Hushed heritage: A feasibility study of South African legislation applicable to underwater cultural heritage

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ABSTRACT

Underwater cultural heritage (UCH) and its protection is an extremely under-researched area within South African heritage. In the country there are only a small number of experts in this field.

UNESCO defines UCH as "all traces of human existence, having a cultural, historical or archaeological character, which have periodically or continuously been submerged or semi-submerged in water" (UNESCO, 2001:2). There are various types of UCH; however, the present study focuses exclusively on shipwrecks. South Africa has an estimated 2 200 to 3 500 shipwrecks along its 3 000 km coastline. These wrecks represent a rich UCH resource of national and international significance.

The purpose of this study was to determine the status quo of UCH protection (esp. shipwrecks) in South Africa and to measure it against international best practice. This helped the researcher identify the strengths and weaknesses within South African legislation and make recommendations for improvement.

The South African legislative and institutional framework for UCH conservation management was studied and compared with international best practice. In this regard, the main outcome of the study was reached, namely determining whether South African legislation applicable to UCH is capable and viable to protect and conserve the numerous shipwrecks along the country's coastline. The final conclusion was that the legislative measures, in particular the NHRA, are sufficient to protect shipwrecks (as UCH resources) effectively. However, its implementation and enforcement by the relevant authorities is found to be inadequate. This is due mainly to a lack of expertise and capacity in the country within this field. Therefore, capacity-building was identified as a major requirement to improve the South African management regime for UCH conservation. Finally, a UCH operational framework was proposed to counter the challenges, in terms of strategic focus areas of application.

Key terms: heritage; underwater cultural heritage (UCH); heritage protection; conservation management; shipwrecks; National Heritage Resources Act; UNESCO Convention on the Protection of UCH; ICOMOS Charter on the Protection and Management of the UCH; salvage.

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ABBREVIATIONS

ACHA - African Centre for Heritage Activities

AIMURE - African Institute for Marine & Underwater Research, Exploration and Education.

AJRA - Admiralty Jurisdiction Regulations Act 105 of 1983

APM - Archaeological, Palaeontological and Meteorites Permit Committee

BCE - Before Common Era

CEA - Customs & Excise Act 19 of 1964

ch - Chapter

CITES - Convention on the International Trade in Endangered Species of Wild Fauna and Flora of 1973

CMI - Comite Maritime International / International Maritime Committee

DAC - Department of Arts & Culture

DEA - Department of Environmental Affairs

DOALAS - United Nations Division of Ocean Affairs and Law of the Sea

DRASSM - *Le Département des recherches archéologiques subaquatiques et sous-marines I* Department of Marine and Underwater Archaeological Research

ECPHRR - Eastern Cape Provincial Heritage Resources Regulations 24 of 2002

EIA - Environmental Impact Assessment

EEZ - Exclusive Economic Zone

FAA - Focus Areas of Application

HWC - Heritage Western Cape

ICOMOS - International Council of Monuments and Sites

ICUCH   - ICOMOS International Committee on the Underwater Cultural Heritage

ILA   - International Law Association

IMO   - International Maritime Organisation

km   - Kilometre

KZNHA   - KwaZulu-Natal Heritage Act 10 of 1997

LSSATSA   - Legal Succession to the South African Transport Services Act 9 of 1989

MLRA   - Marine Living Resources Act 18 of 1998

MSA   - Merchant Shipping Act 57 of 1951

MTA   - Marine Traffic Act 2 of 1981

MUCH   - Maritime and Underwater Cultural Heritage

MZA   - Maritime Zones Act 15 of 1994

NAS   - Nautical Archaeology Society

NBKB   - Ngwao Boswa Kapa Bokone (Heritage Northern Cape)

NEMA   - National Environmental Management Act 107 of 1998

NGO   - Non-governmental Organisation

NHRA   - National Heritage Resources Act 25 of 1999

nm   - Nautical Mile (1,852 km)

NMA   - National Monuments Act 28 of 1969

NMC   - National Monuments Council

NPA   - National Ports Authority

NRF   - National Research Foundation

PHRA   - Provincial Heritage Resources Authority

SACHM   - South African Cultural History Museum

SAHRA	- South African Heritage Resources Agency
SAIMA	- South African Institute of Maritime Archaeology
SAMA	- South African Museum Association
SANDF	- South African National Defence Force
SANParks	- South African National Parks
SAPS	- South African Police Service
SARS	- South African Revenue Service
SAT	- South African Tourism
SCUBA	- Self-contained Underwater Breathing Apparatus
SWP	- Slave Wreck Project
UCH	- Underwater Cultural Heritage
UCT	- University of Cape Town
UK	- United Kingdom
UNESCO	- United Nations Educational, Scientific and Cultural Organisation
UNCLOS	- United Nations Convention on the Law of the Sea
UNISA	- University of South Africa
WESSA	- Wildlife and Environmental Society of South Africa
Wits	- University of Witwatersrand
WSA	- Wreck & Salvage Act 94 of 1996

1. INTRODUCTION – OUTLINE OF STUDY

The present study investigated the phenomenon of shipwrecks as heritage resources and their conservation in South Africa. This introductory chapter provides an outline of the study. The background to the specific field of study is sketched, after which the problem statement posited, the objectives stated and the questions posed that guided the research. Finally, the research methods are described and the outline of the study explained.

1.1 Background: underwater cultural heritage and its conservation

Beforehand, it is necessary to situate the study within the broader context of heritage as well as link it to the nature and aims of heritage conservation.

1.1.1 The nature of heritage as concept

It should be emphasised from the outset that heritage is a malleable concept without a fixed conceptual meaning. Although its value is generally accepted, heritage remains a highly-contested concept (Harvey, 2001:319). Therefore, it is difficult to formulate a clear-cut definition for this phenomenon. During the course of this chapter the different conceptualisations of "heritage" should become evident.

Heritage comprises elements of culture inherited from the past and passed on between generations (Hardy, 1988:333). Hardy (cited in Timothy and Boyd 2003:2) describes heritage with the image of an heirloom transferred from current to future generations. Forrest (2006:257) concurs and adds that a heritage resource would include any site or object which possesses "aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance". This definition alludes only to the tangible aspects of heritage, which can be observed and touched, but is silent on the intangible aspects. However, the cultural assets bequeathed between generations manifest in multiple forms. These entail, on the one hand, the

tangible resources such as historical artefacts of various types, historical sites such as battlefields, or hard copy documents in archives. On the other hand, heritage can be intangible, for example, historical associations with objects, and the skill to perform traditional music or produce traditional crafts, to name only a few. The International Council on Monuments and Sites (hereafter: ICOMOS), defines heritage as a broad concept that incorporates both tangible and intangible assets (McKercher & du Cros, 2002:7). The different types of heritage can be distinguished. Figure 1 below indicates the major categories of heritage.
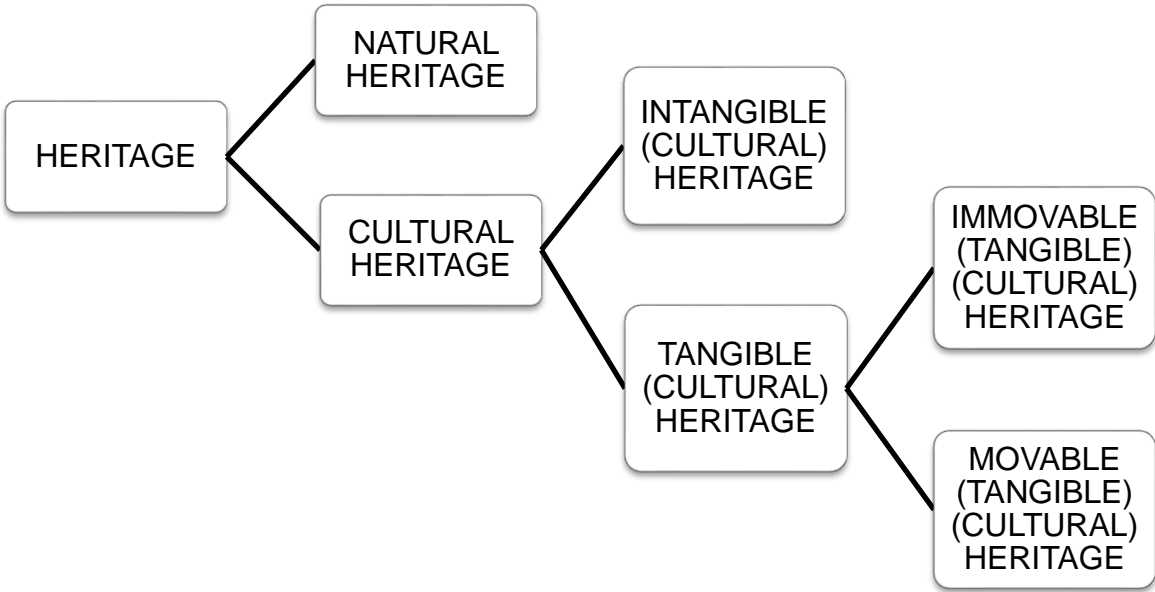
Figure 1: Main categories of heritage.

Source: Author's own compilation, 2017.

1.1.2 The history of heritage

Due to the dual nature of heritage as explicated above, scholars have different views on the historical development of this phenomenon. Harvey (2001:335) states that opinions about heritage changed over the years in accordance with the social context and power relations of the period. Certain scholars regard heritage as a highly recent development and others associate it with modernity. However, there is an alternative view of heritage as an age-old concept that originated centuries ago (Harvey, 2001:328-330). The view on the origins of heritage depends on how this phenomenon is conceptualised.

