is addressed below.

2.4.5 The channelling of liability and compulsory insurance

The realisation that there was a high potential of vast pollution damage that could be caused by oil spills resulted in the channelling of liability in two ways.[200]

Firstly, both the 1969 CLC and 1992 CLC requires tanker owners to be adequately covered by insurance for oil pollution risks.[201] In this respect, compulsory insurance to the amount of the prescribed limits is imposed on all tankers carrying over 2000 tonnes of oil in bulk as cargo.[202] In the light of this requirement of compulsory insurance, the shipowner's right to limit his

[196] Article I (3) of the 1969 CLC and the 1992 CLC.
[197] Ibid.
[198] Article III (4) of the 1969 CLC.
[199] Article III (4) of the 1992 CLC
[200] Hill *Maritime Law* 6th Ed 2003 428.
[201] Ibid.
[202] Article VII of the 1969 CLC; liability amounts dealt with in 4.7 below.

liability is imperative to ensure adequate insurance availability in the market.[203]

Insurance cover for shipowners is provided by protection and indemnity (P & I) clubs.[204] P & I clubs insure their shipowner-members on a mutual basis in terms of which each member is both an underwriter and the assured.[205] The cover provided by P & I clubs generally provides for third party risk cover and oil pollution damage to the extent of the limits in the CLC.[206] The requirement of compulsory insurance is attested to by a certificate issued by an authority in the contracting state once such authority is satisfied that adequate insurance or financial security is in place.[207] The 1992 CLC contains a measure of uniformity and flexibility by providing that contracting states are to accept insurance certificates issued by other contracting states as having the same force as certificates issued in their own state, even if such a ship is not registered in the certifying state.[208] One disadvantage of compulsory insurance is that it does not cover oil spills from ships carrying less than 2000 tonnes of oil in cargo.

Article VIII then introduces a prescription period within which all claims must be instituted. This provision provides for a prescription period of three years but may be extended to six years in the case of subsequent or delayed pollution.[209] The wording of this provision has created some confusion but has been interpreted by courts to mean that the period of prescription runs from the first occurrence of the incident and ends after three years, but the supplementary three years may be used in the case of delayed pollution caused by the same incident i.e. the *Prestige* that sunk after its major oil spill was a cause for delayed pollution.[210]

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[203] Tan (n144) (2006) 297.
[204] Dillon and Van Niekerk *South African Maritime Law* 1983 141.
[205] Dillon (n204) (1983) 134-135.
[206] Ibid; see 4.5 above.
[207] Ibid.
[208] Ibid; Article VII (7) of the 1992 CLC.
[209] Hill (n200) (2003) 437.
[210] Ibid.

Secondly, the other way in which there is a channelling of liability, is in terms of the 1971 Fund Convention which was introduced to provide additional compensation to victims of major oil pollution disasters.[211] This substantial compensation is to be paid out of the fund where full or even adequate compensation was not possible out of the limited amounts contained in the 1969 CLC.[212] The 1971 Fund Convention was an internationally motivated attempt to make the oil industry a contributor to making good the vast losses caused by an oil spill.[213] Oil cargo interests make contributions to the fund. The fund covers compensation which is not covered by the 1969 CLC and the 1992 CLC, as well as, for damages in the case of an oil spill from a ship carrying less than 2000 tonnes of oil as this is not accounted for under the CLC.[214] This cover from the fund compensates for the lack of such cover under the 1992 CLC.

2.4.6 Available defences

Article III (1) of the 1969 CLC and the 1992 CLC makes the shipowner strictly liable, subject to the exceptions/defences provided for in paragraph 2 and 3. The liability of the shipowner will be excluded if the owner proves that the damage:

- Resulted from an act of war, hostilities or civil war or a natural phenomenon of an exceptional, inevitable character;[215]
- Was wholly caused by an act or omission with intent to cause damage by a third party;[216]
- Was wholly caused by the negligence or wrongful act of a government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.[217]

[211] Hill (n200) (2003) 428.
[212] Ibid.
[213] Ibid.
[214] Bongaerts and Bièvre 1987 *The Geneva papers on Risk and Insurance* 12 (43) 148.
[215] Article III (2)(a) of the 1969 CLC and the 1992 CLC.
[216] Article III (2)(b) of the 1969 CLC and the 1992 CLC.
[217] Article III (2)(c) of the 1969 CLC and the 1992 CLC; the act must be in the exercise of their public function.

A possible inadequacy in the wording of this provision was highlighted in the Swedish case which involved the Soviet tanker, *Tsesis*, which struck a submerged rock in 1977.[218] The shipowner sought to prove that the Swedish government was at fault for being negligent in its duty to maintain '*other navigational aids*' by failing to represent such rock on a chart, which would allow the shipowner to escape liability.[219] The Swedish Supreme Court eventually found in favour of the shipowner, but this decision has been criticised, and Hill argues that, had it been decided in accordance with English law, the case was likely to have seen a different outcome.[220] Nevertheless, this provision is yet another example of uncertainty within the 1969 CLC which has been created by vague and ambiguous wording.

Finally, article III (3) provides that, if the owner proves that the damage was caused wholly or partially either from an act or omission with intent to cause damage by the person who suffered such damage or from the negligence of such person, the owner may be fully or partially exonerated from liability. This is to avoid scandalous and unlawful acts for the mere purpose of the compensation payout.

2.4.7 Limitation of liability

The limitation of liability is important to ensure the effectiveness and viability of the compensation system. Indefinite liability would most likely impose unrealistic burdens on shipowner's, as well as, make insurance cover difficult, if not impossible.

Article V of the 1969 CLC is one of the most significant provisions as it provides for the limitation of the shipowner's liability by setting 'liability ceilings'.[221] In summary, the registered shipowner was entitled to limit his/her liability to 2000 (gold) francs per ship's tonnage, provided that the aggregate

[218] Hill (n200) (2003) 427.
[219] Ibid.
[220] Ibid.
[221] Ibid.

amount shall not exceed 210 million francs in any event.[222] The currency was later changed from francs to special drawing rights (SDRs) and the amended provision allowed the owner to limit his liability to 133 SDRs per tonne and an aggregate amount not exceeding 14 million SDRs.[223] The owner would, however, be disallowed from limiting his/her liability if the incident occurred owing to the actual fault or privity of the owner.[224] An unfortunate problem for the victims of oil spills is that it is common cause that the fault of the owner is often very difficult to prove.

The liability ceilings have always received the most attention and have been amended extensively as it is the feature that directly affects the amount paid out after an oil spill. The fact that these limitation amounts often fall short of total damages incurred after a major oil spill has led to them being criticised after catalytic events like the *Exxon Valdez*. The limitation amounts in article V of the 1992 CLC have, however, been raised to a much higher level than those in the 1969 CLC.[225] This favour towards claimants is, however, balanced by the change in the standards by which the owner's limitation rights may be deprived.[226] The 'actual fault or privity' test from the 1969 CLC was replaced by a stricter one.[227] It now states that the shipowner is not entitled to limit his liability if it is proved that the pollution damage resulted from his personal act or omission, committed with intent to cause damage, or recklessly and with knowledge that damage would probably result.[228] This test makes it much more difficult for claimants to prove the above and thus deny the owner of his limitation rights.[229]

In order to provide for these limitations, the 1992 CLC makes use of units of account which refers to Special Drawing Rights (SDRs) as set by the

[222] Ibid; Article V (1) of the 1969 CLC.
[223] Article V (9)(a) of the 1992 CLC.
[224] Article V (2) of the 1969 CLC.
[225] Hill (n200) (2003) 434.
[226] Ibid.
[227] Ibid.
[228] Article V (2) of the 1992 CLC.
[229] Ibid.

