APPRAISAL OF NAIROBI INTERNATIONAL CONVENTION ON REMOVAL OF WRECKS 2007 AND RELEVANCE TO NIGERIA

Felix Chikwado Kamalu,[1]
Olagunju G. A.,[2]
Adekunle Saheed AKINOLA[3]

ABSTRACT

The Article explored the Nairobi international Convention on the removal of wrecks, 2007. The objectives of the article is to decipher the relevance of the Nairobi international Convention to the Nigerian maritime domain. The methodology adopted was the doctrinal legal research methodology. The Research findings revealed that the Nairobi international Convention dealt mainly with wrecks in the Exclusive Economic Zone of Nigeria whereas most wrecks are the inshore waters and the territorial seas of Nigeria. The article therefore, recommended inter alia, the urgent need for legislative intervention by domesticating the Nairobi Convention so as to be able to enforce its provisions on the registered ship owners in Nigeria, since it is not yet a law by virtue of section 12 of the 1999 Constitution as amended. Nigeria should also review, amend and strengthen our domestic wreck removal laws by narrowing the gap between the Nairobi international Convention and Nigeria's wreck removal laws.

Keywords: Nairobi Convention, Wrecks, Methodology, Legislative Intervention, Ship-owner, Constitution.

1. Introduction

Wrecks refer to vessels or part of a vessel that is at risk of becoming sunken, beached or stranded. Maritime law considers a vessel to be "derelict" when the owner intentionally and voluntarily gives up interest and ownership of it with no intention of returning to it and without transferring ownership to another person.[4]Shipwreck and derelict vessels constitute a serious environmental

[1] B.sc Accounting, LLB, BL, LLM, MBA & P.HD, +2348033181576, kamalufelix7@gmail.com, https://orcid.org/0009-0008-4032-2043 (Lecturer, Faculty of Law, Lagos State University).
[2] LL.B, BL, LL.M, Ph.D. (Professor, Faculty of Law, Lagos State University).
[3] LLB, BL, LLM +2348032493960, Choicelandsolicitors9@gmail.com, https://orcid.org/0009-0007-5346-8773
[4] J. Xu, 'Assessment of Salvage Award under Lloyd's Open Form [LOF]' (Unpublished World Maritime University Dissertation 2000) 171 <http://commons.wmu.se/all_dissertations/171> accessed 30 April 2022.

threat to the water ways of Nigeria. It poses great threat to the safety of lives, goods and property at sea as well as the marine environment. Depending on the nature of the cargo and remaining fuel on board, a shipwreck may cause damage to other coastal interest and to the marine environment. Apart, from the dangers behind wreck removal, there is also the issue of costs involved in marking and removing hazardous wrecks.[5]

In international shipping, wrecks and derelicts are viewed with seriousness because they constitute danger to navigation and to lifeboats engaged in rescue operations and other services at countries habour and waters. Nairobi International Convention of 2007 on the removal of wrecks insists that member countries have a clear waterway and a regime of clean waters devoid of shipwrecks and derelicts.[6] Environmentally, when ships sink with bunkers in them, they become a source of continued pollution and when the water is polluted, it becomes an impediment to safety navigations of other vessels and will also destroy marine habitats.[4]

In view of the above, this article will appraise the Nairobi International Convention of 2007 on removal of wrecks to decipher its relevance to the Nigerian Maritime domain. The article will also establish if the provisions of The Nairobi Convention should be extended to the inshore waters and territorial seas of Nigeria.[5]

2. Research Methodology

This study will employ the library based qualitative research methodology. It will rely on primary and secondary sources of information. The primary sources are

i. International Conventions and Treaties(Nairobi WRC text, IMO materials UNCLOS, LLMC 1976/1996,
ii. Memorandum of Understandings (MOUs)
iii. National Laws (Nigerian Port Authority Acts, NIMASA Acts, Nigerian Merchant Shipping Act, National Inland Waterways Authority Act, etc.
iv. Judicial Decisions: Decisions of courts and tribunals as found in law reports will form an important component of the research;
v. Unstructured personal interviews: responses from interviews with officials of the Nigeria Maritime Administration and Safety Agency (NIMASA), Nigeria Ports

[5] IN Egbuh, 'Charting Nigerian Waters for Safer Navigation' *The International Hydrographic Review* (2006) 7(3) 28

[6] Nairobi International Convention on the removal of wrecks (2007)

Authority (NPA), the Nigeria Inland Waterways Authority (NIWA), Shippers Council, Maritime lawyers among others will be considered.

3. THE NAIROBI INTERNATIONAL CONVENTION OF 2007

Nairobi International Convention of 2007 on the removal of wrecks provides the legal basis and uniform rules for States to remove shipwrecks located beyond the territorial sea that may affect adversely the safety of lives, goods and property at sea as well as the marine environment. The Convention is the first International instrument providing for strict liability, compulsory insurance and direct action in relation to wrecks located beyond the territorial sea of costal states. Three vital questions arise when dealing with wrecks and derelicts vessels and may be summarized as follows: Who is responsible for the shipwrecks and derelicts?; What measures are to be taken based on such responsibility? And how can the responsibility be enforced?[7]

The Nairobi International Convention on the Removal of Wrecks 2007 (Nairobi WRC 2007) addresses these questions. The Nairobi WRC 2007 was negotiated in Nairobi, Kenya between 14th to18th May 2007 and entered into force on 14 of April 2015. As a geographical consequence and as a gesture of appreciation to Kenya for hosting the conference, the convention was named the "Nairobi Convention". This was also the first diplomatic conference to be held in Africa.[8]

3.1 Preparatory Work on the Nairobi WRC 2007

The need to set up a Convention concerning wreck removal outside of the territorial sea of coastal States had for a long time been a subject of discussion. It was first raised at IMO Legal Committee (LEG) in 1974.[9] Although the need to set up such International Uniform Rules for Harmonization was clearly acknowledged, yet, the issue did not go further until 1993 when delegation of Germany, the Netherlands and the United Kingdom submitted this matter to the 69th meeting of the IMO Legal Committee (LEG) by proposing a draft convention on the removal of wrecks.[10]

At the 70th session, Germany, the Netherlands and United Kingdom submitted further paper on this subject arguing that the International Convention is necessary in order to establish uniform

---

[7] J Kern, *Wreck Law – A Systematisation of Legal Interests and Conflicts* (Handelshögskolan vid Göteborgsuniversitet 2021) 35.

[8] Ibi

[9] DC Michel 'Introductory note to the Nairobi International Convention on the Removal of Wrecks 2007', International Legal Materials (2007), 46, 694-696.

[10] Ibid

rules on wrecks removal beyond the territorial sea. A draft convention was attached to their joint submission.[11] The draft convention emphasized three key components to be regulated by it as follows:

1. The rights of coastal States to remove wrecks from its Exclusive Economic Zone (EEZ) if they are considered to present dangers to the safety of navigation or marine environment;
2. Strict liability of the ship owners for the costs of reporting, locating, marking and removing a wreck if required to do so by the coastal State;
3. Compulsory insurance or other financial security that has to be maintained by the ship owners up to the limits of the International Convention on the Limitation of Liability for Maritime Claims, 1976.

In 1996, the Committee Maritime International ("CMI") became actively involved in the Legal Committee Programme. It made a report regarding the survey of national legislative regarding wreck removal, which concluded that national regimes on wreck removal have many similarities dealing with wreck in territorial sea of its member States. "CMI" is a non-governmental not – for - profit international organization established in Antwerp in 1897, the object of which is to contribute by all appropriate means and activities to the unification of Maritime Law in all its aspects.[12] The result of the CMI opened possibilities to extend the Scope of Application of the Convention even in internal and territorial waters, although the draft was confined only to international waters that is, Exclusive Economic Zone (EEZ).

