



Institute for European Studies  
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# Testing limited environmental liability against human rights requirements

Armelle Gouritin

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## ABSTRACT

Questions regarding oil spills remain high on the political agenda. Legal scholars, legislators as well as the international, European and national Courts struggle to determine key issues, such as who is to be held liable for oil spills, under which conditions and for which damage. The international regime on oil spills was meant to establish an “equilibrium” between the needs of the victims (being compensated for their harm) and the needs of the economic actors (being able to continue their activities). There is, however, a constantly increasing array of legal scholars’ work that criticizes the regime. Indeed, the victims of a recent oil spill, the *Erika*, have tried to escape the international regime on oil spills and to rely instead on the provisions of national criminal law or EC waste legislation. In parallel, the EC legislator has questioned the sufficiency of the international regime, as it has started preparing legislative acts of its own. One can in fact wonder whether challenging the international liability regime with the European Convention on Human Rights could prove to be a way forward, both for the EC regulators as well as the victims of oil spills. This paper claims that the right to property, as enshrined in Article P1-1 of the Human Rights Convention, could be used to challenge the limited environmental liability provisions of the international frameworks.

## ABOUT THE AUTHOR

Armelle Gouritin is a Ph.D. researcher at the Institute for European Studies. In her Ph.D., she focuses on the substantive interplay between EC environmental responsibility directives on the one hand, and international environmental law and the European Court on Human Rights’ case law on the other. The author warmly thanks Lawrence Steenstra and Claire Roche Kelly from the IES for all the time and work they kindly devoted for this paper to be published.



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## 1 INTRODUCTION

Questions regarding oil spills remain high on the political agenda.<sup>1</sup> Legal scholars, legislators as well as the international, European and national Courts struggle to determine key issues, such as who is to be held liable for oil spills, under which conditions and for which damage.

The international regime on civil liability for oil spills, which was established in 1992, was meant to establish an "equilibrium" between the needs of the victims of oil spills (being compensated for the harm) and the needs of the economic actors (being able to continue their activities). The international regime has, however, been challenged. There is a constantly increasing array of legal scholars' work on the international liability mechanism<sup>2</sup>--in particular work that criticizes the regime.<sup>3</sup> Indeed, the victims of a recent oil spill, the *Erika*, have tried to escape the international civil liability regime to rely instead on the provisions of national criminal law<sup>4</sup> or EC waste legislation.<sup>5</sup> It is quite revealing that victims have been willing to escape the regime that was supposed to "ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships".<sup>6</sup> In parallel, the EC legislator has questioned the sufficiency of the international civil liability regime, as it has started preparing legislative acts of its own.<sup>7</sup> One can in fact wonder whether challenging the international civil liability regime against the European Convention for the Protection of Human Rights and Fundamental Freedoms ("HR Convention") could prove to be a way forward, both for the EC regulators as well as the victims of oil spills. It can be seen as a concrete example of applying human rights based claims in an environmental case.

Whereas the civil law and criminal aspects of oil pollution accidents such as *Erika* have been widely covered by legal practitioners and scholars, and while some articles have been devoted to the international regime from a critical or a law and economics perspective, much less has been said about a human rights approach in this field.

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<sup>1</sup> See e.g. ECHR, *Mangouras v. Spain*, no. 12050/04, the *Prestige* case.

<sup>2</sup> De la Rue 1993; Wilkinson 1993, 71; Gauci 1999, 29; Goransson 1999, 345; Wolfrum and Langenfeld 1999; Brans 2001; Chen 2001; Boyle 2005, 3.

<sup>3</sup> Duruigbo 2000, 65; Le Couviour 2002, 2271; Daniel 2003, 225; Faure and Hui 2003, 242; Ibrahim 2005, 63.

<sup>4</sup> On January 16<sup>th</sup> 2008, Total SA, Giuseppe Savarese (the shipowner), Antonio Pollara (the handler) and Rina (the expert company) were sentenced *in solidum* to pay indemnities of 192 millions €, plus individual penalties by the Tribunal de Grande Instance de Paris. The judgment, while recognizing the risks inherent to oceangoing vessels, reckons Total SA was 'guilty of imprudence', from the fact that Total SA did not take into account 'the age of the ship', (nearly 25 years), and 'the discontinuity of its technical handling and maintenance' (Tribunal de Grande Instance de Paris, Appeal No. 9934895010).

<sup>5</sup> ECJ, *Commune de Mesquer v. Total*, Case C-188/07 3rd indent.

<sup>6</sup> See the preamble of the Liability and Fund Conventions: "Convinced of the needs to elaborate a compensation and indemnification system supplementary to the International Convention on Civil Liability for Oil Pollution Damage with a view to ensuring that full compensation will be available to victims of oil pollution accidents and that the shipowners are at the same time given relief in respect of the additional financial burdens imposed on them by the said Convention".

<sup>7</sup> See the Preamble, recitals 3, 5 and 9 of Commission Proposal on Civil Liability of Shipowners (2005). The Commission states in the Explanatory Memorandum to the Proposal (2005, 3): "International schemes only have a very limited preventative and dissuasive effect. (...) the almost complete limitation of operator liability. - - The legitimacy of the principle of limited liability is being increasingly contested". Another example, outside the maritime transport sector, is the Directive 2004/35/EC on Environmental Liability, which follows the principle of operators' unlimited liability (see page 4) "Modernising these international Conventions will involve revising them. The revision process is underway for the 1992 Convention on Civil Liability for Oil Pollution Damage. The Commission intends to work for improvements to be made to this convention, such as removing the ceiling on civil liability" (emphasis added).

This paper provides such a human rights focused study. In particular, it questions whether the right to property, as enshrined in Article P1-1 of the HR Convention, could be used to challenge the limited environmental liability provisions of the international framework. In other words, this article analyzes the extent to which the liability scheme set up by the international civil liability regime fulfills the human rights requirements of the HR Convention, as interpreted by the European Court on Human Rights (“the Court” or “ECHR”). The paper will focus on one provision of the HR Convention: Article 1 of Protocol No. 1 (“Article P1-1”), *i.e.* the right to property.

The practical starting point of this article is the *Erika* accident. As noted, some of the victims of *the Erika* accident have attempted to escape the rules of the international regime on oil spills, because the regime limits the parties’ right to claim damages on harm caused to their property. Yet the findings of the paper do not limit themselves to the *Erika* accident; they are rather meant to bring forth the incompatibility between the international civil liability regime and the HR Convention’s requirements regarding the right to property.

Should the international civil liability regime and human rights be considered incompatible, there would clearly be a need for a further careful assessment of the consequences. That, however, is already beyond the scope of this paper. Nor will this paper go into details regarding questions on the hierarchy of norms, or the extent to which the State parties to the HR Convention are limited in their discretion in signing and ratifying international conventions.

This paper will first focus on the international civil liability regime. The analysis will then move in the third chapter to the HR Convention, more particularly the case law of the ECHR relating to the right to property. In Chapter 4, the international law on limited liability will be discussed in the context of the human right to property. Finally, the analysis will terminate with conclusions in Chapter 5.

## 2 CL REGIME: A LEGALLY LIMITED LIABILITY

### 2.1 Overview<sup>8</sup>

The international civil liability regime consists, as noted, of two conventions: the 1992 “Civil Liability Convention” (“CLC”) and the 1992 “Fund Convention”.<sup>9</sup> The 1992 Conventions were adopted in the wake of the *Torrey Canyon* disaster,<sup>10</sup> and they entered into force on 30 May 1996. Their primary purpose is to establish compensation for the claimants as quickly and as simply as possible.<sup>11</sup> The Conventions apply to damage caused by persistent oil pollution in the territory<sup>12</sup> of a State party.<sup>13</sup> Almost all EU Member States with a coastline are parties to the international regime.<sup>14</sup>

The “first layer” or part of the Regime is the CLC. The CLC sets a channeled<sup>15</sup> and strict<sup>16</sup> liability for the damage on the liable person, *i.e.* the registered owner of the oil tanker from which the polluting oil escaped.<sup>17</sup> The registered owner of the ship must subscribe insurance.<sup>18</sup> However, the ship owner’s liability is severely limited, as a list of exceptions enables him to be exempted from liability on various accounts.<sup>19</sup> Moreover, the owner’s liability is limited to an amount proportionate to the tonnage of the vessel: the so-called “ceiling”.

The “second layer”<sup>20</sup> of the international regime, the Fund Convention, provides additional protection for victims who cannot get full compensation under the CLC.<sup>21</sup> The Fund compensates for pollution damage that occurred in a State that is member to the Fund Convention.<sup>22</sup> In 2003, a Supplementary Fund Protocol to the Fund Convention was

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<sup>8</sup> This article is not meant to provide with an in-depth study of the international liability regime. For such an in-depth study, please see footnotes 2, 3, 67, 68.