international monetary fund (IMF) which are to be converted into national currency on the date of the constitution of the fund.[230]

The calculation of the aggregate amount of limitation per incident was as follows:

(a) 3 million SDRs for a ship not exceeding 5 000 tonnes; and
(b) for a ship in excess of 5 000 tonnes – 3 million SDRs together with 420 SDRs for each additional tonne of its tonnage in excess of 5 000 tonnes up to a maximum of 59.7 million SDRs.[231]

The above amounts were then amended once again in October, 2000, and the amounts at present are:

(a) 4 510 000 SDRs for a ship not exceeding 5 000 tonnes; and
(b) for a ship in excess of 5 000 tonnes – 4 510 000 SDRs together with 631 SDRs for each additional tonne of its tonnage in excess of 5 000 tonnes up to a maximum of 89 770 000 SDRs.[232]

As can be seen from the above trend, the limitation amounts have to be upgraded constantly to account for inflation and also to keep up with changing circumstances. An example of changing circumstances is the advancement of technology. Technological development is far more advanced today than it was in 1969 or even 1992 which could make it easier to detect certain environmental damage or easier to ascertain an accurate estimated amount of restoration which could not be done a few years ago.

Lastly, it is important to note that liability was channelled more narrowly to the shipowner to avoid various claims being made outside the CLC as was the case with the *Amoco Cadiz*.[233]

[230] Article V (9)(a) of the 1992 CLC.
[231] Article V (1)(a)-(b) of the 1992 CLC.
[232] Article V (1)(a)-(b) of the 1992 CLC.
[233] Tan (n144) (2006); see 4.4 above pg 17-18.

2.5 Formalising the channelling of liability: the Fund Convention and its protocols

The 1971 Fund Convention was updated by a protocol in 1992 and will, therefore, be discussed only minimally with the main focus in this part being the 1992 Fund Convention. Many of the general provisions of the conventions have, however, been left untouched and the discussion below should be construed as applicable to both conventions. Any changes or differences will be specifically pointed out.

The preamble of the 1971 Fund convention acknowledges that the CLC is not sufficient on its own, and it aims to provide further adequate compensation to victims of oil pollution. It further expresses the view that "the economic consequences of oil pollution damage resulting from the escape or discharge of oil carried in bulk at sea by ships should not exclusively be borne by the shipping industry but should in part be borne by the oil cargo interests".[234] The aims set out in the 1992 Fund convention are on a par with these aims.[235] The Fund was named the international oil pollution compensation fund (IOPC Fund) but the name was later amended to the "IOPC fund 1992" (the Fund).[236] The Fund is a legal entity capable of suing and being sued in its own right, with the director of the fund being its legal representative.[237] The scope of the 1971 Fund convention was limited to pollution damage caused and preventive measures taken on the territory and territorial sea of a contracting state.[238] This was, however, extended by the 1992 Fund convention to include pollution damage in the EEZ or an equivalent designated area of not more than 200 nautical miles from the baselines and to preventive measures wherever they may be taken.[239]

[234] Hill (n200) (2003) 428.
[235] Hill (n200) (2003) 437.
[236] Article 2(1) of the 1971 Fund convention; Article 3(1) of the 1992 Fund convention.
[237] Hill (n200) (2003) 428, 438.
[238] Ibid.
[239] Article 3(a)-(b) of the 1992 Fund convention.

2.5.1 Fundamental features of the fund

The fund may be used for compensation for pollution damage in the following instances:

(a) where no liability for the damage arises under the CLC;
(b) where the shipowner is financially incapable of meeting his/her full obligations under the CLC in full, and any financial security that may be provided is insufficient to satisfy the claims for compensation for the damage; and
(c) where the damage exceeds the shipowner's liability under the CLC.[240]

Pollution damage includes expenses reasonably incurred by the owner to undertake voluntary preventive measures, and, therefore, this may be included in the compensation amount.[241] The 1971 Fund convention allowed not only for compensation but also for indemnification to shipowners and their guarantors or insurers.[242] The indemnification to shipowners and their guarantors was for a portion of the amount payable under the 1969 CLC in an attempt to relieve the "additional financial burden" imposed on them.[243] This was referred to as 'roll-back relief' and it is now purely of historical interest since it was completely abolished in the 1992 Fund convention.[244]

2.5.1.1 Contributions

Contributions shall be made to the fund by any person from a contracting state who receives a total quantity of contributing oil which exceeds 150 000 tonnes.[245] If the aggregate amount of such persons contributing oil, together with an associated person's (i.e. subsidiary) oil, exceeds 150 000 tonnes then such persons shall make contributions.[246]

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[240] Article 4(1)(a)-(c) of the 1992 Fund convention.
[241] Ibid.
[242] Hill (n200) (2003) 428-429.
[243] Ibid.
[244] Ibid.
[245] Article 10(1) of the 1992 Fund convention; Hill (n200) (2003) 439.
[246] Article 10(2)(a)-(b) of the 1992 Fund convention.

Contributing oil is crude oil and fuel oil, both of which are defined in article 1 of the 1971 and 1992 Fund Conventions.[247]

2.5.1.2 Exceptions

If the Fund proves that the pollution damage resulted from an act of war, hostilities, civil war or insurrection, or was caused by oil which had escaped or been discharged from a warship or other ship owned or operated by a state and used only on government non-commercial service, then the Fund would not incur obligations.[248] In addition, no compensation would be paid where the claimant could not prove that the damage had resulted from an incident involving one or more ships.[249] If the Fund proves that the pollution damage resulted entirely or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the fund may be exonerated wholly or partially from its obligation to pay compensation to such person.[250] There will, however, be no exoneration of the fund with regard to preventive measures.[251]

2.5.1.3 Limitations

Article 4(4) of the 1971 Fund convention limited the fund's obligation to 450 million francs.[252] It also, however, made provision for a higher amount should future circumstances justify it, and this amount should in any event not exceed 900 million francs.[253] The 1971 Fund convention used the outdated currency of francs; the 1992 Fund convention followed the example of the 1992 CLC and adopted the currency of SDRs. In 1992 the fund was obliged to pay a maximum amount of 135 million SDRs, this amount being

[247] Hill (n200) (2003) 439.
[248] Article 4(2)(a) of the 1992 Fund convention.
[249] Article 4(2)(b) of the 1992 Fund convention.
[250] Article 4(3) of the 1992 Fund convention.
[251] Ibid.
[252] Hill (n200) (2003) 429.
[253] Ibid.

inclusive of the amount incurred under the 1992 CLC.[254] In October 2000, the IMO started to realise that this limit would need to be changed to account for inflation and other circumstances, and a resolution was adopted by the IMO which increased this limit to 203 000 000 SDRs.[255]

As in the case of the CLC and its many protocols, as time passed, the circumstances called for an extra tier of compensation. This third-tier is provided in the 2003 protocol to amend the 1992 Fund convention (2003 Supplementary Fund).[256] The preamble of the 2003 Supplementary Fund notes that the maximum compensation provided for in the 1992 Fund convention might be insufficient in certain circumstances.[257] It further believes that the 2003 Supplementary Fund should seek to ensure that victims of oil pollution damage are compensated in full for their loss or damage.[258] As such, the compensation amount was increased in comparison to the 1992 Fund convention. It now holds that the total amount payable by the 2003 Supplementary Fund together with the amount recoverable from the 1992 CLC and 1992 Fund convention must not exceed 750 million SDRs.[259]

2.6 Conclusion

In general, the 1969 CLC was a revolutionary regime and a shift away from the old international position which was fraught with uncertainty and a lack of regulation. As time passed, however, its effectiveness was tested through its ability to handle subsequent oil spill incidents adequately. After some years, it became evident that certain changes had to be made to this regime. These changes were provided for in a protocol of amendment in 1992 which was prompted by the *Amoco Cadiz* in 1978 and the *Exxon Valdez* in 1989.

