



**COLLEGE OF LAW AND MANAGEMENT STUDIES
SCHOOL OF LAW
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**THE REGULATION OF THE REMOVAL OF HAZARDOUS SHIPWRECKS IN
SOUTH AFRICAN WATERS AND A DISCUSSION ON THE ADOPTION OF
THE NAIROBI INTERNATIONAL CONVENTION ON THE REMOVAL OF
WRECKS, 2007.**

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29 NOVEMBER 2013.

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List of Abbreviations

1957 Convention	-	International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, 1957
1996 Protocol	-	Protocol of 1996 to amend the Limitation of Liability for Maritime Claims
AJRA	-	Admiralty Jurisdiction Regulation Act 108 of 1983
Bill 20B	-	Merchant Shipping (Civil Liability Convention) Bill 20B, 2013
Bunkers Convention	-	International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001
Civil Liability Act	-	Marine Pollution (Control and Civil Liability) Act 6 of 1981
CLC	-	International Convention on Civil Liability for Oil Pollution Damage, 1969
CLC 1992	-	International Convention on Civil Liability for Oil Pollution Damage, 1992
CMI	-	Comite Maritime International
Committee	-	IMO's Legal Committee and Maritime Safety Committee
Constitution	-	Constitution of the Republic of South Africa, 1996
EEZ	-	Exclusive Economic Zone
HNS Convention	-	International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996
IMO	-	International Maritime Organisation
Intervention Act	-	Marine Pollution (Intervention Act) 64 of 1987

Intervention Convention	-	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969.
IOPC	-	International Oil Pollution Compensation
IOPC Fund	-	International Oil Pollution Compensation Fund, 1992
ISM Code	-	International management code for the safe operation of ships and for pollution prevention, 2002
ITOPF	-	International Tanker Owners Pollution Federation Limited
LEG	-	The IMO Legal Committee
LLMC	-	Convention on the Limitation of Liability for Maritime Claims, 1976
MTA	-	Marine Traffic Act 2 of 1981
MTR	-	Marine Traffic Regulations in GN 9575 of 1 February 1985
MEPC	-	The IMO Marine Environment Protection Committee
MSC	-	The IMO Maritime Safety Committee
Nairobi Convention	-	Nairobi International Convention on the Removal of Wrecks, 2007
Other liability Conventions	-	Bunkers Convention, CLC and HNS Convention
P&I Club	-	Protection and Indemnity Clubs
Resolution A 949(23)	-	Guidelines on places of refuge for ships in need of assistance
Salvage Convention	-	International Convention on Salvage, 1989
SAMSA	-	South African Maritime Safety Authority
SAMSA Act	-	South African Maritime Safety Authority Act 5 of 1998
SDR	-	Special Drawing Right
SMR	-	Merchant Shipping (Safety Management) Regulation, 2003
South African MSA	-	Merchant Shipping Act 57 of 1951

Tonnage Convention	-	International Convention on Tonnage Measurement of ships, 1969
UK	-	United Kingdom
UK MSA	-	United Kingdom Merchant Shipping Act, 1995
UNCLOS	-	United Nations Convention on the Law of the Sea
UNESCO Convention	-	UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2001
US	-	United States of America
Wreck Act	-	UK Wreck Removal Convention Act, 2011
Wreck and Salvage Act	-	South African Wreck and Salvage Act 94 of 1996
Wreck Bill	-	UK Wreck Removal Convention Bill, 2010
Zones Act	-	Maritime Zones Act 15 of 1994

Definitions

- Affected State - In terms Article 1(10) of the Nairobi Convention, “the State in whose Convention area the wreck is located”
- EEZ - In terms of Article 57 of UNCLOS, an area not exceeding a distance of 200 nautical miles from the baseline
- Gross tonnage - In terms of Article 2(4) of the Tonnage Convention, “measure of the the overall size of a ship determined in accordance with the provisions of the present Convention”
- High Seas - In terms of Article 86 of UNCLOS, those “not included in the EEZ, in the territorial sea or in the internal waters of a State”
- Internal waters- In terms of Article 8 of UNCLOS, water landward from the baseline
- Nautical mile - In terms of Section 1 of the Maritime Zones Act, “the international nautical mile of 1 852 metres”
- SDR - In terms of the International Monetary Fund it is “a potential claim on the freely usable currencies”
- Shipowner - In terms of Article 1(8) of the Nairobi Convention it is the registered owner of the ship
- Territorial Sea - In terms of Article 2 of UNCLOS, sea measured 12 nautical miles from the baseline

Abstract

International trade in large amounts of commodities resulted in the recent growth of the shipping industry. With larger ships being constructed to meet land based demands for various types of commodities combined with the unpredictable and often perilous conditions at sea, the risk of a shipwreck arising becomes more likely. Not only do these wrecks pose a danger to the environment and to navigation but also, in the event of the shipowner escaping liability by abandoning the wreck for instance, the state affected by the wreck finds itself financially burdened by the costs involved in having the wreck removed. Moreover, an affected state cannot intervene and impose conditions to the shipowner to have a wreck removed if it occurred in its exclusive economic zone because the state's jurisdiction is limited to preserving natural resources. Thus, despite drifting cargo and the ship itself posing a hazard to coastal states, they had no authority to intervene and issue a wreck removal notice.

Recognising these safety concerns and lacunae in international law, the International Maritime Organisation formulated the Nairobi International Convention on the Removal of Wrecks, 2007, ("Nairobi Convention") which was aimed at governing the regulation of removing wrecks whilst imposing strict liability on the shipowner, subject to the other liability Conventions and limitation of liability. However, after a survey was conducted by the Comité Maritime International it was also established that national laws of many states such as the United Kingdom ("UK") and South Africa were inadequate to enforce liability claims for costs incurred in removing a wreck. As a result, the Convention allows contracting states to apply the provisions of the Convention to their territorial sea.

This dissertation will discuss relevant provisions of the Nairobi Convention and illustrate how it has been implemented and consequently reformed the law of the United Kingdom. The dissertation will then analyse the implementation strategy which enforces the Convention in the UK, with the aim of providing a suggestion of how South Africa should enforce the Convention into its national laws. This will lead to an assessment of the current legislative framework governing wreck removal in South Africa with the aim of establishing whether the law is need of reform and how this should be facilitated.

CHAPTER 1: INTRODUCTION

1.1 Background

With the rise of the industrial revolution in the 19th century,¹ wet bulk cargo (fuel) was in demand in order to fuel land-based vehicles, leading to the development of shipping.² The most economically viable mode of transporting large quantities of cargo.³ More companies took advantage of shipping in order to benefit from trading internationally and thus, larger ships were constructed to meet the growing demands.⁴ The demand for commodities resulted in the transportation of various types of cargo such as “wet-bulk cargo (e.g. crude oil), dry-bulk cargo (e.g. iron-ore, coal, grains) and general cargo (containerised).”⁵ With voluminous amounts of cargo being transported, there was a rise in potential danger to the marine environment which could prove catastrophic in the event of a shipwreck arising.

With the unpredictable conditions at sea that a ship laden with large amounts of cargo is exposed to, the risk of a wreck is inevitable. Originally, a ‘wreck’ was defined as “all objects formerly being a ship or part thereof washed on shore or found upon the sea.”⁶ However, this definition needed to be expanded to cover the possible irreversible damage suffered to the marine environment.⁷ The effects of oil spill for instance, causes degradation to the marine environment sometimes with permanent alteration of the ecosystem and these changes negatively impact the food chain.⁸ As a result, the notion of a ‘hazardous wreck’ emerged which essentially implies any wreck which threatens navigation or damages the marine environment.⁹

¹ ‘Introduction’ *IMO* available at: <http://www.imo.org/About/Conventions/Pages/Home.aspx>, accessed on 31 August 2013.

² ‘Background’ available at <http://www.imo.org/OurWork/Environment/PollutionPrevention/OilPollution/Pages/Background.aspx>, accessed on 31 August 2013.

³ ‘Marine environment’ *IMO* available at <http://www.imo.org/OurWork/Environment/Pages/Default.aspx>, accessed on 31 August 2013.

⁴ ‘Maritime Safety’ *IMO* available at <http://www.imo.org/OurWork/Safety/Pages/Default.aspx>, accessed on 31 August 2013.

⁵ T Jones ‘The world of carriage of goods by sea’ *LLM in Maritime Law-2013 Carriage of Goods by Sea* [lecture 1] 23 July 2013 slide 3.

⁶ ARM Fogarty *Merchant Shipping Legislation* 2 ed (2004) 273.

⁷ R Soni *Control of Marine Pollution in International Law* (1985) 2.

⁸ E Papadimitriou ‘Parliamentary Assembly – The environmental impact of sunken shipwrecks’ 20 January 2012, 8 <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=13079&Language=EN>, accessed on 14 May 2013.

⁹ Nairobi International Convention on the Removal of Wrecks, 2007, Article 1(4) read with Article 1(5). The Convention is annexed to this dissertation.

1.2 Consequences of a shipwreck

1.2.1 Safety concerns

A wreck which causes a threat to the environment or a danger to navigation poses a safety concern to mariners and the environment.¹⁰ On an international platform, it was recommended that maintaining safety at sea would best be facilitated with the introduction of international regulations which mariners should abide by.¹¹ Thus a division of the United Nations, known as the International Maritime Organisation (“IMO”), was established to fulfill this task.¹² Introducing legal frameworks to ensure safety at sea was crucial because 90% of the world’s trading commodities involved shipping,¹³ being described as the “life-blood of global trade.”¹⁴

1.2.2 Liability

An associated issue to safety was the financial implications emanating from a wreck.¹⁵ For instance, in South Africa, there have been a number of wrecks where the shipowner escaped all liability with regard to removing a wreck.¹⁶ As a result, it became the South African government’s burden to have the wreck removed because it is their duty to protect the marine environment¹⁷ as every ship has the right of innocent passage whilst traversing the territorial sea.¹⁸ One of the ways in which a shipowner escapes liability in South Africa is by abandoning

¹⁰ Z Kopacz, W Morgaś & J Urbanskiñ ‘The Maritime Safety System, its Main Components and Elements’ (1999) 54 *Journal of Navigation* 199, 200, available at http://journals.cambridge.org/download.php?file=%2FNAV%2FNAV54_02%2FS0373463301001205a.pdf&code=f2aeb1990da0dfa0efbe7a12d05dd39, accessed on 23 September 2013.

¹¹ ‘Improving safety at sea is conducted by enforcing rules, done by the Imo’ available at: <http://www.imo.org/About/HistoryOfIMO/Pages/Default.aspx>, accessed on 16 November 2013.

¹² Background (note 2 above).

¹³ Marine environment (note 3 above).

¹⁴ International Chamber of Shipping ‘International Shipping Lifeblood of World Trade’ available at: <http://www.ics-shipping.org/icsfilm.htm>, accessed on 8 September 2013.

¹⁵ MA Nesterowicz ‘The application of the Environmental Liability Directive to damage caused by pollution from ships,’ FD Rose (ed) *Lloyd’s Maritime and Commercial Law Quarterly* (2007) 107, 107.

¹⁶ This will be discussed further in chapter 4.

¹⁷ United Nations Convention on the Law of the Sea, 1982, Article 192 read with Article 194.

¹⁸ *Ibid*, Article 17 read with Article 19.

the wreck and this usually occurs where the damage sustained exceeds the value of the salvaged property.¹⁹ This issue will be discussed further in chapter 4.

A wreck removal operation can run into exorbitant figures.²⁰ This is because there are a number of factors that impact on costs, such as the environmental damage, the location of the wreck, and the costs of examining various aspects of the stricken ship in order to affect prompt and efficient removal.²¹ When the shipowner does not pay, defeating the “polluter pays principle”²² and a wreck is a form of pollution to the marine environment²³ which should be removed by the shipowner, a significant financial strain is imposed on the government affected by the wreck because shipowner’s usually have insurance to cover these expenses whilst the government does not. Liability for wreck removal claims is the current predicament South Africa faces and the pivotal issue considered in this dissertation. The aim of this study is to assess the laws governing the regulation of a shipowner’s liability with regard to the removal of a wreck which poses a hazard to navigation or threatens the environment.

1.3 Objectives

Accordingly, the issue of liability of a shipowner for costs incurred in removing a wreck and the issue of whose responsibility it is to have a wreck removed will be examined. These issues will be analysed with particular reference to the introduction of the IMO’s safety and liability Convention, the Nairobi International Convention on the Removal of Wrecks, 2007, (“Nairobi Convention”), which was specifically designed to regulate liability for the removal of a

¹⁹ ‘Guidance on dealing with abandonment of ships on land or in ports’ available at: <http://www.basel.int/Portals/4/Basel&20Convention/docs/ships/abandonment/GuidanceOnDealingWithAbandonmentOfShips.English.pdf>, accessed on 4 July 2013.

²⁰ ‘SOS: Shipwreck removal is costly’ 22 March 2013 <http://www.allaboutshipping.co.uk/2013/03/22/sos-shipwreck-removal-is-costly/>, accessed on 14 May 2013.

²¹ J Herbet ‘Lloyds: The challenges and implications of removing shipwrecks in the 21st century’ (2013) 8 <http://www.lloyds.com/~media/lloyds/reports/emerging%20risk%20reports/wreck%20report%20final%20version%20aw.pdf>, accessed on 14 May 2013.

²² CB Anderson ‘Marine Pollution and the “Polluter Pays” Principle: Should the Polluter also Pay Punitive Damages?’ (2012) 43 *JMLC* 43, 52; Section 2(4)(a)(vii) and Section 2(4)(p) of the National Environmental Management Act 107 of 1998.

²³ UNCLOS (note 17 above) Article 1(4).

hazardous abandoned wreck in the Exclusive Economic Zone (“EEZ”). The Nairobi Convention is not yet in force as it requires 10 ratifications²⁴ but there are currently only 8.²⁵

1.4 Pivotal issues to be investigated

This dissertation will examine the following:

1. The current legislative framework governing wreck removal in South Africa.
2. Liability of a shipowner for the costs incurred in removing a wreck.
3. An appropriate way of developing the current legislation in South Africa.

1.5 Structure of the dissertation

In light of the above issues, chapter 2 will trace the legal development of the Nairobi Convention and it will explore the reason why it was introduced in light of the other liability Conventions of the shipowner. This will lead to a discussion surrounding the relevant provisions contained therein and thereafter highlighting any shortfalls of the Convention. This chapter will essentially lay the foundation for establishing whether there is a need for South Africa to accede to the Nairobi Convention.

Thereafter, chapter 3 will examine the need for reform which necessitated the UK to accede to and adopt the Convention. This chapter will focus on how the Convention was implemented into their national law. The reason for choosing this state is because most of South Africa’s maritime law stems from England and thus, the manner in which the Convention is applied in this jurisdiction would be of persuasive value in determining South Africa’s implementation strategy in the future. This chapter will essentially assist in establishing how the current legislation regarding wreck removal in South Africa could be developed.

²⁴ Nairobi Convention (note 9 above) Article 18(1).

²⁵ According to ‘Status of Conventions as at 7 November 2013’ *IMO* available at: <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf>, accessed on 16 November 2013, the eight States are: Bulgaria, Germany, India, Iran, Morocco, Nigeria, Palau and the United Kingdom.

After an examination of the provisions of the Nairobi Convention and its implementation, chapter 4 will then provide an analysis of South Africa's current legislative regime by highlighting the recent hazardous wrecks that occurred along our coastline, illustrating the gaps which exist in holding the shipowner strictly liable. This chapter will then provide a recommendation with regard to the Convention and how the current laws could be developed. In this way the inconsistencies between the Convention and the existing applicable national laws will be dealt with and then ways in which the Convention should be enforced in South Africa will be explored.

This dissertation will conclude, in chapter 5, by reflecting on the provisions of the Nairobi Convention and the recommendations proposed with particular reference to Transnet's Dig-Out Port Project, underway in Durban, which aims at constructing a new port capable of accommodating larger ships laden with more cargo. This chapter will also comment on whether the proposed amendments in terms of the Nairobi Convention will be able to adequately handle the issues raised from the wrecks that have occurred along South Africa's coastline and argue whether there is a need for reform.

CHAPTER 2: THE NAIROBI INTERNATIONAL CONVENTION ON THE REMOVAL OF WRECKS, 2007.

2.1 Introduction

The technological advancements that have occurred over the years have had a profound effect on the maritime industry, with major implications for the environment. Soni explains:

“In the last decade or two there has been an amazing development of technical expertise and mastery over the use of the sea and its resources. This has taken place in almost every maritime activity; the enormous expansion of the fishing industry the construction of supertankers [and] the development of submersibles and submarines that plunge into abyss of the seas. ... All these ‘causes’ have the effect of increasing the scale and the sources of pollution.”²⁶

Ensuring safety and security of shipping at sea is the task of the IMO.²⁷ To fulfill these duties the IMO develops legal frameworks to regulate matters pertaining to the sea and, with reference to their function as a safety regulatory organ, it is their duty to ensure that there is a proper maritime safety system to enhance safety at sea.²⁸ Safety at sea encompasses three categories, namely, the safety of ships, the safety of people and the prevention of pollution to the marine environment from ships.²⁹ Thus, it is the role of the IMO to regulate the position of the removal of hazardous wrecks in the international arena.³⁰ This is because a wreck is a source of pollution and is required to be removed³¹ as per the instructions of the affected states salvage team.

According to Article 8(1) of the International Convention on Salvage, 1989, (“Salvage Convention”) it is the salvors duty to ensure effective removal of a wreck thereby minimising harm and degradation to the marine environment. The salvors use their expertise to assess the

²⁶ Soni (note 7 above) 37-38.

²⁷ Background (note 2 above).

²⁸ Kopacz, Morgaś & Urbanskiń (note 10 above) 201.

²⁹ *Ibid*, 200.

³⁰ ‘Adoption of the Rules of Procedure’ *IMO* 5 October 2009 available at: <http://docs.imo.org/Search.aspx?mode=advanced&titles=International%20Conference%20on%20the%20Revision%20of%20the%20HNS%20Convention&datetype=last&documentlang=en&cid=1>, (LEG/CONF.17/INF.2), accessed on 31 August 2013.

³¹ ‘Hazard Evaluation Procedure for Chemical Substances Carried by Ships’ *GESAMP Reports and Studies No. 64* Available at: www.dft.gov.uk/mca/gesamp_r_s_64_final_and_study_35.pdf, accessed on 18 September 2013.

wreckage and possible damage to the environment thereafter, they call upon the appropriate equipment to be utilised.

As a result of the environmental and liability concerns, the Nairobi Convention was introduced. This Convention was necessary because, after a survey was conducted in 2009, it was revealed that there were over 1 300 abandoned wrecks worldwide, and this figure was on the increase; posing a financial strain on the states affected by the wreck since there was no compulsory regime regulating the responsibilities and liability for having the wreck removed.³² The IMO set out the problems emanating from wrecks as follows:

“First, and depending on its location, a wreck may constitute a hazard to navigation, potentially endangering other vessels and their crews; second, and of equal concern, depending on the nature of the cargo, is the potential for a wreck to cause substantial damage to the marine and coastal environments; and third, in an age where goods and services are becoming increasingly expensive, is the issue of the costs involved in the marking and removal of hazardous wrecks.”³³

This chapter will trace key events leading to the development of the Nairobi Convention. Thereafter a critical discussion of its legal framework will be conducted revealing any inconsistencies with the international framework.

2.2 Key events leading to the development of the Nairobi Convention

The text of the Nairobi Convention was created over a period of twelve years and the initial deliberations were taken in 1967.³⁴ They were prompted by the running aground of a Liberian tanker known as the *Torrey Canyon*, outside the British territorial sea off the Scilly Island, United Kingdom (“UK”), on 18 March 1967.³⁵ At the time of the incident, the vessel was

³² ‘The International Tanker Owners Pollution Federation Limited’ available at: <http://www.itopf.com/spill-compensation/other-maritime-conventions/#Nairobi>, accessed on 4 July 2013.

³³ ‘Nairobi International Convention on the Removal of Wrecks’ *IMO* available at: <http://www.imo.org/About/Conventions/ListOfConventions/Pages/Nairobi-International-Convention-on-the-Removal-of-Wrecks.aspx>, accessed on 31 August 2013.

³⁴ R Shaw ‘The Nairobi Wreck Removal Convention’ (2007) 13 *JIML* 429, 429.

³⁵ AC Simpson ‘The Torrey Canyon Disaster and Fisheries’ *Laboratory Leaflet No.18* February 1968, 1, 1 available at: <http://www.cefas.co.uk/publications/lableaflets/lableaflet18.pdf>, accessed on 31 August 2013.

carrying 120 000 tons of crude oil, which was released into the environment.³⁶ The effects of the disaster were felt on the coastlines and the marine inhabitants.³⁷ The total clean-up costs amounted to £3 million, which was owed by the shipowners.³⁸ This was the first major oil tanker incident which prompted the urgent need to implement international laws regarding protection of the marine environment.³⁹

This incident raised two major issues, firstly, it reflected the lack of adequate laws to allow a coastal state to intervene when a casualty occurred on the High Seas which threatened that state.⁴⁰ Secondly, it revealed that there were no provisions holding the shipowner liable or for the affected state to be compensated.⁴¹ To address these issues the IMO introduced a Maritime Safety Committee and a Legal Committee (“the Committees”) to provide a sound legal framework to regulate maritime safety.⁴² The Maritime Safety Committee addressed issues regarding the safety of ships,⁴³ whilst the Legal Committee regulated compensatory matters regarding the rights and responsibilities of coastal states.⁴⁴

Apart from the above legal issues, this incident also sparked off the initial discussions concerning the introduction of a Convention which would become the present Nairobi Convention, whilst also creating other civil liability regimes.⁴⁵ With regard to the two main issues emanating from the *Torrey Canyon* incident, these were addressed as follows. Firstly, the public law issue was dealt with by means of the introduction of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969,

³⁶ J Devanney ‘The Tankership Tromedy-The Impeding Disasters in Tankers’ (2006), 26 available at: www.c4tx.org/ctx/pub/tromedy2.pdf, accessed on 1 September 2013.

³⁷ AE Utton ‘Protective Measures and the “Torrey Canyon”’ (1968) 9 (3) *Boston College Law Review* 613, 614-615 available at: lawdigitalcommons.bc.edu/bclr/vol9/iss3/4, accessed on 31 August 2013.

³⁸ C De La Rue & CB Anderson *Shipping and the Environment* (1998) 11-12.

³⁹ Devanney (note 36 above) 26.

⁴⁰ ‘Draft Convention on Wreck Removal’ *IMO* 27 March 2003 available at:

<http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2086%2F4%2F1&datatype=last&documentlang=en&cid=1>, (LEG 86/4/1), accessed on 31 August 2013; De La Rue & Anderson (note 38 above) 12.

⁴¹ ‘Incidents involving the IOPC Funds 2012’ *IOPC Funds* available at:

http://www.iopcfunds.org/uploads/tx_iopcpublications/incidents2012_e.pdf, accessed on 1 September 2013.

⁴² ‘Report of the Legal Committee on the work of its Eighty-seventh session’ *IMO* 23 October 2003, 5 available at: <http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2087%2F17&datatype=last&documentlang=en&cid=1>, (LEG 87/17), accessed on 31 August 2013.

⁴³ LEG 86/4/1 (note 40 above).

⁴⁴ ‘Legal Matters’ *IMO* available at: <http://www.imo.org/OurWork/Legal/Pages/Default.aspx>, accessed on 31 August 2013.

⁴⁵ J Xu ‘The public law framework of ship-sourced oil pollution’ (2007) 13 *JIML* 416, 420.

(“Intervention Convention”).⁴⁶ This Convention empowered states to intervene in cases where there was a threat of pollution from marine casualties giving rise to a grave danger to the affected states coastline or related interests.⁴⁷ This was later entrenched under Article 221(1) of the United Nations Convention on the Law of the Sea, 1982, (“UNCLOS”).

Secondly, with regard to the private law aspect, the Committees developed the International Convention on Civil Liability for Oil Pollution Damage 1969, (“CLC”).⁴⁸ The CLC formed the basis for legal liability from oil pollution damage by holding the shipowner strictly liable for any damage caused and, since it required shipowners to maintain insurance, it permitted the claimant to take direct action against the shipowner’s insurer.⁴⁹ Effectively, it compensated the victim who suffered from oil pollution damage.⁵⁰ The compulsory insurance provision ensured that the shipowner would be held strictly liable for this damage.⁵¹ Despite the strict liability imposed on the shipowner, this liability extended to a certain maximum amount only, as the Convention included a ‘limitation of liability’ provision, acknowledging the right of a shipowner to limit the liability.⁵² Limitation of a shipowner’s liability is based on a public policy perspective in that a shipowner should not be held liable for amounts exceeding his insurance.⁵³

However, since the amount of compensation was usually inadequate in relation to the damage suffered by the third party, a Fund was established and codified under the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (“Fund Convention”).⁵⁴ The objective for introducing the Fund Convention was to extend the maximum compensation limits of the victim who could not obtain the full amount in terms of the CLC due to the limitation of the shipowner’s liability.⁵⁵

⁴⁶ J Dugard *International Law: A South African Perspective* 3 ed (2008) 620-621.

⁴⁷ LEG/CONF.17/INF.2 (note 30 above).

⁴⁸ JH Bates & C Benson *Marine Environment Law Service* Issue No. 15 (2000) 4-1.

⁴⁹ LEG 87/17 (note 42 above) 5-6.

⁵⁰ Devanney (note 36 above) 26.

⁵¹ Bates & Benson (note 48 above) 4-2.

⁵² International Convention on Civil Liability for Oil Pollution Damage, 1969, Article 5.

⁵³ ‘The Travaux Préparatoirese of the LLMC Convention, 1976 and of the Protocol of 1996’ *CMI* 5 available at: <http://www.comitemaritime.org/Uploads/Publications/Travaux%20Preparatoirese%20of%20the%20LLMC%20Convention%201976%20and%20of%20the%20Protocol%20of%201996.pdf>, accessed on 6 September 2013.

⁵⁴ Devanney (note 36 above) 26.

⁵⁵ Soni (note 7 above) 193.

The CLC and the Fund Convention were both amended in 1992,⁵⁶ (the new CLC will be referred to as “CLC 1992”). CLC 1992 introduced higher limits of liability for the shipowner and is now applicable to the EEZ.⁵⁷ However, the Fund Convention did not become effective and ceased to exist, with the result that the International Oil Pollution Compensation Fund, 1992 (“IOPC Fund”) was set up to provide the outstanding compensation that was not covered by CLC 1992.⁵⁸ Thus, the CLC 1992 is the first tier of liability against the shipowner and, if the damage exceeds the limit recoverable under CLC 1992, then the claimant can claim from the IOPC Fund.

