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# Salvaging Historic Shipwrecks in South Africa



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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Masters in Law in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a program of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Masters in Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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## I. INTRODUCTION

The mystique surrounding shipwrecks has intrigued man since the inception of sea travel itself. The wreck lies as a submerged time capsule, holding secrets of the past, patiently waiting to tell her stories, with rich rewards for archaeologists and salvors alike. Modern advances in underwater technology have supported a drastic increase in the discovery and retrieval of shipwrecks and their cargoes. Accompanying such advances are tensions which have emerged between interested parties in historic wrecks, the most notorious being between two broad interest groups;<sup>1</sup> those who are ‘attracted by the commercial value of such wrecks and those concerned to protect their historical and cultural value.’<sup>2</sup> This dissertation considers the viability of salvage law in the context of historic shipwrecks in South African waters.<sup>3</sup>

The dissertation commences by examining the conceptual scope and application of salvage law principles. Attention is drawn to considering whether its theoretical requirements are feasible and appropriate for application to historic shipwrecks. It will be submitted that on a doctrinal level the principles of salvage law are suitable. The theoretical deliberations of salvage law are then put to task in three case examples. Firstly; the *S.S. Central America*, aptly referred to as the ‘Ship of Gold,’ sank in international waters in 1857, losing 425 souls with 13.6 tons of gold.<sup>4</sup> American courts upheld her successful salvage and set new precedents for the field of salvage law in relation to the law of finds, and in the context of historic shipwrecks, offering guidance to international and domestic policies. Secondly; the *Mercedes*, which was discovered in 2007 with an astounding 594 000 gold and silver coins, with an estimated value of US\$500 million.<sup>5</sup> Her salvage led to an international furore,

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<sup>1</sup> Other interests may include recreational diving, land reclamation schemes, port developments, pipeline construction, deep seabed mining, oil and gas exploration and commercial fishing, as identified in; Van Zyl, Megan *An analysis of the objectives and general principles of the United Nations Educational, Scientific and Cultural Organisation’s Convention on the Protection of Underwater Cultural Heritage* (unpublished LLM dissertation University of Cape Town 2005) at 10.

<sup>2</sup> Dromgoole, Sarah ‘UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: implications for commercial salvors’ (2003) *LMCLQ* at 317.

<sup>3</sup> Jurisdictions differ on the precise definition of a ‘historic shipwreck.’ Domestic legislation holds that wrecks over the age of 60 years, or which are specifically identified as such, qualify as ‘archaeological’ objects worthy of heritage protection, whilst certain international instruments hold that the passage of 100 years is the appropriate definitional threshold. The term is employed in this paper in a generic sense referring to vessels of general historical or archaeological relevance.

<sup>4</sup> See 2.3.1. below.

<sup>5</sup> See 2.3.2. below.

straining diplomatic relations, ending in a harsh outcome for the salvors. South African historic wrecks inevitably emanate from other jurisdictions and the case stands to remind domestic policymakers that legal complexities surrounding historic wreck salvage are frequently compounded by its generally international nature. Finally the unfortunate matter of the *Dodington*, which sank in South African waters, is considered.<sup>6</sup> Her looting exposed the short-comings in domestic legislation and was ultimately instrumental in leading a call for greater regulation and protection of historic shipwrecks.

International discourse surrounding the desirability of endorsing the application of salvage law to historic wrecks has been hugely influenced by the increased awareness of, and the consequent demand to protect, underwater cultural heritage (UCH). The nature of such international deliberations is examined. Arguments of interested parties, specifically those of underwater archaeologists and salvors, are considered. Further; the UNESCO's *Convention on the Protection of Underwater Cultural Heritage*,<sup>7</sup> which stands as the vanguard of international deliberations in this regard, is assessed.

Chapter III examines the South African regime. The country has a rich and fascinating maritime history which necessitates careful management of her historic wrecks. The development of legislation in this regard is tracked. Finally the current legislative environment is outlined. Much of the contemporary administration of historic wrecks is controlled through a permit system by the South African Heritage Resources Agency (SAHRA).

The next section reflects on the domestic regime, and offers two proposals for change. The legislative structure stands to offend certain private property rights, perhaps even to an unconstitutional extent. Further; it proposes an unsatisfactory system of determining what qualifies as part of the country's underwater heritage, and stands to limit its accessibility. The dissertation will advocate that legislators need to conceptually reconsider the statutory determination of underwater heritage and proposes a grading system. Further; it will propose that the principles of salvage law should be promoted in the realm of historic wrecks.

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<sup>6</sup> See 2.3.3. below.

<sup>7</sup> United Nations Educational Social and Cultural Organisation Convention on the Protection of Underwater Cultural Heritage (2001) Paris (the 2001 UNESCO Convention).

## II. SALVAGE LAW

### 2.1. Conceptualising salvage law

The viability of customary salvage law principles in the field of historic shipwrecks requires consideration of its exact scope and application. Salvage has been described as a ‘service voluntarily rendered in relieving property from an impending peril at sea or other navigable waters by those under no legal obligation to do so.’<sup>8</sup> Salvage law stands essentially uniform throughout the maritime world, with two widely ratified international conventions addressing the substantive law.<sup>9</sup> The earlier instrument, the Brussels Convention of 1910, was prepared for a diplomatic conference by the Comité Maritime International (CMI),<sup>10</sup> whilst the later convention, the 1989 London Convention, was prepared by the International Maritime Organisation (IMO).<sup>11</sup>

The concept of salvage is almost as ancient as shipping itself. The oldest codification of salvage principles is to be found in the Rhodian Code, dating back to 800 B.C., which was subsequently adopted by various European legislative instruments, such as England’s Law of Oleron, which states;<sup>12</sup>

Article XLV ‘If a ship be surprised at sea with whirl winds, or be shipwrecked any person saving anything from the wreck, shall have one-fifth of what he saves.’

Article XLVII. ‘If gold or silver, or any other thing be drawn up out of the sea eight cubits deep, he that draws it shall have one-third, and if fifteen cubits, he shall have one half, because of the depth.’<sup>13</sup>

A successful salvor accordingly earns a right to an award, for the property saved, from its owner.<sup>14</sup> Customarily, and in terms of the mentioned international treaties, four requirements must be met for a salvor to be eligible for a salvage award; (1) there must be

<sup>8</sup> Wilder, Mark ‘Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries’ (2000) 67 *Defence Counsel Journal* at 92.

<sup>9</sup> Sweeney, Joseph C ‘An overview of commercial salvage principles in the context of marine archaeology’ (1999) 30 *J. Mar. L. & Com.* at 188.

<sup>10</sup> Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea, Brussels, Sept. 23, 1910, T.S. No. 576, 37 Stat. 1658.

<sup>11</sup> International Convention on Salvage, London, Apr. 20, 1989, IMO Doc. LEG 60/12.

<sup>12</sup> Regan, Rob ‘When lost liners become found: an examination of the effectiveness of present maritime legal and statutory regimes for protecting historic wrecks in international waters with some proposals for change’ (2004-2005) 29 *Tul. Mar. L.J.* at 313.

<sup>13</sup> As quoted in *R.M.S. Titanic, Inc. v Haver*, 171 F.3d 943, 962, 1999 AMC 1330, 1348 (4<sup>th</sup> Cir. 1999).

<sup>14</sup> Regan (*supra*) at 321.

maritime property that (2) was at risk of a marine peril but that was (3) successfully preserved by the (4) voluntary conduct of salvors.<sup>15</sup> Once the requisite elements of salvage have been met a salvage award may be determined. The value of such award will be grounded on the value of the salvaged goods and the efforts of the salvors.<sup>16</sup>

Contemporary salvage law seeks to reward a salvor for more than simply his time and expenses incurred; it offers the prospect of profit. This commercial incentive supporting salvage law is attributable to much of its success. The rationale for this position was succinctly described by Justice Story in *Rowe v The Brig*;<sup>17</sup>

‘In cases of salvage, the measure of reward has never been adjusted by a mere estimate of the labor and services performed by the salvors. These, to be sure, are very important ingredients; and are greatly enhanced in value, when they have been accompanied by personal peril and gallantry, by prompt and hardy enterprise, and by severe and long-continued exposure to the inclemencies of the winds and waves. But an enlarged policy, looking to the safety and interest of the commercial world, decrees a liberal recompense, with a view to stimulate ambition, by holding out what may be deemed an honourable reward.’<sup>18</sup>

A salvor may obtain certain rights. Salvage law does not envision the transfer (or acquisition) of ownership by the salvor of the salvaged goods. As a preliminary step the salvor may be protected from competing salvors through judicial granting of ‘salvor-in-possession’ rights.<sup>19</sup> Such a limited right grants the salvor exclusive access and possession of the property to be salvaged, preventing interference from other salvors. Such an application requires simply that the standard of *constructive* possession is shown.<sup>20</sup> For the purposes of determining a salvage award *success* is one requirement, and accordingly the possessory standard would be *actual* possession.<sup>21</sup>

A range of factors may be considered when determining the quantum of a salvage award. It is a largely discretionary exercise by a court. The 1869 United States Supreme Court

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<sup>15</sup> Sweeney, Joseph C ‘An overview of commercial salvage principles in the context of marine archaeology’ (1999) 30 *J. Mar. L. & Com.* at 189. These requirements have been presented in marginally different forms in other texts, but their substantive cores remain largely similar.

<sup>16</sup> Regan (*supra*) at 321.

<sup>17</sup> 20 F. Cas. 1281, 1283 (C.C.D. Mass. 1818)(No. 12,093).

<sup>18</sup> As quoted in Regan (*supra*) at 322.

<sup>19</sup> DuClos, Justin S ‘A conceptual wreck: salvaging the law of finds’ (2007) 38 *J. Mar. L. & Com.* at 27.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

decision of *The Blackwell*<sup>22</sup> is often employed for guidance in this regard in various jurisdictions, and echoes many of the factors used during the Rhodian period.<sup>23</sup> The decision held the following factors to be important;

‘(1) [t]he labor expended by the salvors in the rendering the salvage service; (2) [t]he promptitude, skill, and energy displayed in rendering the service and saving the property; (3) [t]he value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed; (4) [t]he risk incurred by the salvors in securing the property from the impending peril; (5) [t]he value of the property saved; (6) [t]he degree of danger from which the property was rescued.’<sup>24</sup>

## 2.2. Suitability of salvage law to historic wrecks

The traditional law of salvage may at times appear ineptly placed in the realm of historic wrecks. The criticisms of salvage law to this extent can be split into two camps. Firstly; it has been suggested that salvage law is conceptually ineptly placed as some of its requirements are stretched beyond their intended or desired application. Secondly; commercial salvage objectives have been criticised as being fundamentally incompatible with the goals of preservation and promotion of historic shipwrecks and their UCH. This second concern will be addressed fully at a later stage. Its meaningful consideration requires one to assess the first criticism, the conceptual correctness of salvage law being applied to historic wrecks. This will be examined by considering each of the above mentioned traditional four pillars of salvage.<sup>25</sup>

### (a) *Maritime property*

Various national interpretations of the scope of ‘maritime property’ for the purposes of determining jurisdiction of an admiralty court have not always been consistent.<sup>26</sup> In South Africa the Admiralty Jurisdiction Regulation Act recognises salvage as a ‘maritime claim.’<sup>27</sup>

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<sup>22</sup> *The Blackwell* 77 U.S. 1 (1869).

<sup>23</sup> Wilder, Mark ‘Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries’ (2000) 67 *Defence Counsel Journal* at 93.

<sup>24</sup> At 13 – 14.

<sup>25</sup> As identified in Sweeney (*supra*) at 190.

<sup>26</sup> *Ibid.*

<sup>27</sup> Admiralty Jurisdiction Regulation Act 105 of 1983 s 1(k).

A broad interpretation is afforded to ‘wreck’ under the Wreck and Salvage Act.<sup>28</sup> Accordingly, it would be correct to consider historic wrecks, in terms of South African domestic legislation, as ‘maritime property’ for the purposes of salvage law.

*(b) Marine peril*

Salvage law envisions the returning of maritime property that is in peril. The requirement has been criticised in the context of historic wrecks. Many such wrecks would comfortably satisfy this requirement, for instance; wrecks subject to destructive fluvial action, or wrecks that stand to deteriorate in the foreseeable future and be lost forever. The requirement does however appear to be stretched when one considers other examples. For instance; gold coins lying in deep cold water, with no exposure to sunlight, with minimal fluvial action.

It has been advocated that the prospective peril the property faces need not be restricted to physical danger, but may include the frustration of its economic realisation.<sup>29</sup> Thus, by lying on the ocean’s floor, such property is in peril of not realising its commercial value. Contentions surrounding this argument can be reduced to how, on a policy level, maritime property that qualifies as UCH is viewed. A counter-argument is that the real ‘peril’ such property faces may in fact be its retrieval and return to the commercial stream, and the resultant ‘loss’ of the valuable UCH for broader purposes.<sup>30</sup> Such considerations may best be determined through national legislative measures, and will be considered further at a later stage.

*(c) Partial or total success in such recovery*

Success remains the core element of salvage. Salvors are not rewarded simply on the basis of costs incurred or time spent. This has classically been referred to as the ‘No-Cure-No-Pay’ policy. Such expenditures incurred to perform the salvage operation may only be considered when there has been a successful salvage of the maritime property. The severe nature of this approach was softened somewhat in Lloyds Open Form (LOF) in 1995. The

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<sup>28</sup> Wreck and Salvage Act 94 of 1996 s 1. Such interpretation is however qualified in the context of *historic* wrecks in Section 23 which states that such Act will not derogate from the National Monuments Act 28 of 1969 (currently the National Heritage Resources Act 25 of 1999). This will be examined at a later stage.

<sup>29</sup> Forrest, Craig ‘Has the application of salvage law to underwater cultural heritage become a thing of the past?’ (2003) 34 *J. Mar. L. & Com.* at 329.

<sup>30</sup> *Ibid.*

form, which is widely used today, allows for limited reimbursement of a salvor's expenses incurred in situations where damage to the environment was minimised, despite an unsuccessful salvage of the maritime property.<sup>31</sup> In most maritime nations the successful salvor(s) acquires a maritime lien, which arises *ex lege*, and attaches to the salvaged property.<sup>32</sup> The salvage lien is not necessarily restricted to a single person or enterprise, but may extend to all those who assisted in the operation. This principle is naturally extended to also apply to the salvage award.

