

## A CRITICAL REVIEW OF THE INCORPORATION OF SOLAS SURVEY AND CERTIFICATION STANDARDS IN SOUTH AFRICAN LAW

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### Abstract

*The 1982 United Nations Convention on the Law of the Sea (UNCLOS) requires sovereign states engaged in maritime navigation to adopt domestic regulations giving effect to navigational safety standards. These standards have been developed by the International Maritime Organisation (IMO) in several conventions, which require, amongst other things, that coastal states conduct surveys of all vessels that call at their ports. The survey requirements caused delays in vessel turnaround times, due to a difference in prescribed survey intervals. To address that issue, the 1988 International Conference on the Harmonized System of Survey and Certification adopted protocols that amended major international conventions and introduced the Harmonized System of Survey and Certification (HSSC).*

*The HSSC makes the survey intervals across the relevant safety regulations uniform. However, the IMO does not have competence to impose uniform implementation of its conventions by member states, because implementation falls within the competence of state parties to each independent instrument. With a focus on the 1974 Safety of Life at Sea Convention (SOLAS), as amended, this article critically discusses the incorporation of SOLAS survey and certification standards into the Merchant Shipping Act (MSA) and its subordinate legislation. It identifies discrepancies and gaps in the vessel survey and certification requirements of the MSA in contrast to SOLAS provisions. It then makes a recommendation for the amendment of the MSA, aimed at protecting the competitiveness of South African ports and ensuring that domestic legislation is compliant with SOLAS provisions, thereby fostering the goal of the international maritime community for uniformity in the implementation of international standards regulating shipping, including navigation.*

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## 1 Introduction

The authority of a state in international law to exercise control over its components is primarily territorial.<sup>1</sup> Subject to other rules of international law such as human rights law,<sup>2</sup> the state has complete jurisdiction over its territory, including over all persons within its territory, irrespective of nationality.<sup>3</sup> In conformity with the 1982 United Nations Convention on the Law of the Sea (UNCLOS),<sup>4</sup> The maritime spaces in which the coastal state exercises some form of sovereign rights, include internal waters, territorial seas, the contiguous zone, the exclusive economic zone (EEZ) and the continental shelf, and maritime spaces that fall beyond the jurisdiction and control of the coastal state include the high seas and the deep seabed, referred to in the UNCLOS as the 'Area'.<sup>5</sup> The degree of jurisdiction exercised by the coastal state varies within the different maritime spaces.<sup>6</sup> The spaces under coastal state jurisdiction can be further subdivided into zones regulated by the territorial sovereignty of the state (internal waters and territorial sea), and zones beyond the territorial sovereignty of the state but still falling within its national jurisdiction (EEZ and contiguous zone).<sup>7</sup>

In the exercise of their jurisdiction, coastal states may regulate the standards of foreign vessels, except in relation to the military vessels of foreign governments.<sup>8</sup> However, coastal states' jurisdiction may not be exercised over their territorial sea in a manner that affects the construction, design, equipment and manning standards (CDEM)

<sup>1</sup> See *SS Lotus (France v Turkey)* PCIJ Ser A, No 10 (1927) 18; *Kaunda and others v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) para 38; *Okah v S and Others* 2016 (4) All SA 775 (SCA) para 29. See also J Dugard *International Law: A South African Perspective* 4 ed (2011) 148.

<sup>2</sup> See H Strydom (ed) *International Law* (2016) 244; See also AJ Colangelo 'Spatial legality' (2012) 107 *Northwestern University Law Review* 106.

<sup>3</sup> Y Tanaka *The International Law of the Sea* 2 ed (2015) 6.

<sup>4</sup> 1833 UNTS 3 (1982) 21 ILM 1261.

<sup>5</sup> Tanaka (n 3 above) 5; Other areas subject to coastal state jurisdiction include archipelagos and straits, neither of which are directly relevant to South Africa; see Dugard (n 1 above) 368.

<sup>6</sup> Ø Jensen *Fridtjof Nansen Report* (2006) 14; A Bardin 'Coastal state's jurisdiction over foreign vessels' (2002) 14 *Pace International Law Review* 30.

<sup>7</sup> Tanaka (n 3 above) 6.

<sup>8</sup> See art 21 of UNCLOS. The vessels referred to in this article are those used for navigation at sea and the term is used interchangeably with 'ship'. South Africa's jurisdiction to regulate foreign vessels that come within its territory does not extend to vessels belonging to the defence forces of foreign states (see part 4.1 below).

of foreign vessels, unless such laws and regulations give effect to generally accepted international rules or standards.<sup>9</sup> Generally accepted international standards refer to those standards developed by the International Maritime Organization (IMO).<sup>10</sup>

In 1948, a United Nations (UN) conference in Geneva adopted a convention that established the IMO,<sup>11</sup> and one of its key purposes is

[t]o provide machinery for co-operation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.<sup>12</sup>

The IMO aims to harmonise international maritime regulations<sup>13</sup> and has established a body of laws, comprising of about 50 conventions, to that end.<sup>14</sup> The measures contained in the conventions cover all aspects of international shipping including ship design, construction, equipment, manning, operation and disposal.<sup>15</sup> The most relevant IMO instrument with regard to vessel navigation standards include the International Convention for the 1974 Safety of Life at Sea, as amended (SOLAS);<sup>16</sup> the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, as amended (STCW 1978);<sup>17</sup> the Convention on the International Regulations for Preventing Collisions at Sea, as amended (COLREGs 1972);<sup>18</sup> the 1978 Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships, as amended (MARPOL 1973/1978);<sup>19</sup> and the 1988 Protocol Relating to the International Convention on Load Lines, as amended (LL Protocol

<sup>9</sup> See art 21(2) of UNCLOS.

<sup>10</sup> L Shi 'Successful use of the Tacit Acceptance Procedure to effectuate progress in international maritime law' (1998-1999) 11 *University of San Francisco Maritime Law Journal* 300.

<sup>11</sup> Convention on the Intergovernmental Maritime Consultative Organization, 289 UNTS 48. Until 1982, the Organisation was called the Inter-Governmental Maritime Consultative Organization (IMCO).

<sup>12</sup> Art 1(a) of the 1948 Convention on the IMO.

<sup>13</sup> B Marten *Port State Jurisdiction and the Regulation of International Merchant Shipping* (2014) 81.

<sup>14</sup> See R Falkner (ed) *The Handbook of Global Climate and Environment Policy* (2016) 62.

<sup>15</sup> See for example SOLAS.

<sup>16</sup> 1184 UNTS 1, (1975) 14 ILM 959.

<sup>17</sup> 1361 UNTS 2.

<sup>18</sup> 1050 UNTS 18, (1973) 12 ILM 734. Also see IMO 'IMO and Safety of Navigation' 2016, <http://www.imo.org/en/OurWork/Safety/Navigation/Pages/Default.aspx> (accessed 12 October 2017).

<sup>19</sup> 1340 UNTS 61, (1978) 17 ILM 546.

1988).<sup>20</sup> However, the focus of this article is on SOLAS, because it is 'the most important and influential multilateral treaty dealing with maritime safety...'.<sup>21</sup>

To establish whether a vessel's condition complies with prescribed navigational safety standards, state parties to SOLAS are required not only to ensure that vessels registered under their flag are inspected for compliance before they may navigate, but that foreign vessels visiting their territory must be surveyed to ensure that they also comply with the safety standards.<sup>22</sup> The survey dates and intervals prescribed under SOLAS and other relevant IMO instruments such as MARPOL and the LL Protocol 1988 were not uniform and caused delays.<sup>23</sup> To bring uniformity to survey intervals and certification standards, the IMO, through the International Conference on the Harmonized System of Survey and Certification, 1988 (1988 HSSC Conference), amended all three conventions by introducing the Harmonized System of Survey and Certification (HSSC).<sup>24</sup>

This article bears relevance to African states, in light of the African Union (AU) 2050 Africa's Integrated Maritime Strategy (2050 AIM Strategy).<sup>25</sup> In accordance with the framework for strategic actions of the 2050 AIM Strategy, AU states are 'urged to accept and fulfil all those responsibilities that emanate from the establishment of maritime zones as foreseen by UNCLOS and the IMO SOLAS Convention'.<sup>26</sup> That notwithstanding, there are a number of African states that are not yet party to SOLAS and that have yet to ratify its Protocols.<sup>27</sup> The article sets out to discuss critically the incorporation of the SOLAS survey and certification standards in South African law, identify any discrepancies and gaps in the domestic standards as regulated by the Merchant Shipping Act (MSA),<sup>28</sup> and make a recommendation to eliminate the discrepancies and gaps. Identifying

<sup>20</sup> 1988 Protocol on Load Lines <http://www.admiraltylawguide.com/conven/protoloadlines1988.html> (accessed 6 November 2017).