In recognition that there were Very Large Crude Carriers capable for carrying more cargo and thus, potential polluters of the marine environment, another Convention was introduced, the International Convention for the Prevention of Pollution from Ships, 1973, (“MARPOL”).⁵⁹ MARPOL permits the right to inspect and board vessels in the EEZ to ensure that they are safe to enter the state.⁶⁰ This Convention assisted in maintaining safety at sea with regard to preventing pollution.⁶¹

The Convention was not applicable to all wrecks. For instance, on 25 August 1984, a French ship known as the *Mont-Louis* collided with a ferry and sank 15 km off outside the Belgian territorial sea.⁶² The ship was carrying a toxic cargo of uranium hexafluoride, which was urgently required to be removed because the wreck lay on a sandbank near the pilot station and was a danger to navigation.⁶³ Therefore, the Belgian authorities held the shipowner liable to remove the wreck despite lack of jurisdiction.⁶⁴ The Intervention Convention was not applicable in this case study because, it only applies to pollution damage⁶⁵ whereas this wreck posed a danger to navigation. This incident raised awareness of a coastal state’s power to institute action beyond its territorial

⁵⁶ LEG/CONF. 17/INF.2 (note 30 above) 1.

⁵⁷ De La Rue & Anderson (note 48 above) 71.

⁵⁸ ‘Compensation and Claims Management’ available at: <http://www.iopcfunds.org/compensation/>, accessed on 1 September 2013.

⁵⁹ Devanney (note 36 above) 26.

⁶⁰ P Holloway ‘Liability for marine pollution and South Africa’s Prevention Regime, including the policy on Places of Refuge’ unpublished paper, 1 November 2012, 10.

⁶¹ Kopacz, Morgaś & Urbanskiñ (note 10 above) 199.

⁶² G Sert ‘The Recovery of Radioactive Sources abler a Shipwreck the case of the Mont-Louis Cargo and the implications of the M.S.C Carla’ available at: <http://www.iaea.org/About/Policy/GC/GC42/SciProg/gc42-scifor-8.pdf>, accessed on 6 September 2013.

⁶³ *Ibid.*

⁶⁴ Shaw (note 34 above) 431.

⁶⁵ International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, Article 1.

sea in circumstances when a wreck poses a danger to navigation or obstructs access to the coastal states major port.⁶⁶

At this juncture, the development of the international maritime Conventions as discussed above governed oil pollution from wrecks, but with the advent of new generations ships, such as containerised ships, various other types of cargo were also transported, creating other types of pollution which are equally hazardous to the environment.⁶⁷ Thus, compensation regimes for ship-sourced pollution broadened with the development of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, (“HNS Convention”) for damage caused by the carriage of hazardous or noxious substances. This Convention is, however, not yet in force.⁶⁸ The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 (“Bunkers Convention,”) was introduced to regulate oil pollution caused by a ships bunkers.⁶⁹ With the development of these two Conventions, the legal framework regarding compensation and liability for marine pollution from ships was almost complete as the only outstanding liability Convention for the shipowner still to be put in place was a compulsory regulatory regime governing wreck removal.⁷⁰

Even though the civil liability regimes were being developed and discussions concerning the subject of the Nairobi Convention continued, the latter was not a priority, as it is evident that the other Conventions mentioned above took preference in being developed.⁷¹ This is because the IMO Committees believed that it would be premature to discuss this Convention until UNCLOS was adopted.⁷² This is because UNCLOS embodied the “new sea area”⁷³ and would provide a uniform legal basis⁷⁴ “for States to remove, or have removed shipwrecks that may have the

⁶⁶ Shaw (note 34 above) 431.

⁶⁷ Soni (note 7 above) 128.

⁶⁸ Status of Conventions (note 25 above).

⁶⁹ LEG/CONF. 17/INF.2 (note 30 above) 2.

⁷⁰ LEG 87/17 (note 42 above) 6.

⁷¹ P Griggs ‘Draft Convention’ *CMI Yearbook 2005-2006 Annuaire* 376, 376 available at:

http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2005_2006.pdf, accessed on 6 September 2013.

⁷² JE De Boer ‘The Nairobi Perspective: Nairobi International Convention on the Removal of Wrecks, 2007’ *CMI Yearbook 2007-2008 Annuaire* 333, 335 available at:

<http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202007-2008.pdf>, accessed on 6 September 2013.

⁷³ Shaw (note 34 above) 430.

⁷⁴ LEG 86/4/1 (note 40 above).

potential to affect adversely the safety of lives, goods and property at sea, as well as the marine environment”⁷⁵ from wrecks situated outside their territorial seas.⁷⁶

Thus, it was only in 1993 that discussions surrounding the Nairobi Convention continued. Discussions began in 1993 because UNCLOS had its required number of ratifications. However, before being implemented, the United States withdrew its consent and as a result UNCLOS became effective only in 1994.⁷⁷ Nevertheless, in 1993, a draft to the Nairobi Convention was proposed and in 1994, Germany, Netherlands and the United Kingdom submitted a further paper in which they stated the essence of the Nairobi Convention as encapsulating the following principles:

1. “The grant[ing] of rights to coastal states to remove a wreck from its EEZ if it was a danger to safe navigation or the marine environment
2. Strict liability on the shipowner for the costs of reporting, marking and removing a wreck if required to do so by the coastal state
3. Compulsory insurance and direct action against insurers, up to the LLMC⁷⁸ Limit, modeled on the equivalent provisions of Article VII of the 1969 CLC Convention.”⁷⁹

The draft text to the Convention was aimed at filling the gaps in international law considering the fact that Article 221 of UNCLOS prevented a coastal state from intervening in the EEZ.⁸⁰ The Draft Convention only applied to the EEZ, however, after the 74th Legal Committee session, in 1996, it was recommended that its scope should be extended to the territorial sea as well since it was found that many provisions in the Convention were similar to state’s national laws and it would provide a better legislative scheme for a coastal state, where certain provisions were lacking (this conclusion was based on the responses received from Comité Maritime International (“CMI”) questionnaires).⁸¹ This recommendation was aimed at maintaining uniformity governing wreck removal in the coastal state’s territorial sea and its EEZ.⁸² Griggs⁸³ notes that apart from maintaining uniformity, the reason why this Convention was suggested to

⁷⁵ ‘Nairobi International Convention on the Removal of Wrecks’ (note 33 above).

⁷⁶ CMI Yearbook 2005-2006 (note 71 above) 376.

⁷⁷ Dugard (note 46 above) 355.

⁷⁸ Convention on the Limitation of Liability for Maritime Claims, 1976.

⁷⁹ Shaw (note 34 above) 431.

⁸⁰ CMI Yearbook 2005-2006 (note 71 above) 376.

⁸¹ *Ibid.*

⁸² *Ibid.*, 377.

⁸³ *Ibid.*

apply to the territorial sea was because, national legislation of many states were discovered to be inadequate to regulate liability for wreck removal claims where the wrecks occurred within the territorial sea of that state. However, some states did not want the Convention to apply to its territorial sea, and thus this issue awaited further discussion.⁸⁴

In the meanwhile, according to the IMO,⁸⁵ on 18 November 1997, a Belize cargo ship, *An Tai*, arrived at Port Klang, Malaysia and after four days the ship broke and sank in the Port. The effect of the wreckage was a major oil spill in the Port and the Malaysian Marine Department ordered the shipowner to have the wreck removed. However, they did not comply because of insufficient funds despite having insurance. As a result, the Malaysian government had to bear the costs of the removal operations. This incident proves that there is an urgent need to reform states national laws to address liability and compensation for wreck removal operations as well ensure that the government is compensated for damage sustained. This incident also raised the issue of the geographical scope of the Nairobi Convention and whether it should be mandatorily applied to the territorial sea of a state party.

The IMO⁸⁶ had also recorded that on 12 December 1999, the *Erika*, a Maltese tanker carrying 31 000 tons of heavy fuel oil, sank 60 nautical miles off the Brittany coastline, France.⁸⁷ When the tanker was experiencing difficulties, the master sent a distress call but the surrounding coastal states refused it entry because of the potential pollution. The ship subsequently sank and spilled its cargo, endangering the environment.⁸⁸ The clean up operation amounted to R6 billion.⁸⁹ This

⁸⁴ CMI Yearbook 2007-2008 (note 72 above) 337.

⁸⁵ 'Draft Convention on Wreck Removal-Experience of *An Tai* incident' IMO 14 September 2001 available at: <http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2083%2F5%2F2&datatype=last&documentlang=en&cid=1>, (LEG 83/5/2), accessed on 8 September 2013.

⁸⁶ 'IMO/UNEP Forum on regional arrangements for co-operation in combating marine pollution incidents 30 September-2 October 2002' IMO 9 May 2003, 8, 160 available at: <http://docs.imo.org/Search.aspx?mode=advanced&titles=IMO%2FUNEP%20Forum%20on%20regional%20arrangements%20for%20co-operation%20in%20combating%20marine%20pollution%20incidents&datatype=last&documentlang=en&cid=1>, (MEPC 49/Inf.20), accessed on 1 September 2013.

⁸⁷ Incidents involving the IOPC Funds 2012 (note 41 above) 6.

⁸⁸ *Ibid.*

⁸⁹ J Hare 'The International Oil Pollution (IOPC) Fund' 8 June 2012, 1 available at: www.uctshiplaw.com, accessed on 30 September 2013.

led to the European Commission proposing that the rules on places of refuge needed reform.⁹⁰ The issue of places of refuge will be examined further in this chapter and in chapter 4 below.

Subsequently, the IMO⁹¹ reported that a ship known as the *Castor* was carrying 29 500 tons of gasoline on 31 January 2000, when a crack appeared across the deck. At the time of the incident, the ship was 16 miles off the North Moroccan Coast and it sought refuge from the Moroccan and Gibraltar authorities, but was unsuccessful. However, salvage operations commenced and continued for several weeks. Had the states allowed this ship entry, all the salvage operations could have been averted. This incident raised further concerns regarding the places of refuge.

According to Griggs,⁹² after the September 2001 terrorist attacks in the United States, urgent reform was required to address maritime security at an international level. Since the IMO is also responsible for implementing security provisions, the terrorist attacks led to a four year delay in addressing the wreck removal provisions contained in the proposed Nairobi Convention.⁹³

Only in 2006 did discussions concerning the Nairobi Convention reemerge. In this year outstanding issues were debated such as whether the application of the Convention should be compulsorily applicable to the territorial sea.⁹⁴ At the 2007 Diplomatic Conference held in the United Nations Office in Nairobi, regarding the final discussions and enactment of the proposed Convention, it was concluded that the Convention should be voluntarily applicable to the territorial sea.

The above mentioned incidents clearly demonstrate that there was an urgent need to address the shipowners liability for marine pollution, however, the other liability Conventions failed to address the situation of a wreck becoming a hazard to navigation to the coastal state, necessitating its removal to a place specified by that coastal state. Thus, the Nairobi Convention

⁹⁰ MEPC 49/Inf.20 (note 86 above) 160.

⁹¹ 'Places of Refuge' IMO 14 February 2003 available at: <http://docs.imo.org/Search.aspx?mode=advanced&titles=Places%20of%20Refuge&datatype=last&documentlang=en&cid=1>, (MSC 77/8/2), accessed on 8 September 2013.

⁹² CMI Yearbook 2005-2006 (note 71 above) 376.

⁹³ *Ibid.*

⁹⁴ CMI Yearbook 2007-2008 (note 72 above) 337.

completes this liability framework of the shipowner.⁹⁵ In the next section below the legal framework of the Nairobi Convention will be analysed.

2.3 Legal framework of the Nairobi Convention

The Nairobi Convention is not only a liability Convention but it also makes provision for compensation and stipulates the shipowners' duties.⁹⁶ It was designed to clarify the obligations of the shipowner to ensure that wrecks are removed from the EEZ and to clarify the rights of the coastal state under international law.⁹⁷ Only the main provisions regarding application, rights and obligations of the Convention will be examined since it is beyond the scope of this dissertation to address every provision in the Convention.

2.3.1 Article 1-Application of the Convention (Definitions)

To trigger the application of the Nairobi Convention, it must be determined that a 'ship' was involved in a 'maritime casualty,' and that this has resulted in a 'wreck' situated in the 'convention area' which poses a 'hazard' to 'related interests.'

(a) Article 1(1)-Convention Area

Like the other liability Conventions,⁹⁸ the Nairobi Convention is mandatorily applicable to the contracting states' EEZ.⁹⁹ The EEZ is the area adjacent to and beyond the territorial sea¹⁰⁰ but within 200 nautical miles from the baseline.¹⁰¹ The reason the Nairobi Convention has imposed a geographical restriction in its application is because, if a wreck occurs within the territorial sea, then the coastal state will exercise full sovereignty over the wreck and its national laws will

⁹⁵ K Khosla 'Shipowners' Liabilities under the Wreck Removal Convention' *The Lloyd Shipping Law Centre* 3 October 2007 available at http://www.shippinglbc.com/content/uploads/members_documents/Lecture%20notes_WRC_03.10.07.pdf, accessed on 6 September 2013.

⁹⁶ 'Draft Convention on Wreck Removal' *IMO* 16 September 2002 available at: <http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2085%2F3%2F2&datatype=last&documentlang=en&cid=1>, (LEG 85/3/2), accessed on 8 September 2013.

⁹⁷ CMI Yearbook 2007-2008 (note 72 above) 335.

⁹⁸ CLC (note 52 above) Article II, International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 Article 2 and International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 Article 3.

⁹⁹ Nairobi Convention (note 9 above) Article 1(1).

¹⁰⁰ UNCLOS (note 17 above) Article 55.

¹⁰¹ *Ibid*, Article 57.

become applicable.¹⁰² However, where a wreck occurs within the EEZ, then coastal states will not have jurisdiction because their rights are limited to the extent of protecting marine resources only¹⁰³ and UNCLOS does not expressly permit states to ensure that a wreck which poses a hazard to navigation should be removed from these waters.¹⁰⁴ Thus, the Nairobi Convention fills the gap in international law.¹⁰⁵ Although the Nairobi Convention is applicable to the EEZ, state parties are given an option to allow the Convention, and its provisions, to apply within its territorial sea.¹⁰⁶

(b) Article 1(2)-Ship

This Article provides a wider definition of a ‘ship,’ than the other liability Conventions,¹⁰⁷ as it implies that a ship can be anything which is capable of being afloat and capable of being used for navigational purposes.¹⁰⁸

¹⁰² *Ibid*, Article 2.

¹⁰³ *Ibid*, Article 56:

- “1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.”

¹⁰⁴ Shaw (note 34 above) 430.

¹⁰⁵ LEG 86/4/1 (note 40 above).

¹⁰⁶ Nairobi Convention (note 9 above) Article 3(2) and Article 3(3).

¹⁰⁷ CLC (note 52 above) Article I(1) requires a ship to be “capable of carrying oil;” whilst Article 1(1) of both the Bunkers Convention (note 98 above) and HNS Convention (note 98 above) states that a ship is defined as any seagoing vessel.

¹⁰⁸ P Todd ‘Shipping Law’ R Merkin (ed) *Journal of Business Law* (2009) 203, 206 available at: http://www.sweetandmaxwell.co.uk/catalogue/edownloadaddoc.aspx?sapmaterialnum=7128&filename=476_2009131_41915.pdf&fileserver=EPIC, accessed on 4 July 2013.

(c) Article 1(3)-Maritime Casualty

This Article is in line with Article 221(2) of UNCLOS and it renders the Convention applicable where the incident results in damage or a threat of material damage to the ship or its cargo. This Convention is much wider in its application as opposed to the other liability Conventions which requires there to be a “grave and imminent threat of damage.”¹⁰⁹ In this way, the Nairobi Convention ensures minimal damage to the environment by including a more embracing provision which is in compliance with the objectives of the International Convention on Salvage, 1989¹¹⁰ and ensures safe navigation of other mariners.

(d) Article 1(4)-Wreck

The definition of a “wreck” provided in this Article is quite broad as it includes the ship and the cargo on board the sunken or stranded ship.¹¹¹ In addition, Article 1(4)(d) permits a ship which is reasonably expected to sink if no assistance is rendered to be deemed a wreck. This provision was introduced to cater for the situation where a wreck is subsequently abandoned.¹¹² Accordingly, the provisions of the Convention will be applicable despite abandonment.¹¹³ It has been submitted that, if the ship is drifting ashore despite salvage attempts, then “the acts of the salvor are not in fact “assisting” the ship and the vessel is therefore a wreck on the true and proper construction of Article 1(4)(d).”¹¹⁴

Apart from including instances of abandonment, it can be inferred that this provision also regulates ships in need of assistance. According to the IMO Resolution A 949(23),¹¹⁵ item 1.18 defines a “ship in need of assistance” as one which is in a predicament that could lead to the loss of the vessel or one which leads to an environmental or navigational hazard.¹¹⁶ Such ships

¹⁰⁹ CLC (note 52 above) Article 1(8), the Bunkers Convention (note 98 above) and the HNS Convention (note 98 above).

¹¹⁰ Article 9 of the International Convention on Salvage, 1989.

¹¹¹ Nairobi Convention (note 9 above) Article 1(4)(a)-(c).

¹¹² “The compatibility of the Draft Convention on Wreck Removal with existing Maritime Conventions” *CMI Yearbook 2004 Annuaire* 447, 448 available at: http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2004.pdf, accessed on 6 September 2013.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, 449.

¹¹⁵ ‘Guidelines on Places of Refuge for ships in need of assistance’ *IMO* 5 March 2004 available at: http://www.imo.org/blast/blastDataHelper.asp?data_id=9042&filename=949.pdf, (Resolution A 949(23)), accessed on 24 September 2013.

¹¹⁶ The latter two hazards are codified under the Article 1(5) of the Nairobi Convention (note 9 above).

require a place of refuge in order to stabilize and reduce the possible hazards.¹¹⁷ Although the best option for a distressed ship is to be allowed entry,¹¹⁸ coastal states are reluctant to grant such entry because of the potential damage that could ensue.¹¹⁹ Accordingly, financial strain and ecological degradation are factors that may negatively influence the decision of granting access into the state.¹²⁰

Thus, it is submitted that Article 1(4)(d) of the Nairobi Convention can assist in the financial aspect and would encourage assistance of ships in distress by favorably considering a place of refuge request.¹²¹ This is because the ship in distress will be deemed to be a wreck and the provisions the Nairobi Convention will become applicable ensuring that the affected state recoups its financial loss and will hold the shipowner strictly liable,¹²² whilst also being advantageous to the shipowner as the probabilities of the ship sinking will be lessened.¹²³

Contained under Article 1(4)(d) is the following: “where effective measures to assist the ship or any property in danger are not already being taken” amounts to a prohibition in that the distressed ship will only be considered as a wreck if no assistance was rendered to the ship, in the form of a salvage operation. This prohibition was included to prevent the coastal state from having powers to intervene once salvage operations commenced. However, the coastal state does have the power to intervene in order to protect the coastline from pollution.¹²⁴

(e) Article 1(5)-Hazard

One of the effects of a wreck is that it disrupts navigation.¹²⁵ As such Article 1(5)(a) of the Nairobi Convention provides that a wreck will be deemed “hazardous” if it poses a danger to

¹¹⁷ Resolution A 949(23) (note 115 above) Item 1.19.

¹¹⁸ As highlighted in the *Erika* and *Castor* incidents as highlighted earlier in this chapter on page 13. The application of the Nairobi Convention with regard to places of refuge will be discussed in chapter 4 with particular reference to the position in South Africa.

¹¹⁹ Resolution A 949(23) (note 115 above) Item 1.5.

¹²⁰ *Ibid*, Item 1.4.

¹²¹ ‘Places of Refuge’ *IMO* 24 September 2004 available:

<http://docs.imo.org/Search.aspx?mode=advanced&symbol=leg%2089%2F7%2F1&datatype=last&documentlang=en&cid=1>, (LEG 89/7/1), accessed on 8 September 2013.

¹²² Nairobi Convention (note 9 above) Article 10(1).

¹²³ E Van Hooydonk *Places of Refuge* (2010) 8.

¹²⁴ Nairobi Convention (note 9 above) Article 9(4) read with Article 9 of the Salvage Convention (note 110 above).

¹²⁵ LE Henderson ‘The Wreck Act Duties to Mark and Remove’ (1990) 21 *JMLC* 417, 417.

navigation.¹²⁶ This was introduced in response to the growing concern of safe navigation.¹²⁷ Since the existing liability Conventions only dealt with environmental damage emanating from a wreck,¹²⁸ this Convention again fills the gap in international law by catering for the position of wrecks which endangers navigation.¹²⁹

Article 1(5)(b) confirms the position of the other liability Conventions by stating that a hazardous wreck is one which damages the environment.¹³⁰ Although arguments were made at the 78th session that including this sub-article would be repetitive of the other Conventions, it was concluded that it was nevertheless necessary to be included in order to protect the coastline and the marine life.¹³¹ Further, it was submitted that this Article actually differed from the other liability Conventions in that the Nairobi Convention permitted the removal of a wreck where the wreck, as defined under Article 1(4), poses a danger to the marine environment.¹³²

(f) Article 1(6)-Related interests

The Nairobi Convention extends the effects of the wreck to economic loss sustained due to the wreckage.¹³³ Therefore, anybody who has a direct claim resulting from the wreck is permitted to lodge a claim against the shipowner. This is based on the rationale that claimants must be in the same economic position they would have been in had it not been for the incident.¹³⁴

¹²⁶ For example a major incident occurred due to failing to mark a wreck, the *Tricolor* incident, which posed a danger to navigation. This will be discussed further in chapter 3 on page 33-34.

¹²⁷ 'Draft Convention on Wreck Removal-The Relationship between the Draft Wreck Removal Convention (DWRC) and the Intervention Convention' *IMO* 17 September 2002 available at: <http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2085%2F3%2F1&datatype=last&documentlang=en&cid=1>, (LEG 85/3/1), accessed on 8 September 2013.

¹²⁸ CLC (note 52 above) Article 1(6), Article 1(9) of the Bunker Convention (note 98 above) and Article 1(6) of the HNS Convention (note 98 above).

¹²⁹ LEG 86/4/1 (note 40 above); Shaw (note 34 above) 430.

¹³⁰ CLC (note 52 above) Article 1(6), Article 1(9) of the Bunker Convention (note 98 above) and Article 1(6) of the HNS Convention (note 98 above).

¹³¹ 'Report of the Legal Committee on the Work of its Seventy-Eighth Session' *IMO* 2 November 1998, 1, 9-10 available at:

<http://docs.imo.org/Search.aspx?mode=advanced&symbol=leg%2078%2F11&datatype=last&documentlang=en&cid=1>, (LEG 78/11), accessed on 8 September 2013.

¹³² LEG 86/4/1 (note 40 above).

¹³³ In the other liability Conventions, reference is made to pollution damage only. This can be found under Article 1(6) of CLC (note 52 above), Article 1(9) of the Bunker Convention (note 98 above) and article 1(6) of the HNS Convention (note 98 above).

¹³⁴ Compensation and Claims Management (note 58 above).

2.3.2 Article 2-Objectives and general principles

Effectively, this Article limits the affected state's powers to intervene by requiring only necessary and proportional measures to be taken to remove the hazard. This provision is similar to Article V of the Intervention Convention. Although the Nairobi Convention does not define what the proportionate measures are, like the Intervention Convention,¹³⁵ Article 2(2) and (3) should be read within context and with reference to Article 6 which provides a criteria for the determination of whether a wreck is hazardous. On a proper assessment of the wreck, the affected state will be able to determine the hazard and require the shipowner to remove such a hazard, and this would ensure that only proportional measures are undertaken.

Furthermore, Article 2(4) expresses states that action taken in the EEZ are only in regard to wreck removal and this Convention will not entitle the affected states to any more rights within this maritime zone.¹³⁶

2.3.3 Article 3-Scope of application

The Nairobi Convention applies to the Convention Area, as defined under Article 1, which is the EEZ. However, Article 3(2) of the Nairobi Convention allows states the option of applying the provisions to the territorial sea and this can be effected by the "opts-in" function. The state's powers within the EEZ are strictly in relation to wreck removal and the rights of the coastal state under the Nairobi Convention do not affect any restriction imposed in terms of UNCLOS.¹³⁷ Where the states have opted-in, the Convention will not prejudice their powers if a wreck occurs within the territorial sea, but their powers will be subject to Article 4(4). Therefore, costs incurred other than in relation to costs that the owner will be liable for in terms of this Convention¹³⁸ will not be covered by the compulsory insurance.¹³⁹

¹³⁵ Intervention Convention (note 65 above) Article V(3).

¹³⁶ UNCLOS (note 17 above) Article 56(1).

¹³⁷ *Ibid.*

¹³⁸ Nairobi Convention (note 9 above) Article 10(1) which holds the shipowner liable for costs incurred in locating, marking and removing the wreck.

¹³⁹ *Ibid.*, Article 3(2), last sentence.

2.3.4 Article 4-Exclusions

This Article lists instances when the application of the Nairobi Convention will be excluded. Article 4(1) excludes the application of the Convention if measures are being taken in terms of the Intervention Convention, which applies to the High Seas.¹⁴⁰ Thus Article 4(1) was designed to address the application of the Intervention Convention as, prior to the maritime zones being created in terms of UNCLOS,¹⁴¹ the territorial sea was three miles from the baseline and there was no EEZ, which meant that the High Sea was 3 nautical miles seaward.¹⁴² Furthermore, the scope of the Nairobi Convention is much wider as it applies to danger to navigation and provides a “lower threshold for environmental concerns” in respect to liability of the shipowner, which has not been addressed by the Intervention Convention.¹⁴³ However, since UNCLOS has defined the maritime zones, the Nairobi Convention is applicable to the EEZ (and maybe the territorial sea) and the Intervention Convention is applicable to the High Seas. There would be no inconsistencies.

Article 4(2) excludes the application of the Nairobi Convention to warships yet, there are 6338 potentially pollutant warships and some have already posed a danger to navigation or a threat to the environment requiring its removal.¹⁴⁴ This exclusion of warships will be explored further under “historic wrecks.”

2.3.5 Article 5-8: Obligations of the parties

The Nairobi Convention imposes a number of obligations on the parties. To maintain safety at sea, the master or operator of the ship is obliged to report the maritime casualty to the affected state as soon as possible with all information enabling the affected state to determine whether the wreck is hazardous.¹⁴⁵ Article 21 of UNCLOS, provides that states are to ensure the safe passage of ships through its territorial sea. It is the duty of the state to ensure that the waters are free from

¹⁴⁰ Intervention Convention (note 65 above) Article I(1).

¹⁴¹ Shaw (note 34 above) 429.

¹⁴² *Ibid*, 435; LEG 86/4/1 (note 40 above).

