

**THE INCORPORATION OF THE HAZARDOUS AND
NOXIOUS SUBSTANCES CONVENTION IN SOUTH
AFRICAN LAW**

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Abstract

The objective of this dissertation is to determine whether the current South African legal framework is conducive for the implementation of the *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea* of 1996. This dissertation examines the role of international law, and specifically the role of international environmental law, in the South African legal framework. The content of the Convention itself is examined, as well as various South African acts and regulations dealing with incidents regarding hazardous and noxious substances. The South African legal framework regarding HNS is fragmented, requiring the legal advisor to consult various documents in order to determine the legal standpoint. These acts and regulations contradict each other and do not promote legal certainty. Thus the current legal framework is not conducive for the implementation of the Convention.

Uittreksel

Die doel van hierdie skripsie is om te bepaal of die Suid-Afrikaanse reg bevorderlik is vir die implementering van die *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea* van 1996. Die rol van internasionale reg, en meer spesifiek internasionale omgewingsreg, in die Suid Afrikaanse konteks word ondersoek. Verder word die teks van die Konvensie, sowel as verskillende Suid-Afrikaanse wette en regulasies, wat voorvalle van gevaarlike en skadelike stowwe reël, bestudeer. Die Suid-Afrikaanse reg is wat HNS betref gefragmenteer wat beteken dat 'n adviseur verskeie bronne moet raadpleeg om te bepaal wat die standpunt is. Hierdie wette en regulasies bevat teenstrydige bepalinge, en bevorder nie regsekerheid nie. Dus is die huidige Suid-Afrikaanse reg nie bevorderlik vir die implementering van die Konvensie nie.

List of Abbreviations

ECA	<i>The Environment Conservation Act 73 of 1989</i>
HNS	Hazardous and Noxious Substances
HNS Convention	<i>The International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea 1996</i>
IBC Code	The International Code for the Construction and Equipment of Ships Carrying Chemicals in Bulk, 1983.
IMF	The International Monetary Fund
IMO	The International Maritime Organisation
NEMA	<i>National Environmental Management Act of 1998</i>
SACJ	The South African Criminal Law Journal
SAJELP	The South African Journal of Environmental Law and Policy
SA Merc LJ	The South African Mercantile Law Journal
SDR	Special Drawing Rights
SWULR	Southwestern University Law Review
Tex Intl LJ	The Texas International Law Journal

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1. INTRODUCTION

Industrial production creates an accumulation of waste, which may be potentially hazardous to the environment.¹ Furthermore industrial activities require certain substances necessary for production that may also be potentially hazardous.² Many of these substances are exported and imported between countries.³ Although international trade is of great importance in an economy, the carriage of hazardous and noxious substances (hereafter HNS) must not be detrimental to the environment anywhere in the world.⁴

There may be various reasons for the transborder movement of HNS, but two seem to be the most plausible. Firstly, not all countries have the natural resources or the means to manufacture certain HNS that are needed in production. The only means of obtaining these required substances may be to import it from another country. Secondly, countries need methods to dispose of the hazardous waste or by-products of production. This is often achieved by exporting their waste to other countries that have better facilities to dispose of such substances.⁵

There is however an inherent risk of environmental damage due to transborder movements of HNS. The *International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and*

1 Kiss 1991 *Tex Intl L J* 521.

2 Pallemarts *Toxics* 7.

3 See Gilhuis *Europees en Nederlands Milieurecht* 22 for a discussion on the European and specifically the Dutch policies on transport of waste in the European Union as well as Clairmont J 1996 *The Environmental Lawyer* 545.

4 Imports and exports have an effect on a country's Gross Domestic Product. In general it is regarded better if a country's exports exceeds its imports. Section 24 of the Constitution further states that every person has the right to a non-harmful environment and the conservation of such an environment for future generations. Section 2(3) of the NEMA requires development to be sustainable and section 2(4) sets out the relevant factors in determining whether development is in fact sustainable. One of these factors is the prevention and remedying of pollution. Thus in order to accomplish sustainable development any pollution regarding HNS should be prevented and in the event of a spill, the damage caused by the HNS must be remedied.

5 Two other reasons for exporting hazardous waste to other countries for disposal, is that those countries may have less effective monitoring requirements or may just be cheaper, Kiss 1991 *Tex Intl L J* 529. Developing countries have become a favourite dumping ground because of these reasons, Naldi *The Regulation of Trade in Hazardous Waste* 218.

Noxious Substances by Sea (hereafter the HNS Convention) was established in 1996 with the aim to regulate this practice.⁶ The preamble of the HNS Convention states that its objective is to provide adequate, prompt and effective compensation for loss or damage arising from the carriage of HNS by sea. South Africa has not yet ratified the HNS Convention.⁷ If South Africa ratifies it, it may be a useful exercise to determine the implication of the provisions of the Convention on South African environmental law. Foreign businesses, government, society and non-governmental organisations are likely to demand South Africa's compliance with environmental norms and standards when doing business with South African enterprises.⁸ The general rule regarding the transborder movement of hazardous substances states in this regard that:

...under the principles of international law...no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein.⁹

In the light of this general rule, it is essential that environmental damage and loss due to HNS must be kept to a minimum and that compensation must be paid to all of those affected by this damage or loss. It may accordingly be important to determine if South Africa has the necessary legal framework to implement the HNS Convention and if it is able to provide compensation in the case of damage or loss. This poses the question:

Is the current South African legal framework conducive to the implementation of the HNS Convention?

6 This is, however, not the only convention dealing with HNS. The *Basel Convention On The Control Of Transboundary Movements Of Hazardous Wastes And Their Disposal* deals specifically with hazardous waste and its disposal.

7 See Dugard *International Law* 330. Ratification is one of the ways in which a country may become a party to a convention. Ratification is the endorsement of an earlier signature. The other way of becoming party is accession. This is done by countries that did not participate in the negotiation of the convention.

8 Glazewski *Environmental Law* 631.

9 Glazewski *Environmental Law* 631, *US v Canada* 1938 (Also known as the *Trail Smelter Case*).

By way of a literature study, the HNS Convention will be interpreted and compared to South African legislation and proclamations, to determine whether it can be implemented in the current South African legal framework.