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[254] Hill *op cit* (n177) 438.
[255] IMO, Legal Committee, Resolution LEG.2(82), 18 October 2000 (see full citation in bibliography).
[256] The preamble of the 2003 supplementary fund.
[257] Ibid.
[258] Ibid.
[259] Article 4(2)(a) of the 2003 supplementary fund.

The standard of care adopted in this regime was strict liability which makes the responsible person automatically liable for oil pollution damage without proof of fault. This form of liability works particularly well in cases such as the present where the specific activity is risky and the substance concerned is inherently harmful to the environment. The imposition of strict liability was seen as an innovative measure at the time, and at present it is regarded as an effective tool as it also has the ability to encourage compliance with regulatory measures for ships in order to decrease the chances of oil spills and accidents.

The 1969 CLC applied only to unladen tankers and accidental damage within the territory and territorial sea of an affected state. The 1992 CLC, however, extended the scope of application to include damage caused within a state's EEZ and to preventive measures taken anywhere, including the high seas. The substance covered by this regime is restricted to oil, and the definition of oil has been made more specific in the 1992 CLC to assist with the practical implementation of the regime. The 1969 CLC fell short of protection over a state's EEZ since this zone was only created in the UNCLOS in 1982 and thus this was rectified in 1992.

The definition of pollution damage in the 1969 CLC was vague and created practical inconsistencies. The definition was then amended in the 1992 CLC but it is still not free from fault. The 1992 CLC sought rectification of these inconsistencies and thus made it clear that pure environmental damage could not be claimed. However, the extent of environmental costs that may be claimed still remains unclear.

The responsible person in the case of oil pollution damage caused by ships is the shipowner and the strict liability of a shipowner may be excluded only in terms of the following defences - an unavoidable event occurred, if the accident was caused by the intent of a third party, or the accident was caused by a negligent government in its duty to maintain navigational aids.

In order for the system to be economically operable, liability ceilings are used. These limits, however, often fall short of total damages and are among the features that have received the most attention owing to the constant need to increase them to account for inflation and other circumstances. This, in turn, puts the efficiency of liability ceilings in question. The liability ceilings may, however, be excluded if it is proven that pollution damage was caused by the shipowner's intentional or reckless personal act or omission.

Finally, the channelling of liability is a very important aspect of this regime. Compulsory insurance is imposed on all ships that carry more than 2000 tonnes of oil. The risk of oil spills will increase with the amount of oil carried and, thus, a threshold has been set. Spills caused by ships carrying less than 2000 tonnes will be covered wholly or partially by the fund. The fund also covers cases in which the shipowner cannot fully compensate. The oil industry contributes to the fund to achieve this channelling of liability. The supplementary fund was added as the third tier to this regime.

The international regime has managed to keep up to a certain extent with developments and changing circumstances through protocols of amendment which have primarily addressed problems that have arisen in practice. Save for the limitations posed on environmental damage and pure environmental damage, the regime adequately addresses compensation for economic loss to individuals and states. Whilst recognising that some improvement needs to be made with regard to recoverable environmental damage, it is also noted that, in order for this civil liability regime to continue working effectively, it cannot be over-excessive and the striking of a balance is of importance.

CHAPTER 3: A REVIEW OF THE SOUTH AFRICAN CIVIL LIABILITY AND COMPENSATION REGIME GOVERNING OIL POLLUTION CAUSED BY SHIPS

3.1 Introduction

As has been illustrated in the previous chapter, 1969 CLC and the 1971 Fund convention formed the framework of the international regime governing oil pollution civil liability, which SA enacted into domestic law in 1981 through the MPA. The aforementioned conventions were, however, amended by two protocols in 1992 that now constitute the 'new' international regime.[260] SA subsequently acceded to the 1992 CLC and the 1992 Fund convention on 1 October 2005.[261] The updated international regime was, however, domestically enacted only eight years later.[262] This legal reform was brought about by: the Merchant Shipping (Civil Liability Convention) Act 25 of 2013 ("MSCLC Act"); the Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013 ("the IOPC Fund Act"); the Merchant Shipping (International Oil Pollution Compensation Fund) Administrations Act 35 of 2013 ("Administrations Act"); and the Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act 36 of 2013 ("Contributions Act").

The aim of this chapter is to establish what SA's legal regime entails following the enactment of these laws. The MSCLC Act and the IOPC Fund Act will be analysed according to the same broad themes of a civil liability regime. A brief background is provided as a starting point.

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[260] Liability and Compensation http://www.iopcfunds.org/uploads/tx_iopcpublications/Text_of_Conventions_e.pdf (accessed 26.04.2014).

[261] CLC and Fund http://www.gard.no/ikbViewer/Content/72868/CLC%20compilation.pdf (accessed 26.04.2014).

[262] SA tables global oil http://www.iol.co.za/scitech/science/environment/sa-tables-global-oil-spill-pacts-1.1561972#.U1jqo1KKDIU (accessed 24.04.2014).

3.2 Background

Prior to the suite of statutes enacted to fulfil SA's international obligations and domesticate the 1992 CLC and 1992 Fund convention, civil liability for oil pollution damage in SA was primarily dealt with in the Marine Pollution (Control and Civil Liability) Act 6 of 1981 (MPCCLA). The relevance of the MPCCLA is the fact that it was not wholly repealed following the enactment of the new merchant shipping acts. In exploring SA's existing regime, it is therefore necessary to address this and determine the practical effects thereof.

3.3 The South African regime on civil liability for oil pollution

3.3.1 Marine Pollution (Control and Civil Liability) Act 6 of 1981 ('MPCCLA')

The starting point is to state the object of the MPCCLA. The object is to protect the marine environment by providing for the prevention and combating of pollution of the sea by oil and other harmful substances and, furthermore, to provide for liability in certain respects of loss or damage caused by the discharge of oil from ships, tankers and offshore installations.[263] The importance of specifying ships, tankers and installations is to differentiate this pollution from bunker oil pollution, which is commonly known as fuel oil or furnace oil of ships and is dealt with in terms of a different set of laws.[264]

In addition, for the purposes of this section, the writer will refer only to ships, but it should be known that this term intends to include tankers and offshore installations.

[263] The long title of the MPCCLA.
[264] Verwey MPE *Liability for oil pollution damage: an Anglo-South African comparison* Master's Thesis North West University (2005) 8.

The MPCCLA provides for both criminal and civil liability[265] by creating a prohibition on the discharge of oil from any ship.[266] If oil is discharged from a ship then the master of the ship, or, if he is not the owner, then he, together with the owner of such ship, shall be guilty of an offence.[267] The type of liability created by this provision is strict liability.[268] Strict liability in terms of criminal law is liability imposed by a statute without the necessity of proving criminal intent, and it is intended to forbid certain acts.[269] There are three defences available to the owner or master facing criminal liability[270], but these will not be discussed since the focus of this paper is civil liability.

