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ARTICLE

Channelling of Liability under the International Convention on Civil Liability for Oil Pollution Damage 1992 from the Perspective of Remote Operation of Ships

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Abstract
The emergence of remotely operated vessels introduces new players, such as remote operators, into the shipping industry. The International Maritime Organization (IMO) is working to incorporate these concepts into its regulatory framework. Given the significant responsibilities expected of remote operators, their liability for oil pollution and their role in marine environment protection require careful examination. The IMO is reviewing whether remote operators should be protected under the 'channelling of liability' provision in the International Convention on Civil Liability for Oil Pollution Damage 1992, which shields certain parties from negligence claims. While this provision may simplify the process of assigning liability, it has been criticized for weakening incentives to protect the marine environment. This article examines two options for the IMO: (i) leaving the status of remote operators undefined, allowing courts to interpret if they fall within the provision, or (ii) explicitly clarifying their status. The former is assessed through treaty interpretation and domestic case law, highlighting risks of legal uncertainty. The latter is explored by evaluating policy considerations and tools that could strengthen incentives for protecting the marine environment.

Keywords: Marine environment; Oil pollution; Remote operation; Channelling of liability; Treaty interpretation; Environmental protection incentives

1. Introduction

Effective international environmental governance of the seas relies on robust civil liability and compensation regimes for oil pollution.[1] While these systems significantly support environmental restoration, their effectiveness in incentivizing environmental protection requires further analysis. Among instruments imposing liability, the 1969

[1] M. Jacobsson, 'The Contribution of the International Compensation Regimes to the Protection of the Ocean' (2024) 39(3) *The International Journal of Marine and Coastal Law*, pp. 486–505.

International Convention on Civil Liability for Oil Pollution Damage (CLC 69),[2] as amended by the 1992 Protocol[3] (collectively CLC 92), has been widely adopted and applied consistently in major oil spill disputes. It provides a framework for adequate and prompt compensation for various types of damage, including the costs of reasonable measures for environmental reinstatement (Article I(6)). These measures aim to restore the affected biological community as close as possible to its pre-incident condition,[4] making compensation essential for environmental preservation. Unlike other conventions on oil pollution, CLC 92 shields certain parties from liability for oil pollution resulting from their negligence,[5] channelling civil liability to the vessel's owner and its financial guarantor. Consequently, the CLC regime arguably does not aim to ensure corrective justice and does not strictly adhere to the 'polluter pays' principle, as it protects actual polluters from victims' claims arising from their negligence via channelling. This policy choice raises questions about the effectiveness of channelling in creating incentives to prevent pollution and safeguard the environment for parties protected from victims' claims (protected parties).

Despite a significant decline in accidental oil pollution from hydrocarbon oil over the past decade,[6] the issue persists, rendering civil liability regimes still relevant for future incidents. Environmental concerns are expected to remain a priority for policymakers, especially with the rise of new-generation vessels[7] and remote operation practices. This evolution may require new perspectives and possibly new regulatory measures. In 2021, the International Maritime Organization (IMO) conducted a preliminary review of the international conventions to integrate these advancements.[8] Specifically, regarding CLC 92, the IMO is considering how remote operators –

2 Brussels (Belgium), 29 Nov. 1969, in force 19 June 1975, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%20973/volume-973-I-14097-English.pdf.

3 Protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969, London (United Kingdom (UK)), 27 Nov. 1992, in force 30 May 1996, available at: https://iopcfunds.org/wp-content/uploads/2018/06/Text-of-Conventions_e.pdf.

4 International Oil Pollution Compensation Funds (IOPCF), *Claims Manual: 2019 Edition* (IOPCF, 2019), para. 3.6.4, available at: https://iopcfunds.org/wp-content/uploads/2018/12/2019-Claims-Manual_e-1.pdf.

5 Similarly, see also International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, London (UK), 30 Apr. 2010, not yet in force, available at: https://www.hnsconvention.org/the-convention.

6 See International Tanker Owners Pollution Federation (ITOPF), *Oil Tanker Spill Statistics 2024*, (ITOPF, 2025), available at: https://www.itopf.org/knowledge-resources/data-statistics/statistics.

7 See A. Habibic, 'Samsung Heavy Partners with Kongsberg for Next-Gen Autonomous LNG Carrier', *Offshore Energy*, (21 Mar. 2023, available at: https://www.offshore-energy.biz/samsung-heavy-partners-with-kongsberg-for-next-gen-autonomous-lng-carrier (for the news that an agreement was made in 2023 to develop autonomous liquefied natural gas (LNG) carriers, potentially paving the way for similar initiatives with oil tankers). Further, the IMO Legal Committee (LEG) acknowledges the potential of tankers qualifying as maritime autonomous surface ships (MASS): IMO, 'Outcome of the Regulatory Scoping Exercise and Gap Analysis of Conventions Emanating from the Legal Committee with respect to Maritime Autonomous Surface Ships (MASS)', 15 Dec. 2021, IMO Doc. LEG.1/Circ.11, Annex, pp. 16, 21, available at: https://docs.imo.org/Category.aspx?cid=148.

8 IMO, ibid.; Maritime Safety Committee (MSC), 'Outcome of the Regulatory Scoping Exercise for the Use of Maritime Autonomous Surface Ships (MASS)', 3 June 2021, IMO Doc. MSC.1/Circ.1638, available at: https://docs.imo.org/Category.aspx?cid=106.

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individuals operating vessels from a location other than on board the ship itself – should be considered in terms of channelling liability.[9] This article explores the IMO's pertinent question on the matter as follows. Section 2 provides an overview of channelling liability under CLC 92. Section 3 discusses the IMO's current efforts to integrate remote operators within the existing regulatory framework and the options considered regarding the applicability of the channelling of liability provision to them. Section 4 analyzes the legal implications of not explicitly clarifying whether they should be included in or excluded from the channelling provision, referencing the rules of interpretation of international conventions and previous case law regarding channelling. Section 5 proposes policy considerations for clarifying the position of remote operators, focusing on incentives for marine environmental protection.

2. CLC Regime and Channelling of Liability: An Overview

CLC 92 establishes a civil liability system in which the owner of the vessel responsible for oil pollution and its financial guarantor are liable for pollution damage. CLC 69 provides that no claim can be made against the owner's servants or agents under the Convention or otherwise. CLC 92 expands the list of parties exempt from liability to encompass pilots, individuals performing services to the ship without being a crew member, charterers, managers, operators, and other parties listed specifically in the 1992 Protocol.[10] Unlike CLC 69, CLC 92 contains a provision that allows victims to file a claim against these parties if the damage resulted from 'their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result' (conduct barring immunity).[11] Consequently, unless the proviso is complied with, victims of oil pollution may not claim against these parties under CLC 92; thus, the claims would have to be channelled against the owner. This is termed 'channelling of liability'. Because of the challenge of proving both the high degree of fault and the knowledge regarding the likelihood of damage occurring among the protected parties, claims are often directed to the owner in many circumstances. In this context, there have been examples from different jurisdictions where courts have ruled that conduct barring immunity[12] makes those specified in the channelling provision liable to the victims under CLC 92. Therefore, it is crucial to determine who falls within this provision, as victims may claim against the owner only if the negligence of these parties causes pollution damage, or also claim directly against the parties themselves if immunity is barred.

In addition to the foregoing instruments, the 1992 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage

9 IMO (2021), LEG.1/Circ.11, n. 7 above, Annex, pp. 18–20, para. 5.5.

10 N. 3 above, Art. III(4).

11 Ibid. This test mirrors the criteria that determine when owners are barred from relying on the limitation of liability under Art. V(2) CLC 92.

12 Cour de Cassation (Chambre Criminelle), 25 Sept. 2012, 10-82.938 (*Erika – Cour de Cassation*). For information on a ruling in Spain by the Supreme Court in the *Prestige* case, see IOPCF, *Prestige*, Jan. 2016, p. 8, available at: https://iopcfunds.org/wp-content/uploads/2018/10/archived_case_study_2016_prestige.pdf.

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(1992 Fund Convention),[13] superseding the 1971 Convention of the same name,[14] establishes a system to compensate victims through the International Oil Pollution Compensation Fund (IOPCF), where, among other reasons, the limits under CLC 92 are insufficient for compensation. The 2003 Supplementary Protocol to the 1992 Fund Convention[15] sets out higher limits of liability compared to the CLC 92 and the Fund Convention, and provides compensation when the limits under the latter are inadequate to cover pollution damages.