<sup>9</sup> Hereinafter, the CLC and Fund Convention refer to the texts as amended in 1992. There are 102 Parties to both the CLC and Fund Convention as of 3 August 2009, and there will be 104 Parties by 24 April 2010 (IOPCF, States Parties).

<sup>10</sup> In March 1967 the *Torrey Canyon*, a crude carrier grounded on a reef off the coast of England. About 60,000 tons of oil was released and carried onto the shores of England and France.

<sup>11</sup> See the Preamble to the CLC in footnote 6 above.

<sup>12</sup> Including the territorial sea and the exclusive economic zone-EEZ.

<sup>13</sup> CLC, art. I, par. 6.

<sup>14</sup> Oosterveen 2006, 245.

<sup>15</sup> Channeling of liability means the process by which the liable person is designated. In other words, there is a pre-defined liable person. See Section 2.2.5.

<sup>16</sup> Strict liability means liability that can be established without any fault.

<sup>17</sup> CLC, art. III, par. 4.

<sup>18</sup> *Ibid.*, art. VII.

<sup>19</sup> *Ibid.*, art. III. Explanatory note to IOPCF (2009, 2) establishes: “He (*the owner*) is exempt from liability under the 1992 Civil Liability Convention only if he proves that:

a) the damage resulted from an act of war or a grave natural disaster, or  
b) the damage was wholly caused by sabotage by a third party, or  
c) the damage was wholly caused by the negligence of public authorities in maintaining lights or other navigational aids.”

<sup>20</sup> Oosterveen 2006, 248.

<sup>21</sup> This is usually the case when the damage exceeds the limit of the shipowner’s insurance. For other cases, see Fund Convention art. 4. It is worth noting that the fund is not financed by governments, but by contributions from persons receiving ‘contributing oil’ in a Member State after carriage by sea (Fund Convention, art. 1, par. 3.). In other words, the Fund is financed by the Oil Industry.

<sup>22</sup> While the Fund Convention is attractive to both developing States and industrialized States, one notable exception is the United States. It decided in late 1980’s not to join the international regime and rather to develop a national legislation on the issue: the Oil Pollution Act (OPA) 1990 and the Comprehensive Environmental response, Compensation and Liability Act (CERCLA).

adopted.<sup>23</sup> It provides for supplementary compensation up to a level of 1 173 million USD per accident.<sup>24</sup>

## 2.2 Six limitations to liability

There are six major limitations being placed upon the ship owner's liability to compensate for the harm caused by oil spills: the burden of proof is placed on the claimant; the time frame for the claims is limited; the limited definition of "damage"; the limited amounts available for compensation; the channeling of liability; as well as the rather theoretical possibilities for overriding the limitations of liability. They are treated successively in the sections that follow below.

### 2.2.1 The claimant's burden of proof

The CLC, Fund Convention and Supplementary Fund Protocol place the burden of proof on the claimant. In other words, the claimant must establish his loss and his entitlement to compensation.<sup>25</sup> The difficulties are manifold: for example, the proof can require some technical knowledge. It can also turn out to be rather difficult to access the information needed to establish a cause of action (e.g. when industrial information is protected and inaccessible). On the other hand, the level of proof required can be difficult to attain. These difficulties are commonly described in legal literature devoted to environmental liability matters.

The claimant can challenge the Fund's decision before the competent Court, *i.e.* the Court of the State where the damage occurred. The decision of such a Court binds both the Fund and the claimant.<sup>26</sup>

### 2.2.2 The time frame

The time frame within which the claimant must introduce his request is limited. This limitation can be very important because in practice some damages are only revealed ("consolidated" as some scholars put it) long after the damage was caused. This could happen when the pollution's effects (e.g. pollution of a lake by a noxious substance) are fully acknowledged years later, once the time limit for introducing a claim has already passed. Hence, it is very important to carefully determine what triggers the temporal limitation: is it the occurrence of the pollution, the cause of the damage, the discovery of the damage or the moment that the claimant could or should have acknowledged damage? In this respect, the CLC reads as follows:<sup>27</sup>

"Rights of compensation under this Convention shall be extinguished unless an action is brought there under within *three years* from the date *when the damage occurred*. However, in no case shall an action be brought *after six years from the date of the incident which caused the damage*. Where this incident consists of a series of occurrences, the six years' period shall run from the date of the first such occurrence"

<sup>23</sup> There have been 24 Parties since 13 October 2009 (IOPCF, States Parties). A separate inter-governmental organization was also established: the International Oil Pollution Compensation Supplementary Fund ('the Supplementary Fund').

<sup>24</sup> To be more precise, since the SPF entered into force (3 March 2005), the total available amount for incidents that occurred after the entry into force has grown to approximately USD 1.173 Million, while the total available amount for incidents that took place before the entry into force is approx. USD 211 million (IOPCF, Compensation limits) (before the economic crisis).

<sup>25</sup> This is commonly the case under civil liability regimes, as Oosterveen (2006, 251) emphasises.

<sup>26</sup> Fund Convention, art. 7 par. 6.

<sup>27</sup> Art. 8 (emphasis added).

We can also underline the time that elapses between the damage, the moment a claim is introduced, screened, reviewed and accepted, and the moment when the compensation (money) is actually transferred. This is very important because in the case of oil spills, most of the claimants had suffered a damage linked with their professional activity.

The *Erika* accident, which occurred in December 1999, can be used as an example. On the website of the Fund, there is a page dedicated to this accident:

As at 7 May 2007, 7,003 claims for compensation had been submitted for a total of €388 million (£259 million). Some 6,889 claims have been assessed by the experts engaged by the 1992 Fund and Steamship Mutual, i.e. 98.4 % of all claims presented. Payments totaling €128 million (£80 million) have been made in respect of 5,666 of these claims. (...) The total claims arising out of this incident by far exceeded the amount of compensation available, some €185 million or £125 million. In order to enable the 1992 Fund to make substantial payments to claimants, the French Government and the French oil company Total SA undertook to pursue their claims only if and to the extent that all other claimants were compensated in full, the claim by Total SA to rank after the Government's claim. Initially, as a result of the uncertainty as to the total amount of the admissible claims, the Fund had to limit its payments to a certain percentage of the loss or damage actually suffered by the respective claimants. However, as that uncertainty diminished, the level of payments for claimants other than the French Government and Total SA was increased to 100 % in April 2003.<sup>28</sup>

Still on the same page, one can read more than two years later:

As at 24 September 2008, 7 130 claims for compensation, other than those made by the French Government and Total SA, had been submitted for a total of €211 million (£201.8 million). By that date 99.7 % of these claims had been assessed. Some 1 014 claims, totaling €31.8 million (£30.4 million), had been rejected.<sup>29</sup>

Almost *nine years* after the accident, some of the claims still had not been screened. Around 20 claims have been left unscreened. The payments for the decided cases were made as late as four years after the accident.<sup>30</sup>

### 2.2.3 Definition of damage

The third limitation concerns the definition of “environmental damage”: the broader the definition, the wider the compensation. Issues commonly raised by legal scholars refer to the constraints inherent to the very nature of environmental damage, and more particularly to “pure” environmental (ecological) damage. Should environmental features with no

<sup>28</sup> IOPCF, *Erika* (emphasis added).

<sup>29</sup> *Ibid.*

<sup>30</sup> Since the *Erika* accident occurred almost 10 year ago, it is rather hard to get data on the number of claims that had not been assessed e.g. 5 years after the accident. In comparison, for the more recent (November 2002) oil-spill caused by the *Prestige*, a detailed description of the incident and other information is available on the website of the IOPCF, a page specifically devoted to the accident (IOPCF, *Prestige*). As for the level of assessment of the claims assessed by French claimants, one can read under “Claims situation”:

“France: As at 20 August 2008, 481 compensation claims totalling €109.6 million (£104.8 million) have been received by the Claims Office in Lorient (...)

Of the 481 claims submitted to the Claims Handling Office, 92% had been assessed by 20 August 2008. Many of the remaining claims lack sufficient supporting documentation and such documentation has been requested from the claimants. Four hundred and forty six claims had been assessed for €49.8 million (£47.6 million) and interim payments totalling €5 million (£4 million) had been made at 30% of the assessed amounts in respect of 324 claims. The remaining claims await a response from the claimants or are being re-examined following the claimants' disagreement with the assessed amount. Fifty-four claims totalling €3.7 million (£3.5 million) had been rejected because the claimants had not demonstrated that a loss had been suffered due to the incident.” (Emphasis added) In other words, 69 months, more than 5 years and a half after the incident, some 40 claims were left unscreened.”

economic value, no “utility” for humans, be compensated for? Another question is whether clean-up costs should be prescribed even though they are said to be “non-reasonable”.<sup>31</sup>

The international regime defines recoverable damage as:

“(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”<sup>32</sup>

Hence, the damage must have been caused outside the ship to be recoverable, must have been caused by contamination by oil, and must have occurred within the territory of a State party.