The MPCCLA makes provision for liability for loss, damage or costs caused by the discharge of oil.[271] In this instance of civil liability, strict liability is imposed on the owner of the ship only at the time of the incident or at the time of the first occurrence of an incident that consists of a series of occurrences and not on the master of such ship.[272] This section states that the owner shall be liable for any loss or damage which results in the republic: by pollution from oil discharge;[273] the costs for any measures taken by the Authority for the purposes of reducing or preventing loss or damage caused as a result of the discharge of any oil;[274] and any loss or damage caused by such measures taken.[275] The 'authority' referred to in this section is the South African Maritime Safety Authority ('SAMSA').[276]

As is foreseeable, Section 9(3) makes provision for three defences that may exclude an owner's liability. This section states that the owner shall not be liable where the discharge or anticipated discharge of oil resulted from an act of war, hostilities, civil war, insurrection or an exceptional, inevitable and

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[265] Ibid 24.
[266] S 2(1) of the MPCCLA.
[267] Verwey (n264) (2005) 24.
[268] Verwey (n264) (2005) 24
[269] BusinessDictionary http://www.businessdictionary.com/definition/strict-liability.html (accessed 08.05.2014).
[270] Verwey (n264) (2005) 25; S 2(1)(a)-(c) of the MPCCLA.
[271] S 9 of the MPCCLA.
[272] Verwey (n264) (2005) 25; s 9(1) of the MPCCLA.
[273] S 9(1)(a) of the MPCCLA.
[274] S 9(1)(b) of the MPCCLA.
[275] Verwey (n264) (2005) 25; s 9(1)(c) of the MPCCLA.
[276] S 1(1) of the MPCCLA.

irresistible natural phenomenon[277] or by an act or omission by any person, other than the owner or a servant/agent of the owner, with intent to cause damage,[278] or was wholly caused by the negligence or wrongful act of any government or authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.[279]

The MPCCLA, furthermore, provides for the joint and several liability of an owner of a ship involved in an incident together with another ship, where the liability for the damage, loss or costs cannot be reasonably separated.[280] In addition, the MPCCLA allows for the limitation of an owner's liability where he/she incurs liability as a result of an incident which occurred without such owner's actual fault or privity.[281]

Where an owner's liability is subject to limitation, the aggregate of all amounts payable by such owner in respect of such liability shall not exceed the following:
(i) in the case of a ship or a tanker, 133 units of account for each ton or 14 million units of account, whichever is the lesser; and
(ii) in the case of an offshore installation, a sum determined by the Minister but not exceeding 14 million units of account.[282]

The MPCCLA clarifies that "unit of account" means a Special Drawing Right (SDR) as defined by the International Monetary Fund, and that the value of such SDR in South African currency shall be determined in terms of the valuation given by the International Monetary Fund at the time when payment is made, or at the time when a section 12(1) application is considered by the court.[283] The current value of 1 SDR is the equivalent of

[277] Verwey (n264) (2005) 25; s 9(3)(a) of the MPCCLA.
[278] S 9(3)(b) of the MPCCLA.
[279] S 9(3)(c) of the MPCCLA.
[280] S 9(4) of the MPCCLA.
[281] S 9(5) of the MPCCLA.
[282] S 9(5)(b) of the MPCCLA.
[283] S 9(8)(a) of the MPCCLA.

R16, 0659.[284] So, in terms of the MPCCLA, a shipowner's liability will be capped at R 2 136 per tonne or R 224 million rand, whichever is lesser.[285]

It is common knowledge that the limitation amounts in terms of Section 9(5) are insufficiently low and would not be able to cover or deal with major oil spills effectively, and, in such a case, the SA government would have to pay the remaining costs.[286] The reason for this problem is that the MPCCLA uses amounts present in the 1969 CLC and does not take into account the 1992 protocol.[287] This is one problem that should be resolved in terms of the CLC Act 25 of 2013.

The MPCCLA further requires shipowners to take out compulsory insurance against liability for loss, damage or costs.[288] It provides that no tanker carrying more than 2 000 long tonnes of oil in bulk as cargo may enter or leave a port in the Republic, or arrive at or lease an offshore installation in the territorial waters, unless it carries on board a valid certificate stating that a contract of insurance or other financial security exists for an amount not less than an amount fixed in accordance with section 9(5).[289] Section 9(5) provides liability ceilings as follows, 133 SDRs for each ton of tonnage or 14 million SDRs, whichever is lesser. If a tanker is in contravention of these provisions, the master and the owner shall be guilty of an offence.[290] So what essentially happens in practice is that shipowners can save on insurance costs owing to the fact that they can be insured for up to $500 million but are statutorily obliged to much less.[291]

Up to this point, the discussion has been about the 'old' SA regime governing the civil liability in marine oil pollution. It is clear that the MPCCLA was insufficient and outdated since it implements the 1969 CLC and was the

[284] *As at 09/05/2014 International Monetary Fund http://www.imf.org/external/np/fin/data/rms_sdrv.aspx (accessed 09.05.2014).
[285] *SDR rate multiplied by the total units of account.
[286] Verwey (n264) (2005) 26.
[287] Ibid.
[288] Verwey (n264) (2005) 26; s 13 of the MPCCLA.
[289] Verwey (n264) (2005) 26; s 13(1) of the MPCCLA.
[290] S 13(6) of the MPCCLA.
[291] Verwey (n264) (2005) 26.

main piece of legislation governing oil pollution in SA even years after the international regime had been improved in terms of the 1992 CLC. Much needed reform was brought about to address this gap in 2013 which sought to give domestic effect to both, the 1992 CLC and the 1992 Fund Convention, and is examined here below.

3.3.2 The Merchant Shipping (Civil Liability Convention) Act, 2013

Firstly, the object of this act is to enact the 1992 protocol of amendment (1992 CLC) into law and provide for matters connected therewith.[292] Secondly, it is important to note that the MSCLC Act repeals sections 13, 14 and 15 of the MPCCLA which addresses compulsory insurance and authoritative certificates and replaces them with Sections 8 to 14 of the MSCLC Act.[293] The old MPCCLA and the new MSCLC act largely regulate similar issues; the MPCCLA is, however, not fully repealed. This means that there is a general overlap between the relevant acts which may cause potential conflict or uncertainty. It is presumed that the courts will allow the MSCLC Act to prevail since it gives effect to the most recent international regime. The manner, in which the MSCLC act was enacted, however, is not ideal in the light of the potential uncertainty it creates.[294] Furthermore, the enacting of the 1992 protocol wholly into SA's domestic law creates the risk of inserting inappropriate or problematic material into our legal system.[295] Apart from these procedural issues, an analysis of the provisions of the 1992 protocol in conjunction with the substantive provisions contained in the MSCLC Act is needed to assess the changes to the South African regime. However, to avoid repetition of the discussion of the international regime, this chapter will simply contain a brief overview of same.

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[292] The preamble of the CLC act.
[293] S 17 and sch of the MSCLC act.
[294] Statement by the Maritime Law Association of South Africa – full statement available at: www.pmg.org.za/files/130814marine.pdf (accessed 25.06.2014).
[295] Ibid.

3.3.2.1 Standard of care

Since the 1992 CLC was incorporated wholly into South African law, the provisions imposing strict liability on the shipowner are applicable to the South African regime.[296]

3.3.2.2 Scope of application

The MSCLC Act follows the general structure of South African legislation, causing it to have introductory provisions relating to the application of the act. These provisions provide that the 1992 CLC has the "force of law in the republic" and is also applicable to the Prince Edward Islands which form part of South African territory.[297] The Maritime Law Association of SA raised the issue that this wording is inappropriate to enactments intended to have extra-territorial application.[298]

Three things must be addressed in order to fully determine the scope of application, being the applicable activity, the substance covered, and the geographical scope.

The activity to which the MSCLC Act applies is, broadly, the shipping of oil. Therefore, upon the escape or discharge of oil from such a ship, the MSCLC Act will become applicable.[299]

The 1992 CLC is limited to oil as a polluting substance.[300] The MSCLC Act is accordingly applicable if the oil causes pollution damage as defined in the 1992 CLC.