2. INTERNATIONAL ENVIRONMENTAL LAW

2.1 Incidents regarding HNS

The International Maritime Organisation (IMO) published data indicating 28 known incidents regarding accidents of HNS carried by sea between 1995 and 2001.¹⁰ It is estimated that more than half of all bulk, and 15% of containerised cargoes are hazardous.¹¹ This provides an idea of the amount of HNS being shipped, and the risk of pollution to the marine environment. If a pollution incident occurs, liability should be determined, and compensation should be sought in terms of international law such as the HNS Convention. International treaties and international law are the primary sources of international law.¹²

2.2 International environmental law and the Constitution

International customary law applies to South Africa as long as it is not against public policy or South African legislation.¹³ The HNS Convention will thus not be applicable in South Africa, unless ratified or incorporated by the South African Government, or if some of the Convention's provisions are regarded

10 Legal Committee 2002 HYPERLINK <http://www.folk.uio.no/erik/www/HNS/INF-2.pdf>. It is important to note that these aren't the only incidents regarding HNS carried by sea but only gives an indication that incidents involving HNS occurs on a regular basis. It is estimated that in 1990, 400 million metric tons of hazardous and noxious waste was produced worldwide, Lipman *Hazardous Waste* 266. According to the UN Special Rapporteur, 20% of hazardous waste generated in 1989 was being shipped to developing countries and 50 million tons of that was exported to Africa. See also Naldi 2000 *SAJELP* 218.

11 See Kotze 2002 *SAYIL* 171 footnote 1.

12 Olivier 2002 *SAJELP* 152. See also Kidd *Environmental Law* 64 in this regard.

13 For a full discussion of international customary law, see Kiss *International Environmental Law* 115.

as international customary law.¹⁴ The importance and application of international environmental law in the South African context is stated in various sections of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution).¹⁵ Sections 231(1) – (5) contain the procedures South Africa has to apply to adopt international agreements such as the HNS Convention into South African law.¹⁶ Section 231(4) implies that International agreements will become domestic law if it is enacted into domestic law by national legislation.¹⁷ Dugard¹⁸ argues that a customary rule or law would be applied in South Africa if the country did not object to it. In the case of international treaties, any agreement requiring ratification after the country has signed it, must be approved by parliament to come into force as South African law, while an agreement not requiring ratification will come into force the moment it is signed.¹⁹ Section 39(1)(b) of the Constitution further requires courts to consider international law during the interpretation of the Constitution.²⁰ The implication of this section is that all relevant international law must be considered whether it is binding or not.²¹

According to section 232 of the Constitution, international customary law will be regarded as South African law as long as it is consistent with the Constitution or with an Act of Parliament.²² This means that South African common law rules and judicial decisions are excluded from the scope of this section.²³ Section 232 is supported by section 233 of the Constitution, which states that South African legislation that is consistent with international law

14 It is unlikely that the bulk of the Convention's clauses are international customary law. Even if there are such clauses in the Convention, only those clauses will be applicable and not of much use in South African law.

15 For a more comprehensive discussion on the Constitution with regards to environmental law, see Kidd *Environmental Law*

16 Kotze 2002 SAYIL 174.

17 Section 231(4) of the Constitution.

18 Dugard *International Law* 54 after examining the decisions of *Du Toit v Kruger* 1905 22 SC 234, *Nduli v Minister of Justice* 1978 1 SA 893 (A) and *Sv Petane* 1988 3 SA 51 (C).

19 Dugard *International Law* 56.

20 Kotze 2002 SAYIL 174.

21 *S v Makwanyane* 1995 3 SA 391 413-414.

22 Kotze 2002 SAYIL 175.

23 In *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 2 SA 709 E, the court stated that the doctrine of *stare decisis* does not apply to international law, Dugard *International Law* 52.

carries more weight than legislation inconsistent with international law.²⁴ Judicial decisions will be applied, however, in deciding which rules of customary international law will be applicable in terms of section 232, and how they are to be proved.²⁵ The court may look to judicial decisions and international treaties for guidance as to whether a particular rule is to be regarded as customary international law.²⁶ Thus the HNS Convention may be used as a guideline in dealing with damage due to HNS if the relevant rule is deemed to be international customary law. It has already been stated, however, that a few individual provisions regarded as international customary law, will not be of much use without the rest of the Convention.²⁷

2.3 International environmental law and NEMA²⁸

The National Environmental Act 107 of 1998 (NEMA) provides for the adoption of international environmental law instruments into South African Law.²⁹ Section 1(1) of the NEMA defines an international environmental instrument as any international agreement, declaration, resolution, convention or protocol, which relates to the management of the environment. The HNS Convention falls within the scope of NEMA's definition of international environmental instruments as "any international convention". The environment must be protected through any reasonable measure by the government.³⁰ These measures to be taken may include international conventions such as the HNS Convention.³¹

The NEMA sets out the procedure the Minister³² has to follow in order to meet the obligations of the agreement.³³ The Minister may recommend the

24 Dugard *International Law* 52.

25 Dugard *International Law* 52.

26 Dugard *International Law* 52.

27 See page 3, footnote 11.

28 The inner workings of the NEMA are discussed in F Soltau 1999 *SAJELP* 33 –51. This article provides insight into the procedures for recovering compensation due to environmental damage and discusses liability in terms of the NEMA.