¹⁴³ LEG 85/3/1 (note 127 above).

¹⁴⁴ DS Etkin ‘Magnitude of the Potentially-Polluting Shipwreck Problem’ *NAMEPA Environmental Intelligence in Shipping Seminar San Francisco, California* 9 March 2010 available at: http://www.namepa.net/Downloads/events/san_fran_seminar_presentations/Wreck%20Oil/Etkin%20Presentation%20NAMEPA%20SF%203-9-10.pdf, accessed on 20 May 2013.

¹⁴⁵ Nairobi Convention (note 9 above) Article 5.

any wreck and conducive to mariners to continue their trade and sail safely.¹⁴⁶ Safety at sea requires the state to ensure no disruptions or interferences to navigation and a wreck poses a threat to navigation.¹⁴⁷ Therefore, in order for the coastal state to fulfill this obligation properly, reporting a wreck¹⁴⁸ is imperative and this is the first obligation in terms of the Nairobi Convention.¹⁴⁹

Once the casualty is reported, the obligation shifts to the affected state which is required to determine whether the wreck is a hazardous wreck¹⁵⁰ and to assist the state in making this finding, the Nairobi Convention lists a number of factors that should be considered.¹⁵¹ After the affected state has concluded that a hazardous wreck is present, it is their duty to precisely locate the wreck¹⁵² and mark it, ensuring safety at sea.¹⁵³ Thereafter, the obligation shifts to the shipowner to have the wreck removed.¹⁵⁴

2.3.6 Article 9-Measures to facilitate the removal of wrecks

Article 9 encompasses the primary obligation of the shipowner to have the wreck removed. To ensure that the shipowner will be held responsible for the removal of the wreck, the Nairobi Convention permits a “State-to-State” notification by enabling the affected state to consult the state of ship’s registry to determine who the registered owner of the ship is.¹⁵⁵ Also, closely linked with this identification process, the identified shipowner will now be held strictly liable for the removal costs.¹⁵⁶

Article 9(4) allows *any* salvor to conduct the salvage operations. This provision is innovative as Shaw¹⁵⁷ notes that most states restricts salvors to their own contractually employed salvors. He adds that the reason this changed is because the Nairobi Convention applies to the EEZ and that zone is not ordinarily subject to national legislation. According to Article 9(5) the affected state’s

¹⁴⁶ Kopacz, Morgaś & Urbanskiñ (note 10 above) 200.

¹⁴⁷ Henderson (note 125 above) 417.

¹⁴⁸ Nairobi Convention (note 9 above) Article 1(4).

¹⁴⁹ *Ibid*, Article 5(1).

¹⁵⁰ *Ibid*, Article 1(5).

¹⁵¹ *Ibid*, Article 6(a), one of the factors is “the type, size and construction of the wreck.”

¹⁵² *Ibid*, Article 7.

¹⁵³ *Ibid*, Article 8. These two obligations are essential, considering the *Tricolor* incident (discussed in the chapter 3).

¹⁵⁴ *Ibid*, Article 9(2).

¹⁵⁵ *Ibid*, Article 9(1).

¹⁵⁶ Discussed further under “Article 10-11.”

¹⁵⁷ Shaw (note 34 above) 436.

power to intervene is restricted to ensuring that the environment and safety of shipping is maintained once the removal procedures have commenced. This is why parties who opt-in are permitted to exclude the application of this sub-Article.¹⁵⁸

Article 9(6) read with Article 9(7) states that the affected state can stipulate a deadline for the removal operation, and thereafter it will have the wreck removed. However, this does not mean that the affected state has control over the EEZ and its powers are restricted to removing the hazard off the wreck only.¹⁵⁹ Where the wreck poses an imminent danger, then the affected state is permitted to intervene and remove the wreck immediately, whilst holding the shipowner liable for costs.¹⁶⁰ With regard to the opt-in function, certain provisions of Article 9 are excluded;¹⁶¹ as a result the affected state cannot claim for costs other than those incurred in terms of Article 10(1) of the Nairobi Convention if it occurs within the territorial sea.¹⁶²

2.3.7 Article 10-11: Liability regimes of the shipowner

Article 10(1) of the Nairobi Convention holds the shipowner strictly liable for costs incurred in locating, marking and removing the wreck.¹⁶³ This strict liability is similar to the other liability Conventions.¹⁶⁴ However, the shipowner's liability under the Nairobi Convention is subject to their liability in terms of the other liability Conventions, whichever is applicable and enforced in the affected state.¹⁶⁵ In this way, the Convention seeks to avoid a "double liability on the shipowner." This occurs, for instance, where a wreck causes its cargo of oil to be spilt into the environment. Thus, the CLC will be applicable (as this Convention applies to oil pollution damage) and the Nairobi Convention will also be applicable (as it regards the cargo on board the vessel to be a "wreck"). Therefore, Article 11 holds the shipowner liable to the extent of the oil pollution damage in terms of the CLC.

¹⁵⁸ Nairobi Convention (note 9 above) Article 4(4)(a)(ii).

¹⁵⁹ *Ibid*, Article 9(7) read with Article 2(2).

¹⁶⁰ *Ibid*, Article 9(8).

¹⁶¹ *Ibid*, Article 4(4)(a)(ii).

¹⁶² *Ibid*, Article 3(2), (last sentence).

¹⁶³ *Ibid*, Articles 7, 8 and 9.

¹⁶⁴ Providing strict liability of the shipowner. CLC (note 52 above) Article III; the Bunker Convention (note 98 above) Article 3 and HNS Convention (note 98 above) Article 2.

¹⁶⁵ Nairobi Convention (note 9 above) Article 11.

Although strictly liable, shipowners have the right to limit their liability for subsequent loss sustained by a claimant.¹⁶⁶ The CLC¹⁶⁷ and HNS Convention¹⁶⁸ permit shipowners to limit their liability in the prescribed manner set out under those Conventions. However, the Bunker Convention¹⁶⁹ and Nairobi Convention allows shipowners to limit their liability in terms of the Convention on the Limitation of Liability for Maritime Claims, 1976, (“LLMC”), whether or not the affected state is a party to the LLMC.¹⁷⁰ This can be inferred from the wording of Article 12(1) which requires the shipowner to maintain insurance only up to the value of the limitation calculated under Article 6(1)(b) of the LLMC, read with the Protocol of 1996 to amend the Limitation of Liability for Maritime Claims, (“1996 Protocol”).¹⁷¹ The UK was very instrumental in the development of the Nairobi Convention, in fact Shaw was part of the CMI Working Group on the draft Nairobi Convention and he formulated the wording of Article 12(1) and noted that “the word “calculated” was inserted (by me [Shaw]) in an attempt to ensure that the limit will apply even in states which have not ratified the 1976 LLMC Convention and 1996 Protocol.”¹⁷²

Accordingly, the shipowner’s liability for wreck removal costs¹⁷³ will be limited to 1 million Special Drawing Rights¹⁷⁴ on the first 2000 gross tonnage of the ship,¹⁷⁵ and thereafter it is calculated on the formula envisaged under the LLMC.¹⁷⁶ This amount is “almost unbreakable,”¹⁷⁷ which is the viable option in order to maintain adequate insurance for wreck removal costs as the subsequent loss can be assessed prior to the venture and reasonable

¹⁶⁶ Travaux (note 53 above) x; JF Wilson *Carriage of Goods by Sea* 7 ed 282.

¹⁶⁷ CLC (note 52 above) Article V.

¹⁶⁸ Article 9 of HNS Convention (note 98 above).

¹⁶⁹ Article 6 of the Bunker Convention (note 98 above).

¹⁷⁰ Nairobi Convention (note 9 above) Article 10(2) read with Article 12(1); R Shaw ‘Introduction to the Nairobi Wreck Removal Convention’ *The Lloyd Shipping Law Centre* 3 October 2007, par 4 available at http://www.shippinglbc.com/content/uploads/members_documents/Lecture%20notes_WRC_03.10.07.pdf, accessed on 6 September 2013.

¹⁷¹ Article 3(b) of the Protocol of 1996 to amend the Limitation of Liability for Maritime Claims.

¹⁷² Shaw (note 170 above) par 4.

¹⁷³ Article 2(1)(d) of the LLMC (note 78 above) specifically included claims in relation to wreck removal operation.

¹⁷⁴ Article 6 is read with Article 8 which changes the “unit of account” measurement to Special Drawing Right (“SDR”). According to the International Monetary Fund website, ‘Special Drawing Rights (SDRs)’ available at: <http://www.imf.org/external/np/exr/facts/sdr.htm>, accessed on 16 November 2013, an SDR is “a potential claim on the freely usable currencies.”

¹⁷⁵ Article 2(4) of the International Convention on Tonnage Measurement of ships, 1969, states defines “gross tonnage” as “the measure of the overall size of a ship.”

¹⁷⁶ Griggs P, Williams R & Farr J *Limitation of Liability for Maritime Claims* 4 ed (2005) 46.

¹⁷⁷ Article 4 of the LLMC (note 78 above) contains the exception to the limitation value which can only be triggered if the claimant can prove that the shipowner had intention to cause the loss sustained and that the shipowner acted with such knowledge. Clearly this is a more onerous task and therefore, it is seen as “almost unbreakable.”

insurance cover can be obtained.¹⁷⁸ Therefore, if the Bunker Convention and the Nairobi Convention are applicable in a matter, the bunker pollution claim will compete with the wreck removal claim.¹⁷⁹ Where a wreck occurs in the EEZ, the LLMC will be applicable because Article 56 of UNCLOS only allows coastal states to exercise their national laws for the regulation of natural resources. Thus, by requiring the LLMC to be applicable to liability claims for wreck removal costs, as envisaged by the Nairobi Convention, it ensures that liability of the shipowner is attained.

The LLMC has amended the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, 1957, (“1957 Convention”) by increasing the limits of liability and is almost unbreakable¹⁸⁰ which provides certainty that the shipowner will be adequately insured whilst also ensuring that the affected state will be compensated for the loss sustained.¹⁸¹ However, many states have not ratified the LLMC and in some states the limits of liability are governed by the provisions of the 1957 Convention.¹⁸² This is the current position in South Africa. Although South Africa has not ratified either limitation Conventions we have given the 1957 Convention force of law by virtue of Section 261 of the South African Merchant Shipping Act 57 of 1951 (“South African MSA”).¹⁸³

The 1957 Convention provides very low limits and is “breakable” if the claimant can prove “actual fault or privity on the shipowner”, with the effect that the claimant is entitled to be compensated for the entire loss as opposed to the statutory limits.¹⁸⁴ It is beyond the ambit of this dissertation to go into detail with regard to the Limitation Conventions; however, it can be noted that a problem arises where a contracting state to the Nairobi Convention opts-in and where the applicable limitation of liability regime is not in terms of the LLMC. This is because Article 12(1) of the Nairobi Convention alludes to the application of the LLMC and thus there would be a conflict of laws if a wreck occurs in the territorial sea.¹⁸⁵ This problem with the implementation of the Nairobi Convention will accordingly be discussed further in chapter 4 with reference to

¹⁷⁸ Travaux (note 53 above) 5.

¹⁷⁹ Shaw (note 34 above) 437.

¹⁸⁰ Wilson (note 166 above) 287.

¹⁸¹ Travaux (note 53 above) 5.

¹⁸² Further discussion in chapter 4.

¹⁸³ J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 518.

¹⁸⁴ Wilson (note 166 above) 287.

¹⁸⁵ Section 261(1) of the South African Merchant Shipping Act 57 of 1951 is not based on the LLMC.

the position of limitation in South Africa, but it suffices to say that the LLMC should be applicable to the territorial sea despite national laws.

2.3.8 Article 12-Compulsory insurance

This provision is very similar to the other liability Conventions¹⁸⁶ with the exception that ships over 300 gross tonnage are required to maintain insurance¹⁸⁷ for costs in terms of this Convention¹⁸⁸ up to a capped value in terms of the LLMC and the 1996 Protocol.¹⁸⁹ Usually, shipowners will uphold a mutual insurance for the wreck removal costs taken out by a Protection and Indemnity (“P&I”) Club.¹⁹⁰ However, this compulsory insurance provision catering for ships over 300 gross tonnage creates a practical problem as the International Safety Maritime Code (“ISM Code”) applies to vessels over 500 gross tonnage.¹⁹¹ Although the ISM Code would not ordinarily apply to ships between 300-500 gross tonnage, in order to ensure compliance with the Nairobi Convention, it would be appropriate to compel shipowners to comply with the ISM Code to ensure that every ship has a proper safety system.¹⁹²

Article 12 is one of the essential features for enforcing liability as Article 12(2) requires the state of the ship’s registry to issue a certificate proving that the ship has insurance to cover wreck removal costs. This provision has the effect of implying that the flag state has guaranteed the contents of the certificates. Furthermore, it requires all ships entering the contracting states convention area¹⁹³ to have insurance, whether or not their flag state is a party to the Convention.

Shipowners are required to carry the certificate onboard their ship (a copy of the insurance certificate is annexed to the Convention) and this requirement is fulfilled if it is in electronic form.¹⁹⁴ Further, Article 12(10) enables the affected states to defeat the P&I Clubs principle of

¹⁸⁶ CLC (note 52 above) Article VII, HNS Convention (note 98 above) Article 12 and Bunker Convention (note 98 above) Article 7.

¹⁸⁷ MAM Gauthier “Ships on the Rocks” The Nairobi International Convention on the Removal of Wrecks, 2007’ 2008, available at: www.tc.gc.ca, accessed on 7 July 2013.

¹⁸⁸ Nairobi Convention (note 9 above) Articles 10(1).

¹⁸⁹ *Ibid*, Article 12(1) read with Article 3(b) of 1996 Protocol (note 171 above).

¹⁹⁰ Anderson (note 22 above) 57.

¹⁹¹ Shaw (note 34 above) 437.

¹⁹² This will also be discussed in chapter 4 with reference to the position in South Africa.

¹⁹³ Nairobi Convention (note 9 above) in terms of Article 1 subject to Article 3(2).

¹⁹⁴ *Ibid*, Article 12(13).

“pay to be paid”, which requires a claim to be lodged once the shipowner has settled the debt with the third party,¹⁹⁵ by allowing a direct claim against the P&I Club.

2.3.9 Article 18-Entry into force

The Nairobi Convention requires 10 states in total to ratify it to become enforced¹⁹⁶ and this relatively small figure can be attributed to the fact that many states have accepted the final text of the Convention.¹⁹⁷ Since there are only 8 signatories, as mentioned in chapter 1, the Convention is not yet enforced.¹⁹⁸

After considering the relevant provisions of the Nairobi Convention the next section will provide a discussion on the shortfalls of the Convention.

2.4 Shortcomings of the Nairobi Convention

2.4.1 Historic Wrecks

One of the shortfalls of the Nairobi Convention is that it does not address the position of historic hazardous warships. The issue that arises with historic wrecks is whether the statutory preservation of this wreck (*in situ*) should prevail over safety issues. Historic wrecks are preserved *in situ* because they have been “identified ... [as providing] a snap-shot of our past maritime history”¹⁹⁹ since these wrecks which have been sunk for more than 100 years.²⁰⁰ Accordingly, due to the significance attached to historic wrecks, the UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2001, (“UNESCO Convention”) has been established to ensure that these wrecks are preserved *in situ* since it forms part of the underwater cultural heritage.²⁰¹

¹⁹⁵ Hare (note 183 above) 947.

¹⁹⁶ Nairobi Convention (note 9 above) Article 18(1).

¹⁹⁷ Shaw (note 34 above) 438.

¹⁹⁸ Status of Conventions (note 25 above).

¹⁹⁹ NSW Heritage Officer ‘Bega Shipwreck 1908’

<http://www.environment.nsw.gov.au/resources/heritagebranch/maritime/bega1908.pdf>, accessed on 28 April 2013.

²⁰⁰ Article 1(a)(ii) of the UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2001.

²⁰¹ *Ibid*, Article 1(a) read with Article 2; C Forrest ‘Culturally and environmentally sensitive sunken warships’ *Australian & New Zealand Maritime Law Journal* 2012 (26) 80, 85 available at <https://maritimejournal.murdoch.edu.au/index.php/maritimejournal/article/view/181>, accessed on 14 May 2013.

The dilemma is that a historic wreck can pose a hazard to navigation or threaten the environment because, as the age of wrecks increases, so too does the risk of a potential massive environmental threat (example the oil which was sunk with the ship).²⁰² There are over 8500 wrecks totaling 0.5-4.3 billion gallons of oil and hazardous materials and 75% of these wrecks are warships.²⁰³ It has also been recorded that the “two World Wars have left a legacy of potentially hazardous wrecks, including bunker or cargo oils, munitions, or other poisonous or noxious cargoes.”²⁰⁴ Scientists believe that “after 70 years at the bottom of the ocean, these wrecks will soon start to leak. “There is ample evidence that there are a large number of wrecks in US coastal waters that are, in essence, spills waiting to happen”.”²⁰⁵

A historic wreck becoming a hazardous wreck arise due to the deterioration of the structural integrity of the ship²⁰⁶ where they “have become corroded to the point where they are liable to start leaking significant quantities of toxic substances.”²⁰⁷ These toxic substances can contaminate the food chain posing a threat to humans.²⁰⁸ As a result historic warships can be described as an “environmental ‘time-bombs’.”²⁰⁹ A warship releasing its cargo in subsequent years did arise and is demonstrated by the incidents which follow.

On 14 October 1939, the *HMS Royal Oak*, a warship, sank with 1 500 tonnes of oil, in the UK.²¹⁰ Then in 1996 until 2000 the wreck began releasing its cargo which resulted in a \$300 000 removal operation.²¹¹ According to a UK Maritime Coastguard Agency report,²¹² in August 1944 the *SS Richard Montgomery* ran aground whilst carrying explosives. Since the wreck is considered a historic wreck, it is protected *in situ* by virtue of the UK Protection of Wrecks Act,

²⁰² ‘Wreck Oil Removal Program (WORP) 2009 Demonstration Project Overview’ available at: www.mlaus.org, accessed on 15 September 2013.

²⁰³ Etkin (note 144 above) 2-3.

²⁰⁴ Forrest (note 201 above) 80.

²⁰⁵ M Hamer ‘Why wartime wrecks are slicking time bombs’ *New Scientist* 7 September 2010 available at: www.newscientist.com, accessed on 15 September 2013.

²⁰⁶ *Ibid.*

²⁰⁷ Papadimitriou (note 8 above) 1.

²⁰⁸ *Ibid* 3.

²⁰⁹ Forrest (note 201 above) 80.

²¹⁰ J Michel ... *et al* ‘Potentially Polluting Wrecks in Marine Waters’ *2005 International Oil Spill Conference* 14 available at: http://www.environmental-research.com/erc_reports/ERC_report_16.pdf, accessed on 2 July 2013.

²¹¹ *Ibid*, 17.

²¹² ‘Report on the wreck of the SS Richard Montgomery’ *Maritime Coastguard Agency* November 2000 available at: http://www.dft.gov.uk/mca/2000_survey_report_montgomery.pdf, accessed on 18 September 2013.

1973. The report added that, due to the hazardous cargo the wreck contained and considering that the structural integrity of the wreck deteriorates over time, close monitoring is required to ensure that the ship's cargo does not explode posing a threat to the environment.

On 14 July 1953, the *SS Luckenbach*, whilst carrying military supplies for the Korean War, collided with another ship and sank in California, USA.²¹³ Later in November 2001, the wreck began spilling its cargo and endangering the marine inhabitants; with a total clean up operation cost over \$20 million.²¹⁴ A further example is that of the *RMS Lusitania* sank off the Irish coast whilst carrying war materials including munitions on 7 May 1915;²¹⁵ munitions on board a wreck are equally damaging to the environment as oils.²¹⁶ In addition there was the *UB 38* which was destroyed during the First World War and sunk in the Dover Barrage strait, UK, on 8 February 1918, where it lay *in situ* for almost ninety years until it became a danger to navigation and was then removed to deeper waters.²¹⁷

The UNESCO Convention requires warships to be preserved *in situ* yet the incidents mentioned above illustrates the need for its removal since they either posed a danger to navigation or a threat to the environment. In terms of the Nairobi Convention, these wrecks will be regarded as hazardous wrecks and required to be removed.²¹⁸ However, Article 4(2) of the Nairobi Convention excludes the application of the Convention to warships but this provision is at the discretion of the affected state. Preventing the application of the Convention to these wrecks poses a gap within the Convention²¹⁹ as warships do constitute a 'wreck' within the meaning of Article 1(4)(a). It should be noted that this Convention was aimed at ensuring that the owner of the wreck will be liable. Since ownership of historic wrecks vests with the state²²⁰ in which the wreck is located liability for wreck removal claims will not be an issue and thus, the Nairobi

²¹³ 'The Shipwreck Jacob Luckenbuch' *National Oceanic & Atmospheric Administration* available at: sanctuaries.noaa.gov/maritime/expeditions/luckenbach.html, on accessed on 15 September 2013.

²¹⁴ WOPR (note 202 above).

²¹⁵ J Rosenberg 'Munitions found on the Lusitania' *20th Century History* available at: histroy1900s.about.com accessed on 11 September 2013.

²¹⁶ Forrest (note 201 above) 81.

²¹⁷ D Glass 'Relocation of the WW1 U-Boat wreck in Dover Strait' July 2008 available at: http://www.dft.gov.uk/mca/ub38_story_07_08.pdf, accessed on 11 September 2013.

²¹⁸ Nairobi Convention (note 9 above) Article 1.

²¹⁹ *Ibid*, Article 1(5) and Article 4(2).

²²⁰ Under the UNESCO Convention (note 200 above) Article 7 vests sovereignty of a historic wreck, within the territorial sea, with the state in whose jurisdiction it lies. In South Africa, Section 2(c) of the National Heritage Resources Act 25 of 1999, includes a wreck over 75 years as "archaeological" and it forms part of national estate (as expressed under Section 3).

Convention should be applicable to all hazardous wrecks including warships. With a uniform set of rules governing wreck removal expeditious and effective removal can be attained preventing further degradation to the environment and limiting the potential hazards created thereof.

However, if the Nairobi Convention is applicable to warships, there would be a conflict with the provisions of the UNESCO Convention. This is because the UNESCO Convention advocates for preservation of historic wrecks, whilst the Nairobi Convention is aimed at removing all hazards of wrecks. Therefore, to maintain consistency between these Conventions only reasonable and proportionate measures should be undertaken in removing the hazard off the wreck.²²¹ In this way, a compromise is achieved between these Conventions as only the danger is removed whilst still preserving the wreck *in situ* for instance the removal of the *UB38* into deeper waters.

Apart from the issue of historic wrecks there are several other shortfalls with the Convention.

2.4.2 *Other shortfalls*

Firstly, the Nairobi Convention does not allow the sale of the wreck where the affected state undertook the wreck removal operation.²²² The CMI stated that the reason for not including this provision is that it might “discourage states from ratifying the WRC [Nairobi Convention]” and that there was no need to harmonise national law with international standards.²²³ However, it is clear that had this provision been incorporated, states would have enjoyed added financial security in the event of a shipowner being recalcitrant, thereby encouraging the state’s to undertake wreck removal operations. Nevertheless, the Convention requires compulsory insurance and enables a direct action against the insurer and thus, it is not necessary to include the provision for sale of the wreck.²²⁴

Secondly, wrecked aircrafts are not catered for under the definition of a wreck, Article 1(4), in Nairobi Convention.²²⁵ Although this type of wreck does not pose a major threat to the

²²¹ Nairobi Convention (note 9 above) Article 2(2).

²²² Shaw (note 34 above) 439.

²²³ LEG 78/11 (note 131 above) 14.

²²⁴ Nairobi Convention (note 9 above) Article 12(10).

²²⁵ De Boer (note 73 above) 338.

environment, as the fuel the aircraft carries is capable of being dispersed naturally, the wreckage may nevertheless pose a hazard to navigation.²²⁶

Thirdly, the Nairobi Convention does not cater for penalty provisions and as a result different contracting states will have different clauses, with the result that the desired uniformity in the application and enforcement of the Convention is not created.

Another problem with the Nairobi Convention is that it fails to provide a jurisdictional clause for the enforcement of the liability claims. The other liability Conventions have one permitting claimants to institute legal proceedings in their country as opposed to the defendant shipowner's country.²²⁷ Having a jurisdictional clause creates a systematic process for litigation and avoids several claims being heard in different countries depending on which laws are favourable to the parties.²²⁸ Thus a lack of such a provision in the Nairobi Convention is problematic.

Nevertheless, it should be remembered that the Nairobi Convention is a partial liability Convention and it specifically refers to the LLMC. According to Article 11 of the LLMC any person²²⁹ is permitted to constitute the Limitation Fund. The Limitation Fund is the accumulated value of Articles 6 and 7. Although Article 11(1) requires the Fund to be created in a country that is a party to the LLMC, the Nairobi Convention permits the application of the limitable values as calculated under the Article 6(1)(b), and its amended values in terms of the Protocols to be applicable despite the affected state being a contracting state to the LLMC.²³⁰ Thus, the Limitation Fund in this context will essentially consist of the Article 6(1)(b). In terms of Article 14 the procedural rules in force at the place where the Limitation Fund is created will be applicable. Accordingly, all matters pertaining to the Nairobi Convention should be referred to the court where the shipowner is seeking to limit his liability. In compliance with the other liability regimes, the jurisdiction of this court should be in line with the claimant's jurisdiction.

²²⁶ *Ibid.*

²²⁷ CLC (note 52 above) Article IX(1), HNS Convention (note 98 above) Articles 38 and 39 and Bunkers Convention (note 98 above) Article 9 and 10.

²²⁸ De La Rue & Anderson (note 38 above) 116.

²²⁹ As defined under Article 1 of the LLMC (note 78 above).

²³⁰ Shaw (note 170 above) par 4.

2.5 Conclusion

This chapter has traced the developments of the shipowners liability with regard to marine pollution claims and it has highlighted the necessity for the introduction of the Nairobi Convention. It is evident that the Nairobi Convention not only fills the gaps in existing international law but it also completes the liability framework for the shipowner and the affected states compensatory schemes. Accordingly, when this Convention (and the HNS Convention) comes into force:

“Shipowner’s liabilities under international conventions:

- CLC - pollution damage, persistent oil from tankers
- HNSC - damage, chemicals, dangerous goods
- Bunkers - pollution damage, bunker spills from non-tankers
- WRC - removal of hazardous wrecks.”²³¹

An examination of the Nairobi Convention has been undertaken here with a view to ultimately determining whether South Africa should accede to this Convention. Although there are some shortfalls with the Convention, it is clear that the advantages of adopting the Convention outweigh the disadvantages. In order to explore these advantages further, the following chapter will analyse the implementation and enforcement measures in one of the contracting states, namely, the UK.