A number of delegations led by the delegation of the Netherlands strongly opposed the extended application. The reason for such reluctance can be found in the absence of necessity for such a solution. Although a new legal basis is necessary for the coastal States to take measures, outside their territorial seas, the coastal States are to be limited in the freedom of action in accordance with the limitation imposed by Intervention Conventions 1969. Such limitations are considered to be inappropriate for actions taken by the coastal states within the sea areas under their jurisdiction. Hence, imposing the application of the new Convention even in the inland waters would result with restriction of coastal States right to take whatever action they consider to be appropriate in their State territories. Yet, one cannot ignore the fact that most of the wrecks lie in

[11] CD Michel, 'Nairobi International Convention on the Removal of Wrecks' International Legal Materials (2007) 46(4) 694

[12] Comite Maritime International available online at: https://www.comitemaritime.org accessed 24 April 2020

the shallow waters that are within the inland waters over which the coastal States exercise their jurisdictions.[13]

The Nairobi WRC 2007 is reputed to be the convention that has taken the longest time to develop. The initial deliberations were taken in 1974, when the need to set up uniform rules in the removal of wrecks outside territorial seas was first raised at the IMO Legal Committee. Although, this was clearly acknowledged and recognized, the issue did not receive further attention until 1993.[14]

3.2 The Objective and General Principle of the Nairobi WRC 2007

Article 2 of the Nairobi WRC 2007 provide for the objective and general principle of the convention. The main objective of the Nairobi WRC 2007 is to harmonize the regulation of wrecks removal .The Nairobi Convention is also meant to fill the gaps in international law by providing coastal States with clear mandates of wreck located outside the territorial sea while at the same time claim compensation for incurred cost as a result of the removal.[15]

Thus, the Convention strive to impose new international regime under which the coastal State could take actions for wrecks removal beyond their territorial seas where they cannot exercise their jurisdiction in accordance with the provision of the United Nation Convention on the Law of the Sea (UNCLOS). [16]

The objective and general principle of the Nairobi WRC 2007 are summarized below:

1. A state party may take measures in accordance with the convention to remove wrecks which pose hazards to navigation or to the environment out of their Exclusive Economic Zone (EEZ).
2. The convention holds the shipowner strictly liable for the costs of locating, reporting, marking and removing a wreck.
3. Measures taken by the affected state in accordance with paragraph I above shall be proportionate to the hazards.
4. 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.
5. The convention imposes compulsory insurance or other financial security on the ship owner up to the limit of the International Convention on Limitation of Liability for Maritime Claims, 1976.

1. The application of the Nairobi WRC 2007 within the convention area shall not entitle a State party to claim or exercise sovereignty or sovereign right over any part of the high seas.

---

[13] CD Michel (n 8)
[14] KP Mukherjee and M Brownrigg, *Farthing on International Shipping* (Springer 2003) 327
[15] Ibid
[16] Ibid

It is important to stress that without the Nairobi WRC 2007, the mandates of coastal States are unclear when it comes to wrecks located outside the territorial seas.[17] Within the territorial seas, however, coastal State can apply their national laws on wrecks since they have full sovereignty in those areas.[18] The situation is not however the same in the Exclusive Economic Zone (EEZ).

It remains unclear whether the Nairobi WRC 2007 codifies the already existing mandate or if it creates new mandates for States in respect of wrecks removal beyond their territorial seas.[19] A similar ambiguity arose in relation to the International Convention Relating to Intervention on the High Seas in cases of Oil Pollution Casualties, 1969. The convention was an effect of the wreckage of the Torrey Canyon of 1967 and the environmental effects that followed.[20] The facts of which case is as follows:

> A Liberian Tanker known as "the Torrey Canyon" ran aground outside the British territorial sea of the Scilly Island, United Kingdom (UK) on the 18th March, 1967.[21] At the time of the incidence, the vessel was carrying 120,000 tons of crude oil, which was released into the environment.[22] The effects of the disaster were felt on the marine inhabitants.[23] The total clean-up costs amounted to £3million, which was owed by the ship owners.[24]

This was the first major oil tanker incident which prompted the urgent need to implement international laws regarding protection of the marine environment.[25] In the case, the United Kingdom intervened on the high seas and given other States' attitude and acceptance of this behaviour, it can be argued that the Intervention Convention of 1969 only codifies existing provision of the international customary law. The same line of reasoning could potentially be used in relation to the Nairobi WRC 2007. [26]

---

[17] Ibid

[18] Article 2 UNCLOS 1982

[19] S Dromgoole and C Forrest, 'The Nairobi Wrecks Removal Convention 2007 and Hazardous Historic Shipwreck' *Lloyd's Maritime and Commercial Law Quarterly* (2011) 1, 92-122

[20] Ibid.

[21] AC Simpson, 'The Torrey Canyon Disaster and Fisheries Laboratory Leaflet' *Cefas* (1968) <http://www.cefas.co.uk/publication/lableaflets/lableaflet18.pdf> accessed 30 November 2019

[22] J Devanney, *The Tanker Ship Tromedy: The Impending Disaster in Tankers?* (Tavern 2006) 26

[23] AE Utton, 'The Protective Measures and the "Torrey Canyon"' *Boston College Law Review* (1968) 9(3) 613, 614-615.

[24] C De La Rue and CB Anderson, *Shipping and the Environment* (CRC Press 2015) 11-12

[25] Ibid

[26] Ibid

Considering the fact that Nairobi WRC 2007 deals with the liability of the shipowners and imposes on them the obligations in accordance with its provisions, the Nairobi WRC 2007 can be placed within the group of conventions covering liability and compensation, together with the International Convention on Civil Liability for Oil Pollution Damage 1969 (as amended); The Convention on Liability and Compensation for Damages in connection with the carriage of Hazardous and Noxious Substances 1996; Athens Convention relating to the carriage of Passengers and their Luggage by sea 1974 (PAL 1974); International Convention on Civil Liability for Bunker Oil Pollution Damages 2001 (Bunker Convention 2001); Convention on the Limitation of Liability for Maritime Claims 1976 (LLMC 1976), forming the pillars of uniform international legal regime of compensation for damages in maritime Affairs.[27] Nevertheless, there are several significant differences that make the Nairobi WRC 2007 more effective in achieving its main objectives.[28] These differences are fully discussed below:

3.2.1 The Convention Area

Article 1.1 of the Nairobi WRC 2007 defines the "Convention Area" as the "Exclusive Economic Zone" (EEZ) of a state party established in accordance with international laws .If a state party has not established an Exclusive Economic Zone (EEZ), article 1.1 of Nairobi WRC 2007 Provides that the Exclusive Economic Zone of such a state shall cover …."an area beyond and adjacent to the territorial sea of that state in accordance with international law and extending not more than 200 nautical miles from the baseline from which the breadth of its territorial sea is measured.