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Heritage can be conceptualised as that which is transferred from one generation to the following, the "heirloom" referred to in the previous section. This heirloom can be tangible (e.g. a building or an object) or intangible (e.g. the skill to produce craftwork or perform a traditional dance). When heritage is conceptualised in this way, it is incorrect to view this phenomenon as associated with modern day matters only. The "heirloom" existed even in primitive times, since these people also bequeathed objects, skills and other cultural elements to their children as parents do currently as well. Harvey (2008:22) points out: "Heritage has always been with us", and adds that this phenomenon is omnipresent and forms part of any society. He cites examples of heritage from different ages, including the Roman civilisation, Middle Ages and Renaissance.

To illustrate this point in the context of this study, shipwrecks can be used as an example. The oldest shipwreck discovered by archaeologists, the Dokos off the coast of southern Greece, is dated to the second Proto-Helladic period, between 2700 and 2200 BCE, well over 4 000 years ago (Truong, 2015:1). There are other ancient shipwrecks such as the Uluburun off the coast of south-western Turkey, dated to the 14th century BCE in the Bronze Age (Holloway, 2014:1). If UCH is conceptualised as the "heirloom", in this case the physical shipwreck and its content, then such heritage originated thousands of years ago.

However, heritage can also be conceptualised not as the "heirloom" transferred between generations, but as a mental process by which this "heirloom" is constructed as an object of cultural significance for a particular group of people. In this case, the heritage's date of origin does not necessarily coincide with the date of origin of the various elements of the "heirloom". Furthermore, heritage, even when linked to ancient forms of tangible and intangible assets, is a social construct for the use of the present generation. In this regard, a study about the history of the mental processes guiding the construction of heritage will reveal how far back in history this construct originated. Harvey (2001:335-336), who regards heritage as a cultural process and an ethical undertaking, suggests that research into the origins of the concept "heritage" should scrutinise earlier periods of history. The reason is that this construct developed over a longer period than merely the extended era of unprecedented economic growth during the 19th and 20th centuries.

Considering the discussion above, heritage can be conceptualised as an acute awareness in society of the value and significance of the "heirloom" or of its potential value as an economic resource that may generate revenue for its owners. In this light, the origin of heritage may be viewed as even much more recent. Such an awareness of heritage have led to its development as a field of study or an industry. Heritage and its management, conservation as a regulated industry, and heritage studies as an academic discipline, did not exist before the 20th century. Lowenthal as well as Graham et al. (cited in Harvey, 2001:322) point out that the intensified interest in heritage has emerged recently, since the late 20th century. McCrone et al (cited in Harvey, 2001:323) agrees that heritage (i.e. as a sector of the economy) has its origins in the "new world economy" that took off in the 1970s.

At present, heritage is used as a commodity in the tourism industry. It should be noted that the link between heritage and tourism reaches back centuries. Heritage tourism can be seen as the oldest form of tourism, and specifically the so-called special-interest tourism. Ancient merchants, sailors and adventurers visited the pyramids and the Nile River in Egypt, and later, during the 16th and 17th centuries, the so called "Grand Tour" emerged. The latter was mostly undertaken by the elite in Europe as an experience of educational and cultural refinement (Timothy & Boyd, 2003:11). These tours were undertaken to ancient cities such as Paris, Turin, Milan, Venice, Florence, Rome and Naples, where iconic landmarks were visited and various cultures and languages studied. In the 16th century, these tours usually lasted up to 40 months. However, later since the 19th century, such tours only lasted four months and included fewer attractions (Timothy & Boyd, 2003:11-12).

After these phases of heritage tourism, a new phenomenon originated in the form of "Great World Exhibitions", of which the first was held in London in 1756 (Ivanovic, 2008:176). These exhibitions were important to the development of heritage presentation and interpretation. The reason was that these exhibitions generated funds necessary for the important European museums and gave visitors the opportunity to experience the indigenous art and culture of the host country (Ivanovic, 2008:177). A further form of material remains from the past would entail underwater heritage assets (e.g. shipwrecks), which are also the research focus, as explained in the following subsection.

<u>1.1.3 Underwater cultural heritage as specific sub-section of cultural heritage</u>

Considering the outline of different categories presented in Figure 1 (see 1.1.1), the research focused on underwater cultural heritage (hereafter: UCH). This raises the question: Where does UCH fit into the bigger picture of heritage? Naturally, underwater heritage resources are entirely or partly submerged in, or closely associated with, water. Therefore, if left in their location under water, these artefacts are not readily visible to the general public. Should examples of UCH not be exhibited or presented in a museum, they may tend to become a forgotten and neglected component of heritage. Such a sentiment is shared by Sharfman et al. (2012:88) who agree that this aspect of heritage does not receive the necessary attention from heritage practitioners and the public alike. Should UCH be focussed on in publications and within the media, instead of exhibitions within musuems, it might aid in keeping it within the public consciousness.

The United Nations Educational, Scientific and Cultural Organisation (hereafter: UNESCO) has been the international frontrunner in UCH conservation. The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (hereafter: 2001 UNESCO Convention) describes UCH as "an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage" (UNESCO, 2001:1). The Convention considers UCH to include all traces of human existence that have a cultural, historical or archaeological character and which have been periodically or continuously submerged or semi-submerged in water. This includes any site or built structure, type of vehicle (land, air, or sea), and its cargo, and other objects of cultural significance. However, this definition excludes pipelines, cables and other installations that are still in use (UNESCO, 2001:2). The focus of the UNESCO definition on the material nature of UCH places the latter in the category of tangible cultural heritage (see Figure 1 above), by containing both movable and immovable elements.

From UNESCO's definition it is clear that different types of UCH exist. UNESCO (2012a:1) explains on its website: "Underwater cultural heritage consists of wrecks, ruins, submerged landscapes, caves and wells, and traces of marine exploitation." Within South Africa, the types of UCH entail: "submerged landscapes, the exploitation of maritime resources and stone walled fish traps in the Western Cape, wooden fish weirs in KwaZulu-Natal, rock art along the Southern Coast, maritime infrastructure including harbours, lighthouses, shipyards and storehouses, as

well as shipwrecks and shipwreck survivor camps" (Sharman et al., 2012:88; Gribble & Sharfman, 2013:6802). Given the complexity of heritage and the difficulty of defining UCH as a resource, the present study focuses on a single type only, namely shipwrecks.

A shipwreck consists of the remains of a wrecked seafaring vessel. This includes the cargo that it was carrying when it was wrecked, as justified by the National Heritage Resources Act of South Africa (hereafter: NHRA) in stating that heritage objects include "objects recovered from the soil or waters of South Africa" (Forrest, 2006:263; RSA, 1999b:12). The NHRA further defines wrecks in general as archaeological resources in section 2(ii)(c). This definition is mirrored by the KwaZulu-Natal Heritage Act (hereafter: KZNHA), in section 1, subsection (c) under archaeology, which includes:

> … wrecks, 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, as defined respectively in sections 3, 4 and 6 of the Maritime Zones Act, 15 of 1994, and any cargo, debris or artefacts found or associated therewith, which is older than 60 years or which the South African Heritage Resources Agency (SAHRA) considers to be worthy of conservation (RSA, 1999b:6; KwaZulu-Natal Provincial Government, 1997:1).

A wreck is further defined by the Wreck and Salvage Act, 94 of 1996, section 1(xii), and the Customs and Excise Act, 91 of 1996, in section 112 to include:

> … any flotsam, jetsam, lagan or derelict, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores or equipment of any such ship or aircraft and any portion of the personal property on board such a ship or aircraft when it was lost, abandoned, stranded or in distress (RSA, 1996b:2; Staniland, 1999:136).

Shipwrecks have fascinated people and are often associated with romantic tales of adventure. Black Beard, Jack Sparrow and Pirates of the Caribbean are some of the names that spring to mind (Verbinski, 2003). The stories, myths and legends associated with wrecked ships, introduce an element of intangible heritage into the classification of these phenomena as heritage resources. However, beyond the legends and myths linked to shipwrecks, these structures also constitute a real, material element of human history and heritage. The present

study was limited to examining the conservation of the tangible heritage aspect of shipwrecks, particularly within South African territory.

Among the plethora of shipwrecks in the oceans and seas or on the coastlines of the earth, a number of these structures have become more famous than others. The Titanic, the "unsinkable" ship that sank on its maiden voyage, is the most famous of such shipwrecks. At present this once majestic ocean liner lies at the bottom of the North Atlantic Ocean off Newfoundland. Its treasures are scattered on the seabed, covered in moss, currently housing deep-sea marine life. Its legacy has not been lost, because after more than a century and many books on the topic, the story of Titanic is still being retold in the media and has become part of popular culture (Cameron, 1997). Most shipwrecks are not nearly as famous as the Titanic and several are all but forgotten.

South Africa has a coastline of approximately 3 000 km (Newbould & Newbould, 2013:13) and territorial waters stretching 12 nautical miles (nm) into the ocean (Freestone et al., 2006:3; Tanaka, 2012:83). Within the country's waters lie myriad wrecks, not to mention other movable objects. Clearly, these UCH assets should be conserved for posterity, as explained below.

1.1.4 The development of the need to conserve heritage

The need to conserve heritage for future generations typically arose from an awareness of the value and cultural significance of such assets. Theoretically, all elements of nature and culture have the potential to form part of heritage. Larkham (cited in Harvey, 2001:319) is of the opinion that heritage is "all things to all humans". Harvey (2001:319) cites Johnson & Thomas that, "Heritage is virtually anything by which some kind of link, however tenuous or false, may be forged with the past." These views may lead to the conception that heritage can be anything that ever held meaning, was made, or utilised. Such thinking would be detrimental, seeing that it reduces the notion of heritage to a vast, almost meaningless concept.