<sup>21</sup> AJ Rodriguez & M Campbell Hubbardt 'The International Safety Management (ISM) Code: A new level of uniformity' (1998-1999) 73 *Tulane Law Review* 1585, 1587.

<sup>22</sup> See part B of SOLAS.

<sup>23</sup> See part 3 below.

<sup>24</sup> See IMO Res A.883(21) 'Global and uniform implementation of the harmonised system of survey and certification (HSSC)' para 3 and para 5(a) [http://transport.mid.gov.kz/sites/default/files/pages/a\\_21-res.883\\_-\\_global\\_and\\_uniform\\_implementation\\_of\\_the\\_harmonizedsystem\\_of\\_survey\\_and\\_certification\\_hss.pdf](http://transport.mid.gov.kz/sites/default/files/pages/a_21-res.883_-_global_and_uniform_implementation_of_the_harmonizedsystem_of_survey_and_certification_hss.pdf). See also Shi (n 10 above) 320.

<sup>25</sup> See African Union '2050 AIM Strategy', <https://au.int/en/documents/30928/2050-aim-strategy> (accessed 2 February 2018).

<sup>26</sup> See para 59 of the 2050 AIM Strategy.

<sup>27</sup> For example, Botswana, Burkina Faso, Cameroon, Gabon and Gambia, to name a few. See status of IMO multilateral treaties, <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf> (accessed 2 February 2018).

<sup>28</sup> Act 57 of 1951.

discrepancies and regulatory gaps is essential because they create inconsistencies with the survey and certification standards prescribed by SOLAS, aimed at fostering uniformity in the regulation of vessel survey and certification standards as established by the HSSC. The discussions include the relevance of uniformity in the incorporation of international rules, a background on SOLAS 1974 as amended and a discussion on the regulatory discrepancies and gaps between the MSA survey and certification standards and SOLAS Protocol 1988. This article concludes with a recommendation to amend the MSA and incorporate the survey and certification standards regulated under SOLAS as amended, in a more comprehensive manner.

## 2 Relevance of Uniformity in the Incorporation of International Safety Standards

Uniformity is vital in shipping regulations. However, where states rely solely on domestic legislation to regulate navigation, this would indubitably result in a plethora of conflicting instruments regulating the safety of navigation across the globe.<sup>29</sup> Moreover, unilateral regulations 'could also result in distortions in competition and administrative confusion'.<sup>30</sup> Thus, states are encouraged to adopt international standards rather than create unilateral domestic legislation.<sup>31</sup>

Moreover, uniformity in shipping regulations enhances economic efficiency and provides 'predictability, certainty and stability which are the foundations of international trade and maritime commerce'.<sup>32</sup> Over 90% of Africa's trade transactions are conducted by sea, making international trade vital to many African economies.<sup>33</sup> Using the oceans as a medium of transportation impacts on people and industries across the African continent, with thousands of job opportunities available to Africans due to the numerous vessels, ports, shipyards, and support

<sup>29</sup> RR Churchill & AV Lowe *The Law of the Sea* 3 ed (1999) 265, Marten (n 13 above) 17.

<sup>30</sup> TA Mensah 'Maritime safety regulations' *Max Planck Encyclopedia of Public International Law* (2011) para 2. Unilateral regulations will lead to a maze of conflicting regulations, which will undoubtedly affect the efficiency of international trade – a significant percentage of which is transported by sea. See Comité Maritime International 'Brochure on Promoting Maritime Treaty Ratification the ICS/ISF and CMI Campaign' (2013) <http://comitemaritime.org/Uploads/Work%20In%20Progress/Promoting%20Ratification%20of%20Maritime%20Conventions/3%20ICS%20Brochure%20-%20April%202013.pdf> (accessed 23 May 2017). See also Rodriguez & Hubbardt (n 21 above) 1586.

<sup>31</sup> M Gavouneli *Functional Jurisdiction in the Law of the Sea* (2007) 35.

<sup>32</sup> B Makins 'Uniformity of the law of the carriage of goods by sea in the 1990s: The Hamburg Rules – a casualty' (1991) 8 *Australian and New Zealand Maritime Law Journal* 35.

<sup>33</sup> See para 2 of the 2050 AIM Strategy.

industries in the Africa's maritime domain. It is evident that 'inefficiencies in Africa's maritime system with its supply chains and industries can thus have costly impact on a large number of participants in the economies of many African countries'.<sup>34</sup> In South Africa, the government has launched Operation *Phakisa*, aimed at implementing national development policies and programmes better, faster and more effectively. The first phase of the implementation focuses on unlocking the economic potential of South Africa's oceans.<sup>35</sup>

Applauding the strides undertaken by the IMO to achieve uniformity in the regulatory framework of maritime law, Lord Diplock stated:

Not uniformity for its own sake, but uniformity which will facilitate international trade, reduce the costs of sea transport and what is equally important if trade is to be carried on successfully, will bring as much certainty into it as possible so that those taking part in it know where they stand, what obligations they have to fulfil and what risks they run.<sup>36</sup>

In an ideal maritime arena, the same regulatory provisions would exist in domestic laws, and such provisions would be interpreted in the same manner in all countries that have given them force of law.<sup>37</sup> Moreover, as Reynolds observes, maritime shipping is international in character:

The international maritime industry [has reiterated] the relationship between economic viability and the ability to absorb the costs associated with, *inter alia*, ship maintenance and regulatory compliance ... [w]ith shipping being an international activity, the additional financial and other burdens, which arise because of the non-uniformity of regulations across State and regional boundaries, can be very discouraging.<sup>38</sup>

South Africa, 'the powerhouse of the African continent',<sup>39</sup> has shown interest in the development of maritime regulations, through its active role within the IMO, participating in the IMO Council and various working

<sup>34</sup> See para 3 of the 2050 AIM Strategy.

<sup>35</sup> See SAMSA 'Operation Phakisa' (2013) <https://www.samsa.org.za/press-room/news/operation-phakisa> (accessed 2 February 2018).

<sup>36</sup> Makins (n 32 above) 36.

<sup>37</sup> F Berlingieri 'Uniformity in maritime law and implementation of international conventions' (1987) 18 *Journal of Maritime Law and Commerce* 317.

<sup>38</sup> GS Reynolds 'The regulation of international shipping: Systematic issues facing states in the administration of maritime affairs and the eradication of substandard shipping' 2000 *World Maritime University Dissertations* 25. See also D Smith, JL Suárez de Vivero, & TS Agardy (eds) *Routledge Handbook of Ocean Resources and Management* (2015) 202, stating that the 'size and international character of the shipping industry make it one of the leading drivers of the global economy'.

<sup>39</sup> See E de Wet, H Hestermeyer & R Wolfrum (eds) *The Implementation of International Law in Germany and South Africa* (2015) vii.

groups of the organisation.<sup>40</sup> South Africa became a member of the IMO in 1995 and has recently been elected as a Category C member of its Council.<sup>41</sup> As a member of the IMO, South Africa should pursue uniformity in the implementation of international standards.

### 3 International Convention for the Safety of Life at Sea 1974 as Amended (SOLAS)

A response to the *Titanic* disaster in 1912, the first SOLAS Convention saw life in 1914.<sup>42</sup> It was subsequently modified in 1929,<sup>43</sup> 1948<sup>44</sup> and 1960.<sup>45</sup> In 1974, a new SOLAS Convention was drafted. The 1974 Convention introduced the concept of 'tacit amendment procedure', whereby it is easier for amendments to come into force within a shorter time frame. With this new procedure, amendments come into force on a specified date, if on that date there were no registered objections by the member states. Prior to this new procedure, none of the amendments to the 1960 SOLAS Convention adopted between 1966 and 1973 received sufficient acceptances to satisfy the requirements for entry into force,<sup>46</sup> whereas, the 1981 amendments to SOLAS, for example, entered into force on 1 September 1984.<sup>47</sup> SOLAS has seen numerous amendments

<sup>40</sup> See P Vrancken 'The international law of the sea' in De Wet *et al* (n 39 above) 156.

<sup>41</sup> Category C members are states denoted as having 'special interests in maritime transport or navigation and whose election to the Council will ensure the representation of all major geographic areas of the world'. The Council is the Executive Organ of IMO and is responsible, under the Assembly, for supervising the work of the Organization. Between sessions of the Assembly the Council performs all the functions of the Assembly, except the function of making recommendations to Governments on maritime safety and pollution'. See IMO 'Structure of IMO' 2017 <http://www.imo.org/en/About/Pages/Structure.aspx> (accessed 31 January 2018).

<sup>42</sup> See text of the Convention for the Safety of Life at Sea 1914, <https://archive.org/details/textofconvention00inte> (accessed 23 October 2017).