As for what is recoverable,<sup>33</sup> costs that are admissible for recovery include: clean-up costs justified from a technical and scientific point of view; costs of measures aimed at preventing or minimizing recoverable damage under the regime as long as they are reasonable; property damage as such with the deduction of wear and tear; and losses consequential upon damage to property (e.g. loss of income), together with pure economic loss (e.g. fishing activities are rendered impossible by the pollution of the sea, guests not remaining or not coming to a hotel because the beach is polluted) and environmental impact assessments/studies likely to provide reliable and useful information on damage recoverable under the regime. As far as “environmental damage *per se*” (i.e. impairment of the environment as such) is concerned, the compensation is limited to the costs of reasonable measures of reinstatement<sup>34</sup> actually undertaken or to be undertaken.<sup>35</sup> The so-called “pure ecological damage” (e.g. irreversible loss of biodiversity) is not compensated for.

#### 2.2.4 Compensation: limited amounts, equal treatment

As mentioned earlier, the amount available to compensate oil-spill victims, whose claim is admissible according to the international liability regime, is limited. This begs the question of how, concretely, the limited amount will be divided among the claimants.

A fundamental principle applied by the Fund is the equal treatment of claimants.<sup>36</sup> According to this principle, the claimants are paid the same percentage of their claims, if the total amount of admissible claims exceeds the finances available in the Fund. In other words, this ‘pro-rating’ exercise means that, “once a risk of ‘overpayment’ becomes clear, the Fund must determine the estimated total costs of the incident, and pay only the corresponding percentage of their claims”.<sup>37</sup> In such a case, governments usually choose to “stand last in the queue”. Indeed, their claims usually are of such an amount that small

<sup>31</sup> This question raises the issue of the intersection between environmental law and economic values, on the one hand, and science, on the other hand.

<sup>32</sup> CLC, art. I, par. 6, incorporated by reference in art. 1, par. 2 to the Fund Convention.

<sup>33</sup> Oosterveen 2006, 255-60.

<sup>34</sup> On the concept of “reasonable measures of reinstatement”, see the International Oil Pollution Compensation Fund 1992 (2005, 10).

<sup>35</sup> Pfennigstorf 1979, 347-448; Brans 1996, 297-304; Sands and Stewart 1996, 290-6; French 2003, 266-8; Burlington 2004, 77; Ibrahima 2005, 63-72.

<sup>36</sup> Fund Convention, art. 4, par. 5.

<sup>37</sup> Oosterveen 2006, 252.

and private claimants would otherwise not receive much of the total available funds. The most important point to note for the purpose of this paper is the fact that victims are *not* assured to receive compensation for the *whole damage* they suffered.

### 2.2.5 The channeled liability

As mentioned earlier, the liability enshrined in the international civil liability regime can be considered ‘strict liability’, meaning that no fault is required to trigger the compensation mechanisms. Liability is channeled to an identified person: the ship owner.<sup>38</sup> Concretely, what is at stake here (and what the victims of the *Erika* spill over tried to escape) is the (in)ability to question the responsibility of other maritime actors and to claim for compensation from them, once responsibility is established.

The channeling of the ship-owner’s liability is defined in Article III par. 4 of the CLC as follows:

“No claim for compensation for pollution damage may be made against the owner otherwise than in accordance with this Convention. Subject to paragraph 5 of this Article, no claim for compensation for pollution damage under this Convention or otherwise may be made against:

- (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 (howsoever 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)”

The channeling of liability significantly restricts the extent to which the victims of pollution may claim compensation from the broad range of actors involved in maritime traffic, which limits the money available for compensation (directly or through supplementary insurances). Some authors have labeled the channeling of liability the “de-responsabilization” of “many other persons such as employees, the charterer or other third parties (...) Hence, their incentives for [the] prevention [of accidents] are diluted”.<sup>39</sup>

### 2.2.6 The theoretical exceptions

The sixth limit concerns the limited possibilities to avoid the application of the limited liability rules set by the international regime. In this respect, the international civil liability mechanism foresees situations that hamper the maritime actors to pretend to have some of the above-mentioned limitations applied. In other words, these are the exceptions, limited liability being the principle.

The ship owner cannot pretend to have his liability limited if it is proven (by the claimant or any interested party) that “the pollution damage resulted from his *personal act* or

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<sup>38</sup> See Section 2.1

<sup>39</sup> Faure and Hui 2001, 250; Le Couviour 2001, 138-52.

*omission*, committed with the *intent* to cause such damage, or *recklessly* and *with knowledge* that such damage would probably result”.<sup>40</sup> Similarly and as seen above, it follows from the channeled liability that a range of maritime actors cannot be requested to compensate for the pollution damage. This limitation can be overridden, and the liability of the persons listed in article 3§4 challenged, 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”.<sup>41</sup>

These exceptions to the limitations are nevertheless largely theoretical. Faults committed either with intent or recklessly are extremely difficult to prove. There are several reasons behind the difficulties. First and foremost, it is commonly recognized by judges and legal authors that maritime transport bears intrinsic dangers and risks.<sup>42</sup> Second, it is necessary to have good technical skills to fully understand the whole chain of causation that eventually leads to an oil spill. Will the victims have such a level of knowledge? All in all they have to, since they bear the burden of proof. Hence, it is likely that the exceptions to the ship owner’s limited liability to compensate are rare. The impunity of a series of maritime actors is quite common.<sup>43</sup>

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<sup>40</sup> CLC, art. 5, par. 2 (emphasis added).

<sup>41</sup> *Ibid.*, art. 3, par. 4 (last sentence).

<sup>42</sup> See, e.g., Terzic (2009, 7, 9).

<sup>43</sup> Please note that searching for a full compensation from the ship owner may be very difficult, because the corporate structures (and veil) render the ‘actual’ owner hard to identify. The ‘registered’ owner may in some cases be just an ‘ad hoc’ entity possessing nothing else than the vessel that caused the damage.



### 3 HUMAN RIGHT TO PROPERTY

#### 3.1 The “human rights approach” to environmental protection

This paper focuses on the question whether the above described limits, set by the international civil liability regime, *contradict* the fundamental/human right to property as interpreted by the ECHR. Before addressing this core question, however, the link between environmental matters and human rights needs to be introduced.

Distinct links between human rights and environmental law (human rights approaches) are possible. Many works are devoted to this approach.<sup>44</sup> Kristof Hectors, for example, has identified four kinds of approaches.<sup>45</sup> First, healthy environment can be recognised as a pre-requisite to the enjoyment of basic rights. Second, the protection of basic human rights may be considered essential to the protection of the environment. The third and most recent approach considers that human rights and the protection of the environment are indivisible. The human right to a healthy and secure environment is a substantial independent human right. Fourth, environmental protection is integrated in other policy fields.<sup>46</sup> This last approach is the only one not being grounded on the notion of rights.<sup>47</sup> This paper is based on the second approach, whereby existing human rights apply to environmental protection matters. As mentioned earlier, this paper will focus on a specific human right--*the right to property*. Other grounds could have been studied (right to a fair trial, right to an effective remedy, etc). This approach is not unchallenged: among others it is commonly seen as largely anthropocentric. While it is by no way claimed that this approach is “the” approach to be upheld, we will nevertheless use such an approach as it may prove effective for testing legally limited liability applied in environmental matters.

#### 3.2 The European Court on Human Rights<sup>48</sup>

The HR Convention states that two kinds of applications may be submitted to the Court. On the one hand, Article 33 of the Convention describes Inter-State cases. A State may bring another State before the Court, claiming that the latter did not respect the obligations of the Convention.<sup>49</sup> On the other hand, Article 34 mentions individual applications. These applications are brought before the Court by a private person (physical person, legal

<sup>44</sup> MacDonald 2008, 213-26; Pallemarts 2008, 149-78.

<sup>45</sup> Hectors 2008, 165-75.

<sup>46</sup> Shelton 2002. Firstly, the recognition of a healthy environment as a condition for the enjoyment of basic human rights. Secondly, some human rights ground the protection of the environment (the focus is then on procedural rights: access to justice, access to the information, public participation). Thirdly, the recognition of an autonomous right to a healthy environment.

