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Responsabilidade por danos à ecodiversidade marinha: o vazio legal da Convenção Internacional sobre Responsabilidade Civil por danos causados por poluição por óleo

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Sumário

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Abstract

Marine pollution can come from many sources and result in different kinds of damage. At a time when the environment is getting more and more affected by anthropocentric activities, it is essential to be able to legally address the problem of liability of the marine environment itself. Therefore, taking into consideration that the pollution related to hydrocarbons has one of the most important and effective liability regimes, this paper aims to identify and analyze the main gap in the International Convention on Civil Liability for Oil Pollution (CLC) in relation to the protection of the environment. As a hypothesis, it is raised that, although it refers to "impairment of the environment" as a «pollution damage», the CLC is still markedly influenced by an anthropocentric view of the concept of damage. This is because the main objective underlying the adoption of the concept of damage was set in 1969, and continues to be, even after 1992 changes, to provide compensation for damage to a person, regardless of the effect caused to the environment itself. The methodology adopted was descriptive and based on theoretical bibliographical research. The investigation was eminently based on a literature review. The results confirm the hypothesis and point out that the gap identified in the CLC does not derive from the non-existence of a literal basis for its broad interpretation (including damage to the environment within the scope of the CLC), but from an irrational concern related to the difficulty of quantification of the damage done to the marine ecodiversity.

Keywords: marine ecodiversity damage; liability; CLC; marine pollution; IMO.

Resumo

A poluição marinha pode vir de muitas fontes e resultar em diferentes tipos de danos. Numa altura em que o ambiente é cada vez mais afectado por actividades antropocêntricas, é essencial poder resolver legalmente o problema da responsabilidade por danos ao próprio ambiente marinho. Portan-

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to, tendo em consideração que a poluição relacionada com hidrocarbonetos possui um dos mais importantes e eficazes regimes de responsabilidade, este artigo tem como objetivo identificar e analisar a principal lacuna da Convenção Internacional sobre Responsabilidade Civil por Danos Causados por Poluição por Óleo (CLC) em relação à proteção do ambiente. Como hipótese, levanta-se que, embora se refira aos "danos causados ao ambiente" como um dos "prejuízos devidos à poluição"', a CLC ainda é marcadamente influenciada por uma visão antropocêntrica do conceito de dano. Isto porque o principal objetivo subjacente à adoção do conceito de dano foi em 1969, e continua a ser, mesmo após as alterações de 1992, a reparação do dano causado a uma pessoa, independentemente do efeito causado ao próprio ambiente. A metodologia adotada foi descritiva e baseada em pesquisa bibliográfica e teórica. A investigação foi eminentemente baseada em revisão de literatura. Os resultados confirmam a hipótese e apontam que a lacuna identificada na CLC não decorre da inexistência de uma base literal para a sua interpretação ampla (incluindo danos ao meio ambiente no âmbito da CLC), mas de uma preocupação irracional alicerçada na dificuldade de quantificação dos danos causados à ecodiversidade marinha.

Palavras-chave: dano à ecodiversidade marinha; responsabilidade; CLC; poluição marinha; IMO.

1 Introduction

Marine pollution can come from many sources - terrestrial; arising from seabed activities under national jurisdiction; from activities in the Area; by jettisoning; from vessels and from or through the atmosphere[1]. Any one of them has irreparable consequences for marine ecosystems and causes incalculable damage to the natural environment.

However, the existing regulatory framework for the compensation and reparation of damage caused to the environment per se is, for the most part, composed of civil liability regimes and is restricted to compensation and reparation, only, of the personal damage suffered by individuals through the natural environment[2].

In addition, despite the variety of sources of pollution that can affect the marine environment, only part of the pollution from ships (mainly that related to hydrocarbons) has a fully operational and effective liability regime, with damage resulting from other types of marine pollution, in most cases, without repair and/or compensation[3].

Here we seek to go beyond this anthropocentric vision, effectively enshrining marine ecodiversity as a value to be considered and protected and, consequently, compensated and repaired, if it is affected.

To this end, the objective of this paper is to verify if the CLC regime adequately addresses, or not, the damage to marine ecodiversity. Here we will understand the marine ecodiversity damage, or the damage to marine ecodiversity, as the negative affectation of biotic and abiotic elements and their interrelationship, as well as the affectation of services provided by the same elements that jeopardize the diversity and balance of the ecosystem[4]. A broader perspective is applied, to include the living and non-living elements and their ecological services. For that reason, we adopt the concept of ecodiversity damage instead of biodiversity damage.

To address this problem, we will examine the main characteristics of the civil liability for oil pollution regime, in particular, the concept of pollution damage. We will conciliate this with an analysis of evolution of the doctrinal and jurisprudential position in regard to the concept of pollution damage. To finalise, we will provide a modern interpretation of the concept of damage to understand in what way the marine ecodiversity damage is, or is not, covered by the international liability regime for oil pollution.

The importance of this subject is more than evident at a time when disasters are multiplying. Hence, understanding the contours of the damage to marine ecodiversity and its compensation is an essential condition to be able to legally address the problem of liability for the marine environment damage.

[1] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. *UNCLOS article 207 to 212*.

[2] COUDOING, Nadege. Le dommage écologique pur e l'article 31 du NCPC. *Revue Juridique de L'Environnement*, France, n. 2, p. 165-180, June 2009. p. 166.

[3] GAVOUNELI, Maria. State jurisdiction in relation to the protection and preservation of the Marine Environment. *In*: ATTARD, David. *The IMLI Manual on International Maritime Law*: vol. III: marine environmental law and maritime security law. Oxford: Oxford University Press, 2016. p. 5-32. p. 6.

[4] SILVEIRA, Paula de Castro. *Dano à ecodiversidade e responsabilidade ambiental*. Portugal: Petrony Editora, 2019. p. 147.

2 The role of general international maritime law in protecting the marine environment: historic perspective

The United Nations Convention for the Law of the Sea 1982 (hereinafter UNCLOS) established for the first time a global and comprehensive regime for the protection of the marine environment. It became clear, with its entry into force, that marine pollution is no longer allowed, or tolerated, within the scope of freedom of navigation.

In particular, its Part XII, entitled "*protection and preservation of the marine environment*" stipulates a general obligation on all States *"…to protect and preserve the marine environment*"[5]. Having overcome the classic division adopted in the Convention between "Flag State", "Coastal State" and "Port State", with regard to environmental protection, a comprehensive regime is adopted for all States, regardless of their status quo.

Indeed, States must take all necessary measures to ensure that activities under their jurisdiction or control are carried out in such a way as not to cause pollution damage to other States and their environment, and that pollution caused by incidents or activities under their jurisdiction or control does not extend beyond the areas where they exercise sovereign rights in accordance with this Convention[6].

In this sense, environmental protection measures must refer to all sources of pollution of the marine environment and must include, among others, those aimed at reducing as much as possible:

> (a) the release of toxic, harmful or noxious substances, especially those which are persistent, from land-based sources, from or through the atmosphere or by dumping;
>
> (b) pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment,
>
> operation and manning of vessels;
>
> (c) pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and
>
> regulating the design, construction, equipment, operation and manning of such installations or devices;
>
> (d) pollution from other installations and devices operating in the marine environment, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.[7]

The Convention recognizes the principle of common but differentiated responsibilities and the principle of applying the best available techniques as essential requisites for the implementation of measures to protect the marine environment by States. With this, it adopts a conciliatory posture between the developed countries and those, still, in development. Making everyone accept the inclusion of this matter as essential to guarantee freedom of navigation[8].

With specific regard to liability for damage caused to the marine environment, UNCLOS in its article 235, no. 2, provides that

> States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.[9]

In addition, at the level of international law, paragraph 3 of the same article provides that

> With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria

[5] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. *UNCLOS article 192*.

[6] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. *UNCLOS article 194*. n. 2.

[7] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. *UNCLOS article 194*. n. 3.

[8] "States shall take, individually or jointly, as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment, whatever its source, using the most practicable means for this purpose. available to them and in accordance with their possibilities, and shall endeavor to harmonize their policies in this regard". UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. *UNCLOS article 194*. n. 1.