<sup>43</sup> International Convention for the Safety of Life at Sea, 1929. See UKTO 034/1932 Cmd4198, <http://treaties.fco.gov.uk/docs/pdf/1932/TS0034-1.pdf> (accessed 23 October 2017).

<sup>44</sup> International Convention for the Safety of Life at Sea, 1948. See UKTO 001/1953 Cmd8720, <http://treaties.fco.gov.uk/docs/pdf/1953/TS0001-1.pdf> (accessed 23 October 2017).

<sup>45</sup> International Convention for the Safety of Life at Sea, 1960. See UKTO 065/1965 Cmd2812 <http://treaties.fco.gov.uk/docs/pdf/1965/TS0065-1.pdf> (accessed 23 October 2017).

<sup>46</sup> See IMO 'Introduction' 2016 <http://www.imo.org/en/About/Conventions/Pages/Home.aspx> (accessed 23 October 2017).

<sup>47</sup> See IMO 'History of SOLAS' 2017 <http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofSOLAS/Pages/default.aspx> (accessed 23 October 2017).



since 1974<sup>48</sup> and is now referred to as SOLAS 1974 as amended.<sup>49</sup> A series of tanker accidents between 1976 and 1977 led to the convening of the International Conference on Tanker Safety and Pollution Prevention, in London in 1978.<sup>50</sup> The conference adopted the Protocol of 1978 to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS Protocol 1978).<sup>51</sup>

As mentioned above, the 1988 HSSC Conference led to the amendment of SOLAS to introduce the harmonised system of survey and certification (HSSC).<sup>52</sup> The HSSC standards are incorporated by the Protocol of 1988 to the International Convention for the Safety of Life at Sea, 1974, as amended (SOLAS Protocol 1988).<sup>53</sup> SOLAS requires member states to survey vessels that visit their ports and prevent vessels that do not comply with the safety standards from sailing.<sup>54</sup> In line with the goal of the IMO that all states apply a single and uniform system of survey and certification to all types of vessels entitled to fly their flags and change over from the existing system of survey and certification to the harmonised system in a uniform manner,<sup>55</sup> the IMO has passed resolutions adopting amendments to introduce the HSSC into other international instruments.<sup>56</sup> SOLAS, as amended by SOLAS Protocol 1988 and other international instruments that incorporate the HSSC, require that vessels be issued with relevant certificates following a survey, as prescribed by their regulations.<sup>57</sup>

The relevance of SOLAS Protocol 1988 in the maritime community cannot be overemphasised because of its significant acceptance by 113

<sup>48</sup> Some of these amendments include: the Protocol of 1978 – Tanker safety and pollution prevention; the 1981 amendments – chapter II-1 and II-2 updated; the 1983 amendments – revised chapter III; the 1988 (April) amendments – post Herald of Free Enterprise.

<sup>49</sup> See IMO (n 47 above).

<sup>50</sup> See WD Snider 'IMCO Conference on Tanker Safety and Pollution Prevention' (1978) 15 *Marine Technology* 297.

<sup>51</sup> 1226 UNTS 237 (1978) 17 ILM 579.

<sup>52</sup> See (n 24 above).

<sup>53</sup> See <http://www.ifrc.org/docs/idrl/I457EN.pdf> (accessed 23 October 2017).

<sup>54</sup> See reg I/6(c) of SOLAS Protocol 1988.

<sup>55</sup> See IMO Resolution A.883(21) (n 24 above) paras 7–8.

<sup>56</sup> See resolution MEPC 39(29) in respect of Annexes I and II of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78); resolutions MEPC 40(29) and MSC 16(58) in respect of the International Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (IBC Code); resolution MSC 17(58) in respect of the International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code); and resolutions MEPC 41(29) and MSC 18(58) in respect of the Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk (BCH Code).

<sup>57</sup> See regs 5 of MARPOL and I/12 of SOLAS Protocol 1988.



states, representing 97.18% of the world tonnage.<sup>58</sup> The United States of America (USA) and the European Union (EU),<sup>59</sup> attract significant numbers of merchant vessels to their ports, have the ability to influence global navigational standards through the development and enforcement of unilateral regulations that affect the condition and operational standards of foreign vessels.<sup>60</sup> However, the USA, once a major impediment to uniform implementation of IMO instruments due to its reluctance to ratify them,<sup>61</sup> has ratified SOLAS<sup>62</sup> and is a party to SOLAS Protocol 1988.<sup>63</sup> Notwithstanding the significant acceptance of SOLAS Protocol 1988 by maritime states, its acceptance by an influential nation such as the USA is an added impetus for South Africa to ratify SOLAS Protocol 1988. In order to boost the economic efficiency of South African ports and curb any risks of distortions in competition and administrative confusion when dealing with merchant fleets flying the flag of the USA or that of any other state party to SOLAS Protocol 1988,<sup>64</sup> the MSA should be amended to incorporate SOLAS Protocol 1988 provisions in a comprehensive manner.

## **4 Regulatory Discrepancies and Gaps between MSA Survey and Certification Standards and SOLAS Protocol 1988**

### **4.1 Introduction**

The MSA is the primary enabling legislation for the regulation of shipping in South Africa.<sup>65</sup> SOLAS, as amended by SOLAS Protocol 1978, has the force of law in South Africa, subject to the provisions of the MSA<sup>66</sup> as well

<sup>58</sup> See Summary status of IMO conventions as at 19 January 2018 <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/StatusOfTreaties.pdf> (accessed 2 February 2018).

<sup>59</sup> The USA introduced a double hull requirement for oil tankers in the 1990s, and the EU made Directive 2003/25/EC of 14 April 2003 on specific stability requirements for ro-ro passenger ships. See B Marten 'Port state jurisdiction, international conventions and extraterritoriality: an expansive interpretation' in H Ringbom (ed) *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (2015) 107.

<sup>60</sup> These states though great, also have to consider balancing their interests when engaging in such unilateral action (Marten id 108).

<sup>61</sup> See NJ Healy 'International uniformity in maritime law: the goal and the obstacles' (1979) 9 *California Western International Law Journal* 501.

<sup>62</sup> Ratified on 7 September 1978.

<sup>63</sup> Ratified on 1 July 1991.

<sup>64</sup> See part 2 above.

<sup>65</sup> J Hare *Shipping Law and Admiralty Jurisdiction in South Africa* 2 ed (2009) 316.

<sup>66</sup> See s 356bis(1) of the MSA.

as the regulations made in terms of the MSA.<sup>67</sup> As such, SOLAS Protocol 1978 is the 'Safety Convention' for purposes of the MSA.<sup>68</sup> At the time of completion of this article, South Africa is not yet a party to SOLAS Protocol 1988, and Parliament is yet to enact any legislation giving effect to SOLAS Protocol 1988 in South Africa.<sup>69</sup>

The provisions of the MSA are applicable to all foreign vessels – excluding vessels belonging to foreign defence forces – only while such foreign vessels are in a South African port or its territorial waters.<sup>70</sup> The port forms an integral part of the coast of the state under which it falls<sup>71</sup> and is subject to its sovereignty by virtue of its location within the internal waters of the state.<sup>72</sup> Within its internal waters, South Africa may enforce its laws against foreign vessels and persons on board, subject to any limitation under international law.<sup>73</sup> Subject to exceptions in the UNCLOS and international law, war vessels and government vessels used for non-commercial purposes are covered by sovereign immunity.<sup>74</sup> However, in conformity with international law, South Africa may require such vessels to vacate her territorial waters, should they fail to comply with the MSA regulation of passage through South Africa's territorial sea or disregard a request to establish such compliance.<sup>75</sup> In addition, foreign vessels that enter South African waters may be surveyed to ascertain their compliance with the MSA.<sup>76</sup> No one, including the master or owner of a foreign vessel, may allow a foreign vessel to navigate away from any port

<sup>67</sup> 'The Minister [of Transport] may make such notifications, declarations and regulations as may be reasonably necessary to give effect, subject to such exemptions, restrictions and modifications as may be desirable, to the provisions of the Safety Convention' (s 356(2)(a) of the MSA).

<sup>68</sup> See s 2(1), read with s 356bis(1); see also PHG Vrancken *South Africa and the Law of the Sea* (2011) 230.

<sup>69</sup> Section 231(4) of the Constitution of the Republic of South Africa, 1996, provides that an international agreement becomes law in the Republic when it is enacted into law by national legislation.

<sup>70</sup> See s 3(5) read with sub-sec (6) of the MSA.

<sup>71</sup> See art 11 of UNCLOS.