²³¹ Khosla (note 95 above) 20.

CHAPTER 3: APPLICATION OF THE NAIROBI CONVENTION IN THE UNITED KINGDOM

3.1 Introduction

This chapter will examine the implementation of the Nairobi Convention in the UK. The reason for choosing this state in particular is because the definition of a ‘wreck’ under the South African Wreck and Salvage Act 94 of 1996, (“Wreck and Salvage Act”), originated from the 1894 English Merchant Shipping Act, which has been repealed,²³² but South Africa’s definition of a wreck is broader.²³³ Apart from this, today English law is still referred to in terms of Section 6(1)(a) of the Admiralty Jurisdiction Regulation Act 105 of 1983, (“AJRA”).²³⁴ Furthermore, the UK is one of the world’s leading maritime nations and it assisted in the development of the Nairobi Convention.²³⁵ Thus, this chapter will highlight particular incidents resulting in the reform of UK’s legislation governing wreck removal and thereafter examine the implementation of the Convention in the UK.

3.2 Recent incidents demonstrating the need for reform

According to a report by the Marine Accident Investigation Branch,²³⁶ on 26 March 1997 a container ship known as the *MV Cita* ran aground in the Isles of Scilly, UK. The ship was loaded with three tiers of containers when the incident occurred and these were released into the

²³² Hare (note 183 above) 254.

²³³ Fogarty (note 6 above) 273; H Staniland *Law of South Africa* first reissue (1993) 86.

²³⁴ Section 6 (1) (a) of the Admiralty Jurisdiction Regulation Act 108 of 1983:

“Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall- (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied.”

²³⁵ Shaw (note 34 above) 433; the contribution made by the UK has been discussed in chapter 2 on page 24.

²³⁶ ‘Marine Accident Report 3/98: MV Cita’ *Marine Accident investigation Branch* available at: http://www.maib.gov.uk/cms_resources.cfm?file=/cita_pub_1998.pdf, accessed on 18 September 2013.

environment causing a navigational hazard. In terms of Section 253(1)(a) read with Section 252(2)(a) of the Merchant Shipping Act, 1995, (“UK MSA”), the general lighthouse authority²³⁷ was vested with the power to have the wreck removed and directed the shipowners to pay for the removal costs; however, they failed to do so. Accordingly, the authority was permitted to have the wreck sold and the outstanding costs were paid from the General Lighthouse Fund.²³⁸ The General Lighthouse Fund is administered by the Secretary of State,²³⁹ who is given the general power to regulate wrecks throughout the UK.²⁴⁰ In this incident the funds were not enough to cover the entire removal operation and the surplus were paid by the government.²⁴¹

On 14 December 2000, another container ship, the *MV Lagik*, ran aground across the River Nene, UK.²⁴² The ship was carrying various oils and steel as cargo.²⁴³ As result the cargo spilt into the river and the wreck blocked further entry into the harbour for 44 days, with the immediate abandonment of the wreck by the shipowners despite the fact that the harbour authority²⁴⁴ ordered the shipowner to remove the wreck.²⁴⁵ The total removal operation amounted to £1.25 million which was paid by the UK government.²⁴⁶

Many wrecks also occur in the English Channel, which is a busy shipping lane and, apart from the liability issue, these wrecks have a profound effect on navigation. For instance, on 14 December 2002, the *MV Tricolor*, a vehicle carrier, collided with a container ship, the *Kariba*, in the English Channel.²⁴⁷ The *Tricolor* was carrying approximately 2000 new vehicles on deck and

²³⁷ Section 193 of the UK Merchant Shipping Act 1995, available at: <http://www.legislation.gov.uk/ukpga/1995/21/data.pdf>, accessed on 20 September 2013.

²³⁸ *Ibid*, Section 253(3).

²³⁹ *Ibid*, Section 211.

²⁴⁰ *Ibid*, Section 248(1).

²⁴¹ ‘Year needed to remove cargo ship wrecked off Devon’ *Environment News Service* 23 January 2007 available at on www.ens-newswire.com, accessed on 18 September 2013.

²⁴² H Steve ‘Steve Maritime Disaster Pages “The MV Lagik”’ available at <http://stevesmaritime.com/lagik.html>, accessed on 20 September 2013.

²⁴³ ‘News of the Lagik’ *Sutton Bridge* available at: www.suttonbridge.eshire.net, accessed on 18 September 2013.

²⁴⁴ UK MSA (note 237 above) Sections 252(1)-2(a).

²⁴⁵ ‘Wreck Removal Convention Bill Explanatory note’ *House of Commons* 21 March 2011 available at: <http://www.publications.parliament.uk/pa/bills/lbill/2010-2011/0059/en/2011059en.pdf>, accessed on 18 September 2013.

²⁴⁶ *Ibid*.

²⁴⁷ H Steve ‘Steve Maritime Disaster Pages “The Tricolor”’ available at <http://stevesmaritime.com/tricolor.html>, accessed on 20 September 2013.

the collision resulted in all the vehicles being released into the sea and led to the grounding of the *Tricolor*.²⁴⁸

It was, under common law, the duty of the appropriate authority to mark a wreck to warn other mariners,²⁴⁹ a duty later codified under Section 252(2)(b) of the UK MSA. Thus, after this incident it was the responsibility of the general lighthouse authority's²⁵⁰ to have the wreck buoyed until it was capable of being raised or removed. However, before the wreck could be marked²⁵¹ another ship collided with the sunken *Tricolor*.²⁵² Clearly, marking a wreck is significant to safety at sea.

Another example is the incident when, according to a report by the Maritime and Coastal Agency,²⁵³ on 18 January 2007, a UK registered container ship, the *MSC Napoli*, got into difficulties in the English Channel and the master sent out a distress call seeking refuge from the French and UK authorities. However, it was refused entry and because of the magnitude of a probable disaster, the ship was abandoned. Subsequently, information was provided regarding the cargo that was on board the ship and its bunker fuel, which indicated that there was a significant threat to the environment, in addition to the danger to navigation. The removal operation totaled £2.8 million which was paid by the government.²⁵⁴

Previously, wreck removal was governed by sections 252-254 of the UK MSA. Section 252 of the UK MSA empowered the harbour authorities to take control of a wreck where it was situated under their jurisdiction and allowed them to remove or destroy a wreck where it posed a danger to navigation.²⁵⁵ If the wreck occurred on the seashore or on banks of the UK and the harbour authority was not vested with any power to govern this area, then the general lighthouse authority was given the power to remove it.²⁵⁶ In addition to the harbour authorities' powers, they were required to buoy the wreck site until the danger was removed and they were permitted

²⁴⁸ *Ibid*.

²⁴⁹ Fogarty (note 6 above) 284.

²⁵⁰ UK MSA (note 237 above) Section 253(1).

²⁵¹ *Ibid*, Section 252(2)(b) read with Section 253(1).

²⁵² Steve (note 247 above).

²⁵³ 'MSC Napoli incident: The Maritime and Coastguard Agency's response' *Maritime and Coastguard Agency*, available at: http://www.dft.gov.uk/mca/197-299_napoli_report_final-redux.pdf, accessed on 13 September 2013.

²⁵⁴ Wreck Removal Convention Bill 144, 2011, available at: <http://www.publications.parliament.uk/pa/bills/cbill/2010-2011/0144/2011144.pdf>, accessed on 18 September 2013.

²⁵⁵ UK MSA (note 237 above) Sections 252(1)-(2)(a).

²⁵⁶ *Ibid*, Section 253(1).

to sell the raised wrecked vessel to recover any costs incurred.²⁵⁷ However, the UK MSA did not properly cater for the strict liability of a shipowner in relation to removal costs and as a result the government bore the loss.²⁵⁸ In the event of abandonment of the wreck, the removal costs were paid out of the General Lighthouse Fund and the outstanding costs were paid from government and not by the shipowner.²⁵⁹

Accordingly, the UK Public Bill Committee²⁶⁰ argued that reform in the law relating to the removal of hazardous wrecks was required. This is because, firstly, there was no existing legislation which permitted the authorities to monitor and regulate wreck removal occurring within the EEZ.²⁶¹ Secondly, the UK MSA could not hold the shipowner strictly liable to remove the wreck, with the result that the costs were shifted to the government.²⁶² As a result of the above concerns, the Committee proposed a Wreck Removal Convention Bill, 2010, (“Wreck Bill”), to be enacted and that the Nairobi Convention should be annexed as a schedule to the Bill. They concluded their argument by stating that, if this Bill were accepted, then it would certainly improve the removal of wrecks regime in the UK by holding shipowners strictly liable.

3.3 Current legislative framework governing wreck removal in the UK

After recognising the financial burden placed on the government emanating from wreck removal costs, the Wreck Bill became an Act of Parliament on 21 July 2011. It was known as the Wreck Removal Convention Act, 2011, (“Wreck Act”).²⁶³ The Wreck Act amended the provisions relating to wreck removal under the UK MSA and it gave effect to the Nairobi Convention. It

²⁵⁷ *Ibid*, Section 252(2)(b)-(d).

²⁵⁸ Enforcing strict liability is the current problem South Africa faces which will be explored in chapter 4.

²⁵⁹ *Ibid*, Section 253(3). This is the current predicament South Africa faces where a shipowner abandons the wreck leaving the government with the wreck removal costs. This is evident in the *Seli 1* and the *MT Phoenix* incidents which will be discussed in chapter 4.

²⁶⁰ ‘Wreck Removal Convention Bill-Public Bill Committee’ 7 February 2011 available at: <http://www.publications.parliament.uk/pa/cm201011/cmpublic/wreckremovalconvention/110207/pm/110207s01.htm> accessed on 14 September 2013.

²⁶¹ UNCLOS (note 17 above) Article 56.

²⁶² As highlighted in the *MV Cita*, the *MV Lagik* and the *MSC Napoli* incidents.

²⁶³ Wreck Removal Convention Act 2011, available at: <http://www.legislation.gov.uk/ukpga/2011/8/data.pdf>, accessed on 20 September 2013.

was argued that apart from the liability regime under the Convention, the introduction of the new Act ensured prompt response to incidents as the obligations of the parties would be clarified.²⁶⁴

On 12 November 2012, the UK acceded and opted-in to the Nairobi Convention.²⁶⁵ With parliamentary consent in 2011, an amendment was made to extend the wreck removal provisions and this was affected by introducing Part 9A of the Wreck Act, which was to be inserted into the UK MSA by including the amendments after Section 255, giving effect to the Nairobi Convention, and annexing the Convention as schedule 11ZA thereto.²⁶⁶ The powers of the authorities are now extended since previously they could not intervene where a wreck occurred outside their jurisdiction.²⁶⁷

There were a number of amended provisions giving effect to the Nairobi Convention in terms of the Wreck Act. Section 255A of the Wreck Act states that the Nairobi Convention will be applicable to the UK. Section 255B is in line with Article 5 of the Nairobi Convention, which requires the master or operator of the ship to report the wreck, in terms of Article 5(2) of the Convention, immediately.²⁶⁸ If any ship wrecks in the UK Convention area (which is the EEZ and the territorial sea²⁶⁹), then a report is made to the Secretary of State.²⁷⁰ As noted above, this is because the Secretary of State is vested with the power to regulate wrecks.²⁷¹ Section 255B (3) requires all UK registered ships to report the wreck if it occurs within another contracting state's convention area. If the master or operator of any ship fails to fulfill these obligations, that person will be guilty of an offence in terms of Sections 255B (7) and (8).²⁷²

²⁶⁴ O Bennett 'Wreck Removal Convention Bill 2010-11' 17 March 2011 available at: <http://www.parliament.uk/briefing-papers/SN05887>, accessed on 14 September 2013.

²⁶⁵ 'Wreck Removal Convention Bill-Explanatory Notes' (Session 2010-11) 23 March 2011, available at: <http://www.publications.parliament.uk/pa/bills/lbill/2010-2011/0059/en/2011059en.htm>, accessed on 18 September 2013.

²⁶⁶ 'Wreck Removal Convention Act 2011-Explanatory Notes' available at: <http://www.legislation.gov.uk/ukpga/2011/8/notes/division/4/1/data.pdf>, accessed on 14 September 2013.

²⁶⁷ Bennett (note 264 above).

²⁶⁸ Wreck Act (note 263 above) Section 255B (1).

²⁶⁹ Wreck Act-Explanatory Notes (note 266 above).

²⁷⁰ Wreck Act (note 263 above) Section 255B (2).

²⁷¹ UK MSA (note 237 above) Section 248(1).

²⁷² This section provides that the person found guilty will be liable on a summary conviction to a fine not exceeding £50 000 or conviction on indictment to a fine.

Section 255C codifies the UK's obligations to locate²⁷³ and mark²⁷⁴ any wreck which occurs within its convention area. The Secretary of State is permitted to delegate this duty to specified authorities²⁷⁵ in accordance with the location of the wreck and the authorities' jurisdiction over the wreck.²⁷⁶ Once the authority has fulfilled its duty in removing the wreck, this discharges the UK's obligation in terms of the Convention.²⁷⁷ It should be noted that the authority's powers are in terms of the Convention and not of Sections 252 or 253 of the UK MSA.²⁷⁸

The UK has acknowledged the technological sophistication of ships and the electronic equipment onboard a ship.²⁷⁹ As a result, the UK Transport Committee proposed that the obligation of "marking" a wreck can be fulfilled electronically.²⁸⁰ This is performed by the use of the "Automatic Identification System", which describes the wreck site on the radar's electronic chart display of a ship automatically.²⁸¹ The Trinity House²⁸² favoured this immediate approach to marking, in light of the *Tricolor* incident but the UK Parliament warned against substituting this for physically buoying (marking) the wreck, which is still required.²⁸³ This warning system is in line with Rule 7(b) of International Regulations for Preventing Collisions at Sea, 1972, which requires proper use of a radar system to prevent collisions where there is a risk of a collision. The initiative taken by the UK actually enhances the maritime safety system, ensuring that safety at sea is maintained.²⁸⁴

²⁷³ Nairobi Convention (note 9 above) Article 7.

²⁷⁴ *Ibid*, Article 8.

²⁷⁵ The jurisdiction of firstly, the Harbour and Conservancy Authority and secondly, the lighthouse authorities are governed by Section 252 and 253 of the UK MSA (note 237 above) respectively.

²⁷⁶ Wreck Act (note 263 above) Section 255C (3) read with Section 255C (7).

²⁷⁷ *Ibid*, Section 255C (7).

²⁷⁸ *Ibid*, Section 255C (4).

²⁷⁹ 'The Draft Navigation Bill-Ninth Report of Session 2007-08' *House of Commons-Transport Committee*, 16 July 2008 available at:

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtran/709/70909.htm#a24> accessed on 14 September 2013.

²⁸⁰ Section 11(2)(b) of the Marine Navigation Act, 2013 available at:

<http://www.legislation.gov.uk/ukpga/2013/23/enacted/data.pdf>, accessed on 16 November 2013.

²⁸¹ 'AIS transponders' *IMO* available at: <http://www.imo.org/OurWork/Safety/Navigation/Pages/AIS.aspx>, accessed on 16 November 2013.

²⁸² Section 193(1)(a) of the UK MSA (note 237 above) defines the Trinity House as the general lighthouse authority for England and Wales and adjacent seas and islands.

²⁸³ 'Wreck Removal Convention-Committee on Transport Ninth Report' *Parliament* 19 July 2008, available at: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtran/709/70910.htm>, accessed on 18 September 2013.

²⁸⁴ Kopacz, Morgaś & Urbanski (note 10 above) 211.

Section 255D of the Wreck Act is in line with Article 6 of the Nairobi Convention, which provides guidance for determining whether the wreck is a hazardous wreck and requires a wreck notice to be issued. The notice requires the registered owner of the ship to remove the wreck²⁸⁵ and to produce evidence of insurance.²⁸⁶ The registered owner will be guilty of an offence if he does not comply with the wreck removal notice.²⁸⁷ The notice is in terms of Article 9(6)(b) and (c) of the Nairobi Convention but the Secretary of State is permitted to impose conditions to that notice to ensure protection of the environment.²⁸⁸ In the event of the registered owner's failing to comply with his obligation to remove the wreck, then the Secretary of State can direct an appropriate authority to have the wreck removed;²⁸⁹ however, since the shipowner will be required to maintain insurance, the Secretary of State will have a direct claim against the insurer.²⁹⁰

Section 255G holds the registered shipowner strictly liable for all costs incurred²⁹¹ subject to the limitation provisions.²⁹² Since the LLMC is applicable in the UK²⁹³ and is applied in terms of the Nairobi Convention,²⁹⁴ consistency is maintained with regard to limitation of liability claims for wrecks occurring in the territorial sea and the EEZ.²⁹⁵ Therefore, there is no discrepancy in the application on the limitation of the shipowner's liability in the UK.²⁹⁶

Section 255J requires every ship over 300 gross tonnage to maintain insurance for wreck removal expenses.²⁹⁷ Article 21 of UNCLOS requires ships innocently traversing through the territorial sea to comply with the coastal states laws. As such, no ship will be permitted to enter

²⁸⁵ Nairobi Convention (note 9 above) Article 9(2).

²⁸⁶ *Ibid*, Article 9(3) read with Article 12.

²⁸⁷ Wreck Act (note 263 above) Section 255D (4). The offences are in terms of Section 255D (5) of the Wreck Act which renders the owner liable on summary conviction to a sum of £50 000 or conviction on indictment to a fine.

²⁸⁸ *Ibid*, Section 255E which is in line with Article 9 (4) of the Nairobi Convention (note 9 above).

²⁸⁹ Wreck Act (note 263 above) Section 255F (2).

²⁹⁰ Nairobi Convention (note 9 above) Article 12(10).

²⁹¹ *Ibid*, Article 10(1).

²⁹² Wreck Act (note 263 above) Section 255G (5).

²⁹³ UK MSA (note 237 above) Section 185.

²⁹⁴ Nairobi Convention (note 9 above) Article 11 and 12(1).

²⁹⁵ 'Wreck Removal Convention Act 2011-Section 255G' available at:

<http://www.legislation.gov.uk/ukpga/2011/8/notes/division/4/1/7>, accessed on 14 September 2013.

²⁹⁶ 'Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976-Extension to the Baliwick of Guernsey by the United Kingdom' *IMO* (LLMC.3/Circ.38) 12 June 2013 available at: <http://docs.imo.org/Category.aspx?cid=303>, accessed on 16 November 2013.

²⁹⁷ Wreck Act (note 263 above) Section 255J (1).

or leave a UK port without proof of wreck removal insurance²⁹⁸ and a certificate from that ship's flag state, confirming that the vessel has insurance to cover wreck removal expenses.²⁹⁹ If the master or operator of the ship fails to produce these documents and attempts to enter or leave the UK port, then the master or operator of the ship will be guilty of an offence.³⁰⁰ The UK has permitted the use of electronic insurance certificates, in terms of Article 12(13) of the Nairobi Convention, and makes them accessible to all contracting states.³⁰¹ In the UK the insurance certificate for UK registered ships is issued by the Secretary of State, if satisfied that the ship has wreck removal insurance and that it will be sufficient to cover the removal costs, which is in terms of Article 12(2) of the Nairobi Convention.³⁰²

Section 255P permits recovery of costs directly from the shipowner's insurer identified on the wreck removal insurance and insurance certificate issued by the state.³⁰³ Once this provision is triggered, the insurer effectively subrogates the position of the shipowner but with an added defence to subsequent wreck removal claims of the shipowner's being willfully negligent, resulting in the accident.³⁰⁴ Wreck removal and the marking and destruction of wrecks are covered by P&I Club, so the direct action against the insurer will be against that shipowner's P&I Club.³⁰⁵

3.4 Conclusion

This chapter has examined the need for reforming the UK's legislation governing wreck removal, which resulted in the accession, adoption and exercising the option of allowing the Nairobi Convention to be applicable to the UK's territorial sea.³⁰⁶ To enforce these provisions an amendment to the UK MSA was necessary and the Convention was attached to this Act. Clearly, these implementation measures and the criminal sanctions which enforced the Convention will

²⁹⁸ *Ibid*, Section 255J (2).

²⁹⁹ *Ibid*, Section 255J (3).

³⁰⁰ *Ibid*, Sections 255K (1)-(2) which renders the master or operator of the ship guilty of an offence for not maintaining insurance and liable on summary conviction to £50 000 or conviction on indictment.

³⁰¹ *Ibid*, Section 255Q.

³⁰² *Ibid*, Section 255N (2).

³⁰³ *Ibid*, Section 255P (1).

³⁰⁴ *Ibid*, Section 255P (3).

³⁰⁵ Hare (note 183 above) 947.

³⁰⁶ Wreck Removal Convention-Committee on Transport Ninth Report (note 283 above).

provide an adequate framework regulating the liability of a shipowner with regard to wreck removal claims.

The problems experienced by the UK government in terms of liability for wreck removal costs are very similar to the concerns faced by the South African government where, our government is ultimately held liable for wreck removal costs because of inadequate legislation.³⁰⁷ The next chapter will analyse the current legislative framework in South Africa with a view to determining whether South Africa should adopt the Nairobi Convention and if so, how this should be affected.

³⁰⁷ This situation arose with the *Seli 1* and the *MT Phoenix* incidents which will be discussed in chapter 4.

CHAPTER 4: A SOUTH AFRICAN PERSPECTIVE

4.1 Introduction

After analysing the provisions and the implementation of the Nairobi Convention this chapter will focus on the current legislative framework in South Africa. This is because liability for wreck removal claims becomes a pertinent issue in view of the increase in the size of ships that are traversing South African waters.³⁰⁸ To accommodate these new vessels, which have increased in size to meet the current commodity demands,³⁰⁹ Transnet has embarked on developing a new port in Durban, the “Durban Dig-Out Port Project.”³¹⁰ With this increase in size of ships and the amount of commodities being transported in conjunction with the perilous sea conditions off the South African coast the risk of a hazardous wreck³¹¹ becomes more likely. Liability in the case of abandonment poses a significant financial burden on the government. Although the implication of legal abandonment does not relieve the shipowner of his obligations,³¹² recent case studies have proved otherwise,³¹³ and without a strict liability regime, the South African government is financially burdened.

Thus, this chapter will examine the implications of our current legislation with regard to liability for wreck removal claims in light of the recent shipwrecks which occurred along our coastline and will conclude with a recommendation regarding the Nairobi Convention. In addition, some implementation challenges in the enforcement of the Convention will be considered and a recommendation suggested.

³⁰⁸ Jones (note 5 above).

³⁰⁹ Port development plans’ *Transnet* 18 available at:

<http://www.transnet.net/BusinessWithUs/LTPF%202012/4.%20Ports%20Development%20Plans.pdf>, accessed on 28 September 2013.

³¹⁰ *Ibid*, 16.

³¹¹ Nairobi Convention (note 9 above) Article 1(5).

³¹² Hare (note 183 above) 264.

³¹³ Such as the *Seli 1* and the *MT Phoenix* incidents which will be discussed on pages 43-46.

4.2 A review of the hazardous wrecks that have occurred along the coastline South Africa

4.2.1 Places of Refuge

Section 1 of the Wreck and Salvage Act includes ships in distress under the definition of a 'wreck,' and thus places of refuge becomes a crucial matter in the area of wreck removal, as discussed in chapter 2 above. According to Item 1.19 of Resolution A 949(23), a "place of refuge" is a place where a ship in need of assistance can take action to enable it to stabilize its condition and reduce the hazards to navigation, and to protect human life and the environment." To allow a ship in distress entry, it requires the coastal state to weigh up competing interests of the shipowner (in saving the ship) and the coastal state's environmental and financial interests and this approach adopted by South Africa, to reconcile the two is based on the theory of "good management on the basis of right to access."³¹⁴ This theory allows states to refuse the entry of a ship in need of assistance as the exception to the right of access if this decision was arrived at on an objective basis.³¹⁵ This is because a ship in distress loses its right to innocent passage in the territorial sea³¹⁶ and must now seek permission to enter³¹⁷ from the South African Maritime Safety Authority ("SAMSA"),³¹⁸ which is a juristic person³¹⁹ created to ensure safety within the territorial sea.³²⁰

Although Resolution A 949(23) has not been adopted in South Africa, our policy is based on it.³²¹ Where the shipowner complies with SAMSA's orders, it will be allowed entry.³²² This is evident from the granting of entry to the *Cape Africa* seeking refuge in Cape Town on 26 April 2004. The ship was allowed entry since the shipowner allowed SAMSA to inspect it.³²³

³¹⁴ E Van Hooydonk 'The Obligation to Offer a Place of Refuge to a Ship in Distress' *CMI Yearbook 2003 Annuaire* 403, 432 available at: http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2003.pdf, accessed on 6 September 2013.

³¹⁵ *Ibid.*

³¹⁶ UNCLOS (note 17 above) Article 19.

³¹⁷ Section 5 of the Maritime Traffic Act 2 of 1981 read with reg 5 of the Marine Traffic Regulations in GN 9575 of 1 February 1985.

³¹⁸ Staniland (note 233 above) 94.

³¹⁹ Section 2(1) of the South African Maritime Safety Authority Act 5 of 1998.

³²⁰ *Ibid.*, Section 3.

³²¹ Holloway (note 60 above) 31.

³²² MTA (note 317 above) Section 4(1).

³²³ H Du Plessis 'Ship in distress off Cape coast' *IOL News* 27 April 2004 available at: <http://www.iol.co.za/news/south-africa/ship-in-distress-off-cape-coast-1.211512?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 24 September 2013.

However, where the shipowner fails to comply with the South African policy, which takes into account the assistance rendered by the shipowner and whether the requisite financial pollution insurance cover is in place, the ship maybe refused entry.³²⁴

This situation occurred on 5 September 2001, where the *Ikan Tanda* sought refuge in Cape Town.³²⁵ SAMSA³²⁶ refused the ship entry because the owner failed to comply with the conditions SAMSA imposed in terms of Section 5(1) of the Marine Traffic Act 2 of 1981, (“MTA”),³²⁷ namely, to provide a full financial guarantee in the event of marine pollution damage.³²⁸ Since the ship was refused entry and because of its deteriorating condition,³²⁹ its cargo caused an environmental threat.³³⁰ On 30 August 2002, a ship known as the *Bismihita La*, also seeking refuge in Cape Town was refused because of the shipowner failed to co-operate and provide sufficient details concerning the ship to SAMSA³³¹ in terms of the conditions imposed.³³² As a result SAMSA could not make an adequate decision to allow its entry.³³³

Such a refusal in granting access does not only affect the ship involved and threatens the environment in the event of a wreck arising but wrecks also pose a navigational hazard.