[9] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. *UNCLOS article 235*. n. 2.

> and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.[10]

Article 235 establishes a general obligation for States to guarantee "*prompt and adequate*" compensation following "*damage resulting from pollution of the marine environment*", where it seems obvious to us that this should include not only personal injury, but above all damage to marine ecodiversity. However, this device alone does not operationalize the marine environmental liability regime, it will be just the basis on which it will have to be created.

This means, in practice, that any of the sources of pollution foreseen in Part XII, could have their own liability regime for damage caused to the environment, or even that a comprehensive regime of marine environmental liability could be drawn up, regardless of the source. Therefore, since the mid-1970s, also driven by the Stockholm Declaration of 1972, several specific liability regimes have been developed to cover damage caused to the natural environment[11].

However, in reality, among the various sources of marine pollution addressed in Part XII, only pollution by ships and from oil spills has an operational and existing liability regime, which has even served as a "model" for other maritime, and non-maritime, regimes of the kind[12].

3 The liability for damage caused by hydrocarbons – The CLC Model Convention

The sinking of the Torrey Canyon tanker, which occurred in 1967, marks the birth of the special civil liability regime for damage resulting from oil spills, despite the Convention that regulates it only appearing in 1969[13]. In fact, it was only following the strong media attention that was generated around the damage resulting from that incident, with millions spent on cleanup costs, that the need for a uniform international regime that guaranteed effective and adequate compensation to the victims became essential[14].

Thus, by way of reaction, under the auspices of the International Maritime Organization, a series of international instruments appear that aim to regulate maritime transport, both in terms of preventing pollution by ships (MARPOL[15]); preparing for and responding to an incident of this kind (OPRC 1990[16] and Protocol OPRC-HNS 2000[17]) and civil liability and compensation for pollution related to maritime transport (CLC 1969 and IOPC Fund 1971; HNS Convention[18] and HNS Protocol[19]; Bunker Convention[20] and LLMC[21]). With regard to our object of study, we will focus, above all, on CLC Convention.

[10] UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. *UNCLOS article 235*. parag. 3.

[11] NASCIMENTO, Leonardo Leite. International law environment: the transnational law as solution to effectiveness of international standards on freshwater. *Revista Brasileira de Direito Internacional*, Curitiba, v. 2, n. 2, p. 233–253, July/Dec. 2016. p. 236.

[12] The initial version of the International Convention on Civil Liability for Oil Pollution Damage, 1969 (hereinafter CLC 1969) was amended by the Protocol to the Convention, 1992, resulting in what is now known as the International Convention on Civil Liability for Oil Pollution to Oil Pollution 1992 (hereinafter CLC 1992).

[13] DEL CASTILLHO, Teresa Fajardo. Contaminação por hidrocarbonetos depois da catástrofe do Prestige e seu impacto no Direito Internacional e Comunitário. *In*: VARELLA, Marcelo Dias (org.). *Governo de Riscos, Rede Latino-Americana-Europeia sobre Governo dos Riscos*. Brasília: UNICEUB: UNITAR, 2005. p. 120-139. p. 218.

[14] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. Liability and compensation for ship-source oil pollution: an overview of the international legal framework for oil pollution damage from tankers: studies in transport law and policy: n. 1. *United Nations*, 2012. p. 9.

[15] International Convention for the Prevention of Pollution from Ships (MARPOL) was adopted on November 2, 1973, and amended by the 1978 Protocol and, its Annex IV, by the 1997 Protocol of October 1983.

[16] International Convention on Oil Pollution Preparedness, Response and Co-Operation (OPRC) was adopted on November 30, 1990 and entered into force on May 13, 1995.

[17] Protocol on Preparedness Response and Co-Operation to Pollution Incidents by Hazardous and Noxious Substances (OPRC-HNS Protocol) was adopted on March 15, 2000 and entered into force on June 14, 2007.

[18] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS), was adopted in May 1996.

[19] The Protocol amending the HNS Convention was adopted in 2010.

[20] The International Convention on Civil Liability for Bunkers Oil Pollution Damage (Bunker) was adopted on March 23, 2001 and entered into force on November 21, 2008.

[21] The Convention on Limitation of Liability for Maritime Claims (LLMC) was adopted on 19 November 1976 and entered into force on 1 December 1986. It was later amended by the 1996 Protocol adopted on 2 May of that year and which entered into force on May 13, 2004.

3.1 The structure of the CLC/Fund model

The International Convention on Civil Liability for Oil Pollution Damage (CLC) emerged in 1969 with the aim of creating a harmonized civil liability regime among the Member States[22]. It was designed to create a regulatory framework that would ensure adequate compensation to victims of pollution resulting from leaks or discharges of heavy hydrocarbons, i. e. crude oil, fuel oil, heavy diesel oil and lubrication oil, transported aboard a ship.

However, given the lack of resources to cover damage resulting from oil pollution, in 1971 the International Oil Pollution Compensation Fund (hereinafter IOPC Fund) was created[23]. The purpose of this was to complement compensation for damage resulting from marine pollution by heavy hydrocarbons and to share the risk inherent in maritime activity from the point of view of contamination.

It thus creates a system of solidarity, based on an equitable distribution of responsibilities between transporters and importers of heavy hydrocarbons, with the aim of providing an economically satisfactory response to those who may be affected in the context of the pollution resulting from this activity and which translates into a second level of compensation to be added to the limits already established in the CLC[24]. And this can happen when:

- One of the exceptions to the liability channelling regime applies;
- The owner's insurer is unable to fully meet its financial obligations; or
- The cost of compensation for damage caused by pollution exceeds the liability limits defined by the CLC.

However, over the last few years, a series of other incidents involving tankers have occurred, such as the case of Amoco Cadiz in France in 1976, Exxon Valdez in the USA in 1989, Braer in the United Kingdom in 1993, Erika and Prestige in Spain in 1999 and 2002, among others. Thus, contributing to increase the legislative production[25] (TOVALOP[26] and CRISTAL[27]) and doctrinal in this area, appearing, in most cases, as a reaction[28] to the different types of damage verified as a result of each new disaster[29].

In view of this, it was concluded that, despite the model regime worked well initially, it is not sufficient to cover the volume of damage resulting from this type of incident[30]. Indeed, it was understood that the CLC needed to be revised and amended, maintaining its essence, yes, but increasing the financial limits adopted, as well as expanding its scope of application by expanding its

[22] It entered into force in 1975.

[23] It entered into force in 1978.

[24] MARTÍN, Unai Belintxon. La responsabilidad civil en el Derecho Marítimo: la efectiva aplicación de las medidas de prevención en materia de seguridad marítima. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 193-245. p. 207.

[25] It turns out that the volume of damage generated by this type of incident is so high that, at the same time as the CLC 1969 regime was being negotiated, ship owners and the oil industry adopted two voluntary regimes on the same matter. These regimes, known as TOVALOP (Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution) and CRISTAL (Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution), were intended to serve as an interim solution while the CLC did not obtain worldwide application. As such, on February 20, 1997, their application ceased, since their maintenance was seen, by many, as a disincentive to the ratification of the CLC. See The IOPC Fund´s 25 years of compensating victims of oil pollution incidents, IOPC, 2003, p.14, www.iopc.com.

[26] TOVALOP established the liability of owners in cases of damage resulting from oil spillage from their ships. However, this regime did not apply if the CLC was competent to regulate the incident in question. With regard to environmental damage, in its initial version, from 1987, the definition of "pollution damage" was in every way similar to the one we will find in CLC 1969. However, one aspect is noteworthy: the fact that TOVALOP excludes complaints based on theoretical calculations. Claims for damage to natural resources deemed "non-commercial, such as birds, coral reefs, among others, were excluded". BRANS, Edward H. P. *Liability for damage to public natural resources*: standing, damage and damage assessment. Netherlands: Kluwer Law International, 2001. (International Environmental Law and Policy Series, 61). p. 362.