However, other conventions exist regarding oil pollution, which establish joint and several liability rather than channelling claims to the owner.[16] The choice between these options has both advantages and drawbacks, which are aptly covered in several works[17] and are not elaborated upon in their entirety in this article. Instead, the article considers the primary advantages and criticisms of channelling in the last section, specifically the adequate and prompt compensation of the victim, and the failure to create incentives for protecting the marine environment, offering perspectives on whether remote operators should be included in the channelling. To set the scene for this analysis, we must first examine the recent work conducted by the IMO on remote operators.

3. Recent Attempts by the IMO to Contextualize Remote Operators

The IMO is striving to progressively integrate autonomous vessels into its regulatory framework. The Maritime Safety Committee (MSC) and Legal Committee (LEG) reviewed existing international conventions and published preliminary results in 2021, highlighting the need to clarify the role and liability of remote operators. In this context, one of the key issues for the IMO was (and remains) whether remote operators should be protected under the channelling of liability provision of CLC 92. Further work continued in 2023 and 2024 with the development of a Draft International Code of Safety for Maritime Autonomous Surface Ships (Draft Code)[18]

13 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, London (UK), 27 Nov. 1992, in force 30 May 1996, available at: https://iopcfunds.org/wp-content/uploads/2018/06/Text-of-Conventions_e.pdf.

14 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Brussels (Belgium), 18 Dec. 1971, in force 16 Oct. 1978, available at: https://iopcfunds.org/wp-content/uploads/2018/03/71FC_e.pdf.

15 Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1992, London (UK), 16 May 2003, in force 3 Mar. 2005, available at: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/17146/A-17146-0800000280588d77.pdf.

16 E.g., International Convention on Civil Liability for Bunker Oil Pollution Convention 2001, London (UK), 23 Mar. 2001, in force 21 Nov. 2008, Art. 3(2), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A22002A0925%2801%29.

17 For examples see M. Faure & W. Hui, 'Economic Analysis of Compensation for Oil Pollution Damage' (2006) 37(2) *Journal of Maritime Law and Commerce*, pp. 179–217, at 208–11; A.E. Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17(1) *Journal of Environmental Law*, pp. 3–26, at 14–5; M. Faure, 'Causal Uncertainty, Joint and Several Liability and Insurance', in H. Koziol & J. Spier (eds), *Liber Amicorum Pierre Widmer* (Springer, 2003), pp. 79–98, n. 12 at 90–2, 94–5.

18 MSC, 'Development of a Goal-Based Instrument for Maritime Autonomous Surface Ships (MASS): Report of the Intersessional Working Group', 16 Sept. 2024, IMO Doc. MSC 109/5, Annex (Draft Code), available at: https://docs.imo.org/Category.aspx?cid=49&session=109. The Draft Code is

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by the MSC, which includes a definition for, and provisions regarding the roles and responsibilities of remote operators. The Draft Code is important for the LEG, which is awaiting its finalization to assess whether there is a need for amendments to or interpretations of the conventions under its purview,[19] including CLC 92. This could consequently affect how the channelling of liability provisions will be addressed. The following subsections provide an overview of the recent efforts by the IMO in addressing the role of remote operators and the options considered so far regarding their position under the channelling of liability provision.

3.1. Remote Operators in the Context of the Draft Code

The remote operation of both manned and unmanned ships has been a topic of discussion for many years. Earlier research on the operation of unmanned ships covered this type of operation as one managed from a location remote from the ship, involving the monitoring of collision avoidance systems, navigation, and voyage planning.[20] Over the years, the emergence of the concept of remote operation has led to the development of remote operations centres,[21] requiring operators to perform roles akin to onboard crew and masters. This shift necessitates clarification of their roles, responsibilities, and cooperation with other stakeholders while addressing their position within the framework of civil liability.

To address the technical and legal aspects of greater autonomy, the IMO is working to define remote operators and operation centres. The Draft Code currently contains definitions distinguishing between crew on board a maritime autonomous surface ship (MASS)[22] and 'MASS remote crew', defined as 'a remote master, remote operators and responsible persons controlling operating MASS remotely and/or providing assistance to the crew in the MASS operation'.[23] Numerous references also exist to 'remote operator',[24] described as 'a qualified person who is employed or engaged to operate

sought to be complementary to other IMO instruments, such as the International Convention for the Safety of Life at Sea (SOLAS) 1974, as amended (Annex, Preamble, para. 6), and applies to cargo ships having autonomous or remote operation functions which are subject to SOLAS Chapter I, including any associated remote operations centre(s) (Annex, Part 1, Chapter 2). The Draft Code is anticipated to have non-mandatory effect in the short term; however, it is developed in such a manner to allow its application mandatorily in the future.

[19] IMO, 'Report of the Legal Committee on the Work of its 111th Session', 16 May 2024, IMO Doc. LEG 111/17/Add.1, Annex 8, p. 1, available at: https://docs.imo.org/Category.aspx?cid=45&session=11.

[20] S.N. MacKinnon, Y. Man & M. Baldauf, 'D8.8: Final Report: Shore Control Centre', Maritime Unmanned Navigation through Intelligence in Networks, 15 Sept. 2015, p. 7.

[21] For recent cooperation between a shipbuilding company and a classification society towards the development of a remote operations centre see 'DNV and Samsung Heavy Industries Collaborate on Remote Operation Centre for Autonomous Ships Project', *American Journal of Transportation*, 27 Oct. 2023, available at: https://www.ajot.com/news/dnv-and-samsung-heavy-industries-collaborate-on-remote-operation-centre-for-autonomous-ships-project.

[22] A MASS is defined as 'a ship which, to a varying degree, can operate independent of human interaction': Draft Code, n. 18 above, Annex, paras 4.25–4.26.

[23] Ibid., para. 4.27.

[24] Ibid., paras 6.3.5, 9.2, 15.2.7.

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some or all aspects of the functions of a MASS from a Remote Operations Centre',[25] which was previously also agreed by the MSC-LEG-FAL Joint Working Group on MASS.[26] Although this wording is not yet finalized and may therefore change over time, it indicates that the current approach of the Draft Code is to include remote operators as part of the ship's crew.

Remote operators are expected to perform a variety of functions. Moreover, legal challenges are presented by a single operator managing multiple MASS[27] simultaneously, different operation centres controlling a vessel during a single voyage[28] or operating different MASS functions. Such scenarios raise questions about the protection of remote operators under the channelling of liability provisions when oil pollution occurs. Acknowledging the significance of remote operators, the IMO LEG has considered clarifying their position regarding this provision.[29] The next subsection outlines the IMO's relevant work to date.

3.2. The IMO Scoping Exercise: Consideration of Remote Operators in the Context of the Channelling of Liability

Possible amendments to CLC 69 (which would expand the parties protected by the channelling of liability) were discussed in the 1980s,[30] when remote operation of vessels was clearly not yet on the agenda. The provision on channelling in CLC 92 was therefore drafted with consideration for conventional players, including crew members, servants and agents of the owner, commercial operators, charterers, and so forth. With the introduction of new generation vessels into shipping, however, the position of remote operators in relation to the channelling provision needs to be addressed. This was stressed by the IMO LEG in its scoping exercise.[31] The importance of this lies in the fact that if remote operators are protected, the owner could be liable under CLC 92 for their negligence without remote operators having to compensate victims for oil pollution damage. To what extent this could incentivize remote operators to safeguard the environment would consequently come into play.

[25] Ibid., para. 4.38.

[26] IMO, 'Measures to Address Maritime Autonomous Surface Ships (MASS) in Instruments under the Purview of LEG: Report of the MSC-LEG-FAL Joint Working Group on Maritime Autonomous Surface Ships (MASS) on its Second Session', 19 Jan. 2024, IMO Doc. LEG 111/10, p. 8, para. 35, available at: https://docs.imo.org/Category.aspx?cid=45&session=111.

[27] This possibility was expressed regarding remote masters: ibid., p. 7, para. 32.

[28] Ibid., p. 7, paras 28–31.

[29] IMO, n. 7 above, Annex, pp. 18–9.

[30] See, e.g., Inter-Governmental Maritime Consultative Organization (IMCO), 'Report of the Chairman of the Second Informal Meeting on the Revision of the Civil Liability Convention and the Fund Convention', 22 Jan. 1982, IMCO Doc. LEG 48/2/2, pp. 25–6, paras 80-5, available at: https://archives.imo.org/imoarch/index.html; IMCO, 'Report of the Chairman of the Informal Working Group on the Revision of the Civil Liability Convention and the Fund Convention', 15 July 1981, IMCO Doc. LEG XLVI/3/1, pp. 13–4, paras 48–50, available at: https://archives.imo.org/imoarch/index.html; IMCO, 'Report of the Legal Committee on the Work of its 48th Session', Mar. 1982, IMCO Doc. LEG 48/619, pp. 19–21, paras 89–99, available at: https://archives.imo.org/imoarch/index.html.