For a tangible or intangible heritage asset to qualify as worthy of protection it must meet a clear condition. Such an asset acquires the status of genuine heritage only when an individual person or a group attaches value to it thus signifying special significance to him/her/them. From this condition flows the definition that various resources with particular significance for people from different cultural groups can be considered as heritage.

This requirement of cultural significance raises the question: How can the significance of a heritage resource be determined? The Australian ICOMOS Charter for places of cultural significance of 1999 (hereafter: Burra Charter) defines cultural significance as "aesthetic, historic, scientific, social or spiritual value for past, present or future generations" (Australia ICOMOS, 1999:7). It further states, "Cultural significance is embodied in the place itself, its fabric, setting, use, associations, meanings, records, related places and related objects" (Australia ICOMOS, 1999:7).

For the various reasons stipulated in the Burra Charter, such as aesthetic, historic, scientific, social or spiritual, heritage may be regarded as an invaluable asset. The metaphor of the heirloom mentioned previously suggests that heritage is valuable and precious, thus worthy of being transferred to the next generation. The field of heritage studies has determined the social, cultural, scientific and economic value of this concept. These studies have confirmed that heritage is a priceless and irreplaceable asset that must be protected, properly managed, and conserved by the present generation for the benefit of future generations (Timothy & Boyd, 2003:2-3).

Sets of criteria have been developed to help determine the significance of heritage resources. In the case of South Africa, the applicable criteria to declare a heritage resource as part of the national estate as either a Grade I, Grade II or Grade III heritage resource, have been written into section 3(3) of the NHRA. In terms of this section:

> A place or object is to be considered part of the national estate if it has cultural significance or other special value because of:
> (a) its importance in the community, or pattern of South Africa's history;
> (b) its possession of uncommon, rare or endangered aspects of South Africa's natural or cultural heritage;

(c) its potential to yield information that will contribute to an understanding of South Africa's natural or cultural heritage;

(d) its importance in demonstrating the principal characteristics of a particular class of South Africa's natural or cultural places or objects;

(e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group;

(f) its importance in demonstrating a high degree of creative or technical achievement at a particular period;

(g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;

(h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; and

(i) sites of significance relating to the history of slavery in South Africa (RSA, 1999b:14).

It is thus possible that a shipwreck, as a heritage resource, can meet almost all the above-mentioned criteria when its significance has to be determined.

International regulatory measures for heritage conservation

Regulatory measures are required to protect heritage resources. Europe took the lead in the 19th century. The oldest known law regulating heritage was adopted in Italy in 1820. The only other legislation for heritage in the first half of the 1800s was introduced in Honduras (UNESCO, c2007). In the second half of the 19th century, measures for heritage conservation were also adopted in the Dominican Republic, United Kingdom (UK), Denmark and Switzerland. The Ancient Monuments Protection Act of 1882 was the first such regulatory measure implemented in Britain (Harvey, 2001:321, 323). The United States of America's Law on Antiquities was implemented in 1906 (UNESCO, c2007). Thereafter followed France's legislation for historical monuments in 1913 and that of Greece on antique objects, in 1926. Furthermore, China already had legislation in place by 1928, whilst Iran developed a national heritage law in 1930, which was the first comprehensive heritage conservation law in the world. Australia is a current frontrunner in heritage conservation, although its first legislation on heritage was implemented only in 1955.

From the second half of the 20th century, heritage conservation became internationalised. A study of the documents covering international agreements on heritage reveals that several elements had been omitted from the initial rudimentary definitions of this phenomenon. Over the years, these elements have been added to make the definition of heritage more inclusive.

Initially, after the First World War, the concern over the threats to historic buildings and the need to restore damaged structures led to the first conference of specialists and the Athens Charter for the Restoration of Historic Monuments in 1931. The process stalled during the Second World War and only in 1957 the First International Congress of Architects and Specialists of Historic Buildings was held in Paris. The Second International Congress of Architects and Specialists of Historic Buildings led to the establishment of ICOMOS and produced the International Charter for the Conservation and Restoration of Monuments and Sites (Venice Charter) of 1964, which focussed solely on buildings/monuments and their sites (ICOMOS, 2004). In conjunction with the heritage charters, various national committees were established in certain countries to enhance heritage conservation. The first of such committees were the Society for the Protection of Ancient Buildings in 1877 and the National Trust in 1895, both in the UK (Ahmad, s.a.:1).

In the early 1960s there was a threat to the Abu Simbel temples due to the Egyptian government's plans to construct the Aswan Dam in the Nile River. This crisis mobilised conservationists to launch a massive international project to dismantle the temples and rebuild them on higher ground. The project was spearheaded by UNESCO and its multinational team of archaeologists (UNESCO, 2017b:1-2). UNESCO's draft Recommendations concerning the Preservation of Cultural Property Endangered by Public or Private Works defined "cultural property" as both immovable and movable. This included not only scheduled sites and structures, but also "the unscheduled or unclassified vestiges of the past as well as artistically or historically important recent sites and structures" (UNESCO, 1968:2).

The need to conserve heritage was formalised in the 20th century by instituting heritage conservation organisations and adopting measures for heritage conservation. Thereafter, the original focus shifted to tangible heritage such as buildings, structures, objects in museums and archaeological sites. This situation persisted until the end of the 1960s. The World Heritage

Convention of 1972 distinguished natural from cultural heritage, but its definition of cultural heritage was extremely limited by including only monuments, groups of buildings and sites (UNESCO, 1972:2), in other words only those assets regarded currently as immovable tangible cultural heritage.

In the 1970s and 1980s, the scope of heritage conservation gradually broadened to incorporate more than objects, structures and sites. The first version of the Burra Charter in 1979 defined "place of cultural significance" still rather narrowly as "site, area, building or other work, groups of buildings or other works of cultural significance together with pertinent contents and surroundings" (Australia ICOMOS, 1979:1). The Charter on the Preservation of Historic Gardens (Florence Charter) of 1982 added gardens (ICOMOS, 1982) and the Charter on the Conservation of Historic Towns and Urban Areas (Washington Charter) of 1987 added townscapes.

Only by the end of the 20th century, the need intensified to conserve intangible or living heritage (Ahmad, 2006:299; Vecco, 2010:322-324). After the turn of the millennium, intangible heritage was covered in a new convention that supplemented the World Heritage Convention. This was, namely the Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO, 2003:2).

Heritage conservation creates a link between the past, the present and the future. It is an activity the present generation performs to safeguard those assets which they have received from past generations in order to transfer it safely to future generations.

1.2 Problem statement

Shipwrecks can be considered traces of the past, sometimes a more remote and sometimes a more recent past. As assets of heritage, shipwrecks connect the current generation to civilizations, towns, industries, craftsmanship, and the circumstances of those who lived long before them. All components on a ship at the time it was wrecked or stranded can provide

insight into people's life styles during a particular period, especially what and possibly with whom they traded, as well as their achievements (SAT, 2015:2).

> From great seafaring nations to nomadic desert tribes, every society relies on water. It has determined settlement patterns, trade routes and the movement of people. It has allowed some to flourish and others to perish (Sharfman et al., 2012:88).

The heritage associated with water is not very often thought of, let alone focused on during general conservation efforts (Sharfman et al., 2012:88). The reason may be that most countries entertain other priorities, and that heritage conservation would capture much needed resources (esp. financial ones) from other more pressing matters (Sharfman et al., 2012:93).

In the past, ships were used for various reasons such as exploiting resources, exploration, and moving cargo and people from one place to another. As a result, the maritime operations became part of the economics, politics and social constructs of the international community (Werz, 1993:20). This confirms the importance of ships internationally, as shipwrecks in one way or another are linked to seafaring nations. The largest threat to these occurred after the invention of the Self-Contained Underwater Breathing Apparatus, or SCUBA, in the 1940's. Wrecks that were once safe under water from human interference became at risk from looting and treasure-hunting (Werz, 1993:22; Prott, 1999:ix; Dromgoole, 1999:xvii).

Underwater cultural heritage (UCH) resources, including shipwrecks, can be considered priceless, fragile and irreplaceable. Therefore, the need is evident to protect these assets. The ideal for a country is that the conservation management of these resources should be addressed adequately in legislation and that its implementation should meet international standards.

The problem is that the significance of UCH is not always recognised, because it is often not as readily visible as other tangible cultural heritage resources. People do not instantaneously consider shipwrecks as heritage assets. Shipwrecks are mostly hidden from view and usually are not accessible to the public. As a result, these structures may easily be neglected in

heritage conservation. The danger is, therefore, that shipwrecks may not feature as prominently as other heritage resources (e.g. buildings, intangible heritage and terrestrial archaeological sites) in legislation for conservation management. Preservation of underwater heritage resources depends on the archaeologists and museologists who have developed a passion and conservational responsibility towards it.

The current South African regime for conservation management is relatively young, as shipwrecks were mostly viewed as "other peoples' heritage" (Sharfman et al., 2012:99). If the NHRA is considered its starting point, then it has been in place for less than 20 years. The problem investigated in the present study is whether in South Africa the danger of "out of sight out of mind" also applies to the protection of shipwrecks as resources of cultural heritage.

This raises the following questions:

- How well are underwater cultural heritage resources protected in this country's legislation?
- Are these assets adequately included in the NHRA and regulations deriving from it?
- How are these resources preserved?
- Who is responsible for finding, documenting, and protecting them?
- What is the best way to protect such priceless assets?
- Do South African legislation, policies, and principles regulating UCH compare favourably with international best practice and conservation strategies in other countries?
- Do the responsible government departments and agencies apply international conventions in this regard?

To summarise: South Africa has a large number of UCH resources. These resources are mentioned in the NHRA as part of the national estate. The problem investigated in the present study, and which to date has not received comprehensive scientific attention, is how well UCH resources are protected in theory by South African legislation and in practice by the institutions responsible for law enforcement in this regard.