29 Chapter 6.

30 Section 24(b) of the Constitution.

31 Kotze 2002 *SAYIL* 174.

32 The Minister of the Department of Environmental and Tourism.

33 Chapter 6.

accession or ratification of any international environmental instrument.³⁴ After adoption of the instrument the minister may publish the provisions and amendments in the *Government Gazette*.³⁵ Furthermore, the Minister may introduce legislation to Parliament, or make regulations to give effect to the instrument.³⁶ The Minister must provide annual reports regarding the international environmental instrument he/she is responsible for, as well a performance report meeting the government's requirements for sustainable development.³⁷ Section 27(1) states that the NEMA is applicable to all international environmental instruments, but it seems to be applicable only to the instruments to which South Africa is a party. Read together, the Constitution and the NEMA accommodates the incorporation and adoption of the HNS Convention.³⁸

The amount of HNS transported by sea and the amount of incidents involving HNS paints a picture of the dangers and risks associated with the carriage of HNS. The NEMA interacts with the Constitution by fulfilling the duty of the state, to protect the environment through legislative measures, provided for in section 24(b) of the Constitution.³⁹ In considering this, everything points to an obligation on the South African government to ratify and incorporate the HNS Convention. By incorporating the HNS Convention and by placing liability on the polluter according to the polluter-pays principle, claims for environmental damage caused by HNS are allowed and thus South African coast and coastal waters are preserved.⁴⁰ The polluter pays principle entails that the party who polluted the environment is held liable for all costs due to the pollution.⁴¹ This principle is reflected in sections 2(4)(p), 28 and 30 of the

34 Section 25(1).

35 Section 25(2).

36 Section 25(3).

37 Section 26. For a complete discussion on the 2002 Johannesburg World Summit on Sustainable Development, see Nanda & Pring *International Law & Policy* 110.

38 Kotze 2002 *SAYIL* 175.

39 Soltau 1999 *SAJELP* 33.

40 The polluter pays principle is one of the principles in the *White Paper on Environmental Management Policy For South Africa* GNR 749, GG18894 of 15 May 1998. See also Sampson 2001 *WRC Report* 45.

41 Havenga 1995 *SA Merc LJ* 188. The 'polluter pays' principle may be described as the polluter being liable to pay all costs for the reversal of damage or loss to the environment because the remediation of the damaged environment environment is part of sustainable development.

NEMA.⁴² By making the polluter liable for damage, he/she may be more careful and try to prevent pollution.⁴³ This principle is also reflected in the HNS Convention⁴⁴ by placing the liability on the shipowner and thus holding the polluter liable.⁴⁵ This may prevent pollution or assist speedy remediation of the damaged environment.

3 THE HNS CONVENTION AS INTERNATIONAL ENVIRONMENTAL INSTRUMENT

3.1 General

The HNS Convention is based on the model of the Civil Liability Convention of 1969, which was ratified by South Africa.⁴⁶ The HNS Convention was designed to determine liability and ensure compensation for loss or damage due to the carriage of potentially hazardous and noxious substances by ship.⁴⁷ This statement includes three problematic terms, which are important to the application of the HNS Convention, namely “HNS”, “damage” and “ship”.

3.1.1 What are hazardous and noxious substances?

The Convention does not define HNS specifically but refers to broad categories of substances in terms of IMO codes, which define substances

42 Soltau 1999 *SAJELP* 33. Section 2(4)(p) states that the costs of remedying, preventing, controlling or minimising pollution, environmental degradation and consequent adverse health effects must be paid for by those responsible for harming the environment. Section 28 states shortly that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring. Section 30 defines the ‘responsible person’, as to include any person who is responsible for the incident, owns any hazardous substance involved in the incident, or was in control of any hazardous substance involved in the incident at the time of the incident.

43 Havenga 1995 *SA Merc LJ* 188. This is an economic incentive used to prevent pollution as one of the objectives of the environmental law.

44 Chapter II.

45 See paragraph 3.2.1.1 below for a discussion on the liability of the shipowner in terms of the HNS Convention.

46 Nordquist *Maritime Issues* 338.

47 Tetley *Maritime Liens* 142.

requiring special handling.⁴⁸ These categories are defined in article 1(5) of the convention. Dangerous and/or noxious liquid substances,⁴⁹ liquified gas,⁵⁰ oil,⁵¹ flammable substances⁵² and solid materials with hazardous qualities⁵³ all carried in bulk, are considered to be hazardous and noxious substances according to the Convention.⁵⁴ The Convention also applies to any damage caused by residue of previous cargo falling into one of the above-mentioned categories.⁵⁵ Having to consult various documents in order to determine if a product is in fact a HNS may be cumbersome, but the Legal Committee of the IMO, who developed the Convention, found it impractical to keep redefining a list of substances in the HNS Convention itself.⁵⁶ Other benefits of having such standard lists are transparency, legal certainty and uniformity of law and thus aid the courts during interpretation.

3.1.2 What is meant by damage?

The type of loss or damage the HNS Convention applies to is not limited to the cost of repairing environmental damage and is defined in article 1(6).⁵⁷ Damage includes the loss of life, whether on board or outside the involved ship,⁵⁸ loss or damage to property, loss or damage to the environment⁵⁹ and the cost of preventive measures.⁶⁰ By including these various types of loss or damage, the scope of the Convention is broadened which should further encourage the shipowner to ensure the safe carriage of HNS.

48 Nordquist *Maritime Issues* 344.

49 As defined in the IBC Code, appendix II of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973 and Chapter 17 of the International Code for the Construction and Equipment of Ships Carrying Chemicals in Bulk, 1983.

50 As defined in the IGC Code and in Chapter 19 of the International Code for the Construction and Equipment of Ships Carrying Chemicals in Bulk, 1983.

51 As defined in MARPOL Annex I and appendix I of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973.

52 These gases may not have a flashpoint of over 60 degrees Celsius.

53 As defined in appendix B of the Code of Safe Practice for Solid Bulk Cargoes.

54 Nordquist *Maritime Issues* 344.

55 Nordquist *Maritime Issues* 344.

56 Nordquist *Maritime Issues* 344.

57 Wetterstein 1997 *Georgia Journal for International & Comparative Law* 598.

58 For a discussion on how hazardous exports influences human rights, see Jacob 1983 *SWULR* 81.

59 Compensation for damage to the environment is limited to the cost of reasonable measures to repair according to article 1(6)(c).