[31] See IMO, n. 7 above, Annex, pp. 13–4 for CLC 69, p. 18 for CLC 92.

The LEG suggested that the liability for oil pollution of remote operators could be addressed by leaving the channelling provision unchanged, interpreting it,[32] or expressly excluding them through amendments or new instruments.[33] However, it was also acknowledged that failing to clarify their status could create legal uncertainty, which may hinder the development of MASS.[34] The following sections explore these options, their legal implications, and associated policy considerations.

4. Appraisals on the Option of not Clarifying the Position of Remote Operators regarding the Channelling of Liability

Where there is uncertainty as to whether remote operators fall within the channelling provision, the task of clarifying this will be left to the courts, which will determine whether they act as 'servants or agents of the owner or the members of the crew' under Article III(4)(a) CLC 92, 'any other person who, without being a member of the crew, performs services for the ship' under Article III(4)(b), or as 'operator' under Article III(4)(c).[35] These terms should be interpreted using the rules of interpretation in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).[36] These rules are also part of customary international law,[37] making them applicable even in non-signatory states.[38]

Under Article 31 VCLT, entitled 'General rule of interpretation', treaty interpretation requires, *inter alia*, the identification of the 'ordinary meaning' of terms in their context and consideration of the treaty's object and purpose. Should the meaning deriving from the application of this rule be ambiguous, absurd, or in need of confirmation, supplementary means such as the preparatory works of the convention may be employed (Article 32 VCLT). It is noteworthy that Article 31 does not clarify whether, in identifying the 'ordinary meaning' of a term, one must consider the meaning at the time of the conclusion of the Convention (static interpretation) or at the time of the interpretation (dynamic interpretation).[39] Both approaches are employed in international judicial practice[40] and are considered in this work.

32 Ibid.

33 Ibid., Annex, p. 14 for CLC 69, p. 18 for CLC 92.

34 Ibid., Annex, pp. 14–5 for CLC 69, p. 19 for CLC 92. The Comité Maritime International (CMI) (a non-governmental organization with the objective of contributing to the unification of maritime law, at: https://comitemaritime.org) contended that the position of remote controllers should be expressly clarified under CLC 92 although, in the opinion of the drafters of the document, these persons were clearly included in the list: CMI Consolidated Analysis of IMO LEG Conventions, page entitled 'CLC Protocol 92', row 51, column E, available at: https://comitemaritime.org/work/mass.

35 It could also be argued that remote operators might fall under 'any person taking preventive measures' in Art. III(4)(e) CLC 92, when responding to an oil pollution incident.

36 Vienna (Austria), 23 May 1969, in force 27 Jan. 1980, available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

37 U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer, 2007), p. 14.

38 See O. Cachard, 'International and National Oil Pollution Regimes: Their Coexistence in Continental Europe after the *Erika* and *Prestige* Incidents', in B. Soyer & A. Tettenborn (eds), *Maritime Liabilities in a Global and Regional Context* (Routledge, 2018), pp. 30–9, at 37.

39 O. Dörr & K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2018), p. 572.

40 Ibid.

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Article 33 VCLT establishes a special rule of interpretation[41] regarding treaties authenticated in two or more languages. Both CLC 69, which contains the initial version of the channelling provision, and the 1992 Protocol, which includes additional parties therein, are authenticated in English and French.[42] Therefore, Article 33 VCLT would also be relevant for the interpretation of the channelling provision. Articles 33(1) and 33(3), respectively, prescribe equal authority for texts in different languages and presume identical meanings for the terms used therein. This presumption is adopted because, when seeking to determine the ordinary meaning of a term under Article 31(1), one must consider all authentic versions of the term and compare them,[43] which is a challenging task. Therefore, according to the presumption, the interpreter may work with one or two authentic languages for 'routine interpretation',[44] unless there is a difference in meaning between those versions as per Article 33(4) VCLT.[45] According to this subparagraph, if there is a difference in meaning, Articles 31 and 32 (including all their subparagraphs) should guide interpretation. If that does not resolve the issue, the interpretation that best reconciles the texts in the light of the object and purpose of the treaty should be selected (Article 33(4)).

All the aforementioned rules will assist in interpreting the channelling provision. Further, the subparagraphs within the provision are examined below by reference to absence on board and operational independence from the owner. Any findings suggesting potential divergent decisions by courts would need careful consideration, as they could influence the IMO's decision to clarify the channelling provision.

4.1. Remote Operators: 'Servants or Agents of the Owner or the Members of the Crew' under Article III(4)(a)?

The IMO LEG emphasized the ambiguity regarding whether remote operators come within the term 'servants or agents' in liability conventions.[46] This term was included in CLC 69 and was expanded in CLC 92 with the addition of 'or the members of the crew'. Because of the inherent connection between remote operators and operation centres, our analysis below considers both. Additionally, the reference to 'owner' in the subparagraph, along with its broad definition in Article I(3) CLC 92 (which encompasses registered owners, unregistered owners, and operators of state vessels) will also inform this analysis.

41 See Linderfalk, n. 37 above, p. 355 (describing the rule as a 'special rule').
42 CLC 69, n. 2 above Art. XXI; Final Clauses of the Protocol of 1992 to amend the 1969 Civil Liability Convention, n. 3 above, Art. 18.
43 Dörr & Schmalenbach, n. 39 above, p. 646, para. 32.
44 Ibid.
45 Ibid.
46 IMO, n. 7 above, Annex, p. 7, para. 5.4.

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Remote operators: 'servants ... of the owner'?

It was suggested that remote operations centres could be operated by ship owners or manning companies,[47] or by ship management companies.[48] Alternatives included groups of masters, engineers, or pilots specializing in difficult navigation areas.[49] Shipyards and engine manufacturers were also considered essential for resolving ship and engine issues.[50] These expectations highlight a potential distinction between remote operators employed by the owner[51] of a MASS and those acting independently. This distinction was recognized in the literature[52] and acknowledged by some states during the work of the IMO LEG on MASS.[53] It is also crucial for liability purposes: if the MASS owner manages the remote operations centre, remote operators might be considered employees and fall within the term 'servant' in Article III(4)(a) CLC 92, thereby granting them immunity from being sued for negligence resulting in pollution damage.[54]

For interpretation, both the words 'servant' in English and '*préposé*' in French should be taken into account as per Article 33 VCLT. It was suggested that the French word implies a subordinate function or employee, suggesting a person acting in the course of employment whose actions entail the principal's responsibility under the rule of *respondeat superior*.[55] The term 'servant' seems to closely resemble its French counterpart.

[47] L. Kretschmann et al., 'D9.3: Quantitative Assessment, Maritime Unmanned Navigation through Intelligence in Networks, 12 Oct. 2015, p. 80.

[48] For the view that these companies are likely to take over the management of unmanned ships see V. Ulfbeck & A. Arda, 'Remote Control and Remote Risk of Liability? Vicarious Liability for Remotely Controlled Vessels in Scandinavian and English Law', in T.M. Johansson et al. (eds), *Autonomous Vessels in Maritime Affairs: Law and Governance Implications* (Palgrave Macmillan, 2023), pp. 263–75, at 267. Regarding the fact that, currently, remote operators and ship managers may not be equated see L. Zhu & M. Zhu, 'Analysing the Legal Status of Operators of Remotely Controlled Vessels' (2023) 29 *Journal of International Maritime Law*, pp. 31–40, at 36.

[49] MacKinnon, Man & Baldauf, n. 20 above.

[50] Kretschmann et al., n. 47 above.

[51] Including, more generally, registered and unregistered owners.

[52] S. Baughen, 'Who Is the Master Now? Regulatory and Contractual Challenges of Unmanned Vessels', in B. Soyer & A. Tettenborn (eds), *New Technologies, Artificial Intelligence and Shipping Law in the 21st Century* (Routledge, 2019), pp. 129–47, at 139; Ulfbeck & Arda, n. 48 above, p. 264; Z. Amaxilati, 'The Human Element in Autonomous Shipping', in B. Soyer & A. Tettenborn (eds), *Disruptive Technologies, Climate Change and Shipping* (Routledge, 2022), pp. 114–26, at 124. For the view that the contractual relationship between the owner and the remote operator will probably render the latter an independent contractor in the absence of special circumstances see Zhu & Zhu, n. 48 above, p. 40.