*(d) Voluntary action*

A salvage award may only be granted where the salvor performed the salvage operation voluntarily. The requirement seeks to bar the rewarding of those who performed salvage actions under a legal obligation to do so, for instance a statutory or contractual obligation. Contentions around this requirement generally arise in situations of ships in distress. Typically precluded groups would include the coast guard and naval personnel, who have a statutory obligation to assist. Further, the ship's master and crew, who generally have a contractual obligation to protect the vessel, or would be acting in the interests of their own self-preservation.<sup>33</sup>

It has been argued that the actions of professional salvors operating on historic wrecks should, in many cases, not be considered to qualify as being done on a *voluntary* basis due to their ready availability to assist for a fee and that such 'salvors' should rather seek recourse in contract.<sup>34</sup> This argument is based on a strict interpretation of the element of voluntariness and is not widely held today.<sup>35</sup>

*(e) Further considerations*

Salvage law dictates that a salvor is entitled to a salvage reward upon successfully returning the salvaged property to its owner. This progression labours under the assumption that there is in fact an identifiable owner. Frequently this proves to be a stumbling block for

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<sup>31</sup> Sweeney, Joseph C 'An overview of commercial salvage principles in the context of marine archaeology' (1999) 30 *J. Mar. L. & Com.* 185 at 191.

<sup>32</sup> Hofmeyr, Gys *Admiralty Jurisdiction, Law and Practice in South Africa* 2ed (2012) at 269.

<sup>33</sup> Regan, Rob 'When lost liners become found: an examination of the effectiveness of present maritime legal and statutory regimes for protecting historic wrecks in international waters with some proposals for change' (2004-2005) 29 *Tul. Mar. L.J.* at 322.

<sup>34</sup> Sweeney (*supra*) at 192.

<sup>35</sup> *Ibid.*

salvors of historic wrecks. Records of ownership structures have either been muddied over the passage of time or the original owners have abandoned their ownership rights.

### 2.3. Three cases

The success of salvaging historic wrecks has met varied outcomes in different jurisdictions. This dissertation will consider three examples. Firstly; the *S.S. Central America*, which stands as an apparent salvage success story. Secondly; the *Nuestra Senora De Las Mercedes*, a case which demonstrates a need for greater certainty in the field and the international complexities surrounding shipwrecks. Finally; the *Dodington*, a South Africa salvage story of mixed successes. These cases studies do not attempt to stand as a comprehensive consideration of any other jurisdiction but rather to consider the conceptual feasibility of salvaging historic wrecks through highlighted examples.

#### 2.3.1. The *S.S. Central America* – a salvage success story<sup>36</sup>

The clean operation of the law of salvage is often beset by the operation of potentially conflicting legal structures. The case of the *S.S. Central America* stands to demonstrate the potentially conflicting legal machinery used to administer a found historic wreck. In this case a United States Fourth Circuit Court delivered a helpful judgment considering the salvage law against the law of finds.

The law of finds allows for ownership to vest with a party who has acquired abandoned property, referred to as *res nullius* in Roman-Dutch Law, into its possession. Its application ‘necessarily assumes that the property involved was never owned or was abandoned.’<sup>37</sup> Abandonment is not lightly presumed in South African law.<sup>38</sup>

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<sup>36</sup> For a rich account of the vessel’s history and subsequent discovery of the wreck see Kinder, Gary *Ship of Gold in the Deep Blue Sea* (1998).

<sup>37</sup> Wilder (*supra*) at 93.

<sup>38</sup> Hare, John *Shipping law & admiralty jurisdiction in South Africa* 2ed (2009) at 264. There is a volley of domestic cases in this regard, which are generally reduced to the issue of whether the previous owner did in fact abandon the property. Under Roman-Dutch law the abandonment of property rights was known as *derelictio*, and such property is then rendered *res nullius*. Per Joubert JA in *The Antipolis* 1990 (1) SA 751 (SCA) at 757C:

Aptly referred to as ‘The Ship of Gold,’ the *S.S. Central America*, an eighty-five meter side-wheel steamer, sank in 1857 with 425 souls lost, accompanied by 13.6 tons of gold.<sup>39</sup> She was a luxury vessel transporting passengers, cargo and mail.<sup>40</sup> Much of her business stemmed from the 1850 California Gold Rush. Prior to the construction of the transcontinental railroad safety concerns dictated that a seemingly safer option was to travel via sea oppose to traversing terrestrial America from California to New York. Passengers, often prospectors accompanied by their regularly lucrative cargoes, would commonly steam from San Francisco to the Pacific side of Panama, then proceed by rail across the relatively short distance to Panama’s Atlantic seaboard, to link with a final trip by steam up America’s East Coast to New York.<sup>41</sup> It is in this final leg of the journey that the *Ship of Gold* tendered her businesses.

On the evening of 9 September 1857, the vessel was making fair progress when she unexpectedly encountered a strong hurricane off the coast of Carolinas.<sup>42</sup> The storm became increasingly stronger. All hands, passenger and crew, toiled furiously over the following two days to assist her, but it was not be. She lay on the Atlantic Ocean floor undisturbed until 1988 when, after an extensive search, she was found by the Columbus-America Discovery Group (CADG), who began salvage operations in 1989.

The salvage operations, headed Thomas Thompson,<sup>43</sup> developed new technologies to retrieve the maritime property, which lay almost 2.5 kilometres underwater, including ‘NEMO,’ a remote submarine specifically designed to effectively operate at these depths.<sup>44</sup> Thompson also assembled an experienced team from various fields, including; scientists,

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‘Volgens ons gemene reg word eiendomsreg oor ‘n saak deur *derelict* verloor wanneer ‘n eienaar sy saak prysgee of abandonneer met die bedoeling om nie meer eienaar daarvan te wees nie.’

See also; *The Paris Maru: Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 168; *The Thermopolae: Salvage Association of London v SA Salvage Syndicate Ltd* (1906) 23 SC 169.

<sup>39</sup> Wilder (*supra*) at 99.

<sup>40</sup> Peltz, Robert D ‘Salvaging historic wrecks’ (2000-2001) 25 *Tul. Mar. L.J.* at 19.

<sup>41</sup> *Ibid.*

<sup>42</sup> Wilder (*supra*) at 99.

<sup>43</sup> The finding of the vessel was the result of nearly two decades of intensive research, planning, investigation and actual searching. It was the culmination of Thompson’s, a research scientist, professional career. Peltz (*supra*) at 20.

<sup>44</sup> *Ibid.*

archaeologists, engineers and professional salvors for the operation.<sup>45</sup> Actual salvage operations were limited to two to three month windows during the year, the remainder was spent researching and planning, as well as developing more effective technologies and methods.<sup>46</sup>

During late 1989 CADG filed and obtained an *in rem* action in the United States District Court for the Eastern District of Virginia granting it exclusive salvage rights of the vessel.<sup>47</sup> Upon the successful completion of the salvage operation the CADG amended their original action to one seeking a declaratory order recognising its ownership of the lucrative cargo that had been retrieved, in accordance with the law of finds. The matter was opposed by various parties, including thirty-nine British and American insurers and their ‘successors-in-interest,’ claiming their subrogated rights.<sup>48</sup> The CAGD argued the cargo had been abandoned, and accordingly no other party currently held any rights in such property.<sup>49</sup> The federal district court held that the property was to be considered abandoned, and accordingly the CAGD had become owners in line with the law of finds. The court held that the determination that the property was abandoned was grounded in the facts that, firstly; the underwriters had made no concerted effort to locate the wreck since 1858 and, secondly; they had over time destroyed all documentary evidence that could support their claims, from which their intention to abandon could be inferred.<sup>50</sup>

The decision was reversed on appeal by a split panel of the Fourth Circuit.<sup>51</sup> It held that the lower court had erroneously applied the law of finds. To this extent it held that the property had not in fact been ‘abandoned’ and as such salvage law should be applied. The court held that the law of finds should only be applied where either; the owners had expressly and publicly abandoned their interest, or in instances where an ancient ship is salvaged and

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid. Columbus-Am. Discovery Group v Atl. Mut. Ins. Co.*, 742 F. Supp. 1372, 1990 AMC 2409 (E.D. Va. 1990), *rev'd in part*, 974 F.2d 450, 1992 AMC 2705 (4<sup>th</sup> Cir. 1992).

<sup>48</sup> *Ibid. Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 1992 AMC 2705 (4<sup>th</sup> Cir. 1991).

The matter was also opposed by a rival salvor who alleged that they CAGD had used his information to locate the wreck, a claim that was dismissed by the court for lack of evidence.

<sup>49</sup> Abandoned property under the common law is considered *res nullius*.

<sup>50</sup> Wilder (*supra*) at 100.

<sup>51</sup> *CADG I*, 974 F.2d at 468, 1992 AMC 2727.

no owner (or subrogated claimant) claims any interest.<sup>52</sup> The court held that abandonment may only be inferred within these certain narrow parameters, but where an owner steps forward, then the appropriate system is salvage law.<sup>53</sup> Further; that any evidence of express abandonment should be clear and concise.<sup>54</sup> The District Court, on remand from the Fourth Circuit, determined that the CADG was entitled to a 90 per cent salvage award of the total gold value.<sup>55</sup>

The *S.S. Central America* demonstrates the attraction of salvage law as an equitable means of settlement in such circumstances. It seeks to carve a middle road for salvors, who may not become owners of the salvaged property, yet are still incentivised and rewarded for their invaluable contribution, whilst an owner has its property, which it may have financially disregarded, returned, albeit at a price.

### 2.3.2. The *Nuestra Senora De Las Mercedes* – an international incident

The legal complexities surrounding historic wreck salvage are frequently compounded by its generally international nature. South Africa is not traditionally a ship owning nation. Historic wrecks in her territorial waters inevitably emanate from other jurisdictions. A domestic legal regime should be aware in this regard and not isolate itself from this reality. Broader considerations are often brought into play, extending beyond mere jurisdictional determinations, and may even test international diplomatic relations.

The salvage of the *Nuestra Senora De Las Mercedes* ('the *Mercedes*') by Odyssey Marine Exploration ('Odyssey') in 2007 began a lengthy international controversy. The matter stands to highlight the uncertainties and inconsistencies that may arise under such facts. The *Mercedes*, although found in international waters, stands as an example of many such complications.

Odyssey, a well-financed professional salvage group, was operating approximately 100 miles west of the Straits of Gibraltar in international waters when they stumbled across

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<sup>52</sup> Wilder (*supra*) at 100.

<sup>53</sup> *CADG I*, 974 F.2d at 467-468, 1992 AMC 2727.

<sup>54</sup> *Ibid.*

<sup>55</sup> The total value of gold proved far less than originally estimated. The project costs for CAGD totalled US\$30 million, with gold retrieved valued at US\$21 million, the reward of US\$19 million did not result in a profit. Wilder (*supra*) at 100.

an irregular echo sound pattern on the ocean's floor. The team's high-tech underwater remote submarine 'Zeus' was deployed to investigate. She relayed via video to a packed control room images of a sea bed littered with coins. After a comprehensive pre-disturbance survey, the coins were salvaged over a period of several weeks, yielding approximately 594 000 gold and silver coins, with an estimated value of US\$500 million.<sup>56</sup> Odyssey named the unidentified wreck the *Black Swan*. The coins were transported under absolute secrecy to mainland Gibraltar, and then flown to an undisclosed location in the United States of America.

Odyssey sought an order from the United States District Court for the Middle District of Florida against 'The Unidentified Shipwreck Vessel, its apparel, tackle, appurtenances and cargo' stating its possessory rights, either under the law of finds, or the law of salvage should it be found to be of application.<sup>57</sup> A small recovered artefact of the ship was used to arrest the vessel *in rem*, and the Court declared Odyssey interim custodian of the wreck.<sup>58</sup> Odyssey published the required notice of arrest, attracting the interest of the Kingdom of Spain, which filed a claim for the vessel, its contents and its cargo. Further; Spain requested more information that may assist in establishing the identity of the *Black Swan*.<sup>59</sup> Odyssey conceded that the wreck *may* be that of the *Mercedes*.

Litigation in the United States intensified with Spain filing a notice claiming it was in fact the *Mercedes*, which was a Spanish Royal Navy Frigate, and accordingly immune from arrest pursuant to the United States' Foreign Sovereign Immunities Act of 1976 (FSIA), and her cargo should thus be returned to Spain.<sup>60</sup> At this point Peru intervened, claiming the coins originated and were minted in Peru and were part of the country's cultural heritage, and thus belonged to the Peruvian people. Further; twenty-five individual claimants emerged, twenty-

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<sup>56</sup> Burns, Christine Nicole 'Finders Weepers, Losers Keepers: The Eleventh Circuit Denies Salvage Company's Claims to a Sunken Military Vessel Found in International Waters in *Odyssey Marine Exploration, Inc v. Unidentified Shipwrecked Vessel*' (2011-2012) 36 Tul. Mar L.J. at 803.

<sup>57</sup> *Ibid. Odyssey Marine Exploration, Inc v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1166, 2011 AMC 2409, 2411-12 (11<sup>th</sup> Cir. 2011), *aff'g* 657 F. Supp. 1126 (M.D. Fla. 2009).

<sup>58</sup> This fiction of an arrest *in rem* of the vessel to obtain jurisdiction is common practice in the United States of America, and was used, for instance, in litigation surrounding *The Titanic*.

<sup>59</sup> Nelson, Michael R 'Finders, weepers-losers, keepers? Florida court says U.S. company must return recovered treasure to Kingdom of Spain' (2010) 16 *Law & Bus. Rev. Am.* at 587.

<sup>60</sup> Burns (*supra*) at 804. The Act outlines recognised sovereign immunities by the United States. This includes, as was argued by Spain, foreign military vessels and their cargoes.

four of who claimed they were direct descendants of the true owners of the valuable cargoes.<sup>61</sup> The *Odyssey* contended that the identity of the *Black Swan* remained uncertain, but if it was indeed the *Mercedes*, it was argued that she was involved in merchant activity when she encountered and was sank by British navy vessels.

While litigation proceeded in the United States, Spain arrested *Odyssey*'s two salvage vessels and a vast range of her equipment which was located in Spain. The vessels were held for over five months with its crew on-board. Most of the crew's passports were seized. On two occasions the vessels attempted to sail. Spanish authorities reacted forcefully. On the second occasion, with a host of international press on-board the *Odyssey*'s vessel, two Spanish navy frigates forced her back to dock, the Captain was imprisoned, and crew were thoroughly interrogated. All recording devices of the press were confiscated. *Odyssey* claimed that at this point she was in international waters and that the boarding was illegal.