Finally, the geographical scope of the act is somewhat confusing owing to the unfortunate wording used in the MSCLC Act. The MSCLC Act

[296] Article III (1)-(3) of the 1992 CLC.
[297] Sections 2(1) and 4 of the MSCLC act.
[298] Statement by the Maritime Law Association of South Africa – full statement available at: www.pmg.org.za/files/130814marine.pdf (accessed 25.06.2104).
[299] Articles I (1) and I (6) of the 1992 CLC.
[300] Article I (5) of the 1992 CLC; see fn 96 chap 2

constantly refers to 'in the republic'; the provisions in the 1992 CLC, however, provide that the convention is applicable to pollution damage in the territory, territorial sea and EEZ of a contracting state and to preventive measures, *wherever* they are taken (own emphasis).[301] Since the 1992 CLC was enacted wholly into South African law, the MSCLC Act should apply in circumstances where preventive measures are taken beyond SA's territory in an incident involving SA as a contracting state. This issue was, however, brought to the attention of the government by the Maritime Law Association of SA. The impractical wording was, nevertheless, retained in the final version of the MSCLC Act.

3.3.2.3 Definition of damage

As has been noted previously, the importance of a solid definition of pollution damage rests on the fact that the liability of the shipowner is dependent on what is considered to be pollution.

According to the 1992 CLC, "Pollution damage" means:

(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken; and

(b) the costs of preventive measures and further loss or damage caused by preventive measures.[302]

As noted in the previous chapter, costs for environmental damage were restricted when the definition of damage was amended in the 1992 Fund convention. This amended definition makes it clear that pure environmental

[301] Article II (a)-(b) of the 1992 CLC.
[302] Article I (6)(a)-(b) of the 1992 CLC.

damage may not be claimed. The extent of environmental costs that may be claimed is, however, still unclear.

By wholly enacting the 1992 CLC into SA law, the MSCLC Act fails to address these issues which have been problematic in the international context for many years. It is proposed in this dissertation that, since environmental damage is such an important aspect of this regime, this aspect could easily have been clarified in the MSCLC Act by the addition of the same standards and measures that are used in the National Environmental Management Act 107 of 1998 (NEMA) and/or other SA environmental acts. This would be in line with the approach adopted in UNCLOS which allows contracting states to adopt measures which are "stricter than generally accepted international standards".[303] Such provision would have made this regime stronger than it is from an environmental law perspective.

3.3.2.4 Responsible Person

The 1992 CLC provides that the owner of a polluting ship is the responsible person in the case of oil pollution damage.[304] It further provides that the owner is the "person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship."[305] In the case, however, of a ship owned by a State, and operated by a company which is registered as the ship's operator in that State, the owner shall mean such a company.[306]

In addition to this, no claim for compensation may be made against the servants and agents of the owner, members of the crew, the pilot or any other person who performs services for the ship, any charterer, manager or operator of the ship, any salvage operator, any person taking preventive

[303] Boyle (n123) (1985) 79..
[304] Article III (1) of the 1992 CLC.
[305] Article I (3) of the 1992 CLC.
[306] Ibid.

measures, and the servants and agents of some of these excluded persons.[307]

Other entities or persons may be indirectly responsible for oil pollution damage caused by ships, through the channelling of liability which facilitates this possibility. These are the entities which provide insurance cover to shipowners and are commonly known as protection and indemnity clubs (P&I clubs).[308]

3.3.2.5 Channelling of liability

3.3.2.5 (a) Compulsory Insurance

Article VII (1) of the 1992 CLC states that the owner of a ship registered in a contracting state and carrying more than 2000 tons of oil in bulk as cargo must maintain insurance or financial security to the amount of the limits prescribed in article V. For enforcement purposes, every ship entering or leaving SA must have on board an insurance certificate which contains the information specified in article VII of the 1992 CLC and which is issued by the appropriate authority.[309] The authority for all ships registered in SA is SAMSA.[310] Ships of non-contracting states must maintain the same level of insurance in order to avoid unfair advantage.[311] Warships and government or state-owned ships are, however, exempt from compulsory insurance.[312]

It is important to administer the requirement of compulsory insurance in a strict manner which imposes sanctions for non-compliance owing to the vast damage that an oil spill incident can cause. A ship entering or leaving a

[307] Article III (4) of the 1992 CLC
[308] Dillon (n204) (1983) 141.
[309] Article VII (2) of the 1992 CLC.
[310] S 1 of the MSCLC act.
[311] Gurdial Singh Nijar *et al* 'Developing a liability and redress regime under the Cartagena protocol on biosafety' *Institute for Agriculture and Trade Policy* 2000 37; Article VII (10) – VII (12) of the 1992 CLC.
[312] Ibid.

port or terminal in the republic, therefore, without an insurance certificate on board makes the master and owner guilty of an offence and liable, on conviction, to a fine not exceeding R250 000.[313] If a South African registered ship attempts to do the same outside of the republic, its master and owner shall also be guilty and liable to a fine not exceeding R250 000.[314] An exception to the above two offences is made in section 11(3) of the MSCLC Act which states that, if a valid insurance certificate is in place but is just not on board such ship, the fine shall not exceed R20 000.

Article VII (8) of the 1992 CLC allows a claim to be made directly against an insurer or financial security provider. In such a case, the defendant may avail himself of the defences that would have been available to the shipowner. The defendant may, furthermore, limit his liability in accordance with article V.[315]

One of the downfalls of the provisions implementing compulsory insurance is that it does not affect ships carrying less than 2000 tonnes of oil. As we have seen, this gap is addressed by the 1992 Fund convention which provides for insurance claims that fall out of the scope of the 1992 CLC.[316]

3.3.2.5 (b) The Merchant Shipping (International Oil Pollution Compensation Fund) Act 24 of 2013 ("the IOPC Fund act")

The IOPC Fund Act adopts the same approach as the MSCLC Act by enacting the 1992 Fund convention wholly into SA law.

As mentioned in Chapter 2, there are three main instances in which the 1992 Fund convention may be utilised. These instances are: compensation for pollution damage where no liability for the damage arises under the CLC; where the shipowner is financially incapable of meeting his full obligations

[313] S 11(1) of the MSCLC act.
[314] S 11(2) of the MSCLC act.
[315] Article VII (8) of the 1992 CLC.
[316] Bongaerts and Bièvre 1987 *The Geneva papers on Risk and Insurance* 12 (43) 148.

under the CLC or where any financial security that may be provided is insufficient to satisfy the claims for compensation for the damage and thirdly, where the damage exceeds the shipowner's liability under the CLC.[317]

All contracting states that receive a total quantity of contributing oil which exceeds 150 000 tonnes shall make contributions to the Fund.[318] Contributing oil is crude oil and fuel oil, both of which are defined in article 1 of the 1992 Fund convention as follows:[319]

> (a) "Crude Oil" means any liquid hydrocarbon mixture occurring naturally in the earth whether or not treated to render it suitable for transportation. It also includes crude oils from which certain distillate fractions have been removed (sometimes referred to as "topped crudes") or to which certain distillate fractions have been added (sometimes referred to as "spiked" or "reconstituted" crudes).[320]
>
> (b) "Fuel Oil" means heavy distillates or residues from crude oil or blends of such materials intended for use as a fuel for the production of heat or power of a quality equivalent to the "American Society for Testing and Materials' Specification for Number Four Fuel Oil (Designation D 396-69)", or heavier.[321]

As mentioned earlier, it is of great importance to have accurate and clear definitions in environmental matters since it is often a highly technical method that is used to expunge pollution damage. The abovementioned definitions are detailed and they contain clearly defined parameters which ensure less confusion and inconsistency as is the case with the definition of pollution damage in the 1992 CLC.