<sup>72</sup> See art 2(1) of UNCLOS. All harbours in South Africa are part of its internal waters (see s 3(1)(b) of the Maritime Zones Act 15 of 1994. 'Any law in force in South Africa, including the common law, shall also apply in its internal waters and the airspace above its internal waters' (s 3(2) of the Maritime Zones Act) <https://www.samsa.org.za/sites/samsa.org.za/files/Maritime%20Zones%20Act%2C%201994.pdf> (accessed 23 October 2017). Also see *Macard Stein & Co v Port Marine Contractors (Pty) Ltd and Others* 1995 (2) All SA 657 (A) paras 15–16. See also Vrancken (n 68 above) 15 and 17.

<sup>73</sup> See Vrancken id 129–130.

<sup>74</sup> See arts 32 and 236 of UNCLOS. See also '*ARA Libertad*' (*Argentina v. Ghana*), *Provisional Measures, Order of 15 December 2012*, *ITLOS Reports 2012*, 332 paras 93–95.

<sup>75</sup> See art 30 of UNCLOS.

<sup>76</sup> See s 7 of the MSA.

in South Africa in an unseaworthy state.<sup>77</sup> There is an implied obligation in every contract of service between the owner of a vessel and the master or a seafarer, and in every agreement between the master and the crew, notwithstanding any other agreement to the contrary, to the effect that they 'shall use all reasonable means to ensure the seaworthiness of the [vessel] for the voyage at the time when the voyage commences'.<sup>78</sup>

In order to ascertain that a vessel in South African waters complies with the safety provisions under the MSA, a surveyor may inspect it.<sup>79</sup> The South African Maritime Safety Authority (SAMSA)<sup>80</sup> is 'responsible for the administration of [the MSA], and [has] control of all matters incidental thereto'.<sup>81</sup> SAMSA has a duty under the South African Maritime Safety Authority Act (SAMSAA) 1998,<sup>82</sup> to conduct surveys in order to ascertain compliance with international and domestic regulations and as directed by the Minister of Transport.<sup>83</sup> SOLAS Protocol 1988 requires that vessels be subject to a survey prior to the issue of a passenger ship safety certificate, cargo ship safety construction certificate, cargo ship safety equipment certificate, cargo ship safety radio certificate, cargo ship safety certificate, record of equipment, and an exemption certificate.<sup>84</sup> In South Africa the duty to conduct the relevant surveys for the issue of safety certificates falls within the ambit of SAMSA.<sup>85</sup> The survey process is vital to the issuing of certificates because the certificates provide evidence that a vessel – domestic or foreign – has complied with the provisions of the relevant international instrument.<sup>86</sup>

<sup>77</sup> See s 240(a) of the MSA.

<sup>78</sup> Section 241(1) of the MSA. Civil or criminal liability may be excluded in specific circumstances (see s 242 of the MSA).

<sup>79</sup> Section 7 of the MSA.

<sup>80</sup> Established by s 2(1) of the South African Maritime Safety Authority Act (SAMSAA) 1998.

<sup>81</sup> Section 5 of the MSA.

<sup>82</sup> Act 5 of 1998, published under GN 468 in GG 18796 of 31 March 1998 <http://0-discover.sabinet.co.za/wam.seals.ac.za/document/GGD96372> (accessed 2 February 2018).

<sup>83</sup> See s 4(a)–(c) of SAMSAA. See also Hare (n 65 above) 321.

<sup>84</sup> See reg I/12(a) of SOLAS Protocol 1988.

<sup>85</sup> See ss 192–193 of the MSA.

<sup>86</sup> Hare (n 65 above) 321. According to s 2 (Definition and interpretation of certain references) of the MSA, 'reference to any kind of safety certificate under the MSA is synonymous with reference to a Safety Convention Certificate in terms of the International Convention for the Safety of Life at Sea done at London on 1 November 1974, the English text of which is set forth in the Second Schedule as modified by any amendment made under Art VIII of that Convention that has entered into force for the Republic and, after the date on which the Protocol of 1978 relating to the Safety Convention enters into force for the Republic, as also modified by that Protocol'.

## 4.2 *Survey of Passenger Vessels*

SOLAS Protocol 1988 requires that passenger vessels<sup>87</sup> be subject to an initial survey before they are put in service,<sup>88</sup> a renewal survey once every 12 months,<sup>89</sup> and additional surveys when required.<sup>90</sup> SOLAS Protocol 1988 provides that an initial survey

shall include a complete inspection of the ship's structure, machinery and equipment, including the outside of the ship's bottom and the inside and outside of the boilers. This survey shall be such as to ensure that the arrangements, materials and scantlings of the structure, boilers and other pressure vessels and their appurtenances, main and auxiliary machinery, electrical installation, radio installations including those used in life-saving appliances, fire protection, fire safety systems and appliances, life-saving appliances and arrangements, shipborne navigational equipment, nautical publications, means of embarkation for pilots and other equipment fully comply with the requirements of the present regulations, and of the laws, decrees, orders and regulations promulgated as a result thereof by the Administration for ships of the service for which it is intended. The survey shall also be such as to ensure that the workmanship of all parts of the ship and its equipment is in all respects satisfactory, and that the ship is provided with the lights, shapes, means of making sound signals and distress signals as required by the provisions of the present regulations and the International Regulations for Preventing Collisions at Sea in force.<sup>91</sup>

SOLAS Protocol 1988 further provides that

the [laws, decrees, orders and regulations] shall among other things prescribe the requirements to be observed as to the initial and subsequent hydraulic or other acceptable alternative tests to which the main and auxiliary boilers, connections, steam pipes, high pressure receivers and fuel tanks for internal combustion engines are to be submitted including the test procedures to be followed and the intervals between two consecutive tests.<sup>92</sup>

<sup>87</sup> These are vessels that carry more than 12 passengers [see I/2(f) of SOLAS Protocol 1988]; s 2 of the MSA provides the same definition of passenger vessels.

<sup>88</sup> See reg I/7(a)(i) of SOLAS Protocol 1988.

<sup>89</sup> See reg I/7(a)(ii), subject to reg 14(b), (e), (f) and (g) of SOLAS Protocol 1988.

<sup>90</sup> See reg I/7(a)(iii) of SOLAS Protocol 1988.

<sup>91</sup> See reg I/7(b)(i) of SOLAS Protocol 1988.

<sup>92</sup> See reg I/7(c)(ii) of SOLAS Protocol 1988.

On the other hand, the MSA requires that prior to the award of a safety convention certificate,<sup>93</sup> vessels are inspected by a surveyor.<sup>94</sup> However, the MSA does not prescribe what requirements must be observed during the conduct of the initial survey, thereby leaving room for speculation with regard to what such an initial survey would entail. Given that 97.18% of the world's maritime tonnage complies to SOLAS Protocol 1988 standards,<sup>95</sup> the discrepancy in regulatory provisions between the MSA and SOLAS Protocol 1988 should not be maintained. This discrepancy could be remedied by amending the MSA to incorporate the comprehensive survey requirements laid out by SOLAS Protocol 1988, thereby ensuring uniformity in the relevant survey requirements.

With regard to a renewal survey, SOLAS Protocol 1988 provides that

[it] shall include an inspection of the structure, boilers and other pressure vessels, machinery and equipment, including the outside of the ship's bottom. The survey shall be such as to ensure that the ship, as regards the structure, boilers and other pressure vessels and their appurtenances, main and auxiliary machinery, electrical installation, radio installations including those used in life-saving appliances, fire protection, fire safety systems and appliances, life-saving appliances and arrangements, shipborne navigational equipment, nautical publications, means of embarkation for pilots and other equipment is in satisfactory condition and is fit for the service for which it is intended, and that it complies with the requirements of the present regulations and of the laws, decrees, orders and regulations promulgated as a result thereof by the Administration. The lights, shapes, means of making sound signals and distress signals carried by the ship shall also be subject to the above-mentioned survey for the purpose of ensuring that they comply with the requirements of the present regulations and of the International Regulations for Preventing Collisions at Sea in force;<sup>96</sup>

In this regard, the MSA does provide for the conduct of a renewal survey in conformity with SOLAS Protocol 1988.<sup>97</sup> The MSA provides that passenger vessels must be surveyed at intervals not exceeding

<sup>93</sup> Defined in s 2 of the MSA: "Safety Convention certificate" means a passenger ship safety certificate, a cargo ship safety construction certificate, a cargo ship safety equipment certificate, a cargo ship safety radio certificate, or an exemption certificate'.

<sup>94</sup> Section 190(1) read with s 3(5) and (6) of the MSA. SAMSA may 'recognize or appoint as a ship surveyor, engineer surveyor or radio or other surveyor any qualified person whom it deems fit to act as such for the purposes of this Act'. Section 4(b) of the MSA.

<sup>95</sup> See (n 58 above).

<sup>96</sup> See reg I/7(b)(ii) of SOLAS Protocol 1988.

<sup>97</sup> See reg I/7(a)(ii) of SOLAS Protocol 1988.