[27] Under CRISTAL, compensation for damages resulting from oil spills could be obtained from the company owning the cargo, i.e. the oil.

[28] DAVIS, Mark. Lessons unlearned: the legal and policy legacy of the BP Deepwater Horizon Spill. *Washington and Lee Journal of Energy, Climate, and the Environment*, v. 3, n. 2, p. 155-175, 2012. p. 155.

[29] SARAIVA, Rute. Direito internacional privado, responsabilidade e ambiente. *In*: VICENTE, Dário Moura (org.). *Estudos em memória do Professor Doutor António Marques dos Santos*: volume I. Coimbra: Almedina, 2005. p. 637-672.

[30] "The regime has proven to be effective, practical and has worked well during its 25 years of operation. Most claims are resolved outside the Courts. The regime is relatively easy to understand and apply in any case", THE IOPC Fund´s 25 years of compensating victims of oil pollution incidentes. *IOPC*, 2003. Available at: in www.iopc.com. p. 30

coverage to other types of damage, such as damage to the marine environment[31].

Thus, after a frustrated attempt to amend it in 1984, following the disaster of the Exxon Valdez tanker in 1989, the USA approved its own legislation – the "Oil Pollution Act" of 1990 (OPA) – considering that the amendments envisaged in the 1984 Protocol were in fact necessary[32]. In 1992, without needing USA ratification, the International Convention on Civil Liability for Oil Pollution Damage (CLC 1969) was amended by the Protocol to the International Convention on Civil Liability for Oil Pollution Damage, 1992 (CLC 1992).

Nonetheless, once again following an incident, in this case involving the tanker Erika, in 1999, the need for a further increase in compensation levels became pressing and, in fact, in 2000, levels of compensation provided for in 1992 were increased by fifty percent[33] to the values stipulated in the 1992 Conventions. However, as it still does not appear to be sufficient to effectively cover the damage caused, in 2003 a Complementary Fund was created, which is structured as an optional third level of compensation[34].

Now, taking into account the number of countries that have already withdrawn the CLC 1969 and the IOPC Fund 1971 and ratified the CLC 1992 and the IOPC Fund 1992, the old regime constituted by the CLC 1969 and the IOPC Fund 1971 lost a great deal of part of its importance[35]. On May 24, 2002, the IOPC Fund 1971 ceased to be in force, since the number of States Parties to it fell below twenty-five, which led to its closure, continuing to operate only until claims related to damages resulting from incidents occurring before May 24, 2002 are resolved. It should be noted that, although the European Union itself is not a party to the Convention, since the ratification rules adopted do not allow this to happen, most Member States are, today, parties to the CLC and the IOPC Fund 1992.

Thus, with regard to funds, the IOPC Fund 1992 and the IOPC Fund 2003 are in force[36]. As already mentioned, the IOPC Fund 1992 establishes a complementary compensation regime for the CLC, operating under the same geographic area and with the same legal regime[37]. Its objective is to guarantee compensation for damage not adequately covered by the owner of the ship under CLC 1992. As regards the Complementary Fund 2003, which we will call IOPC Fund 2003, unlike the IOPC Fund 1992, its objective is not to change the limits in force, but to complement them[38]. Thus, acting as an optional third level of compensation for damage caused by contamination by hydrocarbons[39]. So much so that only Member States of the 1992 Fund were allowed to adhere to it, having been ratified by 32 States[40].

[31] THE IOPC Fund´s 25 years of compensating victims of oil pollution incidentes. *IOPC*, 2003. Available at: in www.iopc.com. p. 14.

[32] FAURE, Michael; YING, Song. *China and international environmental liability*: legal remedies for transboundary pollution: new horizons in environmental law. UK: Edward Elgar Publishing Limited, 2008. p. 75.

[33] These new limits came into effect on 1 November 2003 for all CLC Member States.

[34] COUVIOUR, Karine. Aprés L´Érika: réformer d´urgence le regime international de responsabilité et d´indemnisation des dommages de pollution par hydrocarbures. *La Semaine Juridique*, n. 12, Mar. 2008.

[35] THE IOPC Fund´s 25 years of compensating victims of oil pollution incidentes. *IOPC*, 2003. Available at: in www.iopc.com. p. 14.

[36] Cfr. Annual Report 2011, IOPC, p. 4, in www.iopc.com.

[37] It should be noted that, despite the intimate connection with the CLC, the Fund has its own bodies and full autonomy from it. Indeed, the IOPC Fund comprises the Assembly, the Executive Committee and the Secretariat. The contribution to the fund is made by hydrocarbon importers in each State Party to the CLC, on the number of hydrocarbons they have received by sea, taking into account the volume received in the year preceding the year in which payment is requested. In other words, it is the Member States that are part of the CLC and, consequently, of the Fund, but it is the companies that import the hydrocarbon transported by sea, which must make the payments that finance it.

[38] MARTÍN, Unai Belintxon. La responsabilidad civil en el Derecho Marítimo: la efectiva aplicación de las medidas de prevención en materia de seguridad marítima. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 193-245. p. 219.

[39] Following the creation of this Complementary Fund, two new agreements emerged: STOPIA 2006 and TOPIA 2006, which entered into force on February 20, 2006 and which aim to introduce a set of voluntary compensation measures. These agreements are intended to correct the imbalances created with the constitution of the IOPC Fund 2003. It should be noted, however, that the CLC and the IOPC Fund 1992 and the IOPC Fund 2003 will continue to be applicable even in the case of events covered by the scope of application of STOPIA and TOPIA. However, as stipulated in these new agreements, the Fund will be reimbursed by the owner of the ship. In this sense, according to TOPIA 2006, the Complementary Fund is entitled to be reimbursed by the ship's owner in the amount of 50% of the indemnity payments made to the plaintiffs when a ship intervenes in the claim to which the aforementioned agreement applies.

[40] This Complementary Fund also has its own legal personality and the same scope of application as the CLC. However, it distances itself from the 1992 IOPC Fund with regard to the mode of contribution, providing for a minimum amount of annual payment by the Member States. This minimum contribution assumes an amount equal to the reception of one million tons of hydrocarbons. Cfr.

The compensation paid[41], per incident, under the IOPC Fund 1971 was originally 30,000,000 million SDR[42] and passed, in 1987, to 60,000,000 million SDR[43]. As regards the IOPC Fund 1992, the maximum limit is SDR 135,000,000 million, including the amount paid by the ship´s owner and his insurer under CLC 1992. Since November 1, 2003, this limit has been increased to 203,000,000 million SDR, a figure that still does not satisfy some States Parties[44]. And, since November 2003, the IOPC Fund 2003 has at its disposal 547,000,000 million SDR, in addition to the 203,000,000 million SDR already foreseen under the scope of the IOPC Fund 1992, to cover damage resulting from maritime pollution by hydrocarbons for countries that ratified the same.

3.2 The scope of application of the CLC

With regard to the CLC, its scope of application is materially and geographically delimited. With regard to the material delimitation, the CLC applies only to damage due to oil pollution resulting from heavy oil spills from a ship.

For a proper understanding of its material scope of application, it is necessary to understand the definition that the Convention assigns to some essential concepts such as: ship, oil and pollution damage.

In practice, several questions can be raised following the concept of ship, namely whether it is a "sea-going", that is, prepared for maritime navigation or not. After all, we can come across a ship that transports hydrocarbons as cargo, but that we can see it is not prepared, or it has not been designed for maritime navigation, despite, in fact, carrying it out. We can also come across ships that transport hydrocarbons to a certain location and establish themselves there as storage platforms. And, in these cases, it is questioned whether, lacking the intention to continue the maritime journey, its qualification as a ship will be disputed[45].

In fact, it seems to us defensible that a situation could arise in which this type of vessel is considered a ship, for the purposes of the Convention, up to a certain point, and ceases to be so when certain characteristics are lost, namely the intention to continue its sea journey.