4.2.2 Wrecks which causes a navigational hazard

On 12 September 2002 an Italian flagged container ship, the *Jolly Rubino*, ran aground in Richards Bay causing an environmental and navigational danger from its containers.³³⁴ In this incident the shipowner’s had maintained insurance and their insurer compensated South Africa

³²⁴ MTA (note 317 above) Section 5(1) Act read with Regulations 5, 13, 14 and 16 of the MTR (note 317 above).

³²⁵ H Du Plessis ‘Stranded ship poses oil threat to coastline’ *IOL News* 6 September 2001 available at:

<http://www.iol.co.za/news/south-africa/stranded-ship-poses-oil-threat-to-coastline-1.72338?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 24 September 2013.

³²⁶ SAMSA Act (note 319 above) Section 3.

³²⁷ Read with regulations 13(1) and 14(1) of the MTA (note 317 above).

³²⁸ Holloway (note 60 above) 28.

³²⁹ Resolution A 949(23) (note 115 above) Item 1.3.

³³⁰ Du Plessis (note 325 above).

³³¹ Holloway (note 60 above) 29.

³³² MTA (note 317 above) Section 5(1) read with Regulations 13(1) and 14(1) of the MTR (note 317 above).

³³³ Resolution A 949(23) (note 115 above) Item 3.11.

³³⁴ ‘St. Lucia Park Barricaded Against shipwreck spill’ *Environment News Service* available at: <http://www.ens-news.com/ens/sep2002/2002-09-19-04.asp>, accessed on 20 September 2013.

for the loss sustained.³³⁵ Another incident demonstrating the extent of wrecks in South Africa and the hazard involved occurred on 19 August 2003 when an American registered container ship, the *Sealand Express*, ran aground in Cape Town releasing its cargo and posing a navigational hazard.³³⁶ Also on 26 June 2006, a German registered ship, the *Safmarine Agulhas*, ran aground in East London³³⁷ and its containers posed a hazard to navigation.³³⁸

Another crucial issue with liability of wrecks occurs where the wreck is abandoned. The implications of this are discussed in the following section.

4.2.3 Abandoned wrecks

Usually the costs for removing a wreck runs into exorbitant figures especially considering the impact the wreck has on the environment.³³⁹ As a result the most favourable and cost effective option for the shipowner is to abandon the ship with the aim of relinquishing all obligations attached.³⁴⁰ However, when a ship is abandoned, only the rights, title and interest are lost not the obligations such as removing the wreck.³⁴¹ This has been codified under Section 18(3) of the Wreck and Salvage Act, which holds the shipowner liable for the costs incurred in removing a wreck, within the territorial sea, to a place specified by SAMSA despite abandonment.³⁴² However, recent case studies have demonstrated that enforcing this provision is problematic.

Illustrating this position is an incident where a Turkish bulk carrier, the *Seli 1*, sought assistance in Cape Town after experiencing engine failure and subsequently ran aground on 7 September

³³⁵ T Carnie 'Cover-up claim over Jolly Rubino wreck' *IOL News* 2 December 2002 available at: http://www.iol.co.za/news/south-africa/cover-up-claim-over-jolly-rubino-wreck-1.97986#.UoZmnXB_5Bk, accessed on 20 September 2013.

³³⁶ J Willemans 'Shipwrecked' *Eye Witness* 24 August 2013 available at:

<http://ewn.co.za/2013/08/15/130815Shipwrecked>, accessed on 24 September 2013.

³³⁷ SAPA 'Stranded ship to be relieved of containers' *IOL News* 3 July 2006 available at:

http://www.iol.co.za/news/south-africa/stranded-ship-to-be-relieved-of-containers-1.283980#.UkLz9dJ_5Bk, accessed on 25 September 2013.

³³⁸ C Jenkins 'Rescue crew tell of drama at sea' *IOL* 7 August 2006 available at: <http://www.iol.co.za/news/south-africa/rescue-crew-tell-of-drama-at-sea-1.288375?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 25 September 2013.

³³⁹ For example the damage caused by the *Erika* as discussed in chapter 2.

³⁴⁰ JC Scowcroft 'Wreck Removal: An overview and Recent Developments' (1985) 16 *JMLC* 311, 321.

³⁴¹ Hare (note 183 above) 264.

³⁴² Section 18(2) of the Wreck and Salvage Act 94 of 1996. An extract of the Wreck and Salvage Act, Section 18, is annexed hereto.

2009.³⁴³ The *Seli I* was laden with various types of cargo,³⁴⁴ which was released into the environment.³⁴⁵ During this time, the shipowners of the ship abandoned the wreck.³⁴⁶ Although the ship had insurance, with a Russian P&I Club, the insurers refused to pay because the shipowners had abandoned the wreck and they claimed that their responsibilities were also forfeited.³⁴⁷ This is because of the P&I Club's "pay to be paid" principle which requires the insured to fulfill the claim and only then will the Club compensate the insured.³⁴⁸ Therefore, when the shipowner does not pay, the claimant (affected state) will not have a claim against the insurer because of their standard practice, which is why in the *Seli I* incident a claim could not be lodged against the Club.

The prolonged delay, amounting to four years, in removing the wreck stemmed from insufficient funds from the government to successfully conduct the removal operation.³⁴⁹ Since the shipowners had abandoned the wreck, it was SAMSA's duty to employ the services of a salvor to have it removed in order to minimise the threat of pollution to the environment.³⁵⁰ Although Section 18(3) of the Wreck and Salvage Act permits SAMSA to recover the costs incurred from the shipowner, despite abandonment, this was not executed in the *Seli I*. Accordingly, since it was SAMSA that had entered into the salvage contract with the salvors,³⁵¹ SAMSA was contractually indebted to them and paid the costs from the Maritime Fund, which is essentially the monies received, from mariners who fail to abide by statutory regulations, in fulfilling its

³⁴³ T Hutson 'Shipwreck legislation lacking' *The Mercury* 10 August 2011, available at:

<http://www.iol.co.za/mercury/shipwreck-legislation-lacking-1.1114777>, accessed on 17 August 2013.

³⁴⁴ C McKune & SAPA 'Oil threat from stuck bulk carrier' *IOL News* 9 September 2009, available at:

<http://www.iol.co.za/news/south-africa/oil-threat-from-stuck-bulk-carrier-1.457921?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 17 August 2013.

³⁴⁵ SAPA 'Table Bay Wreck to be Removed' *IOL News* 9 September 2012 available at

http://www.iol.co.za/news/south-africa/western-cape/seli-1-wreck-set-to-go-at-last-1.137836#UaBT66J_7Sg, accessed on 28 April 2013.

³⁴⁶ SAPA 'Fuel removed from stranded carrier' *IOL News* 24 September 2009 available at:

http://www.iol.co.za/news/south-africa/fuel-removed-from-stranded-carrier-1.459487#UkHHLtJ_5Bk, accessed on 15 August 2013.

³⁴⁷ M Gosling 'Clean up continues after oil spill' *IOL Scitech* 5 September 2011 available at:

http://www.iol.co.za/scitech/science/environment/clean-up-continues-after-oil-spill-1.1131808?showComments=true#UkHZ3tJ_5Bk, accessed: 23 August 2013.

³⁴⁸ H Bennett *The Law of Marine Insurance* 2 ed (2006) 484.

³⁴⁹ 'Seli wreck eroding Blouberg' *Cape Times* 15 June 2012 available at: http://www.iol.co.za/capetimes/seli-wreck-eroding-blouberg-1.1320047?TB_iframe=true&height=600&keepThis=true&width=900#UkHhkNJ_5Bk, accessed on 23 August 2013.

³⁵⁰ Section 18(1)(b) of the Wreck and Salvage Act (note 342 above) read with Section 3(b) of the SAMSA Act (note 319 above).

³⁵¹ Section 9(2)(a) of the SAMSA Act (note 319 above).

duty.³⁵² However, this was insufficient to recoup the costs incurred in the wreck removal operation and SAMSA in conjunction with the Minister of Transport sought a grant from the Minister of Finance³⁵³ in the sum of R40 million.³⁵⁴

A similar incident occurred in Kwa-Zulu Natal on 26 July 2011 when an oil tanker, the *MT Phoenix*, ran aground.³⁵⁵ Attempts were made to trace the owners but this was unsuccessful as there were no reliable records revealing who the registered shipowner was³⁵⁶ and the ship had no insurance.³⁵⁷ Although the *MT Phoenix* was an oil tanker, it carried no oil as cargo and accordingly, it was not required to maintain insurance in terms of Section 13 of the Marine Pollution (Control and Civil Liability) Act 6 of 1981, (“Civil Liability Act”),³⁵⁸ which is in terms of CLC. Despite South Africa’s denouncing its ratification to this Convention and acceding to CLC 1992, the latter Convention could not be applied in South Africa because there was an enabling legislation giving the Convention force of law.³⁵⁹

As a result, Section 18(1)(b) of the Wreck and Salvage Act required SAMSA to have the wreck removed but at the shipowner’s expense.³⁶⁰ This obligation is imposed on SAMSA to ensure safety at sea³⁶¹ and a safe marine environment.³⁶² Since the shipowners were untraceable in the *Phoenix* incident, the wreck removal costs, totaling R39 million,³⁶³ were paid by the South

³⁵² *Ibid*, Sections 38(1) and (3).

³⁵³ *Ibid*, Section 39.

³⁵⁴ H Du Plessis ‘Ship in trouble costs SA a ton’ *IOL News* 15 September 2009 available at: http://www.iol.co.za/news/south-africa/ship-trouble-costs-sa-a-ton-1.458621#.UkHDctJ_5Bk, accessed on 15 August 2013.

³⁵⁵ ‘Tanker hits the rocks’ *Cape Argus* 27 July 2011 available at: http://www.iol.co.za/capeargus/tanker-hits-the-rocks-1.1106916?showComments=true#.UkKnbtJ_5Bk, accessed on 23 August 2013.

³⁵⁶ B Cole & K Pillay ‘Ship fuel salvage starts’ *Daily News* 29 July 2009 available at: <http://www.iol.co.za/news/south-africa/kwazulu-natal/ship-fuel-salvage-starts-1.1108533?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 23 August 2013.

³⁵⁷ K Pillay ‘Samsa manager: grounding of the Phoenix an act of God’ *Daily News* 8 August 2011 available at: http://www.iol.co.za/dailynews/news/samsa-manager-grounding-of-the-phoenix-an-act-of-god-1.1114012#.UkKnbnJ_5Bk, accessed on 23 August 2013.

³⁵⁸ ‘Tanker hits the rocks’ *Cape Argus* 27 July 2011 available at: http://www.iol.co.za/capeargus/tanker-hits-the-rocks-1.1106916?showComments=true#.UkKnbtJ_5Bk, accessed on 23 August 2013.

³⁵⁹ Section 231(4) of the Constitution of the Republic of South Africa, 1996.

³⁶⁰ Wreck and Salvage Act (note 342 above) Section 18(3).

³⁶¹ Section 3 of the SAMSA Act (note 319 above).

³⁶² Constitution (note 359 above) Section 24.

³⁶³ T Hutson ‘Phoenix owners to get off scot-free’ *The Mercury* 19 October 2011, available at http://www.iol.co.za/mercury/phoenix-owners-to-get-off-scot-free-1.1160140#.UdKuODt_7Sg, accessed on 17 August 2013.

African government.³⁶⁴ SAMSA directed that the wreck should be raised and sunk outside the shipping lanes in Durban.³⁶⁵

Internationally, insurance underpins liability Conventions which ensures that a claimant will be reimbursed for damage suffered. In South Africa, this is no different provided the shipowner complies with P&I Club rules and in this way the insurance compensates the government for the losses sustained. This is illustrated by an incident which occurred on 8 August 2013, involving the *Kiani Satu*.³⁶⁶ The wreck posed a hazard to the environment³⁶⁷ but since the shipowners had insurance, a full compensation was made.³⁶⁸ Likewise when the *MV Smart* ran aground on 19 August 2013, the shipowners had insurance to cover the full costs for the wreck removal operation.³⁶⁹ However, when the shipowner maintains inadequate or no insurance cover a financial strain is imposed on the government, because in these instances a shipowner would be willing to abide by the P&I Club rules, however, due to inadequate insurance this becomes difficult.

4.2.4 Inadequate insurance to cover damage to the environment

Demonstrating this position is an incident which occurred on 12 May 2012, involving a Japanese registered ship, the *Eihatsu Maru*, which ran aground in Cape Town.³⁷⁰ Since there was a threat of damage to the marine environment, it was ordered to be removed immediately.³⁷¹ However, since the wreck was not removed within the time specified, SAMSA caused the wreck to be removed in terms of Section 18(1)(b) of the Wreck and Salvage Act but at the shipowner's

³⁶⁴ Section 39 of the SAMSA Act (note 319 above).

³⁶⁵ Section 4(e) of the Marine Pollution (Control & Civil Liability) Act 6 of 1981.

³⁶⁶ 'Now oil from Buffels Bay wreck in estuary' *Times Live* 9 September 2013 available at: <http://www.timeslive.co.za/scitech/2013/09/09/now-oil-from-buffels-bay-wreck-in-estuary>, accessed on 23 September 2013.

³⁶⁷ 'South Africa suffers two shipwrecks' *News Afrique Informations* 13 August 2013 available at: <http://www.afriquejet.com/news/10251-south-africa-suffers-two-shipwrecks.html>, accessed on 23 September 2013.

³⁶⁸ G Davis 'Kiani Satu costs can be recovered' *Eye Witness News* 29 August 2013 available at: <http://ewn.co.za/2013/08/29/Kiani-Satu-costs-can-be-recovered>, accessed on 23 September 2013.

³⁶⁹ K Lancaster 'Smart move to remove oil from ship' *The Mercury* 21 August 2013.

³⁷⁰ J Bester 'Incredible hulk stalks Clifton' available at: <http://www.iol.co.za/news/south-africa/western-cape/incredible-hull-stalks-clifton-1.1295345?ot=inmsa.ArticlePrintPageLayout.ot> 13 May 2012, accessed on 1 July 2013.

³⁷¹ SAPA 'Trawler salvage operations to resume' 15 May 2012 available at: http://www.iol.co.za/news/south-africa/western-cape/rawler-salvage-operations-to-resume-1.1297419#Uj8EQtJ_5Bk, accessed on 1 July 2013.

expense.³⁷² Although the shipowner agreed to cover the removal costs in terms of its insurance, the insurance cover was inadequate for the expenses incurred in the entire wreck removal operation.³⁷³ As such the South African government had to pay the outstanding amounts.³⁷⁴

This account of the recent hazardous wrecks that occurred along South Africa's coastline has demonstrated that there are issues and challenges which need to be addressed in dealing with the result of wrecks along our coastline. Thus, the next section will analyse the existing legal regime in South Africa with a view to highlighting its shortcomings and the need for reform.

4.3 Review of the current legislation governing wreck removal in South Africa

Section 18 of the Wreck and Salvage Act governs the removal of wrecks which occur within the territorial sea.³⁷⁵ The controversial provision relates to Section 18(3) which permits SAMSA to hold the shipowner liable despite abandonment. However, based on the *Seli 1* and *MT Phoenix* incidents discussed above, enforcing this provision is clearly a problem as the shipowner is not held strictly liable for the removal costs incurred. In these incidents the owners overtly expressed their intention to abandon the wrecks³⁷⁶ and despite Section 18(3) they escaped liability. Clearly, there is a gap between the statutory framework and enforcement mechanisms which inevitably imposes a financial strain to the government especially considering the increased costs in marking and removing a wreck.³⁷⁷

From the *Kiani Satu* and the *MV Smart* incidents, it can be seen that insurance is vital to liability regimes and a lack of a proper liability regime can impose financial burdens on the government. Section 18 of the Wreck and Salvage Act does not strictly hold the shipowner liable for removal costs and does not provide any financial assurance for compensation. At the time of the grounding of the *MT Phoenix* the only existing compulsory insurance regime in South Africa

³⁷² Wreck and Salvage Act (note 342 above) Section 18(3).

³⁷³ M Gosling 'Japanese vessel 'not properly manned' *Cape Times* 17 October 2012 available at: http://www.iol.co.za/capetimes/japanese-vessel-not-properly-manned-1.1404771#.Uj8l6NJ_5Bk, accessed on 21 September 2013.

³⁷⁴ H Geldenhuys 'R7m bill as Eihatsu owner ducks' 17 June 2012 available at: http://www.iol.co.za/news/south-africa/western-cape/r7m-bill-as-eihatsu-owner-ducks-1.1320606#.Uj7vJtJ_5Bk, accessed on 1 July 2013.

³⁷⁵ Section 4 of the Maritime Zones Act 15 of 1994.

³⁷⁶ Staniland (note 233 above) 97.

³⁷⁷ Herbet (note 21 above).

was in terms of the outdated CLC, which only applied to tankers if that tanker carried 2000 tons of oil as cargo.³⁷⁸ This legislative framework has been amended, which gives effect to the CLC 1992 by the enactment of the Merchant Shipping (Civil Liability Convention) Bill 20B, 2013, (“Bill 20B”).

The preservation of the marine environment from pollution is integral and is codified under Section 2(1) of the Marine Living Resources Act 18 of 1998. In line with this provision is Section 18(1)(a) of the Wreck and Salvage Act which gives SAMSA the power to direct any wreck to be removed. If there is an environmental threat, for instance where there is an oil spill from the wreck, then the wreck removal order is reinforced by the provisions of the Civil Liability Act, subject to its conditions, which will require the shipowner to maintain insurance.³⁷⁹ Clearly there exists no compulsory regime governing the removal of a wreck which poses a threat to the environment other than by oils or which poses a navigational hazard in South Africa.

The only provision which requires the shipowner to have the wreck removed is specifically where there is a danger to navigation, under Section 74(2) of the National Ports Act 12 of 2005. However, this provision is only applicable to internal waters. Thus, currently there is no specific regulatory regime expressly governing the removal of a wreck where it poses a danger to navigation in the territorial sea. South Africa has experienced wrecks which have posed a danger to navigation and these incidents were governed by the Wreck and Salvage Act which, as noted above, has a problem with enforcement.

In addition to the above gaps in our law, the gap in international law which necessitated the implementation of the Nairobi Convention (as discussed in chapter 2) is reflected in South Africa’s legislation as well. This is because South Africa’s maritime zones are in line with UNCLOS and this is entrenched under the Maritime Zones Act 15 of 1994, (“Zones Act”). Accordingly, SAMSA will not be able to exercise and direct the shipowners of a wreck to have it removed where it occurs in the EEZ because the only powers they have in this zone are in relation to natural resources.³⁸⁰ South Africa has given two international agreements force by

³⁷⁸ Civil Liability Act (note 365 above) Section 13(1).

³⁷⁹ *Ibid*, Section 13(1).

³⁸⁰ Wreck and Salvage Act (note 342 above) Section 18 read with Zones Act (note 376 above) Section 7.

enacting the Marine Pollution (Intervention Act) 64 of 1987.³⁸¹ These agreements are the Intervention Convention and its Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1973. Effectively, these agreements permit measures to be taken if there is a grave and imminent threat of danger to the coastline by drifting oils from a marine casualty on the High Seas.³⁸² Thus, the gap in the legislative framework implies that, if a wreck occurs in the EEZ and even if the contents are drifting, SAMSA will not have the authority to require its removal.³⁸³

Another problem demonstrated from the incidents above relates to places of refuge. This is because the factors that SAMSA considers in order to make its decision to allow the ship entry includes requiring the master to provide sufficient particularity regarding the wreck³⁸⁴ and ensuring that the ship has financial assurance for a possible environmental threat.³⁸⁵ These are the reasons the *Bismihita La* and the *Ikan Tanda* were refused entry, respectively, as noted above.

Thus, the issues raised with regard to the current legislative regime in South Africa pertain to:

1. Imposing strict liability on the shipowner for the removal of wrecks
2. The responsibilities of the shipowner and the affected state
3. Providing a unified legal framework governing wreck removal in South Africa.

Clearly there is a need for reform in South Africa's national legislation³⁸⁶ and the next section will discuss recommendations to address these issues.

³⁸¹ Section 2(1) of the Marine Pollution (Intervention Act) 64 of 1987.

³⁸² Intervention Convention (note 65 above) Article I.

³⁸³ LEG 86/4/1 (note 40 above).

³⁸⁴ Resolution A 949(23) (note 115 above) Item 2.4.

³⁸⁵ *Ibid*, Item 1.4 read with Item 3.11.

³⁸⁶ These problems are very similar to the problems faced in UK as discussed in chapter 3 which led the UK to implement and adopt the Nairobi Convention.

4.4 Recommendation

4.4.1 A way forward for South Africa in terms of the Nairobi Convention

Considering the gaps in South African law regulating wreck removal, it should be clear that South Africa should accede and opt-in to the Nairobi Convention for the reasons set out below.

Firstly, the Nairobi Convention will regulate the position of a wreck occurring in the EEZ, thereby filling the gap in the Zones Act³⁸⁷ and vesting SAMSA with authority to fulfill its duties of ensuring safety at sea.³⁸⁸ In addition to the application of the Convention, and considering the unenforceable provisions of the Wreck and Salvage Act with regard to liability for wreck removal claims,³⁸⁹ South Africa should opt-in,³⁹⁰ thereby allowing the provisions of the Convention to be applicable to the territorial sea. The application of the Convention to the territorial sea will be the “exception” to Section 4(2) of the Zones Act, which states that the laws applicable in South Africa will be applied to the territorial sea.³⁹¹ Since the Convention is silent on how removal should be enforced,³⁹² it will be SAMSA’s task, in consultation with the Department of Transport, to decide the appropriate solution for removal.³⁹³

Secondly, in terms of the Nairobi Convention the problems experienced by the place of refuge incidents, as noted above, will be eradicated and the ship will have a better chance of being granted a place of refuge, thereby preventing further damage to the ship and saving the marine environment from pollution.³⁹⁴ This is because a ship in need of assistance will be regarded as a ‘wreck’ in terms of Article 1(4)(d) of the Nairobi Convention.³⁹⁵ Thus, the objectives contained in Resolution A 949(23) will be fulfilled; for instance, the issue raised in the *Bismihita La* will now be statutorily regulated, requiring the master of any vessel traversing the convention area to report the casualty immediately.³⁹⁶ This entails a detailed description of the wreck,³⁹⁷ which

³⁸⁷ Zones Act (note 376 above) Section 7(2).

³⁸⁸ Section 3 of the SAMSA Act (note 319 above).

³⁸⁹ Wreck and Salvage Act (note 342 above) Section 18(3).

³⁹⁰ Nairobi Convention (note 9 above) Article 3(2).

³⁹¹ Section 4(1) of the Zones Act (note 375 above) states that the territorial sea is measured 12 nautical miles from the baseline.

³⁹² Nairobi Convention (note 9 above) Article 1(7).

³⁹³ Wreck and Salvage Act (note 342 above) Section 18(1).

³⁹⁴ In terms of the objectives listed under Item 1 of Resolution A 949(23) (note 115 above).

³⁹⁵ Discussed on chapter 2 above.

³⁹⁶ Nairobi Convention (note 9 above) Article 5(1).

would enable SAMSA to effectively assess the risks (to South Africa) and benefits (to the ship) for the ship's entry.³⁹⁸

Thirdly, the main reason for acceding to the Nairobi Convention is that the shipowner will be held strictly liable and responsible for having the hazardous wreck removed.³⁹⁹ This will be the case even if the shipowner abandons the wreck⁴⁰⁰ and is enforced by the compulsory insurance provision.⁴⁰¹ Thus by opting-in, the gaps and enforcement issues of holding the shipowner strictly liable, under Section 18(3) of the Wreck and Salvage Act, will be filled thereby absolving the government from further liability, which was the case in the *Seli I* and *MT Phoenix* incidents discussed above. Further, this liability provision assists in the decision making process as to whether a ship seeking refuge should be allowed entry. The *Ikan Tanda* was refused entry because it had insufficient insurance and, as a result of refusal, the ship's cargo caused environmental damage. Thus, if the Convention had been applicable, the subsequent degradation to the environment would have been averted because the shipowner would have been required to maintain adequate insurance and the ship would have been allowed entry.

Thus, closely allied with the strict liability regime is the compulsory insurance provision, which reinforces the liability regime. This is the fourth reason for acceding to the Convention. However, at this point before considering the compulsory insurance provision in terms of the Nairobi Convention, an examination of the application of the existing compulsory insurance regime in light of the other liability Conventions needs to be undertaken. Of the other liability Conventions,⁴⁰² South Africa has only acceded to CLC 1992, which was only given force of law in 2013 with the introduction of the Bill 20B. South Africa has not acceded to the HNS or Bunkers Convention⁴⁰³ and the existing Civil Liability Act gives effect to the 1969 CLC.

This implies that until this Bill becomes an Act of Parliament only tankers carrying cargo of 2000 tons will be required to maintain insurance.⁴⁰⁴ Clearly, this situation is inadequate

³⁹⁷ *Ibid*, Article 5(2), as discussed in chapter 2 above.

³⁹⁸ Resolution A 949(23) (note 115 above) Item 3.10-3.12.

³⁹⁹ Nairobi Convention (note 9 above) Article 1(5) read with Articles 9(2) and Article 10(1).

⁴⁰⁰ *Ibid*, Article 1(4)(d).

⁴⁰¹ *Ibid*, Article 12.

⁴⁰² CLC (note 52 above), HNS Convention (note 98 above) and Bunkers Convention (note 98 above).

⁴⁰³ Status of Conventions (note 25 above).

⁴⁰⁴ According to Clause 10(1) of the Bill 20B, the compulsory insurance provision will now be applied to **any** vessel which carries 2000 tonnes of oil as cargo.

considering that it is not only tankers that traverse South African waters but also container ships which poses a significant hazard in the event of a wreck arising. When the Bill becomes enforced it will require a shipowner of any ship to maintain insurance if his ship carries 2000 tonnes of oil as cargo.⁴⁰⁵ If the ship does not fulfill this condition, then the shipowner will not be required to have insurance and this imposes financial strain on the government, as was evident in the above incidents. However, if the Nairobi Convention is acceded to, the shipowner of any ship over 300 gross tonnage will be required to maintain insurance for wreck removal costs, and this will be covered by a P&I Club insurance. A significant advantage of the compulsory insurance provision⁴⁰⁶ is that it defeats the P&I Club principle of “pay to be paid” and allows a direct claim to be instituted against the shipowner’s P&I Club insurance.⁴⁰⁷ Thus, in the *Seli I* incident, a valid claim would have been lodged against the insurer despite their rule and the South African government would have been able to save the R40 million.