60 Glazewski *Environmental Law* 806.

3.1.3 What type of vessel is classified as a ship?

The Convention only applies to HNS carried by ship. A ship, according to the Convention, means any seagoing vessel of any type.⁶¹ This may include anything from a small tugboat to a massive containership, thus including anything that might carry HNS. There are, however, certain exceptions. These are warships, naval auxiliary or a ship owned or used for non-commercial purposes by a state.⁶² According to article 4(6) of the Convention, if an involved ship is used by a state for commercial reasons, it must waive all defences based on sovereign immunity and be subject to the jurisdiction set out in article 38.⁶³ A state may, however, exclude ships not exceeding 200 gross tonnage and carrying packaged HNS inside the state's territorial water, from the application of the Convention.⁶⁴ These types of ships may also be exempted from the application of the HNS Convention if they travel from that state to a neighbouring state that agreed that the Convention would not apply.⁶⁵

3.2 The application of the HNS Convention

The HNS Convention provides a two-tier system for liability and compensation.⁶⁶ Chapter II of the Convention places liability on the shipowner⁶⁷ while Chapter III establishes the International Hazardous and Noxious Substances Fund (HNS Fund).

61 Article 1(1).

62 Balkin 1999 *Australian Yearbook of International Law* 14.

63 Balkin 1999 *Australian Yearbook of International Law* 15.

64 Article 5(1).

65 Article 5(2).

66 Sands *Principles of International Environmental Law* 930.

67 Balkin 1999 *Australian Yearbook of International Law* 16.

3.2.1 First-tier Liability

3.2.1.1 Strict liability of the shipowner

Chapter II⁶⁸ of the HNS Convention places a strict liability on the shipowner and lists the defences against this liability as well as the limitations on liability.⁶⁹ According to this principle, *mens rea*⁷⁰ is not required for liability to fall on the owner.⁷¹ In other words, the polluter need not be negligent or at fault to be held liable.⁷² The accused party is not allowed to use the defence of ignorance or mistake of law.⁷³ In *S v Qumbella* 1966 4 SA 356 (A), the court stated that the basic rule regarding the *mens rea* principle is that the legislature may expressly override it.⁷⁴ In 2002 the court confirmed this decision in *S v Manamela*,⁷⁵ but limited it to 'regulatory' cases.⁷⁶ The principle of strict liability in the case of shipowners would thus only be acknowledged in South Africa if it is expressly overridden.⁷⁷

3.2.1.2 Exceptions to liability

Articles 7(2) and (3) of the HNS Convention contains the exceptions to strict liability. If the damage was caused by an act of war, hostilities or a natural

68 Specifically article 7.

69 Sands *Principles of International Environmental Law* 930.

70 *Mens rea* means malicious intent.

71 Balkin 1999 Australian Yearbook of International Law 16.

72 Murungi 2005 *Comparative and International Law Journal of South Africa* 56. Strict liability differs from fault liability as used in the law of delict. Fault liability requires the harmful act to be caused intentionally or negligently. The onus rests on the claimant to prove that the respondent did not exercise due care and thus acted negligently. Negligence or intent is not a requirement for strict liability.

73 Kidd 2002 SACJ 24. Strict liability differs from absolute liability in the sense that absolute liability puts the liability on a person upon proof of the prohibited act. The goal of strict liability is to contribute to efficient administration of legislation, and to encourage compliance with said legislation.

74 Kidd 2002 SACJ 25. This may be done by the use of reverse onus. The accused party will be required to disprove the *prima facie* case made out by the other party, on a balance of probabilities.

75 2000 3 SA 1 (CC)

76 Kidd 2002 SACJ 25. By 'regulatory', the court meant that it would be acceptable in cases where the accused is not subject to a heavy penalty for example imprisonment.

77 Although it is not made much use of in SA according to Kidd SACJ 40.

phenomenon⁷⁸ the shipowner will be exonerated.⁷⁹ This will also be the case if the loss or damage was caused by an act or omission by a third party,⁸⁰ with the intent to cause it.⁸¹ Furthermore, the owner will be exempted if the loss or damage was caused by the negligence of any government or an authority responsible for navigational aids.⁸² The last exception is where an involved party fail to furnish information regarding the hazardous and noxious nature of the cargo.⁸³ This last exception will only exonerate the shipowner if the failure to furnish information caused the damage or caused the shipowner not to obtain the necessary insurance.⁸⁴ Situations where the shipowner was not reasonably to blame for the damage or loss are excluded by these exceptions.⁸⁵

3.2.1.3 Limitations on liability

The HNS Convention places limitations on the strict liability of the shipowner.⁸⁶ The shipowner is entitled to limit his liability to an amount calculated on a sliding scale based on the gross tonnage of the ship.⁸⁷ This limitation is expressed in terms of special drawing rights (hereafter SDR), which is a standard monetary unit, established by the International Monetary Fund.⁸⁸ The amount the shipowner is liable for is calculated as 10 million SDR for the first 2,000 gross tonnage.⁸⁹ For each unit of gross tonnage between 2,001 and 50,000 gross tonnage, it is an extra 1,500 SDR.⁹⁰ Another 360 SDR will be added to the aggregate amount for each unit of gross tonnage

78 The natural phenomenon must have an exceptional, inevitable and irresistible character. In other words it must be force major and thus according to Schmitthoff's *Export Trade* 108, must be totally out of the involved parties control.

79 Article 7(2)(a).

80 Article 7(2)(b).

81 Glazewski *Environmental Law* 805.

82 Balkin 1999 Australian Yearbook of International Law 17. Article 7(2)(c).

83 Article 7(2)(a). See also Glazewski *Environmental Law* 805.

84 Balkin 1999 Australian Yearbook of International Law 18.

85 It should be noted that these exceptions only excludes the shipowner from liability. The victims should be able to institute civil actions against the person responsible.

86 Article 9(1).

87 Balkin 1999 Australian Yearbook of International Law 20.

88 On the 13th of October 2005, 1 SDR was the equivalent of 1,44257 US dollars according to the IMF's website. This related to R9,47 for 1 SDR on that date.