In section 5 of the IOPC Fund Act, the Fund is recognised as a juristic person who is represented by the director of the Fund. It should also be

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[317] Article 4(1)(a)-(c) of the 1992 Fund convention; see chap 2 fn 152.
[318] Article 10(1) of the 1992 Fund convention; Hill *op cit* (n177) 439.
[319] Hill op cit (n177) 439.
[320] Article 1(3)(a) of the 1992 Fund convention.
[321] Article 1(3)(b) of the 1992 Fund convention.

noted that the scope of application of the 1992 Fund convention is the same as that of the 1992 CLC.[322]

There are, furthermore, three instances in which the Fund will incur no obligations:

- If the pollution damage resulted from an act of war, hostilities, civil war or insurrection or was caused by oil which has escaped or been discharged from a warship or other ship owned or operated by a state and used only on government non-commercial service;[323]
- If the claimant cannot prove that the damage resulted from an incident involving one or more ships;[324]
- If the Fund proves that the pollution damage resulted entirely or partially either from an act or omission done with the intent to cause damage by the person who suffered the damage or from the negligence of that person, the fund may be exonerated wholly or partially from its obligation to pay compensation to such person.[325] There will, however, be no exoneration of the fund with regard to preventive measures.[326]

Finally, the Fund is also subject to limitation amounts to ensure its continuity. According to the Supplementary Fund protocol, which is the latest amendment to the 1992 Fund convention, the aggregate amount of compensation payable for any one incident shall be limited to 750 million SDRs together with the total compensation paid out in terms of the 1992 CLC.[327]

3.4 The Fund's application in SA

The enactment of the international oil pollution compensation regime into domestic law is very recent and, as a result, literature regarding the

[322] Article 3 of the 1992 Fund convention.
[323] Article 4(2)(a) of the 1992 Fund convention.
[324] Article 4(2)(b) of the 1992 Fund convention.
[325] Article 4(3) of the 1992 Fund convention.
[326] Ibid.
[327] Article 4(2)(a) of the Supplementary Fund protocol.

practical effect on the SA regime is limited. The writer has, therefore, resorted to making use of the minutes of committee meetings of the National Council of Provinces (NCOP). According to a meeting held in October 2013, the fund is based in the United Kingdom (UK) and any claims against the fund are to be lodged in London.[328] SA, furthermore, owes money to the fund due to the fact that SA was obliged internationally to start making contributions to the fund in 2005 upon ratification of the relevant convention yet no contributions were made by SA since 2005.[329] Lastly, this meeting clarified that, while shipping companies are responsible for contributing levies to the fund, such money cannot be directly transferred without being accounted for and that, therefore, the South African Revenue Services (SARS) is to assist in the collection of monies and payment to the fund.[330] This process was facilitated by the Contributions Act which came into effect in 2013.

The Contributions Act provides that any person who receives more than 150 000 metric tons of contributing oil during the tax period is liable to pay levies to the Commissioner of SARS.[331] 'Contributing oil' means crude oil and fuel oil, and the tax period refers to one calendar year.[332]

The minister is to determine, and publish in a government gazette notice, the rate of the levy for a particular tax period after taking into account:

(a) The contributions calculated and invoiced by the director of the Fund in terms of article 12 of the 1992 Fund Convention in respect of the particular tax period; and [333]

(b) The volume of contributing oil imported in the tax period.[334]

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[328] https://pmg.org.za/committee-meeting/16461/ (last accessed 06/07/2015).
[329] Ibid.
[330] Ibid.
[331] Section 2(1) of the Contributions Act.
[332] Section 1 of the Contributions Act.
[333] Section 3(1)(a) of the Contributions Act.
[334] Section 3(1)(b) of the Contributions Act.

The Minister must, furthermore, specify the date on which the levy is due and payable.[335]

Finally, the government must pay to the Fund the amount of contributions invoiced by the director of the Fund, as well as interest on any unpaid amounts to the fund.[336] The total amount owed to the fund is a direct charge against the national revenue fund, and the Commissioner of SARS is authorised to address matters relating thereto.[337]

This system created by the various acts which make up SA's oil pollution regime seems logically sound and well thought out. One must once again, however, reiterate that proper compliance and enforcement measures are needed to ensure that this system is efficient.

3.5 Available defences

The available defences to a shipowner in SA are exactly the same as those provided for in the international regime. For ease of reference, however, the applicable provisions are reproduced here. Article III (1) of the 1969 CLC and the 1992 CLC makes the shipowner strictly liable, subject to the exceptions provided for in paragraph 2 and 3. The liability of the shipowner will be excluded if the owner proves that the damage:

- Resulted from an act of war, hostilities or civil war or a natural phenomenon of an exceptional, inevitable character;[338]
- Was caused wholly by an act or omission with intent to cause damage by a third party;[339] or
- Was caused wholly by the negligence or wrongful act of a government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.[340]

[335] Section 3(2) of the Contributions Act.
[336] Section 4(1) of the Contributions Act.
[337] Section 4(2)-(3) of the Contributions Act.
[338] Article III (2)(a) of the 1969 CLC and the 1992 CLC.
[339] Article III (2)(b) of the 1969 CLC and the 1992 CLC.

A possible inadequacy in the wording of this provision was highlighted in the Swedish case which involved the Soviet tanker, *Tsesis*, which struck a submerged rock in 1977.[341] The shipowner sought to prove that the Swedish government was at fault for being negligent in its duty to maintain '*other navigational aids*' by failing to represent such rock on a chart which would have allowed the shipowner to escape liability.[342] The Supreme Court of Sweden eventually found in favour of the shipowner, but there was a division of opinion in the Supreme Court which illustrates the difficulty of these issues.[343] The conventions, furthermore, do not effectively address the liability of governmental authorities, and a shipowner's liability will be determined according to right of recourse available in domestic laws.[344] This, and the vague and ambiguous wording within the conventions, makes it almost impossible to ensure a uniform application of the international conventions.

Finally, article III (3) provides that, if the owner proves that the damage was caused wholly or partially either from an act or omission with intent to cause damage by the person who suffered such damage, or from the negligence of such person, the owner may be fully or partially exonerated from liability.

3.6 Limitation of liability

The shipowner's right to limit his liability is one of the most controversial topics within the international oil pollution regime. Article V of the 1992 CLC stipulates limitation amounts in terms of which the shipowner may cap his liability. International trends, however, reveal that the limitation

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[340] Article III (2)(c) of the 1969 CLC and the 1992 CLC; the act must be in the exercise of their public function.
[341] Hill (n200) 2003 427.
[342] Ibid.
[343] C de la Rue and C B Anderson Shipping and the Environment 2nd ed 2009/2015 Routledge 102.
[344] Ibid.

amounts have constantly to be upgraded to account for inflation, as well as to keep up with changing circumstances.