<sup>48</sup> HR Convention; Sudre 1997; Pettiti, Decaux and Imbert 1999; de Salvia 2003; Charrier 2005; Renucci 2007; Sudre 2007.

Berger and Pettiti 2007. ; Manuel sur les droits de l’homme et l’environnement - Principes tirés de la jurisprudence de la Cour Européenne des droits de l’homme, Editions du Conseil de l’Europe, 2006, <http://www.echr.coe.int/library/DIGDOC/DG2/ISBN/COE-2006-FR-9789287159793.pdf>; et

Jean-François Akandji-Kombé, Les obligations positives en vertu de la Convention Européenne des Droits de l’Homme - Un guide pour la mise en oeuvre de la Convention Européenne des Droits de l’Homme, Précis sur les droits de l’homme n°7, 2006, Editions du Conseil de l’Europe, [http://www.echr.coe.int/library/DIGDOC/DG2/HRHAND/DG2-FR-HRHAND-07\(2006\).pdf](http://www.echr.coe.int/library/DIGDOC/DG2/HRHAND/DG2-FR-HRHAND-07(2006).pdf)

<sup>49</sup> These kind of cases are quite exceptional. See ECHR, *Ireland v. the United Kingdom*, no. 5310/71; ECHR, *Denmark v. Turkey*, no. 34382/97; ECHR, *Cyprus v. Turkey* [GC], no. 25781/94. All the cases mentioned in this paper are available on the website of the Court (European Court of Human Rights, Search Portal Hudoc).

person, NGO, group of private persons) who claims to be the victim of a breach by a State of the rights enshrined in the Convention.

As far as the environment is concerned, one can note that the word environment does not appear once in the text of the Convention. The Convention does not have any provisions that would expressly cover environmental matters.<sup>50</sup> There is no express right to a peaceful, healthy and high quality environment. Nevertheless, the Court has elaborated a whole body of rules covering environmental issues, relying mainly on the following grounds: right to life (Article 2), prohibition of torture (Article 3), right to a fair trial (Article 6§1), right to respect for private and family life (Article 8), freedom of expression (Article 10), freedom of assembly and association (Article 11), right to an effective remedy (Article 13), and protection of property (Article 1 of the first protocol - Article P1-1). The Court has interpreted the Convention very dynamically in order to assess matters of environmental protection. The Court's dynamism deserves to be underlined. It has been acknowledged by many scholars in all fields covered by the Convention, not only in environmental matters. The Court has, for example, used a diverse range of legal sources, as it has not restricted itself to literal interpretations of the Convention. It has recently extended the applicable sources to international law texts, even where the concerned States are not parties to the international treaties in question.<sup>51</sup> Finally, the Court has very recently recognised the right to a healthy environment.<sup>52</sup>

As mentioned above, this paper does not focus on issues of competence. Nevertheless, it will briefly elaborate on this point for it can not only answer the question of whether the Court can actually review international Conventions setting environmental liability, but also illustrate the above-mentioned dynamism of the Court.

This working paper focuses on the international civil liability regime. In more concrete terms, the paper analyzes whether the victims of the Erika oil spill could question before the Court the rules contained in the international civil liability regime. In particular, the paper considers if the *Erika* victims can challenge the international civil liability rules as they bind France, a party to the conventions in question. Would the Court consider that the national (implementing) laws interfere with the fundamental right to property?

The national measure at stake in this paper would be French law n°94-478, through which France becomes a party to the CLC.<sup>53</sup> The paper will determine if the French law in question falls under the jurisdiction of the Court despite the international nature of the civil liability regime.

As for the jurisdiction of the Court, it may be essential that the interference by the national (French) authorities with human rights in fact stems from the substantive content of an international norm. It is the content of the international norm, to be applied in the national legal order, that would in fact be challenged by the claimant as infringing the HR Convention. Does such a national measure fall under the jurisdiction of the Court?

<sup>50</sup> This can be explained by the fact that the Convention was adopted in 1950. At that time, the priority was to build a sustainable peace and to rebuild the economies.

<sup>51</sup> ECHR, *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 60-86

<sup>52</sup> ECHR, *Tătar v. Romania*, no. 67021/01.

<sup>53</sup> The only article of Law n° 94-478 reads as follows: "Article unique. - Est autorisée l'approbation du protocole modifiant la convention de Bruxelles du 29 novembre 1969 sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures, fait à Londres le 27 novembre 1992, et dont le texte est annexé à la présente loi."

To answer that question, one may rely on the text of the HR Convention and the *Bosphorus* case.<sup>54</sup> Under the text of the Convention, “The High Contracting Parties shall secure to everyone *within their jurisdiction* the rights and freedoms defined in Section I of this Convention”.<sup>55</sup> As for the notion of jurisdiction, the *Bosphorus* case reminds us of the principle: jurisdiction is primarily of a territorial nature.<sup>56</sup>

Before assessing whether the international measure can, as such, be considered to fall under the Court’s jurisdiction, it should be established to what extent an international norm to which France is a party is binding under the French legal order. Indeed, the French Constitution recognizes the primacy of international law over national law.<sup>57</sup>

The Court’s jurisdiction when dealing with international law has been confirmed in the *Bosphorus* case<sup>58</sup> in the following terms:<sup>59</sup>

“152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue cooperation in certain fields of activity. (...)”

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs *regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations*. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party’s “jurisdiction” from scrutiny under the Convention (see *United Communist Party of Turkey and Others v. Turkey*).<sup>60</sup>

The Court concluded in §154 that a State party to the Convention has to respect the Court’s requirements, including the “treaty commitments subsequent to the entry into force of the (HR) Convention”.<sup>61</sup>

Applying these principles to the *Erika* case, it can be concluded, firstly, that treaty commitments resulting from the CLC are enforced and applied on the French territory,

<sup>54</sup> ECHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim İrketi v. Ireland* [GC], no. 45036/98; Eckes 2007, 47-67.

<sup>55</sup> HR Convention, Article 1 (Obligation to respect human rights) (emphasis added).

<sup>56</sup> ECHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim İrketi v. Ireland* [GC], no. 45036/98, § 136: the text of Article 1 requires States Parties to answer for any infringement of the rights and freedoms protected by the Convention committed against individuals placed under their “jurisdiction” (see ECHR, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311). The notion of “jurisdiction” reflects the term’s meaning in public international law (see ECHR, *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99, and 48209/99, § 20; ECHR, *Banković and Others v. Belgium and Others* [GC], no. 52207/99, §§ 59-61; and ECHR, *Assanidze v. Georgia*, no. 71503/01, § 137), so that a State’s jurisdictional competence is considered primarily territorial (see ECHR, *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99, and 48209/99, § 20; ECHR, *Banković and Others v. Belgium and Others*, no. 52207/99, § 59) and the jurisdiction is presumed to be exercised throughout the State’s territory (see ECHR, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99 § 312).

<sup>57</sup> Art. 55 of the French Constitution reads as follows: “Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l’autre partie.”

<sup>58</sup> ECHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim İrketi v. Ireland* [GC], no. 45036/98, §§152-153 (emphasis added; internal citations omitted).

<sup>59</sup> The *Bosphorus* case concerned Community law that resulted from international commitments.

<sup>60</sup> ECHR, *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 29.

<sup>61</sup> ECHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 154 reads as follows: “In reconciling both these positions and thereby establishing the extent to which a State’s action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention; the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards. - - The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention. - - ” (Internal references omitted)

given the French recognition of the primacy of international law over national law. Secondly, despite the international nature of the norm in question and the international source of the questioned commitments, the transposing French law 94-478 falls under the jurisdiction of the Court.

It can therefore be concluded that the Court would have jurisdiction to consider whether French law n°94-478, which transposes in France the provisions of the CLC, would infringe an individual's right to peaceful enjoyment of his or her possessions.

### 3.3 Right to property under the HR Convention (Article P1-1)<sup>62</sup>

Article 1 of the first Protocol to the HR Convention reads as follows:

#### “Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”

#### 3.3.1 Property: an autonomous right

The notion of property is autonomous in the framework of the HR Convention, as interpreted by the Court.<sup>63</sup> As such it does not depend on the definitions in the State parties' legal orders. The notion of property has been interpreted extensively by the Court: the legal definition of property is recognized for almost anything with a patrimonial value, as long as there is a “legitimate expectation” that the claim or debt may be realized. Nevertheless, the claim must have sufficient grounds in national law.<sup>64</sup> Such a condition is met e.g. when the patrimonial value is well settled by the national courts.