89 Article 9(1)(a).

90 Article 9(1)(b).

exceeding 50,000 gross tonnage.⁹¹ The total amount of the shipowner's liability is further limited to 100 million SDR.⁹² If the shipowner intended damage, or acted recklessly with the knowledge that damage could occur,⁹³ his/her liability will not be limited.⁹⁴

3.2.1.4 Channelling of liability

No action may be brought against a person or institution other than the shipowner unless the damage was caused by a personal act with intent or done recklessly with the knowledge that damage might occur.⁹⁵ According to article 7(6), the shipowner will be liable but he may exercise the right of recourse against any third party responsible for the damage.⁹⁶ The victims may not use common law actions to recover more from the shipowner than the amount he was liable for under the HNS Convention.⁹⁷

3.2.1.5 Compulsory insurance

The shipowner is required to have compulsory insurance⁹⁸ in the waters of a member state.⁹⁹ The rationale behind this is to ensure compensation by forcing the shipowner to cover his/her liability.¹⁰⁰ A compulsory insurance certificate proving that the ship has the necessary insurance or financial insurance must be carried on board.¹⁰¹ The certificate must be issued by the state in which the ship is registered, if that state is in fact a member state.¹⁰² If the ship is not registered in a member state, it may seek the certificate from the authorities of any member state.¹⁰³

91 Article 9(1)(b).

92 Article 9(1)(b).

93 Article 9(2).

94 Sands *Principles of International Environmental Law* 931.

95 Article 7.

96 Balkin 1999 Australian Yearbook of International Law 18.

97 Article 7(4). See also Balkin 1999 Australian Yearbook of International Law 18.

98 Article 12(1).

99 Nordquist *Maritime Issues* 340. Security such as a bank guarantee has the same effect as insurance, Balkin 1999 Australian Yearbook of International Law 19.

100 Nordquist *Maritime Issues* 341.

101 Article 12(1)-(4).

102 Balkin 1999 Australian Yearbook of International Law 19.

103 Nordquist *Maritime Issues* 341.

3.2.2 Second-tier liability of the HNS Fund

Chapter III of the Convention establishes the HNS Fund. The objective of this Fund is that it will compensate the victims of the incident if the shipowner is not liable, incapable of meeting the financial obligations, or if the damage exceeds the shipowner's liability in terms of article 9.¹⁰⁴ Thus even if there is no first-tier liability¹⁰⁵ the HNS Fund will still compensate the victims.¹⁰⁶ The Fund is not liable if the damage was the result of an act of war, hostilities, civil war or if the HNS was discharged from a vessel owned by the government and which was not used for commercial purposes.¹⁰⁷ Although the HNS Fund is not liable for damage caused by the wilful or negligent act or omission of a person, it must pay any cost incurred for preventive measures.¹⁰⁸ No claim for interest accrued due to damage may be brought against the Fund.¹⁰⁹

The HNS Fund's liability is limited to 250 million SDR.¹¹⁰ Claims for loss of life or personal injury have priority over all other claims.¹¹¹ If the total claim for damage exceeds 250 million SDR the compensation will be divided in proportion to the claimants' claims.¹¹²

The HNS Fund is financed through contributions made by receivers of contributing cargo.¹¹³ The receiver is the person who is responsible for the customs clearance, or if there are no customs controls, the person who physically receives the cargo.¹¹⁴

104 Sands *Principles of International Environmental Law* 931.

105 Article 13(1)(a).

106 Balkin 1999 Australian Yearbook of International Law 25.

107 Article 14(3)(a).

108 Article 14(4).

109 Article 14(5)(c).

110 Article 14(5)(b). See also Nordquist *Maritime Issues* 340, as well as 3.2.1.3 above for a discussion on Special Drawing Rights.

111 Balkin 1999 Australian Yearbook of International Law 26.

112 Article 14(6).

113 Tetley *Maritime Liens* 142.

114 Article 1(4)(a). See also Nordquist *Maritime Issues* 342.

3.3 Prescription

According to article 37(1) the claim under first-tier liability must be brought within 3 years from the date the victim knew or ought reasonably to have known about the damage as well as the shipowner's identity.¹¹⁵ Actions against the HNS Fund under the second-tier do not require the claimant to know the identity of the shipowner.¹¹⁶ Article 37(3) states that no claim may be brought a period of 10 years after the date of the damage-causing incident.¹¹⁷ Wetterstein¹¹⁸ criticises this ultimate period of prescription saying that the effect of many HNS can only be felt after 10 years has passed. Balkin¹¹⁹ answers this critique by stating that according to article 37(4) where there is a series of occurrences, prescription will only start from the date of the last one. This will allow for the all the effects of the incident to become known and thus avoids the situation where victims claim for damages, due to the incident, after compensation has been paid.

3.4 Summary

By referring to various categories of HNS according to the IMO codes, there is no need to keep redefining lists of HNS in all the various conventions dealing with HNS. In this way only the IMO's lists need to be updated which makes it more practical. Damage, as defined in the HNS Convention, is broad in order to cover more than environmental damage. In doing this, the Convention attempts to cover as many effects of pollution as possible. The definition of a ship is also broad. It includes any sea going vessel capable of carrying HNS. Thus, the Convention attempts to cover all possible incidents regarding HNS.

115 Wetterstein 1997 *Georgia Journal for International & Comparative Law* 609.

116 Balkin 1999 *Australian Yearbook of International Law* 30.

117 Wetterstein 1997 *Georgia Journal for International & Comparative Law* 609.

118 Wetterstein 1997 *Georgia Journal for International & Comparative Law* 610.

119 Balkin 1999 *Australian Yearbook of International Law* 30.

First-tier liability places strict liability on the shipowner. In order to accomplish this, the South African legislature must override the principle of *mens rea*. This will allow strict liability in terms of the HNS Convention. The exclusions to first-tier liability are important to exclude any liability, if the damage was caused by a situation in which it would be unreasonable to hold him/her liable, for example an act of God. It would be unreasonable to hold the shipowner of a tugboat liable to the same extent as the shipowner of a cargo ship.¹²⁰ Therefore the liability is limited according to the size of the ship. The compulsory insurance is a beneficial provision. By requiring insurance the shipowner is forced to cover possible incidents, and it is to his/her advantage, as they do not have to pay compensation out of their own funds.