This definition of Exclusive Economic Zone provided by article 1.1 of Nairobi WRC 2007 coincides with the definition of Exclusive Economic Zone in article 57 of UNCLOS, 1982. According to article 57 of UNCLOS "The Exclusive Economic Zone" shall not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

The "Convention Area" is a newly adopted term, not yet encountered in international law. Thus, it is necessary to emphasize that the Nairobi WRC 2007 follows the basic structure of other conventions covering liability and compensation such as CLC, HNS, LLMC and Bunkers Convention, it nevertheless, uses terms not yet used in the provisions of these other conventions

[27] Overview of the Nairobi International Convention on the Removal of Wrecks 2007, available online at: <www.tc.gc.ca/eng/policy/ac> accessed 30 November 2019

[28] Ibid

covering liability and compensation, which is of great significance for defining the limits of the Nairobi convention's application.[29]

3.2.2 The Scope of Application

Article 3.1 of the Nairobi WRC provides: "except as otherwise provided in this Convention, this Convention shall apply to wrecks in the "Convention Area". The "Convention Area" according to article 1.1 of the Nairobi WRC 2007 is the Exclusive Economic Zone (EEZ) of a State party, established in accordance with international law.

From the above provisions, it stands to reason that the territorial sea of a coastal State or a State party is not subject to the scope of the Nairobi WRC 2007. Nevertheless, a State party may in accordance with article 3.2 of the Nairobi WRC 2007 extend the application of the Nairobi Convention to wrecks located within its territory, including the territorial sea, subject to article 3.3. In that case, it shall notify the Secretary-General accordingly, at the time of expressing its consent to be bound by the Nairobi WRC 2007 or at any time thereafter.

Once a State party does extend the application of the Nairobi WRC 2007 within the territory, including the territorial sea, by notifying the Secretary-General in accordance with the Convention, the "Convention Area" shall constitute both the Exclusive Economic Zone (EEZ) and the territorial waters.[30] The Nairobi WRC 2007 shall not prejudice the rights and obligations of the State party 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 the Nairobi WRC 2007.

The Nairobi WRC 2007 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.[31]

Moreover, the Nairobi WRC 2007 shall not apply to any warship or any 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.[32]

---

[29] Ibid
[30] Article 3.3 of Nairobi WRC 2007
[31] Article 4.1 of Nairobi WRC 2007.
[32] Article 4.2 of Nairobi WRC 2007.

Furthermore, Article 4.4.a provides that when a State party has made a notification under article 3.2, the following provisions of this convention shall not apply in its territory, including the territorial sea:

(i) Article 2.4

(ii) Article 9.1; 9.5; 9.7; 9.8; 9.9; and 9.10

(iii) Article 15.

Finally, article 9.4 of Nairobi WRC 2007, in so far 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.[33]

It can be established from the above provisions that the Nairobi WRC 2007 was drafted with the Exclusive Economic Zone (EEZ) in mind, including the general requirement to act in proportionate manner. Thus, a State party would be free to apply the provisions of the Nairobi 2007 in its territorial waters but it may not necessarily accept the convention's provisions drafted with the Exclusive Economic Zone (EEZ) in mind.[34]

The Nairobi WRC 2007 applies differently, inside and outside the territory including the territorial sea of a State party. While some of its provisions apply irrespective of the locations of the wreck, others do not apply inside the territorial waters, or apply only with modified effects. The essence of the differences is that in relation to a wreck constituting a hazard inside the territory, including the territorial sea, the Affected States (AS) has greater freedom of action with respect to measures to remove the wreck.[35]

More so, according to the argument put forward by Jhonnie M. Kern: since the "Convention Area" is equal to the Exclusive Economic Zone (EEZ) or a corresponding area, it means that the Nairobi WRC 2007 is not applicable or is not meant to be applicable to the territorial sea or to

---

[33]Article 4.4.b of Nairobi WRC2007.

[34]R Shaw, 'Wreck Removal: Key Issues Remain Unresolved' *MarineLink* (2007) 1 <https://www.marinelink.com/news/convention-unresolved-312997> accessed 02 February 2020

[35] Ibid

the internal waters.[36] He further maintained that from the onset, the Nairobi WRC 2007 covers an area between 12 and 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. It can be noted that this fact may lead to the convention actually being applicable on the High Sea. The scope of the application is 200 nautical miles from the baseline, also for States that have not established an Exclusive Economic Zone (EEZ)".[37]

This leads to consequences when it comes to what types of wrecks that are likely to fall under the application of the Nairobi WRC 2007. The water in the Exclusive Economic Zone is often deep. Consequently, sunken ships are in general, more seldom, likely to pose a hazard to navigation, since they will be submerged in such a way as not to cause problems of this kind. Instead it is more likely that the wrecks being covered by the Nairobi Convention in these cases are wrecks that pose a hazard to the environment and not to navigation.[38]

Another consequence of the scope of application of the Nairobi WRC 2007 is that incidents that occur close to shore are not covered. This is a dangerous development and it is very problematic since most wreckage occurs close to shore either in the territorial sea or in the internal waters.[39]

Although the Nairobi WRC 2007 made provision for Opt – in - cause in article 3.2, allowing a State party to extend the scope of application to wrecks located within its territory, including the territorial sea but considering that wreckage is most likely to occur close to shore and the fact that only roughly few contracting States have chosen to use the opt – in - clause, it is a problem to the Nairobi WRC 2007. Furthermore, the fact that many States have chosen not to extend the application of the Nairobi Convention also, means that the overall goal of striving towards harmonization is undermined. Harmonization and strive towards uniform framework are fundamental parts of the preamble of the Nairobi WRC 2007, making the construction with an optional clause of application somewhat bewildering.[40]

---

[36] Ibid

[37] JM Kern, 'Wreck Removal and the Nairobi Convention – A Movement Towards a Unified Framework?' *Frontiers in Marine Science* (2016) <https://www.frontiersin.org/articles/10.3389/fmars.2016.00011/full> accessed 30 November 2019

[38] Y Baatz, *Maritime Law* (Taylor and Francis 2014) 2661.

[39] GM Gauci, 'The International Convention on the Removal of Wrecks 2007 – A Flawed Instrument?' *Journal of Business Law* (2009) (3) 203.

[40] Ibid

3.4 Types of Wrecks

The Nairobi WRC 2007 distinguished between two types of wrecks.[41] The first one is the wreck posing a hazard to navigation. An example of a wreck classified in this category is a ship sinking in the middle of a busy shipping lane or a wreck being positioned in such a way as to obstruct a trafficked fairway thereby endangering other ship that use the route for navigation. Example of this type of wreck is the wreckage of Tricolor in 2002.

Tricolor was a Norwegian Flagged Vehicle Carrier that sank in a densely trafficked part of the English Channel following a collision with another ship. The Wreck was positioned inside the French Exclusive Economic Zone and badly situated in a type of crossing in the traffic separation scheme where the Traffic is dense.

The wreck was positioned closed to the waterline and at times, depending on the tide, submerged closed to the surface. Consequently, the wreck turned into a hazard to navigation, which also manifested in practice. Even though the wreck was overseen by French Authorities and marked in accordance with general practice using buoys and even a radar transponder, a ship collided with the wreck the night after the wreckage. A couple of days later yet another ship collided with the wreck despite surveillance and information of the wreck being spread.[42]

The wreckage of the Tricolor shows the importance of being able to handle wrecks removal cases where wrecks obstruct navigation. In a situation like this, immediate action is often necessary. The case also illustrates the uncertainty concerning what actions a State can take when confronted with this kind of situation in its Exclusive Economic Zone. Article 56 of the UNCLOS 1982 allows for measures to be taken by a coastal State when it comes to the protection of the marine environment.

When the situation emerged, French Authorities ordered that the wreck should be removed but doubts were raised as to the mandate to issue that kind of order in accordance with International Law.[43] It is this kind of uncertainty that the Nairobi Convention is meant to eliminate.