#### 3.3.2 The three norms of Article P1-1

It is settled case law that Article P1-1 contains three norms (rules). The *Sporrong and Lönnroth v. Sweden* case highlights the matter:

“61. (...) [t]hat Article (P1-1) comprises three distinct rules. **The first rule**, which is of a general nature, enounces the principle of *peaceful enjoyment of property*; it is set out in the first sentence of the first paragraph. **The second rule** covers *deprivation of possessions and subjects it to certain conditions*; it appears in the second sentence of the same paragraph. **The third rule** recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.

<sup>62</sup>First Protocol to the Human Rights convention 1952, art. 1.

<sup>63</sup> ECHR, *Öneryildiz v. Turkey* [GC], no. 48939/99, § 124.

<sup>64</sup> ECHR, *Kopecky v. Slovakia* [GC], no. 44912/98, § 52; ECHR, *Draon v. France* [GC], no. 1513/03, § 68, 6 October 2005; ECHR, *Maurice v. France* [GC], no. 11810/03, § 66.

The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable”.<sup>65</sup>

Even though those three norms are said to be independent, the Court tends to consider them together within article P1-1.<sup>66</sup>

The first norm establishes the principle of peaceful enjoyment of property. It has also been labelled “norme floue” (blurred norm), “norme balai”<sup>67</sup> (sweeping norm), or “catégorie résiduelle”<sup>68</sup> (residual category) for this first norm seems, at the first glance, to be defined negatively. Any national measure that would not fall within the scope of the second or third norm would fall within the first norm’s scope. Nevertheless, it is necessary to define the first norm positively, since otherwise article P1-1 would “only” and “broadly” consist of the second and third norm (*i.e.* deprivation of possessions and control of the use of property). Thus, defining the first norm is essential in order to realize the full potential of the whole article. Accordingly, the Court found that the 1<sup>st</sup> norm applies to expropriations where compensation is not determined or if compensation is not actually awarded.<sup>69</sup> Similarly, the Court found that the 1<sup>st</sup> norm applies when “fluidity” and “uncertainty” are a result of the interference and the aim of the questioned national measure.<sup>70</sup>

Moving from the 1<sup>st</sup> norm to the 2<sup>nd</sup> and 3<sup>rd</sup> norms, the distinction between the latter two is made along two criteria. The first and main criterion is quantitative (the *consequence* of the interfering measure), the second and complementary criterion is qualitative (the *aim* pursued by the interfering measure). The consequence of the deprivation of property (second norm) is the definitive and complete dispossession of a right or interest qualified as a possession. There is a complete and irreversible rupture in the legal relationship that links the possession, the object of the right or of the interest, and the entitled person. On the contrary, when some elements of the right that result from the possession are interfered with but not left entirely without substance, the interfering measure is qualified as control of use of property (third norm). The same applies when the person entitled to the right still, after the interference, retains a legal link with the property. When the aim pursued is of general interest, the norm to be applied is the second one, whereas when the aim pursued by the interfering measure is part of social and economic policies run by the State, the third norm applies.<sup>71</sup> Françoise Tulkens has the same reading<sup>72</sup> when she elaborates that the distinction between the dispossession and regulation of property seems to be of a quantitative nature (the degree of interference by national authorities) rather than of qualitative nature (the nature of interference by national authorities).

<sup>65</sup> ECHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 61 (emphasis added).

<sup>66</sup> ECHR, *James and Others v. UK*, 21 February 1986, § 37 (emphasis added).

<sup>67</sup> Sudre 2003, 226-7; Rozakis and Voyatzis 2006, 7.

<sup>68</sup> Allen 2005, 107; Rozakis and Voyatzis 2006, 7.

<sup>69</sup> ECHR, *Geraldes Barba v. Portugal*, no. 61009/00, §§ 46-47.

<sup>70</sup> This “fluidity” or “uncertainty” criterion is also a feature used for qualifying property (*e.g.* intangible property) (Rozakis and Voyatzis 2006, 12-13).

<sup>71</sup> Vanderberghe 2006, 35.

<sup>72</sup> ECHR, *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 160: “The Chamber shared the Government’s point of view - -. It noted that, while it was true that the applicant could not exercise her right of use in terms of physical possession as the house had been occupied by the tenants and that her rights in respect of letting the flats, including her right to receive rent and to terminate leases, had been subject to a number of statutory limitations, she had never lost her right to sell her property. Nor had the authorities applied any measures resulting in the transfer of her ownership. In the Chamber’s opinion, those issues concerned the degree of the State’s interference, and not its nature. All the measures taken, whose aim was to subject the applicant’s house to continued tenancy and not to take it away from her permanently, could not be considered a formal or even *de facto* expropriation but constituted a means of State control of the use of her property. The Chamber therefore concluded that the case should be examined under the second paragraph of Article 1 of Protocol No. 1 - - ” (internal citations omitted), *op. cit.* Tulkens (2006, 65-66).

### 3.3.3 The three tests to assess the conformity of national interference with Article P1-1

When assessing national measures against article P1-1 requirements, “Both the ECtHR (*European Court on Human Rights*) and the ECJ (*European Court of Justice*) have repeatedly emphasized that the right to property is not an absolute right, limitations to that right can be justified under certain conditions. In its *Beyeler* judgment,<sup>73</sup> the ECtHR allowed such limitations on the condition that they pass the ‘*lawfulness test*’, the ‘*general interest test*’, and the ‘*fair balance test*’”.<sup>74</sup> In other words, the right to property is not an absolute right: it can be limited as long as the national, interfering law respects the above-mentioned three tests.<sup>75</sup>

### 3.3.4 Procedural guarantees in the framework of Article P1-1

Finally, procedural guarantees also have a role to play: the *Air Canada* case<sup>76</sup> developed and specified the procedural requirements for the control of the use of property. Those settled requirements are clearly exposed by the *Jokela v. Finland* case.<sup>77</sup>

“Although Article 1 of Protocol No. 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (...)”.

This procedural requirement goes together with the positive obligation of the State to take measures in order to protect property in cases that arise between private persons (both physical and natural persons), *i.e.* when article P1-1 has a horizontal effect.<sup>78</sup>

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<sup>73</sup> ECHR, *Beyeler v. Italy* [GC], no. 33202/96.

<sup>74</sup> Schutte 2004, 34, op. cit. Lenaerts and Vanvoorden (2006, 126).

<sup>75</sup> For absolute rights (such as ECHR’s Article 3 - prohibition of torture) to be infringed, the mere interference by a state constitutes an infringement of the ECHR requirements.

<sup>76</sup> ECHR, *Air Canada v. the United Kingdom*, 5 May 1995.

<sup>77</sup> ECHR, *Jokela v. Finland*, no. 28856/95, § 45, quoted by Tulkens (2006, 87).

<sup>78</sup> ECHR, *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96.

## 4 THE COMPATIBILITY OF THE CL REGIME WITH ARTICLE P1-1 OF THE HR CONVENTION

### 4.1 A prelude - the *Pressos* case

The above-mentioned limitations of liability, enshrined in the international civil liability regime will be assessed against the requirements elaborated in the context of the HR Convention's right to property.

As noted, to better illustrate the matter, the paper reflects upon a case of a fisherman who conducted his activities along the coast of France (a State party to the Civil Liability and Fund Conventions), and who suffered of pollution resulting from the escape or discharge of oil from *Erika*. Could the fisherman reasonably refer his case to the Court on Human Rights on the grounds that as France is a party to the international regime in question, the international regime applies within the French jurisdiction? The impact of the regime is that the fisherman is denied (full) compensation for the harm caused. Will the fact that France has signed/ratified the international conventions in question thus lead to an infringement of the victim's right to property, as conceived by the European Convention on Human Rights and as interpreted by the European Court on Human Rights?

In assessing the *Erika* accident, the *Pressos Compania Naviera S.A. and Others v. Belgium* case ("the *Pressos* case")<sup>79</sup> could present interesting analogies. The issue at stake was also limited liability for maritime claims.

In the *Pressos* case, pursuant to a Belgian Act<sup>80</sup> on the piloting of sea-going vessels and the treaties concluded between Belgium and the Netherlands, merchant ships that enter the Scheldt estuary must have on board a pilot with a license issued by the Belgian or Netherlands authorities. In Belgium the piloting of sea-going vessels is a public service organized by the State in the interest of shipping. In practice pilot services for maritime and river navigation are provided either directly by the State or by private companies acting under a license.<sup>81</sup> The liability of the pilots is determined under Belgian law as follows:<sup>82</sup>

"The organiser of a pilot service cannot be held directly or indirectly liable for damage sustained or caused by the ship under pilotage, where such damage is the result of the negligence of the organiser himself or one of his staff acting in the performance of his duties, irrespective of whether the negligence in question consists of an act or omission.