The second-tier liability is a form of 'top-up' compensation. Payment by the HNS Fund is important in order to ensure that a large part of compensation is paid, even if there is no first-tier liability. The exceptions may exempt the HNS Fund from liability, but it does not exempt the parties involved in war, or the government responsible for damage or loss, against civil actions.

By implementing the HNS Convention the Member state will have legal certainty as to liability and compensation for damage or loss due to HNS carried by sea. Legal certainty will not only be beneficial to the maritime transporter. It also holds benefits for the third parties, by providing guidance on their claims, as well as to the environment, as steps to remedy environmental damage or loss should be accelerated.¹²¹

4. HNS in South Africa

HNS is regulated by various different acts and regulations in South Africa. In researching the South African perspective of HNS this dissertation will consider the most important legal instruments dealing with HNS and specifically the transport of HNS by sea.

¹²⁰ It is important to note, however, that due to the nature of HNS, a tugboat is also able to transport severely hazardous HNS.

¹²¹ De Bièvre *Journal of Maritime Law and Commerce* 88.

4.1 Legislation and Regulations

4.1.1 The Carriage of Goods by Sea Act¹²²

The objective of this Act is to amend the law in respect of the carriage of goods by sea, and to provide for any matter related therewith.¹²³ For the purposes of this Act, a 'ship' means any vessel used for the carriage of goods by sea.¹²⁴ This definition is thus confined to vessels used for commercial purposes whereas the HNS Convention covers all vessels on the sea.¹²⁵ The term 'dangerous goods' is defined in a broad sense to include goods posing a threat to the ship, the personnel and other cargo, and not just goods that are inherently dangerous.¹²⁶

The way of determining liability in this Act is similar to the strict liability approach, imposed on the shipowner in the HNS Convention.¹²⁷ The only difference is that in this case the shipper of the goods will be liable and only if the shipment is hazardous and the carrier did not consent to carrying dangerous goods.¹²⁸ In such a case the carrier may destroy or dispose of these goods without being liable. The shipper will be directly and indirectly liable for that as well as any other expense due to the carriage of such substances. The main difference between this Act and the HNS Convention is

122 Act 1 of 1986.

123 The preamble of the Act.

124 Section 1.

125 See paragraph 3.1.3 above.

126 Hare *Shipping law* 516. For an example on how the court interprets this term, see *The Recife* 1997 4 SA 852 (C).

127 Article IV (1) of the Hague Rules in Schedule 1 of the Act.

128 Article IV (6) of the Hague Rules in Schedule 1 of the Act. The act distinguishes between the 'carrier' and the 'shipper'. The 'shipper' is the party contracting to ship the goods. The 'carrier' includes the shipowner or the charterer who enters into a contract of carriage with a shipper.

that liability with regard to HNS is placed on the shipper of the goods and not on the shipowner.¹²⁹

4.1.2 *The Hazardous Substances Act*¹³⁰

This Act aims to fulfil certain objectives. In the first place, it aims to control any substance, which may be hazardous to the health or wellbeing of humans.¹³¹

In the second place, the Act divides these substances into groups according to the degree of danger it poses.¹³²

Groups I and II are substances, which are of a toxic, corrosive, irritant, sensitising or flammable nature.¹³³ Groups III and IV are related to electronic and radioactive material and thus not relevant for this dissertation.¹³⁴ HNS as such is not defined by this Act as it refers to any substance declared hazardous by the Minister of National Health.¹³⁵

In the third place, the Act provides for the prohibition and control of the importation of hazardous substances.¹³⁶ Lastly, it provides that any other matter connected with any of these provisions will be dealt with by this Act.

4.1.3 *Marine Pollution (Control and Civil Liability) Act*¹³⁷

129 Article IV (6) of the Hague Rules in Schedule 1 of the Act.

130 Act 25 of 1977.

131 The preamble of the Act. The substances cause harm due to being corrosive, toxic, irritable or flammable.

132 The preamble of the Act. Certain electronic products are also classified into these groups but are not relevant as they are not subject to the HNS Convention.

133 Fuggle *Environmental Management* 564.

134 Fuggle *Environmental Management* 564.

135 Section 1.

136 The preamble of the Act. The manufacturing, sale, use, operation, application, modification, disposal and dumping of such substances are also prohibited and controlled by this Act.

137 Act 6 of 1981.

This Act provides for the protection of the marine environment from pollution by oil and other harmful substances by preventing and combating pollution at sea and determining liability.¹³⁸

In section 1 of this Act, 'harmful substance' is defined as any substance, which is likely to create a hazard to marine animals, human life or living resources, if it is introduced into the sea. The definition also includes any substance controlled by MARPOL 1973/78.¹³⁹ From this definition it is possible to determine that damage, even though not defined by this Act, includes damage to persons as in the HNS Convention.¹⁴⁰ A 'ship' is defined as any kind of vessel or seaborne object from which oil can be discharged, excluding a tanker.¹⁴¹ This also falls within the scope of the HNS Convention.

According to the Act, the shipowner is liable for loss or damage, as well as any costs for reasonable measures taken after the accident, for the purposes of reducing loss or damage.¹⁴² The shipowner will only be liable for this damage.¹⁴³

Even though this Act provides for hazardous substances it is clear that it was primarily meant to be used for the prevention of oil pollution.

4.1.4 *The Maritime Occupational Safety Regulations*¹⁴⁴

These regulations provide for safety regulation of workers in the maritime industry. The important provision regarding the HNS Convention, however, is section 13, which deals with hazardous cargo in general. This section requires the employer of a crew to inform the safety officer as well as the safety

138 The preamble of the act.

139 This is a convention contained in the schedule to the *Marine Pollution (Prevention of Pollution) Act*.

140 See paragraph 3.1.2 above.

141 Section 1. This includes platforms and oilrigs on the sea.

142 Sections 9(1)(a) and (b)

143 Section 10(1).

144 R1904 GG 16068, made under the section 356 of the Merchant Shipping Act 57 of 1951, by the Minister of Transport, on the 11th of November 1994.

committee of any hazardous cargo on board, and any hazards that may arise from the cargo.¹⁴⁵

The regulation does not provide provisions for HNS in particular and gives no clear meaning of hazardous cargo. It might be argued that these regulations are too vague in this regard.