The limitation amounts refer to units of account. The 1992 CLC explains that units of account refer to SDRs as set by the international monetary fund (IMF) and they are to be converted into national currency on the date of the constitution of the fund.[345] The calculation of the aggregate amount of limitation per incident was as follows:

(c) 3 million SDRs for a ship not exceeding 5 000 tonnes
(d) for a ship in excess of 5 000 tonnes, 3 million SDRs together with 420 SDRs for each additional tonne of its tonnage in excess of 5 000 tonnes up to a maximum of 59.7 million SDRs.[346]

The above amounts were amended in a protocol once again in October, 2000. The amounts at present are:

(c) 4 510 000 SDRs for a ship not exceeding 5 000 tonnes; and
(d) for a ship in excess of 5 000 tonnes, 4 510 000 SDRs together with 631 SDRs for each additional tonne of its tonnage in excess of 5 000 tonnes up to a maximum of 89 770 000 SDRs.[347]

The uncertainty herein lies in the fact that the wording which was used when enacting the 1992 CLC into SA law does not allow for an automatic enactment of further protocols to the 1992 CLC. In order to determine whether or not SA is entitled to use the latest liability ceilings enacted in October of 2000, one will have to enquire whether it has been published in the government gazette by the Minister as binding on the republic.[348]

[345] Article V (9)(a) of the 1992 CLC.
[346] Article V (1)(a)-(b) of the 1992 CLC.
[347] Article V (1)(a)-(b) of the 1992 CLC.
[348] Section 2(2) of the MSCLC act.

4. Conclusion

In the light of the fact that the conventions were enacted wholly into South African law, it would be repetitive of chapter two to comment on every component of the civil liability regime.

The scope of application of the South African civil liability regime for oil pollution brought about by the recent SA laws, should practically, not encounter any problems owing to the unfortunate wording used in the MSCLC Act. In the event of such problems, however, it is argued that the courts will give effect to the correct interpretation of the acts, that is in line with the international regime and the object of the acts.

The definition of ‘pollution damage’ could have been improved upon within SA’s regime instead of simply enacting it ‘as is’ into domestic law. In the light of the uncertainty the definition has created within the international regime, the writer suggests that SA should have amended this definition so as to include pure environmental damage and, therefore, provide a greater protection to the environment. Alternatively, this definition could have been merged with similar definitions as contained in NEMA so as to create some uniformity, even if only within the parameters of SA.

With regards to compulsory insurance, as well as the general application of the IOPC Fund Act, it is plausible to note that SA will need to ensure that the compliance and enforcement measures in place are effective and efficient. If one looks at the enforcement of environmental laws in SA in general, the picture created is that SA needs to do more to enforce the rules and regulations that are “paper perfect”.

CHAPTER 4: A CLOSER LOOK AT STATUTES OF GENERAL APPLICATION IN SOUTH AFRICA, HOW THEY MAY ASSIST IN IMPROVING THE CIVIL LIABILITY REGIME AND RECOMMENDATIONS

4.1 Introduction

The activity of maritime transportation is of an international nature and this justifies the necessity of having an international regime. Whether or not this regime is effective, however, depends on the implementation and co-operation within the many participating states. As discussed in Chapter 2, the great environmental threat posed by oil pollution, which surpasses human and geographical boundaries, mandated the need for a unified regime. In Chapter 3 we looked at new legislation which was enacted to bridge the gap in the South African civil liability regime. This chapter will address other South African legislation which indirectly forms part of the civil liability regime, by being generally applicable to environmental matters, with the purpose of ascertaining how this legislation may assist in improving the civil liability regime. Recommendations will be made where applicable and this dissertation will then come to a conclusion in Chapter 5.

4.2 The South African Civil Liability Regime for Oil Pollution Damage Caused by Ships

The previous chapter focused solely on the four civil liability acts which were enacted in December 2013 to give effect to the international conventions which make up the international regime; however, it is important to note that there are other laws in SA which may have a bearing on SA's civil liability regime and these are worth mentioning as a matter of relevance.

These are referred to as statutes of general application[349], namely, the Constitution of the Republic of South Africa Act 108 of 1996; the National Environmental Management Act (NEMA) known as the "umbrella convention" for SA's environmental laws; the South African Maritime Safety Authority Act 5 of 1998 (SAMSA Act); The Maritime Zones Act 15 of 1994 (MZA); The National Ports Act 12 of 2005 (NPA) and The Maritime Traffic Act 2 of 1981 (MTA). This is not an exhaustive list and the writer will only expand on the first three abovementioned statutes.

4.2.1 The Constitution of the Republic of South Africa Act, 108 of 1996 (The Constitution)

The Constitution is the highest and supreme law of SA, it is the founding document of SA and will thus always be of general application[350] to any South African regime. The importance of this statute lies in the fact that it contains in it fundamental human rights which must be respected and protected. Section 24 of the Constitution is two-fold; Section 24(a) states that everyone has the right to an environment that is not harmful to their health or well-being and secondly, Section 24(b) imposes a burden on the state to take legislative and other measures to: -

"(i) prevent pollution and ecological degradation;
(ii) promote conservation;
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."[351]

The elevation of the environmental right to a justiciable constitutional right means, that in the context of oil pollution, the courts may decide whether oil pollution caused by a shipping incident is harmful to a person's well being and whether the state to adequate measures to prevent pollution damage as required in Section 24(b).[352] However, a *lacuna* exists due to there being no

[349] Verwey (n264) (2005) 14.
[350] Ibid.
[351] Ibid; S24 of The Constitution.
[352] Verwey (n264) (2005) 15-16.

specific mention of oil pollution in the Constitution and the courts never having deliberated this right in the context of oil pollution.
It is recommended that the constitutional environmental right should be relied upon in a shipping incident case so as to allow the courts an opportunity to decide on the weight this right holds in the context of oil pollution and the extent to which it may be relied upon in the future. Furthermore, perhaps this right should have been mentioned in the preamble of the MSCLC Act to indicate its importance and it might be worthy of such provision being made in an amendment act.

4.2.2 The National Environmental Management Act 108 of 1997 (NEMA) – "The Umbrella Convention"

NEMA is a framework environmental act which contains general and innovative provisions relating to environmental management in SA. As such, it contains provisions that would be useful in the implementation, enforcement and improvement of the civil liability regime for oil pollution damage.[353]

One of the problem areas identified within SA's oil pollution regime is the fact that the international conventions were enacted wholly into domestic law, without regard for any problems those provisions may have presented in an international context. One example would be the definition of oil pollution damage[354] which was retained when this could have been an opportunity to improve on that definition and provide for pure environmental damage. [355]

NEMA broadly defines 'Pollution' as: "any change in the environment caused by -

(i) substances;
(ii) radioactive or other waves; or
(iii) noise, odours, dust or heat;

[353] The scope of this dissertation does not allow for the principles of NEMA to be thoroughly examined here.
[354] Refer back to Chapter 3.
[355] Refer Back to Chapter 2.

- emitted from any activity, including the storage or treatment of waste or substances, construction and the provision of services, whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or well-being *or on the composition, resilience and productivity of natural or managed ecosystems*, or on materials useful to people, or will have such an effect in the future (own emphasis)."[356]

The NEMA definition of "pollution" specifically makes provision for pure environmental damage to be accounted for as illustrated above. It is recommended that the MSCLC Act should be amended to include a more stringent definition of damage such as:

Proposed definition for "pollution damage" -
"*loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, which includes compensation for the impairment of the environment by any adverse effect to the composition and resilience of natural or managed ecosystems, where such impairment shall be equal to the actual costs for restoration of the marine environment.*"

The above proposed definition then accounts for pure environmental damage, as well as, eliminates the uncertainty surrounding the international definition with relation to "*reasonable measures of reinstatement actually undertaken or to be undertaken*". As mentioned in chapter 3[357], there is nothing in international law which precludes a state from adopting stricter measures, only that a state's laws cannot be less effective than generally accepted international rules.[358]

[356] Section 1 of NEMA.
[357] Refer back to Chapter 3.
[358] Boyle (n123) (1985) 354.