Nor can the organiser of a pilot service be held directly or indirectly liable for damage caused by a malfunction or defect in the equipment owned or used by the pilot service for the purpose of supplying information or instructions to the sea-going vessels.

(...) The ship shall be liable for the damage referred to in the first paragraph. A member of staff [of the pilot service] who, by his act or omission, caused the damage referred to in the first paragraph above shall

<sup>79</sup> ECHR, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995.

<sup>80</sup> Wet 3 november 1967.

<sup>81</sup> *Ibid.*, §§ 9-10.

<sup>82</sup> Section 3 bis in Wet 3 november 1967.

be liable only in the event of a deliberately tortuous act or gross negligence.

The liability of a member of staff for damage caused by his gross negligence shall be limited to five hundred thousand francs for each incident giving rise to such damage”.<sup>83</sup>

The applicants in the *Pressos* case were ship owners, mutual shipping insurance associations and insolvency administrators. They claimed that through the above-quoted requirement, Belgium imposed on them an excessive burden. It upset the fair balance between the demands of the general interest and the requirements of the protection of their right to the peaceful enjoyment of their possessions by exempting the organizer of a pilot service from liability for negligence on the part of its staff on the one hand, and by limiting the liability of the latter and retrospectively extinguishing without consideration any claims for compensation which the applicants may have had against the Belgian State or against private companies offering pilot services for casualties occurring before 17 September 1988 it on the other hand.

The government claimed that the Act reflected not only financial considerations, but concerns that bringing Belgian law in line with the law of the neighboring countries could warrant prospective legislation in this area to derogate from the general law of torts. The Court concluded that

“ [The government’s] considerations - - could not justify legislating with retrospective effect with the aim and consequence of *depriving the applicants of their claims for compensation*.

*Such a fundamental interference* with the applicants' rights is inconsistent with preserving a fair balance between the interests at stake.

*In addition* the retrospective effect of the Act deprived the applicants of their claims for compensation in respect of the damage sustained and therefore infringed the second sentence of the first paragraph of that Article (P1-1).”<sup>84</sup>

#### 4.2 Testing the international civil liability regime against the HR Convention: the *Erika* case

The first issue to assess is whether the Court would legally define a claim for compensation in the framework of the international civil liability regime as a possession. If that is the case, it should be next examined whether the Court would consider the French law, which imposes limitations on an individual’s enjoyment of such possession, to constitute an interference by national authorities. Further, it is possible to assess which norm would apply in the case of *Erika* as well as question the horizontal effect of article P1-1. The horizontal effect refers to the applicability of the Article to cases that arise between private parties as opposed to a State and a private person. In the latter case, the Article would have a vertical effect.

<sup>83</sup> ECHR, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 18.

<sup>84</sup> *Ibid.*, § 43, emphasis added.



#### 4.2.1 The legal definition of possession and the horizontal effect of Article P1-1

As for the legal definition of possession,<sup>85</sup> the Court stated in the *Pressos* case:

“The rules in question are rules of tort, under which claims for compensation come into existence as soon as the damage occurs. A claim of this nature “constituted an asset” and therefore amounted to “a possession within the meaning of the first sentence of Article 1 (P1-1). This provision (*Article P1-1*) was accordingly applicable in the present case” (...).<sup>86</sup>

In the *Erika* case the rules questioned are those set by the international civil liability regime. This regime establishes a liability mechanism under which, just like in the *Pressos* case, “claims for compensation come into existence as soon as the damage occurs”.<sup>87</sup> Hence, we can deduce that the Court would in the *Erika* case, *mutatis mutandis*, consider the claim to fall under the legal definition of a possession.

One could also wonder whether Article P1-1 would apply given the horizontal character of the case, *i.e.* between private persons. As the Court stated in the *Sovtransavto* case:

“As regards the right guaranteed by Article 1 of Protocol No. 1, those positive obligations may entail certain measures necessary to protect the right of property - - , *even in cases involving litigation between individuals or companies*. This means, in particular, that the States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons”.<sup>88</sup>

Hence, Article P1-1 applies also in horizontal relationships. In other words, the horizontal effect does not preclude the application of the requirements of Article P1-1.

#### 4.2.2 The 1<sup>st</sup> norm of Article P1-1 (peaceful enjoyment of property)

Next, it is necessary to determine which one(s) of the three norms (rules) of Article P1-1, as exposed above in section 3.3.2, applies in our case.<sup>89</sup> This will have important consequences for the next steps of the analysis. In the *Pressos* case, the Court stated:

“The Court notes that the 1988 Act *exempted the State and other organisers of pilot services from their liability* for negligent acts for which they could have been answerable. It resulted in an *interference with the exercise of rights* deriving from claims for damages which could have been asserted in domestic law up to that point and, accordingly, with the right that everyone, including each of the applicants, has to *the peaceful enjoyment of his or her possessions* - -”.<sup>90</sup>

From this paragraph we can conclude that the first norm would apply in the *Erika* case, because the exemption of liability constituted an interference with the exercise of rights deriving from claims for damages that could have been asserted in domestic law. It will thus be applied accordingly.

<sup>85</sup> Possession is an autonomous notion in the context of the HR Convention (see Section 3.4.1).

<sup>86</sup> ECHR, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 31.

<sup>87</sup> CLC reads as follows: “Art. III: 1. Except as provided in paragraphs 2 and 3 of this Article, the owner of a ship at the time of an incident, or, where the incident consists of a series of occurrences, at the time of the first such occurrence, shall be liable for any pollution damage caused by the ship as a result of the incident.”

<sup>88</sup> ECHR, *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 96 (emphasis added, internal citations omitted).

<sup>89</sup> As was explained in Section 3.4.2 above, Article P1-1 contains three norms (rules).

<sup>90</sup> ECHR, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 34.

### 4.2.3 The lawfulness test: fulfilled

In testing the ‘lawfulness’ (or legality), the standards established in the Court’s case law regarding the legal basis and quality of the law<sup>91</sup> that interferes with the right to property (Article P1-1) are essential. In other words, the state’s interference must have a legal basis in the national order, and this legal basis must be in line with the norms that are superior to it.<sup>92</sup> The interfering law must fulfill the following requirements: it must be accessible, precise, predictable and clear.<sup>93</sup> This set of substantive requirements goes together with a third, procedural one: the national legal order must offer the claimant the possibility to effectively challenge the state’s interference. The claimant must have access to a procedure that enables him/her to defend his/her economic interests. That is the procedural side of Article P1-1.<sup>94</sup>

Applying the lawfulness test to the *Erika* case, it may be observed that the interfering law n°94-478 was adopted on the basis of the French Constitution’s Article 53.<sup>95</sup> Hence, law n°94-478 has a legal basis in the national order. Second, the law must be accessible, precise, predictable and clear. These requirements are taken as fulfilled as well.

Third, the procedural requirement of Article P1-1 states that the claimant must be able to effectively challenge the interfering regulation. The claimant must have access to a procedure that enables him/her to defend his/her economic interests. One may wonder whether the international civil liability regime provides such sufficient guarantees. To what extent are the requirements of a review, of an equitable confrontation, fulfilled? Is the claimant in a position to effectively challenge the measures so as to defend his economic interests?<sup>96</sup> Nevertheless, as the focus of this paper is not on these procedural aspects, they may for the purposes of the present analysis also be considered as fulfilled.

All in all, the lawfulness test may be regarded successfully passed.

### 4.2.4 The general interest test: fulfilled

Regarding the general interest test (or legitimate aim test), the Court’s control is marginal<sup>97</sup>: it is sufficient for a State to invoke a measure in line with a legitimate policy (be it social or economic)<sup>98</sup>. The state simply needs to ground the interference on a reasonable basis. When dealing with the control of the use of property (article P1-1’s 3<sup>rd</sup> norm), the discretion of the Court is even more marginal: any objective satisfying the

<sup>91</sup> This case-law was developed by the Court in the context of the Convention’s article 8 - right to respect for private and family life; article 9 -freedom of thought, conscience and religion; article 10 - freedom of expression; and article 11 -freedom of assembly and association.

<sup>92</sup> ECHR, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, § 81, case quoted by Tulken (2006, 79).

<sup>93</sup> *Ovey and White* 2006, 360-3. See, e.g., ECHR, *Hentrich v. France*, 22 September 1994, § 42.

<sup>94</sup> ECHR, *Witteck v. Germany*, no. 37290/97, § 55; this aspect will be elaborated in the following section.