In December 2009 the District Court granted Spain's motion to dismiss.<sup>62</sup> It held that the vessel was part of the Spanish Navy and accordingly was still owned by the Kingdom of Spain. The court held that the vessel was immune from arrest in the United States under the FSIA. *Odyssey* was ordered to return all artefacts to Spain. The decision was appealed by all other parties. The return of the property was however stayed until the appeals process had made a determination.<sup>63</sup> In January 2011 *Odyssey* claimed it had come into possession of leaked documents indicating the United States Government had attempted to assist the Spain in having the coins returned in exchange for an allegedly stolen artwork of an American private citizen, which had been found in Spain.<sup>64</sup> The American State Department declined to comment, whilst the Kingdom of Spain denied any wrongdoing on their part. A special investigation into the matter by the Department of State's Office of Inspector General failed to find sufficient proof of the connection between the *Mercedes* and the stolen artwork.<sup>65</sup>

In September 2011 the 11<sup>th</sup> Circuit Court of Appeals confirmed the lower court's decision, namely that the wreck was that of the *Mercedes* and that *Odyssey* must give all

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<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> 2011 AMC at 2415.

<sup>64</sup> Severson, Kim and Brown, Robbie 'WikiLeaks Cables Make Appearance in a Tale of Sunken Treasure and Nazi Theft' New York Times, 6 January 2011, Online.

<sup>65</sup> Department of State's Office of Inspector General, 'Congressional Request for Review: Department of State Activities Regarding Shipwreck Salvage Claim (ISP-I-11-36)' Online.

salvaged property to the Kingdom of Spain.<sup>66</sup> An appeal by Odyssey in January 2012 to the same court to stay the order pending an appeal to the United States Supreme Court was dismissed. A final attempt was made by Odyssey in an emergency appeal to the United States Supreme Court in February 2012, which was dismissed.<sup>67</sup> On 24 February 2012 two C-130 Hercules planes sent by the Kingdom of Spain collected the coins. In May 2012 a final petition was made by Odyssey to the Supreme Court to reconsider its judgment. This was denied.

### 2.3.3. Disappointment in the *Dodington*

The case of the *Dodington's* coins played an instrumental role in revealing a need to reconsider and reform legislation protecting South Africa's underwater heritage. The matter exposed certain vulnerabilities and deficiencies of domestic legislation surrounding salvaging historic wrecks. Further; it demonstrated the need to monitor and enforce legislative means that were in place. Even though the principles of salvage law were not strictly relied on, the matter has often been invoked to demonstrate the undesirable role of commercial salvors of historic wrecks in South Africa.<sup>68</sup> It will be submitted that this argument is unduly harsh on commercial salvors. The case does however offer an attractive baseline from which to assess concerns surrounding the salvaging of historic wrecks found in South African waters. A full account of the legislative environment in South Africa relating to historic wreck salvage, and its history, is provided in Chapter III.

On the morning of 29 September 1997 The Times of London contained an advertisement titled 'Clive of India's Gold Found in Pirate Wreck.'<sup>69</sup> The advertisement was to promote an auction to be held in London where a total of 1,214 gold coins would go under the hammer.<sup>70</sup> Clive of India, or more formally Robert Clive, famously lost his fortune when

<sup>66</sup> *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159, 1184, 2011 AMC 2409, 2440 (11<sup>th</sup> Cir. 2011), *aff'g* 657 F. Supp. 2d 1126 (M.D. Fla. 2009).

<sup>67</sup> Goodman, Al 'High court rejects stay in Spanish sunken treasure case' CNN, 10 February 2012, Online.

<sup>68</sup> See generally; Gribble, John and Forrest, Craig 'Underwater Cultural Heritage at Risk: The Case of the *Dodington* Coins' in *Art and Cultural Heritage; Law, Policy and Practice* (2006) at 313. For a fascinating account of the survivors of the *Dodington* see Burman, Jose *Shipwreck! Courage and Endurance in the Southern Seas* (1986) at 54.

<sup>69</sup> Times of London, 'Clive of India's Gold Found in Pirate Wreck,' 29 September 1997.

<sup>70</sup> Gribble (*supra*) at 313.

the East Indiaman *Dodington* was wrecked in 1755 in Algoa Bay, South Africa. The wreck and her contents were supposedly under the protection of South African heritage legislation, yet the advertisement was the first time the relevant authority, the National Monuments Council (NMC), was made aware that any coins had in fact been recovered from the wreck.<sup>71</sup>

The *Dodington* departed from Dover on 22 April 1755. She sailed in a fleet of British vessels, comprising of; the *Stretham* (which carried Clive), *Pelham*, *Edgecote* and *Houghton*.<sup>72</sup> Robert Clive had been appointed by the British East India Company to lead efforts to drive the French out of India.<sup>73</sup> The *Dodington* pulled ahead of the fleet at an early stage. After rounding Cape Agulhas her master, James Sampson, made fatal navigational error which resulted in her sailing far closer to South Africa's treacherous East Coast as she headed north.<sup>74</sup> During the early hours of 17 July 1755 the *Dodington* struck rocks off Bird Island and within twenty minutes she was gone.<sup>75</sup> Only 23 of the 270 aboard survived.<sup>76</sup> The survivors spent several months on Bird Island building a small vessel, *Happy Deliverance*, with which they sailed to Mozambique and were subsequently rescued.<sup>77</sup>

In 1977 David Allen and Gerry van Niekerk found the *Dodington* wreck.<sup>78</sup> The pair began excavation of the wreck that same year. In 1982, after an amendment to the National Monuments Act,<sup>79</sup> they obtained the requisite permit allowing further excavation, which was frequently renewed in the following years.<sup>80</sup> Many recovered artefacts were given to the Port Elizabeth Museum for research and display purposes.<sup>81</sup> No significant finds of coins were reported over this period. Allen and van Niekerk had also been successful in locating another wreck that same year, the *Santissimo Sacramento*,<sup>82</sup> and were appalled by the ruthless

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* The Portuguese charts Sampson relied, although generally accurate, were erroneous in their depiction of the South-Eastern parts of South Africa, indicating a far slighter terrestrial boundary northwards.

<sup>75</sup> *Ibid.*

<sup>76</sup> Shaw, John *Clive of India's gold comes up for sale after legal settlement* Independent, 28 August 2000, Online.

<sup>77</sup> Gribble (*supra*) at 314.

<sup>78</sup> See generally; Allen, Geoffrey and Allen, David *Clive's Lost Treasure* (1978).

<sup>79</sup> National Monuments Act 32 of 1961.

<sup>80</sup> Gribble (*supra*) at 314.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.* A Portuguese wreck dating 1647.

plundering they witnessed of both sites by divers once word of their location was out. The duo was ultimately fairly successful in drawing political attention to the plight of unprotected underwater cultural heritage off South Africa's coast.<sup>83</sup>

The Times' auction advertisement did not specifically state the coins were retrieved from the *Dodington*, but did state it was the personal fortune of Clive of India. Various suspicious details surrounded the auction. The identity of the divers was kept secret, for apparent protection against fellow treasure seekers. It was claimed the wreck was found in international waters, yet off the east-coast of South Africa. This would conveniently exclude any jurisdictional encounters with South African authorities. However, a wreck found off the east-coast of South Africa, outside the 24 mile jurisdictional boundary, would see a minimum depth of approximately 200 metres, a suspiciously impressive depth for a diver to operate at.<sup>84</sup> These, accompanied by other dubious details, led the NMC to the conclusion that the coins could only have come from the *Dodington*.

The NMC now faced the monumental task of having the coins returned to South Africa from the United Kingdom (UK). This relatively unprecedented situation resulted in the NMC exploring various avenues to this end. The first such avenue was to consider the viability of an application to a court in the UK for *repatriation* of the *Dodington* coins.<sup>85</sup> It was argued that the coins qualified as protected cultural heritage in terms of the National Monuments Act, and were exported illegally from South Africa in terms of its domestic legislation, and should accordingly be repatriated. The argument did of course depend on the premise that a court in the UK would be prepared to enforce South African public law. It was recognised that, in the absence of any bilateral or multilateral treaty, this was not a viable option. The Government of the UK had clarified this proposition before when responding to a question regarding the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, holding;

'[i]t is not possible for HM Government to take measures against individuals or organisations unless the law of the United Kingdom is broken... There is no provision in the laws of the United Kingdom for proceedings to be taken against persons suspecting of having infringed the export controls of another country.'<sup>86</sup>

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<sup>83</sup> *Ibid.* Their success is considered further in Chapter III.

<sup>84</sup> *Ibid.*

<sup>85</sup> For a detailed discussion of the NMC's case for repatriation, and the subsequent case of ownership, see generally; Gribble (*supra*) at 316 – 318.

<sup>86</sup> UNESCO Doc. 20 C/84 at 46 as quoted in Gribble (*supra*) at 317.

The NMC thought greater success may be found in a claim of *ownership* of the *Dodington* coins by the South African authorities. Ownership of property, albeit by a foreign owner or country, would be recognised in the UK, and recourse to recover stolen property would be available.<sup>87</sup> The difficulty lay in the fact that, in order to establish the South African Government indeed owned the *Dodington* coins, a court in the UK would be required to investigate the proposition through examination of its domestic public law legislation which granted ownership to the State. The argument was further complicated by the fact that such legislation, at the time, was riddled with ambiguities and uncertainties regarding ownership of the contents of a wreck, as will be examined in Chapter III. Further; it had not been proved as fact that the coins were retrieved from the *Dodington*.

The NMC decided that, given the uncertain outcome of expensive litigation in a foreign jurisdiction, an out of court settlement was the best available option.<sup>88</sup> Of the 1,214 coins on auction by Spink & Sons, 450 were returned to the South African Government.<sup>89</sup> The incident revealed certain shortcomings South Africa faced regarding both domestic control and international recourse regarding the protection of such historical artefacts. The illegal acts of looting stood to contribute to a negative image of the commercial salvor in the context of historic wrecks, fuelling the argument that commercial salvage and the protection of underwater cultural heritage are fundamentally at odds.

#### 2.4. International deliberations; salvage law in relation to the protection of UCH

The international discourse surrounding the desirability of endorsing the application of salvage law to historic wrecks has been hugely influenced by the increased awareness of, and the consequent demand to protect, UCH.<sup>90</sup> It has been argued that commercially incentivised

<sup>87</sup> Gribble (*supra*) at 317. Such recourse is naturally subject to domestic considerations in the UK, such as the *bona fide* purchaser, prescription, etc.

<sup>88</sup> Carnie, Tony *SA gets back pirated coins worth R3 million IOL*, 14 February 2001, Online.

<sup>89</sup> Macgregor, Karen *Stolen gold back in South Africa The Independent*, 18 February 2001, Online.

<sup>90</sup> The 2001 UNESCO Convention defines 'Underwater cultural heritage' in Article 1(a) as;

‘...all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

- (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;

salvage activities are fundamentally at odds with such objectives. However it has also been argued, as is the view of this author, that incentivising commercial salvors to locate and retrieve such UCH is the very protection and awareness it requires. This section will briefly examine such deliberations. It will proceed to consider the increased international recognition and protection UCH has received through the development of international conventions, which culminate with the prevailing 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (2001 UNESCO Convention). Such international dialogue stands to inform and assist South Africa in crafting her own policies.<sup>91</sup>

#### 2.4.1. Nature of conflict

Different parties value different interests in historic wrecks. Frictions arise when one party feels its interests are being prejudiced by the realisation of another's interests. The question that should follow is whether such perceived prejudice by the other party is a justifiable infringement, or does it warrant the other party alter its *modus operandi*, or should the offending party simply be barred completely? Depending on which source one consults, activities of commercial wreck salvors could fit into any of the three answers. Domestic solutions to these conflicts are proposed in later chapters.

The most notorious conflict of interested parties in historic wrecks is between two broad interest groups; those who are 'attracted by the commercial value of such wrecks and those concerned to protect their historical and cultural value.'<sup>92</sup> Although this grouping does

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- (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
  - (iii) objects of prehistoric character.'

<sup>91</sup> South Africa has often weighed in on the field on an international level, for instance, a South African delegation was sent to contribute to the drafting of the 2001 UNESCO Convention. The team was led by John Gribble, a qualified maritime archaeologist, working under the National Monuments Council and subsequently in the SAHRA. See further Forrest, Craig "South Africa" in *The protection of the underwater cultural heritage; national perspectives in light of the UNESCO Convention 2001* Dromgoole, Sarah ed. (2006) at 254.

<sup>92</sup> Dromgoole (*supra*) at 317.

not present a definitive taxonomy, for brevity sake, the groups will be referred to as salvors on the one hand and underwater archaeologists as the label representing the second group.<sup>93</sup>

Tensions between commercial and cultural interests in historic wrecks have been prevalent since the advent of SCUBA technology in the 1960s.<sup>94</sup> Previously unreachable wreck locations have become increasingly accessible. Technological advances have resulted in a historically exponential number of wrecks being found and accessed over the last 35 years. The commercialisation of salvage operations surrounding historic wrecks has developed alongside these technological advances. The historic salvage ‘industry’ began to truly expand in 1970s with the retrieval of treasure found in Spanish Galleons wrecked off the Florida Keys.<sup>95</sup> Contemporary historic salvors now range from inquisitive recreational divers to publicly listed companies on the New York Stock Exchange.<sup>96</sup>

The technological advances have equally assisted the field of marine archaeology. For instance; remote submarines, such as ‘Nemo’ used for the *S.S. Central America’s* salvage or ‘Zeus’ for the *Mercedes’* recovery, have afforded archaeologists unprecedented access to precious underwater resources. The submersibles allow for the search and retrieval of fragile artefacts. Robotic arms, scooping, vacuuming and grasping functions cater for recovery of even the most fragile of items, such as paper documents, tea cups, and glassware, as seen in the case of the *S.S. Central America*, at over 2 kilometres beneath the ocean’s surface.<sup>97</sup> Specialist video and photographic equipment have also assisted greatly in investigating and documenting wreck sites and their surrounding debris fields.

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<sup>93</sup> As used in; Forrest, Craig ‘Has the application of salvage law to underwater cultural heritage become a thing of the past?’ (2003) 34 *J. Mar. L. & Com.* at 310, which explains; ‘The term ‘underwater archaeology’ is used...in a generic context, to include the study of any of the subject matter referred to under similar terms, such as, nautical archaeology, naval archaeology, maritime archaeology, marine archaeology, archaeology of water transport and archaeology of the boat.’ The discipline of ‘marine archaeology’ is a highly specialised field, requiring very specific qualifications. Only a small handful of qualified marine archaeologists practice in South Africa.