[53] IMO, 'Measures to Address Maritime Autonomous Surface Ships (MASS) in Instruments under the Purview of the Legal Committee, MASS Operational Context: Submitted by the Russian Federation', 23 Dec. 2022, IMO Doc. LEG 110/11/4, Annex, p. 3, FR4.8, available at: https://docs.imo.org/Category.aspx?cid=45&session=110.

[54] See Baughen, n. 52 above, p. 139 (for the proposition that if the remote operators are employed by the owner they would fall within Art. III(4)(a) CLC 92).

[55] F. Berlingieri, *International Maritime Conventions, Vol. 3: Protection of the Marine Environment* (Routledge, 2015), p. 131.

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For instance, in *Reino de Espana* v. *American Bureau of Shipping Inc.* (*RE* v. *ABS* or *Prestige*),[56] 'servant' was interpreted as a person working at the owner's direction.[57] The foregoing supports the argument that employees of a remote operations centre owned by the (registered or unregistered) owner, as per Article I(3) CLC 92, could be considered 'servants' of that owner and be protected under the channelling provision. Conversely, a person registered as an operator of a state vessel and consequently regarded as the 'owner' under Article I(3) is less likely to possess a remote operations centre. In this scenario, remote operators may not be protected under Article III(4)(a) as they may not qualify as a 'servant' of the ship's operator.

Remote operators: 'agents of the owner'?

If the remote operations centre functions independently from the 'owner' (in the broad sense as per Article I(3), including the company registered as the ship's operator in the case of a ship owned by a state), it would be necessary to identify where remote operators would fit within subparagraph (a). The term 'agent' requires further elaboration in this regard.

According to Article 33 VCLT, the words 'agent' in English and '*mandataire*' in French should be considered for interpretation. It has been suggested that '*mandataire*' denotes a person acting on behalf of another,[58] which can also be said for 'agent'. However, it remains unclear whether the person must also act 'for the account' of another to qualify as such. Moreover, agents possess greater independence than servants, although the necessary degree of independence remains unclear. Given the ambiguity of the ordinary meanings of these terms, supplementary means of interpretation under Article 32(a), including the preparatory works of CLC 69 and 92, must be consulted. The CLC 69 preparatory works indicate that proposals to include independent contractors alongside 'servants' and 'agents'[59] were rejected, meaning that independent contractors, who have less owner control than agents, fall outside the scope of 'servants or agents'. Agents, therefore, may be considered parties less independent of the owner, compared with independent contractors, and work on behalf of the owner without an employment relationship. In *RE* v. *ABS*, it was noted *obiter* that an independent classification society not working at the owner's direction or on its behalf could not be considered a servant or agent.[60]

Based on the above, if remote operators work in an independent centre that acts as an 'agent', they may assist in fulfilling the centre's duties. The centre could be vicariously liable for the operators' actions and could seek protection under the

[56] 528 F. Supp. 2d 455 (SDNY 2008) (*RE* v. *ABS*).

[57] Ibid., p. 458, per Laura Taylor Swain DJ. It is noteworthy that the relevant parts of this decision were *obiter dicta*; see Cachard, n. 38 above, p. 32. Further, this interpretation had not relied on the VCLT.

[58] Berlingieri, n. 55 above, p. 131.

[59] See, e.g., IMCO, 'Official Records of the International Legal Conference on Marine Pollution Damage, 1969', 20 Nov. 1969, IMCO Doc. LEG/CONF/4/Add.6/Rev.2, p. 548, for the proposal submitted by the delegation of The Netherlands. See also Baughen (n. 52 above, p. 139) for the view that if the remote operators are independent contractors they would 'likely fall within heading (a) as an "agent of the owner"'.

[60] See *RE* v. *ABS*, n. 56 above, p. 458, per Laura Taylor Swain DJ.

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channelling provision. Although remote operators may not be agents themselves, the centre, acting as an 'agent', might be protected under Article III(4)(a) CLC 92. It would follow whether remote operators, as servants of the centre acting as 'agent', could potentially be protected under the channelling provision. As Article III(4)(f) protects only servants or agents of those under subparagraphs (c), (d) and (e) (but not (a)), remote operators, as servants of the centre, may not be protected under either Article III(4)(a) or Article III(4)(f).

Dynamic interpretation of 'crew' to encompass remote operators?

The interpretation of 'crew'[61] ('*membres de l'équipage*' in the French version) in Article III(4)(a) CLC 92 is a significant issue highlighted by the IMO LEG,[62] particularly regarding whether it includes remote operators. Traditionally, 'crew' refers to all seafarers on board a ship[63] and is not defined explicitly in the Convention. Although remote operators may operate similarly to onboard crew, courts might find this inadequate to classify them as 'crew'. As the French and English versions of the wording display no difference in accordance with Article 33(4) VCLT, courts must interpret 'crew' according to its ordinary meaning within the context of the term and the object and purpose of CLC 92, as per Article 31(1) VCLT. This involves deciding between a static interpretation, based on the intent when CLC 92 was drafted, and a dynamic interpretation, referring to the meaning that the term holds at the time of interpretation. If opting for the latter, courts must establish whether the parties intended a dynamic interpretation[64] or, if the term was dynamic from the outset,[65] capable of evolving over time.[66]

When the 1992 Protocol was drafted, the term 'crew' was arguably not intended to be interpreted dynamically. Also, as courts appear to be increasingly inclined to construe a term statically,[67] 'crew' could be interpreted by courts to encompass only those who operate on board the vessel. This being the case, the Draft Code currently encompasses remote operators within the definition of 'crew'. If the Code becomes mandatory and the LEG does not clarify the wording of 'crew' in the channelling provision, courts that decide to interpret the wording dynamically may benefit from the Code including remote operators as part of 'crew', as this wording could be seen as one that necessarily evolves over time. However, uncertainty about

61 This wording did not exist in CLC 69 and was added with the 1992 Protocol, n 3 above.

62 IMO, n. 7 above, Annex, para. 5.11.

63 See Berlingieri, n. 55 above, p. 132.

64 Dörr & Schmalenbach, n. 39 above, p. 573.

65 Ibid.

66 See Dörr & Schmalenbach, n. 39 above, p. 612 (for the view that where the parties use a generic wording that 'necessarily evolves over time', 'they usually must be presumed to have intended a dynamic interpretation'). See also M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill/Martinus Nijhoff, 2009), p. 426 (on the suggestion that '[a] term may have a number of ordinary meanings, which may even change over time').

67 Dörr & Schmalenbach, n. 39 above, p. 572.

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whether courts would interpret 'crew' dynamically or statically would continue, thus disrupting legal certainty. Policymakers are thus urged to provide explicit clarification on this matter.

4.2. Remote Operators: 'Pilot, or Any Other Person Who, Without Being a Member of the Crew, Performs Services for the Ship' under Article III(4)(b)

Courts that might assess whether remote operators fall within Article III(4)(b) CLC 92 would encounter three key issues. Firstly, the term 'person' is likely to include remote operators, based on its broad definition.[68] Secondly, the ambiguity surrounding their status as 'crew' depends on whether courts adopt a static or dynamic interpretation. A dynamic view may classify remote operators as 'crew', thereby excluding them from protection under Article III(4)(b), whereas a static interpretation, which requires physical presence on board, could permit their inclusion under the provision. Thirdly, courts may consider whether protection under Article III(4)(b) requires services similar to those performed by pilots to be performed by remote operators, invoking the *ejusdem generis* rule.[69] However, its applicability to treaty interpretation is still uncertain.[70] If applied, courts would assess the nature, scope, and location of remote operators' services in comparison to pilots, whose traditional onboard role may be evolving with technological advances, potentially broadening the term's definition if 'pilot' is interpreted dynamically. Previous case law involving classification societies[71] – performing offboard services like remote operators and qualified as non-crew entities – may provide guidance in interpreting Article III(4)(b), as some rulings have extended the protection under the relevant subparagraph to them. The following overview of narrow and broad interpretations of Article III(4)(b), based on court rulings and academic views, highlights divergences that underscore the need for IMO clarification on the status of remote operators regarding channelling.

[68] See CLC 92, n. 2 above, Art. I(2). However, certain commentators argue that the scope is narrower: Berlingieri, n. 55 above, p. 133; and C. de la Rue, C. Anderson & J. Hare, *Shipping and the Environment* (Routledge, 2023), p. 143.

[69] The rule is that where general words follow specific words, the former should be construed as being confined to the things of the same kind as those specifically listed. This interpretative rule is classified as one regarding the supplementary means of interpretation regulated under Art. 32 VCLT, n. 36 above. See Linderfalk, n. 37 above, pp. 303–10 (although if the rule is to be 'taken into consideration in the interpretation of treaties, it must be described as a rule of interpretation in and of itself': ibid., p. 310).