<sup>95</sup> Article 53 of the French Constitution reads as follows: “Les traités de paix, les traités de commerce, les traités ou accords relatifs à l’organisation internationale, ceux qui engagent les finances de l’Etat, ceux qui modifient des dispositions de nature législative, ceux qui sont relatifs à l’état des personnes, ceux qui comportent cession, échange ou adjonction de territoire, ne peuvent être ratifiés ou approuvés qu’en vertu d’une loi. Ils ne prennent effet qu’après avoir été ratifiés ou approuvés. Nulle cession, nul échange, nulle adjonction de territoire n’est valable sans le consentement des populations intéressées.”

<sup>96</sup> ECHR, *Witteck v. Germany*, no. 37290/97, § 55.

<sup>97</sup> ECHR, *James and Others v. the United Kingdom*, 21 February 1986, § 45; ECHR, *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, §§ 83, 91; ECHR, *Draon v. France* [GC], no. 1513/03, § 75, 6 October 2005; ECHR, *Maurice v. France* [GC], no. 11810/03, § 83.

<sup>98</sup> Granting a license for the sake of economic and technologic development (ECHR, *Smith Kline and French Laboratories Ltd v. the Netherlands* (dec.), no. 12633/87), measures ensuring the economic welfare of the state (ECHR, *Pressos Compania Naviera S.A. and Others v. Belgium*, 20 November 1995, § 37), social measures understood broadly (ECHR, *Ollila v. Finland* (dec.), no. 18969/91), measures re. public works, land planning and the environment, agricultural policy, public health, public security, artistic and cultural patrimony.

general interest is sufficient.<sup>99</sup> It may be added that the notions of public interest and general interest are considered to be the same under the Court's settled case law.<sup>100</sup>

The preamble of the CLC reads as follows:<sup>101</sup>

“The States Parties to the present Convention,  
 Conscious of the dangers of pollution posed by the worldwide maritime carriage of oil in bulk,  
 Convinced of the need to ensure that adequate compensation is available to persons who suffer damage caused by pollution resulting from the escape or discharge of oil from ships,  
 Desiring to adopt uniform international rules and procedures for determining questions of liability and providing adequate compensation in such cases,  
 Have agreed as follows”

Given the Court's marginal control, the Court would be expected to consider the measure's goal as expressed in the Civil Liability Convention preamble as fulfilling the general interest test.<sup>102</sup>

#### 4.2.5 The proportionality test: issues of concern

##### 4.2.5.1 An overview

Until the *Sporrong* case, the Court's control was limited to issues of legality (lawfulness) and legitimacy (general interest). In the *Sporrong* case, however, the Court clearly highlighted important features that have since then become settled in the case law as for the “proportionality” (or “fair balance”) test of Article P1-1:<sup>103</sup>

“the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.<sup>104</sup> The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1).

The Agent of the Government recognised the need for such a balance. At the hearing on the morning of 23 February 1982, he pointed out that, under the Expropriation Act, an expropriation permit must not be issued if the public purpose in question can be achieved in a different way; when this is being assessed, full weight must be given both to the interests of the individual and to the public interest.”

In comparison with the legality and legitimacy tests, the Court has more room to operate when it applies the proportionality test. The evolution of the Court's case law has consequently been the most significant in this area. It is also clearly the most important test in terms of this paper.

<sup>99</sup> Nature protection: ECHR, *Fredin v. Sweden* (no. 1), 18 February 1991, § 48; housing policy: ECHR, *Mellacher and Others v. Austria*, 19 December 1989, § 47; measures fighting drugs traffic: ECHR, *Air Canada v. the United Kingdom*, 5 May 1995, § 42.), as highlighted by Tulkens 2006.

<sup>100</sup> See amongst others ECHR, *James and Others v. the United Kingdom*, 21 February 1986, § 43; ECHR, *Bäck v. Finland*, no. 37598/97, § 53, op. cit. Tulkens (2006, 70).

<sup>101</sup> See the introduction to the Fund Convention's preamble in footnote 6.

<sup>102</sup> The Community as a whole does not, however, obtain any direct advantage from the national measure. See ECHR, *Allard v. Sweden*, no. 35179/97, § 52.

<sup>103</sup> ECHR, *Sporrong and Lönnroth v. Sweden*, 23 September 1982, §69.. For a similar approach, see ECHR, *James and Others v. the United Kingdom*, 21 February 1986, § 50.

<sup>104</sup> Internal quote omitted.

The intensity of the proportionality requirement varies depending on which of the P1-1 norms applies.<sup>105</sup> Indeed, in respect of the 3<sup>rd</sup> norm (control of the use of property), where the States have a wide discretion in determining a legitimate goal (see above), the Court's control regarding proportionality is rather marginal. The States do enjoy a wide margin of appreciation in asserting that the interference is adequate in light of the purpose to be reached. The extent of compensation is not scrutinized in detail. The *Chassagnou* case<sup>106</sup> revealed the potential of the proportionality requirement in regulating interferences with the use of property, however. Even though the state's measure was found to be legal and legitimate, it did not meet the proportionality requirement.<sup>107</sup>

On the contrary, when assessing a state's interference with the right to property against the 2<sup>nd</sup> norm (deprivation of possession and subjecting possessions to certain conditions) or the 1<sup>st</sup> norm (peaceful enjoyment of property), the Court's control is stronger.

The Court applies five criteria when it assesses proportionality in the context of Article P1 - 1. First, the *severity and seriousness* of the state's interference are analyzed. Second, the Court assesses the *interests at stake*: the seriousness of the measure must be proportionate to the defended interests. When assessing the interests, the Court keeps in mind that the Convention is meant to protect concrete and effective rights. Hence, the Court must go beyond the mere appearances and analyze the concrete reality of each situation that it deals with.<sup>108</sup>

The third criterion is the *harm suffered*, together with the *possibility to obtain compensation*. The reasonable compensation requirement itself is assessed against two criteria: the compensation must be in line with the value of the property<sup>109</sup> and it must take place within a reasonable time (hence making a link to the procedural requirements).<sup>110</sup> As for the value of the property, the Court recognizes that when the state's interference takes place in the context of a political or economic reform, the state is entitled not to compensate for the full value of the property. As for the time frame, the national courts must take it into account when granting compensation: when the whole process of awarding compensation is excessively long, the compensation must be raised accordingly. A particularly long delay in paying the compensation does make the financial burden heavier and places the victim in a situation of uncertainty.<sup>111</sup> In such a case, the time between the moment when the compensation was awarded and when it was effectuated constitutes a distinct prejudice.<sup>112</sup>

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<sup>105</sup> Allen 2005, 107, op. cit. Rozakis and Voyatzis (2006, 24).

<sup>106</sup> ECHR, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 85.

<sup>107</sup> Tulkens 2006, 83.

<sup>108</sup> ECHR, *Czapska v. Poland* [GC], no. 35014/97, § 168 and ECHR, *Broniowski v. Poland* [GC], no. 31443/96, § 151: "In assessing compliance with Article 1 of Protocol No. 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. That assessment may involve not only the relevant compensation terms - if the situation is akin to the taking of property - but also the conduct of the parties, including the means employed by the State and their implementation. In that context, it should be stressed that uncertainty - be it legislative, administrative or arising from practices applied by the authorities - is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner - - " (Internal citations omitted).

<sup>109</sup> ECHR, *James and Others v. the United Kingdom*, 21 February 1986, § 54; ECHR, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 96.

<sup>110</sup> ECHR, *Akkuş v. Turkey*, 9 July 1997, § 29.

<sup>111</sup> ECHR, *Koçak and Others v. Turkey*, no. 42432/98, § 14

<sup>112</sup> ECHR, *Günel v. Turkey (no. 1)*, no. 19282/92, § 30.

The fourth criterion to be taken into account is the national law's *lack of clarity*, its *uncertainty*. Lack of clarity<sup>113</sup> and a wide margin of appreciation left to the public authorities will be taken into account by the Court when it assesses whether the law is in line with the proportionality requirement.<sup>114</sup> The Court has also established e.g. in the *Papachela* case, that if the internal norm is excessively rigid, no account can properly be taken of the diversity of the situations. The Court concluded in the *Papachela* case that the internal norm was not proportionate.<sup>115</sup> As for the procedural requirements, in the *Biozokat* case<sup>116</sup> the Court estimated that since the affected owners had to multiply the procedures in order to qualify for compensation, a fair balance was not achieved.