From the above, it appears that the identification of the ship is not automatic and requires analysis of the factual situation in question. To facilitate this task, some characteristics of the ship are, from the outset, pointed out by the Convention itself, such as:

- The ship does not need to be originally designed for the transport of hydrocarbons, it may in fact have been adapted for that purpose;
- To be considered a ship, the ability to transport hydrocarbons in bulk as cargo is not enough, it must actually be transporting hydrocarbons in bulk as cargo;
- If not, the Convention also applies, if it is the journey immediately following the carriage of hydrocarbons in bulk as cargo[46].

In this sequence, it is believed that only hydrocarbons transported as cargo are covered by the Convention, or on the journey immediately after that, its residues. However, reconciling it with the definition of hydrocarbons presented by the Convention, we will arrive at a slightly different conclusion[47].

http://www.iopcfunds.org/about-us/membership/a-z-listing/.

41 Finally, it is also up to the IOPC 1992 bodies to manage this entire compensation scheme for damage structured by the CLC and the IOPC Fund, bearing in mind the need to respond quickly and effectively to the multiplicity of interests involved. It is a process for claiming damage and compensation, tending to be out-of-court and which is basically governed by the criteria for receiving complaints and assessing damage provided for in the "claims manual", an interpretative document of the Convention approved by the General Assembly of the IOPC Fund.

42 Special Drawing is the unit of account stipulated in the Conventions under analysis, as defined by the IOPC.

43 THE IOPC Fund´s 25 years of compensating victims of oil pollution incidentes. *IOPC*, 2003. Available at: in www.iopc.com. p. 15.

44 SCHOENBAUM, Thomas J. Liability for damages in oil spill accidents: evaluating the USA and international law regimes in the light of deepwater horizon. *Journal of Environmental Law*, p. 1-22, 2012. p. 10.

45 CORDEIRO, António Menezes. Da natureza jurídica do navio. *In*: GOMES, Januário da Costa (org.). *O Navio*: II Jornadas de Lisboa de Direito Marítimo, 11 e 12 de novembro de 2010. Coimbra: Almedina, 2012. p. 7-44.; PINHEIRO, Luís de Lima. O navio em Direito Internacional. *In*: GOMES, Januário da Costa (org.). *O Navio*: II Jornadas de Lisboa de Direito Marítimo, 11 e 12 de novembro de 2010. Coimbra: Almedina, 2012. p. 97-123.; MARTINS, Eliane M. Octaviano. *Curso de direito marítimo*: vol. I: teoria geral. 4. ed. Brasil: Editora Manole, 2013. p. 120.

46 CLC 1992. art. I, parag. 1.

47 The damage resulting from spillage, even of heavy hydrocarbons, is not within the scope of the CLC, if these come, for example, from an offshore oil exploration platform. This gap in the Convention must be filled by the IMO and regional organizations

As can be seen in the concept of damage presented by CLC 1992, it comprises

> (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; (b) the costs of preventive measures and further loss or damage caused by preventive measures[48].

That is, the Convention applies to damage resulting from hydrocarbons carried as cargo or as fuel on the Tanker, provided that they result from heavy hydrocarbons[49].

It is important, in view of this, to emphasize that the CLC regime is not a comprehensive regime. It does not have the ambition to respond to all damage resulting from maritime pollution. On the contrary, it is a regime with well-defined borders and perhaps because of this limited scope, it has managed to succeed and remain firm in international law as a source of inspiration for other regimes, whether in other sectors of activity, or in more comprehensive diplomas such as the Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (hereinafter "Directive").

In addition to the objective delimitation, the scope of application of the CLC is also geographically limited. In order to understand this delimitation, it is necessary to converge the information provided by article I, no. 6 (a) and article II, both of CLC 1992. The first states that damage due to pollution means any loss or damage external to the ship caused by contamination resulting from leakage or discharge of hydrocarbons from the ship, whatever the place where it may have occurred. Therefore, it is not the place where the damage occurred that will condition the application, or not, of the Convention. But then, what criteria should be followed?

In order to answer this question and complete the definition presented, it is necessary to resort to the aforementioned Article II, which expressly states that the Convention applies exclusively to damage due to pollution caused in the territory, including the territorial sea, of a State Party.

After 1992, and only for the States that ratified the 1992 CLC, the referred regime is expanded and now also covers the damage that occurred in the Exclusive Economic Zone (EEZ) of a State Party, established in accordance with the international law or, if a State Party has not established such a zone, in an area beyond that adjacent to the territorial sea of that State, as determined by that State in accordance with international law, to an extent not exceeding 200 nautical miles from the lines base used to delimit the territorial sea[50].

From the above, the CLC will be applicable even if the incident occurs in the territory of a non-Party State, provided that its effects are felt in the territory of a State Party. Consequently, damage resulting from pollution by hydrocarbons that occurs in the territory of a non-Party State, as well as that which occurs in the High Seas and does not result in damage, or imminent threat of damage, in the territory of a State Party is outside the scope of the CLC[51].

3.3 Type of responsibility adopted in the CLC

The CLC provides that the owner of a ship, at the time an event occurs, or, if the event consists of a succession of facts, at the time the first occurs, is liable for any damage due to pollution caused by the ship and resulting from the event. That is, the owner of the ship is obliged to repair the damage, regardless of whether they are at fault[52].

We thus have the establishment of the tendency that is beginning to gain more and more strength and which understands that, in the face of certain activities considered potentially dangerous, the attribution should be based on the risk and not based on the subject's fault.

competent to deal with the problem of marine pollution. SCHOENBAUM, Thomas J. Liability for damages in oil spill accidents: evaluating the USA and international law regimes in the light of deepwater horizon. *Journal of Environmental Law*, p. 1-22, 2012. p. 5.

[48] CLC 1992. art. I, parag. 5.

[49] It does so because these types of hydrocarbons are considered difficult to naturally dissipate when released into the sea, requiring cleaning measures specially designed for this purpose. While the damage resulting from spills of light hydrocarbons, such as gasoline, refined diesel, and kerosene, tend to evaporate quickly, generally not requiring special cleaning measures.

[50] CLC 1992. art. II.

[51] This type of situation is covered by the International Convention on intervention on the High Seas in the event of an accident that causes or may cause oil pollution, signed in Brussels in 1969.

[52] CLC 1992. art. III, n. 1.

However, the Convention provides for the possibility of excluding the owner from liability, provided that it is proved that the damage in question:

- Resulted from an act of war, hostilities, civil war and insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character;
- Was wholly caused by an intentional act or omission by a third party to cause damage;
- Has been wholly caused by the negligence, or other harmful act, of any Government or another authority responsible for lights or other aids to navigation, in the exercise of that function[53].

These exclusions are not without problems, namely, they can raise questions when, for example, the pollution damage results directly from "*a natural phenomenon of an exceptional, inevitable and irresistible nature*", but there is, upstream, an error of captain's navigation that diverted the ship from a safe course. In these cases, it is questioned whether or not the ship's owner can exempt himself from liability.

In this regard, it should be noted that, in the event that the Directive is not applicable, pursuant to its article 4, as this is damage resulting from incidents for which liability falls within the scope of application of the CLC, for example, in practice, we may be faced with a situation where the operator may not be subject to any type of liability for the damage caused to the natural environment.

Reinforcing the disclaimer, the Convention adopts a double degree of objectivity, with objective liability, on the one hand, and with the channelling of liability on the other[54].

In fact, the adoption of an objective type of liability regime is one of the great corollaries of the CLC. However, in order to adequately delimit its scope of application, it is important to understand the concept of "owner"[55]. It means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons in possession of the ship. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the operator of the ship, owner means that company[56].

This means that, in principle, the person appearing in the ship's property register - the owner - will be responsible for compensation for damage resulting from their vessel, regardless of the existence of proof of fault[57]. It only suffices for the victim to prove the causal link between the fact and the damage, that is, between the leakage or discharge of hydrocarbons from the ship and the specific damage, as in traditional civil liability regimes[58].