[70] For the approaches of courts to the application of the *ejusdem generis* rule in treaty interpretation see F. Baetens, 'Ejusdem Generis and Noscitur a Sociis', in J. Klingler, Y. Parkhomenko & C. Salonidis (eds), *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Wolters Kluwer, 2019), pp. 133–60. It was provided in this context that 'despite frequent references to it and with the exception of the interpretation of most favoured-nation (MFN) clauses, *ejusdem generis* is not an influential canon of construction in most areas of international law': Baetens, ibid., p. 158. See also Linderfalk, n. 37 above, p. 310.

[71] For examples, see *RE* v. *ABS*, n. 56 above (regarding the *Prestige* oil pollution incident); *Erika – Cour de Cassation*, n. 12 above; Cour d'Appel de Paris, Pôle 4, 11ème chambre (30 Mar. 2010), n° RG 08/02278 (*Erika – Cour d'Appel*); Tribunal de Grande Instance de Paris, 11ème chambre, 4ème section (16 Jan. 2008), n° 9934895010 (*Erika – Tribunal*), regarding the *Erika* oil pollution incident.

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Narrow interpretation of Article III(4)(b)

The narrow interpretation of Article III(4)(b) CLC 92 was favoured in the *Erika* judgment by the French High Court,[72] which limited the provision to those directly involved in maritime operations,[73] such as pilots and crew. Classification societies were excluded.[74] The narrow interpretation seems tenable according to certain commentators who emphasize the application of the *ejusdem generis* rule of construction.[75] It was argued that the individual providing services must have a legal relationship with the owner just as the pilot would have.[76] Furthermore, it was stated that providing services akin to those of the crew would require these services to be rendered on board the vessel.[77]

Another view suggested that if the provision were intended to include all individuals providing services for the ship without limitation, then the phrase 'without being a member of the crew' would have been superfluous.[78] Adoption of this narrow view and the static interpretation of 'pilot' would exclude remote operators from the protection under Article III(4)(b) CLC 92.

However, this interpretation was dismissed in *RE* v. *ABS*, in which the claimants invoked the *ejusdem generis* rule for the construction of Article III(4)(b). The Court ruled that the language of Article I(2) and Article III was clear and did not require interpretation by reference to pilots,[79] and it extended protection to a classification society.[80] Some scholars argue that Article III(4)(b) does not necessitate services to be performed onboard.[81] Proponents of this view could also argue that one should be cautious about applying the *ejusdem generis* rule to international conventions.[82] This

[72] Ibid., *Erika – Tribunal*.

[73] Ibid., p. 304.

[74] The Court of Appeal also excluded the societies from protection on the ground that by issuing class and statutory certificates they were exercising public services rather than private services for the ship, as per Art. III(4)(b) CLC 92: *Erika – Cour d'Appel*, n. 71 above, p. 423. See also De la Rue, Anderson & Hare, n. 68 above, p. 144; IOPCF, 'Incidents Involving the IOPCF Funds – 1992 Fund: Erika – Note by the Director', 17 May 2010, IOPC/JUN10/3/1, p. 5, para. 4.2.3, available at: https://documentservices.iopcfunds.org/wp-content/uploads/sites/2/2018/12/IOPC_JUN10_3_1.pdf.

[75] See Berlingieri, n. 55 above, p. 132; De la Rue, Anderson & Hare, n. 68 above, p. 144 (without expressly alluding to this rule of construction doubts whether the subparagraph was intended to have a broad effect 'both as a matter of construction and having regard to the preparatory work leading to the 1984 CLC Protocol in which the text was originally adopted').

[76] Berlingieri, n. 55 above, p. 132.

[77] Ibid.

[78] M. Jacobsson, 'The French Court of Cassation and the *Erika* Case: Some Issues relating to Civil Liability' (2014) 20 *Journal of International Maritime Law*, pp. 18–29, at 22.

[79] *RE* v. *ABS*, n. 56 above, pp. 459–60. See, however, De la Rue, Anderson & Hare, n. 68 above, p. 143 ('it is debatable whether it applies also to pilotage authorities or corporate bodies who employ or engage individuals performing the services').

[80] *RE* v. *ABS*, n. 56 above, p. 460. The Court's rejection of Art. III(4)(b)'s narrow interpretation may qualify as *obiter dictum*.

[81] De la Rue, Anderson & Hare, n. 68 above, p. 143 ('The wording ... might also include persons who perform services for the ship without boarding it, such as crews of harbour tugs').

[82] Even if it applies, one could argue that it can be used only as a supplementary means of interpretation under Art. 32 VCLT, following the application of Art. 31 VCLT where need be. For the view that the rule may be considered as a supplementary means of interpretation see Linderfalk, n. 37 above, p. 279.

suggests that a broader interpretation of Article III(4)(b) may be more fitting, allowing for remote operators to be encompassed within the provision.

Broad interpretation of Article III(4)(b)

According to some authors, the adoption of a broad interpretation was justified both literally, given the general category of 'any other person' following 'pilot', and teleologically, as a broad interpretation of the channelling provision would align with the objective of the Convention.[83] In the *Erika* case, the French Court of Cassation also adopted a broad interpretation of the wording and held that classification societies could, in principle, benefit from the channelling system.[84] However, in the circumstances of the case, the society had acted recklessly and thus lost the benefits of channelling.[85] It was contended, therefore, that a broad interpretation had been made in this case 'in what could be described as an *obiter*'.[86] It is noteworthy that the Court was criticized for failing to provide any explanation on the reason why a classification society could enjoy protection under the channelling provision.[87] Despite the criticism, the decision remains significant as it exemplifies that courts can favour a broad interpretation of Article III(4)(b) CLC 92. This, therefore, could enable remote operators who are not providing services aboard the vessel to fall within the relevant provisions and enjoy the protection of channelling of liability. However, as the foregoing suggests, different courts may adopt varying approaches, which supports the view that the IMO should clarify whether remote operators are protected under the channelling provision.

4.3. Remote Operators: 'Operator' under Article III(4)(c)?

It may be necessary to ascertain whether remote operators could be classified as 'operator' under Article III(4)(c) CLC 92. A similar query was raised by the IMO LEG during its scoping exercise concerning the international conventions reviewed, and it was acknowledged that the term referred primarily to the commercial operator of the ship; however, the LEG felt that the wording required clarification.[88]

The French version of CLC 92 includes the term '*armateur-gérant*', implying a person resembling an owner who operates the ship for their own account.[89] The English term 'operator', however, appears ambiguous as it could refer both to the ship's commercial operator and to the individual controlling and navigating the ship remotely. Accordingly, it can be argued that there is a distinction in meaning between the French and English versions according to Article 33(4) VCLT, which necessitates

83 Cachard, n. 38 above, p. 37.
84 *Erika – Cour de Cassation*, n. 12 above.
85 Ibid. See also Cachard, n. 38 above, p. 33.
86 See Berlingieri, n. 55 above, p. 132. For a similar view see also De la Rue, Anderson & Hare, n. 68 above, p. 144.
87 Berlingieri, n. 55 above, p. 132. For the view that 'in criminal cases the Court of Cassation does not normally give reasons for its decisions' see Jacobsson, n. 78 above, p. 22, at n. 15.
88 IMO, n. 7 above, Annex, p. 7, para. 5.4.
89 Berlingieri, n. 55 above, p. 133.

identifying the ordinary meaning of the term within its context and considering the object and purpose of the Convention. The 'context' includes the other parts of the Convention,[90] and the remaining terms of the relevant sentence.[91] The term 'operator' also appears in Article I as in 'ship's operator', which suggests a person with the characteristics of owner. Further, the remaining terms of Article III(4)(c) are 'charterers' and 'manager', which are similar in nature to the ship's operator rather than to the remote operator. Accordingly, this term arguably suggests management and control, rather than the operation of ship functions remotely,[92] akin to the roles of master and crew.[93] The Court of Appeal in England and Wales recently upheld this interpretation of the Convention on Limitation of Liability for Maritime Claims 1976,[94] ruling that 'operator' involves managing and controlling the vessel, not just physical operation.[95] It overturned a previous decision that had classified a party supplying crew to operate machinery on an unmanned barge as an 'operator'.[96] Based on this, one could argue that remote operators are likely to fall outside the definition of 'operator' in Article III(4)(c) CLC 92. However, ambiguity remains regarding how courts might interpret this term.