<sup>94</sup> Dromgoole (*supra*) at 318.

<sup>95</sup> *Ibid.*

<sup>96</sup> For instance; Odyssey Marine Exploration.

<sup>97</sup> Dorsey, WR ‘Historic Salvors, Marine Archaeologists and the UNESCO Draft Convention on Underwater Cultural Heritage’, paper delivered at the Houston Marine Seminar (2000) at 2.

#### 2.4.2. Arguments of underwater archaeologists and salvors

The two groups have conflicted on various fronts. Certain underwater archaeologists, and incidentally legal academics, largely view salvors as looting treasure hunters which should be stopped. Conversely many salvors claim their skills and financial outlay is what often allows for UCH to be retrieved, studied, preserved and documented. William Dorsey, President of The Maritime Law Association of the United States, provides a good explanation;

‘They [underwater archaeologists] would say that the commercial salvors are people who know the price of everything and the value of nothing. By the same token many commercial historic salvors regard the archaeologists as impractical intellectuals, who know the value of everything and the cost of nothing.’<sup>98</sup>

##### 2.4.2.1. Underwater archaeologists

A fundamental difference between underwater archaeologists and salvors is the value each attaches to UCH. On one end of the spectrum, salvors view UCH as a commercial resource, one that requires labour and expertise to realise its economic value. The other end of the spectrum is defined by the ‘purists’ of the underwater archaeology community who hold that it is morally and ethically wrong to attribute economic value to UCH.<sup>99</sup> Naturally shades emerge between these two camps.

Archaeological purists argue the application of the law of salvage aids cultural commercialisation by returning UCH to the economic stream. They reject arguments for the engagement in the business of the sale and private ownership of UCH. Salvage law envisions the retrieval of maritime property by salvors to its owner. Archaeologists have suggested that the conventional concept of private ownership with regards to UCH may be inappropriate as UCH is property which in fact belongs to humankind as a whole.<sup>100</sup>

It has been claimed that the financially fuelled motivation of salvors does not encourage the necessary careful and painstaking archaeological techniques required to protect and obtain the maximum amount of information from a wreck and its associated artefacts.<sup>101</sup> Dromgoole notes in this regard;

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<sup>98</sup> Dorsey (*supra*) at 6.

<sup>99</sup> Forrest (*supra*) at 317.

<sup>100</sup> *Ibid.*

<sup>101</sup> See, amongst others, Forrest (*supra*) at 309.

‘Commercial exploitation requires that the valuable parts of a wreck, usually the cargo and sometimes the personal effects of the passengers, are recovered quickly and efficiently. This may mean that a “surgical incision” is made into the vessel in order to remove the cargo and other valuables, leaving the rest of the wreck unexcavated. Such an operation is likely to result in destabilization of the site and damage to the parts of the wreck – including the hull – that are of most archaeological significance.’<sup>102</sup>

Underwater archaeologists may not necessarily wish for artefacts found on or near historic wrecks to be brought to the surface. In certain instances the best archaeological decision may be *in situ* preservation of the wreck site.<sup>103</sup> *In situ* preservation can yield various advantages. For instance; the value an artefact may in fact be its position, rather than the object itself.<sup>104</sup> In the *Mercedes* the scattered nature of the wreck site led archaeologists to the conclusion that she was engaged in a fire fight and the likely reason of her sinking was a well-aimed cannon-ball that struck her gunpowder arsenal.<sup>105</sup> Further; more information about a wreck or artefacts may be discovered by keeping the collection together, whether by means of *in situ* preservation or after retrieval of the artefacts to the surface. *In situ* preservation may also buy valuable time for archaeologists. It prevents the hasty excavation of a site which may in fact require more time for activities such as background research to be completed.

#### 2.4.2.2. Salvors

The salvage community have responded to, and in many instances found solutions to, concerns surrounding the salvaging of historic wrecks, and accordingly, UCH. A full consideration of arguments favouring the salvage of historic wrecks specifically in South Africa is provided in Chapter IV. For the purposes of this section conceptual arguments in favour of salvage, as have been contended in the broader international maritime community, will be outlined.

The notion of a single grouping of ‘salvors’ may be misleading. Salvors of historic wrecks, as discussed, range from inquisitive skin divers to publicly listed companies. It is however important from the outset to distinguish between legal and illegal salvage

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<sup>102</sup> Dromgoole (*supra*) at 319.

<sup>103</sup> *In situ* is a Latin phrase meaning ‘in position’ with the meaning in this context that a historic wreck and associated property is not retrieved to the surface.

<sup>104</sup> Personal discussion with Jonathan Sharfman; head of the SAHRA’s Maritime & Underwater Cultural Heritage Unit (MUCH) 6 December 2012.

<sup>105</sup> As suggested in the documentary series; *Treasure Quest* Discovery Channel. Aired 2008.

operations. Salvors are often associated with, and viewed as akin to, looters. The term salvor is employed as relating to those who act, or at least attempt to act, within legal parameters. A looter is by definition a party who totally disregards legal confines.<sup>106</sup> The looting of historic wrecks has in the past had an adverse effect on the salvage community, for example; the illegal removal of coins from the *Dodington*, which should not be considered the actions of salvors.

Salvors have argued that the application of salvage law to UCH need not compromise the archaeological process. Many large salvage operations have made every attempt to ensure this. Comprehensive pre-disturbance surveys map and document the position of all seen artefacts. Such an exercise has become standard practice for larger operations, as seen in the salvage operations around the *Mercedes* and the *S.S. Central America*. A pre-disturbance survey stands as one example of where commercial and cultural interests can operate in a mutually beneficial manner. The survey, whether viewed from a purely commercial or cultural standpoint, informs one as to the exact layout of a wreck site. The position and, from what can be seen, nature of each and every artefact is documented. Highly sophisticated and specialist technology can now afford one an unprecedented detailed site map, even at the greatest of depths.

Salvors have argued that the realisation of commercial objects need not require the exclusion of archaeological interests, and that there are many instances of the two either operating without infringing the other's interests, or in a mutually beneficial manner. Large salvage teams will as a matter of course have members with qualifications in the fields of underwater archaeology in their employment. Their meaningful involvement often forms a crucial part of the salvors operation. Odyssey Marine Exploration has demonstrated this through continual support and promotion of archaeological involvement in their operations.<sup>107</sup> Courts in the USA have moved towards employing this as a factor in determining a salvage award when dealing with a historic wreck.<sup>108</sup>

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<sup>106</sup> See Lee Spence, E 'Ethics in underwater archaeology' Sea Research Society, states; 'Looters are criminals showing wanton disregard for the rights of property of others. Looters work sites without lawful right and usually without proper record keeping. Looters are thieves who are strictly in it for profit, and break all kinds of laws respecting public and private property. Looters should definitely be reported and if possible stopped.'

<sup>107</sup> Odyssey have permanently employed and qualified crew members who solely focussed on the underwater archaeological aspects surrounding salvage operations. An advertised position by Odyssey describes the position as follows;

### 2.4.3. International law developments and the 2001 UNESCO Convention

International law impacting the salvaging of historic wrecks has developed in a gradual and piecemeal manner. In November 2001 the UNESCO passed the Convention on the Protection of Underwater Cultural Heritage. South Africa is poised to ratify the Convention in the foreseeable future. Accordingly an examination of the Convention and the development of other international instruments provide a good baseline to consider South Africa's current domestic regime and international position. Three primary fields of international law, which often overlap, have had a noteworthy effect on the salvaging of historic wrecks; the international law of the sea, salvage law and underwater cultural heritage protection. The three are briefly considered in relation to salvaging historic wrecks.

#### 2.4.3.1. *The law of the sea and salvage law*

The 1982 UN Convention on the Law of the Sea, which South Africa has ratified, imposes broad duties on states to protect UCH.<sup>109</sup> Article 149 reads;

‘All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the state or country of origin, or the state of cultural origin, or the state of historical and archaeological origin.’

Forrest notes that the Article was of particular significance for two reasons.<sup>110</sup> Firstly; it introduced the somewhat novel concept that the preservation of UCH should be for the benefit of mankind. Secondly; it introduced certain preferential rights surrounding UCH. Article 303 of the Convention goes on to state;

- (1) States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose
- (2) In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

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‘The Marine Archaeologist’s primary role is to help plan shipwreck survey and excavation projects, and to oversee recording, recovery and interpretation of data and materials from sites. This includes advising Project Managers on archaeological methodology, planning dives with Remotely-Operated Vehicles and supervising all aspects of archaeological operations (retrieving artefacts, recording, photomosaic production, dive video, measurements and interpretation). In addition, the Marine Archaeologist will be required to write up fieldwork for internal use and scientific publication and conduct academic and popular presentations.’ Odyssey Marine Exploration, *Careers* [Retrieved; 31 December 2012].

<sup>108</sup> Dromgoole (*supra*) at 320.

<sup>109</sup> United Nations *Convention on the Law of the Sea* Montego Bay 10 December 1982.

<sup>110</sup> Forrest, Craig *International Law and the protection of cultural heritage* (2011) Routledge, Oxfordshire at 322.

- (3) Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
- (4) This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historic nature.

The UN Law of the Sea Convention has subsequently been criticised for a lack of clarity as to the exact scope and application of these two Articles.<sup>111</sup>

The international unification of salvage law principles began as early as 1896 when the International Law Association (ILA) founded the Comité Maritime International (CMI). The initial task of the CMI was the promotion of unification of maritime law on an international level.<sup>112</sup> An early international instrument was the 1910 Salvage Convention, which although did not deal with the salvaging of historic wrecks, was useful in establishing an international set of principles relating to salvage law, including the introduction of the infamous ‘No-Cure-No-Pay’ principle.<sup>113</sup> The United Nations subsequently founded the International Maritime Organisation (IMO) which was tasked with reconsidering the 1910 Salvage Convention. Their work resulted in the adoption of the 1989 International Convention on Salvage, which did not directly deal with the salvaging of historic wrecks, although it did take a somewhat pragmatic stance by allowing states to determine their own position on the matter.<sup>114</sup> Article 30, which is entitled ‘Reservations’ states that;

1. Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this Convention:
  - (d) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.

#### 2.4.3.2. *The 2001 UNESCO Convention*

In 1988 the ILA undertook to draft a convention specifically aimed at the protection of UCH. This task was passed on to the UNESCO in 1995, which published the first draft in 1998, and

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<sup>111</sup> See generally in this regard *ibid* at 324.

<sup>112</sup> Forrest (*supra*) at 330.

<sup>113</sup> Forrest (*supra*) at 330. Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 1910.

<sup>114</sup> South Africa neither ratified nor acceded the Convention because, as Hare notes; ‘it was considered the Convention was regarded as lacking in certain respects, particularly in relation to its application and to the calculation of...special compensation.’ Hare (*supra*) at 402.

the final version by 2001.<sup>115</sup> The 2001 UNESCO Convention has had a profound impact on the salvaging of historic wrecks, both on an international law level, and in terms of how states structure their own domestic legislation. The Convention aims to protect UCH.<sup>116</sup> The application of salvage law to UCH was, and to an extent remains, a hotly debated topic. Bederman has criticised drafting process as not being inclusive in earlier stages, especially when still under the direction of the ILA, claiming; ‘the ILA worked on its product for several years, during which time no input was invited from any person or entity other than those concerned with historic preservation.’<sup>117</sup>

The Convention advocates the position that the retrieval of UCH for commercial purposes is incompatible with its desired preservation.<sup>118</sup> This was achieved through the adoption of a non-commercialisation clause. Initial drafts of the non-commercialisation clause were draconian in outlook, demanding the absolute removal of all economic association with UCH. The absolute non-commercialisation of UCH was met with a controversial reception.<sup>119</sup> Critics questioned, for instance, whether a paid archaeologist would be in breach of the notion of non-commercialisation should he be involved in the study of UCH.<sup>120</sup> The final non-commercialisation clause currently reads;

‘The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.’<sup>121</sup>

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<sup>115</sup> Dromgoole (*supra*) at 320.

<sup>116</sup> The definition of UCH is provided above. The salient features of the definition are that the property needs to have been underwater, either completely or partially, and not necessarily continuously, for a period of 100 years. The reason for the 100 year period, as noted by Dromgoole, is as a measure of traces of human existence that have a cultural significance. South Africa’s baseline period in this regard is 60 years, as will be examined in Chapter III. Dromgoole (*supra*) at 321.

<sup>117</sup> Bederman, David ‘The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal’ (1999) 30 *J. Mar. L. & Com.* at 331.

<sup>118</sup> Forrest, Craig ‘A New International Regime for the Protection of Underwater Cultural Heritage’ (2002) 51 *ICLQ* at 533.

<sup>119</sup> Forrest, Craig *International Law and the protection of cultural heritage* (2011) at 344.

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

<sup>121</sup> Rule 2 of Annex.

The clause is now qualified by its two sub-sections to the extent that the commercialisation of UCH is permissible under certain narrow circumstances.<sup>122</sup> The qualification aims to prevent potentially adverse and unintentional effects the initial drafts may have had on the underwater archaeological community.

It has been suggested that the non-commercialisation clause is a fatal blow for the application of the law of salvage.<sup>123</sup> Salvage law essentially rests on commercial principles. O’Keefe and Nafziger consider the inappropriate commercial objectives of salvage law in the context of UCH, stating;

‘It should be noted that the law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is. The major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.’<sup>124</sup>

The final non-commercialisation clause dampens arguments favouring the application of salvage law to UCH. It does not however state, in clear language, that the application of salvage law is not permitted. The golden opportunity to provide clear guidance as to the applicability of salvage law arose in Article 4, entitled ‘Relationship to law of salvage and law of finds.’

Article 4, the salvage law clause, states;

‘Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds...’

The clause takes a clear position of salvage law. Unfortunately the waters are then muddied by the rest of Article 4, which states;

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<sup>122</sup> The Clause is qualified in its two subsections to the effect that it cannot be interpreted as preventing;

- (a) ‘the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorisation of the competent authorities;
- (b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; ...; and is subject to the authorisation of the competent authorities.’

<sup>123</sup> Forrest, Craig *International Law and the protection of cultural heritage* (2011) at 342.

<sup>124</sup> O’Keefe, Patrick and Nafziger, James ‘The Draft Convention on the Protection of the Underwater Cultural Heritage’ (1994) 25 *Ocean Development and International Law* at 408 as quoted in *ibid*.