This study can prove to be the first step towards more efficient legislation and more effective conservation management of the country's UCH. The research attempted to outline the current legislative framework for the management of South African UCH assets, and assess it in light of the international legislative framework and best practice in selected countries. By doing so, a definite judgment can be made on South African legislation and how it manages UCH. The study does not, however, serve to argue why UCH should be managed, but rather that it must be managed as stipulated by law and the effectiveness of the applicable regulations.

1.3 Objective of study and research questions

The purpose of the present study was to determine the current status quo regarding the protection of UCH in South Africa and compare it to international best practice. The aim was to do a scientific assessment of the legislative framework guiding the management for the conservation of underwater heritage resources, specifically shipwrecks. The research focused on the practical implementation of this framework by the responsible authorities and bodies. To reach these mentioned aims, it was necessary to investigate international rules and best practice as well as compare strategies in South Africa within this sphere to those in other countries.

The objectives of the study were:

- Define underwater cultural heritage (UCH) with special reference to shipwrecks.
- Explain the value and significance of shipwrecks as heritage resources in order to argue the need for their protection.
- Establish international best practice in the conservation management of especially shipwrecks, by analysing the relevant international conventions, principles, charters and guidelines, and evaluating its implementation in selected countries.
- Analyse thoroughly and evaluate the South African legislative framework for the conservation management of specifically shipwrecks.
- Investigate and evaluate the conservation management of UCH in South Africa by the relevant authorities and other stakeholders, specifically with regard to shipwrecks
- Compare the above-mentioned conservation management of UCH in South Africa with international best practice to draw conclusions and make applicable recommendations.

The following research questions were used to direct the objectives above:

- What is included in the category of underwater cultural heritage (UCH)?
- How is a shipwreck defined as an example of UCH?
- What value and significance are attached to shipwrecks that necessitates their protection as heritage resources?
- How do the relevant international conventions, principles, charters and guidelines and its implementation in selected countries reflect international best practice in the conservation management of specifically shipwrecks?
- What is the status quo of the South African legislative framework for the conservation management of UCH, such as shipwrecks?
- How is this mentioned conservation management of UCH in South Africa applied by the relevant authorities and other stakeholders specifically for shipwrecks?
- How does this South African conservation management of UCH for shipwrecks compare with international best practice and which strategies are implemented in the selected countries?

1.4 Research methods

The present study followed a qualitative research design. The primary techniques to collect data entail analysing relevant literature and conducting interviews. This study employed two basic research methods:

1. A broad *literature study* to determine the meaning of underwater cultural heritage (UCH), and the legislative and regulatory framework of South Africa and internationally, the current status of protection of UCH, and the best international practice for preservation.
2. An *empirical study,* including interviews with various professionals working in the field of heritage and UCH protection. This study was conducted to ascertain how effectively and efficiently South African law is implemented in this field and to identify the challenges posed to law enforcement and the conservation of UCH.

1.4.1 Literature study

Mouton (2011:86-87) states that a literature study is necessary for a successful research project. Such a study has to commence with a review of prior research and publications on the particular topic. Although there are various sources available on the topic of UCH, shipwrecks (both in South Africa and internationally), and the national and international protection of these resources; many of these sources are outdated and therefore not applicable to this particular study.

The researcher used, among others, the following databases to locate relevant literature for the present study: EbscoHost, Sabinet, Sabinet Legal, JSTOR, and SAePublications. Within EbscoHost: Academic Search Premier, CAB Abstracts, e-Book Collection, e-Journals, Environment Complete, Hospitality & Tourism Index, Newspaper Source, and Waters & Oceans Worldwide were consulted. These databases have been searched to identify and collect as wide a range of sources as possible.

The literature study included academic articles from databases, published books and newspaper and scholarly articles, internet articles, published legislation, and archival documents. The main sources included:

- 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage;
- *Legal protection of the underwater cultural heritage: national and international perspectives* by S. Dromgoole, published in 1999. This book discusses the protection and regulations regarding UCH within various countries as well as internationally;
- *The protection of the underwater cultural heritage: national perspectives in light of the UNESCO Convention 2001* by S. Dromgoole, published in 2006. The author sheds light on how the 2001 UNESCO Convention influenced various countries' regulations regarding the protection of UCH.

The sources above focused on the legal and institutional protection of cultural heritage in general and UCH in particular within different countries both before and after the 2001

UNESCO Convention. The following sources gave an international perspective on UCH conservation in general:

- *Underwater cultural heritage and international law* by S. Dromgoole, published in 2013. In this book, Professor Dromgoole explains all the legal factors influencing UCH by including international regulations, ownership issues, and heritage and archaeological practises;
- *Who is entitled to a shipwreck located in international waters? A contest for the spoils between salvors, the original owners, legitimate heirs, state governments and the historic preservationists* by C.Z. Triay, published in 2014. This dissertation discusses the significance of shipwrecks, ownership of wrecks and national and international regulations governing UCH;
- UNESCO articles. On the UNESCO website there is a section for underwater cultural heritage at http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/, where a variety of resources on the topic are listed.

The following sources were instrumental in understanding the effect of "law of the sea" on UCH:

- *The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea* by A. Strati, published in 1995;
- *The international law of the sea* by Y. Tanaka, published in 2012. Professor Tanaka discusses the main subjects regarding the international law of the sea and includes less traditional subjects, such as the law's position on the conservation of marine biological diversity and peace and security for all at sea;
- *The law of the sea* by D. Freestone, R. Barnes and D. Ong, published in 2006. This book provides a critical analysis of the law of the sea and discusses its ability to govern important and sometimes unforeseen issues pertaining to the use of oceans.

Different types of sources were consulted to investigate the current status quo of UCH conservation in South Africa. The following acts were analysed:

- The National Monuments Act, 1969,
- The Maritime Zones Act of South Africa, 1994,
- The Wreck and Salvage Act of South Africa, 1996,
- The National Heritage Resources Act of South Africa, 1999.

Literature on this topic includes the following sources:

- *South Africa: Maritime archaeology* by J. Boshoff, published in 2013. This paper discusses the development of UCH management, legislation and conservation in South Africa;

- *Maritime legal management in South Africa* by J. Gribble and J. Sharfman, published in 2013. The authors explain the development of legislation in South Africa protecting UCH and their importance and relevance;

- *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* by J. Sharman, J. Boshoff and R. Parthesius, published in 2012. In this paper the authors provide a complete overview of the state of UCH in South Africa, including legislative, training, awareness raising and conservation factors.;

- *Maritiem argeologiese ondersoeke in 'n Suid-Afrikaanse konteks: doelstelling, metode en praktyk* by B. Werz, published in 1993. Werz discusses the international relevance of UCH in South Africa and its importance to the general public and researchers.

This is, however, by no means a complete list of all sources consulted for the present study.

1.4.2 Empirical study

An empirical study consists of information gathered by researchers through their senses (esp. observation), rather than relying on logic (Sarantakos, 2005:4). Mouton (2011:105) mentions "fieldwork" in his publication, which covers various data collection methods including observation, interviewing and text analysis.

As mentioned previously, the present study was based on qualitative research, which entails describing and understanding human actions rather than explaining or predicting them (Babbie & Mouton, 2011:53). Sarantakos (2005:344) points out that qualitative research implies data consisting of words, and not statistics.

In this study free-attitude interviews were conducted with selected members of the heritage, archaeological, and underwater cultural heritage (UCH) sectors. According to Oskowitz and

Meulenberg-Buskens (1997:86-87), free-attitude interviewing was developed by Vrolijk, Dykema and Timmerman in 1980 as the "Vrije Attitude Gesprek". It is a "controlled, non-directive, depth interview", which entails that the researcher poses a single question to launch the interview, after which he/she becomes a listener. This was generally the case during interviews conducted for the present study. Thus, the respondents directed the conversation naturally towards the topics that had to be discussed. In certain cases however, it was necessary to adapt the technique by posing additional questions to gather the necessary information.

The necessary ethical clearance was obtained through the North-West University ethics process. This included the completion of a short ethical questionnaire. An extended questionnaire is only applicable where sensitive information is gathered from respondents. However, all respondents were informed of the purpose of the interview and their right to inform the interviewer of any statements that should remain confidential at the start of the recorded interview.

The respondents selected for the interviews were identified and selected based on their in-depth knowledge regarding aspects of the field of research. Candidates were selected to include experts working in both the underwater archaeology and related museum fields, in order to include role players from all areas of UCH management and conservation. Due to both time and financial constraints it was impossible to interview all role players within the field of South African UCH. Various possible candidates were selected and contacted including from the Dias Museum in Mossel Bay, the Shipwreck Museum in Bredasdorp, the Simonstown Museum, a lecturer from the University of Cape Town (UCT), and archaeologists from Iziko Museums, the South African Heritage Resources Agency (SAHRA) and the African Centre for Heritage Activities (ACHA). The following candidates responded and agreed to interviews: Mr. Mrubata, Mr. Boshoff, Mr. Gribble and Mr. Sharfmann. Ms. Marx and Ms. Wares agreed to interviews during interviews with Mr. Mrubata and Mr. Gribble.

Interviews focused on South African protection of UCH, and included participants from various museums (Iziko's Maritime Centre in Cape Town, Dias Museum Complex), institutions (Iziko Museums, SAHRA's MUCH Unit) and NGO's working in the field (ACHA). Mr. Mbulelo Mrubata from the Dias Museum was interviewed to establish this institution's involvement in and contribution to UCH conservation in South Africa.