Allowing the position of remote operators to be addressed by the courts under the channelling provision could lead to considerable legal uncertainty. While this might incentivize operators to prevent oil pollution, it risks creating inconsistent treatment across jurisdictions, undermining the harmonized application of the Convention and deterring individuals from becoming remote operators because of their potential liability. Therefore, this uncertainty should be addressed by clarifying the role of remote operators. The following section explores policy considerations for achieving this clarification.

5. Appraisals on the Option of Clarifying the Position of Remote Operators regarding the Channelling of Liability

5.1. Form of Clarification: Unified Interpretation?

The IMO LEG considered whether remote operators should be exempt from liability for oil pollution, which could be achieved through inclusion in the channelling

[90] Dörr & Schmalenbach, n. 39 above, p. 583.

[91] Villiger, n. 66 above, p. 427, para. 10.

[92] Similarly, see Zhu & Zhu, n. 48 above, p. 38. For the view that it includes remote operators, see Baughen, n. 52 above, p. 139.

[93] See Ulfbeck & Arda, n. 48 above, p. 266 (for the view that remote operators will take over the role of masters and seafarers).

[94] London (UK), 19 Nov. 1976, in force 1 Dec. 1986, available at: https://treaties.un.org/pages/showDetails.aspx?objid=08000002800f9404.

[95] *Splitt Chartering Apps and Others v. Saga Shipholding Norway AS and Others (The Stema Barge II)* [2022] 1 Lloyd's Rep. 170. For a commentary on this decision see M. Suri, 'Who is an Operator Within LLMC' (2022) 2 *Lloyd's Maritime and Commercial Law Quarterly*, pp. 177–83.

[96] *Splitt Chartering Apps and Others* v. *Saga Shipholding Norway AS and Others (The Stema Barge II)* [2021] 2 Lloyd's Rep. 307; for a commentary on this decision see M. Suri, 'Will LLMC Apply to Remote Control Centre Operators: The Stema Barge II' (2022) 1 *Lloyd's Maritime and Commercial Law Quarterly*, pp. 9–13.

provision. The Committee also provided that if they are to be liable (that is, are not excluded from liability), it could develop a unified interpretation[97] to ensure consistent court decisions among member states, as seen in interpreting the test for breaking an owner's liability limit under Article V CLC 92.[98] This approach, regarded as a 'subsequent agreement' or 'practice' under Article 31(3) VCLT by the LEG,[99] raises certain concerns.

During the process that led to the adoption of the aforementioned unified interpretation, some delegations emphasized that such an interpretation could result in complex legal issues for state parties that did not agree to the resolution.[100] Whether a later agreement necessitates the presence and affirmation of all states party to the convention is consequently a matter for consideration. Moreover, a crucial question concerns the legal effect of a subsequent agreement on state courts. The International Law Commission (ILC), in its work on subsequent agreements and subsequent practice in relation to the interpretation of treaties,[101] provides that '[s]uch an agreement may, but need not, be legally binding for it to be taken into account'.[102]

The commentary on this work also alludes to the 'not necessarily conclusive, but authoritative' character of subsequent agreements.[103] One of the conclusions provides that '[s]ubsequent agreements and subsequent practice … contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty'.[104] It was further pointed out by the ILC that some domestic courts had 'rightly' emphasized that Article 31(3) VCLT requires only that subsequent agreements and practice 'be taken into account'[105] by courts in addition to the other means of interpretation, and not to be necessarily conclusive in overriding them.[106]

[97] IMO, n. 7 above, Annex, p. 14 for CLC 69, p. 19 for CLC 92.

[98] IMO, 'Interpretation of Article 6 of the Protocol of 1992 to Amend the International Convention on Civil Liability for Oil Pollution Damage, 1969 amending Article V(2) of the International Convention on Civil Liability for Oil Pollution Damage, 1969', 28 Jan. 2022, IMO Doc. A 32/Res.1165, available at: https://docs.imo.org/Category.aspx?cid = 34&session = 32. Under the Convention, the owner loses its right to limit its liability where 'it is proved that the pollution damage resulted from his personal act or omission, committed with intent to cause such damage, or recklessly and with knowledge that such damage would probably result': Art. V(2). The interpretation clarified that the wording 'recklessly' referred to a level of culpability higher than 'gross negligence'.

[99] See IMO, 'Report of the Legal Committee on the Work of its 107th Session', 11 Dec. 2020, IMO Doc. LEG 107/18/2, p. 19, para. 9.11, available at: https://docs.imo.org/Category.aspx?cid = 45&session = 107.

[100] Ibid., para. 9.13.

[101] The conclusions are found in United Nations General Assembly (UNGA) Resolution 73/202, 'Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties', 20 Dec. 2018, UN Doc. A/RES/73/202, available at: https://docs.un.org/en/A/RES/73/202.

[102] Ibid., Conclusion 10, para. 1, second sentence.

[103] UNGA Official Records A/73/10, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries', 2018, UN Doc. A/73/10, pp. 11–116, at 25, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_11_2018.pdf.

[104] Ibid., Conclusion 7 on 'Possible effects of subsequent agreements and subsequent practice in interpretation'.

[105] Ibid., p. 26.

[106] Ibid., pp. 24–5.

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Accordingly, even when a unified interpretation is achieved, as the LEG considered, this would merely need to be taken into account by courts in interpreting the Convention alongside the other means of interpretation and not have conclusive effect. In these circumstances, it seems unlikely that the unified interpretation will serve the purpose of providing clarity regarding the harmonized application of the Convention.[107]

5.2. Achieving the Objective of Adequate and Prompt Compensation of Victims

According to the Preamble to CLC 92, one objective of the Convention is to provide adequate compensation for victims of oil pollution. The adequacy element includes the adequacy of the limits available for compensation;[108] however, the Convention also seeks to ensure prompt compensation by channelling liability to the owner. Therefore, any policy decisions regarding the clarification of the position of remote operators (specifically, whether or not they will be protected by channelling) are expected to consider these objectives.

If the pollution damage arises from the negligence of the remote operator – whether it is classified under the channelling provision or as a 'third party'[109] – adequate compensation would not pose a problem for victims. In both circumstances, the owner would be strictly liable to the victims, which would ensure adequate and prompt compensation. Similarly, if remote operators are included in the channelling provision, and in the unlikely event they act recklessly with the knowledge that damage is likely to result, aside from the possibility of the victim directly suing the operators, the owner would remain liable towards the victim as its liability is strict.[110] If the owner is sued and cannot provide compensation, the IOPCF would do so. Where remote operators are classified as third parties, the owner remains strictly liable for pollution damage caused by their recklessness, as Article III(2)(b) CLC 92 exonerates the shipowner only for the intentional acts or omissions of third parties. This shows that classifying remote operators as either falling within the channelling provision or as third parties would not significantly affect the adequate and prompt compensation of victims.

5.3. Fair Treatment of Remote Operators vis-à-vis the Parties Protected by Channelling Expressly or by Way of Judicial Interpretation

The channelling provision explicitly protects several parties from being directly sued by victims for their negligent actions resulting in oil pollution. Certain other parties are

107 C. Fourie, 'Charting the Sea of Limitation: Analysis of the IMO Unified Interpretation on the Test for Breaking the Shipowner's Right to Limit Liability' (2023), runner-up in the 2023 Comité Maritime International Young Person's Essay Prize (yCMI Essay Prize), available at: https://comitemaritime.org/work/ycmi-essay-prize.

108 See, e.g., CMI, 'Review of the Limits of Liability and Compensation Provided in the 1969 Civil Liability Convention and the 1971 Fund Convention: Position Paper Submitted by the CMI', CMI Doc. LEG 50/4/10, 18 Feb. 1983, p. 13, available at: https://archives.imo.org/imoarch/index.html.

109 Those who do not fall within the channelling provision and who are not considered as victims or owners, such as those mentioned in Art. III(2)(b) CLC 92.

110 I.e., irrespective of both its own fault and that of those within the channelling provision.

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considered within the provision by courts through judicial interpretation, even if they are not explicitly mentioned therein. The policy decision on whether to include remote operators in the channelling provision should be scrutinized regarding the position of remote operators vis-à-vis those protected parties. The following makes such a comparison to guide policymakers towards fair treatment of remote operators regarding their potential inclusion in the channelling provision.

Remote operators versus masters, crew members, and pilots

Remote operators are expected to perform duties akin to those of masters, crew, and pilots, such as navigation and environmental protection, and are currently regarded under the Draft Code as part of the 'MASS remote crew'. Their financial status aligns with masters and crew, rather than with wealthier parties such as charterers or managers. Accordingly, excluding them from the channelling provision purely because of their absence from vessels may appear unjustified. Protecting remote operators also aligns with the IMO's goal of integrating new technologies,[111] encouraging individuals to contribute to maritime operations from ashore rather than onboard.