It is important to take into account that, nowadays, with the complexity of relationships that develop in the context of the maritime transport of goods, this accountability can be efficient, but proves to be profoundly unfair[59]. After all, currently, maritime shipment is characterized by a multiplicity of players, which means that the owner of the ship, in most situations, does not control the type of goods that are transported, nor do they have the authority or means to verify whether the appropriate safety and prevention measures are being taken by the charterer, carrier, shipowner, etc. This leads to cases of fictitious liability that do not correspond to the real subject responsible for the damage in question[60].

[53] CLC 1992. art. III, parag. 2.

[54] ROBERT, Sabrina. *L´Érika*: responsabilités pour un désastre écologique. Paris: Pedone, 2003. p. 30.

[55] CLC 1969. art. I, n. 8, with the wording of 1992.

[56] CLC 1969. art. I, parag. 3. "owner means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship. However in the case of a ship owned by a State and operated by a company which in that State is registered as the ship´s operator, "owner" mean such company".

[57] DELEBECQUE, Philippe. La pollution marine, rapport français. *In*: VINEY, Geneviève; DUBUISSON, Bernard (org.). *Les responsabilités environnementales dans l´espace européen*: point de vue franco-belge. Bruxelles: Emile Bruylant, 2006. p. 375-395. p. 389.

[58] DELEBECQUE, Philippe. La pollution marine, rapport français. *In*: VINEY, Geneviève; DUBUISSON, Bernard (org.). *Les responsabilités environnementales dans l´espace européen*: point de vue franco-belge. Bruxelles: Emile Bruylant, 2006. p. 375-395. p. 390.

[59] For example: "[…] in the case of the Prestige, an oil tanker built in Japan, flying the Bahamas flag and owned by an obscure Greek shipping company, which transported Russian crude oil… it will be liable for damages with insurance and additional amounts obtained by the Fund", DEL CASTILLHO, Teresa Fajardo. Contaminação por hidrocarbonetos depois da catástrofe do Prestige e seu impacto no Direito Internacional e Comunitário. In: VARELLA, Marcelo Dias (org.). *Governo de Riscos, Rede Latino-Americana-Europeia sobre Governo dos Riscos*. Brasília: UNICEUB: UNITAR, 2005. p. 120-139. p. 226.

[60] ROBERT, Sabrina. *L´Érika*: responsabilités pour un désastre écologique. Paris: Pedone, 2003. p. 26.

3.4 The channelling of liability

One of the greatest innovations of the Convention is not the adoption of strict liability, per se, but what is called "channelling of liability". This means that, in addition to the responsible being objectively the owner, the Convention establishes that no other claim referring to damage due to pollution, which is not based on the provisions of the same, can be made against it.

Furthermore, the liability rests exclusively with the owner. The Convention establishes that no claim for compensation for damage due to pollution, whether or not based on its provisions, may be made against:[61]

> a) the servants or agents of the owner or the members of the crew;
>
> b) the pilot or any other person who, without being a member of the crew, performs services for the ship;
>
> c) any charterer (how so ever described, including a bareboat charterer), manager or operator of the ship;
>
> d) any person performing salvage operations with the consent of the owner or on the instructions of a competent public authority;
>
> e) any person taking preventive measures;
>
> f) all servants or agents of persons mentioned in subparagraphs (c), (d) and (e);[62]

In practice, this means that, in principle, victims are prohibited from bringing claims for damage against persons other than the owner of the ship, as well as, with regard to the owner of the ship, claims for compensation for damage due to pollution that is not based on the provisions of the CLC[63].

Despite seeming somewhat restrictive, this regime was designed to protect the legal security of the victims, on the one hand, and the ship's owner, on the other. With this, the aim is to overcome the burden of forcing the injured party to bring claims for compensation against a series of subjects, which could jeopardize the effective compensation for the damage resulting from the pollution in question[64]. And, furthermore, limiting the owner's liability to the provisions of the CLC, thus compensating for the burden of being objectively liable for damage, even when there is no fault or willful misconduct in the occurrence of the same.

The exclusion of liability for the subjects mentioned in the CLC is one of the most important points of the regime, after all, it avoids the prosecution of lawsuits against them. However, no reference is made in CLC 1969, or in CLC 1992, regarding the owner of the cargo and the society responsible for the classification of the ship[65]. Because of this, the Paris Correctional Court, in the Trial of January 16, 2008, regarding the Erika case, refused the classification society (RINA) the immunity provided for under article III, no. 4 (b) of CLC 1992, as it cannot be considered as a person providing services to the ship[66] [67]. The Court also considered that, when issuing official security certificates, it acted as an Agent of the State of Malta (Flag State). Therefore, like the latter, it enjoys immunity from jurisdiction. However, this would have to be invoked in a timely manner and, by failing to do so, it waived the same, for which it can be held liable and, in effect, criminally and civilly condemned for repairing the damage resulting from the accident involving the Tanker Erika[68].

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[61] Contrary to this, MARTÍN, Unai Belintxon. La responsabilidad civil en el Derecho Marítimo: la efectiva aplicación de las medidas de prevención en materia de seguridad marítima. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 193-245. p. 209. by providing that "Nevertheless it is not impeded to bring actions against other persons that could have caused the accident or even aggravated it".

[62] CLC 1992. art. III.

[63] GOMES, Manuel Januário da Costa. *Limitação de responsabilidade por créditos marítimos*. Coimbra: Almedina, 2010. p. 393.

[64] BRANS, Edward H. P. *Liability for damage to public natural resources*: standing, damage and damage assessment. Netherlands: Kluwer Law International, 2001. (International Environmental Law and Policy Series, 61). p. 315.

[65] GONZALO, Marco Lopez de. The liability of classification societies. *In*: GOMES, Januário da Costa (org.). *O Navio*: II Jornadas de Lisboa de Direito Marítimo, 11 e 12 de novembro de 2010. Coimbra: Almedina, 2012. p. 125-136.

[66] GASDETA, Juan M. Velázquez. Reino de España v Americana Bureau of Shipping et al: punto final o punto aparte. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 163-191.; LÓPEZ, Francisco Javier Quel; AROCENA, Mª Dolores Bollo. Claves de la evolución reciente del derecho del mar en materia de prevención de la contaminación: hacia una revisión de las competencias del estado Rector Del Puerto, estado Ribereño y estado del Pabellón. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 35-64.

[67] PAPADOPOULOU, Dandi. The role of french environmental associations in civil liability for environmental harm: courtesy of Erika. *Journal of Environmental Law*, v. 21, n. 1, p. 87-112, 2009. p. 88.

[68] IOPC/JUN10/3/1, 17, May 2010, in www.iopc.com.

In March 2010, this decision was confirmed by the Court of Criminal Appeal and, with regard to the channelling of liability, other conclusions are still important to enunciate:

- The representative of the registered owner of the Tanker Erika was considered "owner's agent", as defined in article III 4 (a) of the CLC 1992 and despite being, theoretically, able to benefit from the channelling of liability provided for in the Convention, it was considered that he acted negligently and with the knowledge that such damage could occur, thus ruling out the possibility of taking advantage of the exemption provided for therein;
- The President of the management company (Panship) was an agent of the company providing services to the ship, article III 4 (b) and, as such, is not protected by the channelling of responsibility;
- Total SA was "de facto" the charterer of the Tanker Erika and, as such, can benefit from the channelling of liability provided for in article III 4 (c) of the CLC 1992[69].

However, channelling liability is not an absolute rule[70]. In some situations, the owner's liability may be waived, with some of those expressly immune subjects being held liable. This happens in cases where it is proven that the damage resulted from an act, or omission, of these persons with the intention to cause such damage or through imprudence and with the knowledge that such damage could occur[71].

3.5 Limitation of liability in the CLC

Even if the owner is held liable, they will only be liable up to a certain limit expressly provided for in the CLC. In fact, the owner has the right to limit their liability to values defined by the Convention and according to the weight of the ship[72]. To this end, it must set up a fund in the amount of the limit of its liability before the Court of any of the States Parties.