12 months in accordance with the construction regulations;<sup>98</sup> the life-saving equipment regulations;<sup>99</sup> the collision and distress signal regulations;<sup>100</sup> the radio installations regulations,<sup>101</sup> and any other applicable regulations which may have been made.<sup>102</sup>

The construction regulations apply to foreign vessels that come into a port in South Africa.<sup>103</sup> Upon entry into the port of a state, foreign vessels submit to the provisions of the civil and criminal regulations of that state.<sup>104</sup> Access to the internal waters of a state is not a given right awarded to foreign vessels.<sup>105</sup> However, there are exceptional cases where a foreign vessel may be granted access into internal waters, such as where the vessel is in distress. The UNCLOS provides that vessels enjoy a right of passage in particular circumstances including *force majeure*.<sup>106</sup> In addition, where the establishment of a straight baseline that 'has the

<sup>98</sup> Made in terms of s 356 of the MSA as amended, published under GN R79 in GG 1955 of 19 January 1968 and amended by: GN R389 GG 17841 7/3/97.

<sup>99</sup> Made in terms of s 356 of the MSA as amended, published under GN R141 in GG 1970 of 2 February 1968 and amended by GN R565 GG 27665 of 17/6/2005.

<sup>100</sup> Made in terms of s 356 of the MSA as amended, published under GN R566 in GG 27675 of 17 June 2005, amended by GN R778 in GG 278475 of 5/8/2005.

<sup>101</sup> Made in terms of s 356 of the MSA as amended, published under GN R506 in GG 23345 of 26 April 2002 and amended by: GN R457 in GG 36623 of 2/7/2013.

<sup>102</sup> See s 190(2)(a) of the MSA. Other regulations applicable to foreign vessels include the navigation bridge visibility regulations, 2004 made in terms of s 356 of the MSA published under GN 1199 in GG 26878 of 15 October 2004; See reg 3(1)(b) of the navigation bridge visibility regulations read with s 3(5) and (6) of the MSA; the carriage of cargoes regulations, 2004, made in terms of s 356 of the MSA as amended, published under GN R859 in GG 26577 of 23 July 2004, see reg 4(1)(b) of the carriage of cargoes regulations, also see reg 4(2) of the carriage of cargoes regulations read with s 3(5) and (6) of the MSA; the dangerous goods regulations, 1997, made in terms of s 356 of the MSA, published under GN R574 in GG 17921 of 18 April 1997, see reg 2 of the dangerous goods regulations read with s 3(5) and (6) of the MSA; the INF code regulations, 2003, made in terms of s 356 of the MSA, published under GN R791 in GG 24922 of 6 June 2003, see reg 5 of the INF code regulations read with reg 4(1)(b) of the INF code regulations, also see reg 4(2) of the INF code regulations read with sec 3(5) and (6) of the MSA; the IGC code regulations, 1998, made in terms of s 356 of the MSA, published under GN R791 in GG 24922 of 6 June 2003], see reg 2(3) of the IGC code regulations read with s 3(5) and (6) of the MSA; the safety management regulations, 2003, made in terms of s 356 of the MSA, published under GN R720 in GG 24923 of 6 June 2003, see reg (4)(1)(ii) of the safety management regulations read with s 3(5) and (6) of the MSA; and the maritime occupational safety regulations, made in terms of s 356 of the MSA, published under GN R1904 in GG 16068 of 11 November 1994 and amended by GN R545 GG 26301 of 30 April 2004, see reg 2 of the maritime occupational safety regulations read with s 3(5) and (6) of the MSA.

<sup>103</sup> See regs 3, 106(1)(b) and 146 of the construction regulations read with s 3(5) and (6) of the MSA.

<sup>104</sup> Marten (n 13 above) 9.

<sup>105</sup> Vrancken (n 68 above) 119.

<sup>106</sup> See art 18(2) of UNCLOS. South African law refers to *vis major* in reg 16(1) of the marine traffic regulations, 1985.

effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in [UNCLOS] shall exist in those waters'.<sup>107</sup> In South Africa, vessels in distress are exempt to an extent from the requirement to comply with domestic regulations.<sup>108</sup> Nevertheless, vessels in distress are granted entry to the internal waters of South Africa only if their passage is innocent.<sup>109</sup>

The construction standards required for a vessel are static in nature, hence a foreign vessel's compliance or non-compliance with the construction regulations is unlikely to change in the course of a voyage.<sup>110</sup> Where the provisions of the construction regulations go beyond the UNCLOS limitation of 'generally accepted' standards,<sup>111</sup> it is sufficient for jurisdictional purposes that non-compliance exists whilst the foreign vessel is in port, where South Africa can rely on territoriality.<sup>112</sup> Requiring that a foreign vessel be compliant with domestic standards when it enters a South African port habitually suggests that such compliance with domestic standards is required throughout the vessel's journey. This does not conflict with the limitation on South Africa's scope of coastal state jurisdiction, provided the 'extraterritorial impact of the construction regulations is incidental rather than [the] primary purpose' of the regulation.<sup>113</sup>

The construction regulations regulate the watertight subdivision of passenger vessels;<sup>114</sup> bilge pumping arrangements;<sup>115</sup> electrical equipment and installations;<sup>116</sup> fire protection;<sup>117</sup> boilers and machinery;<sup>118</sup> miscellaneous provisions as well as equivalents and exemptions.<sup>119</sup> In addition, the passenger vessels to which the construction regulations apply are classified into:

<sup>107</sup> See art 8(2) of UNCLOS; see ss 1(iii) and 2 of the Marine Traffic Act 2 of 1981, read with s 3(3) of the MZA.

<sup>108</sup> Vrancken (n 68 above) 130; see also *Nkondo v Minister of Police* 1980 (2) SA 894 O 900D.

<sup>109</sup> The UNCLOS 'was deliberately negotiated and drafted to exclude situations wherein a vessel in distress is automatically deemed in "innocent passage"' (Vrancken n 68 above 127).

<sup>110</sup> See EJ Molenaar 'Port state jurisdiction: Towards mandatory and comprehensive use' in D Freestone, R Barnes & DM Ong (eds) *The Law of the Sea: Progress and Prospects* (2006) 198.

<sup>111</sup> See art 21(2) of UNCLOS.

<sup>112</sup> See (n 1 above).

<sup>113</sup> See Molenaar (n 110 above).

<sup>114</sup> See generally, ch II of the construction regulations.

<sup>115</sup> See ch III of the construction regulations.

<sup>116</sup> See ch IV of the construction regulations.

<sup>117</sup> See ch V of the construction regulations.

<sup>118</sup> See ch VI of the construction regulations.

<sup>119</sup> See chs VII and VIII of the construction regulations, respectively.



Class I – A ship engaged on voyages any of which are international voyages other than short international voyages.

Class II – A ship, other than a ship of Class I engaged on voyages any of which are short international voyages.

Class IIA – A ship of 70 feet in length or over, other than a ship of Class V or VI, engaged on voyages of any kind other than international voyages.

Class III – Not yet allocated.

Class IV – Not yet allocated.

Class V – A ship of 50 feet in length or over engaged only on voyages to sea in fine weather with not more than 40 persons on board, in the course of which voyages the ship is at no time more than 40 miles from the point of departure nor more than 15 miles from land.

Class VI – A ship which operates at a port or is engaged on voyages to sea in fine weather with not more than 250 persons on board, in the course of which voyages the ship is at no time more than 15 miles from the point of departure nor more than 5 miles from land.<sup>120</sup>

However, the construction regulations do not provide any regulation regarding the requirements to be observed during the initial survey prior to the issue of a passenger-ship safety certificate as regulated by SOLAS Protocol 1988.<sup>121</sup> Moreover, SOLAS Protocol 1988 is specific with regard to the scope of renewal and additional surveys.<sup>122</sup> As mentioned earlier, ‘predictability and certainty’ are essential to international trade.<sup>123</sup> The construction regulations do not provide such predictability and certainty, in light of the lack of any provision for renewal surveys for the issuing of a passenger-ship safety certificate.<sup>124</sup>

In terms of the life-saving equipment regulations, they apply to foreign vessels weighing 25 tons or more when in South African waters,<sup>125</sup> but do not apply to ‘vessels of less than 100 tons that are used solely for

<sup>120</sup> Reg 4(1) of the construction regulations.

<sup>121</sup> See (n 91 above).

<sup>122</sup> See (n 96 above).

<sup>123</sup> See (n 32 above).

<sup>124</sup> There is only a provision with regard to power for going astern, to which effect ‘[t]he ability of the machinery to reverse the direction of thrust of the propeller in sufficient time, under normal manoeuvring conditions, and so to bring the ship to rest from maximum ahead service speed, shall be demonstrated at the first survey of the ship’ (see reg 74(2) of the construction regulations). Further vessel construction-related regulations are made in the safety of navigation regulations (safety of navigation regulations 1968 made in terms of s 356 of the MSA). The safety of navigation regulations, however, do not fill the regulatory gap with regard to survey standards, to provide uniformity with SOLAS Protocol 1988 standards.