The second type of wreck is a wreck that poses a hazard to the environment. An example of this is a ship where the wreckage in itself is a danger to the environment where no other convention

---

[41] Ibid

[42] M Harmer, 'Shipping "Pile-up" Sparks Fears' *New Scientist* (2003) 177(7) <www-trimityhouse-co.uk/marine_in_Fo/aids_to_navigation/emergency_wreck_marking_buoy.html> accessed 02 February 2020

[43] S Dromgoole and C Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks' *Lloyd's Maritime and Commercial Law Quarterly* (2011) 1, 93

or regulation has already regulated the matter.[44] There are several conventions that may already deal with the environmental aspect of wreckage. Examples of such convention are: the International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969 as amended and the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) 2001. These conventions will be discussed under a different topic.

3.5 Reporting, Locating, Marking and Removal of Wrecks

Articles 5 to 9 of the Nairobi WRC 2007 address the reporting, locating and marking of wrecks as well as measures to facilitate their removal. As earlier stated, article 2 of Nairobi WRC 2007 enables a State Party to take measures in accordance with the Nairobi Convention when it comes to wrecks situated within the "Convention Area" of that State Party that constitute a hazard. A hazard is defined in article 1.5 of the Nairobi WRC 2007.

It is important to stress that the "Convention Area" according to the article 1.1 of the Nairobi WRC 2007 is the "Exclusive Economic Zone (EZZ) of a State Party established in accordance with International Law. Where a State Party does extend the application of the Nairobi WRC 2007 within its territory including its territorial sea by notifying the Secretary-General in accordance with article 3.2 of the Nairobi WRC 2007, the "Convention Area" shall constitute both the Exclusive Economic Zone (EZZ) and the territorial waters.

Thus, the Nairobi WRC 2007 pursuant to article 5 requires that the master and the operator of a ship, flying its flag to report to the Affected State without delay when that ship has being involved in a wreck. Once either the master or the operator has fulfilled this reporting obligation, the other shall not be obliged to report.

The Affected State shall upon the receipt of the report, use all practical means including the good offices of the States and Organizations to warn mariners and the States concerned of the nature and location of the wreck as a matter of urgency pursuant to article 7.1 of the Nairobi WRC 2007. Article 7.2 of the Nairobi WRC 2007 further provides that if the Affected State has reason to believe that the wreck poses a hazard, it shall ensure that all practical steps are taken to establish the precise location of the wreck.

Article 8.1 of the Nairobi WRC 2007 provides that: if the Affected State determines that the wreck constitutes a hazard, that State shall ensure that all reasonable steps are taken to mark the

[44] Article 4.1 and article 11 of the Nairobi WRC 2007.

wreck. The provision of article 8 of the Nairobi WRC 2007 differs significantly from the provisions of article 7 of the Nairobi WRC 2007 in the sense that article 8 is only relevant if the wreck has been determined to constitute a hazard. This seems to follow a pattern or method where the Affected State first, is informed about the wreck, in accordance with article 5 of the Nairobi WRC 2007.

Thereafter, the Affected State shall warn all mariners who are at risk and also locate the wreck if the Affected State has reason to believe that the wreck constitute a hazard. Finally, follows the marking of the wreck when it has been located and determined to pose a hazard.

Furthermore, article 8.2 of the Nairobi WRC 2007 provides that: when marking the wreck, all practical steps shall be taken to ensure that the marking conform to the International Accepted System of Buoyage in use in the area where the wreck is located. The marking of the wreck according to article 8.3 of the Nairobi WRC 2007 shall be promulgated by the Affected State by nautical publications and the like.

In 2006, the International Maritime Organization (IMO) recommended the testing of a new kind of buoy specifically used for wrecks.[45] This is called an Emergency Wreck Marking Buoy and it is designed to facilitate navigation both visually and by radio. The buoy shall be placed as closed to the wreck as possible alternatively around the wreck in a pattern and within other marks that are used. The buoy is coloured in vertical stripes of blue and yellow and has a top mark in the form of a standing or upright yellow cross.[46]

Article 9 of the Nairobi WRC 2007 provides several measures to facilitate the removal of wrecks that are determined to pose a hazard by the Affected State. Article 9.1.a provides that upon such a determination by the Affected State that there is a wreck constituting a hazard in the light of the Nairobi Convention, the Affected State must immediately inform the State party where the ship is registered and the registered owner and consult with them and any other Affected State, about measures to be taken in relation to the wreck. Thus, the responsibility to remove the hazardous wreck rest on the registered owner according to article 9.2 of the Nairobi WRC 2007. The registered owner is defined in article 1.8 of the Nairobi WRC 2007.

Article 9.4 of the Nairobi WRC 2007 provides that the registered owner has the right to contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf

[45] IMO, 'Emergency Wreck Marking Buoy' SN.1/Circ.259 (2006) 1-3

[46] Ibid

the registered owner. Before such removal commences, the Affected State can lay down certain conditions for the removal but 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. When the removal has begun, article 9.5 of Nairobi WRC 2007 provides that the Affected State may only intervene, to the extent necessary to ensure that the removal proceeds effectively in a manner that is consistent with consideration of safety and protection of the marine environment.

As earlier stated, the responsibility to remove the wreck rest with the registered owner in accordance with the provisions of article 9.2 of the Nairobi WRC 2007, however, situation may arise where the registered owner objects to this responsibility or cannot be contacted. In order to deal with the ugly situation, article 9.6.a of the Nairobi WRC 2007 provides that the affected State shall set a reasonable deadline within which the wreck is to be removed. The length of this deadline is to be set taking into account the hazard that the wreck poses. Article 9.6.b further provides that the Affected State shall inform the registered owner in writing that if the registered owner does not remove the wreck within the deadline, it may remove the wreck at the registered owner's expense.

Moreover, article 9.6.c provides that should the hazard become particularly severe, the Affected State shall inform the registered owner in writing that the State intends to intervene immediately. More so, if the registered owner cannot be contacted or does not remove the wreck within the deadline set, article 9.7 of Nairobi WRC 2007 provides that the Affected State can commence the wreck removal by the most practical and expeditious means available provided that it is consistent with considerations of safety and protection of the marine environment.

Finally, article 9.8 of the Nairobi WRC 2007 provides that 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 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 stands to reason that article 9.8 of the Nairobi WRC 2007 will not be applicable if it is impossible to locate or contact the registered owner.

3.6 The Liability of Shipowners

Article 10.1 of the Nairobi WRC 2007 regulates that subject to article 11, the registered owner is strictly liable for the cost of locating, marking and removing the wreck under article 7, 8 and 9 respectively. The liability of the registered owner under article 10.1 of the Nairobi WRC 2007 follows the same pattern as in other Conventions of Maritime Law covering liability and compensation such as the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Convention) 2001 as amended.[47]

It is important to stress that the provisions of article 10.1 of the Nairobi WRC 2007 seems to only encompass cost that the affected State has incurred. On the contrary, this would mean that costs incurred by another actor than the affected State are not covered.[48]

The registered owner has strict liability in the sense that the registered owner is presumed to be liable. The owner can however, be exonerated on three grounds as follows: First, the registered owner is exonerated if he can prove that the wreck resulted from an act of war, hostility, civil war, insurrection or a natural phenomenon of an exceptional inevitable character as provided by article 10.1.a of the Nairobi WRC 2007; Second, the registered owner will escape liability if he can establish that the Maritime Casualty that cause the wreck was wholly caused by the act or omission done with the intent to cause damage by a third party; and Third, in accordance with article 10.1.c of the Nairobi WRC 2007, the registered owner is further exonerated from liability if the maritime casually that caused the wreck was wholly caused by the negligence or other wrongful act of any Government or other Authorities responsible for the maintenance of lights or other navigational aids in the exercise of that functions.