With regard to the CLC, following the Resolution adopted by the Legal Committee of the IMO on October 18, 2000, the values initially foreseen in 1992 were expanded. As of November 1, 2003, the owner of the ship has the right to limit their liability to a total amount, per event, which does not exceed, in any case, 89,770,000 million SDR, calculated as follows[73]:

- 4,510,000 million SDR for a ship not exceeding 5,000 units;
- For a ship with a tonnage greater than that, for each additional tonnage unit, 631 SDR must be added to the aforementioned amount;

The figure of limitation of liability has its origins in general maritime law, namely, in the international conventions relating to the limitation of liability in matters of debts for maritime claims[74]. However, it is in the right of civil liability for damage resulting from oil pollution that it reaches its highest limits, namely, in view of the values provided for in the CLC and in the London Convention of 1976, it appears that the ceilings established in the first are substantially higher than those provided for in the 1976 Convention[75].

In this sense, article V (3) of the CLC, in its post-1992 version, states that

> For the purpose of availing himself of the benefit of limitation provided for in paragraph 1 of this Article the owner shall constitute a fund for the total sum representing the limit of his liability with the Court or other competent authority of any one of the Contracting States in which action is brought under Article IX or, if no action is brought, with

[69] IOPC/JUN10/3/1, 17, May 2010, in www.iopc.com.

[70] DELEBECQUE, Philippe. La pollution marine, rapport français. *In*: VINEY, Geneviève; DUBUISSON, Bernard (org.). *Les responsabilités environnementales dans l´espace européen*: point de vue franco-belge. Bruxelles: Emile Bruylant, 2006. p. 375-395. p. 391.

[71] CLC 1992. art. III, parag. 4.

[72] Claims Manual, International Oil Pollution Compensation Fund, 1992, 2019 Edition. This element of interpretation, prepared by the IOPC, despite not being binding, serves as an interpretativefor the provisions presented in the CLC and IOPC.

[73] No. 3 of the Resolution of the Legal Committee of the IMO, of October 18, 2000, which amends the Limitation Values of the 1992 Protocol amending the 1969 CLC.

[74] The 1957 Brussels Convention and subsequently the 1976 London Convention deal specifically with this matter.

[75] MARTÍN, Unai Belintxon. La responsabilidad civil en el Derecho Marítimo: la efectiva aplicación de las medidas de prevención en materia de seguridad marítima. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 193-245. p. 194.

> any Court or other competent authority in any one of the Contracting States in which an action can be brought under Article IX. The fund can be constituted either by depositing the sum or by producing a bank guarantee or other guarantee, acceptable under the legislation of the Contracting State where the fund is constituted, and considered to be adequate by the Court or other competent authority.[76]

However, this faculty also presents some limitations, bringing to light another common rule in maritime law, which is the one that provides that the owner can no longer benefit from the limitation of liability if it is proved that the damage due to pollution resulted from an action or omission that is imputed to them, committed with the intention to cause such damage or recklessly and with the knowledge that such damage could occur.

Finally, the limitation of liability was one of the reasons why the USA did not ratify CLC 1992 and created its own regime – Oil Pollution Act 1990 (OPA)[77]. This regime, which is more comprehensive than the international regime, does not provide for any limitation of liability, nor any channelling of responsibility to the owner of the ship[78]. In addition, it provides coverage for a greater number of damage, unlike the CLC.

3.6 The mandatory insurance at CLC

In addition to the limitation, the CLC also provides for the possibility of transferring responsibility to the insurer, through the imposition of compulsory insurance, or other financial guarantee in the maximum amount of liability provided for in the CLC. This obligation is imposed on owners of ships registered in a Member State, with the capacity to transport more than 2,000 tons of hydrocarbons in bulk as cargo[79]. Therefore, ships that have not been registered in a Member State are excluded from this obligation, whatever the quantity of hydrocarbons they carry[80].

On the other hand, a ship carrying less than 2,000 tons of hydrocarbons, even if it is registered in a Member State, is not obliged to take out insurance or maintain any other type of financial guarantee[81]. Bearing in mind that, most of the time, this type of transport is carried out by "single ship" companies, what happens is that in the face of an accident where the owner does not have insurance, the victims have no other guarantee of full compensation for the damage costs, as the ship in question may not be sufficient.

In reality, nothing guarantees that an accident with a ship carrying less than 2,000 tons of hydrocarbons is less serious than one carrying a value greater than that. The level of pollution depends on a series of factors such as: the success of the cleaning measures, the type and characteristics of the oil spilled, the weather and oceanographic conditions, as well as the possibility of natural dispersion[82]. Therefore, the severity and scale of the effects of oil spills from ships carrying less than 2,000 tons could be much greater than one carrying a greater amount than that[83].

4 The "Pollution Damage"

The "pollution damage" is a concept widely used in international maritime conventions, especially in those that follow the CLC regime. It is often mistakenly adopted as a synonym for damage caused to the environment. However, we will verify that its scope of application is not necessarily the same.

[76] CLC post-1992 version, art. V, n. 3.

[77] SCHOENBAUM, Thomas J. Liability for damages in oil spill accidents: evaluating the USA and international law regimes in the light of deepwater horizon. *Journal of Environmental Law*, p. 1-22, 2012. p. 8.

[78] MARTÍN, Unai Belintxon. La responsabilidad civil en el Derecho Marítimo: la efectiva aplicación de las medidas de prevención en materia de seguridad marítima. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 193-245. p. 213.

[79] CLC 1969, art. VII, parag. 1.

[80] In this regard, we can say that, in reality, other regimes end up filling this gap, at least partially. For example, in the European Union all ships are required to have valid insurance to approach European ports.

[81] BRANS, Edward H. P. *Liability for damage to public natural resources*: standing, damage and damage assessment. Netherlands: Kluwer Law International, 2001. (International Environmental Law and Policy Series, 61). p. 313.

[82] THE IOPC Fund´s 25 years of compensating victims of oil pollution incidentes. *IOPC*, 2003. Available at: in www.iopc.com. p. 40.

[83] MARTÍN, Unai Belintxon. La responsabilidad civil en el Derecho Marítimo: la efectiva aplicación de las medidas de prevención en materia de seguridad marítima. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 193-245. p. 210. E: BRANS, Edward H. P. *Liability for damage to public natural resources*: standing, damage and damage assessment. Netherlands: Kluwer Law International, 2001. (International Environmental Law and Policy Series, 61). p. 313.

The term "pollution damage" was adopted by CLC 1969 and its objective was to provide adequate compensation to victims for damage caused following a heavy oil spill.

The emphasis of the original regime was on compensation for the individual "victim" who suffered damage as a result of the contamination in question, not compensation for the damage caused to the natural environment, nor to the marine ecosystem.

In 1969, pollution damage meant loss or damage outside the ship caused by a leak or discharge of hydrocarbons from the ship, wherever they occur, including the costs of preventive measures and other losses resulting from their application[84]. The ambiguity resulting from this definition has led over the years to different interpretations by national courts, even giving rise to a movement towards adopting a new, more complete definition, which would lead to a uniform application of the concept in the States Parties. Indeed, after a failed attempt in 1984, the provision was amended in 1992[85].

Thus, for the States that ratified the Protocol amending the CLC, "pollution damage" now 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; b) the costs of preventive measures and further loss or damage caused by preventive measures.

It could be assumed that from 1992 the damage caused to the environment started, in fact, to be considered repairable under the concept of "pollution damage". However, the way in which the definition of pollution damage is presented, even after 1992, does not indicate exactly what kind of damage it covers, which means that almost all types of damage resulting from oil pollution can be included in this concept[86]. However, does this mean a full incorporation of the damage done to the natural environment? The answer to this question depends, on the one hand, on the analysis of the eventual paradigm shift from 1969 to 1992, and, on the other hand, on the solutions adopted in four incidents: Antonio Gramsci in 1979, Patmos in 1985, Haven in 1991 and Erika in 1999. The latter will deserve, for the positions it assumes with regard to "ecological damage", the greatest of our attention, after all, it reflects a change in attitude towards repairing this type of damage[87].