<sup>125</sup> See reg 3(1)(b) of the life-saving equipment regulations read with s 3(5) and (6) of the MSA.

sport or recreation'.<sup>126</sup> Passenger vessels are also classified under the life-saving equipment regulations to include:

Class I – A passenger ship engaged on voyages any of which are international voyages other than short international voyages.

Class II – A passenger ship, other than a ship of class I, engaged on voyages any of which are short international voyages.

Class IIA – A passenger ship of 70 feet in length or over, other than a ship of class V or VI, engaged on voyages of any kind other than international voyages.

Class III – Not yet allocated.

Class IV – Not yet allocated.

Class V – A passenger ship of 50 feet in length or over, engaged only on voyages to sea in fine weather with not more than 40 persons on board, in the course of which voyages the ship is at no time more than 40 miles from the point of departure nor more than 15 miles from land.

Class VI – A passenger ship which operates at a port or is engaged on voyages to sea in fine weather with not more than 250 persons on board, in the course of which voyages the ship is at no time more than 15 miles from the point of departure nor more than 5 miles from land.<sup>127</sup>

SOLAS Protocol 1988 provides a comprehensive list of life-saving appliances required for all vessels, including communication equipment such as radio life-saving appliances, distress flares, personal life-saving appliances such as lifebuoys, to name a few.<sup>128</sup> Additional requirements specific to passenger vessels include, survival craft and rescue boats,<sup>129</sup> personal life-saving appliances which include, lifebuoys, life jackets, and immersion suits and thermal protective aids.<sup>130</sup>

The life-saving equipment regulations provide that the life-saving appliances to be carried on board the various classes of passenger vessels identified under the regulations include, lifeboats, motor lifeboats, life rafts, davits, lifejackets, launching appliances, line throwing appliances;<sup>131</sup> water pipes, hydrants and fire hoses;<sup>132</sup> portable fire extinguishers;<sup>133</sup> provisions for machinery spaces for ships fitted with main or auxiliary oil-fired boilers;<sup>134</sup> machinery spaces containing internal

<sup>126</sup> See reg 3(2) of the life-saving equipment regulations.

<sup>127</sup> See reg 4(1)(a) of the life-saving equipment regulations.

<sup>128</sup> See reg III/Part B, s I of SOLAS Protocol 1988.

<sup>129</sup> See reg III/21 of SOLAS Protocol 1988.

<sup>130</sup> See reg III/22 of SOLAS Protocol 1988.

<sup>131</sup> See regs 5–10 of the life-saving equipment regulations.

<sup>132</sup> See reg 66 of the life-saving equipment regulations.

<sup>133</sup> See reg 67 of the life-saving equipment regulations.

<sup>134</sup> See reg 68 of the life-saving equipment regulations.

combustion type machinery;<sup>135</sup> fire pumps;<sup>136</sup> and provisions for ships not fully decked.<sup>137</sup> These regulations include the requirements affecting life-saving appliances;<sup>138</sup> as well as their handling and stowage.<sup>139</sup> The regulations also provide standards with regard to fire appliances to be used on board passenger vessels to which the life-saving regulations apply.<sup>140</sup> However, a reflection of the regulatory discrepancies in the MSA with regard to surveys, the life-saving equipment regulations do not provide any more clarity with regard to what requirements must be observed during the conduct of the initial survey. On the other hand, SOLAS Protocol 1988 does provide in the requirements for the conduct of an initial survey for passenger vessels, that it '[shall include]... radio installations including those used in life-saving appliances, ... life-saving appliances and arrangements...' <sup>141</sup>

Furthermore, although the life-saving equipment regulations provide a comprehensive list of life-saving appliances to be carried on board passenger vessels to which the regulations apply,<sup>142</sup> they only make provision for the renewal survey of life rafts.<sup>143</sup> SOLAS Protocol 1988, however, without distinguishing between the various appliances that it qualifies as life-saving appliances, provides that a renewal survey 'shall include radio installations including those used in life-saving appliances ... life-saving appliances and arrangements,'<sup>144</sup> once every 12 months.<sup>145</sup> The MSA also provide for surveys at intervals not exceeding 12 months; however, it does not lay out the scope of the surveys.<sup>146</sup> This is another regulatory inconsistency between the MSA and SOLAS Protocol 1988

<sup>135</sup> See reg 69 of the life-saving equipment regulations.

<sup>136</sup> See reg 70 of the life-saving equipment regulations.

<sup>137</sup> See reg 71 of the life-saving equipment regulations.

<sup>138</sup> Chap II of the life-saving equipment regulations.

<sup>139</sup> Ch IV of the life-saving equipment regulations.

<sup>140</sup> See 'Fire appliances' in part II, ch 1 of the life-saving equipment regulations. The regulations under the life-saving equipment regulations do not apply generally to vessel classes (see Vrancken n 68 above 234). While some requirements in respect of life-saving appliances are applicable to all classes of vessels (see regs 20–23 of the life-saving equipment regulations), others differ with regard to the class of the vessel concerned (see regs 5–19 of the life-saving equipment regulations).

<sup>141</sup> See (n 96 above).

<sup>142</sup> See (n 131 – n 137 above).

<sup>143</sup> The life-saving equipment regulations provide that '[a] liferaft which is required to comply with part I of annex 7, shall be surveyed at a servicing station approved by the [SAMSA] or at the works of the manufacturers at intervals of not more than 12 months: Provided that in any case where this is impracticable, such intervals may be extended by the [SAMSA] by a period not exceeding three months' (see reg 25(2) of the life-saving equipment regulations).

<sup>144</sup> See (n 96 above).

<sup>145</sup> See (n 89 above).

<sup>146</sup> See (n 94 above).

that could be eliminated by amending the MSA to incorporate SOLAS Protocol 1988 provisions comprehensively.

The collision and distress signal regulations declare the signals that are to be registered as signals of distress and provide for circumstances and reasons for which such signals may be used.<sup>147</sup> They apply to foreign passenger vessels that come into South Africa,<sup>148</sup> requiring them to comply with the provisions of rules 1 to 36 contained in Annexes I to III of the COLREGs, as amended.<sup>149</sup> The collision and distress signal regulations do not provide survey requirements. SOLAS Protocol 1988, on the other hand, emphasises that every survey should ascertain compliance with COLREGs standards.<sup>150</sup>

Radio installations regulations apply to foreign passenger vessels that come into the Republic,<sup>151</sup> except vessels of less than 25 tons or pleasure vessels<sup>152</sup> of less than 100 tons.<sup>153</sup> The radio installations regulations set the performance standards in respect of radiotelegraphy and radiotelephony<sup>154</sup> and distinguish between Convention ships<sup>155</sup> and non-Convention ships.<sup>156</sup> Convention ships are required to comply with performance standards not inferior to the relevant performance standards adopted by the IMO and specified by the SAMSA in a marine notice as having been so adopted.<sup>157</sup> Non-Convention ships must comply with such performance standards as may be specified by the SAMSA in a marine notice<sup>158</sup> and in either case, the performance standards of Non-Convention ships must be of a type approved by the Independent Communications Authority of South Africa (ICASA).<sup>159</sup>

<sup>147</sup> See reg 2(a) of the collision and distress signal regulations.

<sup>148</sup> See reg 4(2)(a) of the radio installations regulations read with s 3(5) and (6) of the MSA.

<sup>149</sup> Reg 6 of the collision and distress signal regulations.

<sup>150</sup> See reg I/7(b) of SOLAS Protocol 1988.

<sup>151</sup> See reg 3(1)(b) of the radio installations regulations read with s 3(5) and (6) of the MSA.

<sup>152</sup> 'Vessels used solely for sport or recreation' (see reg 2 of the radio installations regulations, interpreting pleasure vessel).

<sup>153</sup> See reg 3(6) of the radio installations regulations.

<sup>154</sup> Vrancken (n 68 above) 234.

<sup>155</sup> Meaning a foreign-going passenger ship; or a foreign-going cargo ship of 300 tons or more (reg 2 of the radio installations regulations: 'Interpretation').

<sup>156</sup> Meaning a passenger ship that is not foreign-going; a cargo ship of 300 tons or more that is not foreign-going; a cargo ship of less than 300 tons; a fishing vessel; or a pleasure vessel (reg 2 of the radio installations regulations: 'Interpretation').

<sup>157</sup> See reg 6(1)(a) of the radio installations regulations; see also Marine Notice 9 of 2017 regarding performance standards for marine radio equipment required by the radio installations regulations.

<sup>158</sup> Ibid.

<sup>159</sup> See reg 6(1)(c) of the radio installations regulations.