4.1.5 Merchant Shipping (Dangerous Goods) Regulations¹⁴⁶

These regulations apply to every ship carrying dangerous goods in bulk or packaged form.¹⁴⁷ It only applies to cargo, and not to goods forming part of the equipment or stores of the ship.¹⁴⁸ The term 'dangerous goods' are defined in two parts.¹⁴⁹ In the first place, the term means any goods classified as dangerous for carriage by sea, by the IMO in one of its publications.¹⁵⁰ In the second place, it means any holders, which previously held dangerous goods and that have not been properly cleaned. This is in accordance with the HNS Convention, which states that any residue of previously carried HNS would be regarded as HNS.¹⁵¹

These regulations contain all the documentation, certificates, stowage, packaging and labelling requirements for dangerous packaged goods.¹⁵² They also contain the requirements for carrying these types of goods on passenger ships as well as the requirements for carrying explosives.¹⁵³ These regulations conform to the HNS Convention, but are not as comprehensive as the Convention. It lacks substance regarding liability, as well as the definition of 'dangerous goods'.

145 This part of the Regulation deals with the requirements and duties of the employer in enabling the safety officers and safety committees to perform their functions.

146 R 574 GG 17921(RG 5905) made under the section 356 of the *Merchant Shipping Act* 57 of 1951, by the Minister of Transport, on the 18th of April 1997.

147 Section 2.

148 This provision is in the last part of the definition of 'dangerous goods' as in section 1.

149 Section 1.

150 See paragraph 2.1 above.

151 Section 1(5)(b).

152 Part 3 of the Regulation.

4.1.6 *The Merchant Shipping/Marine Pollution (IBC Code) Regulations*¹⁵⁴

The objective of these regulations is to ensure that all relevant vessels¹⁵⁵ are constructed, equipped and operated in accordance with the IBC Code.¹⁵⁶

These regulations apply to all chemical tankers constructed after 1 July 1986 and any tanker converted to carry dangerous goods.¹⁵⁷ Again, the regulation does not refer to HNS as such, but provides for a definition of 'pollution hazard substances'. According to this definition, the substances relevant to these regulations are all substances listed in chapter 17 of the IBC Code.¹⁵⁸ As this code is part of the definition of HNS¹⁵⁹ in the HNS Convention, the substances to which these regulations are applicable would be HNS as defined in the Convention.¹⁶⁰

The shipowner and the master of the ship are both liable for an incident.¹⁶¹ If the ship is in breach of a requirement for the carriage of HNS, the ship may be detained in accordance with section 243 of the *Merchant Shipping Act*.¹⁶²

4.1.7 *The National Environmental Management Act (hereafter NEMA)*¹⁶³

The NEMA establishes principles for decision making on matters affecting the environment by providing for environmental governance. Furthermore it promotes co-operative governance and procedures for environmental functions exercised by government. The NEMA contains provisions regarding

153 Part 3 of the regulation contains all the requirements and obligations when carrying dangerous goods in bulk, including required documentation and the stowage plan. Part 4 contains provisions regarding the enforcement of these regulations.

154 *GG 18631 (RG 6082)* made under the section 356 of the Merchant Shipping Act 57 of 1951, by the Minister of Transport, in 1998.

155 As defined in section 2(1).

156 Section 3. The IBC Code is the International Code for the Construction and Equipment of Ships Carrying Chemicals in Bulk, 1983.

157 Section 2(1).

158 Section 1.

159 Section 1(5)(a)(iii).

160 See paragraph 3.1.1 above.

161 Section 9(1)(a).

162 Section 10(1).

dangers to the public and any potential detriment posed to the environment by the activities of a responsible person.¹⁶⁴

The NEMA defines a 'vessel' as any waterborne craft whether self-propelled or not, as well as any moored floating structure.¹⁶⁵ Thus, a ship as in the HNS Convention falls within the scope of the NEMA. HNS is not specifically defined but it may fall within the scope of the NEMA as the source of pollution.¹⁶⁶

'Pollution' is defined as any change to the environment, caused by substances emitted from any activity, where said change has adverse effects on human health or wellbeing, or on the composition, resilience and productivity of natural, or managed ecosystems or useful material, or will have such an effect in the future.¹⁶⁷ This term may mean more or less the same as 'damage' in the HNS Convention, but HNS is still not defined in this Act.¹⁶⁸

Hazard is defined in the Act as any source of, or exposure to danger. It may be argued that the definition of 'hazard' read together with the definition of 'pollution' is wide enough to cover 'HNS' as in the Convention.

According to the NEMA, every person has the right to access of information regarding the state of the environment as well as actual and future threats to the environment, including the production, handling transportation, storage and disposal of HNS.¹⁶⁹

163 Act 107 of 1998.

164 According to section 30(1)(b), the responsible person is the person responsible for the incident and who owns the HNS involved in the incident, or the person who was in control of the HNS involved.

165 Section 1.

166 The definition of 'hazard' in the Act is "any source of, or exposure to danger".

167 Section 1. Change may also be caused by radioactive or other waves, noise, odour, dust and heat.

168 Although hazardous substances are mentioned in section 30, it is not defined in section 1.

169 Section 31(1)(a) and (b). Organs of state are also entitled to this type of information to enable them to perform their duties to protect the environment.

The NEMA provides for the rectification of damage or loss.¹⁷⁰ If a person has caused, pollution, he/she must take reasonable steps to prevent damage from continuing or recurring.¹⁷¹ By placing this obligation on the polluter, the NEMA ensures the rectification of damage or loss.¹⁷²

The aspect of liability in the NEMA differs from the HNS Convention.¹⁷³ Under the NEMA the liable person is not the shipowner, but the person responsible for, or contributing to pollution.¹⁷⁴ It may be argued, however, that the wording of section 28 should be interpreted in such a way that the term 'owner of the vessel' may be added to 'owner of land' in order to include the shipowner which would then conform with the HNS Convention.¹⁷⁵ Another difference regarding liability is that the person who negligently failed to prevent pollution may also be held liable.¹⁷⁶

4.1.8 *The Environmental Conservation Act*¹⁷⁷

This Act (also known as the ECA) provides for the effective protection and controlled utilisation of the environment and any matter related therewith.¹⁷⁸ It does not deal specifically with HNS as such, but some HNS may fall within the scope of the Act's definition of 'waste'. 'Waste' is defined as any material,

170 Chapter 7.

171 Section 28(1) works in the same way for present, as well as possible future pollution.

172 See paragraph 2.3 above, as well as Murungi and Kotze 2005 *Comparative and International Law Journal of South Africa* 47 for a complete discussion on the polluter pays principle.