‘unless it:

- (a) is authorized by the competent authorities, and
- (b) is in full conformity with this Convention, and
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.’

Salvage law was thus not completely down and out, and was granted a backdoor in the form of qualifications to the Convention’s salvage law clause. The qualifications are unfortunate to the extent that they again leave the applicability of salvage law to UCH somewhat ambiguous and vague. The three qualifying directory sub-sections pass the determination of the application of salvage law to State parties. The State party must ensure that the operation of the law of salvage conforms to the Convention, and that UCH receives maximum protection. The salvage clause was a product of protracted negotiations and deliberations, much of which was reactionary to the non-commercialisation clause. Forrest notes in this regard;

‘[non-commercialisation of UCH] was both politically unacceptable to a number of States, and impractical given the difficulties of policing the oceans and restricting the flow of illicitly excavated underwater cultural heritage. Some States also consider that the economic value of underwater cultural heritage could be an incentive for the search for, and recovery of, underwater cultural heritage in a manner that may realise both the economic and archaeological value of underwater cultural heritage.’<sup>125</sup>

The effect of the clause is that State parties may ratify the Convention, amend domestic legislation to compliment the Convention, and still have room, within certain broad parameters, to permit the salvaging of historic wrecks.

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<sup>125</sup> Forrest (*supra*) at 346.

### III. THE SOUTH AFRICAN REGIME

The salvaging of historic shipwrecks in South African waters has proved itself a contentious topic. Over the last century domestic legislation has grappled with balancing competing rights and interests. This Chapter will track such development and then consider the current regime in South Africa. As a point of departure however the maritime history of the country, in so far as is pertinent to the salvaging of historic shipwrecks, is examined.

#### 3.1. Maritime history of shipwrecks around the South African coast

When assessing the salvaging of historic shipwrecks in South Africa a good place to start is to consider the country's maritime history. How many historic shipwrecks are in her waters, and further; would salvaging these shipwrecks be viable? The consideration of her maritime history also assists in determining how the legislature should ideally tailor specific domestic legislation. Whilst international law and general international discourse on the matter stand to contribute and inform in this regard they cannot simply be applied in a pick and choose template manner. The specific history and environmental conditions of South Africa necessitate that domestic legislation caters to its own unique objectives and ideals.

The treacherous and unforgiving South African coast-line has spelt the end for many an ill-fated voyage. Graveyards of wrecks littered along her 2,954 kilometre coastline commemorate the countless lives lost over the last 500 years. South Africa's harsh coastline, combined with merciless sea conditions, has contributed to a continual stream of maritime casualties.<sup>126</sup> Approximately 100 kilometres off the east coast provinces of Kwa-Zulu Natal and the Eastern Cape a sharp rise in the continental ledge, accompanied by the direct reception of Arctic originating ground swells, foster conditions for massive swells which can reach in excess of 30 meters.<sup>127</sup> The area is also particularly prone to rogue waves which will generally strike a vessel broad side should she be travelling either up or down the coastline. In 1488 the first European to reach South Africa's shores, Bartholomew Dias, named the

<sup>126</sup> Ingpen and Pabst note that; 'The other main causes of maritime disaster along our coastline have been inaccurate charts, a lack of lighthouses in earlier years, poorly constructed ships, severe weather conditions, wartime hostilities, mechanical failure and, of course, human fallibility.' Ingpen, Brian and Pabst, Robert *Maritime South Africa – A pictorial history* (1985) at 138.

<sup>127</sup> Sharfman, Jonathan; Boshoff, Jaco and Parthesius, Robert 'Maritime and Underwater Cultural Heritage in South Africa: The Development of Relevant Management Strategies in the Historical Maritime Context of the Southern Tip of Africa' (2012) 7 *J Mari Arch* at 89.

southern point *Cabo das Tormentas*; ‘The Cape of Storms.’ Gale force winds combined with mountainous seas earned her the title.

Various nations have frequented South Africa’s shores. In as early as 600 BC it is believed Phoenician sailors, under instruction from the Egyptian pharaoh Necho, rounded the Cape of Good Hope.<sup>128</sup> From about the 10<sup>th</sup> century onwards Arab and Persian traders were active on the African East Coast. Evidence suggests that, in search of new trade opportunities, these Moslem traders penetrated the interior of contemporary South Africa and may have even rounded the Cape.<sup>129</sup>

As Europe entered the Middle Ages traders in the Middle-East infiltrated European markets, receiving exotic goods from the East, and selling them on to Europe.<sup>130</sup> These traders controlled terrestrial transportation routes. European entrepreneurs sought to break this monopoly on Eastern goods and turned to the seas as a potentially cheaper alternative trade route.<sup>131</sup> In 1489 a Portuguese explorer named Bartholomew Dias led a voyage that rounded the Cape. A decade on he was mimicked by his fellow countryman, Vasco da Gama, a journey which opened the sea route from Europe to the East and marked the beginning of the European ‘Age of Discovery.’<sup>132</sup> Seven years later the first shipwreck in South African waters was recorded.<sup>133</sup>

Portugal dominated the Africa trade route to the East for almost a century, a period in which many ships were wrecked.<sup>134</sup> Their monopoly was however challenged when the English East India Company began utilising the route from 1591, followed by the Dutch East

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<sup>128</sup> Turner, Malcolm *Shipwrecks & Salvage in South Africa – 1505 to the present* (1988) at 11. No consideration of shipwrecks off the South African coast would be complete without reference to Malcolm Turner’s outstanding work. It had stood the test of time as an invaluable text on the matter.

<sup>129</sup> *Ibid*

<sup>130</sup> Sharfman (*supra*) at 91.

<sup>131</sup> *Ibid*.

<sup>132</sup> Athiros, Gabriel and Athiros, Louise *A Cape Odyssey – A journey into the fascinating history of the Cape* (2010) at 9.

<sup>133</sup> *Ibid*. Turner notes that although the exact name of the vessel is unknown, it is referred to as the ‘Soares Wreck.’ It is thought she was a heavily armed Portuguese sailing vessel, loaded with pepper, which ran aground off Mossel Bay

<sup>134</sup> Forrest, Craig “South Africa” in *The protection of the underwater cultural heritage; national perspectives in light of the UNESCO Convention 2001* Dromgoole, Sarah ed. (2006) at 248.

India Company (VOC) in 1595.<sup>135</sup> Dutch dominance of the route truly took force after the establishment of a permanent trading post in the Cape by Jan van Riebeeck of the VOC. Dutch rule in the Cape was temporarily suspended in 1806 by British occupation. It is estimated that a total of 38 nations have lost vessels in South African waters.<sup>136</sup> As the European economy steadily grew, so did trade, and consequently so did maritime traffic. The traffic further increased when nations became aware of the vast inland resources that were available. In 1876 the first diamond, the Eureka Diamond, was found in South Africa, and gold was found soon after in 1886. Military interests also brought vessels to South African shores. The country was at war between 1899 and 1902, the Boer War, which saw a considerable number of English vessels frequent her shores. Maritime traffic around the Cape was also bolstered by the closing of the Suez Canal in 1956 and 1967.<sup>137</sup>

South Africa's rich and diverse maritime history has resulted in a myriad of historic wrecks. Turner estimates that there are in excess of 1,000 'major shipwrecks' that have been recognised lying in South African waters.<sup>138</sup> Some of these wrecks lie as scrap on the ocean floor, often as an environmental irritation, with little historic relevance, whilst others have proved particularly interesting for salvors and underwater archaeologists alike.<sup>139</sup> Salvors have been particularly interested in outward-bound East Indiamen which, as Forrest notes; 'tended to carry more specie than those returning from the Indies. Homeward-bound vessels tended to carry porcelain and non-ferrous metals like tin, as well as perishable goods like spices, silks and tea.'<sup>140</sup>

The decision to attempt the salvage of a particular vessel, particularly if she has not yet been located, can yield disastrous financial results. The salvage of historic wrecks in South African waters has seen a mixed bag of results. Reputed highly valuable cargoes have kept salvors hungry, too often to their financial detriment. The homeward bound vessel the *Middleburg* is a good example of a contemporary 'treasure hunt,' not for gold or silver, but

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<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> Forrest (*supra*) at 249.

<sup>138</sup> Turner (*supra*) at 7. Not all these wrecks would qualify under South African legislation as 'historic wrecks', ie; older than 60 years. This figure does however exclude 'tugs, steam whalers, fishing-boats, barges, yachts and small vessels under twenty tons.'

<sup>139</sup> 'Salvage' may be employed in the section in a broader, meaning the retrieval of goods from a historic wreck, whether or not returned to any owner or subrogated owner.

<sup>140</sup> Forrest (*supra*) at 249.

valuable Chinese porcelain.<sup>141</sup> She was scuttled in Saldanha Bay in 1781. Numerous salvage operations took place with varied results, the last one being in 1969 by the infamous Dodds brothers, which subsequently saw the sale of retrieved porcelain auctioned in Cape Town and Johannesburg in 1972.<sup>142</sup> Another homeward bound vessel that has generated much interest is the Dutch East-Indiaman *Brederode*, which sank in 1785 with an apparent porcelain cargo worth R120 million aboard.<sup>143</sup> She was found in 1998 off Struisbaai by the eminent salvage group Aqua Exploration, led by Charlie Shapiro.<sup>144</sup> The salvage operation did not have a happy financial ending for the team as they were ultimately prevented from salvaging the vessel by the relevant authorities for a variety of reasons concerning the archaeological preservation of the historic wreck.<sup>145</sup>

Research and speculation about lucrative cargoes of outward bound shipwrecks have at times led salvors to success. The *Merestein*, which sank in 1702, saw the retrieval of a considerable amount of seventeenth century silver ducatoons in 1971.<sup>146</sup> The English East-Indiaman the *Johanna* produced 23,000 pieces of eight for salvors in 1982.<sup>147</sup> Similarly, the *Dodington*, which sank in 1755, yielded amongst other property a (known) 1,214 gold coins.<sup>148</sup> Other shipwrecks have proved less financially rewarding. The fabled English East-Indiaman *Grosvenor* which sank in 1782 was said to contain massive amounts of coins and treasure, including the legendary ‘Peacock Throne’ of the Moguls, said to be worth £6.5

<sup>141</sup> Turner (*supra*) at 75. See Turner here for an interesting account of the reasons *The Middleburg* was scuttled.

<sup>142</sup> *Ibid*, Forrest (*supra*) at 249. See Turner at 76 for an inventory of *The Middleburg*’s auctioned porcelain.

<sup>143</sup> Thomasson, Emma *R120m shipwreck find off Cape coast* IOL Available; <http://www.iol.co.za/news/south-africa/r120m-shipwreck-find-off-cape-coast-1.13631?ot=inmsa.ArticlePrintPageLayout.ot> [Retrieved 5 January 2012].

<sup>144</sup> Prominent names in the field were involved in *The Brederode* operation, amongst others; Charles Shapiro, Arnold (Mickey) Shapiro, Frederick (Erik) Lombard, Andre Hartman, Traill Witthuhn, Karen Shapiro, Jaco Boshoff (chief maritime archaeologist from former South African Maritime Museum), John Gribble (of NMC). For further information on this interesting find see Shipwreck.co.za *The Brederode* Available; <http://www.shipwreck.co.za/brederode.html> [Retrieved 5 January 2012] and; Shipwreck Explorer *Brederode* Available; <http://www.shipwreckexplorer.com/hallstrom/brederode/brederode.htm> [Retrieved 5 January 2012].

<sup>145</sup> See in this regard; Blandy, Fran *South African shipwreck diver waits more than a decade for treasure* The Telegraph, Online.

<sup>146</sup> Forrest (*supra*) at 249.

<sup>147</sup> *Ibid*.

<sup>148</sup> See 2.3.3. above for discussion of the *Dodington* coins.

million.<sup>149</sup> The story of the *Grosvenor* reached fantastical levels over the years, with extensive and expensive attempts to recover her lost treasures, none reaching any real success.<sup>150</sup> Another legendary wreck is that of the *Birkenhead*, a British naval vessel which sank in 1852 near Danger Point.<sup>151</sup> She is of particular historical interest, being the first distressed vessel to coin the phrase, ‘women and children first.’ The alleged large quantity of gold coins, said to be kept in the powder room and to be used to pay stationed soldiers’ wages, was never found.<sup>152</sup>

The discussed wrecks are only some of the major wrecks discovered and salvaged over the last 100 years. Of particular interest for future legal considerations are the unfound wrecks. Turner lists the following fascinating inventory of documented, yet unfound, shipwrecks;

‘MNMS Amsterdam: Wrecked in Algoa Bay in 1817. Believed to have been carrying a valuable consignment of rare treasure from Java for the King of the Netherlands. The wreck lies in deep sand.

Dageraad: Wrecked on the west point of Robben Island in 1694. Was carrying chests of specie salvaged from the *Gouden Buis*. Lies within restricted area.

Niuew Haarlem: Wrecked in Table Bay in 1647. Was carrying a large cargo of Chinese porcelain. Lies in sand. Shards of Chinese porcelain have been found on the beach a little north of the Milnerton lighthouse.

RMS Kafir: Wrecked a little south of Olifantsbos Point in 1878. Was carrying a box of specie belonging to the Portuguese government.

Nossa Senhora dos Milagros: Wrecked in Struis Bay in 1686. Was carrying a large amount of jewellery. Probably lies in deep sand.

São Goncalo: Wrecked in Plettenberg Bay in 1630. Was carrying a large amount of Chinese porcelain. Probably lies buried in deep sand.

Timor: Wrecked on the southern tip of Robben Island in 1856. Was carrying a cargo of tin. Some was salvaged soon after the wrecking, but much probably remains. Lies within restricted area.

SS Waldensian: Wrecked on Struis Point in 1862. The Christy Minstrels were on board, and one of their number, Mr Joe Brown, lost a silver belt encrusted with precious stones.<sup>153</sup>

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<sup>149</sup> Turner (*supra*) at 77.

<sup>150</sup> For an interesting account of the incredible lengths salvors went to salvage the *Grosvenor* over the years see *ibid* at 77-78.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

<sup>153</sup> Turner (*supra*) at 80.

### 3.2. Development of legislation affecting historic wreck salvage

The historical progression of legislation affecting the salvaging of historic wrecks in South Africa demonstrates efforts to balance the conflicting interests of parties, interests which principles and perceived importance are ever shifting. Domestic legislation concerning such salvage is inherently multidisciplinary. The legislative environment is essentially three-pronged, consisting of; wreck and salvage provisions, protection for UCH, and customs and exercise management. This section tracks the development of the legislative environment.