The radio installations regulations provide for the installation of radio equipment that complies with SOLAS Protocol 1988 requirements,<sup>160</sup> as well as non-SOLAS requirements applicable to foreign vessels while in South Africa.<sup>161</sup> As far as surveys are concerned, the radio installations regulations do not provide any specific regulation with regard to intervals or their scope, as set out in SOLAS Protocol 1988.<sup>162</sup>

Furthermore, SOLAS Protocol 1988 provides that

an additional survey either general or partial, according to the circumstances, shall be made after a repair resulting from investigations prescribed in regulation 11, or whenever any important repairs or renewals are made. The survey shall be such as to ensure that the necessary repairs or renewals have been effectively made, that the material and workmanship of such repairs or renewals are in all respects satisfactory, and that the ship complies in all respects with the provisions of the present regulations and of the International Regulations for Preventing Collisions at Sea in force, and of the laws, decrees, orders and regulations promulgated as a result thereof by the Administration;<sup>163</sup>

Looking at additional survey requirements, the MSA provides that if a vessel has been altered or damaged in a manner that

affect[s] her seaworthiness or her efficiency... or her compliance with such of the construction regulations, the life-saving equipment regulations, the radio regulations, the collision regulations...or any other regulations which may have been made, as apply to her, the owner or master shall, as soon as possible, forward a report to [SAMSA], giving full particulars of the alteration or damage.<sup>164</sup>

If upon receipt of a report on an alteration or damage to a vessel in South Africa, SAMSA suspects that the vessel could be unseaworthy, or the hull, equipment and machinery are insufficient, SAMSA may order an additional survey to ascertain that the vessel continues to comply with the MSA and applicable regulations made in terms thereof.<sup>165</sup> This provision is compliant with SOLAS Protocol 1988, to the effect that following an additional survey, the vessel must be compliant with SOLAS Protocol 1988 and domestic regulations that have been made.<sup>166</sup>

<sup>160</sup> See generally Part I of the radio installations regulations.

<sup>161</sup> See generally Part II of the radio installations regulations.

<sup>162</sup> See reg I/7 of SOLAS Protocol 1988.

<sup>163</sup> See reg I/7(b)(iii) of SOLAS Protocol 1988.

<sup>164</sup> See s 239(1) of the MSA.

<sup>165</sup> See s 239(2) of the MSA.

<sup>166</sup> See reg I/7(b)(iii) of SOLAS Protocol 1988.

### 4.3 Survey of Non-passenger Vessels

As far as non-passenger vessels<sup>167</sup> are concerned, foreign non-passenger vessels are also subject to the provisions of the MSA by virtue of their presence in South Africa and its territorial waters.<sup>168</sup> Such foreign vessels must be surveyed at intervals 'not exceeding twenty-four months in accordance with the [construction regulations], [life-saving equipment regulations], [collision and distress signal regulations] and any other applicable regulations... Provided that inspections ... applicable to the issue of a cargo ship safety construction certificate shall be at intervals not exceeding five years'.<sup>169</sup>

The construction regulations provide specific rules for vessels classified as cargo ships,<sup>170</sup> which include 'any [foreign] ship of 500 tons or over'.<sup>171</sup> The construction regulations provide for the survey of vessels prior to the issue of a cargo-ship safety construction certificate,<sup>172</sup> in a manner that reflects the regulations under SOLAS Protocol 1988.<sup>173</sup> The construction regulations also provide that a vessel that was awarded a cargo-ship safety construction certificate, must be subject to general intermediate surveys at intervals no longer than five years.<sup>174</sup> This complies with the SOLAS Protocol 1988 requirement that renewal surveys should not be conducted at intervals exceeding five years.<sup>175</sup> However, there is a discrepancy in the intermediate survey requirements because the SOLAS Protocol 1988 also prescribes that the surveys be conducted 'within three months before or after the second anniversary date or within three months before or after the third anniversary date of the Cargo Ship Safety Construction Certificate'.<sup>176</sup>

In addition, the provisions of the construction regulations do not prescribe an intermediate survey of

the steering gear and the associated control systems and electrical installations to ensure that they remain satisfactory for the service for

<sup>167</sup> The MSA does not provide a definition of non-passenger vessel. However, the radio installations regulations provide that a vessel that cannot be classified as a passenger vessel falls under a general category known as cargo vessels (see reg 2 of the radio installations regulations).

<sup>168</sup> See s 3(5) of the MSA. See also (n 72 and n 73 above).

<sup>169</sup> Section 190(2)(b) of the MSA.

<sup>170</sup> See generally part II of the construction regulations.

<sup>171</sup> Reg 106(1) of the construction regulations.

<sup>172</sup> See generally ch II under part II of the construction regulations.

<sup>173</sup> See reg 137(2) of the construction regulations and reg I/10(a)(i) and (b)(i) of the SOLAS.

<sup>174</sup> Reg 139(1) and 139(3) of the construction regulations.

<sup>175</sup> See reg I/10(a)(ii) of SOLAS Protocol 1988.

<sup>176</sup> See reg I/10(a)(iii) of SOLAS Protocol 1988.

which the ship is intended;<sup>177</sup> or, with regard to tankers, 'an inspection of the pump-rooms, cargo, bunker and ventilation piping systems and associated safety devices and the testing of insulation resistance of electrical installations in dangerous zones'.<sup>178</sup>

Moreover, the MSA contains no provisions for an annual survey within three months before or after each anniversary date of the cargo ship safety construction certificate, creating a further discrepancy with the survey requirements in the SOLAS Protocol 1988.<sup>179</sup>

SOLAS Protocol 1988 regulates surveys of life-saving appliances and other equipment of cargo vessels of 500 gross tonnage and upwards.<sup>180</sup> It prescribes and determines the intervals for initial surveys, renewal, periodical, annual and additional surveys of the life-saving appliances and equipment.<sup>181</sup> There is no provision in the MSA or the life-saving equipment regulations that regulate the survey of cargo vessels for compliance with the requirements of a cargo ship safety equipment certificate, thereby creating a regulatory gap that could be filled by amending the MSA to give effect to the SOLAS Protocol 1988 provisions.

Furthermore, SOLAS Protocol 1988 regulates the survey of radio installations of cargo vessels, for compliance with requirements of a cargo ship safety radio certificate.<sup>182</sup> It prescribes and determines the intervals for initial surveys, renewal, periodical and additional surveys of radio installations, including those used in life-saving appliances of cargo vessels to which chapters III and IV apply.<sup>183</sup> Survey requirements for a cargo ship safety radio certificate are not provided for in the MSA, nor the radio installations regulations made in terms thereof, creating another regulatory gap, which could be filled by amending the MSA to incorporate SOLAS Protocol 1988 in a comprehensive manner.

The surveys prescribed by the MSA provide a surveyor with information that he or she needs, to establish a foreign vessel's compliance with the construction regulations, life-saving equipment regulations, collision and distress signal regulations and the radio installations regulations standards of certification and any other applicable regulations which may have been made.<sup>184</sup>

<sup>177</sup> Reg I/10(b)(iii) of SOLAS Protocol 1988.

<sup>178</sup> Reg I/10(b)(iii) of SOLAS Protocol 1988.

<sup>179</sup> See reg I/10(a)(iv) of SOLAS Protocol 1988.

<sup>180</sup> See reg I/8 of SOLAS Protocol 1988.

<sup>181</sup> See reg I/8(a) of SOLAS Protocol 1988.

<sup>182</sup> See reg I/9 of SOLAS Protocol 1988.

<sup>183</sup> See reg I/9(a) of SOLAS Protocol 1988.

<sup>184</sup> See s 191(1) and (2) of the MSA.



#### **4.4 Certification Standards**

As mentioned earlier, certification is evidence that a vessel complies with safety standards. SOLAS Protocol 1988 provides five types of safety certificates: a passenger-ship safety certificate;<sup>185</sup> a cargo-ship safety construction certificate;<sup>186</sup> a cargo-ship safety equipment certificate,<sup>187</sup> a cargo-ship safety radio certificate;<sup>188</sup> and as an alternative to the cargo-ship certificates, it provides for a cargo-ship safety certificate, that 'may be issued after an initial or renewal survey to a cargo ship which complies with the relevant requirements of chapters II-1, II-2, III, IV and V and any other relevant requirements of the present regulations'.<sup>189</sup> In addition, a passenger-ship safety certificate, a cargo-ship safety equipment certificate, a cargo-ship safety radio certificate and a cargo-ship safety certificate, must be supplemented by a record of equipment.<sup>190</sup> Moreover, SOLAS Protocol 1988 makes provision for an exemption to be granted to a vessel in conformity with its regulations, in which case a certificate – called an exemption certificate – must be issued in addition to the prescribed certificate.<sup>191</sup>

The MSA makes provision for the issue of safety convention certificates and exemption certificates thereto.<sup>192</sup> However, it does not provide any regulation for a cargo-ship safety certificate as an alternative to other cargo ship certificates, nor does it contain any regulation to the effect that the passenger-ship safety certificate, cargo-ship safety equipment certificate and cargo-ship safety radio certificate be supplemented by a record of equipment. Moreover, SOLAS Protocol 1988 introduces 'bulk carriers' as a new category of vessel type classified under cargo ship certificates,<sup>193</sup> which are not categorised under the certification forms in SOLAS Protocol 1978 (which are in effect in South Africa). Here again, an amendment of the MSA to incorporate SOLAS Protocol 1988 comprehensively is recommended to fill this regulatory gap.