If the property at stake becomes precarious, the control of proportionality is stricter. Uncertainty (a form of precariousness giving ground to the applicability of the first norm, see above) is another element considered by the Court in assessing whether or not proportionality is respected.<sup>117</sup> Uncertainty can be found when an unreasonably long time elapses before definitive compensation is awarded<sup>118</sup> or before the legal situation of the property is clarified. There is also uncertainty when the State does not take measures that would effectively protect the property.<sup>119</sup>

As the fifth and recently applied criterion, the Court takes the *social function* of the property into account. Mirroring the developments in social welfare case law, the Court has developed a body of jurisprudence in the field of possessions that is linked to livelihood activities. In the *Doğan and Others v. Turkey*<sup>120</sup> case, the Court recognized the right to earn a living by work through the protection of the working means, tools. This right had already been recognized in the *Lallement* case.<sup>121</sup> When applying the social function criterion in the *Alatulkkila* case<sup>122</sup>, Finland was found to have duly taken into account and differentiated the modalities of the measure at stake. Attention had been paid to whether or not the affected persons' means of subsistence were at stake or not.

#### 4.2.5.2 Applying the proportionality test

A proportionality test of the 1st norm starts by an assessment of the two first criteria<sup>123</sup>, the (1) *severity (gravity)* of the state's interference in proportion to the overall (2) *interests at stake*. As noted, the Court must go beyond the mere appearances, and look into the reality of how the international liability regime deals with the individual oil spill victims.<sup>124</sup> This assessment of the Court would very much rely on the fact, the reality of the concrete situation. Because of this largely subjective and rather unpredictable outcome depending upon all the elements of a concrete situation that we cannot set in a fictive case, we will rather focus on the following criteria, which are much more objective and reliable.

<sup>113</sup> As long as this feature does not constitute unpredictable nor arbitrary interference, and is not qualified as *ipso facto* contrary to the Court's requirements.

<sup>114</sup> ECHR, *Beyeler v. Italy* [GC], no. 33202/96, §§ 109-110; ECHR, *Broniowski v. Poland* [GC], no. 31443/96, §154; ECHR, *Străin and Others v. Romania*, no. 57001/00, § 49; ECHR, *Buzescu v. Romania*, no. 61302/00, § 92, op. cit. Vanderberghe (2006, 44).

<sup>115</sup> ECHR, *Papachelas v. Greece* [GC], no. 31423/96, § 53; ECHR, *Katikaridis and Others v. Greece*, 15 November 1996, § 49; ECHR, *Tsomtsos and Others v. Greece*, 15 November 1996, § 40; ECHR, *Biozokat A.E. v. Greece*, no. 61582/00, §§ 28-32.

<sup>116</sup> See Vanderberghe 2006, 44.

<sup>117</sup> *Ibid.*, 25-28.

<sup>118</sup> ECHR, *Almeida Garrett, Mascarenhas Falcão and Others v. Portugal*, nos. 29813/96 and 30229/96, §§ 54-5

<sup>119</sup> ECHR, *Doğan and Others v. Turkey*, nos. 8803-8811/02, 8813/02 and 8815-8819/02, § 154.

<sup>120</sup> *Ibid.*

<sup>121</sup> ECHR, *Lallement v. France*, no. 46044/99, 11 April 2002.

<sup>122</sup> ECHR, *Alatulkkila and Others v. Finland*, no. 33538/96, §§ 66-8. On this issue, see Marguénaud 2007, 665-70.

<sup>123</sup> The Court also scrutinizes the procedural requirements, which are not, as mentioned, the focus of this paper.

<sup>124</sup> ECHR, *Hutten-Czapska v. Poland* [GC], no. 35014/97, § 168; ECHR, *Broniowski v. Poland* [GC], no. 31443/96, § 151.

The Court assesses the suffered harm together with the (3) *victim's ability to obtain compensation*. As was seen above, the interference cannot be proportional when the compensation is not reasonable.<sup>125</sup> Two further criteria -- (4) uncertainty and (5) social function -- restrict the States' margin of appreciation in setting the compensation. Regarding uncertainty, the design and actual functioning of the international civil liability regime are assessed by the Court. First of all, as mentioned earlier and as admitted by the Fund on its website, some nine years after the *Erika* spill took place all the claimants still had not had their claims screened. Second, the Fund itself recognizes uncertainty about the total number of admissible claims. Such uncertainty justified (according to the Fund) a limitation of the payments to a percentage of the loss or damage actually suffered. As uncertainty diminished the payments were complete by April 2003, that is to say more than three years after the accident.<sup>126</sup> Thus, the level of compensation is based upon the number of admissible complaints, in function of the total amount of money available to compensate all the complainants. Based upon all these elements, we can reasonably expect the Court to find uncertainty in the way that the international liability regime grants and determines compensation.

As for the social function, victims such as a fisherman or anyone whose has his professional activity is hampered by an oil spill can obviously argue that there is particular social value attached to the possession. At stake are his working tools and loss of income (be it *e.g.* nets, boats, or pure economic loss suffered because of the pollution of the sea and the consequent inability to fish and loss of clients).

All in all, on the basis of these observations we can reasonably expect that the Court would find both *uncertainty* and that the property has a *social function*. Therefore, the Court's control would be more stringent than it would otherwise be in the context of article P1-1. Bearing in mind the Court's stringent control, it can next be established whether the compensation awarded in the international liability regime is adequate--and hence proportionate.

Compensation is adequate as long as it reasonably reflects the value of the property and is awarded within a reasonable time frame. Here, as explained above, we can highlight the fact that all complainants have not had their case screened by the fund after nine years. Moreover, for those who have had their case screened by the Fund there has been a delay in the full compensation because of the limited amounts available. The long process of awarding compensation has not been taken into account, nor has the time that has elapsed between the award of compensation and its effective payment. Furthermore, claimants are not allowed to challenge the liability of maritime actors listed in the Civil Liability Convention's article III §4 on the grounds of common rules of tort, even though this could have enabled them to get full compensation for their loss or damage. Finally, the compensation mechanism is rigid: no account is taken of the diversity of situations because of the equal treatment and pro-rata exercises. Taking into account the wider margin of control available to the Court (see above), it seems likely to consider that the compensation has not been adequate.

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<sup>125</sup> ECHR, *James and Others v. the United Kingdom*, 21 February 1986, § 120.

<sup>126</sup> "Initially, as a result of the uncertainty as to the total amount of the admissible claims, the Fund had to limit its payments to a certain percentage of the loss or damage actually suffered by the respective claimants. However, as that uncertainty diminished, the level of payments for claimants other than the French Government and Total SA was increased to 100 % in April 2003" (IOPCF, *Erika*).

Hence, there would be reasonable grounds for the Court to find French law n°94-478, which makes the international civil liability regime's provisions to be applied into the national jurisdiction, not to fulfill the proportionality requirement.

Therefore, it may be concluded that the international civil liability regime, which binds the French national authorities, does not fulfill the proportionality requirement in the context of the HR Convention's Article P1-1. The Court would, in other words, consider the French law that implements the CLC not to be in conformity with the HR Convention.

## 5 CONCLUSIONS

This paper discussed grounds to test the compatibility of the international civil liability regime for the Compensation of Oil-Pollution Damage and the European Convention on Human Rights. We focused on the Human Rights Convention's requirements contained in article 1 of the first Protocol: the right to property.<sup>127</sup> The paper does not give clear-cut solutions, but rather challenges the international civil liability regime by applying a "human rights approach". An assessment of the compatibility between the two regimes through a "proportionality" (i.e. "fair balance") test, in particular, revealed clear tensions. In this respect, it is also worth underlining that the limitations of the international civil liability regime have been acknowledged, not only by the European Court of Justice,<sup>128</sup> but also by other EU institutions in the framework of the third "*Erika* package".<sup>129</sup> On the other hand, when contemplating the adoption of the Lisbon Treaty, further points arise, such as the EU's legal personality and the effects if the EU was a party to the international civil liability regime. Perhaps more importantly, the European Court on Human Rights has recently recognized the right to a healthy environment in the *Tătar* case.<sup>130</sup> If this right is further elaborated in future case law, a number of issues could be raised in respect to the international civil liability regime, taking into account the competence the Court granted itself in the *Bosphorus* case. Indeed, there could be an overflow of claims against State parties to the Human Rights Convention, which applied in their jurisdictions other international conventions or EU environmental law that did not meet the Human Rights Convention's requirements. EU and international environmental law may have challenging times ahead.

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<sup>127</sup> Other grounds could obviously also be scrutinized (e.g. Article 6 - the right to a fair trial).

<sup>128</sup> See ECJ, *Commune de Mesquer v. Total*, Case C-188/07.

<sup>129</sup> See footnote n. 7.

<sup>130</sup> ECHR, *Tătar v. Romania*, no. 67021/01, 27 January 2009.







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