4.2.3 The South African Maritime Safety Authority Act 5 of 1998 (SAMSA Act)

The SAMSA Act was formed after the release of a report entitled 'Safe Ships, Cleaner Seas' by Lord Donaldson which contained recommendations which were described to be a wake-up call for industries concerned with the policing of sea routes and the pollution threats that states' face.[359] The act created the South African Maritime Safety Authority (SAMSA) and lists the following as SAMSA's objectives:

> (a) to ensure safety of life and property at sea;
> (b) to prevent and combat pollution of the marine environment by ships; and
> (c) to promote the Republic's maritime interests.[360]

This Act, in having one of its objectives the prevention and combating of pollution by ships, emphasises the importance of the role that SAMSA will play in the context of an oil pollution incident as there is a regulatory burden on them to generally regulate ships within SA marine and coastal waters to give effect to its objectives, as well as, the specific role they play by being referred to as the "Authority" in the recent civil liability legislation.[361]

The writer recommends that SAMSA should actively embrace its role in the context of oil pollution and work together with all other involved state bodies such as the Department of Transport (DOT), Department of Environmental Affairs and Tourism (DEAT), SARS and any subsequent bodies to compile a working document which harmonises the pollution laws pertaining to oil pollution damage, as well as, sets out a systematic and comprehensive plan on how to move forward in the implementation of the oil pollution laws. This document should furthermore address the issue of the outstanding amounts SA is owing to the Fund and formulate a method by which this can be paid

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[359] Hare J *Shipping Law and Admirality* 2 ed (2009) 329-340.
[360] Section 3 (a)-(c) of the SAMSA Act.
[361] Refer back to Chapter 3 pg 47

off as soon as possible to ensure that SA is practically covered should a major oil spill incident ensue.

4.3 Conclusion

The legislation of SA which is indirect or which plays a ‘secondary’ role in the context of oil pollution still holds an important position within the South African Civil Liability regime. It has the ability to direct the courts when deciding on interpretation problems, it indirectly places more importance on pollution prevention and safety measures and it can be used as an example when devising a plan for enforcement and implementation of pollution laws.

CHAPTER 5: CONCLUSION

5.1 Research Question Answered

In Chapter 1, the following question was posed: Is SA's civil liability regime consistent with, aligned with and adequate in light of, the international civil liability regime? The simple answer is yes. The South African regime is mostly consistent with the international regime since the enactment of the MSCLC Act, the IOPC Fund Act, the Contributions Act and the Administration Act in December 2013. However, whether this regime is adequate and effective is a slightly different state of affairs. The third chapter identifies the following problem areas present within the South African regime:

- The unfortunate wording in the MSCLC Act pertaining to the scope of application of the act which makes specific reference to the Republic of SA and unnecessarily creates uncertainty due to the fact that the international conventions also apply to marine waters outside of a state's territory;

- The fact that the 1992 CLC and the 1992 Fund Conventions were enacted wholly into our domestic law with no regard for the interpretive and practical problems which were encountered in various international incidents when relying on the provisions of the 1992 protocols;

- SA has not yet acceded to the Supplementary Fund Protocol which offers additional funds where the 1992 Fund is limiting or insufficient;

- The definition of damage was preserved even though it is fraught with uncertainty in practice. Such an important part of the regime should have been updated to account for uncertainties and improve on the problems in the international regime itself. The definition and parameters of pollution damage forms the basis of liability for a ship owner and should thus be considered of high importance;

- Finally, and most critical of the problem areas, is the money which SA is owing to the international Fund. If payment is not made as soon as possible for the outstanding contributions, there might be difficulties and delays with claims lodged against the Fund in the event of an oil pollution incident.

Therefore the comprehensive answer to the abovementioned research question is two-fold; yes the South African regime is consistent with the international regime; and No it is not seen to be fully adequate in light thereof as the international Fund is not yet available to SA for lack of contributions over the years, as well as, failure to accede to the 2003 Supplementary Fund protocol by SA.

5.2 The International Civil Liability Regime

The international regime is made up of the framework convention UNCLOS, the 1992 CLC, the 1992 Fund Convention and the 2003 Supplementary Fund Protocol. Having regard for the history and development of the international regime which was prompted by various oil spill incidents such as the Torrey Canyon, Amoco Cadiz and Exxon Valdez; this regime was revolutionary in many respects. It gave effect to the ‘polluter pays’ principle by placing liability on the ship owner, it kept up with changing circumstances through amending protocols and it adequately addresses compensation for economic loss to individuals and states. Whilst recognising that some improvement needs to be made with regard to recoverable environmental damage, it is also noted that, in order for this civil liability regime to continue working effectively, it cannot be over-excessive and the striking of a balance is of importance.

Chapter 2 addressed factors or elements which are necessary for the regime to be effective. These factors are:

1. A standard of care which is necessary to ensure uniformity and standard regulations;
2. A scope of application to determine the extent to which rules will be applicable in relation to an activity, substance and geographical boundary.

An important aspect of the scope in the international regime is the definition of ship which limited the regime to laden oil tankers;

3. A definition of (pollution) damage which forms the basis of the civil liability/responsibility;

4. Responsible person to clearly set out who is liable and against whom a claim may or may not be made;

5. The channelling of liability to have in place secondary measures and sources should compensation not be possible initially through the 1992 CLC or the first branch of the system;

6. Available defences to account for exceptional cases where there might be an incident which is caused by circumstances beyond any persons control; and

7. Limitation of liability to ensure the viability of the compensation system, indefinite liability would most likely impose unrealistic burdens on shipowner's, as well as, make insurance cover difficult, if not impossible.

The simple fact that the international regime contains all these vital aspects, illustrates that it should work effectively and encounter minimal problems, however, practically the process is very different to paper and as shown in chapter 2, many procedural/interpretive issues may arise. Nevertheless, the international civil liability regime for oil pollution damage caused by ships is satisfactory and SA should take cognisance of its history and implementation.

5.3 South African Civil Liability Regime

SA acceded to the 1992 CLC and the 1992 Fund convention on 1 October 2005, however, these laws were only domesticated in December 2013. A gap existed in the South African regime for 8 years, the implication being that any oil spill incidents during such time would be subject to the outdated international regime and subject to the liability ceilings of the 1969 CLC. Practically this would mean that uncovered costs for pollution damage would have to be borne by the Government and the taxpayer and SA was in a vulnerable position.

This loophole was finally addressed in 2013 with the enactment of the MSCLC Act, the IOPC Fund Act, the Contributions Act and the Administrations Act. As illustrated in Chapter 3, on paper, SA's regime is now in line with the international regime save for not having acceded to the 2003 Supplementary Protocol.

On the other hand, the practicalities of the South African regime need to be urgently addressed. In Chapter 4 the writer provides recommendations for the improvement of the South African regime, the most important one and worth re-mentioning here, is that the outstanding funds owed to the international fund must be addressed and paid off as soon as possible. SAMSA, SARS and other government bodies related to environmental management need to congregate and prepare a harmonised plan for the implementation and enforcement of the South African civil liability regime.

5.4 Concluding Remarks

In conclusion, SA has taken a big step in the right direction by finally bridging the gap between the international regime and our domestic regime and continued enthusiasm is needed to improve the implementation of the regime. Furthermore, the international regime has developed from nothing into a revolutionary regime which is able to adequately address compensation to states and citizens which fall victim to oil pollution incidents. It is noted that there is still room for improvement in the international regime with regards to pure environmental damage and certainty regarding the extent of environmental costs which may be recoverable, however, this dissertation focused on the civil liability regime from an anthropocentric view and in light of providing compensation to people, the international regime is sufficient.

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