South Africa has an obligation to take all measures necessary to ensure that from the point of view of safety of life, a vessel is fit for its intended purpose.<sup>194</sup> Therefore, where, SAMSA is satisfied that the construction and equipment of a vessel complies with all the

<sup>185</sup> See reg I/12(a)(i) of SOLAS Protocol 1988.

<sup>186</sup> See reg I/12(a)(ii) of SOLAS Protocol 1988.

<sup>187</sup> See reg I/12(a)(iii) of SOLAS Protocol 1988.

<sup>188</sup> See reg I/12(a)(iv) of SOLAS Protocol 1988.

<sup>189</sup> See reg I/12(a)(v)(1) and (2) of SOLAS Protocol 1988.

<sup>190</sup> See reg I/12(a)(vi) of SOLAS Protocol 1988.

<sup>191</sup> See reg I/12(a)(vii) of SOLAS Protocol 1988.

<sup>192</sup> See ss 192 and 193 of the MSA.

<sup>193</sup> See Appendix certificates of SOLAS Protocol 1988.

<sup>194</sup> See art I(b) of the SOLAS.

requirements of regulations made in terms of the MSA<sup>195</sup> and other rules applicable to the vessel while it is engaged in navigation; or to its expected manoeuvres, SAMSA may issue a local safety certificate attesting to the state of the vessel. The local safety certificate must be drafted in a manner that indicates the nature of the journeys or manoeuvres which the certificate authorises the vessel to undertake.<sup>196</sup> Where SAMSA is satisfied that a vessel is exempt from some of the requirements of the domestic safety regulations, and that the vessel meets the remaining requirements, it may issue a local safety exemption certificate stating which of the said requirements the vessel is exempt from, and that the exemption is conditional on her being engaged only in the voyages or operations and complying with the other conditions – if any – specified in the certificates.<sup>197</sup> SAMSA may also issue a local general safety certificate stating that the vessel is constructed and equipped in accordance with the remaining requirements.<sup>198</sup>

All safety convention certificates issued in terms of the MSA lapse after a period of one year from the date of issue as specified in the certificate, except in respect of a cargo-ship safety equipment certificate, which is valid for a period not exceeding two years, or five years in respect of a cargo-ship safety construction certificate.<sup>199</sup> However, a certificate may expire subsequent to a notice from SAMSA informing the vessel owner that the certificate has been cancelled.<sup>200</sup> A cancelled certificate indicates that the vessel is no longer compliant with the MSA or international standards incorporated therein. In this light, where a safety certificate has been cancelled, the vessel owner or master must surrender the certificate to SAMSA, or else SAMSA may detain the vessel until the certificate in issue has been surrendered to it.<sup>201</sup> In addition, an

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<sup>195</sup> The construction regulations, life-saving equipment regulations, radio installations regulations, collision and distress signal regulations and any other regulations which have been made. See (n 110 above).

<sup>196</sup> Section 194(1)(a) of the MSA. The provisions of s 194(1) apply to passenger ships of whatever size which are not intended to be engaged in international voyages; or ships (other than passenger ships) to which SOLAS does not apply and which are intended to be engaged in international voyages; or of whatever size which are not intended to be engaged on international voyages, and which are or are to be registered or licensed in the Republic (s 194(2)).

<sup>197</sup> Section 194(b)(i) of the MSA.

<sup>198</sup> Section 194(b)(ii) of the MSA.

<sup>199</sup> Section 197(1) of the MSA, in compliance with the provisions of reg I/14(a) of SOLAS Protocol 1988.

<sup>200</sup> Section 197(1) of the MSA. Grounds for cancellation of a safety convention certificate by SAMSA are provided under s 198(1) of the MSA.

<sup>201</sup> Section 199(1) and (2) of the MSA.

exemption certificate may not survive any certificate issued with regard to the provisions of the safety convention that has lapsed.<sup>202</sup>

While a foreign vessel is in South African waters, SAMSA may, under acceptable circumstances, grant an extension of a safety convention certificate other than a cargo vessel construction certificate, for a period no longer than five months to enable the foreign vessel to complete its journey to its country of registry or point of inspection.<sup>203</sup> This is, however, not consistent with the maximum three-month extension prescribed by SOLAS Protocol 1988.<sup>204</sup>

## 5 Conclusion

In South Africa, the MSA makes provision for the incorporation of the standards contained in SOLAS, as amended by SOLAS Protocol 1978.<sup>205</sup> SOLAS has undergone two major overhauls since its inception, through Protocols adopted in 1978 and 1988, respectively. SOLAS Protocol 1988 is lauded for introducing into the SOLAS framework, the HSSC, which harmonises the survey and certification requirements under the SOLAS Protocol 1988 with other major international instruments.<sup>206</sup> The HSSC not only operates to eliminate delays caused by different survey intervals and procedures, but its uniform standards go a long way toward enhancing economic efficiency and providing necessary certainty and stability for the conduct of international trade and maritime navigation.<sup>207</sup>

The article set out to critically discuss the incorporation of SOLAS survey and certification standards in South African law; identify any discrepancies and gaps in the domestic standards as regulated by the MSA; and make recommendations to eliminate the discrepancies and gaps. The review of the MSA and its subordinate legislation revealed that South Africa is not a party to the SOLAS Protocol 1988.<sup>208</sup> Moreover, a number of regulatory inconsistencies and gaps were identified between the provisions of the MSA and SOLAS Protocol 1988. The discrepancies and gaps affect provisions with regard to survey measures of passenger vessels and non-passenger vessels, including the maximum extension period awarded to vessels' expired certificates; and regulatory gaps with regard to the regulation for a cargo-ship safety certificate as an alternative to other cargo ship certificates, regulation to the effect

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<sup>202</sup> Section 197(2) of the MSA.

<sup>203</sup> Section 197(3)(b) of the MSA.

<sup>204</sup> See regulation I/14(e) SOLAS 88.

<sup>205</sup> See part 4.1 above.

<sup>206</sup> See part 3 above.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

that the passenger-ship safety certificate, cargo-ship safety equipment certificate and cargo-ship safety radio certificate be supplemented by a record of equipment; and regulation of ‘bulk carriers’ as a new category of vessel type classified under cargo ship certificates.<sup>209</sup>

The discrepancies and gaps between the MSA and SOLAS Protocol 1988 provisions could not only raise questions with regard to the economic viability for foreign vessels to call at South African ports, but go a long way towards defeating the goal of the IMO, for a harmonised system of survey and certification standards to be conducted in a uniform manner by all states.<sup>210</sup> The above critical review informs the recommendation of this article, that the MSA should be amended to incorporate the provisions of SOLAS Protocol 1988 in a comprehensive manner. In addition, considering the tremendous acceptance of SOLAS Protocol 1988, this article could also serve to inform other African states of the significance of becoming a party to SOLAS and the relevance of SOLAS Protocol 1988.

Furthermore, an amendment of the MSA to comprehensively incorporate SOLAS Protocol 1988 will promote the goal of the international maritime community for uniform regulation of survey and certification standards by all states. In addition, in light of Operation *Phakisa*, an amendment of the MSA to incorporate the uniform standards of SOLAS Protocol 1988 in a comprehensive manner, could only further unlock the economic potential of South Africa’s territorial waters, because uniformity in shipping regulations enhances economic efficiency.<sup>211</sup> Moreover, South Africa should pursue uniformity in its implementation of international standards because, not only is ‘a failure of leading maritime nations to lead by example [a significant impediment to uniformity]’,<sup>212</sup> but ‘the goal ... of greater uniformity [in the implementation of international law] is a noble one, and it should be pursued’.<sup>213</sup>

<sup>209</sup> See parts 4.2–4.4 above.

<sup>210</sup> See part 2 above.

<sup>211</sup> Ibid.

<sup>212</sup> PJS Griggs ‘Obstacles to uniformity of maritime law: The Nicholas J Healy Lecture’ (2003) 34 *Journal of Maritime Law and Commerce* 208.

<sup>213</sup> S Hetherington ‘The CMI and the panacea of uniformity – An elusive dream?’ (2014) 39 *Tulane Maritime Law Journal* 182.