The issue of compensation for damage caused to the environment was raised for the first time, within the scope of the CLC and IOPC Fund regime, following the incident with the tanker Antonio Gramisci, on February 27, 1979, which resulted in the leakage of around 5,500 tons of heavy hydrocarbons on the coasts of the former USSR (Latvia and Estonia), Sweden and Finland, responsible for their pollution[88]. As a result of this incident, and based on the Law of the former USSR, the Ministry of Water of the Soviet Union filed a lawsuit for damage to natural resources and for the costs and expenses related to cleaning up polluted waters. This is because the Soviet Law attributed the right of action to the Ministry of Waters, since the territorial sea was considered property of the State[89].

However, the controversial part of that action was based on the way in which the damaged natural resource was evaluated, since the damage was quantified using a mathematical formula called "Methodika". Under this technique, the amount of damage was determined by multiplying the amount of polluted water, estimated on the basis of the amount of hydrocarbon spilled in Soviet waters, by two rubles per cubic meter[90].

[84] "Loss or damage caused outside the ship carrying oil by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, and includes the costs of preventive measures and further loss or damage caused by preventive measures", International Convention on Civil Liability for Oil Pollution Damage, 1969, art. I, n. 6. This definition was also included in article 1, paragraph 2, of the IOPC 1971.

[85] TAQUARY, Eneida Orbage de Britto; TAQUARY, Catharina Orbage de Britto. The margin of interpretation of the treaties. *Revista Brasileira de Direito Internacional*, Salvador, v. 4, n. 1, p. 104–124, Jan./June 2018. p. 105-113.

[86] RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes. *In*: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011. p. 427.

[87] NEYRET, Laurent. Naufrage de L´Erika: vers un droit commun de la réparation des atteintes à l´environnement. *Recueil Dalloz*, n. 38, p. 2681-2689, 30 Oct. 2008. p. 2681.

[88] Fund/WGR.7/4, de 4 de janeiro de 1994.

[89] CHAO, Wu. *Pollution from the Carriage of Oil by Sea*: liability and compensation. United Kingdon: Kluwer Law International, 1996. p. 361.

[90] RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes.

Despite the fact that compensation for this incident was not carried out through the 1971 IOPC Fund, since the former USSR was not a Party to it at that time, Resolution No. 3 of the IOPC deals with the subject of compensation for damage caused to the environment. The document reads "the assessment of the compensation to be paid by the IOPC Fund is not to be made on the basis of an abstract quantification of damages calculated according to theoretical models"[91].

For the purposes of applying the CLC and the IOPC Fund, compensation can only be claimed from the ship owner if the victim has a legal right of action under national law and has suffered economic damage as a result of the pollution[92].

After Antonio Gramisci, other incidents followed and national courts were obliged to rule on the acceptability or, otherwise, on compensation for damage caused to the environment, as well as on its eventual assessment[93].

On March 21, 1985, the Greek Tanker Patmos collided with the Spanish Tanker Castillo del Monte Aragon, offshore Costa da Calabria, Italy, spilling about 700 tons of heavy hydrocarbons[94]. Since most of this was dispersed naturally, only a few tons of hydrocarbons made their way to the coast of Sicily. Following this, several lawsuits were filed in the Court of Sicily against the owner of the ship and against the IOPC Fund 1971. What interests us here is to take into account the complaint brought by the Italian Government for damage to the marine environment[95].

The Italian Government based its argument on article I (6) of the CLC 1969, since, according to it, the definition of "pollution damage" was broad enough to also cover the damage suffered by the environment itself. On 30 July 1986, the Court of First Instance in Messina rejected the Italian action. And, to that end, it based its decision on two arguments: first, that territorial waters are not State property, but rather *res communis omnium* and marine flora and fauna constituted *res nullius*, so that the State did not have the right to claim compensation for them. Second, the Court declared that the State had not suffered any loss of earnings and incurred no costs as a result of the alleged damage to territorial waters, fauna and flora. The court ruled that the State did not suffer any economic damage either, adopting, in this decision, the official position of the IOPC Fund present in Resolution no. 3[96].

The Italian Government appealed the decision and on March 30, 1989, the Messina Court of Appeal reversed the original decision and declared the Italian Government's action admissible. The Court argued that the right to the environment, considering the environment as a unitary asset, including natural resources, health and landscape, belongs to the State in its capacity as representative of the community. And, on the other hand, that despite recognizing that environmental assets do not have a market value and that they are, to that extent, difficult to assess, this is not a sufficient reason for not admitting the action, and that the damage caused to the environment can be compensated through a fair-

In: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011. p. 428.

91 Cfr. "The Assembly of the International Oil Pollution Compensation Fund:
Conscious of the dangers of pollution posed by the world-wide maritime carriage of oil in bulk,
Aware of the detrimental effect of the escape o discharge of persistent oil into sea may have on the environmental and, in particular, on the ecology of the sea, Conscious of the problems of assessing the externa of such damage in monetary terms,
Noting that under the civil liability convention a claim for ecological pollution damage has been raised against the ship-owner which was based on a theoretical model for assessment,
Confirms its intention that the assessment of compensation to be paid by the International Oil Pollution Compensation Fund is not to be made on the basis of an abstract quantification of damage calculated in accordance with theoretical models". Annex, da Fund/WGR.7/4, de 4 de Janeiro de 1994.

92 71FUND/A.4/16, de 2 de outubro de 1981.

93 RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes. *In*: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011. p. 428.

94 CHAO, Wu. *Pollution from the Carriage of Oil by Sea*: liability and compensation. United Kingdon: Kluwer Law International, 1996. p. 366-367.

95 RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes. *In*: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011. p. 429.

96 RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes. *In*: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011. p. 430.

ness judgment[97] which may be established by the Court based on expert opinion[98].

However, the position of the IOPC Fund regarding the arguments used was not known, because the amount stipulated by the Court for compensation for damage resulting from pollution did not reach the minimum amounts necessary to trigger the Fund's intervention.

On 11 April 1991, the Cyprus Tanker Haven[99] caught fire and was responsible for a series of explosions while anchoring seven miles offshore of Genova, Italy[100]. The ship broke into three parts and spilled about 10,000 tons of heavy hydrocarbons. Many actions were received by the Court of Genova. However, the one that interests us for the present study is the one brought by the Italian Government, for damage caused to the marine environment. The position of the IOPC Fund remained in line with Resolution no. 3, even arguing that this type of claims for unquantifiable damage can be brought outside the scope of the Convention based on national law, but never within the scope of the Convention[101].

Nonetheless, what is important to highlight in this example, in particular, is related to the decision of the Court of First Instance of Genova, which understood that the CLC and the IOPC Fund did not exclude claims for damage to the environment. And that, taking into account that they cannot be evaluated based on economic criteria, the damage must be quantified in proportion to approximately one third of the costs of cleaning operations[102]. This decision was subject to appeal by the IOPC Fund. However, before the decision of the Court of Appeal was known, a global out-of-court agreement was concluded between the IOPC Fund, the owner of the ship and the P&I Club, by all actions brought by the Government in the Italian Courts[103].

More recently, this issue was put in evidence in Erika´s case by the Court of Appeal´s decision, on the 25th of September 2012. In the end, the damage caused to the natural environment was recognized as repairable[104]. As such, the Erika judgment has been touted, in recent times, as a decisive step towards environmental protection. However, it deviates significantly from the provisions of the CLC and the IOPC Fund[105].

The Court of Appeal, in the decision rendered in Erika´s case[106], accepted not only compensation for material damage (cleaning costs, restoration measures and property damage) and economic damage, but also moral damage resulting from pollution, including the "loss of enjoyment", damage to reputation, brand and image, as well as moral damage resulting from damage to natural heritage. Likewise, it also accepted the right to compensation for "*préjudice écologique*" (ecological damage)[107]. That is, damage to environmental resources without market value that constitute a legitimate collective interest "separate from that given to the patrimonial and non-patrimonial interests of the subjects of law"[108].

In this decision, it is quite clear that compensation for damage caused to the environment should not be limited to the cost of the cleaning or repair measures undertaken. In this sense, the Court points out some elements that should be taken into account when assessing the amount thereof, such as:

[97] 71FUND/EXC.49/6 de 10 Junho 1996 e 71FUND/EXC.49/12 de 28 Junho 1996, in www.iopc.com.