The first legislation to govern salvage law in South Africa was the United Kingdom's Merchant Shipping Act of 1894.<sup>154</sup> At this stage no notion of differentiation between historic shipwrecks and ordinary shipwrecks was recognised. The legislation recognised the application of traditional salvage principles to all wrecks. A system of reporting finds and retrieved property was established. The system required the reporting of such items to a Receiver of Wreck, an office which would shoulder responsibility to return the salvaged property to its owner, and ensure a salvage award be paid to the salvor.<sup>155</sup> Should the property be unclaimed, ownership would vest with the Crown, and could then be sold at auction. The salvor would then receive a salvage award from the Crown.<sup>156</sup> It is interesting to note that at this stage salvage law was applied in a relatively clean manner to historic wrecks.

A growing unease rose in the underwater archaeological, and to an extent salvage, communities with the lacuna of any form of specific protection or differentiation of retrieved property from shipwrecks that may be of historical or archaeological importance.<sup>157</sup> The need for some form of protection or regulation of UCH became increasingly apparent with the development of 'safe and affordable' SCUBA diving equipment.<sup>158</sup> Legal constructs

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<sup>154</sup> Forrest (*supra*) at 251. South Africa historically had, and continues to have, a strong connection to the admiralty laws of the United Kingdom. The contemporary scope of this connection remains a point of some contention. See generally in this regard Hofmeyr (*supra*) at 85 and 3.3. below.

<sup>155</sup> Forrest (*supra*) at 251.

<sup>156</sup> *Ibid.*

<sup>157</sup> Forrest notes in this regard that there was in fact a small measure of protection for historic wrecks in 1884, stating; 'The earliest legislation that provided some protection for historic wreck, and which deviated from the regulated salvage regime, was limited to the area of Table Bay. In 1884, in response to clashes between rival salvors working in the area, a government notice was issued which required salvors to obtain prior permission from the government before wreck found in the bay could be recovered.' *Ibid.*

<sup>158</sup> Bruk, Judian *An analysis of the Law governing the acquisition of shipwreck* (unpublished LLM dissertation University of Cape Town, 1996) at 23.

regulating the ordinary law of salvage were too often simply ignored when salvaging historic wrecks. Pillaging and looting became the order of business for many a 'salvor.' The situation reached its tipping point with the looting of two wrecks of particular archaeological importance, the *Dodington* and the *Sacramento*.<sup>159</sup> The *Sacramento* was a seventeenth century Portuguese galleon wrecked in 1647 whilst in transit between India and Portugal with a valuable cargo of cannon.<sup>160</sup> The destructive practices disturbed two salvors working on these wrecks at the time, David Allen and Gerrie van Niekerk.<sup>161</sup> Concern surrounding the looting of the vessels was also voiced by the historian of the Port Elizabeth Museum, Mrs D Nash, who was involved in research on both wrecks.<sup>162</sup>

The legislative plight for greater protection for historic wrecks was led by Mr J W E Wiley, a MP, who brought to the attention of the former House of Assembly that there existed no legislation specifically protecting historic wrecks.<sup>163</sup> The position argued before parliament by Wiley was unique, as Van Meurs notes;

'It was emphasized that great reliance was placed on discovery work done by private persons and that the state institutions were not at this stage adequately equipped to undertake such work. Mr Wiley stated that ideally museums should have the authority to issue permits to persons willing to and capable of salvaging wrecks, and that museums would then have the first choice in respect of the objects recovered.'<sup>164</sup>

The National Monuments Amendment Act came into force in 1979.<sup>165</sup> The amendment to the National Monuments Act granted the power to the National Monuments

<sup>159</sup> Forrest (*supra*) at 251. For a discussion of the *Dodington's* cargo see 2.3.3. above.

<sup>160</sup> Van Meurs, L 'Legal aspects of marine archaeological research' (1986) 83 *Acta Juridica* at 109.

<sup>161</sup> Two books about the accounts of the salvors in these salvage operations were written. See; Allen, Geoffrey & Allen, David *The Guns of Sacramento* (1978) and; Allen, Geoffrey & Allen, David *Clive's Lost Treasure* (*supra*).

<sup>162</sup> Van Meurs notes that; 'The Port Elizabeth Museum's involvement in historical research and investigation of conservation techniques prompted the circulation of a paper 'Proposals regarding maritime archaeology in South Africa' dated 16 June 1977, to inter alia, museums, the National Monuments Council and the Department of Nature Conservation. The proposals put forward were that the system of issuing salvage licences should under the Customs and Excise Act should be amended, and that general licences should only be valid for post-1900 wrecks; the salvage of all pre-1900 wrecks should be conducted under the auspices of a proposed Maritime Archaeological Institute ensuring care in excavation and the preservation of all historically valuable material.' Van Meurs (*supra*) at 110.

<sup>163</sup> (1977) 68 *House of Assembly Debates* 17 May 1977, col 7870-7874.

<sup>164</sup> Van Meurs (*supra*) at 110.

<sup>165</sup> National Monuments Amendment Act 35 of 1979.

Council (NMC) to declare any shipwreck over 80 years old a national monument.<sup>166</sup> Any salvaging of such wreck would require a permit from the NMC.<sup>167</sup> The amendments offered a step in the right direction in terms of differentiating and recognising a need to control historic wrecks. Its shortcoming was however that it was only the actual wreck that was declared a national monument, not the contents of the wreck, which could still be legally removed without any NMC permit, and need not be reported.<sup>168</sup> The situation was exploited and apathetic salvage operations led to the loss of valuable archaeological information and artefacts.

The protection of UCH received additional winds in its sails with a further amendment to the National Monuments Act which afforded protection to the contents of a historic wreck.<sup>169</sup> Any operation that would potentially ‘destroy, damage, alter or export from the Republic’ any listed wreck, or its contents, which had been in the Republic for over 100 years, required a special permit from the NMC.<sup>170</sup> An innovative and critically important aspect to the permit was that it now dictated what could be done with such salvaged property. A salvor needed to work in conjunction with an accredited museum which would act as a partner in the recovery operation, which prescribed best archaeological practice to be followed.<sup>171</sup> Further; retrieved property would be kept by the museum until the salvage was complete whereupon the museum would enjoy first pickings of what it wished to keep.<sup>172</sup> The protection of historic wrecks was further ratcheted up by a third amendment in 1986 to the National Monuments Act which held that any wreck over 50 years old required a NMC permit for any form of disturbance.<sup>173</sup>

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<sup>166</sup> National Monuments Act 35 of 1979.

<sup>167</sup> Forrest (*supra*) at 251. Forrest notes that it was on in 1984 that 23 wrecks were declared national monuments, including the *Dodington* and the *Sacramento*.

<sup>168</sup> *Ibid.*

<sup>169</sup> Forrest (*supra*) at 252; National Monuments Amendment Act 13 of 1981.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

### 3.3. Current legislative regime

The current domestic legislative environment discourages the application of salvage law to historic shipwrecks. Salvage law has been delicately shunned in an indirect manner, mainly due to the favouring of certain broader policy principles by the South African Heritage Resources Agency (SAHRA), for instance the circumstances allowing the granting of salvage permits, rather than decree by black letter law directly referring to salvage law. This section will consider the exact standing of the legislative environment concerning historic wreck salvage.

#### 3.3.1. Jurisdiction and applicable law

Jurisdictional considerations concerning historical wreck salvage claims are governed by the Admiralty Jurisdiction Regulation Act.<sup>174</sup> Section 1(1) of the Act defines the scope of the maritime claims ‘for, arising out of or relating to...’ over which an Admiralty Court has jurisdiction.<sup>175</sup> Section 1(1)(k) specifically outlines salvage as such a claim.<sup>176</sup> Once jurisdiction is established the 1983 Act’s notorious Section 6 dictates the law that has to be applied. The first enquiry is to establish whether the Colonial Courts of Admiralty would have had jurisdiction over a salvage claim in 1890. Hofmeyr holds that it did, and states;

‘Because admiralty jurisdiction in respect of salvage existed in 1890 and consequently in the Republic immediately before the commencement of the Act, English law as at 1983 will, in terms of S6(1) of the Act, govern this head of jurisdiction...’<sup>177</sup>

<sup>174</sup> Admiralty Jurisdiction Regulation Act 105 of 1983.

<sup>175</sup> Staniland notes when considering historic wrecks and potential claims that may arise from them that; ‘Although no explicit mention is made in section 1(1) to a maritime claim relating to, or arising out of, a wreck such a claim may, it is submitted, be defined as a maritime claim where it is brought in the nature of a claim for salvage, or as a claim for ownership or possession of a ship, which surely includes a wreck. Alternatively, a claim relating to, or arising out of, a wreck may be define as ‘any other matter which by virtue of its nature or subject matter is a marine or maritime matter [S1(1)(ee)].’ Staniland, Hilton “South Africa” in *Legal Protection of the Underwater Cultural Heritage* Dromgoole, Sarah ed. (1999) at 135.

<sup>176</sup> Section 1(1)(k) states; ‘salvage, including salvage relating to any aircraft and the sharing or apportionment of salvage and any right in respect of property salvaged or which would, but for the negligence or default of the salvor or a person who attempted to save it, have been salvaged, and any claims arising out of the Wreck and Salvage Act, 1996.’ This section considers the position of salvage law, and accordingly attention is afforded to a salvage claim, it is submitted that if a claim is brought for the salvage of a historic wreck, the claim remains a salvage claim. Claims relating to salvage enjoy lien status.

<sup>177</sup> Hofmeyr (*supra*) at 37.

Consequently, English law as at 1 November 1983 is applicable. Section 6(2) qualifies this to the extent that such English law will not apply where any South African statute governs the matter. Several domestic statutes are applicable and for all intents and purposes regulate the field.<sup>178</sup>

### 3.3.2. Customs and Excise Act and the Wreck and Salvage Act

The study of salvaging historic shipwrecks in South Africa necessitates consideration of several legislative arenas. Statutory provisions regulating ‘ordinary’ salvage endeavours have largely been eclipsed in the realm of historic wrecks by the National Heritage Resources Act (NHRA).<sup>179</sup> Ordinary statutory provisions would however still find application in certain instances should a historic wreck be salvaged.

The Customs and Excise Act<sup>180</sup> dictates that any person wishing to either search a wreck or search for a wreck requires a licence from the Commissioner for the South African Revenue Services.<sup>181</sup> The licence does not grant the holder any *exclusive* right to search, or search for, any particular wreck and the Commissioner has the power to set any circumstances under which the licence may be issued.<sup>182</sup> Section 112(2) requires any person who obtains possession of any of the envisioned property qualifying as ‘wreck’ to notify the nearest ‘Controller.’<sup>183</sup> The reported property may be detained by the Controller, and furthermore may be sold by the Controller to cover expenses.<sup>184</sup>

<sup>178</sup> For further particular discussion regarding jurisdiction, for instance in land-locked provinces, see; Staniland, Hilton ‘Admiralty Jurisdiction over Wrecks’ (1991) 108 *South African Law Journal* at 594.

<sup>179</sup> National Heritage Resources Act 25 of 1999.

<sup>180</sup> Customs and Excise Act 91 of 1964.

<sup>181</sup> Section 64(C)(1). The Commissioner may require security is furnished. The Act defines ‘wreck’ in Section 112 as;

‘(1) For the purposes of this section ‘wreck’ includes any-

- (a) flotsam, jetsam, lagan or derelict;
- (b) portion of a ship or aircraft lost, abandoned, stranded or in distress;
- (c) portion of the cargo, stores or equipment of any such ship or aircraft; and
- (d) portion of the personal property on board such ship or aircraft when it was lost, abandoned, stranded or in distress.’

Hare notes that; ‘flotsam is that which is found floating at sea, jetsam is that which is thrown overboard, and lagan is cargo which is lost overboard and buoyed for future recovery.’ Hare (*supra*) at 399.

<sup>182</sup> Section 64(C). Staniland (*supra*) at 136. Further Section 60 requires a prescribed fee be paid.

<sup>183</sup> Section 112(2) states;

‘Any person who has in his possession any wreck, shall without delay give notice thereof to the nearest Controller and shall (unless he is the owner of such wreck or the duly authorized agent of the owner) if required, forthwith deliver that wreck or permit it to be delivered to the said Controller, and unless it is

The application of the Wreck and Salvage Act<sup>185</sup> is limited to the removal of wrecks that pose a danger or obstruction.<sup>186</sup> Further; Section 23 of the Act states; ‘This Act shall not derogate from the operation of the National Monuments Act, 1969’ which can now be interpreted as being the NHRA.<sup>187</sup> The Wreck and Salvage Act thus has extremely limited application in the field of historic wreck salvage. Staniland suggests that it is pragmatically only relevant because it will currently apply to certain wrecks which may become historic wrecks either through the passage of time or if declared so by the SAHRA.<sup>188</sup>

### 3.3.3. National Heritage Resources Act

The NHRA is the most significant domestic legislation affecting the salvaging of historic shipwrecks. It repealed the National Monuments Act and in doing so replaced the National Monuments Council with the SAHRA as the country’s new heritage compliance office. The NHRA pertains to the protection of all cultural heritage; terrestrial and submerged. The blanket legislation approach carries advantages; such as focused policy objectives over a large field, or greater pooled resources. It does however also carry the danger of compromising the specific regulation required for the particular nature associated with historic shipwrecks, and often consequently, affording too much delegated discretionary power to organisational structures to fill in these gaps. This section will consider the relevant provisions of the NHRA.

The NHRA specifically includes ‘wrecks’ in its definition of ‘archaeological’ defining wrecks as;

‘being any vessel or aircraft, or any part thereof, which was wrecked in South Africa, whether on land, in the internal waters, the territorial waters or in the maritime culture zone of the Republic...and any cargo, debris or artefact found or associated therewith, which is older than 60 years or which SAHRA considers to be worthy of conservation.’

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necessary for the preservation or safe-keeping thereof, no person shall without the permission of the said Controller remove or alter in quantity or quality any such wreck.’

<sup>184</sup> Section 43.

<sup>185</sup> Wreck and Salvage Act 94 of 1996.

<sup>186</sup> Forrest (*supra*) at 259.

<sup>187</sup> Section 60 of the National Heritage Resources Act repeals the National Monuments Act.

<sup>188</sup> Staniland (*supra*) at 139.