Article 10.3 of the Nairobi WRC 2007 further provide that no claim for costs referred to in article 10.1 may be made against the registered owner otherwise in accordance with the provision of this convention. It is important to emphasize that these provisions are without prejudice to the right and obligations of a State Party that has made a notification under article 3.2 in relation to wreck located in its territory, including the territorial sea, other than locating, marking and removing the wrecks in accordance with the Nairobi WRC 2007.

Moreover, article 10.4 of the Nairobi WRC 2007 provides that nothing shall prejudice the right of ship owners incurring any cost under the Nairobi convention to pursue a recourse action against third parties, such as cost arising from collision with another vessel.[49]

---

[47] W Irving, 'The Nairobi Convention: Reforming Wreck Removal in New Zealand' *Australian and New Zealand Maritime Law Journal* (2010) 24, 76-92, 207.
[48] GM Gauci (n 36)
[49] Ibid

Finally, article 11.1 of Nairobi WRC 2007 provides that the ship owner shall not be liable under the Nairobi Convention for the cost mentioned in article 10.1 if and to the extent that liability for such cost would be in conflict with:

a) International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969 as amended.
b) The International Convention on Liability and Compensation for Damage in connection with carriage of Hazardous and Noxious Substance by Sea (HNS) 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.

It is evident that the intention was to make liability of ship owners under the Nairobi WRC 2007 subsidiary to those liabilities established under the other conventions covering liabilities and compensations, of course, if they are applicable and in force. Such solution shall not pose any problem in case of liabilities under the CLC, HNS or Nuclear liability regime since these regimes have their own "Stand Alone" funds.

It is important to stress that liability of the ship owner with regards to the cost of reporting, locating, marking and removal of wrecks is not well articulated in the Nigeria Merchant Shipping Act, 2007.

3.7 Limitation of Liability by the Registered Owner

Article 10.2 of the Nairobi WRC 2007 rules that: 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. In the provision of article 10.2 above, the Convention on Limitation of Liability for Maritime Claims (LLMC) 1976, as amended by the protocol of 1996, which is the major convention on his area, is expressly mentioned.

The Convention on Limitation of Liability for Maritime Claims (LLMC) has broad coverage and will be the convention that in general is applicable when it comes to limitation of liability according to the Nairobi WRC 2007.[50] It is therefore of paramount importance to underline that LLMC includes an opt-out clause concerning Limitation of Liability by registered owners for

---

[50] IMO, *Status of Multilateral Conventions and Instrument in Respect of which the International Maritime Organization or its Secretary-General Performs Depository or other Functions* (2015) 369 <www.imo.org/en/About/Convention/Statesofconvention/pages/default.aspx> accessed 30 November 2019

wreck removal.[51] However, many States have exercise the reservation or opt - out clause contained in the LLMC, to exclude wreck removal claims with the result that the cost of removing such wrecks by Public Authorities will not be subject to any limits of liability on the part of the owner of the wreck.

Thus, the registered will not be able to limit liability in these States even though the provision in article 10.2 of the Nairobi WRC 2007 might seem to suggest that.[52] The protocol of 1996 did not affect this reservation. Article 10.2 of the Nairobi WRC 2007 equally permits the registered owner to limit liability according to national system of limitation of liability but in most cases such a system may not exist.

However, in the case of the International Convention on Civil Liability for Bunker Oil Pollution Damage (Bunker Liability) 2001, regime, the liability is restricted to ship's LLMC Limitation Fund which applies as well as to the limitation regime under the Nairobi WRC 2007. In the case of casualty involving both claims (i.e for Bunker Oil Pollution and Wreck Removal), when the registered owner limits its liability in accordance with LLMC Convention, these claims will have to compete with each other for the limited funds available.[53]

3.8 Compulsory Insurance or other Financial Security

Article 12 is the longest article within the Nairobi WRC 2007. The registered owner of a ship of 300 gross tonnages and above flying the flag of a State Party is required to maintain Insurance or other Financial Security, such as a guarantee of a bank or similar institution. The insurance or other security shall cover liability under the Nairobi WRC 2007 in an amount that equals the limit of liability under the applicable national or international limitation regime. In all cases the amount shall not exceed the limitation amount calculated in line with article 6.1.b in the Limitation of Liability for Maritime Claim 1976 as amended.

Article 12.2 of Nairobi WRC 2007 further provides that a certificate attesting that insurance or other financial security in force shall be issued to every ship. This certificate shall show that the ship fulfils the demand that follows from article 12.1 of Nairobi WRC 2007.

---

[51] Article 18.1 and article 2.1-d-e of the Convention on Limitation of Liability for Maritime Claims, 1976 as amended.

[52] J Herbert, 'The Challenges and Implications of Removing Ship Wrecks in the 21st Century' (2022) <https://assets.lloyds.com/assets/pdf-risk-reports-wreck-report-final-version/1/pdf-risk-reports-Wreck-Report-Final-version.PDF> accessed 11 June 2022

[53] A Luttenberger, B Rukavina and B Rak, 'The Implementation of The Nairobi International Convention on Removal of Wrecks, 2007 In the Croatian LAW' *14th International Conference on Transport Science: Maritime, Transport and Logistics Science* (2011) 1-10

Furthermore, article 12.2 of Nairobi WRC 2007 provides that the 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. Article 12.5 of Nairobi WRC 2007 regulates that the certificate is to be kept on board the ship.

The compulsory insurance provision of the Nairobi WRC 2007 corresponds to the compulsory insurance provisions of other International Conventions on liability and compensation such as;

(i) The International Convention on Liability and Compensation for Damages in connection with the carriage of Hazardous and Noxious Substance by Sea, 1996 as amended (HNS);
(ii) The International Convention on Civil Liability for Oil Pollution Damage, 1969 as amended (CLC); and
(iii) The International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, as amended (Bunker Convention).

The responsibility for implementation of compulsory insurance or other financial security obligations lies with the State Party, whose appropriate authority or ship's registry after determining that the requirements have been complied with, are entitled and obliged to issue a certificate attesting that insurance or other financial security is in force in accordance with the provisions of article 12.2 of Nairobi WRC 2007.

A State Party may authorize other institution or an organization to issue such certificate as provided by article 12.3.a of the Nairobi WRC 2007 but it shall fully guarantee the completeness and accuracy of the certificate so issued and shall undertake to ensure the necessary arrangements to satisfy this obligation.

Thus, the Nairobi WRC 2007 empowers the State Party to effectively impose these provisions of compulsory insurance or other financial security on the registered owner of a ship. There are two important obligations of the State Party according to articles 12.11 and 12.12 of the Nairobi WRC 2007:

(a) Not to permit any ship entitled to fly its flag to which this article applies (i.e, ships of 300 gross tonnage or more) to operate at any time unless a certificate has been issued in accordance with the provisions of article 12.2 or 12.14 of Nairobi WRC 2007.[54]

(b) To ensure, under its National Law, that insurance or other Security to the extent required, is in force in respect of any ship of 300 gross tonnage and above, whenever registered, entering or leaving a port in its territory, or arriving at or leaving from an offshore facility in its territorial sea.[55]

The purpose of these provisions is to ensure that any ship, whether registered in State Party or not, upon entering its 'Jurisdiction' has on board a certificate of insurance issued by a State Party. It would thus, ensure that all ships of 300 gross tons or more operating within the State Party's Exclusive Economic Zone (EZZ) are covered by insurance in the event of a shipwreck or derelict.[56]

There is no provision for Compulsory Insurance or other Financial Security by the registered Ship owner in the Domestic Shipping Laws of the Federal Republic of Nigeria, to indemnify the Regulatory Authority for the costs of locating, marking and removal of wrecks. This is a dangerous development and calls for urgent amendment of our Shipping Laws.