Clearly then, the Nairobi Convention addresses the concerns South Africa faces and it is recommended that South Africa accede to⁴⁰⁸ and opt-in⁴⁰⁹ to the Convention for the reasons set out above. However, accession does not give the Convention force of law in South Africa and it will have to be incorporated into national legislation. This new legislation will have to be consistent with existing legislation. Thus, although the compulsory insurance provision enshrined under Article 12 ensures that costs for wreck removal will be covered, nevertheless, enforcing these provisions will be a problem for two reasons. Firstly, the Convention requires ships over 300 gross tonnage to maintain insurance, yet the Merchant Shipping (Safety Management) Regulation, 2003, (“SMR”), which gives effect to the ISM Code, applies to vessels over 500 gross tonnage; secondly, with regard to the limitation of the shipowners liability, the Nairobi Convention refers to the LLMC, yet South Africa is not a party to this Convention (as discussed in chapter 2). Accordingly, the following section will explore these inconsistencies with a view of providing an opinion in terms of its implementation.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ Nairobi Convention (note 9 above) Article 12(10).

⁴⁰⁷ Hare (note 183 above) 947.

⁴⁰⁸ Nairobi Convention (note 9 above) Article 17(1)(a)(iii).

⁴⁰⁹ *Ibid.*, Article 3(2).

4.4.2 Problems with implementation of the Nairobi Convention

- a. A conflict between the Safety Management Regulation and the Nairobi Convention.

The SMR gives the ISM Code force of law in South Africa⁴¹⁰ in order to ensure safety at sea and to maintain a proper safety management system.⁴¹¹ The inconsistency between the SMR and the Nairobi Convention is that the SMR applies to ships over 500 gross tonnage⁴¹² whilst the compulsory insurance provision applies to ships over 300 gross tonnage.⁴¹³ To ensure that the safety management system is maintained, the SMR should be applicable to ships over 300 gross tonnage, thereby ensuring consistency and safety at sea.

- b. Limitation of the shipowner's liability and the Nairobi Convention.

As discussed in chapter 2, there will be a problem with the implementation of the Nairobi Convention in South Africa in terms of limitation of the shipowner's liability if we opt-in, as we are not a party to the LLMC. Limitation of liability in South Africa is based on the 1957 Convention although we have not ratified this Convention either.⁴¹⁴ As a result, a claim for property damage is limited to "66.67 SDR per ton of the ship's tonnage" but with the advantage of having this limit of the shipowner's liability broken if the claimant proves actual fault or privity on the shipowner, implying that there is a chance that the claimant will be entitled to be compensated for the entire claim as opposed to the statutory limits of liability.⁴¹⁵ These provisions ordinarily will be applicable to a wreck occurring within the territorial sea.⁴¹⁶

Although the Nairobi Convention states that the shipowner is entitled to limit his liability in terms of the higher limits of 1 million SDR per gross tonnage of the ship, contained under the LLMC and Protocol, which is almost unbreakable, this is subject to the national law of the

⁴¹⁰ Constitution (note 359 above) Section 231(4) read with reg 2 of the Merchant Shipping (Safety Management) Regulation, 2003.

⁴¹¹ Article 1.2 of the ISM Code.

⁴¹² SMR (note 410 above) reg 4(1)(b).

⁴¹³ Nairobi Convention (note 9 above) Article 12(1).

⁴¹⁴ Griggs, Williams & Farr (note 176 above) 400. This is because Hare (note 183 above) 518, notes that South Africa's limitation provisions are based on Section 503 of the 1894 UK Merchant Shipping Act, 1894 (which has been repealed), and that Act gave effect to the 1957 Convention.

⁴¹⁵ South African MSA (note 184 above) Section 261(1)(b).

⁴¹⁶ Zones Act (note 375 above) Section 4(2).

affected state.⁴¹⁷ It should be noted that the limitation values under the LLMC ensures that the shipowner maintains adequate insurance at a reasonable premium, since the liability that maybe ensued can be assessed prior to the voyage being undertaken as this is calculated on the gross tonnage of the ship.⁴¹⁸ This has been emphasised in the Nairobi Convention by requiring the shipowner to maintain insurance only to the value of his liability which is in terms of Article 6(1)(b) of the LLMC.⁴¹⁹

Apart from these considerations though, in terms of South Africa's national legislation governing limitation, Hare submits that a claim for removing a wreck is not a claim for property damage,⁴²⁰ but a "statutory debt."⁴²¹ Thus, the provisions regarding limitation for a wreck removal claim will not be governed by the South African MSA.⁴²² In this regard, it should be noted that the LLMC is more embracing, as a wreck removal claim is expressly codified under Article 2(1)(d) of the LLMC and the provisions of Article 6(1)(b) include wreck removal claims. Therefore, since South Africa's limitation provisions will not regulate a wreck removal claim, the LLMC should be applicable.⁴²³ Thus, if a wreck occurs within South Africa's territorial sea, the shipowner will be entitled to limit his liability in terms of the LLMC despite South Africa's not acceding to that Convention.⁴²⁴ In this way, consistency in the application of liability and limitation to liability provisions would be maintained in the territorial sea and the EEZ. Clearly, the advantages of acceding to the Nairobi Convention outweigh the inconsistencies and, as noted above, these inconsistencies may be solved.

As well as acceding to the Convention, South Africa has to incorporate the Convention into national legislation to give it effect.⁴²⁵ Therefore, the next section will provide suggestions regarding how the Convention can be enforced in South Africa.

⁴¹⁷ Wilson (note 166 above) 288.

⁴¹⁸ Travaux (note 53 above) 5.

⁴¹⁹ Nairobi Convention (note 9 above) Article 12(1).

⁴²⁰ South African MSA (note 184 above) Section 261(1)(b).

⁴²¹ Hare (note 183 above) 530; this has been confirmed in Fogarty (note 6 above) 285 where it has been noted that Section 503 of the older UK Merchant Shipping Act, 1894 which is basis of South Africa's MSA states that a claim for wreck removal is a "statutory charge which does not constitute "loss of damage"."

⁴²² South African MSA (note 184 above) Section 261(1)(b).

⁴²³ Hare (note 183 above) 530.

⁴²⁴ Nairobi Convention (note 9 above) Article 10(2) and Article 12(1); Shaw (note 170 above) par 4.

⁴²⁵ Constitution (note 359 above) Section 231(4).

4.4.3 Enforcing the Nairobi Convention

Section 231 of the Constitution of the Republic of South Africa, 1996, empowers Parliament to accede to international treaties. According to Article 17(1) of the Nairobi Convention, the Convention is only left for accession. Therefore, South Africa should accede to the Convention. However, merely acceding to the Convention does not give it force of law and it must be enacted into national law.⁴²⁶ According to Dugard,⁴²⁷ there are three ways in which an international treaty can be implemented into national law, namely:

1. The treaty may be embodied in the text of an Act of Parliament;⁴²⁸
2. The treaty may be included as a schedule to a statute;
3. The treaty may be introduced into municipal law by means of proclamation or notice in the Government Gazette.

Therefore, South Africa should annex the Nairobi Convention as a schedule to the Wreck and Salvage, thereby giving the Convention force of law in South Africa.⁴²⁹ However the Salvage Convention is already an annexure to the Wreck and Salvage Act; therefore, the Nairobi Convention could be annexed as “Schedule B” to the text. In order to avoid inconsistencies in the application of the Convention within the Wreck and Salvage Act, further amendments are necessary to ensure consistency. Thus, the following amendments are suggested:

1. Section 18 should be repealed and replaced by Section 18A for the interpretation of the application of Schedule B.
2. The definition of a ‘wreck,’ under Section 1, should be repealed and referred to Annexure B.
3. Section 18A (1) should allow the provisions of Schedule B to have effect in South Africa.
4. Section 18A (2) should state that the Schedule B will have force of law and apply within the territorial sea and the EEZ (“the convention area”).

⁴²⁶ *Ibid.*

⁴²⁷ Dugard (note 46 above) 61.

⁴²⁸ Constitution (note 359 above) Section 239, defines an “Act of Parliament” as national or sub-ordinate legislation.

⁴²⁹ *Ibid*, Section 231(4).

5. Section 18A (3) should provide a jurisdictional clause for the implementation of wreck removal claims which occur in the convention area and this court should be the High Court exercising admiralty jurisdiction.
6. Section 18A (4) should define the “affected state” as SAMSA, thereby allowing SAMSA to discharge the affected state’s obligations in terms of Schedule B.
7. Section 18A (5) should permit the application of the Nairobi Convention to warships.⁴³⁰
8. With regard to the penalties, as stated under Section 22, a provision should be inserted for failing to comply with the duties imposed under the Nairobi Convention. This should be codified as Section 22A. With the regard to the penalties the following are suggested:

The shipowner or the master and operator will be guilty of an offence and liable on conviction to a fine not exceeding R250 000,⁴³¹ if they fail to fulfill their duties as follows:

- a. The shipowner will be guilty if he fails to comply with:
 - i. Article 9(4), or
 - ii. Article 9(6);
- b. The master and operator will be guilty if he fails to comply with:
 - i. Article 5, or
 - ii. Article 12;

of the Schedule B.

In addition to ensuring compliance with the Nairobi Convention, South Africa will be able to institute proceedings *in rem* or *in personam* against an associated ship of the wreck where the wreck removal costs are not fulfilled.⁴³² Furthermore, if an associated ship is arrested and sold in terms of Section 9 of AJRA to recoup the wreck removal costs, Section 11(5)(b) of the AJRA

⁴³⁰ Since Article 4(2) of the Nairobi Convention excludes the provisions to warships as discussed in chapter 2, pages 26-29.

⁴³¹ Imposing criminal sanctions is similar to the manner in which the UK enforced the Nairobi Convention in its national law, in terms of the Wreck Act, as discussed in chapter 3. The reason why this amount is applicable is because it is in line with Clause 11(1) of Bill 20B (note 404 above).

⁴³² In terms of Sections 1(1)(e), (z) or (ee) read with Section 2, 3(4) and Sections 3(6) and (7) of AJRA. Effectively all these provisions read together implies that a wreck removal claim is a maritime claim and an admiralty action can be sought. Furthermore, the claimant will be entitled to institute proceedings against another ship which is owned or controlled by the guilty party (in this case it would be the owner of the ship which is now a wreck).

ranks the wreck removal cost claim above all the other maritime claims listed under Section 11(4) of the AJRA.

Therefore, although the UK has imposed criminal sanctions in the event of non-compliance with the Nairobi Convention (merely as a safety precaution since the Nairobi Convention ensures adequate financial guarantee, as discussed in chapter 3), South Africa's existing national laws ensures complete enforcement of the Nairobi Convention by virtue of the extended arrest provisions under the AJRA. Thus, it provides assurance for recouping the expenses incurred in the wreck removal operation.

4.5 Conclusion

An examination of the current legislative framework governing wreck removal in South Africa was undertaken in this chapter revealing the inconsistency in its application and clear problems relating to enforcement, inevitably leaving the government liable for the exorbitant costs. However, the solutions to these problems have been addressed internationally and, despite the possible inconsistencies in the application thereof, it is recommended that South Africa should accede, opt-in and adopt the Nairobi Convention, as per the recommendations made above.

CHAPTER 5: CONCLUSION

The aim of this dissertation was to assess South Africa's legislation with regard to liability for wreck removal claims. This specific issue is addressed internationally by the Nairobi Convention, introduced by the IMO. However, the Convention is not yet in force and South Africa has not acceded to it. Thus, it is important to determine the adequacy of the current legislative framework in South Africa and whether South Africa should accede to it. Accordingly, this chapter will examine whether the proposed recommendations made in chapter 4 will assist wreck removal claims in future.

Chapter 2 provided an analysis of the provisions of the Nairobi Convention and it should be noted that in terms of the Convention, certainty in holding the shipowner strictly liable of having a wreck removed is attained. This is achieved by the compulsory insurance provision, which also permits the affected state to claim from the shipowner's P&I Club directly which defeats the P&I Club principle.⁴³³ This measure assures and guarantees the shipowner's liability despite abandonment of the wreck but this enforcement measure is clearly lacking in South Africa's legislation, as discussed in chapter 4.

Our laws regulate wreck removal in terms of Section 18 of the Wreck and Salvage Act, and this section fails to hold the shipowner strictly liable. It should be noted that if the Nairobi Convention was applicable to the territorial sea, in terms of Article 3(2) of the Convention, the South African government would have been able to recover the claims for the wreck removal operations of the incidents mentioned in chapter 4 from the shipowners or their insurers directly. In the *Seli 1* incident, SAMSA would have had a direct claim against the shipowners Russian P&I Club despite the shipowner's abandoning the wreck.⁴³⁴ In the *MT Phoenix* incident, the shipowners would have been easily identifiable,⁴³⁵ since the Nairobi Convention requires an insurance certificate with the details of the shipowner are to be carried on board every ship traversing a contracting state's convention area;⁴³⁶ in this way the shipowner is held strictly

⁴³³ Nairobi Convention (note 9 above) Article 12(10).

⁴³⁴ Gosling (note 334 above).

⁴³⁵ Cole & Pillay (note 342 above).

⁴³⁶ Nairobi Convention (note 9 above) Article 12(5).

liable for the costs incurred. If these measures had been taken, it would have saved the government a total sum of R79 million from just these two incidents. Clearly reform is required.

Chapter 3 examined the manner in which the Convention was adopted and implemented by one of the contracting states, the UK. The UK has acceded to the Convention, opted-in and adopted the text into its national law. In addition, to enforce compliance, criminal sanctions have been imposed. These implementation measures should persuade South Africa to follow suit, considering that the incidents which led the UK to affect the changes to its wreck removal legislation are similar to the incidents experienced in South Africa, as discussed in chapters 3 and 4 above. Accordingly, it will be in the best interests of sustaining financial growth in South Africa if the recommendations suggested in chapter 4 are adhered to. Essentially these include South Africa's acceding to the Convention,⁴³⁷ thereby allowing the Convention to become closer to achieving its enforcement target of 10 signatories,⁴³⁸ opting-in⁴³⁹ and adopting the Convention as Schedule B to the Wreck and Salvage Act.⁴⁴⁰

The proposed amendments reflected in this dissertation would, if carried out, complement Transnet's projects. For instance, 2012 saw the first largest ship entering the Durban port. The *MSC Solar* is a 131 771 gross ton ship capable of carrying 11 660 containers. It was accommodated because of Transnet's first completed project of widening and deepening the Durban port thereby allowing a ship of this size entry.⁴⁴¹ Accommodating ships of such size has implications for possible wreck removal. The cost for the wreck removal operation in 2012, of the 114 147 gross ton ship, the *Costa Concordia*, totaled \$1 billion.⁴⁴² If this wreck had occurred in South African waters and the shipowner had abandoned the wreck, the South African government would have had to carry the financial burden. Ships larger than this size, which are currently being constructed and which form part of the Maersk liner built to carry 18 000 twenty-

⁴³⁷ *Ibid*, Article 17(1)(a)(iii).

⁴³⁸ *Ibid*, Article 18.

⁴³⁹ *Ibid*, Article 3(2).

⁴⁴⁰ Section 231(4) of the Constitution (note 359 above).

⁴⁴¹ SAPA 'Largest container ship in SA docks in Durban' *News 24* 5 July 2012 available at: <http://www.news24.com/SouthAfrica/News/Largest-container-ship-in-SA-docks-in-Durban-20120705>, accessed on 25 September 2013.

⁴⁴² M Kelleher 'Removal of wrecks-an increasing challenge for insurers' *IUMI London 2013* available at: http://www.iumi.com/images/gillian/London2013/Tuesday1709/170913B2AMM.Kelleher_FINAL.pdf, accessed on 21 November 2013.

foot equivalent shipping containers, will be accommodated in Durban due to Transnet's new Dig-Out Port Project.⁴⁴³

The Durban Dig-Out Port Project is aimed at constructing a new port in Durban capable of accommodating larger container ships.⁴⁴⁴ This project was initiated with the aim of creating the largest deep water port in Africa.⁴⁴⁵ A deeper port will be able to accommodate the Maersk liner ships as there is a demand for containerised cargo in Durban.⁴⁴⁶ With these developments in the maritime industry, the legislative framework should meet these innovations bearing in mind that every ship is a potential wreck.⁴⁴⁷ Thus, effective measures for financial growth is required, especially if a reoccurrence of the *Seli I* or *MT Phoenix* were to happen. Evidently, there is a need for reform in line with the Nairobi Convention.

Not only will opting-in to the Nairobi Convention ensure consistent application with regard to liability for a wreck removal operation in the EEZ and the territorial sea, it will ensure that South Africa's national laws are adequately enforced and that full compensation for damage incurred will be assured. Clarity in the rights and obligations as well as in the liability of the shipowner will be maintained, thereby creating certainty with regard to wreck removal claims. South Africa's laws regarding wreck removal would then be of international standard and in uniformity with one of our major international trading partners, the UK. Uniformity establishes harmonisation and consistency which is always the objective of the creation of international conventions.⁴⁴⁸

⁴⁴³ 'Maersk's mega ships mean massive opportunities for marine insurance' 12 January 2012 *Etana Insurance* available at: <http://www.etana.co.za/news/entry/maersks-mega-ships-mean-massive-opportunities-for-marine-insurance>, accessed on 21 November 2013.

⁴⁴⁴ 'Proposed Durban Dig-Out Port: Discussion Document' *Transnet* February 2013, 5 available at: http://www.sahra.org.za/sites/default/files/additionaldocs/DDOP_Discussion%20Document_FINAL_2013-02-13.pdf, accessed on 28 September 2013.

⁴⁴⁵ T Creamer 'Transnet begins public consultations on proposed dig-out port' 17 April 2013, available at: <http://www.engineeringnews.co.za/article/transnet-begins-public-consultations-on-proposed-dig-out-port-2013-04-17>, accessed on 16 November 2013.

⁴⁴⁶ M Descoins 'Increasing South Africa's Economic Potential' 6 May 2013, 1 available at: http://kzntopbusiness.co.za/site/south-african-news/view/5827/1271/2013/05/06/Increasing_South_Africas_Economic_Potential/print/, accessed on 19 November 2013.

⁴⁴⁷ H Staniland 'Admiralty Jurisdiction over wrecks' (1991) 108 *SALJ* 594, 597.

⁴⁴⁸ 'Promoting Maritime Treaty Ratification' available at: <http://www.ics-shipping.org/PromotingMaritimeTreatyRatification.pdf>, accessed on 2 July 2013.

By effecting these recommendations South Africa would be in a better position to adequately address liability for the removal of hazardous wrecks in our waters. With a proper legislative system in place, expeditious removal of wrecks would be achieved, thereby reducing further degradation to the environment. The Nairobi Convention proves to be a remarkable document of rules and fills the gap in international and national law. Once it enters into force it will provide the foundation for the regulation of wreck removal. This new legislative regime will meet the corresponding transformations in the development of the new Port as envisaged by the Durban Dig-Out Port Project. Therefore, to enhance and improve the South African economy it is imperative that Parliament addresses wreck removal as a matter of urgency.

BIBLIOGRAPHY:

1. Table of Statutes

1.1 International Conventions

- 1.1.1 Convention on the Limitation of Liability for Maritime Claims, 1976.
- 1.1.2 International Convention for the Prevention of Pollution from Ships, 1973.
- 1.1.3 International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001.
- 1.1.4 International Convention on Civil Liability for Oil Pollution Damage, 1969.
- 1.1.5 International Convention on Civil Liability for Oil Pollution Damage, 1992.
- 1.1.6 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (not yet in force).
- 1.1.7 International Convention on Salvage, 1989.
- 1.1.8 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.
- 1.1.9 International Convention on Tonnage Measurement of ships, 1969.
- 1.1.10 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969.
- 1.1.11 International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships, 1957.
- 1.1.12 International management code for the state operation of ships and for pollution prevention, 2002.
- 1.1.13 International Regulations for Preventing Collisions at Sea, 1972.
- 1.1.14 Nairobi International Convention on the Removal of Wrecks, 2007 (not yet in force).
- 1.1.15 Protocol of 1996 to amend the Limitation of Liability for Maritime Claims.
- 1.1.16 Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1973.
- 1.1.17 UNESCO Convention on the Protection of the Underwater Cultural Heritage, 2001.
- 1.1.18 United Nations on the Convention on Law of the Sea, 1982.

1.2 National Legislation

1.2.1 United Kingdom National Legislation

- i. Marine Navigation Act, 2013 available at:
<http://www.legislation.gov.uk/ukpga/2013/23/enacted/data.pdf>, accessed on 16 November 2013.
- ii. Merchant Shipping Act 1995, available at:
<http://www.legislation.gov.uk/ukpga/1995/21/data.pdf>, accessed on 20 September 2013.

- iii. Wreck Removal Convention Act 2011, available at:
<http://www.legislation.gov.uk/ukpga/2011/8/data.pdf>, accessed on 20 September 2013.
- iv. Wreck Removal Convention Bill 144, 2011, available at:
<http://www.publications.parliament.uk/pa/bills/cbill/2010-2011/0144/2011144.pdf>, accessed on 18 September 2013.

1.2.2 South African National Legislation, Regulations and Bills

- i. Admiralty Jurisdiction Regulation Act 105 of 1983.
- ii. Constitution of the Republic of South Africa, 1996.
- iii. Marine Living Resources Act 18 of 1998.
- iv. Marine Pollution (Control & Civil Liability) Act 6 of 1981.
- v. Marine Pollution (Intervention Act) 64 of 1987.
- vi. Marine Traffic Act 2 of 1981.
- vii. Marine Traffic Regulations in GN 9575 of 1 February 1985.
- viii. Maritime Zones Act 15 of 1994.
- ix. Merchant Shipping Act 57 of 1951.
- x. Merchant Shipping (Civil Liability Convention) Bill 20B, 2013.
- xi. Merchant Shipping (Safety Management) Regulations, 2003.
- xii. National Environmental Management Act 107 of 1998.
- xiii. National Heritage Resources Act 25 of 1999.
- xiv. National Ports Act 12 of 2005.
- xv. South African Maritime Safety Authority Act 5 of 1998.
- xvi. Wreck and Salvage Act 94 of 1996.

2. **Table of Legal instruments**

2.1 IMO Legal Documents

- 2.1.1 ‘Adoption of the Rules of Procedure’ *IMO* 5 October 2009 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&titles=International%20Conference%20on%20the%20Revision%20of%20the%20HNS%20Convention&datatype=last&documentlang=en&cid=1>, (LEG/CONF.17/INF.2), accessed on 31 August 2013.
- 2.1.2 ‘AIS transponders’ *IMO* available at:
<http://www.imo.org/OurWork/Safety/Navigation/Pages/AIS.aspx>, accessed on 16 November 2013.
- 2.1.3 ‘Background’ available at
<http://www.imo.org/OurWork/Environment/PollutionPrevention/OilPollution/Pages/Background.aspx>, accessed on 31 August 2013.
- 2.1.4 ‘Draft Convention on Wreck Removal’ *IMO* 16 September 2002 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2085%2F3%2F2&datatype=last&documentlang=en&cid=1>, (LEG 85/3/2), accessed on 8 September 2013.

- 2.1.5 'Draft Convention on Wreck Removal-Experience of *An Tai* incident' *IMO* 14 September 2001 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2083%2F5%2F2&datatype=last&documentlang=en&cid=1>, (LEG 83/5/2), accessed on 8 September 2013.
- 2.1.6 'Draft Convention on Wreck Removal-The mandate of IMO to regulate the coastal State intervention powers in the EEZ' *IMO* 27 March 2003 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2086%2F4%2F1&datatype=last&documentlang=en&cid=1>, (LEG 86/4/1), accessed on 8 September 2013.
- 2.1.7 'Draft Convention on Wreck Removal-The Relationship between the Draft Wreck Removal Convention (DWRC) and the Intervention Convention' *IMO* 17 September 2002 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2085%2F3%2F1&datatype=last&documentlang=en&cid=1>, (LEG 85/3/1), accessed on 8 September 2013.
- 2.1.8 'Guidelines on Places of Refuge for ships in need of assistance' *IMO* 5 March 2004 available at:
http://www.imo.org/blast/blastDataHelper.asp?data_id=9042&filename=949.pdf (Resolution A 949(23)), accessed on 24 September 2013.
- 2.1.9 'IMO/UNEP Forum on regional arrangements for co-operation in combating marine pollution incidents 30 September-2 October 2002' *IMO* 9 May 2003 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&titles=IMO%2FUNEP%20Forum%20on%20regional%20arrangements%20for%20co-operation%20in%20combating%20marine%20pollution%20incidents&datatype=last&documentlang=en&cid=1>, (MEPC 49/Inf.20), accessed on 1 September 2013.
- 2.1.10 'Improving safety at sea is conducted by enforcing rules, done by the Imo' available at: <http://www.imo.org/About/HistoryOfIMO/Pages/Default.aspx>, accessed on 16 November 2013.
- 2.1.11 'Introduction' *IMO* available at:
<http://www.imo.org/About/Conventions/Pages/Home.aspx>, accessed on 31 August 2013.
- 2.1.12 'Legal Matters' *IMO* available at:
<http://www.imo.org/OurWork/Legal/Pages/Default.aspx>, accessed on 31 August 2013.
- 2.1.13 'Marine environment' available at
<http://www.imo.org/OurWork/Environment/Pages/Default.aspx>, accessed on 31 August 2013.
- 2.1.14 'Maritime Safety' *IMO* available at:
<http://www.imo.org/OurWork/Safety/Pages/Default.aspx>, accessed on 31 August 2013.
- 2.1.15 'Nairobi International Convention on the Removal of Wrecks' *IMO* available at:
<http://www.imo.org/About/Conventions/ListOfConventions/Pages/Nairobi->

International-Convention-on-the-Removal-of-Wrecks.aspx, accessed on 31 August 2013.

- 2.1.16 'Places of Refuge' *IMO* 14 February 2003 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&titles=Places%20of%20Refuge&datatype=last&documentlang=en&cid=1>, (MSC 77/8/2), accessed on 8 September 2013.
- 2.1.17 'Places of Refuge' *IMO* 24 September 2004 available:
<http://docs.imo.org/Search.aspx?mode=advanced&symbol=leg%2089%2F7%2F1&datatype=last&documentlang=en&cid=1>, (LEG 89/7/1), accessed: on 8 September 2013.
- 2.1.18 'Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976-Extension to the Baliwick of Guernsey by the United Kingdom' *IMO* (LLMC.3/Circ.38) 12 June 2013 available at:
<http://docs.imo.org/Category.aspx?cid=303>, accessed on 16 November 2013.
- 2.1.19 'Report of the Legal Committee on the work of its Eighty-seventh session' *IMO* 23 October 2003 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&symbol=LEG%2087%2F17&datatype=last&documentlang=en&cid=1>, (LEG 87/17), accessed on 31 August 2013.
- 2.1.20 'Report of the Legal Committee on the Work of its Seventy-Eighth Session' *IMO* 2 November 1998 available at:
<http://docs.imo.org/Search.aspx?mode=advanced&symbol=leg%2078%2F11&datatype=last&documentlang=en&cid=1>, (LEG 78/11), accessed on 8 September 2013.
- 2.1.21 'Status of Conventions as at 7 November 2013' *IMO* available at:
<http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Status%20-%202013.pdf>, accessed on 16 November 2013.