Accordingly the traditional notion of a ‘historic shipwreck’ refers to a shipwreck older than 60 years, or one which the SAHRA considers worthy of conservation, and is described in the NHRA as an ‘archaeological’ object.<sup>189</sup> Section 35(1) provides that, ‘the protection of any wreck in the territorial waters and maritime cultural zone shall be the responsibility of the SAHRA.’ Territorial waters extend 12 nautical miles from the shore line.<sup>190</sup> The maritime cultural zone extends 24 nautical miles from the shoreline, which runs concurrently with the contiguous zone.<sup>191</sup> It has been suggested that wrecks situated in internal waters may fall under the control of the relevant provincial Heritage Resource Authority.<sup>192</sup>

Ownership of historic shipwrecks vests with the State.<sup>193</sup> This includes such shipwrecks associated cargoes and artefacts.<sup>194</sup> A narrow exception was permitted for the possessors or owners of historic wrecks, or associated property, who reported the fact to SAHRA within two years of the coming into operation of the Act, which was April 2000.<sup>195</sup> The implications of these sweeping ownership provisions are considered in the next chapter.

The SAHRA is a creature of the NHRA with the object to, ‘co-ordinate the identification and management of the national estate.’<sup>196</sup> The SAHRA have a wide range of ‘powers, functions and duties’ listed in the Act.<sup>197</sup> Politically the SAHRA falls under the

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<sup>189</sup> For ease of reference this text will continue to employ the term ‘historic shipwreck’ with the meaning, in the context of the NHRA, as a wreck that qualifies as ‘archaeological’ under Section 2(c).

<sup>190</sup> Section 5; Maritime Zones Act 15 of 1994.

<sup>191</sup> Section 6; Maritime Zones Act 15 of 1994, which states; ‘South Africa shall have, in respect of objects of an archaeological or historical nature found in the maritime cultural zone, the same rights and powers as it has in respect of its territorial water.’ South Africa declared a contiguous zone in line with Article 33 of the United Nations Law of the Sea Convention, 1982. A maritime cultural zone was declared in terms of Article 303 of the same Convention. Forrest (*supra*) at 256.

<sup>192</sup> Hare (*supra*) at 270.

<sup>193</sup> Section 35(2).

<sup>194</sup> Downing, Alistair James *A possible solution to wreck ownership issues in South Africa: Section 28 of the National Heritage Resources Act 25 of 1999* (unpublished LLM dissertation, University of Cape Town, 2002) at 9.

<sup>195</sup> Section 35(8).

<sup>196</sup> Sections 11 and 12.

<sup>197</sup> Section 13 outlines the ‘Functions, powers and duties of SAHRA’ as;

- (a) establish national principles, standards and policy for the identification, recording and management of the national estate in terms of which heritage resources authorities and other relevant bodies must function with respect to South African heritage resources;

Department of Arts and Culture (the Department). Within the SAHRA structure there is a dedicated Maritime and Underwater Cultural Heritage Unit (MUCH).<sup>198</sup> A crucial function of the SAHRA, in terms of historic wreck salvage, is the issuing of the permits required to disturb any archaeological site. The permit system is controlled through the provisions in the NHRA and its published regulations.<sup>199</sup> Section 35(4) is negatively phrased, prohibiting certain actions, unless they have obtained a permit from the SAHRA.<sup>200</sup> It states;

- ‘No person may, without a permit issued by the responsible heritage resources authority—
- (a) destroy, damage, excavate, alter, deface or otherwise disturb any archaeological or palaeontological site or any meteorite;
  - (b) destroy, damage, excavate, remove from its original position, collect or own any archaeological or palaeontological material or object or any meteorite;
  - (c) trade in, sell for private gain, export or attempt to export from the Republic any category of archaeological or palaeontological material or object, or any meteorite; or
  - (d) bring onto or use at an archaeological or palaeontological site any excavation equipment or any equipment which assist in the detection or recovery of metals or archaeological and palaeontological material or objects, or use such equipment for the recovery of meteorites.’

It is important to note that the provision does not prohibit the listed activities but rather requires that in order to conduct such activities a SAHRA permit is required. The salvaging of a historic wreck, as an archaeological site, would accordingly require such a permit.

The NHRA Regulations specifically address requirements for the application for a permit pertaining to a wreck. These Regulations were promulgated after the passing of the

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- (b) co-ordinate the management of the national estate by all agencies of the State and other bodies and monitor their activities to ensure that they comply with national principles, standards and policy for heritage resources management;
  - (c) identify, record and manage nationally significant heritage resources and keep permanent records of such work;
  - (d) advise, assist and provide professional expertise to any authority responsible for the management of the national estate at provincial or local level, and assist any other body concerned with heritage resources management;
  - (e) promote and encourage public understanding and enjoyment of the national estate and public interest and involvement in the identification, assessment, recording and management of heritage resources;
  - (f) promote education and training in fields related to the management of the national estate; and
  - (g) perform any other functions assigned to it by this Act or as directed by the Minister.

<sup>198</sup> The MUCH Unit is currently headed by marine archaeologist Jonathan Sharfman.

<sup>199</sup> GN R323 in GG 21051 of 31 March 2000.

<sup>200</sup> Read with Section 35(1) to the extent that the SAHRA is the ‘responsible heritage resource agency’ for ‘wrecks.’

Act. Chapter II of the Regulations outlines general provisions for all permit applications to SAHRA and governs matters such as financial deposits and procedural issues.<sup>201</sup> It does also recognise SAHRA's powers to prescribe minimum standards of practice and requires that reports are submitted.<sup>202</sup> Further; permit holders are required to have a museum partner for each project, providing archaeological guidance and acting as a repository for retrieved material.<sup>203</sup> Chapter VIII of the Regulations specifically addresses applications for wreck permits, as envisioned in Section 35(4) of the Act.<sup>204</sup> The provisions are relatively detailed and do well to inform a prospective applicant of what is required to obtain the permit. The provisions are however largely procedural in nature, and do not assist with more substantive issues, such as the applicability of salvage law principles.

The NHRA provides sanctions for statutory non-compliance which is complemented by an enforcement system. Section 51 outlines 'offences and penalties.' Offences relating to the contravention of the Act carry penalties ranging from a fine to imprisonment.<sup>205</sup> The Section also affords discretionary powers to the Minister of Arts and Culture to adjust the prescribed fine amounts and regulate related issues. Section 50 recognises 'heritage inspectors' appointed by the SAHRA, and includes by default all South African Police Services members and each customs and excise office.<sup>206</sup>

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<sup>201</sup> Regs 2 and 3. As is envisioned by Section 48(1) of the NHRA.

<sup>202</sup> Regs 4 and 5.

<sup>203</sup> Reg 30(1). Forrest (*supra*) at 261.

<sup>204</sup> Permit holders will generally enter a 'heritage agreement' with all parties involved regarding the operation.

<sup>205</sup> On 7 September 2012 three illegal wreck salvors operating off the Eastern Cape coastline were arrested and charged under, *inter alia*, the NHRA. The arrests may be precedent setting as no illegal salvor of historic wrecks has ever been convicted in South Africa. See further; Spies, Derrick *Historic wrecks stripped for cash* Metro, 10 September 2012, Online; Wilson, Gareth *'Wreck pillagers' nabbed* The Herald, 10 September 2012, Online.

<sup>206</sup> Section 50(1) and (2).

#### IV. REFLECTIONS ON THE REGIME AND PROPOSALS FOR CHANGE

##### 4.1. Where does the law position a historic shipwreck salvor?

Determining the scope and desirability of applying salvage law principles to historic shipwrecks currently rests largely with the NHRA permit system.<sup>207</sup> The application of salvage law to historic shipwrecks is not directly prohibited in any legislation, and the mere control of historic wreck interference through a permit system does not *per se* disallow its operation, as experienced through the Customs and Excise Act's permit system. The system does however place large discretionary power with the SAHRA. In 2001 a five year ban was placed on the salvaging of all historic shipwrecks through the suspension of all granted permits and refusal of any new application.<sup>208</sup> The Department has acknowledged the period of prohibition was not hugely successful as many wrecks were left unmonitored and were illegally looted.<sup>209</sup>

South Africa's impending ratification of the UNESCO Convention has influenced the SAHRA's perspective regarding historic shipwreck salvage. In 2007 the Department submitted a Memorandum to Parliament seeking approval for ratification of the UNESCO Convention. Preliminary consultations were held with stakeholders to consider the desirability of ratification and potentially required amendments to the existing legislation.<sup>210</sup> The recommendation of the Department was to ratify the UNESCO Convention, with the 'reservation expressed that salvage activities should be allowed under strict guidelines and supervision from the South African Heritage Resources Agency.'<sup>211</sup>

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<sup>207</sup> Forrest and Gribble note; 'The South African legislation for example, declares that no person may, without a permit issued by the state agency (South African Heritage Resources Agency – SAHRA), destroy, damage, excavate, alter, deface, remove from its original position, collect or own or otherwise disturb any archaeological site. As such, salvage of UCH is effectively replaced with a permit-based system that grants the agency a very wide discretion in relation to any activity relating to UCH.'

<sup>208</sup> Herman, Dominique *Five-year ban on shipwreck diving lifted* IOL, 30 January 2007, Online.

<sup>209</sup> Wakashe, Themba 'Ratification of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage' Presentation to the Portfolio Committee on Arts & Culture 19 February 2008.

<sup>210</sup> Department of Arts and Culture '2001 UNESCO Convention on Underwater Cultural Heritage: Arts Department Briefing' Parliament 19 February 2008. Meeting were held with the SAHRA, South Africa's UNESCO Office, the Department of Foreign Affairs, Department of Justice and Constitutional Development, Department of Environmental Affairs and Tourism, the South African National Defence Force, the South African Navy, maritime archaeologist and salvage organisations.

<sup>211</sup> *Ibid.*

The acquisition of a SAHRA permit to engage in salvage type activities is a thorny issue.<sup>212</sup> Salvors have expressed dissatisfaction at the uncertainty surrounding the process.<sup>213</sup> The NHRA does not adequately address issues surrounding the position of the salvor of historic wrecks. Wide discretionary powers afforded to the SAHRA in this regard may prove a thin solution by blanket style legislation on a complex issue.

#### 4.2. Criticisms of the South African regime

Significant progress has been made in the protection of historic shipwrecks in South Africa over the last 50 years. A fundamental development, since the early 1980s, is the notion of differentiating wrecks between those of historic or cultural significance, and ‘ordinary’ shipwrecks. The distinction is appropriate, necessary, and widely accepted. It institutes a baseline discourse of appreciation for the historic and cultural value of certain shipwrecks. The South African regime can be criticised in several regards, which relate to the positioning of the principles of salvage law in this context.

##### 4.2.1. Property law and rights are disregarded

The NHRA declares all archaeological objects are property of the State.<sup>214</sup> The provision disregards the general application of property law to such objects and further it is probably unconstitutional. The constitutionality of such property provisions is beyond the scope of this dissertation, however it is briefly noted as naturally disputes surrounding ownership will have a bearing on a salvor of historic wrecks, who seeks to retrieve such goods for an owner and consequently receive a salvage award. Hare notes;

‘The purport of s 35 appears to forfeit ownership rights to the state. Similarly, any wreck that should thereafter fall under the protection of the Act by the

<sup>212</sup> In 2011 the SAHRA received 19 permit applications relating to underwater ‘archaeology’ and issued 8, with 5 pending at the year end, in 2012 a total of 10 permit applications were received, very few of which related to salvage activities. South African Heritage Resources Agency ‘Annual Report 2011’ (2011) at 49; South African Heritage Resources Agency ‘Annual Report 2012’ (2012) at 85.

<sup>213</sup> For instance; in a letter to the SAHRA Permit Committee salvor Charles Shapiro expresses frustration at not being able to meet his permit renewal condition of having an on-site archaeologist due to the general reluctance of archaeologist to co-operate with salvors. Shapiro, Charles ‘SAHRA’s On Site Archaeologist Requirement’ Annexure E.5.2. of SAHRA APMHOB Permit Committee Agenda of 25 October 2012.

<sup>214</sup> Section 35(2).

passage of 60 years would similarly *ipso facto* become state property, without compensation. This is surely unconstitutional. The Constitution protects private rights of ownership, and those rights will have to be recognised unless they are expropriated for reasonable public purposes, with proper compensation at market values paid.<sup>215</sup>

Downing argues the ownership provisions of the NHRA have been interpreted incorrectly. He suggests that they are not preemptory, but merely permissive, stating;

‘In my opinion, acquisition of ownership over a wreck by the State is not automatic in terms of the NHRA. There should be a formal claiming of ownership, coupled with consultation with all interested parties followed by payment of compensation (if appropriate). ..[the] formal claiming must also be wreck specific. The State simply cannot formally claim title to “all the wrecks along the entire length of the coastline of South Africa.” Each wreck would have to be dealt with individually, and the merits thereof assessed independently of the other wrecks. Only then can ownership of wrecks potentially vest in the State.’<sup>216</sup>

Private property rights connected to historic shipwrecks should not expire due to the mere passage of time. Acquisition of ownership by the State may be possible where the property is found to be *res nullius* by means of occupatio, or perhaps where expropriation is granted, but otherwise would surely not be constitutional.<sup>217</sup>

#### 4.2.2. Tenuous link between historic shipwrecks and cultural heritage

The NHRA declares all shipwrecks over 60 years old are to be considered ‘archaeological’ objects and accordingly automatically warrant statutory protection due to their significance as part of South Africa’s cultural heritage. It is submitted that whilst recognition and protection of particular wrecks is a worthy endeavour; the mere passage of time is an arbitrary manner in which to make such a determination. There are many objects that would qualify as ‘wreck’ in the NHRA that are of absolutely no historical, cultural or archaeological significance.<sup>218</sup> Conversely there is property which does not qualify as ‘wreck’ which is culturally significant.

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<sup>215</sup> Hare (*supra*) at 270.

<sup>216</sup> Downing, Alistair James *A possible solution to wreck ownership issues in South Africa: Section 28 of the National Heritage Resources Act 25 of 1999* (unpublished LLM dissertation, University of Cape Town, 2002) at 18.

<sup>217</sup> Section 25(1) of the Constitution deals with deprivation of property, whilst Section 25(2) addresses expropriation. Section 36 is the ‘limitations provision’ which would assess various aspects of the infringement of constitutional property rights in this regard. See generally; Downing (*supra*) at 12 – 19.

<sup>218</sup> Personal discussions with marine archaeologist Jonathan Sharfman, head of the MUCH Unit of the SAHRA.

The NHRA does allow the SAHRA to declare wrecks younger than 60 years as worthy of protection, but is this the most effective process?