3.9 The Direct Right of Action against the Insurer

An important inclusion in the Nairobi WRC 2007 when it comes to the question of insurance is the provision of Article 12.10. Following the regime established in other liability convention, such as the CLC PROT 1992 and Bunker 2001 Conventions, Article 12.10 of the Nairobi WRC 2007 provides: "any claim for costs arising under the convention may be brought directly against the insurer or other person providing financial security for the registered owner's liability"

Thus, from liability insurance and compensation stand points, article 12.10 of the Nairobi WRC 2007 is the most powerful and effective tool to protect victims of marine casualties because it is

[54] Article 12.11 of Nairobi WRC 2007.
[55] Article 12.12 of Nairobi WRC 2007.
[56] Ibid

impossible for the liability insurers-the so called Protection and Indemnity Clubs (P & I clubs)-to conceal themselves behind ship owners.[57] P & I club is a Mutual Insurance Association that provides insurance cover for its member ship owners for their third party liabilities.

The "Pay to be Paid" Rule have historically allowed P & I clubs to deny their contractual obligations if ship owners fail to pay their claims or are bankrupt. The "Pay to be Paid" Rule is a fundamental component of Protection and Indemnity (P & I) Insurance policies which requires a club member to discharge his liabilities to the injured third party before he can be indemnified by the P & I club.[58]

From victim's interests' perspective, the "pay to be paid" rule might have been frequently and deliberately used to protect financial interest of both the ship owners and the P & I clubs. Although, it may be a truly effective legal protection for P& I clubs because the P & I insurance contract exists only between a ship owner and a P & I club and consequently the contractual indemnifying liability may not be expanded to any other third parties. This is why both CLC PROT 1992 and BUNKERS 2001 have introduced the direct right of action against the insurer, and the International Liability and Compensation Conventions have successfully settled in the Contemporary Maritime Legal Framework.[59]

The Nairobi WRC 2007 has also decided to use such powerful and effective tool to prevent any persons responsible and their insurers to escape from legal responsibilities. Thus, article 12.10 regulates both the rights and responsibilities of the liability insurer. Claims arising from the liability of ship owners in respect of locating, marking and removal of wrecks can be directly made against the insurer by the injured party. On other hand, the ship owner's liability insurer is entitled according to Article 12.10 of the Nairobi WRC 2007 to use defenses that the registered ship owner would have been entitled to invoke, such as limitation of liability, except the "bankruptcy or winding up of the registered owner".

Article 12.10 of the Nairobi WRC 2007 further provides that the Limitation of Liability by the insurer is still possible even if the registered owner is not entitled to limit liability. Moreover, the insurer may invoke the defense that the Maritime Casualty was caused by the registered owner

BY Lee, 'An Analysis on Wreck Related National Laws of the Republic of Korea: Considering Nairobi WRC 2007' *World Maritime University* (2014) <https://commons.wmu.se/cgi/viewcontent.cgi?article=1582&context=all_dissertations> accessed 01 February 2020.

[58] Protection and Indemnity Club Law and Practice, Chapter 20, page 335 available online at: <https://www.i-law.com/ilaw/doc/view> accessed 16 April 2020.

[59] Ibid

and may require the registered owner to be joined in the legal proceedings according to article 12.10 of the Nairobi WRC 2007.

In Nigeria, there is no such provision regarding "Direct Action Against the Insurer" in the Merchant Shipping Act (MSA) 2007 nor any other domestic shipping Law of the Federal Republic of Nigeria that deals on wrecks removal. Thus, if ship owner does not possess solvency for the costs of locating, marking and removal of wrecks in Nigeria, the Federal Government of Nigeria will have to bear such expenses. Hence, a new regulation for Direct Right of Action Against the Insurer for wrecks should be incorporated into the Nigeria Merchant Shipping Act (MSA) 2007 through amendment since Nigeria has not yet domesticated the Nairobi WRC 2007.

3.10 Time Limit for a Claim

Article 13 of the Nairobi WRC 2007 provides, with regards to time limits of wreck related claims, that such rights are extinguished unless an action is brought here under, within three years from the date when the hazard has been determined. This, perhaps, refers to when the Affected State has determined that the wreck constitute a hazard as provided in Article 8.1 of the Nairobi WRC 2007.

Furthermore, Article 13 provides that no action shall be undertaken in any case after six years from the date of the Maritime Casualty that caused the wreck. Thus, Article 13 imposes a dual time bar on the filing of claims by any party that has incurred costs, related to the marking and removal of a wreck.

More so, if the Maritime Casualty consists of a series of events, Article 13 rules that the six-year period shall run from the date of the first occurrence. It stands to reason that these time limits provided by Article 13 of Nairobi WRC 2007 seem to exclude the possibility of applying the Nairobi Convention on most of the already existing wrecks.[60]

This is in accordance with Article 28 in the Vienna Convention on the Law of Treaties stating that a Convention does not in doubt, have retroactive effect. Thus, Nairobi WRC 2007 focuses on future wreck instead of already existing wrecks.[61]

[60] GM Gauci (n 36)

[61] S Dromgoole and C Forrest, 'The Nairobi International Convention on the Removal of Wrecks 2007: A Post-adoption Appraisal' in MYA Baatz (ed), *The Modern Law of Marine Insurance* (Vol 3, Informa Law from Routledge 2009) 52

3.11 Settlement of Disputes

Article 15 of the Nairobi WRC 2007 regulates settlement of Disputes. When a dispute arises between two or more States Parties regarding the interpretation of the Nairobi WRC 2007, they shall, according to Article 15.1 of the Nairobi WRC 2007, seek to resolve their dispute, in the first instance, through negotiation, enquiry, meditation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangement or other peaceful means of their choice.

If no settlement is reached within a reasonable period of time, not exceeding twelve months, the provisions on settlement of disputes in the UNCLOS 1982 shall apply according to Article 15.2 of Nairobi WRC 2007. The provision on the settlement of disputes in the UNCLOS shall apply whether or not the individual States are members of the UNCLOS 1982.

3.12 Entry into Force

Article 18 of the Nairobi WRC 2007 stipulates that the Nairobi Convention shall come into force twelve months after ten States have ratified or acceded to it. Thus, the Nairobi WRC 2007 opened for signature from 19th November 2007 until 18th November 2008 and thereafter, opened for ratification, accession or acceptance.

The demand for 10 States is fairly low. This level can be construed in different ways. One construction is that the low number of States necessary for the Nairobi WRC 2007 to enter into force shows that the final phrasing of the Convention gained broad global acceptance at the Conference. On the other hand, the time it took for the Nairobi Convention to reach the 10 States necessary suggest that this might not have been the case.[62]

4. The Relevance of the Nairobi WRC 2007 to the Nigerian Maritime Industry

The Nairobi WRC 2007 provides an international uniform set of rules on the rights and obligations of states and ship owners in dealing with wrecks and its removal which may pose a hazard to navigation and a threat to the marine environment. It clearly states the registered owner's responsibility in the case of wreckage, while at the same time enabling the Affected State to act in situations where immediate actions are required.