The qualified South African professionals working in UCH are (mostly) maritime archaeologists, and are few and far between. For the present study, three of these professionals were interviewed. This was done to establish the current legislative framework and the problems this field faces in practice, as well as their suggestions for improved conservation of UCH in South Africa. These professionals (all qualified maritime archaeologists) were; Mr. Jaco Boshoff from Iziko's Maritime Centre, Mr. John Gribble – at that stage head of the Maritime and Underwater Cultural Heritage Unit of SAHRA – from ACO Associates, and Dr. Jonathan Sharfman of the African Centre for Heritage Activities. Ms. Heather Wares, a historian at that time from SAHRAs MUCH-unit, was also interviewed even though not a maritime archaeologist. Individuals from the Simons Town Museum and the University of Cape Town were also contacted for interviews but did not respond.

The data collected through the free-attitude interviewing were captured by means of sound recordings, which the researcher analysed and interpreted to reach conclusions that provided answers to the relevant research options. Where there were insufficient data on particular aspects, or additional information was required, emails were sent to the interviewees with the necessary questions, to which they duly responded.

1.5 Structure of dissertation

This dissertation consists of the following chapters:

- In chapter 1 the following topics are discussed as an introduction: the outline of the present study as well as the theories on underwater cultural heritage. This includes the various definitions, types and value thereof, specifically for shipwrecks.
- Chapter 2 analyses the international context. This is done by a discussion of various principles, charters and conventions, along with the legislative framework of selected countries (France and the United Kingdom). The aim is to provide an outline of international best practice in this field.
- In chapter 3, the South African legislative and institutional frameworks are analysed by examining and discussing legislation, responsible authorities, and institutional capacities.

- Chapter 4 provides the outcomes of the empirical study to determine what the experts within the field feel is lacking or what is working well.
- In chapter 5, South African legislation in theory and its implementation in practice are compared to international best practice, to reach a conclusion about the effectiveness and feasibility of South African legislation for underwater cultural heritage, specifically shipwrecks.

To reach the above-mentioned conclusion, firstly the international "best practice" must be established for this phenomenon. This will be discussed in the following chapter (Ch. 2).

2. INTERNATIONAL CONTEXT OF UNDERWATER CULTURAL HERITAGE

It is important to ascertain the feasibility of South African legislation that apply to underwater cultural heritage (UCH). To reach this aim, international best practice for UCH should be determined in the South African context. This is done by following two steps. The first step analyses the applicable principles, charters and conventions that either influence, or regulate UCH internationally. The second step determines how UCH is being managed in selected countries that excel at heritage conservation governed by legislation. This step investigates the relevant legislative framework in those countries and whether they indeed ratified the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (2001 UNESCO Convention). Triay (2014:45) sketches the situation as follows:

> Few states around the world have felt compelled to protect historic shipwrecks and other underwater cultural heritage from vandalism and exploitation.

This statement has a surrealistic tone when considering UNESCO's (2012b:1) estimation that globally, more than 3 million shipwrecks can be found on the ocean floor. Even in affluent countries this vast amount of resources cannot be protected by a sole authority, therefore, it requires the support from various role-players. For matters relating to wrecks, certain parties would be involved in decision-making and actions that have a bearing on the fate of a specific wreck. These role-players are:

- the coastal state in which territory the wreck lies;
- the flag state of the wreck;
- the state of origin should it differ from the coastal and flag states; and
- the international community.

The mentioned parties have a mutual interest, but each party's focus, determined by several factors, will differ from that of the others (Strati, 1995:19-20).

2.1 International developments in UCH

International developments in UCH conservation can be divided into two sections: Firstly, those developments influencing UCH, for example, the prohibition of illicit trade, the law of the sea, or salvage regulations. Secondly, it entails those developments that regulate UCH in particular. These include the 2001 UNESCO Convention and the 1996 ICOMOS Charter. Triay (2014:45) explains this concept:

> Conventions … have strengthened the view that when dealing with shipwrecks, particularly historical shipwrecks, its economic value should be superseded by other values such as underwater cultural heritage.

2.1.1 Principles, charters and conventions influencing UCH

Looting at archaeological sites is a worldwide problem (Elia, 1997:88). This activity is defined by Elia (1997:86) as: "The deliberate, destructive and non-archaeological removal of objects from archaeological sites to supply the demand of collectors for antiquities." Treasure hunters tend to plunder wrecks by using dynamite, metal detectors, propwash deflectors, and remotely-operated submersibles (Brodie, 2003:14). These actions and technological advancements provide easy access to wrecks that previously were not accessible to the general public.

Furthermore, the romantic depictions associated with desolate shipwrecks increased public interest in marine archaeology (Brodie, 2003:16). The problem is that looting leads to the destruction of the archaeological sites and their context. Such destruction cannot be reversed and is motivated mostly by commercial rationalisations (Elia, 1997:86, 93).

There are a number of charters and conventions that deal with cultural heritage, however, only few relate specifically to UCH. The following conventions are relevant:

- the 1954 Hague Convention for the Protection of Cultural Heritage in the Event of Armed Conflict;

- the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; and
- the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995.

These frameworks all address the illegal movement and looting of artefacts, including archaeological objects recovered from shipwrecks. The restrictions of these frameworks apply equally to states, institutions, private companies and individuals. The 1970 Convention, for example, states that museums are prohibited from acquiring illegally exported or stolen cultural objects (Clément, 2006:101). However, none of these conventions provide principles on the protection of shipwrecks at the sites where these structures are located (Brodie, 2003:12,14; Clément, 2006:100).

There are, however, two conventions that specifically contain regulations for the protection of UCH. These are the United Nations Law of the Sea Convention and the International Convention of Salvage (under which the law of salvage and the law of finds will also be discussed below).

2.1.1.1 United Nations Convention on the Law of the Sea

United Nations Convention on the Law of the Sea (UNCLOS) was first developed in the late-1940s and has since been revised twice, resulting in the third draft of 1982. The latter came into effect in 1994, after it was ratified by the required 60 nations, and still applies currently (DiMento & Hickman, 2012:15; Sokal, 2005:20). Since November 2017, as many as 167 countries and the European Union have ratified UNCLOS (United Nations: Oceans & Law of the Sea, 2017:1). As a result, this convention is endorsed and applied almost universally.

UNCLOS principles rely solely on dividing the ocean into separate zones (DiMento & Hickman, 2012:15). Firstly, it defines the internal waters of a state where such state has sovereignty*[1] (DiMento & Hickman, 2012:16). According to these principles, states should have national legislation that protect UCH within these areas inward from the baseline (Sokal, 2005:20).

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[1] See Glossary for terms followed by *.

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UNCLOS does include measures for protecting UCH, and provides for states to preserve UCH that are found underwater (Triay, 2014:45-46).

The first zone from the coastline is known as the Territorial Sea, extending 12 nautical miles (nm), which covers the right of innocent and transit passage (DiMento & Hickman, 2012:16). States have sovereign* rights within this zone and, therefore, have control over activities taking place within the area (Sokal, 2005:20).

The Contiguous Zone is drawn between 12 and 24 nm from the coastline in which States have authority over customs, immigration, waste management, and shipwrecks (DiMento & Hickman, 2012:16). UNCLOS ensures the UCH located within the mentioned zone can also be protected by the state concerned (Triay, 2014:45-46). The Continental Shelf and the Exclusive Economic Zone (EEZ) are combined and states may control the resources and activities within this area for up to 200 nm from the coastline (DiMento & Hickman, 2012:16-17; Sokal, 2005:20).

The final demarcated zone that UNCLOS defines, is the High Seas or the Area, in which all states should preserve UCH for "the benefit of mankind as a whole" (Triay, 2014:47; DiMento & Hickman, 2012:17; UN, 1982:article 149). A country of origin is considered as the entity from where cultural, historical or archaeological elements originated that are associated with a UCH site on the High Seas. Such an entity will have preference of the right to activities involving UCH objects at the particular site (Sokal, 2005:20).

Furthermore, states should take responsibility for their own nationals to preserve the resources located in the High Seas and work alongside other states to help conserve and manage these resources (DiMento & Hickman, 2012:18). States, however, do not enjoy jurisdiction or sovereignty* within this zone, apart from on board a vessel operating under that state's flag (Sokal, 2005:20; Stephens & Rothwell, 2013:32).

Article 303 of UNCLOS notes that, "States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose." This article provides

states with the right to protect UCH found within their territory (Sokal, 2005:20). Unfortunately, UNCLOS is silent on instances of UCH found within the area located between the outer limit of the Contiguous Zone and the High Sea (Sokal, 2005:21). This leads to a gap and, therefore, an unfortunate loophole in the international protection of UCH, which treasure hunters can exploit (Sokal, 2005:21). In this regard, UNCLOS is unable to protect UCH comprehensively and accurately, including all territories. Lund (2006:18) is, however, of the opinion that this deficiency was rectified by the 2001 UNESCO Convention (discussed under section 2.1.2 below).

(UNCLOS is also discussed in Chapter 3 with specific reference to its significance for South African UCH; the different zones are also discussed in more detail.)

2.1.1.2 International Convention on Salvage

The International Convention on Salvage of 1989 was drafted by the International Maritime Committee (CMI). Thereafter, it was adopted by the International Maritime Organisation (IMO) and officially came into effect in 1996 (Dromgoole, 2013:172-173). The 1989 Convention defines salvage as:

> … (a) salvage operation means any act or activity undertaken to assist a vessel
> or any other property in danger in navigable water or in any other waters
> whatsoever, and (b) vessel means any ship or craft, or any structure capable of
> navigation. (Boesten, 2002:116).

The Convention includes a "reservation in terms of maritime cultural property" in article 30(1)(d) (Dromgoole, 2006:xxxi). This article enables parties to declare that the salvage principles provided in the Convention do not apply to historical wrecks, nor to warships or state vessels (Nafziger, 2006:xi; Dromgoole, 2013:173).