2.2 ITOPF/IOPC Fund Legal Documents

- 2.2.1 'Compensation and Claims Management' available at:
<http://www.iopcfunds.org/compensation/>, accessed on 1 September 2013.
- 2.2.2 'Incidents involving the IOPC Funds 2012' *IOPC Funds* available at:
http://www.iopcfunds.org/uploads/tx_iopcpublishations/incidents2012_e.pdf, accessed on 1 September 2013.
- 2.2.3 'The International Tanker Owners Pollution Federation Limited' available at:
<http://www.itopf.com/spill-compensation/other-maritime-conventions/#Nairobi>, accessed on 4 July 2013.

2.3 CMI Legal Documents

- 2.3.1 De Boer JE 'The Nairobi Perspective: Nairobi International Convention on the Removal of Wrecks, 2007' *CMI Yearbook 2007-2008 Annuaire* available at:
<http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202007-2008.pdf>, accessed on 6 September 2013.

- 2.3.2 Griggs P ‘Draft Convention’ *CMI Yearbook 2005-2006 Annuaire* available at: http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2005_2006.pdf, accessed on 6 September 2013.
- 2.3.3 ‘The compatibility of the Draft Convention on Wreck Removal with existing Maritime Conventions’ *CMI Yearbook 2004 Annuaire* available at: http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2004.pdf, accessed on 6 September 2013.
- 2.3.4 ‘The Travaux Preparatoire of the LLMC Convention, 1976 and of the Protocol of 1996’ *CMI* available at: <http://www.comitemaritime.org/Uploads/Publications/Travaux%20Preparatoire%20of%20the%20LLMC%20Convention%201976%20and%20of%20the%20Protocol%20of%201996.pdf>, accessed on 6 September 2013.
- 2.3.5 Van Hooydonk E ‘The Obligation to Offer a Place of Refuge to a Ship in Distress’ *CMI Yearbook 2003 Annuaire* available at: http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2003.pdf, accessed on 6 September 2013.

2.4 Other Legal Documents and academic references

- 2.4.1 Bennett O ‘Wreck Removal Convention Bill 2010-11’ 17 March 2011 available at: <http://www.parliament.uk/briefing-papers/SN05887>, accessed on 14 September 2013.
- 2.4.2 Bolomini D ‘The Nairobi International Convention on the Removal of Wrecks, 2007’ *The Lloyd Shipping Law Centre* 3 October 2007 available at: http://www.shippinglbc.com/content/uploads/members_documents/Lecture%20notes_WRC_03.10.07.pdf, accessed on 6 September 2013.
- 2.4.3 Etkin DS ‘Magnitude of the Potentially-Polluting Shipwreck Problem’ *NAMEPA Environmental Intelligence in Shipping Seminar San Francisco, California* 9 March 2010 available at: http://www.namepa.net/Downloads/events/san_fran_seminar_presentations/Wreck%20Oil/Etkin%20Presentation%20NAMEPA%20SF%203-9-10.pdf, accessed on 20 May 2013.
- 2.4.4 Gauthier “‘Ships on the Rocks’ The Nairobi International Convention on the Removal of Wrecks, 2007’ 2008, available at: www.tc.gc.ca, accessed on 7 July 2013.
- 2.4.5 Glass D ‘Relocation of the WW1 U-Boat wreck in Dover Strait’ July 2008 available at: http://www.dft.gov.uk/mca/ub38_story_07_08.pdf, accessed on 11 September 2013.
- 2.4.6 ‘Guidance on dealing with abandonment of ships on land or in ports’ available at: <http://www.basel.int/Portals/4/Basel&20Convention/docs/ships/abandonment/GuidanceOnDealingWithAbandonmentOfShips.English.pdf>, accessed on 4 July 2013.
- 2.4.7 Hare J ‘The International Oil Pollution (IOPC) Fund’ 8 June 2012 available at: www.uctshiplaw.com, accessed on 30 September 2013.
- 2.4.8 ‘Hazard Evaluation Procedure for Chemical Substances Carried by Ships’ *GESAMP Reports and Studies No. 64*, available at:

- www.dft.gov.uk/mca/gesamp_r_s_64_final_and_study_35.pdf, accessed on 18 September 2013.
- 2.4.9 Herbert J 'Lloyds: The challenges and implications of removing shipwrecks in the 21st century' (2013) available at:
<http://www.lloyds.com/~media/lloyds/reports/emerging%20risk%20reports/wreck%20report%20final%20version%20aw.pdf>, accessed on 14 May 2013.
- 2.4.10 International Chamber of Shipping 'International Shipping Lifeblood of World Trade' available at: www.ics-shipping.org/icsfilm.htm, accessed on 8 September 2013.
- 2.4.11 Jones T 'The world of carriage of goods by sea' *LLM in Maritime Law-2013 Carriage of Goods by Sea* [lecture 1] 23 July 2013.
- 2.4.12 Kelleher M 'Removal of wrecks-an increasing challenge for insurers' *IUMI London 2013* available at:
http://www.iumi.com/images/gillian/London2013/Tuesday1709/170913B2AMM.Kelleher_FINAL.pdf, accessed on 21 November 2013.
- 2.4.13 Khosla K 'Shipowners' Liabilities under the Wreck Removal Convention' *The Lloyd Shipping Law Centre* 3 October 2007, available at:
http://www.shippinglbc.com/content/uploads/members_documents/Lecture%20notes_WRC_03.10.07.pdf, accessed on 6 September 2013.
- 2.4.14 'Marine Accident Report 3/98: MV Cita' *Marine Accident investigation Branch* available at:
http://www.maib.gov.uk/cms_resources.cfm?file=/cita_pub_1998.pdf, accessed on 18 September 2013.
- 2.4.15 Michel J ... *et al* 'Potentially Polluting Wrecks in Marine Waters' 2005 *International Oil Spill Conference* 14 available at: http://www.environmental-research.com/erc_reports/ERC_report_16.pdf, accessed on 2 July 2013.
- 2.4.16 'MSC Napoli incident: The Maritime and Coastguard Agency's response' *Maritime and Coastguard Agency*, available at: http://www.dft.gov.uk/mca/197-299_napoli_report_final-redux.pdf, accessed on 13 September 2013.
- 2.4.17 Papadimitriou E 'Parliamentary Assembly – The environmental impact of sunken shipwrecks' 20 January 2012 available at:
<http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=13079&Language=EN>, accessed on 14 May 2013.
- 2.4.18 'Promoting Maritime Treaty Ratification' available at: <http://www.ics-shipping.org/PromotingMaritimeTreatyRatification.pdf>, accessed on 2 July 2013.
- 2.4.19 'Report on the wreck of the SS Richard Montgomery' *Maritime Coastguard Agency* November 2000 available at:
http://www.dft.gov.uk/mca/2000_survey_report_montgomery.pdf, accessed on 18 September 2013.
- 2.4.20 'Special Drawing Rights (SDRs)' available at:
<http://www.imf.org/external/np/exr/facts/sdr.htm>, accessed on 16 November 2013.
- 2.4.21 'Shipping Strategic Partnership' *Maritime UK* 9 September 2013 available at:
www.gov.uk/government/uploads/system/uploads/attachment_data/file/237319/sspp-booklet.pdf, accessed on 13 September 2013.
- 2.4.22 Shaw R 'Introduction to the Nairobi Wreck Removal Convention' *The Lloyd Shipping Law Centre* 3 October 2007 available at

- http://www.shippinglbc.com/content/uploads/members_documents/Lecture%20notes_WRC_03.10.07.pdf, accessed on 6 September 2013.
- 2.4.23 'The Draft Navigation Bill-Ninth Report of Session 2007-08' *House of Commons-Transport Committee*, 16 July 2008 available at:
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtran/709/70909.htm#a24> accessed on 14 September 2013.
- 2.4.24 'The Shipwreck Jacob Luckenbach' *National Oceanic & Atmospheric Administration* available at:
sanctuaries.noaa.gov/maritime/expeditions/luckenbach.html, accessed on 15 September 2013.
- 2.4.25 'Wreck Oil Removal Program (WORP) 2009 Demonstration Project Overview' available at: www.mlaus.org, accessed on 15 September 2013.
- 2.4.26 'Wreck Removal Convention Act 2011-Explanatory Notes' available at:
<http://www.legislation.gov.uk/ukpga/2011/8/notes/division/4/1/data.pdf>, accessed on 14 September 2013.
- 2.4.27 'Wreck Removal Convention Act 2011-Section 255G' available at:
<http://www.legislation.gov.uk/ukpga/2011/8/notes/division/4/1/7>, accessed on 14 September 2013.
- 2.4.28 'Wreck Removal Convention Bill *Explanatory note*' *House of Commons* 21 March 2011 available at: <http://www.publications.parliament.uk/pa/bills/lbill/2010-2011/0059/en/2011059en.pdf>, accessed on 18 September 2013.
- 2.4.29 'Wreck Removal Convention Bill-Public Bill Committee' 7 February 2011 available at:
<http://www.publications.parliament.uk/pa/cm201011/cmpublic/wreckremovalconvention/110207/pm/110207s01.htm>, accessed on 14 September 2013.
- 2.4.30 'Wreck Removal Convention-Committee on Transport Ninth Report' *Parliament* 19 July 2008 available at:
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtran/709/70909.htm>, accessed on 18 September 2013.
- 2.4.31 'Wreck Removal Convention-Committee on Transport Ninth Report' *Parliament* 19 July 2008, available at:
<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmtran/709/70910.htm>, accessed on 18 September 2013.
- 2.4.32 'Wreck Removal Convention Bill-Explanatory Notes' (Session 2010-11) 23 March 2011, available at:
<http://www.publications.parliament.uk/pa/bills/lbill/2010-2011/0059/en/2011059en.htm>, accessed on 18 September 2013.

3. Table of Books

3.1 International

- 3.1.1 Bates JH & Benson C *Marine Environment Law* Service Issue No. 15 (Lloyd's of London Press Ltd: London, 2000).
- 3.1.2 Bennett H *The Law of Marine Insurance* 2 ed (New York: Oxford University Press, 2006).

- 3.1.3 De La Rue C & Anderson CB *Shipping and the Environment* (London: LLP Reference Publishing, 1998).
- 3.1.4 Devanney J *The Tankership Tromedy-The Impeding Disasters in Tankers* 2 ed (Florida: The CTX Press, 2006) available at: <http://www.c4tx.org/ctx/pub/tromedy2.pdf>, accessed on 1 September 2013.
- 3.1.5 Fogarty ARM *Merchant Shipping Legislation* 2 ed (London: Informa Professional, 2004).
- 3.1.6 Griggs P, Williams R & Farr J *Limitation of Liability for Maritime Claims* 4 ed (London: Informa Professional, 2005)
- 3.1.7 Van Hooydonk E *Places of Refuge* (London: Lloyd's List, 2010).
- 3.1.8 Wilson JF *Carriage of Goods by Sea* 7ed (Pearson Education Limited: England, 2010).

3.2 Chapters in books

- 3.2.1 Nesterowicz MA 'The application of the Environmental Liability Directive to damage caused by pollution from ships,' F. D Rose (ed) *Lloyd's Maritime and Commercial Law Quarterly* (2007).

3.3 South African

- 3.3.1 Hare J *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (Kenwyn: Juta & Co, 2009).
- 3.3.2 Dugard J *International Law: A South African Perspective* 3 ed (Cape Town: Juta & Co. Ltd, 2008).
- 3.3.3 Soni R. *Control of Marine Pollution in International Law* (Cape Town: Juta & Co. Ltd, 1985).
- 3.3.4 Staniland H *The Law of South Africa* first reissue (Durban: Butterworths, 1993).

4. Table of Articles

4.1 Journal Articles

- 4.1.1 Anderson CB 'Marine Pollution and the "Polluter Pays" Principle: Should the Polluter also Pay Punitive Damages?' (2012) 43 *JMLC* 43.
- 4.1.2 Forrest C 'Culturally and environmentally sensitive sunken warships' *Australian & New Zealand Maritime Law Journal* 2012 (26) 80 available at <https://maritimejournal.murdoch.edu.au/index.php/maritimejournal/article/view/181>, accessed on 4 May 2013.
- 4.1.3 Henderson LE 'The Wreck Act Duties to Mark and Remove' (1990) 21 *JMLC* 417.
- 4.1.4 Holloway P 'Liability for marine pollution and South Africa's Prevention Regime, including the policy on Places of Refuge' unpublished paper, 1 November 2012.

- 4.1.5 Kopacz Z, Morgaś Z & Urbanski J 'The Maritime Safety System, its Main Components and Elements' (1999) 54 *Journal of Navigation* 199, available at http://journals.cambridge.org/download.php?file=%2FNAV%2FNAV54_02%2FS0373463301001205a.pdf&code=fe2aeb1990da0dfa0efbe7a12d05dd39, accessed on 23 September 2013.
- 4.1.6 Scowcroft JC 'Wreck Removal: An overview and Recent Developments' (1985) 16 *JMLC* 311.
- 4.1.7 Shaw R 'The Nairobi Wreck Removal Convention' (2007) 13 *JIML* 429.
- 4.1.8 Sharfman J, Boshoff J and Parthesius R 'Maritime and Underwater Cultural Heritage in South Africa: The Development of Relevant Management Strategies in the Historical Maritime Context of the Southern Tip of Africa' (2012) 7 *Journal Maritime Archeology* 87.
- 4.1.9 Staniland H 'Admiralty Jurisdiction over wrecks' (1991) 108 *SALJ* 594.
- 4.1.10 Todd P 'Shipping Law' Merkin R (ed) *Journal of Business Law* (2009) 203, 206 available at: http://www.sweetandmaxwell.co.uk/catalogue/edownloadaddoc.aspx?sapmaterialnum=7128&filename=476_2009131_41915.pdf&fileserver=EPIC, accessed on 4 July 2013, 203.
- 4.1.11 Utton AE 'Protective Measures and the "Torrey Canyon"', (1968) 9 (3) *Boston College Law Review* 613 available at: <http://lawdigitalcommons.bc.edu/bclr/vol9/iss3/4>, accessed on 31 August 2013.
- 4.1.12 Xu J 'The public law framework of ship-sourced oil pollution' (2007) 13 *JIML* 416.

4.2 Other Articles

4.2.1 International newspaper articles

- i. Hamer M 'Why wartime wrecks are slicking time bombs' *New Scientist* 7 September 2010 available at: <http://www.newscientist.com>, accessed on 15 September 2013.
- ii. 'In detail: The Sea Empress disaster' available at: <http://news.bbc.co.uk>, accessed on 20 September 2013.
- iii. 'News of the Lagik' *Sutton Bridge* available at: www.suttonbridge.eshire.net, accessed on 18 September 2013.
- iv. 'Now oil from Buffels Bay wreck in estuary' *Times Live* 9 September 2013 available at: <http://www.timeslive.co.za/scitech/2013/09/09/now-oil-from-buffels-bay-wreck-in-estuary>, accessed on 23 September 2013.
- v. NSW Heritage Officer 'Bega Shipwreck 1908' available at: <http://www.environment.nsw.gov.au/resources/heritagebranch/maritime/bega1908.pdf>, accessed on 28 April 2013.
- vi. Rosenburg J 'Munitions found on the Lusitania' *20th Century History* available at: <http://histroy1900s.about.com>, accessed on 11 September 2013.

- vii. Sert G ‘The Recovery of Radioactive Sources abler a Shipwreck the case of the Mont-Louis Cargo and the implications of the M.S.C Carla’ available at: <http://www.iaea.org/About/Policy/GC/GC42/SciProg/gc42-scifor-8.pdf>, accessed on 6 September 2013.
- viii. Simpson AC ‘The Torrey Canyon Disaster and Fisheries’ *Laboratory Leaflet No. 18* February 1968 available at: <http://www.cefas.co.uk/publications/lableaflets/lableaflet18.pdf>, accessed on 31 August 2013.
- ix. ‘SOS: Shipwreck removal is costly’ 22 March 2013 available at: <http://www.allaboutshipping.co.uk/2013/03/22/sos-shipwreck-removal-is-costly/>, accessed on 14 May 2013.
- x. Steve H ‘Steve Maritime Disaster Pages “The MV Lagik”’ available at <http://stevesmaritime.com/lagik.html>, accessed on 20 September 2013.
- xi. Steve H ‘Steve Maritime Disaster Pages “The Tricolor”’ available at <http://stevesmaritime.com/tricolor.html>, accessed on 20 September 2013.

4.2.2 South African newspaper articles

- i. Bester J ‘Incredible hulk stalks Clifton’ 13 May 2012 available at: <http://www.iol.co.za/news/south-africa/western-cape/incredible-hull-stalks-clifton-1.1295345?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 1 July 2013.
- ii. Carnie T ‘Cover-up claim over Jolly Rubino wreck’ *IOL News* 2 December 2002 available at: http://www.iol.co.za/news/south-africa/cover-up-claim-over-jolly-rubino-wreck-1.97986#_UoZmnXB_5Bk, accessed on 20 September 2013.
- iii. Cole B & Pillay K ‘Ship fuel salvage starts’ *Daily News* 29 July 2009 available at: <http://www.iol.co.za/news/south-africa/kwazulu-natal/ship-fuel-salvage-starts-1.1108533?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 23 August 2013.
- iv. Creamer T ‘Transnet begins public consultations on proposed dig-out port’ 17 April 2013, available at: <http://www.engineeringnews.co.za/article/transnet-begins-public-consultations-on-proposed-dig-out-port-2013-04-17>, accessed on 16 November 2013.
- v. Davis G ‘Kiani Satu costs can be recovered’ *Eye Witness News* 29 August 2013 available at: <http://ewn.co.za/2013/08/29/Kiani-Satu-costs-can-be-recovered>, accessed on 23 September 2013.
- vi. Descoins M ‘Increasing South Africa’s Economic Potential’ 6 May 2013 (2013-05-06), 1 available at: http://kzntopbusiness.co.za/site/south-african-news/view/5827/1271/2013/05/06/Increasing_South_Africas_Economic_Potential/print/, accessed on 19 November 2013.
- vii. Du Plessis H ‘Ship in distress off Cape coast’ *IOL News* 27 April 2004 available at: <http://www.iol.co.za/news/south-africa/ship-in-distress-off-cape-coast-1.211512?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 24 September 2013.

- viii. Du Plessis H 'Ship in trouble costs SA a ton' *IOL News* 15 September 2009 available at: http://www.iol.co.za/news/south-africa/ship-trouble-costs-sa-a-ton-1.458621#.UkHDctJ_5Bk, accessed on 15 August 2013.
- ix. Du Plessis H 'Stranded ship poses oil threat to coastline' *IOL News* 6 September 2001 available at: <http://www.iol.co.za/news/south-africa/stranded-ship-poses-oil-threat-to-coastline-1.72338?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 24 September 2013.
- x. Geldenhuys H 'R7m bill as Eihatsu owner ducks' 17 June 2012 available at: http://www.iol.co.za/news/south-africa/western-cape/r7m-bill-as-eihatsu-owner-ducks-1.1320606#.Uj7vJtJ_5Bk, accessed on 1 July 2013.
- xi. Gosling M 'Clean up continues after oil spill' *IOL Scitech* 5 September 2011 available at: http://www.iol.co.za/scitech/science/environment/clean-up-continues-after-oil-spill-1.1131808?showComments=true#.UkHZ3tJ_5Bk, accessed on 23 August 2013.
- xii. Gosling M 'Japanese vessel 'not properly manned'' *Cape Times* 17 October 2012 available at: http://www.iol.co.za/capetimes/japanese-vessel-not-properly-manned-1.1404771#.Uj8l6NJ_5Bk, accessed on 21 September 2013.
- xiii. Hutson T 'Phoenix owners to get off scot-free' *The Mercury* 19 October 2011, available at http://www.iol.co.za/mercury/phoenix-owners-to-get-off-scot-free-1.1160140#.UdKu0Dt_7Sg, accessed on 17 August 2013.
- xiv. Hutson T 'Shipwreck legislation lacking' *The Mercury* 10 August 2011, available at: <http://www.iol.co.za/mercury/shipwreck-legislation-lacking-1.1114777>, accessed on 17 August 2013.
- xv. Jenkins C 'Rescue crew tell of drama at sea' *IOL* 7 August 2006 available at: <http://www.iol.co.za/news/south-africa/rescue-crew-tell-of-drama-at-sea-1.288375?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 25 September 2013.
- xvi. Lancaster K 'Smart move to remove oil from ship' *The Mercury* 21 August 2013.
- xvii. 'Maersk's mega ships mean massive opportunities for marine insurance' 12 January 2012 *Etana Insurance* available at: <http://www.etana.co.za/news/entry/maersks-mega-ships-mean-massive-opportunities-for-marine-insurance>, accessed on 21 November 2013.
- xviii. McKune C & SAPA 'Oil threat from stuck bulk carrier' *IOL News* 9 September 2009, available at: <http://www.iol.co.za/news/south-africa/oil-threat-from-stuck-bulk-carrier-1.457921?ot=inmsa.ArticlePrintPageLayout.ot>, accessed on 17 August 2013.
- xix. Ndenze B 'City declares dispute over wreck' *Cape Times* 2 February 2012 available at: http://www.iol.co.za/capetimes/city-declares-dispute-over-wreck-1.1226023#.UkFrctJ_5Bk, accessed on 23 August 2013.
- xx. Pillay K 'Samsa manager: grounding of the Phoenix an act of God' *Daily News* 8 August 2011 available at: http://www.iol.co.za/dailynews/news/samsa-manager-grounding-of-the-phoenix-an-act-of-god-1.1114012#.UkKnbnJ_5Bk, accessed on 23 August 2013.

- xxi. 'Port development plans' *Transnet* available at:
<http://www.transnet.net/BusinessWithUs/LTPF%202012/4.%20Ports%20Development%20Plans.pdf>, accessed on 28 September 2013.
- xxii. 'Proposed Durban Dig-Out Port: Discussion Document' *Transnet* February 2013 available at:
http://www.sahra.org.za/sites/default/files/additionaldocs/DDOP_Discussion%20Document_FINAL_2013-02-13.pdf, accessed on 28 September 2013.
- xxiii. 'SA to pay for Clifton Salvage' *News24* 16 May 2012
<http://m.news24.com/news24/southafrica/news/sa-to-pay-for-clifton-salvage-20120516>, accessed on 17 August 2013.
- xxiv. SAPA 'Fuel removed from stranded carrier' *IOL News* 24 September 2009 available at: http://www.iol.co.za/news/south-africa/fuel-removed-from-stranded-carrier-1.459487#.UkHHLtJ_5Bk, accessed on 15 August 2013.
- xxv. SAPA 'Stranded ship to be relieved of containers' *IOL News* 3 July 2006 available at: http://www.iol.co.za/news/south-africa/stranded-ship-to-be-relieved-of-containers-1.283980#.UkLz9dJ_5Bk, accessed on 25 September 2013.
- xxvi. SAPA 'Table Bay Wreck to be Removed' *IOL News* 9 September 2012 available at http://www.iol.co.za/news/south-africa/western-cape/seli-1-wreck-set-to-go-at-last-1.137836#UaBT66J_7Sg, accessed on 28 April 2013.
- xxvii. SAPA 'Trawler salvage operations to resume' 15 May 2012 available at:
http://www.iol.co.za/news/south-africa/western-cape/trawler-salvage-operations-to-resume-1.1297419#.Uj8EQtJ_5Bk, accessed on 1 July 2013.
- xxviii. 'Seli wreck eroding Blouberg' *Cape Times* 15 June 2012 available at:
http://www.iol.co.za/capetimes/seli-wreck-eroding-blouberg-1.1320047?TB_iframe=true&height=600&keepThis=true&width=900#.UkHhkNJ_5Bk, accessed on 23 August 2013.
- xxix. 'South Africa suffers two shipwrecks' *News Afrique Informations* 13 August 2013 available at: <http://www.afriquejet.com/news/10251-south-africa-suffers-two-shipwrecks.html>, accessed on 23 September 2013.
- xxx. 'St. Lucia Park Barricaded Against shipwreck spill' *Environment News Service* available at: <http://www.ens-newswire.com/ens/sep2002/2002-09-19-04.asp>, accessed on 20 September 2013.
- xxxi. 'Tanker hits the rocks' *Cape Argus* 27 July 2011 available at:
http://www.iol.co.za/capeargus/tanker-hits-the-rocks-1.1106916?showComments=true#.UkKnbtJ_5Bk, accessed on 23 August 2013.
- xxxii. 'Team battles to save 200 000 oiled birds' *IOL News* 11 January 2007 available at: http://www.iol.co.za/scitech/technology/team-battles-to-save-200-000-oiled-birds-1.23199#.UonadXB_5Bk, accessed on 31 August 2013.
- xxxiii. 'Year needed to remove cargo ship wrecked off Devon' *Environment News Service* 23 January 2007 available at: <http://www.ens-newswire.com/ens/jan2007/2007-01-23-02.asp>, accessed on 18 September 2013.

5. Table of Case Studies

5.1 International Incidents

5.1.1	An Tai	-	18 November 1997.
5.1.2	Castor	-	31 January 2000.
5.1.3	Erika	-	12 December 1999.
5.1.4	HMS Royal Oak	-	14 October 1939.
5.1.5	Jacob Luckenbach	-	14 July 1953.
5.1.6	Mont-Louis	-	25 August 1984.
5.1.7	MSC Napoli	-	18 January 2007.
5.1.8	MV Cita	-	26 March 1997.
5.1.9	MV Lagik	-	14 December 2000.
5.1.10	MV Tricolor	-	14 December 2002.
5.1.11	RMS Lusitania	-	7 May 1915.
5.1.12	SS Richard Montgomery	-	August 1944.
5.1.13	Torrey Canyon	-	18 March 1967.
5.1.14	UB38	-	8 February 1918.

5.2 South African Incidents

5.2.1	Bismihita La	-	30 August 2002.
5.2.2	Cape Africa	-	26 April 2004.
5.2.3	Eihutsu Maru	-	12 May 2012.
5.2.4	Ikan Tanda	-	5 September 2001.
5.2.5	Jolly Rubino	-	12 September 2002.
5.2.6	Kiani Satu	-	8 August 2013.
5.2.7	MT Phoenix	-	26 July 2011.
5.2.8	MV Smart	-	26 August 2013.
5.2.9	Safmarine Agulhas	-	26 June 2006.
5.2.10	Sealand Express	-	19 August 2003.
5.2.11	Seli 1	-	7 September 2009.