Remote operators versus classification societies

The position of remote operators in relation to classification societies, which are not explicitly protected under Article III(4) CLC 92, merits examination. The IMO LEG suggested that if remote operators are not to be excluded from liability, similar to manufacturers and classification societies, the channelling provision could either remain unchanged or an interpretation could be developed on this matter.[112] While the IMO LEG implies that classification societies are excluded from protection under the channelling provision, courts in the *Prestige*[113] and *Erika*[114] cases suggested (*obiter*) that they could be protected.

Classification societies issue certificates that ensure that vessels comply with class rules, thereby influencing maritime operations indirectly and prior to voyages. In contrast, remote operators are expected to perform broader, ongoing duties during operations, which can lead to a potentially higher number of events causing oil pollution, similar to the position of servants, crew members, and salvors, who are explicitly protected under Article III(4). Further, establishing causation between the actions of classification societies and environmental harm is challenging.[115] However,

111 IMO Resolution A.1173(33), 'Strategic Plan for the Organization for the Six-Year Period 2024 to 2029', 6 Dec. 2023, IMO Doc. A 33/Res.1173, p. 6, paras 22–5, available at: https://wwwcdn.imo.org/localresources/en/KnowledgeCentre/IndexofIMOResolutions/AssemblyDocuments/A.1173(33).pdf. This provides the integration of new, emerging, and advancing technologies in the regulatory framework as a strategic direction.

112 IMO, n. 7 above, Annex, p. 14 for CLC 69, p. 19 for CLC 92.

113 *RE* v. *ABS*, n. 56 above.

114 *Erika – Cour de Cassation*, n. 12 above.

115 See, e.g., the leading opinion of Lord Steyn in *Marc Rich & Co. A.G. v. Bishop Rock Marine Co. Ltd, Bethmarine Co. Ltd and Nippon Kaiji Kyokai (The Nicholas H)* [1995] 2 Lloyd's Rep. 299. It was held in *Great American Insurance Co.* v. *Bureau Veritas* (338 F.Supp. 999 (S.D.N.Y.1972, aff'd, 478 F.2d 235 (2d Cir.1973)) that the owner's recourse claim against the classification society following the

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the direct involvement of remote operators in maritime operations makes it more likely that they will be implicated. If classification societies are protected through judicial interpretation, rather than explicitly, then fairness implies that remote operators should enjoy similar protection. Incorporating them into the channelling provision would also address the evolving role of remote operators in contemporary shipping.

5.4. Protection through Channelling for Negligent Acts and its Potential Impact on Incentives for Safeguarding the Marine Environment

Critics emphasize that channelling fails to incentivize those it protects to take adequate measures to prevent or minimize pollution, as they feel assured that the owner will be responsible for their negligent acts or omissions.[116] This has been referred to as 'de-responsibilization'.[117] However, the CLC system is not designed to create corrective or preventive effects but rather to offer effective compensation for victims of oil pollution. The Conventions identify polluters based on a rationale drawing from 'but-for causation': but for the owner's tanker carrying the oil, the pollution would not have occurred; but for the requests of (hypothetical and not actual) oil receivers, the oil would not have been transported and caused the pollution. This means that the owner, their financial guarantor, and the IOPCF are regarded as the polluters by the Conventions.[118] Since actual polluters are not held accountable for their negligence, channelling liability does not necessarily correspond with the 'polluter pays' principle,[119] which is based on internalizing costs. While this principle may encourage parties to take greater care in preventing pollution, it is doubtful whether it has achieved the status of being part of customary international law.[120] Furthermore, the

owner's subrogation to the cargo interests' rights was unsuccessful as it could not satisfy the burden of proving causation between the classification society's negligent acts and the sinking that resulted in the loss of the cargo.

116 For examples see Faure, n. 17 above, p. 94; S. Kopela, 'Civil and Criminal Liability as Mechanisms for the Prevention of Oil Marine Pollution' (2011) 20(3) *Review of European Community and International Environmental Law*, pp. 313–24, at 319. Regarding operators, managers and charterers, see IOPCF 1992, Third Intersessional Working Group, Agenda Item 2 92FUND/WGR.3/14/5 'Review of the International Compensation Regime, The Liability of the Parties Involved in the Carriage of Oil by Sea: Submitted by France, Spain and the European Commission', 16 Jan. 2003, para. 18, available at: https://documentservices.iopcfunds.org/wp-content/uploads/sites/2/2020/01/92FUND_WGR.3_14_5_en.pdf; European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the Establishment of a Fund for the Compensation of Oil Pollution Damage in European Waters and Related Measures' COM(2000) 802 final, 24 Apr. 2001; and European Commission Communication, 'Improving Safety at Sea in Response to the Prestige Accident', COM(2002) 681 final, 3 Dec. 2002.

117 M. Faure & W. Hui, 'The International Regimes for the Compensation of Oil-Pollution Damage: Are They Effective?' (2003) 12(3) *Review of European Community and International Environmental Law*, pp. 242–53, at 250. This term also appears in Kopela, n. 116 above, p. 319.

118 See M. Tsimplis, *Environmental Norms in Maritime Law* (Edward Elgar, 2021), p. 168.

119 Ibid., p. 173; see also J. Adshead, 'The Application and Development of the Polluter-Pays Principle across Jurisdictions in Liability for Marine Oil Pollution: The Tales of the "Erika" and the "Prestige"' (2018) 30(3) *Journal of Environmental Law*, pp. 425–51, at 445–6 (for the view that channelling 'can indirectly lead to the public paying the price of pollution and thus bring the "user pays principle" into play').

120 A. Aust, *Handbook of International Law* (Cambridge University Press, 2005), p. 331; Adshead, n. 119 above, p. 442; Tsimplis, n. 118 above, p. 84–5.

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advantages of this principle in preventing pollution could also be realized through alternative approaches, which are discussed below.

Possibility of recourse actions as a tool creating incentives for environmental protection

Under Article III(5) CLC 92, the owner has the right of recourse against third parties, as well as against those protected by the channelling of liability. This aligns with the 'polluter pays' principle,[121] permitting the owner to seek damages from the actual polluter. The potential for recourse claims by the owner or the IOPCF (following subrogation to the recovery rights of the owner[122]) may incentivize those protected under the channelling provision to prevent oil pollution. The Convention does not limit this right, although some participants during the drafting process suggested that the owner should not exercise recourse against 'socially weak groups of third parties'.[123] There was no consensus on this proposal, so ultimately no limitation was implemented regarding the owner's right of recourse. Despite doubts about the frequency of recourse claims,[124] the possibility of being subject to such actions could encourage remote operators protected under the channelling provision to adopt better environmental protection measures.

Criminal rules as a tool creating incentives for environmental protection

Outside the CLC, environmental protection can be enforced through instruments that impose criminal liability or administrative sanctions on those responsible for their negligent actions.[125] The International Convention for the Prevention of Pollution from Ships (MARPOL)[126] grants a vague right to flag states to impose penalties under their national laws for MARPOL violations,[127] without clarifying whether these penalties should be criminal, administrative, or both. MARPOL allows the discharge of oil resulting from damage to a ship provided that neither the owner nor the master acted intentionally or recklessly and with knowledge that damage would be likely to occur.[128] Apart from this and a few other exceptions, it was viewed as generally covering all discharges, irrespective of the degree of fault.[129]

[121] Tsimplis, n. 118 above, p. 173.

[122] See, e.g., De la Rue, Anderson & Hare, n. 68 above, p. 207.

[123] See IMCO (1982), LEG 48/2/2, n. 30 above, p. 25, para. 83. 'Third parties' in this context meant those protected by channelling.

[124] See Faure & Hui, n. 17 above, p. 209.

[125] H. Ringbom, 'Criminal Liability of Seafarers and Ship Operators: A Regulatory Perspective on Developments in Environmental Law', in B. Soyer & A. Tettenborn (eds), *Ship Operations* (Routledge, 2022), pp. 25–49, at 27 ('if rightly applied, penalties have an important function to fill in complementing and supporting the existing regulatory framework in shipping, that is, by reinforcing the preventive and civil liability rules').

[126] London (UK), 2 Nov. 1973, in force only after the London 1978 Protocol on 2 Oct. 1983, available at: https://www.imo.org/en/about/conventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx.

[127] Ibid., Art. 4.

[128] Ibid., Annex I, reg. 4.2.2.