[98] RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes. *In*: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011. p. 431.

[99] Sobre o caso Haven, ver 71FUND/EXC.28/6, 2 Setembro 1991, 71FUND/EXC.28/6/Add.1, 2 Outubro 1991, 71FUND/EXC.28/9, 8 Outubro 1981, in www.iopc.com.

[100] CHAO, Wu. *Pollution from the Carriage of Oil by Sea*: liability and compensation. United Kingdon: Kluwer Law International, 1996. p. 368-369.

[101] RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes. *In*: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011. p. 433.

[102] RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes. *In*: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011.

[103] FUNF/EXC.48/4 de 10 Abril 1996 e FUND/EXC.48/6 de 17 Abril 1996, in www.iopc.com.

[104] A total of 1016 complaints were rejected, cfr. IOPC/JUN10/3/1, 17 de Maio de 2010, in www.iopc.com.

[105] PAPADOPOULOU, Dandi. The role of french environmental associations in civil liability for environmental harm: courtesy of Erika. *Journal of Environmental Law*, v. 21, n. 1, p. 87-112, 2009. p. 88-89.

[106] JUSTE-RUÍZ, José. Compensation for pollution damage caused by oil tanker accidents: from «Erika» to «Prestige». *Aegean Revue Law Sea*, v. 1, p. 37-60, 2010. p. 44.

[107] L´arrêt de la Cour de Cassation, Chambre Criminelle, 25 de setembro de 2012, n.º 3439, p. 231 (sentença do recurso no caso ERIKA).

[108] IOPC/JUN10/3/1, 17 de Maio de 2010, in www.iopc.com.

- The cost of reasonable remedial measures;
- The number of birds of each species affected by the spill;
- The capacity of nature to regenerate itself;
- The ability of relatively common species to compensate for their loss of reproduction;
- The ability to restore the population of rare birds[109].

From the foregoing, there is a notable evolution in the Court's position with regard to the inclusion of damage caused to the natural environment in the set of damage subject to repair. In fact, this also seems to be the position of the Convention if we only take into account the text of the 1992 version. However, in reality, the position of the bodies responsible for applying the Convention has been restrictive with regard to compensation for damage to the environment.

The bodies responsible for applying the CLC and the IOPC Fund, following the doubts raised regarding the coverage, or not, of damage caused to the environment within the scope of application of the regime, hastened to design the claims manual, as well as other manuals and brochures relating to the different types of damage covered by the regime[110], making clear the interpretation followed with regard to repairable damage[111].

Thus, according to these: "it is virtually impossible to bring a damaged site back to the same ecological state that would have existed if the oil spill had not occurred"[112]. As such, in accordance with Resolution No. 3 of the IOPC Fund, which was intended to clarify the status of compensation for damage caused to the environment, "the assessment of compensation to be paid by the IOPC Fund is not to be made on the basis of an abstract quantification of damage calculated according to theoretical models"[113].

It should be stressed that compensation will therefore be accounted for on the basis of the costs of reasonable reintegration measures, aimed at accelerating the natural recovery of the environment, not on the damage caused to the natural environment itself. This position became publicly known at the 1984 Conference, where the Fund's bodies stated that «the marine environment possessed no real value since it could not be marketed, nor could the sea creatures or fish in it until they were caught»[114].

In this sense, problems arise when the size of the catastrophe has jeopardized a replacement, qua tale, for example, of the same animal or plant species. The broadest interpretation – and which also has the advantage of not rewarding the polluter – is the one that allows replacement to be made using equivalent components[115].

5 Final remarks

From the foregoing, we can say that for the purposes of applying the CLC, the damage caused to the marine environment that does not materialize in repair measures carried out or to be carried out, and which are not within what is understood as reasonable, is not understood as covered damage since they have no market value. Similarly, moral damage should not be considered. After all, it only affects a collective interest and not a specific person.

Therefore, as a result of the strict interpretation applied in Resolution No. 3, this will only compensate the damage to the marine environment within the limits of

[109] L´arrêt de la Cour de Cassation, Chambre Criminelle, 25 de setembro de 2012, n.º 3439, p. 231 (sentença do recurso no caso ERIKA).

[110] REIS, João Henrique Souza dos; CAMPELLO, Lívia Gaigher Bósio. Reasons for using soft law in international environmental law. *Revista Brasileira de Direito Internacional*, Salvador, v. 4, n. 1, p. 83–103, Jan./June 2018. p. 89-92.

[111] Notwithstanding their practical value, these manuals, these resolutions, or brochures, unlike the text of the CLC and the IOPC Fund, are not binding on the Courts of the Member States, being only used as a basis for interpreting the regimes provided for in those instruments. As such, if there is no agreement between the parties involved, the question of the interpretation of the damage covered by the CLC regime will have to be resolved in a jurisdictional seat, thus opening the way to ambiguity in the type of damage that can be covered under its aegis, depending on whether the Court of the country where the question is raised is more, or less, permissive.

[112] INTERNATIONAL Oil Pollution Compensation Fund 1992: Claims Manual, 2019 Edition.

[113] Fund/WGR.7/4, de 4 de Janeiro de 1994.

[114] Official Records of the Conference (1984-1992, Official Records, vol2, LEG/CONF.6/C.2/SR.15, p. 480. CHAO, Wu. *Pollution from the Carriage of Oil by Sea*: liability and compensation. United Kingdon: Kluwer Law International, 1996. p. 152.

[115] RODRÍGUEZ-LUCAS, Luisa. Compensation for damage to the environment per se under international civil liability regimes. *In*: MALJEAN-DUBOIS, Sandrine; LAVANYA, Rajamani (ed.). *La mise en oeuvre du droit international de l´environment*: implementation of international environmental: vol. 2008: Leiden. Boston: Brill: Nijhoff, 2011. p. 437.

the measures implemented for its compensation, or for its prevention, leaving compensation for existing, but unquantifiable or future damage, not compensated[116].

Actions following this type of damage are only accepted if sustained by economic damage, for example, if measures have been taken to reintegrate the environment[117]. Any other type of claim is strictly excluded for purposes of compensation under the CLC regime[118].

In view of this, it can be seen that the position of the IOPC Fund falls short of those enshrined in the Courts and in the decisions described above, it is restrictive and makes us respond negatively regarding the paradigm shift with regard to compensation for damage caused to the environment from 1969 to 1992.

It appears that, even after the amendment occurred in 1992, and notwithstanding the text of the Convention allowing higher flights, the concept of "pollution damage" currently used still has as its main objective the compensation of victims of contamination, not the natural environment. The CLC regime essentially covers individual damage, still leaving a gap for the protection of the marine ecodiversity damage.

However, at this point, it is necessary to make use of an ecosystem approach to interpretate the concept of damage of the CLC regime. In short, it is the time to abandon the traditional technique of protecting nature through the protection of specific species and to view the ecosystem as a whole, taking into account the relationship between species and the ecological conditions of the surrounding system, and ultimately including ecological services. Only a concept of damage with this type of approach will allow an evolution of the concept, which responds to current concerns and needs for the protection of the marine ecosystem.

[116] MARTÍN, Unai Belintxon. La responsabilidad civil en el Derecho Marítimo: la efectiva aplicación de las medidas de prevención en materia de seguridad marítima. *In*: RUBIO, Juan José Álvarez (dir.). *Las lecciones jurídicas del caso Prestige*: prevención, gestión y sanción frente a la contaminación marina por hidrocarburos. Navarra: Thomson Reuters: Arazandi, 2011. p. 193-245. p. 208.

[117] 71FUND/EXC.30/2, 29 novembro 1991, 71FUND/EXC.30/5, 17 dezembro 1991, in www.iopc.com.

[118] BRANS, Edward H. P. *Liability for damage to public natural resources*: standing, damage and damage assessment. Netherlands: Kluwer Law International, 2001. (International Environmental Law and Policy Series, 61). p. 346.

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