173 See paragraph 3.2.1.1 above.

174 Section 28(8)(a). See also Sampson 2001 *WRC Report* 53.

175 Section 28(8) states that the responsible person includes any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation, the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred, or that owner's successor in title, the person in control of the land or any person who has or had a right to use the land at the time when the activity or the process is or was performed or undertaken or the situation came about, or any person who negligently failed to prevent the activity or the process being performed or undertaken, or the situation from coming about. See in this regard also Sampson *WRC Report* 17.

176 In the principle of strict liability, negligence is taken out of the equation. See paragraph 3.2.1.1 above in this regard.

177 Act 73 of 1989. Much of this act have been repealed by the NEMA but Barnard *Roadmap to Environmental Legislation* 12 still lists it as the point of departure when dealing with environmental management.

178 As in the preamble of the act.

which is an undesirable or superfluous by-product, emission, residue, or remainder of any process or activity.¹⁷⁹

The Minister may identify certain activities, which may be detrimental to the environment.¹⁸⁰ The Act allows the minister to make certain regulations regarding the environment. These regulations may be made in order to prohibit or control the sale and distribution, as well as the import or export of any product which may have a detrimental effect on the environment, or on human health.¹⁸¹

The penalties for non-compliance with the ECA are twofold. In the first place, the ECA provides for criminal sanctions taking the form of either a fine, or imprisonment.¹⁸² In the second place, the guilty party may be ordered that damage and/or loss to the environment be remedied.¹⁸³

The controlling of international trade regarding 'waste' and the aspect of damage to human health are both contained in the provisions of the HNS Convention. Parts of this Act may thus overlap with parts of the Convention, although this Act only deals with waste and not HNS in general.

4.2 Summary

Although many of the definitions of these Acts resemble the definitions in the HNS Convention, they do not necessarily fall within the same scope as the HNS Convention. Few of them even mention HNS as defined in the Convention. The objective of all these acts are to preserve the environment to some degree, and some even broadens their scope to include humans, as is done in the Convention.

179 Section 1.

180 Section 21. These activities may include certain industrial processes, transportation, or chemical treatment.

181 For a discussion on these regulations, see Kidd *Environmental Law* 57.

182 Section 29. See also Kidd *Environmental Law* 58.

183 Section 29(7). See also Kidd *Environmental Law* 59.

It is clear, however, that there is no single South African Act or regulation dealing with HNS in the same manner as the HNS Convention does. Domestic legislation regarding HNS is fragmented and it is necessary to consult various different legal instruments to determine the legal point of view. It would furthermore seem that liability is a problem in the above-mentioned instruments. In the *Carriage of Goods by Sea Act*, it is the shipper that will be held liable and only if he hadn't given his consent to the carrying of dangerous substances.¹⁸⁴ In the *Merchant Shipping/Marine Pollution (IBC Code) Regulations* and the ECA, however, the shipowner as well as the master of the ship will be guilty of a criminal offence punishable by a fine or prison sentence.¹⁸⁵ It is clear from the above mentioned, that there are discrepancies in South African law, which should be rectified if the HNS Convention is ratified or incorporated.

If South Africa ratifies the HNS Convention it will be necessary for government to either develop regulations or legislation in order to implement and enforce the HNS Convention, or to enact the Convention into domestic legislation as it is. By incorporating the Convention, there will be legal certainty in regards to incidents regarding HNS, because South Africa will comply with international law and an integrated and uniform legal framework will be created. Another benefit will be the assistance it would provide to courts during interpretation of laws.

5. Conclusion and Recommendations

The objective of this dissertation was to determine whether the current South African legal framework is conducive to the implementation of the HNS Convention. The Convention constitutes international law and is thus not automatically part of South African law. The Constitution as well as the NEMA provide for the incorporation of international law into domestic law. Thus, it is possible to adopt the HNS Convention into South African law by either

¹⁸⁴ See paragraph 4.1.1 above.

¹⁸⁵ See paragraph 4.1.6 above.

ratifying it, as South Africa is one of the signatory countries, or enacting it as South African law, in which case it will automatically be adopted.

The HNS Convention is very broad. It attempts to cover as many sources and effects of pollution as possible. The two-tier system of compensation as set out by the Convention, together with the compulsory insurance placed on the shipowner, ensures that compensation will indeed be paid in the case of environmental damage due to HNS. Adopting the Convention may be beneficial to the victims of pollution, the transporter of HNS, as well as the environment as the damage to it will be remedied.

Current South African legislation dealing with HNS is a fragmented system of laws and regulations, each dealing only with a specific part of HNS. Some of these Acts and regulations contradict each other, especially with regards to liability. An example of this is that most of the Acts provide that the guilty party must remedy the environmental damage or loss, while the *Merchant Shipping/Marine Pollution (IBC Code) Regulations* makes non-compliance a criminal offence. Even though there are some provisions in the Acts that conform to the Convention, those provisions will, furthermore, only be applicable in South African territorial waters.

Due to the above-mentioned problems it seems necessary to adopt the Convention. By doing this the current fragmented legal system will be integrated into one single instrument. A uniform law will improve legal certainty and would facilitate uniform practices of interpretation by the courts. It will also rectify any discrepancies as found in current South African legislation. Furthermore, it would be beneficial to expand the application of South African policies to the international level.

The current South African legal framework is thus, not conducive to the implementation of the HNS Convention. For these reasons, the HNS Convention must be ratified and incorporated in South African Law.

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