There is, however, no mention in the Convention of ways to report and reward discoveries by divers for UCH finds (Dromgoole, 2006:xxxi). Furthermore, there is a lack of guidelines on the

approach to ownership of wrecks. This matter, therefore, resides under national governments, which are expected to provide the guidelines and legislation (Dromgoole, 2006:xxxii). Looters/salvors/divers often present the law of salvage and the law of finds as justification for their, mostly illegal, activities (Carducci, 2006:28).

The law of salvage allows "vessels in peril at sea" to be salvaged for a specified reward. If the reward has not yet been paid, salvors maintain ownership of the objects they recovered in terms of *maritime lien* (Carducci, 2006:28). The law of finds, on the other hand, only applies to vessels that have been abandoned by the owner, and the person who discovered the site may claim the salvaged objects (Carducci, 2006:28). Salvage does not, however, grant full ownership, only until the reward is paid (Carducci, 2006:28). As a result, salvage practises are still popular among divers and the public alike. This condition prevents the establishing of *lex specialis** (specific law) for UCH (Nafziger, 2006:xi).

2.1.2 Principles, charters and conventions regulating UCH

Certain recommendations, charters and conventions influence UCH directly. However, these guidelines are not as important as the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage; thus they will only be discussed briefly. The Recommendation on International Principles Applicable to Archaeological Excavations of 1956 was the first framework to suggest the following: requirement of permits, established conservation principles to be followed, the publication of research, and the conservation of artefacts in museums (Prott, s.a.:1).

During the late-1990s, concern grew for UCH protection on international level. Major technological advancements, such as improvements in SCUBA (self-containing underwater breathing apparatus) diving, magnetometers, sub-bottom profilers, remote-operated vehicles, underwater video cameras and manned submersibles, contributed to advancing the threat to UCH at an alarming rate. This was coupled with growing interest in the exploring of underwater areas and increasing accessibility of such sites (Sokal, 2005:21; Hutchinson, 1996:287-288). A suggestion was made to draft a new international instrument for UCH protection to readdress the shortcomings of the past (Sokal, 2005:21).

ICOMOS Australia established the International Committee on the Underwater Cultural Heritage (ICUCH) in 1991. This sub-committee of ICOMOS's International Committee on Archaeological Sites' main function was to advise on matters relating to UCH and promote international cooperation. The Committee is composed of experts from all five UNESCO geographical regions: Africa, the Arab States, Asia and the Pacific, Europe and North America, and Latin America and the Caribbean (ICUCH, s.a.:1). The Charter on the Protection and Management of the UCH was drafted in 1996 by the Committee. This was meant as a supplement to the 1990 ICOMOS Charter for the Protection and Management of Archaeological Heritage, which helps establish international best practice (Prott, s.a.:3,4). This Charter focuses on UCH found in internal waters, and in both the shallow and the deep sea (Prott, s.a.:4). The Charters' principles, however, is only binding to ICOMOS members and serves only as a guideline to non-members.

The Charter presents several principles worth noting. These entail encouragement of: *in-situ* conservation, increased public access, "non-destructive techniques, as well as non-intrusive survey and sampling". It also focuses on minimising and mitigating impacts to sites, avoiding disturbance of human remains, and the need for adequate documentation of the project concerned (Prott, s.a.:5-6; ICOMOS, 1996:2). The principles in the Charter were later used to formulate the Annex of the 2001 UNESCO Convention (Grenier, 2006:120).

The Nairobi International Convention on the Removal of Wrecks of 2007 empowers states to remove shipwrecks legally when such structures pose a threat to lives, goods, property or the marine environment (IMO, 2017b:1). The Nairobi Convention applies to the zones beyond the Territorial Sea, but states may also choose to apply these principles within their own territories (IMO, 2017b:1).

2.1.2.1 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage

Regarding the UNESCO Convention on the Protection of Underwater Cultural Heritage (2001 UNESCO Convention) Dromgoole (2006:xxvii) notes:

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The adoption of the Convention on the Protection of the Underwater Cultural Heritage by UNESCO in 2001 was the international community's response to the remarkable advances in deep-sea technology that had taken place over the previous twenty years. These advances had made shipwrecks and other UCH lying on the deep ocean floor vulnerable, for the first time, to direct human interference.

The International Law Association (ILA) is a global, non-profit entity founded in the 19th century to promote the study and development of international law and further global understanding and respect for such law. In 1988, the ILA established the Committee on Cultural Heritage Law to begin drafting a convention for UCH (Boesten, 2002:130). The final draft was presented to UNESCO in 1994 after which a feasibility study was done. It was determined that further consultations were necessary (Boesten, 2002:130). The first consultation was held in Paris in May 1996, and included 400 people representing UNESCO, DOALAS (United Nations Division of Ocean Affairs and Law of the Sea), the IMO, the Salvage Union, ICOMOS, various archaeologists and government representatives of 100 States (Boesten, 2002:130-131; Lund, 2006:14, 16). After further negotiations and redrafts, the final text was presented to UNESCO's General Conference in November 2001 (Boesten, 2002:132).

The 2001 UNESCO Convention is currently the only international agreement that focuses on the protection of UCH (Sokal, 2005:20). This Convention was adopted on 6 November 2001 at the 31st General Conference of UNESCO with 87 votes in favour, four countries against, and 15 abstentions due to objections to certain principles. The abstentions included the United Kingdom (UK) and France (Sokal, 2005:21; Dromgoole, 2006:xxvii-xxviii). This fact is relevant to the present study, because these two countries are used as case studies.

The Convention aimed to provide legal principles to help regulate treasure hunting in international waters, thus expanding articles 149 and 303 of UNCLOS as explained above (Dromgoole, 2006:xxvii). Article 2 states that the Convention has the following aims:

- promote the protection of UCH internationally,
- enable multi state co-operation,
- bind State Parties to preserve UCH,

- promote *in-situ* conservation (i.e. at the site) and non-intrusive access,
- promote expert preservation of resources at institutions,
- outlaw commercial exploitation,
- ensure the respectful handling of human remains, and
- allow states to keep sovereign* rights over their vessels (Dromgoole, 2006:391-392).

The contents of the Convention can be divided into specific themes or focus areas, which are expounded below.

UCH resources and protection

The Convention defines two ways in which activities can affect UCH, namely directly or incidentally.

Directly: In article 1(6) activities directed at UCH are described as those "having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage" (Jeffery, 2006:96; UNESCO, 2001:article 1).

Incidentally: Article 1(7) defines activities incidentally affecting UCH as those "which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage" (Jeffery, 2006:96; UNESCO, 2001:article 1).

According to the definition above, incidental activities may include fishing, mining, tourism or recreation, military activities, or the construction of pipelines or marinas (Jeffery, 2006:96). Article 1(1), however, states that constructed developments such as pipelines, cables, or installations still in use will not be considered as UCH currently or in future (Dromgoole, 2006:390). Therefore, the 2001 UNESCO Convention is even more efficient, seeing that it does not focus exclusively on UCH activities. The Convention also provides in article 5 for activities which might unintentionally affect UCH (Dromgoole, 2006:xxxvi). According to the mentioned Article 1(1), UCH is defined as:

> … all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as: sites, structures, buildings, artefacts and human remains … vessels, aircraft … and their cargo, together with their archaeological and natural context; and objects of prehistoric character (Sokal, 2005:21; Dromgoole, 2006:xxix; UNESCO, 2001:article 1).

This 100-year limit mentioned above, excludes more recent wrecks, even if those are deemed important. Sokal (2005:21) points out that these limitations would include important wrecks. According to these guidelines, wrecks from World War 1 and the Titanic, until recently, 2012 and 2014 respectively, were considered not old enough to be included in these protections. Wrecks from World War 2 would only have sunk '100 years ago' when considered after 2039.

The 2001 UNESCO Convention emphasises the preservation of UCH *in situ**, seeing that these sites can be viewed as "time capsules" in which the heritage items are related and help recount the narrative of the ship, its contents, its crew and its route, thereby providing context for historical research (Sokal, 2005:22; Hutchinson, 1996:288; UNESCO, 2012b:1; Dromgoole, 2006:xxix). Objects found on wrecks differ significantly. These can entail the following: coins, porcelain and ceramics, liquids including alcoholic beverages and medicine, textile products including suitcases and shoes, ammunition and slave restraints, to name but a few. In certain instances, objects are found that can be considered as art, as in the case with ancient Roman and Greek wrecks on which valuable statues were discovered (UNESCO, 2012b:2).

In-situ conservation is preferential since the conditions underwater deliver the best possible environment for preservation of numerous materials from shipwrecks. Furthermore, due to technological advancements, the expectations are that archaeologists in future will have improved means to excavate, study and preserve artefacts from wrecks (Sokal, 2005:22). This is also stated within the Annex under rule 1 (Dromgoole, 2006:404).

The 2001 UNESCO Convention recommends that UCH should only be excavated when it is deemed crucial for safety reasons (Sokal, 2005:22). Such excavations should also only be undertaken under the guidance of qualified underwater archaeologists who will ensure the

participants adhere to the appropriate scientific protocol for excavation, documenting and preservation (Sokal, 2005:22; Dromgoole, 2006:xxix). Rule 3 and 4 of the Annex further require all activities of UCH to be performed in a non-destructive manner and operations should not affect UCH adversely more than is necessary (Dromgoole, 2006:404).

In addition, article 2(3) stipulates that UCH should be protected on an international level for the benefit of all humans (Dromgoole, 2006:xxxii). Articles 7-12 discuss the protection of UCH within the maritime zones by the State Parties to the Convention (Dromgoole, 2006:393-397).