The *SAS Pietermaritzburg* stands as an example of the SAHRA exercising this discretionary protection. The wreck carries a fascinating history ranging from leading the D-Day invasion on 6 June 1944, to being sold to the South African Navy, and eventually being used as a museum ship; she was scuttled with full naval ceremonial proceedings on 19 November 1994.<sup>219</sup> The magnificent wreck is a favourite Cape Town SCUBA attraction, but divers reported in early 2012 that ‘salvors’ had been removing significant portions, presumably for sale as scrap metal. Consultations were held with interested parties and, at the time of writing, the application for her recognition under the NHRA as a protected ‘wreck’ is pending.<sup>220</sup> Whilst the current efforts to have her protected and removed from the realm of scrupulous scrappers are to be commended, would it not have been preferable to grant her protection from an earlier stage? The legislative structure in reality only manifested *post facto* protection in this regard for a wreck which should have been removed from any form ‘salvage’ or interference from the moment she was scuttled.

#### 4.2.3. Accessibility of underwater heritage

The NHRA advocates general principles of, *inter alia*, furthering education, management and preservation of heritage resources in the interests of all South Africans.<sup>221</sup> The current regime can be criticised in this regard to the extent that it potentially hinders the accessibility of underwater heritage. This section considers the problematic nature of *in situ* preservation,

<sup>219</sup> Her history is noted in the submission for her protection by the MUCH Unit of SAHRA; ‘The SAS Pietermaritzburg started out her career as the HMS Pelorus, an Algerine Class Ocean Minesweeper, in June 1943. On 6 June 1944, HMS Pelorus achieved prominence when, under the command of Captain George Nelson she led the Allied Armada in the D-Day invasion of Normandy. She was also one of the Allied vessels to first arrive in Singapore after the Japanese surrender in 1945. In 1947, after the end of World War II, she was sold to the South African Navy and initially renamed the HMSAS Maritzburg. However, after submissions by the Council of Pietermaritzburg she was renamed the HMSAS Pietermaritzburg on 21 January 1948. She was used for the training of midshipmen and later refitted and used as a dormitory ship in Simon’s town until 1991.’ SAHRA ‘Submission for declaration as national heritage site *SAS Pietermaritzburg* shipwreck’ 3 December 2012.

<sup>220</sup> SAHRA ‘Report back on public meeting to discuss the preservation of the wreck of the *SAS Pietermaritzburg*’ 4 September 2012.

<sup>221</sup> Section 5(1)(a), (b) and (5).

followed by the shortcomings of removing commercial incentives for salvors to locate and retrieve ‘wrecks.’

*In situ* preservation is the preferred approach to underwater heritage in the 2001 UNESCO Convention.<sup>222</sup> Sentiments of the South African authorities appear indistinct with regards to a firm policy toward *in situ* preservation. In a 2008 parliamentary briefing regarding potential ratification of the 2001 UNESCO Convention issues surrounding *in situ* preservation were discussed. Mr Makhubele of the Department recognised the problematic sea conditions, and the threat of looting if left, but also stated that preservation of recovered items may be problematic.<sup>223</sup>

Our underwater heritage is a rapidly wasting resource.<sup>224</sup> South Africa’s tempestuous sea conditions see to damaging and destroying historic shipwrecks. Significant progress in archaeological techniques minimising the damage caused by the retrieval of property are diminishing arguments on the preservation front, though there is still room for further progress.<sup>225</sup> Whilst national policy thus may appear unclear, the practical reality of a strict bureaucratic permit system is that wrecks remain *in situ*.

Only a select few individuals have access a shipwreck on the ocean floor. SCUBA diving is a pastime requiring expensive equipment and specialist training.<sup>226</sup> The select few in South Africa who are in a position to SCUBA dive are still restricted in terms of feasible

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<sup>222</sup> Article 2(5) reads; ‘The preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.’ 2001 UNESCO Convention.

<sup>223</sup> Department of Arts and Culture ‘2001 UNESCO Convention on Underwater Cultural Heritage: Arts Department Briefing’ Parliament 19 February 2008.

<sup>224</sup> For an international perspective against *in situ* preservation see generally; Booth, Forrest “The Collision of Property Rights and Cultural Heritage; the Salvors’ and Insurers’ Viewpoints” in *Art and Cultural Heritage; Law, Policy and Practice* Hoffman, Barbara ed. (2006) at 296 – 298.

<sup>225</sup> Ortman, Nicole *Exploring practitioners’ attitudes toward in situ preservation and storage of underwater cultural heritage* (unpublished dissertation Flinders University 2009) at 35.

<sup>226</sup> Booth notes in this context; ‘SCUBA diving requires serious training and costly equipment, and therefore it is largely an elite, “first-world” sport. Yet even in the United States, only 0.68 percent of the population participated in the sport in 2003.’ Booth, Forrest “The Collision of Property Rights and Cultural Heritage; the Salvors’ and Insurers’ Viewpoints” in *Art and Cultural Heritage; Law, Policy and Practice* Hoffman, Barbara ed. (2006) at 296.

depths, weather conditions and accessible locations.<sup>227</sup> A strong argument can be made in favour of retrieving underwater heritage ‘in the interests of all South Africans.’ Underwater heritage can be distinguished from much terrestrial heritage in so far as ships and their cargoes were never intended to lie on the ocean floor. These man-made objects were intended to be used and enjoyed above the ocean’s surface. Of the eight most interesting unfound shipwrecks Turner identifies, which are listed in 3.1. above, four are particularly inaccessible as they are believed to lie in deep sand.<sup>228</sup> After comprehensive surveying of the wreck site and the location of all found objects, for archaeological purposes; should these treasures not be preserved for ‘succeeding generations’ in museums or even private collections, rather than awaiting their fate in Davey Jones’ locker?<sup>229</sup>

The accessibility of historic shipwrecks and related artefacts is further hindered by the dampening of commercial incentives for salvors to locate and retrieve such property. The SAHRA self-admittedly face considerable financial restraints and resource shortages.<sup>230</sup> This dulls any ideas of Government financing pricy expeditions to locate unfound wrecks, or even protect found ones. Salvage operators face an increasingly difficult financial climate surrounding historic wrecks. The NHRA correctly discourages ‘exploitation’ of heritage, but it does not specifically reject the commercialisation of it. The 2001 UNESCO Convention contains an anti-commercialisation of UCH clause, yet qualifies it to the extent that such commercialisation may be permitted if in conformity with the Convention and authorised by the competent authority.<sup>231</sup> Commercialisation is a broad term. A total rejection of commercial incentives in the context of underwater heritage appears short-sighted, especially in the South African context. Is a paid archaeologist operating on a historic shipwreck doing so with absolute commercial impunity? Or is the argument that the critical distinction lies

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<sup>227</sup> The maximum recommended depth for recreational SCUBA divers on compressed air is 40 meters. Deeper dives require the use of mixed gases. This form of ‘technical diving’ naturally requires further training and more specialist equipment.

<sup>228</sup> Turner (*supra*) at 80.

<sup>229</sup> Section 5(1)(b) of the NHRA states; ‘every generation has a moral responsibility to act as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South African.’

<sup>230</sup> See generally the damning financial position as explained at; SAHRA ‘South African Heritage Resources Agency on its 2012 Annual Report’ Presentation to Portfolio Committee on Arts & Culture, Parliament 31 October 2012.

<sup>231</sup> 2001 UNESCO Convention Annex Rule 2(b). See discussion in 2.4.3.2. above.

between a *service* warranting reimbursement and the commercialisation of an *object*? Salvage law envisions the former.

#### 4.3. Proposal of grading system for wrecks

The statutory determination that certain shipwrecks qualify as protected heritage due to the mere passing of 60 years is unsatisfactory and leads unintended and undesired consequences.<sup>232</sup> Further; the catch-all provision permitting SAHRA discretion to declare non-qualifying wrecks to be protected is imperfect and has seen practical short-comings.<sup>233</sup> It is submitted that a feasible policy would be the grading of every shipwreck in South African waters.<sup>234</sup>

Conceptually a grading system could operate as follows. A register of shipwrecks is created. It records all relevant facts relating to a specific wreck, and is easily accessible.<sup>235</sup> Such an exercise would largely require a compilation of known facts. Each shipwreck, and its associated property, is ranked into a category between one and five. The ranking of a vessel in a particular category dictates what level of cultural sensitivity and protection is required, and consequently what actions are permitted in relation to the wreck.

A practical illustration may work as follows. A Category 1 shipwreck is a vessel of particularly low cultural or archaeological significance. All activities are permitted on such wreck, including; salvage, the regular application of property law, and removal of the wreck.<sup>236</sup> It would be required to simply forward a copy of any significant planned action relating to this wreck to the SAHRA, which could be completed in an easily accessible template style form drafted by the SAHRA. The SAHRA would be prevented from any form of interference, and have limited discretionary powers, except to the extent that it could intervene if it held that the wreck should be graded in a higher category.

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<sup>232</sup> NHRA Section 2(c).

<sup>233</sup> As noted above in the case of the *SAS Pietermaritzburg*.

<sup>234</sup> It is acknowledged that the notion of a grading system of sorts was briefly raised in consultations regarding the potential ratification by South Africa of the 2001 UNESCO Convention in 2006. The content of such proposals is unknown.

<sup>235</sup> The location of the vessel, if appropriate, may perhaps be withheld for security reasons.

<sup>236</sup> The Wreck and Salvage Act would dictate the legality of such an action.

On the other end of the scale a Category 5 shipwreck is extremely culturally or archaeologically significant. The highest level of heritage protection is afforded to such wreck. Actions surrounding the wreck are only permitted to the extent that they are in the broader interests of protecting and promoting the heritage objects. The discretionary powers of SAHRA are largest in this category which would be tasked to issue a permit for any intervention of the wreck site. The permit system would be similar to the current system, however the category guidelines would provide greater clarity as to which actions would be permitted, and which would not. Salvage activities would be permitted to the extent that they conform to the requirements of the permit. The greatest level of care to ensure the highest archaeological standards and integrity of the objects would be required. For the salvor this would be the cost of doing business in this category. Ownership would vest with the State for such objects if such property were not owned at the time of finding by any other party. If ownership, or related property rights, were to exist at the time of finding, the State would have to consider expropriation.

Categories 2 to 4 would simply see an escalation in requirements. For instance, a Category 3 shipwreck is one of fair cultural or archaeological significance. A permit is required for any intervention of the wreck, but there are strict guidelines as to SAHRA's discretionary power in this regard. A requirement may be, for instance, that a comprehensive pre-disturbance survey is submitted to the SAHRA.

The proposal of a grading system is presented on a conceptual level as it is beyond the scope of this dissertation to produce a detailed and comprehensive classification scheme. The proposal is presented as an alternative to the current *modus operandi*. Such a system would require legislative amendments before implementation but it is submitted that the extent of such amendments is not overwhelming. Many of the structures currently in place would complement such a system. The broad wording of the NHRA would require minimal statutory amendments, and much could largely be achieved through Gazetted Regulations.

#### 4.4. Proposal of promoting salvage law

The application of salvage law principles to the realm of historic shipwrecks in South Africa stands to better the protection and promotion of its underwater heritage in the interests of all its citizens. Salvors have been at the forefront of the discovery of almost every historic shipwreck in South Africa. It is not Government funded expeditions that find new wrecks;

Government's interaction is largely limited to *post facto* intervention. Salvors need to be incentivised to continue finding and retrieving the country's underwater heritage.

Salvage law is adaptable. The case of the *S.S. Central America* demonstrated how absolute archaeological integrity can be maintained on a massive salvage operation. The American courts encouraged the full application of salvage law principles to the historic wreck, with the degree of archaeological sensitivity employed as a factor in determining the salvage award. The financially incentivised salvors ended up bringing the long-forgotten steamer back to life, captivating the public's interest.

South Africa's protective legislation surrounding underwater heritage does not directly preclude the application of salvage law, but rather affords large discretionary powers to the SAHRA in the form of the permit system. It is submitted that policy directives from the SAHRA could encourage salvage law principles. The adaptability of salvage law to the field could be used to foster a beneficially mutual environment, carefully balancing the interests of all parties.

The current NHRA vest ownership of all 'archaeological' wrecks in the State. The State accordingly can draw on the expertise and specialist technologies of salvors to locate and retrieve valuable underwater heritage and in return pay a salvage award. The conceptual suitability of law of salvage to historic wrecks was examined in 2.1. above and it was submitted that its strict principles need not be extended to an unfeasible extent. The dangers of undesirable damage to wreck sites due to hasty excavation by salvors are removed as it is the SAHRA that controls the rules of engagement and this is the cost that salvors in the field will have to accept.

## V. CONCLUSION

Historic shipwrecks may provide invaluable insight into the confidences of history, affording unique understanding of a country's cultural heritages, even of a people's identity. Domestic legislation should accordingly ensure such shipwrecks are cherished, studied and protected. Achieving these archaeological imperatives however need not be to the preclusion of salvage law. The 'commercialisation' of underwater heritage through the application of salvage law need not threaten its protection, in South Africa it may in fact be the very protection it needs.

International deliberations on the appropriateness of salvage law assist in informing domestic policy. The 2001 UNESCO Convention in its qualified non-commercialisation

provisions demonstrates the international community's unease at the absolute removal of all economic value associated with underwater heritage. This is further shown through its qualified salvage provision that affords State parties discretion in this regard. The case of the *S.S. Central America* demonstrates how the USA successfully reconciled commercial salvage objectives with archaeological imperatives. A regulatory regime that financially rewards salvors discourages the illegal looting of wrecks. An economically compelled salvage system may have prevented the unfortunate matter of the *Dodington* coins.

The South African regime has improved dramatically in recognising and realising the need to protect its underwater heritage. The current system is not, however, without flaws. The prospect of ratifying the 2001 UNESCO Convention in the foreseeable future brings with it an opportunity to craft the future legislative direction of underwater heritage drawing from over a decade of experience under the NHRA. Potential amendments to the NHRA or its Regulations need to tailor a specific policy framework that addresses domestic needs. The vaguely worded legislation in this regard grants even the SAHRA a unique opportunity to largely dictate policy objectives.

A vague legislation environment, coupled with a bureaucratically thorny permit system, has indirectly driven the application of salvage law away from the realm of historic wrecks. The commercialisation and specialisation of activities stands as the backbone to incentivising excellence and fuelling modern economies. If managed correctly; incentivised salvors may be the very answer underwater heritage seeks.

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