It makes the registered ship owners financially liable for wrecks that pose a hazard to the safety of navigation or to the marine and coastal environment and require them to take out insurance or provide other financial security for covering the cost of wreck removal. It also provides the Coastal States with a right of direct action against the registered owners' insurers.

[62] W. Irving, (n 44).

There are however, several shortcomings of the Nairobi WRC 2007. One of the major shortcomings is a peculiar inclusion of the opt-in-clause that allows States to extend the application of the Nairobi WRC 2007 to their territories including the territorial seas. This possibility arguably, inhibits harmonization which is a direct opposition with the wordings in the preamble.

Furthermore, there is a lack of uniformity when it comes to limitation of liability by registered ship owners. Some States have opted out of the possibility to limit liability when it comes to wreck removal in LLMC 1976.

In spite of these shortcomings, the significant benefits in ratifying the Nairobi WRC 2007 outweigh any disadvantages in doing so. It is gratifying that Nigeria has ratified the Nairobi International Convention on the Removal of wrecks 2007 (hereinafter abbreviated as Nairobi WRC 2007) but Nigeria has not yet domesticated it. The legal implication of this, is that, as a country, we are bound by our international obligations contained therein vis-à-vis other States Parties. This is because the Law of Treaties form an integral part of international law. It is a law that builds understanding between nations and reminds them that obligations freely entered into by them cannot be freely given or wished away. Hence, the Latin Maxim: "*Pacta Sunt Servanda*".[63] Treaties to nations are thus, what contracts are in domestic laws to individuals.[64]

However, it is important to stress that Nigeria would not be able to enforce the provisions of Nairobi WRC 2007 on the registered ship owners since it is not yet a law in Nigeria. This is because Treaties between Nigeria and other subjects of International law do not transform into domestic Laws unless they are specifically domesticated, that is, enacted into laws by the National Assembly. But it is disheartening and a source of concern that the National Assembly has, over the years, shown little interest in discharging this all important constitutional tasks. Hence, most treaties which Nigeria is a party to have not been domesticated many years after their ratifications.[65]

[63] "Agreement Must Be Obeyed".

[64] GA Olagunju, 'Between Monism and Positivism: An Exposition of the Application of International Treaties in Nigeria' *LASU Law Journal* (2001) 4(1) 101

[65] CE Okeke and MI Anushiem, 'Implementation of Treaties in Nigeria: Issues, Challenges and the Way Forward' *Open Journal of Philosophy* (2001) <https://www.scirp.org/(S(vtj3fa45qm1ean45wffcz5%205))/referencespapers.aspx?referenceid=3437540> accessed 02 January 2020

Nigeria adheres to a Dualist approach to application of international law, a practice which is common in common law countries.[66]According to the Dualist, International Law must be transformed or adopted by the municipal legal system. Thus, the Dualist emphasized the difference between Municipal and International Law and requires the transformation of the latter into the former. Without such transformation, international Law or Treaty can be binding on the State but not on the individual until the transformation has taken place. Examples are Britain and Nigeria.

The Monist on the other hand accepts that International law and Municipal law should be regarded as one aspect of the same coin, binding on both the State and the citizens. In other words, once international treaty is entered into by the State, it is automatically incorporated into the domestic laws without more.[67] U.S.A and Germany are examples of countries practicing Monism.

Thus, treaties validly concluded between Nigeria and other subjects of international law do not automatically transform into Nigerian laws without legislative Intervention - they must be specifically enacted into law by the National Assembly in accordance with Section 12 of the Constitution of the Federal Republic of Nigeria, 1999, as amended (the 1999 Constitution),[68] According to section 12 of the 1999 Constitution! "No treaty between the Federation and any other Country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".

The status of undomesticated treaties in the Nigerian Legal System, which hitherto generated considerable controversy among scholars and jurist[69] was settled in the case of **Abacha V. Fawehinmi**[70] where the supreme court held per Ogundare J.S.C (as he then was) - that undomesticated treaties have no force of law whatsoever in Nigeria. The court however went further to state that where such treaties have been domesticated, they become "Statute with international flavor".[71]

[66] CA Okenwa, 'Has the Controversy Between the Superiority of International Law and Municipal Law Been Resolved?' *Journal of Law, Policy and Globalization* (2015) 35, 116
[67] G.A Olagunju (n 61).
[68] Constitution of the Federal Republic of Nigeria, 1999 (as amended) caps C23, LFN, 2004.
[69] Ibid.
[70] (2000) FWLR (pt.4) 553 at 586
[71] GA Olagunju, 'Abacha v Fawehinmi: Between Monism and Positivism' *LASU Law Journal* (2001) 4(1) 101 <https://www.academia.edu/27179408/Abacha_v_Fawehinmi_Between_Monism_and_Positivism_pdf> accessed 30 April 2023.

Treaty is an international agreement concluded, between States in written form and governed by international law.[72] It includes any international agreement concluded between one or more international organizations which is in written form and governed by international law.[73]

Thus, the 1999 constitution leaves no one in doubt that once a treaty is enacted into law by the National Assembly, it forms part of the Nigeria Legal system. In fact, the issue had long been settled before the promulgation of the 1999 constitution. Hence, in the case of **OguguVs State,**[74] the Supreme Court held that African Charter on Human and Peoples Rights, a treaty which was enacted into Law by the National Assembly in 1983, formed part of the Nigerian domestic laws.

The domestication of the Nairobi WRC 2007 in Nigeria calls for urgent attention, so as to be able to enforce the provisions of the Nairobi Convention on the registered ship owners, since it is not yet a law in Nigeria. But, should Nigeria simply domesticate the Nairobi WRC 2007 without any review of domestic wrecks removal laws or without amending the Merchant Shipping Act (MSA) 2007? The consequence would be no substantial improvement on the Laws of Wrecks Removal in Nigeria. First, the incoherence of the Nigeria's Domestic Wrecks Removal Laws would not only endue but an extra layer of inconsistency would be introduced. Second, Nigeria's Domestic Laws of Wrecks Removal would fail to conform to the best approach taken by the Nairobi Convention. Third, the Nairobi WRC 2007 concerns wrecks in the Exclusive Economic Zone (EEZ) whereas most wrecks are in the inshore waters and territorial seas of Nigeria.

If the Nairobi WRC 2007 is domesticated in Nigeria, she would be free to extend the provisions of Nairobi WRC 2007 in her territorial waters after complying with the provisions of Article 3.2 of the Nairobi WRC 2007, but she may not necessarily accept in totality, the Nairobi Convention's provisions drafted with "Exclusive Economic Zone" in mind, including the general requirement to act in a proportionate manner.

Hence, Nigeria should amend her Domestic wrecks Removal Laws, especially the Merchant Shipping Act, (MSA) 2007, by narrowing the gap between her Domestic wrecks Removal Laws and the Nairobi WRC 2007. In terms of the amendment of the Nigerian Domestic Shipping Laws, the most urgently necessary one is to require ships of 100 gross tonnages and above to obtain and

[72] Article 1 (a) Vienna Convention on the Law of Treaties, 1969.
[73] Article 1 (a) Vienna Convention on the Law of Treaties Between States and International Organization or Between International Organizations, 1986.
[74] (1994) 9 NWLR (pt. 366), 47

maintain the liability insurance for wrecks related costs and expenses. It is more natural that the Merchant Shipping Act, 2007 should include such provisions.