Article 1(1)(a)(i) of the 2001 UNESCO Convention and rule 5 of its Annex refer to "… human remains, together with their archaeological and natural context", and provide for both the protection of such remains, while article 2 urges participants to treat these remains with the utmost respect (Le Gurun, 2006:67; Dromgoole, 2006:404). This protection and respectful handling of all human remains apply to all the mentioned demarcated maritime zones and at all UCH sites (Le Gurun, 2006:67).

Sections 2-14 of the Annex determine that any activities directed at UCH should take place only after a proposal of the project is submitted to the relevant authorities for approval. These sections, including rules 9-36, stipulate the prescribed format of the following aspects:

- the contents of such a proposal,
- the assessment by the authority before approval,
- funding as well as duration of the projects,
- qualifications of participants,
- details on site management,
- documentation of the project,
- environmental issues,
- reporting methods,
- curation of objects from the project, and
- dissemination of the project concerned (Dromgoole, 2006:405-408).

Commercial exploitation and salvage

The main goal of the UNESCO Convention from 2001 is to remove UCH completely from the commercial market. Lund (2006:18) is of the opinion that this can be done successfully. The scholar mentions the Convention on the International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES) as an example of a Convention that succeeded in removing its focus (endangered species) from the commercial market. The regulation, however, only forbids the legal trade in such items (endangered species or UCH), whereas the demand on the illegal market remains.

The 2001 UNESCO Convention completely outlaws commercial exploitation of UCH in article 4 and rule 2 of the Annex. This Convention states that the so-called law of salvage and the law of finds do not apply to any UCH, unless the authorities of the owning state approve of these agreements (Triay, 2014:49-50; Sokal, 2005:22; Dromgoole, 2006:xxix, 404). Rule 2 within the Annex also states that "UCH resources may not be traded, sold, bought or bartered as commercial goods" (Sokal, 2005:22).

From the explanation above, it is evident that, unless activities are authorised, in line with the Convention, or aid in the recovery of resources for protection, the laws of salvage and of finds would not apply to UCH (Dromgoole, 2006:392). In terms of the Salvage Convention's connection with the 2001 UNESCO Convention, State Parties that ratified the Salvage Convention should invoke article 30(1)(d) for a reservation that the latter mentioned Convention would not apply to historical wrecks (Dromgoole, 2013:204-205).

Public access and awareness

The general public are still able to enjoy the UCH sites when diving at and experiencing these environments in a non-intrusive manner, according to rule 7 of the Annex. The Convention particularly stresses the importance of public access, awareness (article 20) and education (Sokal, 2005:22; Dromgoole, 2006:xxix, 399, 405). This accessibility may help raise awareness

and foster appreciation among the public to garner their assistance in protecting such valuable resources. This principle of the 2001 UNESCO Convention, as expounded in article 2(10), is increasingly being incorporated within national legislation (Dromgoole, 2006:xxxvi).

Authorities and state obligations

The responsible national authorities in each state has the mandate to manage UCH within their territory effectively, within the guidelines provided in the 2001 UNESCO Convention (Dromgoole, 2006:xxix). These competent authorities established by the State Party should include competent employees with the applicable knowledge and skills, as determined by article 22 (Dromgoole, 2006:399). State Parties should provide training in underwater archaeology and UCH management. This will ensure that sufficient expertise is readily available in the field. In addition, it will enable the mentioned State Party to assist other countries with both knowledge and technology, as stated in article 21, and discussed below (Dromgoole, 2006:399).

State Parties should adopt measures to ensure all vessels under their state flag and their nationals refrain from activities involving UCH, which contradict the 2001 UNESCO Convention, as stated in article 16 (Dromgoole, 2006:397). However, Article 13 provides for sovereign* immunity to warships and additional state-owned vessels used for non-commercial purposes who accidentally stumble upon UCH. In other words, these vessels do not have to report any UCH finds unless their activities impact directly on or are directed at UCH objects (Dromgoole, 2006:397).

The 2001 UNESCO Convention, furthermore, requires State Parties to take action in the following cases: where resources are recovered in contravention of the Convention, are exported illegally, or finally, or are both illegally recovered and exported (Dromgoole, 2013:335). UCH objects that are excavated illegally and in contradiction to the Convention and national regulations, should be confiscated by the State Party, who should ensure the resources are accessible to the public and can be researched and protected appropriately (Dromgoole, 2006:398).

Numerous states share a particular issue regulated by the 2001 UNESCO Convention. This is, namely that problems may arise between coastal states (in whose territory UCH lies) and flag states (from which such UCH originated), due to certain specifications within the Convention (Dromgoole, 2006:xxxii). Article 25 of the 2001 UNESCO Convention does, however, require cooperation and peaceful settling of disputes between two or more states; should they be unable, UNESCO will provide mediation (Dromgoole, 2006:400).

Article 19 of the 2001 UNESCO Convention and rule 8 of its Annex require mutual support from states when managing and protecting UCH. These states should assist each other with knowledge, expertise, and research (Dromgoole, 2006:xxxvi, 398, 405). The Convention further stipulates that states should negotiate at diplomatic level about issues of ownership. The Convention thus relies on co-operation and mutual respect between states (Forrest, 2006:261).

According to Article 6, agreements between states are encouraged to strengthen the protection of UCH (Dromgoole, 2006:392-393). Article 6(3) links the Convention to other Conventions in this regard by stating that it "… shall not alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of the Convention" (Clément, 2006:101).

2.2 Case studies of selected countries

Certain countries are notably more successful than others in conserving heritage. The following case studies of selected countries were chosen since they particularly excel at heritage conservation in one way or another. Further, careful consideration was given to include countries from both spectrums: France that ratified the 2001 UNESCO Convention, and the United Kingdom that refrained. This selection was done to establish the influence the 2001 UNESCO Convention has had on national legislation and its application to UCH conservation.

Prott (s.a.:2) mentions that both France and the United Kingdom (UK) have implemented legislation that cover UCH exclusively.

Since France and the UK are both countries within the European Union, certain regulations would apply to both State Parties. In 1992, the Council of Europe revised the European Convention on the Protection of the Archaeological Heritage (also known as the Valetta Treaty or the Malta Convention) in Valetta, Malta (Council of Europe, 1992:1). Both the UK and France ratified the Convention in 1995 and 2000 respectively, with the UK only accepting the territorial application (Council of Europe Portal, 2017:1).

This Convention provides guidelines on how any archaeological material, including UCH, should be identified, excavated and protected. Guidelines include the following: keeping a detailed inventory, reporting archaeological finds to the responsible authorities, and ensuring all excavations are supervised and non-destructive. It also entails: applying *in-situ* preservation where possible as well as providing appropriate storage of excavated material, and responsible public access to the sites (Council of Europe, 1992:2-4). The Convention further provides guidelines on financial matters, research of wrecks and projects, and creating public awareness. The focus also falls on prohibiting and monitoring illicit trade in archaeological material, co-operation between states of the Council of Europe to assist with projects, and establishing a Council to manage the implementation of the Convention (Council of Europe, 1992:4-6). European states in general use the European Union NAVIS I and NAVIS II projects as databases listing ancient naval archaeology (UNESCO, 2012c:2).

Even though the guidelines above suggest similarity between the UK and France, the approaches of the two states differ. As Dromgoole (1999:xvii) explains, there is a distinction between states that apply common law, for example the UK, and those adhering to civil law, for example France. It is, therefore, necessary to discuss both the UK and France's respective legislative approaches to the protection of UCH.

In France, the first underwater excavations took place between 1952 and 1957. It was done by divers on the *Grand Congloué* wreck in cooperation with a land-based archaeologist (Le Gurun, 2006:59-60). The team later realised that the excavation site in effect held two different shipwrecks. This discovery led to several strategic insights: an archaeologist is necessary for excavation, *in-situ* conservation should be encouraged, and the same principles should be applied as for terrestrial archaeology. Furthermore, the role-players found that it is extremely important to document excavations, sufficient technological and financial resources are needed, and finally, these outcomes set several standards for best practise in future (Le Gurun, 2006:60).

The French Ministry of Culture maintains a database of wrecks within the inventories of DRASSM (*Département des recherches archéologiques subaquatiques et sous-marines* or the Department of Marine and Underwater Archaeological Research; See UNESCO, 2012c:2; Le Gurun, 2006:70). DRASSM has jurisdiction over 10 000 km of coastline stretching up to 24 nm into the ocean, and is largely responsible for managing and protecting French UCH as well as possible activities flowing from this process, including the proper training of archaeologists (Le Gurun, 2006:70-71). It should be mentioned that French legislation is not applicable beyond the Contiguous Zone (Le Gurun, 2006:83).

French legislation introduced the term "marine cultural asset" to include the broader dimension of UCH within the definition (Dromgoole, 2006;xxix). Maritime cultural assets are defined as "deposits, wrecks, remains or, in general, all assets of prehistoric, archaeological or historical interest" in article L. 532-1 of the Code for Heritage (Le Gurun, 2006:64). As a general definition, it includes all options and excludes possible loopholes by listing all possible types of UCH (Le Gurun, 2006:64-64).

Furthermore, the French legislation, previously the French Law No. 89-874, currently the Code for Heritage, does not restrict the significance of UCH to a certain age. This Code also recognises any UCH resource worth protecting on a case-by-case basis by assessing the cultural value of a wreck (Le Gurun, 2006:65). Such cultural value is not defined specifically by

French law, however certain court cases have used assessments of its "contribution to enhancement of human knowledge of the past", thus relying on the scientific or cultural value (Le Gurun, 2006:66). Rewards for divers and individuals who report finds and leave the site untouched, are also determined in accordance with the value of the particular site divided into either "great interest, superior interest or exceptional interest" (Le Gurun, 2006:66).