ANNEXURE A: EXTRACT OF THE WRECK AND SALVAGE ACT 94 OF 1996.

Extract: Section 18

'18 Powers of Authority in respect of certain wrecks and ships

- (1) (a) When a ship is wrecked, stranded or in distress, the Authority may direct the master or owner of such ship, or both such master and such owner, either orally or in writing to move such ship to a place specified by the Authority or to perform such acts in respect of such ship as may be specified by the Authority.
- (b) If the master or owner of a ship referred to in paragraph (a) fails to perform within the time specified by the Authority any act which he or she has in terms of that paragraph been required to perform, the Authority may cause such act to be performed.
- (2) The Authority may, notwithstanding the provisions of subsection (1), cause any wreck or any wrecked, stranded or abandoned ship or any part thereof to be raised, removed or destroyed or dealt with in such a manner as it may deem fit, if it has not been able to contact the master or the owner of the said wreck, ship or part thereof.
- (3) If the Authority incurs any expenses in connection with the exercise of any power in terms of subsection (1) (b) or (2), it may recover such expenses from the owner of the wreck or ship in question or, in the case of an abandoned wreck or ship, from the person who was the owner thereof at the time of the abandonment.
- (4) If the Authority incurred or will incur any expenses in connection with the exercise of any power in terms of subsection (1) (b) or (2) in respect of any wreck or ship, it may cause any goods to be removed from such wreck or ship.

(5) The Authority may-

(a) sell any wreck or ship in respect of which any power has been exercised in terms of subsection (1) (b) or (2), any part of such wreck or ship and any goods removed therefrom in terms of subsection (4) and apply the proceeds of the sale towards the defrayal of any expenses incurred in connection with the exercise of such power; or

(b) cause any such wreck, ship or goods to be detained until security to the satisfaction of the Authority has been given for the payment of such expenses.

(6) If any wreck, ship or goods are sold in terms of subsection (5) and the proceeds of the sale exceed the amount of the expenses referred to in that subsection, the surplus shall be paid to the owner of the wreck, ship or goods in question after deducting therefrom the amount of any duty payable in respect of such wreck, ship or goods in terms of the Customs and Excise Act, 1964.

(7) The Authority, or any person acting under the authority of the Authority, shall not be liable in respect of anything done in good faith in terms of the provisions of this section.



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INTERNATIONAL CONFERENCE ON THE
REMOVAL OF WRECKS, 2007
Nairobi, 14-18 May 2007
Agenda item 8

LEG/CONF.16/19
23 May 2007
Original: ENGLISH

**ADOPTION OF THE FINAL ACT AND ANY INSTRUMENTS, RECOMMENDATIONS
AND RESOLUTIONS RESULTING FROM THE WORK OF THE CONFERENCE**

NAIROBI INTERNATIONAL CONVENTION ON THE REMOVAL OF WRECKS, 2007

Text adopted by the Conference

Preamble

THE STATES PARTIES TO THE PRESENT CONVENTION,

CONSCIOUS of the fact that wrecks, if not removed, may pose a hazard to navigation or the marine environment,

CONVINCED of the need to adopt uniform international rules and procedures to ensure the prompt and effective removal of wrecks and payment of compensation for the costs therein involved,

NOTING that many wrecks may be located in States' territory, including the territorial sea,

RECOGNIZING the benefits to be gained through uniformity in legal regimes governing responsibility and liability for removal of hazardous wrecks,

BEARING IN MIND the importance of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982, and of the customary international law of the sea, and the consequent need to implement the present Convention in accordance with such provisions,

HAVE AGREED as follows:

Article 1

Definitions

For the purposes of this Convention:

1 "Convention area" means the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area

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beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.

2 “Ship” means a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources.

3 “Maritime casualty” means a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo.

4 “Wreck”, following upon a maritime casualty, means:

- (a) a sunken or stranded ship; or
- (b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or
- (c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or
- (d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken.

5 “Hazard” means any condition or threat that:

- (a) poses a danger or impediment to navigation; or
- (b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

6 “Related interests” means the interests of a coastal State directly affected or threatened by a wreck, such as:

- (a) maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned;
- (b) tourist attractions and other economic interests of the area concerned;
- (c) the health of the coastal population and the wellbeing of the area concerned, including conservation of marine living resources and of wildlife; and
- (d) offshore and underwater infrastructure.

7 “Removal” means any form of prevention, mitigation or elimination of the hazard created by a wreck. “Remove”, “removed” and “removing” shall be construed accordingly.

8 “Registered owner” means the person or persons registered as the owner of the ship or, in the absence of registration, the person or persons owning the ship at the time of the maritime casualty. However, in the case of a ship owned by a State and operated by a company which in that State is registered as the operator of the ship, “registered owner” shall mean such company.

9 “Operator of the ship” means the owner of the ship or any other organization or person such as the manager, or the bareboat charterer, who has assumed the responsibility for operation of the ship from the owner of the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibilities established under the International Safety Management Code, as amended*.

10 “Affected State” means the State in whose Convention area the wreck is located.

11 “State of the ship’s registry” means, in relation to a registered ship, the State of registration of the ship and, in relation to an unregistered ship, the State whose flag the ship is entitled to fly.

12 “Organization” means the International Maritime Organization.

13 “Secretary-General” means the Secretary-General of the Organization.

Article 2

Objectives and general principles

1 A State Party may take measures in accordance with this Convention in relation to the removal of a wreck which poses a hazard in the Convention area.

2 Measures taken by the Affected State in accordance with paragraph 1 shall be proportionate to the hazard.

3 Such measures shall not go beyond what is reasonably necessary to remove a wreck which poses a hazard and shall cease as soon as the wreck has been removed; they shall not unnecessarily interfere with the rights and interests of other States including the State of the ship’s registry, and of any person, physical or corporate, concerned.

4 The application of this Convention within the Convention area shall not entitle a State Party to claim or exercise sovereignty or sovereign rights over any part of the high seas.

5 States Parties shall endeavour to co-operate when the effects of a maritime casualty resulting in a wreck involve a State other than the Affected State.

* Refer to the International Management Code for the Safe Operation of Ships and for Pollution Prevention, adopted by the Assembly of the International Maritime Organization by resolution A.741(18), as amended.

Article 3

Scope of application

1 Except as otherwise provided in this Convention, this Convention shall apply to wrecks in the Convention area.

2 A State Party may extend the application of this Convention to wrecks located within its territory, including the territorial sea, subject to article 4, paragraph 4. In that case, it shall notify the Secretary-General accordingly, at the time of expressing its consent to be bound by this Convention or at any time thereafter. When a State Party has made a notification to apply this Convention to wrecks located within its territory, including the territorial sea, this is without prejudice to the rights and obligations of that State to take measures in relation to wrecks located in its territory, including the territorial sea, other than locating, marking and removing them in accordance with this Convention. The provisions of articles 10, 11 and 12 of this Convention shall not apply to any measures so taken other than those referred to in articles 7, 8 and 9 of this Convention.

3 When a State Party has made a notification under paragraph 2, the “Convention area” of the Affected State shall include the territory, including the territorial sea, of that State Party.

4 A notification made under paragraph 2 above shall take effect for that State Party, if made before entry into force of this Convention for that State Party, upon entry into force. If notification is made after entry into force of this Convention for that State Party, it shall take effect six months after its receipt by the Secretary-General.

5 A State Party that has made a notification under paragraph 2 may withdraw it at any time by means of a notification of withdrawal to the Secretary-General. Such notification of withdrawal shall take effect six months after its receipt by the Secretary-General, unless the notification specifies a later date.

Article 4

Exclusions

1 This Convention shall not apply to measures taken under the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969, as amended, or the Protocol relating to Intervention on the High Seas in Cases of Pollution by Substances other than Oil, 1973, as amended.

2 This Convention shall not apply to any warship or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless that State decides otherwise.

3 Where a State Party decides to apply this Convention to its warships or other ships as described in paragraph 2, it shall notify the Secretary-General, thereof, specifying the terms and conditions of such application.

- 4 (a) When a State Party has made a notification under article 3, paragraph 2, the following provisions of this Convention shall not apply in its territory, including the territorial sea:
- (i) Article 2, paragraph 4;
 - (ii) Article 9, paragraphs 1, 5, 7, 8, 9 and 10; and
 - (iii) Article 15.
- (b) Article 9, paragraph 4, insofar as it applies to the territory, including the territorial sea of a State Party, shall read:

Subject to the national law of the Affected State, the registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the owner. Before such removal commences, the Affected State may lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment.

Article 5

Reporting wrecks

1 A State Party shall require the master and the operator of a ship flying its flag to report to the Affected State without delay when that ship has been involved in a maritime casualty resulting in a wreck. To the extent that the reporting obligation under this article has been fulfilled either by the master or the operator of the ship, the other shall not be obliged to report.

2 Such reports shall provide the name and the principal place of business of the registered owner and all the relevant information necessary for the Affected State to determine whether the wreck poses a hazard in accordance with article 6, including:

- (a) the precise location of the wreck;
- (b) the type, size and construction of the wreck;
- (c) the nature of the damage to, and the condition of, the wreck;
- (d) the nature and quantity of the cargo, in particular any hazardous and noxious substances; and
- (e) the amount and types of oil, including bunker oil and lubricating oil, on board.

Article 6

Determination of hazard

When determining whether a wreck poses a hazard, the following criteria should be taken into account by the Affected State:

- (a) the type, size and construction of the wreck;
- (b) depth of the water in the area;
- (c) tidal range and currents in the area;
- (d) particularly sensitive sea areas identified and, as appropriate, designated in accordance with guidelines adopted by the Organization*, or a clearly defined area of the exclusive economic zone where special mandatory measures have been adopted pursuant to article 211, paragraph 6, of the United Nations Convention on the Law of the Sea, 1982;
- (e) proximity of shipping routes or established traffic lanes;
- (f) traffic density and frequency;
- (g) type of traffic;
- (h) nature and quantity of the wreck's cargo, the amount and types of oil (such as bunker oil and lubricating oil) on board the wreck and, in particular, the damage likely to result should the cargo or oil be released into the marine environment;
- (i) vulnerability of port facilities;
- (j) prevailing meteorological and hydrographical conditions;
- (k) submarine topography of the area;
- (l) height of the wreck above or below the surface of the water at lowest astronomical tide;
- (m) acoustic and magnetic profiles of the wreck;
- (n) proximity of offshore installations, pipelines, telecommunications cables and similar structures; and
- (o) any other circumstances that might necessitate the removal of the wreck.

* Refer to the revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, adopted by the Assembly of the International Maritime Organization by resolution A.982(24), as amended.

Article 7

Locating wrecks

1 Upon becoming aware of a wreck, the Affected State shall use all practicable means, including the good offices of States and organizations, to warn mariners and the States concerned of the nature and location of the wreck as a matter of urgency.

2 If the Affected State has reason to believe that a wreck poses a hazard, it shall ensure that all practicable steps are taken to establish the precise location of the wreck.

Article 8

Marking of wrecks

1 If the Affected State determines that a wreck constitutes a hazard, that State shall ensure that all reasonable steps are taken to mark the wreck.

2 In marking the wreck, all practicable steps shall be taken to ensure that the markings conform to the internationally accepted system of buoyage in use in the area where the wreck is located.

3 The Affected State shall promulgate the particulars of the marking of the wreck by use of all appropriate means, including the appropriate nautical publications.

Article 9

Measures to facilitate the removal of wrecks

1 If the Affected State determines that a wreck constitutes a hazard, that State shall immediately:

- (a) inform the State of the ship's registry and the registered owner; and
- (b) proceed to consult the State of the ship's registry and other States affected by the wreck regarding measures to be taken in relation to the wreck.

2 The registered owner shall remove a wreck determined to constitute a hazard.

3 When a wreck has been determined to constitute a hazard, the registered owner, or other interested party, shall provide the competent authority of the Affected State with evidence of insurance or other financial security as required by article 12.

4 The registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the owner. Before such removal commences, the Affected State may lay down conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment.

5 When the removal referred to in paragraphs 2 and 4 has commenced, the Affected State may intervene in the removal only to the extent necessary to ensure that the removal proceeds effectively in a manner that is consistent with considerations of safety and protection of the marine environment.

6 The Affected State shall:

- (a) set a reasonable deadline within which the registered owner must remove the wreck, taking into account the nature of the hazard determined in accordance with article 6;
- (b) inform the registered owner in writing of the deadline it has set and specify that, if the registered owner does not remove the wreck within that deadline, it may remove the wreck at the registered owner's expense; and
- (c) inform the registered owner in writing that it intends to intervene immediately in circumstances where the hazard becomes particularly severe.

7 If the registered owner does not remove the wreck within the deadline set in accordance with paragraph 6(a), or the registered owner cannot be contacted, the Affected State may remove the wreck by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment.

8 In circumstances where immediate action is required and the Affected State has informed the State of the ship's registry and the registered owner accordingly, it may remove the wreck by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment.

9 States Parties shall take appropriate measures under their national law to ensure that their registered owners comply with paragraphs 2 and 3.

10 States Parties give their consent to the Affected State to act under paragraphs 4 to 8, where required.

11 The information referred to in this article shall be provided by the Affected State to the registered owner identified in the reports referred to in article 5, paragraph 2.

Article 10

Liability of the owner

1 Subject to article 11, the registered owner shall be liable for the costs of locating, marking and removing the wreck under articles 7, 8 and 9, respectively, unless the registered owner proves that the maritime casualty that caused the wreck:

- (a) resulted from an act of war, hostilities, civil war, insurrection, or a natural phenomenon of an exceptional, inevitable and irresistible character;
- (b) was wholly caused by an act or omission done with intent to cause damage by a third party; or

- (c) was wholly caused by the negligence or other wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function.

2 Nothing in this Convention shall affect the right of the registered owner to limit liability under any applicable national or international regime, such as the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

3 No claim for the costs referred to in paragraph 1 may be made against the registered owner otherwise than in accordance with the provisions of this Convention. This is without prejudice to the rights and obligations of a State Party that has made a notification under article 3, paragraph 2, in relation to wrecks located in its territory, including the territorial sea, other than locating, marking and removing in accordance with this Convention.

4 Nothing in this article shall prejudice any right of recourse against third parties.

Article 11

Exceptions to liability

1 The registered owner shall not be liable under this Convention for the costs mentioned in article 10, paragraph 1 if, and to the extent that, liability for such costs would be in conflict with:

- (a) the International Convention on Civil Liability for Oil Pollution Damage, 1969, as amended;
- (b) the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996, as amended;
- (c) the Convention on Third Party Liability in the Field of Nuclear Energy, 1960, as amended, or the Vienna Convention on Civil Liability for Nuclear Damage, 1963, as amended; or national law governing or prohibiting limitation of liability for nuclear damage; or
- (d) the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, as amended;

provided that the relevant convention is applicable and in force.

2 To the extent that measures under this Convention are considered to be salvage under applicable national law or an international convention, such law or convention shall apply to questions of the remuneration or compensation payable to salvors to the exclusion of the rules of this Convention.

Article 12

Compulsory insurance or other financial security

1 The registered owner of a ship of 300 gross tonnage and above and flying the flag of a State Party shall be required to maintain insurance or other financial security, such as a guarantee of a bank or similar institution, to cover liability under this Convention in an amount equal to the limits of liability under the applicable national or international limitation regime, but in all cases not exceeding an amount calculated in accordance with article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims, 1976, as amended.

2 A certificate attesting that insurance or other financial security is in force in accordance with the provisions of this Convention shall be issued to each ship of 300 gross tonnage and above by the appropriate authority of the State of the ship's registry after determining that the requirements of paragraph 1 have been complied with. With respect to a ship registered in a State Party, such certificate shall be issued or certified by the appropriate authority of the State of the ship's registry; with respect to a ship not registered in a State Party it may be issued or certified by the appropriate authority of any State Party. This compulsory insurance certificate shall be in the form of the model set out in the annex to this Convention, and shall contain the following particulars:

- (a) name of the ship, distinctive number or letters and port of registry;
- (b) gross tonnage of the ship;
- (c) name and principal place of business of the registered owner;
- (d) IMO ship identification number;
- (e) type and duration of security;
- (f) name and principal place of business of insurer or other person giving security and, where appropriate, place of business where the insurance or security is established; and
- (g) period of validity of the certificate, which shall not be longer than the period of validity of the insurance or other security.

3 (a) A State Party may authorize either an institution or an organization recognized by it to issue the certificate referred to in paragraph 2. Such institution or organization shall inform that State of the issue of each certificate. In all cases, the State Party shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

- (b) A State Party shall notify the Secretary-General of:
 - (i) the specific responsibilities and conditions of the authority delegated to an institution or organization recognized by it;
 - (ii) the withdrawal of such authority; and

- (iii) the date from which such authority or withdrawal of such authority takes effect.

An authority delegated shall not take effect prior to three months from the date on which notification to that effect was given to the Secretary-General.

- (c) The institution or organization authorized to issue certificates in accordance with this paragraph shall, as a minimum, be authorized to withdraw these certificates if the conditions under which they have been issued are not maintained. In all cases the institution or organization shall report such withdrawal to the State on whose behalf the certificate was issued.

4 The certificate shall be in the official language or languages of the issuing State. If the language used is not English, French or Spanish, the text shall include a translation into one of these languages and, where the State so decides, the official language(s) of the State may be omitted.

5 The certificate shall be carried on board the ship and a copy shall be deposited with the authorities who keep the record of the ship's registry or, if the ship is not registered in a State Party, with the authorities issuing or certifying the certificate.

6 An insurance or other financial security shall not satisfy the requirements of this article if it can cease for reasons other than the expiry of the period of validity of the insurance or security specified in the certificate under paragraph 2 before three months have elapsed from the date on which notice of its termination is given to the authorities referred to in paragraph 5 unless the certificate has been surrendered to these authorities or a new certificate has been issued within the said period. The foregoing provisions shall similarly apply to any modification, which results in the insurance or security no longer satisfying the requirements of this article.

7 The State of the ship's registry shall, subject to the provisions of this article and having regard to any guidelines adopted by the Organization on the financial responsibility of the registered owners, determine the conditions of issue and validity of the certificate.

8 Nothing in this Convention shall be construed as preventing a State Party from relying on information obtained from other States or the Organization or other international organizations relating to the financial standing of providers of insurance or financial security for the purposes of this Convention. In such cases, the State Party relying on such information is not relieved of its responsibility as a State issuing the certificate required by paragraph 2.

9 Certificates issued and certified under the authority of a State Party shall be accepted by other States Parties for the purposes of this Convention and shall be regarded by other States Parties as having the same force as certificates issued or certified by them, even if issued or certified in respect of a ship not registered in a State Party. A State Party may at any time request consultation with the issuing or certifying State should it believe that the insurer or guarantor named in the certificate is not financially capable of meeting the obligations imposed by this Convention.

10 Any claim for costs arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner's liability. In such a case the defendant may invoke the defences (other than the bankruptcy or winding up of the registered owner) that the registered owner would have been entitled to invoke, including limitation of liability under any applicable national or international regime. Furthermore, even if the registered owner is not entitled to limit liability, the defendant may limit liability to an

amount equal to the amount of the insurance or other financial security required to be maintained in accordance with paragraph 1. Moreover, the defendant may invoke the defence that the maritime casualty was caused by the wilful misconduct of the registered owner, but the defendant shall not invoke any other defence which the defendant might have been entitled to invoke in proceedings brought by the registered owner against the defendant. The defendant shall in any event have the right to require the registered owner to be joined in the proceedings.

11 A State Party shall not permit any ship entitled to fly its flag to which this article applies to operate at any time unless a certificate has been issued under paragraphs 2 or 14.

12 Subject to the provisions of this article, each State Party shall ensure, under its national law, that insurance or other security to the extent required by paragraph 1 is in force in respect of any ship of 300 gross tonnage and above, wherever registered, entering or leaving a port in its territory, or arriving at or leaving from an offshore facility in its territorial sea.

13 Notwithstanding the provisions of paragraph 5, a State Party may notify the Secretary-General that, for the purposes of paragraph 12, ships are not required to carry on board or to produce the certificate required by paragraph 2, when entering or leaving a port in its territory, or arriving at or leaving from an offshore facility in its territorial sea, provided that the State Party which issues the certificate required by paragraph 2 has notified the Secretary-General that it maintains records in an electronic format, accessible to all States Parties, attesting the existence of the certificate and enabling States Parties to discharge their obligations under paragraph 12.

14 If insurance or other financial security is not maintained in respect of a ship owned by a State Party, the provisions of this article relating thereto shall not be applicable to such ship, but the ship shall carry a certificate issued by the appropriate authority of the State of registry, stating that it is owned by that State and that the ship's liability is covered within the limits prescribed in paragraph 1. Such a certificate shall follow as closely as possible the model prescribed by paragraph 2.

Article 13

Time limits

Rights to recover costs under this Convention shall be extinguished unless an action is brought hereunder within three years from the date when the hazard has been determined in accordance with this Convention. However, in no case shall an action be brought after six years from the date of the maritime casualty that resulted in the wreck. Where the maritime casualty consists of a series of occurrences, the six-year period shall run from the date of the first occurrence.

Article 14

Amendment provisions

1 At the request of not less than one-third of States Parties, a conference shall be convened by the Organization for the purpose of revising or amending this Convention.

2 Any consent to be bound by this Convention, expressed after the date of entry into force of an amendment to this Convention, shall be deemed to apply to this Convention, as amended.

Article 15

Settlement of disputes

1 Where a dispute arises between two or more States Parties regarding the interpretation or application of this Convention, they shall seek to resolve their dispute, in the first instance, through negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice.

2 If no settlement is possible within a reasonable period of time not exceeding twelve months after one State Party has notified another that a dispute exists between them, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea, 1982, shall apply *mutatis mutandis*, whether or not the States party to the dispute are also States Parties to the United Nations Convention on the Law of the Sea, 1982.

3 Any procedure chosen by a State Party to this Convention and to the United Nations Convention on the Law of the Sea, 1982, pursuant to Article 287 of the latter, shall apply to the settlement of disputes under this article, unless that State Party, when ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, chooses another procedure pursuant to Article 287 for the purpose of the settlement of disputes arising out of this Convention.

4 A State Party to this Convention which is not a Party to the United Nations Convention on the Law of the Sea, 1982, when ratifying, accepting, approving or acceding to this Convention or at any time thereafter shall be free to choose, by means of a written declaration, one or more of the means set out in Article 287, paragraph 1, of the United Nations Convention on the Law of the Sea, 1982, for the purpose of settlement of disputes under this Article. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is party, which is not covered by a declaration in force. For the purpose of conciliation and arbitration, in accordance with Annexes V and VII of the United Nations Convention on the Law of the Sea, 1982, such State shall be entitled to nominate conciliators and arbitrators to be included in the lists referred to in Annex V, Article 2, and Annex VII, Article 2, for the settlement of disputes arising out of this Convention.

5 A declaration made under paragraphs 3 and 4 shall be deposited with the Secretary-General, who shall transmit copies thereof to the States Parties.

Article 16

Relationship to other conventions and international agreements

Nothing in this Convention shall prejudice the rights and obligations of any State under the United Nations Convention on the Law of the Sea, 1982, and under the customary international law of the sea.

Article 17

Signature, ratification, acceptance, approval and accession

1 This Convention shall be open for signature at the Headquarters of the Organization from 19 November 2007 until 18 November 2008 and shall thereafter remain open for accession.

- (a) States may express their consent to be bound by this Convention by:
 - (i) signature without reservation as to ratification, acceptance or approval; or
 - (ii) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or
 - (iii) accession.
- (b) Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

Article 18

Entry into force

1 This Convention shall enter into force twelve months following the date on which ten States have either signed it without reservation as to ratification, acceptance or approval or have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General.

2 For any State which ratifies, accepts, approves or accedes to this Convention after the conditions in paragraph 1 for entry into force have been met, this Convention shall enter into force three months following the date of deposit by such State of the appropriate instrument, but not before this Convention has entered into force in accordance with paragraph 1.

Article 19

Denunciation

1 This Convention may be denounced by a State Party at any time after the expiry of one year following the date on which this Convention comes into force for that State.

2 Denunciation shall be effected by the deposit of an instrument to that effect with the Secretary-General.

3 A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, following its receipt by the Secretary-General.

Article 20

Depositary

- 1 This Convention shall be deposited with the Secretary General.
- 2 The Secretary-General shall:
 - (a) inform all States which have signed or acceded to this Convention of:
 - (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession, together with the date thereof;
 - (ii) the date of entry into force of this Convention;
 - (iii) the deposit of any instrument of denunciation of this Convention, together with the date of the deposit and the date on which the denunciation takes effect; and
 - (iv) other declarations and notifications received pursuant to this Convention;
 - (b) transmit certified true copies of this Convention to all States that have signed or acceded to this Convention.
- 3 As soon as this Convention enters into force, a certified true copy of the text shall be transmitted by the Secretary-General to the Secretary-General of the United Nations, for registration and publication in accordance with Article 102 of the Charter of the United Nations.

Article 21

Languages

This Convention is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE IN NAIROBI this eighteenth day of May two thousand and seven.

IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Convention.

ANNEX

**CERTIFICATE OF INSURANCE OR OTHER FINANCIAL SECURITY
IN RESPECT OF LIABILITY FOR THE REMOVAL OF WRECKS**

Issued in accordance with the provisions of article 12 of the Nairobi International Convention on
the Removal of Wrecks, 2007

Name of Ship	Gross tonnage	Distinctive number or letters	IMO Ship Identification Number	Port of Registry	Name and full address of the principal place of business of the registered owner

This is to certify that there is in force, in respect of the above-named ship, a policy of insurance or other financial security satisfying the requirements of article 12 of the Nairobi International Convention on the Removal of Wrecks, 2007.

Type of Security

Duration of Security

Name and address of the insurer(s) and/or guarantor(s)

Name

Address

.....

This certificate is valid until

Issued or certified by the Government of

.....

(Full designation of the State)

OR

The following text should be used when a State Party avails itself of article 12, paragraph 3:

The present certificate is issued under the authority of the Government of

(full designation of the State) by (name of institution or organization)

At

(Place)

On

(Date)

.....
(Signature and Title of issuing or certifying official)

Explanatory Notes:

- 1 If desired, the designation of the State may include a reference to the competent public authority of the country where the Certificate is issued.
- 2 If the total amount of security has been furnished by more than one source, the amount of each of them should be indicated.
- 3 If security is furnished in several forms, these should be enumerated.
- 4 The entry “Duration of Security” must stipulate the date on which such security takes effect.
- 5 The entry “Address” of the insurer(s) and/or guarantor(s) must indicate the principal place of business of the insurer(s) and/or guarantor(s). If appropriate, the place of business where the insurance or other security is established shall be indicated.