5. Should Nigeria Extend the Provisions of Nairobi WRC 2007 to Her Territory, including the Territorial Sea?

To answer this question, we have to first consider: whether Nigeria is free to adopt national rules enabling them to take measures against ship owners for removal of wrecks; which do not constitute a hazard, after extending the provisions of the Nairobi WRC 2007 within the territorial sea? It appears crystal clear that there is no such provision in the Nairobi WRC 2007, giving State Parties which have extended the provisions of the Nairobi WRC 2007 inward to compel ship owners to remove wrecks which do not constitute a hazard to navigation.

Article 2.1 of the Nairobi WRC 2007 provides that a State Party may take measures in accordance with the Nairobi Convention in relation to the removal of a wreck "which poses a hazard" in the Convention Area. Article 6 of the Nairobi WRC 2007 lists a number of criteria to be taken into account by the Affected State when determining whether a wreck poses a hazard.

Cases can be envisaged where a wreck would not satisfy these criteria. For example, where it is easily avoided by maritime traffic and poses no other hazard; or where it is stranded in a location where it is claimed to impair visual amenity but does not constitute any hazard that might necessitate its removal.[75]

Gaskel and Forrest[76] pointed out that Article 4.4 of the Nairobi WRC 2007 provides for Article 2.4 not to apply in the territory, including the territorial sea of a State Party but it makes no similar provisions with respect to other paragraphs in Article 2. Article 4.4 of the Nairobi WRC 2007 provides: when state party has made a notification under Article 3.2, the following provision of the Nairobi Convention shall not apply in its territory, including the territorial sea: (4.a.i) Article 2.4; (4.a.ii) Article 9.1, 9.5, 9.7, 9.8, 9.9, 9.10; and(4.a.iii) Article 15. (4b) Article 9.4 takes effect "subject to the national law of the Affected State". The Affected State therefore retains the right to legislate for the competent authorities to lay down conditions for a wreck removal operation, including conditions which restrict the owner's freedom of contract.

[75] C De La Rue, 'Shipping and the Environment – Legal Consultancy: Nairobi International Convention on the Removal of Wrecks 2007' (2015) <https://www.collindelarue.com/wreck-removal/> accessed 02 February 2020

[76] N Gaskell and C Forrest, 'The Wreck Removal Convention 2007' *Lloyd's Maritime and Commercial Law Quarterly* (2016) 44, 113-114

However, the conditions for such removal must be 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 2.4 provides: the application of this Nairobi 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. According to Gaskel and Forrest[77] this must lead to the conclusion that the other paragraphs of Article 2 were intended to remain applicable in the territory, including notably Article 2.2 and Article 2.3.

This means that, wherever the wreck is located, measures taken by the Affected State must be proportionate to the hazard[78] and such measures must neither go beyond what is reasonably necessary to remove the wreck when it poses a hazard, nor unnecessarily interfere with the rights of any party concerned.[79] Article 2.3 of the Nairobi WRC 2007 further provides that such measures taken by the Affected State to remove the wreck must cease as soon as the wreck has been removed.

Thus, the reasoning of Gaskel and Forrest referred to above in relation to Article 2.2 and 2.3 of the Nairobi WRC 2007 must likewise apply to Article 2.1: as it is not excluded from the territory, including the territorial sea, by Article 4.4 of the Nairobi WRC 2007. Hence, the right of a State Party to take measures in relation to the removal of a wreck under the Nairobi Convention arises only if it poses a hazard.

The same reasoning must follow from the text of the paragraphs of Article 9 which remain applicable in the territory including the territorial sea (i.e. those not excluded or amended by Article 4.4 of the Nairobi WRC 2007). It is clear that each of these paragraphs – 9.2, 9.3 and 9.6 – applies only to a wreck which has been determined to constitute a hazard. In particular, Article 9.2 provides that "the registered owner shall remove the wreck determined to constitute a hazard". It stands to reason that he has no such obligation where this determination has not been made.

According to the argument put forward by De la Rue Collin[80] that the Nairobi WRC 2007 is open to the interpretation that it does not prevent States from taking measure, outside the scope of the

[77] Ibid
[78] Article 2.2 of the Nairobi WRC 2007
[79] Article 2.3 of the Nairobi WRC 2007
[80] C de la Rue (n 72)

Nairobi Convention, to remove such a wreck at their own expense. However, it is clear from Article 10.3 of the Nairobi WRC 2007 that the Convention provides an exclusive basis for wreck removal orders or recovery of claims against the registered ship owner, and that any measures against him in relation to a wreck which has not been determined to constitute a hazard would be contrary to the Nairobi Convention.

He further maintained that, where a State Party has extended the Nairobi WRC 2007 inwards it clearly has greater powers under the Convention in relation to wrecks in the territorial sea than in relation to those outside it; nevertheless it is also clear that any measures it takes to order removal of a wreck in the Convention Area, or to recover costs of removal from the registered owner or insurers, must be in accordance with the convention. There is no scope for it to legislate for such measures on some other basis outside the convention.[81]

From the above analysis and provisions of Nairobi WRC 2007 as well as the views of some writers, the Nairobi international Convention on the Removal of Wrecks 2007, if extended into Nigeria's territory, including the territorial sea would provide comfort to the harbor masters and shore authorities. Besides, the Nairobi Convention will provide freedom to contract as a particular salvor may not be imposed on the ship owner. There is also the benefit of compulsory insurance or other financial security by the registered ship owner and direct action against the insurer.

Nevertheless, extending the Nairobi Convention provisions into the Nigeria's territory, including the territorial sea, would imply that measures cannot be taken against ship owners for removal of wrecks which do not constitute hazard within Nigeria's territorial waters. Nigerian authorities need no reason to remove wrecks and derelicts from Nigerian coast beyond the fact the wrecks or derelicts exist. Put slightly differently, there should be no need for requirement that the wrecks pose a hazard to navigation as it is one of the criteria for removal under the Nairobi Convention.

Nigeria's territorial waters cover a vast area, and while some of the areas are used extensively for navigation, there are inevitably also, large portions which are rarely navigated. Given this contrast between the vastness of Nigeria's territorial waters and the infrequent navigation of the majority of these waters, if only those wrecks which pose a hazard to navigation were subject to removal, the consequence will be that considerably more wrecks would be abandoned in the Nigeria's waters. The environmental consequences of this could be significant.

---

[81] Ibid

Wrecks may be harmless both to the navigation of other vessels and to the environment, and still need to be removed. In the case of SAN CUVIER,[82] for example, the 'impassable' nature of the local topography meant that the only option for removal was cutting up the wreck and removing it by helicopter. Peculiarly, the remote position of the SAN CUVIER meant that she posed no hazard to navigation and the cost of removing her was greatly inflated.

6. Conclusion

The Nairobi Convention provides a set of uniform international rules aimed at ensuring the prompt and effective removal of wrecks located beyond the territorial sea of State parties. However, most wrecks are in the inshore waters and territorial seas of Nigeria.

Hence, Nigeria should without further delay, domesticate the Nairobi international Convention of 2007 so as to be able to enforce its provisions on the registered ship owner in Nigeria. Nigeria should also review, amend and strengthen her domestic wreck removal laws by narrowing the gap between the Nairobi Convention and the Nigerian domestic wrecks removal laws.

[82] S Cuvier, 'Wreck of Grounded Ship Removal Successful' *Scoop* (2008) <https://www.scoop.co.nz/stories/AK0812/S00312/wreck-of-grounded-ship-removal-successful.htm> accessed 06 March 2022