[129] A. Pozdnakova, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution* (Brill/Martinus Nijhoff, 2013), p. 216. Whether MARPOL permitted state parties to implement criminal sanctions for

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When considering the parties who may be held accountable for their actions, MARPOL was regarded as not having a restrictive nature[130] and that this interpretation was also aligned with the provision on channelling of liability in the CLC 92.[131] The identification of the liable parties was thus left to the state parties.[132] This means oil spills not caused by ship damage, such as during loading or discharging, or sinking as a result of negligence, are punishable under coastal state laws. Currently, in the European Union (EU), the Ship-Source Pollution Directive[133] aims to enhance protection of the marine environment by mandating that any discharges in a wide geographical area,[134] committed with intent, recklessness or 'serious negligence',[135] causing oil pollution shall be regarded as a criminal offence that would be subject to penalties.

Criminal liability for 'serious negligence' is to be interpreted in accordance with 'national law, taking into account relevant case law of the Court of Justice of the [EU]'.[136] It can be argued that both MARPOL and the Directive potentially create a stronger deterrent than CLC 92 against marine pollution arising from negligence, because of the channelling of the liability provision.

The extension of criminal liability to remote operators[137] and its enforcement remains uncertain, particularly when operators are located in states other than the flag

discharges arising from negligence (save for the exception of discharges resulting from damage to the ship) was addressed by the Court of Appeal in *Erika*, n. 71 above, which decided in the affirmative. For a discussion on this point see Kopela, n. 116 above, pp. 317–8. This issue was also addressed later in *Erika – Cour de Cassation*, n. 12 above. See V.B. Eveno, 'L'Affaire Erika: Quelques Réflexions Autour de la Compétence Pénale des Juridictions Françaises' (2013) 19(1) *Neptunus*, pp. 1–12. This question was further raised before the European Court of Justice (ECJ): Case C-308/06, *The Queen, on the application of International Association of Independent Tanker Owners and Others* v. *Secretary of State for Transport*, ECR [2008] I-4057 (*Intertanko*) (although it was not answered by the Court on the ground that the European Union (EU) was not bound by MARPOL).

130 H. Ringbom, *The EU Maritime Safety Policy and International Law* (Brill/Martinus Nijhoff, 2008), p. 418; Pozdnakova, n. 129 above, pp. 225–6. See also De la Rue, Anderson & Hare, n. 68 above, pp. 1254–5 (for the view that parties other than the owner and master who were prosecuted and convicted as per the legislation implementing MARPOL were 'ship's officers and crew, and ship managers responsible for establishing and monitoring shipboard practices').

131 Pozdnakova, n. 129 above, p. 227.

132 Ringbom, n. 130 above, p. 418, n. 163.

133 Directive 2005/35/EC on Ship-Source Pollution and on the Introduction of Penalties, including Criminal Penalties, for Pollution Offences [2005] OJ L 255/11, as amended by Directive 2009/123/EC [2009] OJ L 280/52. Recently, the 2009 Directive on ship-source pollution crimes has been replaced by Directive (EU) 2024/1203 on the Protection of the Environment through Criminal Law and Replacing Directives 2008/99/EC and 2009/123/EC, OJ L 2024/1203. As a consequence, the provisions of the 2005 Directive added or replaced by the 2009 Directive are to be construed as references to the 2024 Directive; see Directive (EU) 2024/1203, Art. 27, para. 72.

134 Directive 2005/35/EC, as amended, n. 133 above, Art. 3(1) (covering the internal waters of Member States in so far as MARPOL is applicable, their territorial seas, straits, exclusive economic zones, high seas).

135 See the decision of the ECJ regarding this wording in *Intertanko*, n. 129 above, para. 77; akin to 'gross' negligence, see Pozdnakova, n. 129 above, p. 213.

136 European Commission, 'Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law and Replacing Directive 2008/99/EC' COM(2021) 851 final, 1 Dec. 2023.

137 Mentioned in IMO, 'Regulatory Scoping Exercise and Gap Analysis of Conventions Emanating from the Legal Committee with respect to Maritime Autonomous Surface Ships (MASS): Summary of Results of the

state. Under Article 94 of the United Nations Convention on the Law of the Sea (UNCLOS),[138] flag states have jurisdiction over 'administrative, technical and social matters' concerning ships flying their flag and their crew, including criminal jurisdiction.[139] However, enforcing this jurisdiction faces challenges, as flag states must obtain consent from territorial states to enforce laws on foreign soil.[140]

Recent discussions at the LEG highlighted differing perspectives on the effective exercise of flag state jurisdiction. Some delegations expressed doubts about the effectiveness of this jurisdiction when remote operations centres are located abroad.[141] Others argued that this jurisdictional link could remain robust, proposing a framework similar to the International Safety Management (ISM) Code.[142] Current practices under SOLAS and the ISM Code, which involve the certification and inspection of ship management companies abroad, are recognized as respecting host state sovereignty.[143] The LEG supported the exploration of the ISM Code model, delegating the development of the relevant framework to the MSC,[144] emphasizing collaboration between flag and host states to ensure oversight in accordance with UNCLOS as MASS developments progress.[145]

While some enforcement challenges may arise, criminal regulations can still motivate remote operators to safeguard the marine environment. Thus, policy decisions regarding their protection under the channelling provision must take into account broader factors beyond the CLC 92, such as these.

6. Conclusion

As remote operations in shipping have increased, the IMO has begun to integrate new generation vessels and the concept of remote operation into the regulatory framework.

LEG Regulatory Scoping Exercise for the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988: Submitted by the United States of America', 9 Jan. 2020, IMO Doc. LEG 107/8/5, p. 2, para. 5, available at: https://docs.imo.org/Category.aspx?cid=45&session=107.

138 Montego Bay (Jamaica), 10 Dec. 1982, in force 16 Nov. 1994, available at: https://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

139 D. Guilfoyle, 'Duties of the Flag State', in A. Proelss (ed.), *The United Nations Convention on the Law of the Sea: A Commentary* (Nomos, 2017), pp. 707–14, at 710. See also B. Dong, L. Bautista & L. Zhu, 'Navigating Uncharted Waters: Challenges and Regulatory Solutions for Flag State Jurisdiction of Maritime Autonomous Surface Ships under UNCLOS' (2024) 161 *Marine Policy*, article 106039, p. 2 (for the view that flag state jurisdiction extends to the enforcement of international laws and regulations such as SOLAS and MARPOL).

140 A. Petrig, 'Unmanned Vessels and the Multi-Dimensional Concept of "Ship" under UNCLOS 1982', in K. Siig, B. Feldtmann & F.M.W. Billing (eds), *The United Nations Convention on the Law of the Sea* (Routledge, 2023), pp. 45–62, at 56. See also Dong, Bautista & Zhu, n. 139 above, p. 2.

141 IMO, 'Report of the Legal Committee on the Work of its 111th Session', 16 May 2024, IMO Doc. LEG 111/17, p. 33, paras 10.24.1–6, available at: https://docs.imo.org/Category.aspx?cid=45&session=111 for the views expressed.

142 Ibid., p. 34, para. 10.26.

143 Ibid., para. 10.25.5.

144 Ibid., para. 10.26.

145 Ibid., para. 10.27. For the view that in order to comply with Art. 91 and 94 UNCLOS, flag states should mandate the location of remote operations centres within their territory see Dong, Bautista & Zhu, n. 139 above, p. 6.

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Remote operators may both contribute to oil pollution and play a crucial role in preventing and responding to oil spills, while also protecting the marine environment. These operators require different skills from conventional seafarers – such as the capability of safely navigating the ship from ashore – necessitating encouragement for their employment. Within the CLC, this could be achieved by including remote operators in the channelling of liability provision. However, channelling of liability has been criticized for failing to incentivize the protected parties to safeguard the environment. The IMO has yet to decide on the protection of remote operators under the channelling provision, which makes the further analysis of this matter especially timely.

This article argues that failing to clarify the position of remote operators regarding the channelling of liability would create considerable legal uncertainty and impede the consistent application of the channelling provision by states that are party to CLC 92. The alternative of clarifying the position of remote operators has also been examined in this article. This is considered a good option but that a unified interpretation is undesirable. It is further contended in this article that in clarifying whether remote operators should be protected under the channelling provision, the IMO may consider the adequate and prompt compensation of victims and conduct a fairness analysis comparing remote operators with other protected parties. If the inclusion of remote operators in the channelling provision is chosen, concerns may arise that this could disincentivize operators from protecting the marine environment. However, this work argues that the potential for recourse actions and criminal liability could mitigate such concerns, provided that enforcement mechanisms are appropriately addressed.

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