Human remains within French territory are treated in accordance with the 2001 UNESCO Convention, although the country does not have any specific legislation that applies to war graves (Le Gurun, 2006:67). However, this omission is immaterial, seeing that France outlaws any access, without proper authorisation, to shipwrecks that form part of maritime cultural assets. Therefore, the regulations ensure all remains are left undisturbed (Le Gurun, 2006:68,71).

Authorisation of maritime excavation projects allows French authorities (DRASSM) to assess the necessity of such a project. This is done to create minimal impact on sites, and ensure any recovered resources are displayed to the public under the correct conditions in a maritime museum (Le Gurun, 2006:71). Such an exhibition in a museum is in accordance with civil law, according to which the public gets preference. In this regard, the focus is on cultural interest over ownership rights, while stressing the importance of preserving archaeological materials, preferably *in situ** (Dromgoole, 1999:xvii).

The illicit trade in UCH resources is strictly forbidden in France. Should an individual fail to report a find to the competent authorities within the allowed 48 hours, or the report be falsified, a fine of € 3 750.00 (approx. R 62 000.00)[2] may be imposed (Le Gurun, 2006:72, 76). Should any project be undertaken without prior authorisation, the fine may amount to € 7 500.00 (approx. R 124 000.00). If an individual sells such resources recovered from French territory, that person could be imprisoned for two years. Alternatively, a fine may be imposed of € 4 580.00 (R 75 000.00), or as much as double the selling price of the resources (Le Gurun, 2006:72). The mentioned offence is identified not only based on the regulations of the 2001 UNESCO Convention, but also on the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954, as well as the UNESCO Convention on the Means of

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[2] All conversions to Rand in the text of the dissertation are calculated using exchange rates as on 17 November 2017.

Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970. France is a State Party to both the latter Conventions (Le Gurun, 2006:73).

In case a state vessel (i.e. a warship) is located in foreign territory, the French government have set up a commission to investigate such vessels and assess its value as UCH. The commission further determines whether excavation of the vessel is possible considering both financial and technological resources. This commission may also liaise with the coastal state to determine the feasibility of a collaborative project. The findings of such a commission thus guide the Ministries of Defence, Culture and Foreign Affairs in their decision on the vessel (Le Gurun, 2006:91).

Furthermore, France re-evaluates its underwater archaeological framework every four years. This enables the state to adjust legislation, principles or guidelines in light of completed projects, discoveries made and threatened sites identified (Prott, s.a.:3).

As a participant, France did ratify the International Salvage Convention of 1989, but made use of the reservation to exclude "maritime cultural property of prehistoric, archaeological or historical interest" (Le Gurun, 2006:74). Ownership of abandoned wrecks reverts to the state, which means that no individual can claim ownership in terms of the law of finds (Le Gurun, 2006:75). Such abandonment can only occur if the owner explicitly states its intent to abandon the wreck, which also does not factor in the lapse of time (Le Gurun, 2006:92). If an owner can be identified, all operations directed at the wreck must first seek consent from the owner before any authorisation for projects will be given, as prescribed by article L. 532-9 of the Code for Heritage (Le Gurun, 2006:90).

When the 2001 UNESCO Convention was adopted, France abstained from voting (Le Gurun, 2006:61). This is surprising since UNESCO has its home base in France. Furthermore, until then, this country had never abstained from voting. Moreover, France's 'track record' is noteworthy in the development of maritime archaeology since its inception (Le Gurun, 2006:61). France boasts four maritime museums or those covering the shipwreck theme: the *Musée de la Marine, Musée Departmental Arles Antique, La Perouse* Museum and the Museum of Underwater Wrecks of the Invasion. These museums exhibit both shipwreck and archaeological artefacts (UNESCO, 2017c:2).

<u>2.2.2 United Kingdom – 2001 UNESCO Convention not ratified:</u>

Along the UK's coastline, there are approximately 7 500 wrecks within the English Channel alone. Of these, 50 are protected, including 32 historically significant wrecks and numerous military ones, which are designated war graves (BBC, 2016:2). The total number of wrecks within England's territorial sea is estimated to be 37 000 (Historic England, 2017:1). Wrecks along the coast include a few that are confirmed as dating back to the Bronze Age (Dromgoole, 2006:313).

It should firstly be understood that the UK geographically incorporates England, Scotland, Wales and Northern Ireland. Legislation applicable to UCH within the UK combines the following legislative frameworks: the Merchant Shipping Act of 1995, the Protection of Wrecks Act of 1973 and the Protection of Military Remains Act of 1986, which apply to all four countries. The Ancient Monuments and Archaeological Areas Act of 1979 only applies to England, Scotland and Wales (Dromgoole, 2006:315). Furthermore, common law as applied in the UK, emphasises the right of owners and only provides protection for sites of significant value (Dromgoole, 1999:xvii). Subsequently, the above-mentioned Acts that apply to UCH in the UK are discussed in more detail.

Merchant Shipping Act of 1995

The Merchant Shipping Act includes provisions of the International Salvage Convention and applies to both historic-culturally significant vessels and wrecks from modern times (Dromgoole, 2006:315). Within the Maritime and Coastguard Agency of the Department of Transport the Receiver of Wreck Office in Southampton handles all wreck-related matters within the UK (Dromgoole, 2006:316). Any person who discovers a wreck, assumes ownership, or is the legal historical owner of such an asset, has to report it to the receiver within 48 hours and provide a detailed report of the wreck or vessel (Dromgoole, 2006:316-317). The Receiver may sell wrecks in its possession if these are worth less than £5 000.00 (approx. R 92 000.00) or too damaged to be worth salvaging (Dromgoole, 2006:318).

Should a wreck be identified as having historical value, the Receiver of Wrecks requests the assistance of various experts and institutions to determine the value and report the wreck's significance to the National Monuments Record (Dromgoole, 2006:318). If the wreck is deemed historically significant and not of British origin, the Receiver will notify the state of origin's heritage agency (Dromgoole, 2006:318).

The British Receiver of Wrecks noted an increase in enquiries about the rights of salvaging the cargo of a historic ship (Hutchinson, 1996:289). The Receiver should be notified within 28 days whenever a wreck is located and artefacts removed from such site, or brought into the country (BBC, 2016:1; MCA, 2014:2). This body can donate the UCH resources in its possession to museums and institutions who will protect the items sufficiently (Dromgoole, 2006:319).

Protection of Wrecks Act of 1973

The Protection of Wrecks Act was introduced in 1973. In 2006 the UK planned to revise the legislation, which covered vessels only, to include the broader "marine historic assets" (Dromgoole, 2006:xxix). However, this legislation is not signed into effect yet, which means the 1973 Act is currently still in force.

Sites with historical, cultural, artistic or archaeological significance should be protected from looting, destruction or disturbance, as stipulated by the Protection of Wrecks Act of 1973 (Dromgoole, 2006:321-322). This Act provides for a protected area surrounding the wreck to form part of the site. Should an individual within this area disturb, remove or damage any part of the wreck, or any institute commence operations to salvaging the wreck, that person or entity is guilty of an offence (Dromgoole, 2006:321). Since the Act governs four different countries, various institutions enforce its principles: English Heritage in England, Historic Scotland, Cadw in Wales and Environment and Heritage Service of the Department of the Environment for Northern Ireland (Dromgoole, 2006:322). An archaeological diving contractor and an Advisory Committee on Historic Wreck Sites are at hand to provide administrative services and expert knowledge and advice to interested individuals or institutions (Dromgoole, 2006:322).

The Protection of Wrecks Act requires that possible interferences at a site should be authorised through a licence application (Dromgoole, 2006:321, 323). Licences are issued to a single individual only, who must adhere to specific requirements. These include:

- divers on a wreck must be competent and equipped,
- activities must be respectful to the historical, archaeological or artistic value of the asset,
- the salvaging operation should be largely non-intrusive,
- licences must be renewed annually, and
- detailed reports submitted annually (Dromgoole, 2006:323-324, 325).

Licence categories were established for surveying, excavation, visiting and non-intrusive surface recovery, and have different requirements (Dromgoole, 2006:324-325).

Ancient Monuments and Archaeological Areas Act of 1979

The Ancient Monuments and Archaeological Areas Act of 1979 requires that ancient monuments and terrestrial archaeological resources must be protected from interference. This Act applies only to England, Scotland and Wales (Dromgoole, 2006:326). Historic Scotland, Cadw and England DCMS (recommended by English Heritage) list monuments in terms of their national significance (Dromgoole, 2006:326).

Criteria for significant monuments include a building, structure or work or its remains and any wreck and the machinery thereof, whether on or below surface, submerged or within a cave, with no age limit (Dromgoole, 2006:327-328). According to this Act, individuals do not require permission to visit the site. However, only visiting is allowed, while removing or damaging any part of the site is considered to be an offence (Dromgoole, 2006:328).

Protection of Military Remains Act of 1986

The UK introduced the Protection of Military Remains Act of 1986 under the Ministry of Defence (Dromgoole, 2006:329). The aim was to protect all wrecks with a connection to the military, whether aircraft or ships, both in territorial and international waters. The Act declares wrecks to

be conserved in one of two ways: firstly, a wreck of which the location is known; secondly, where the precise location is unknown but is suspected to fall within a certain area. In the latter case, a larger area, including the suspected wreck and its remains, is declared and should be protected (Dromgoole, 2006:329).

When a military wreck is located within another state's territorial waters, the Act does not have the power to guarantee protection, and would rely on the other state's legislation. This is similar to military vessels of another state within UK territory, which then are protected by this Act (Dromgoole, 2006:329, 330). The Act is only enforceable within international waters, if the offences are committed by a British national or anyone on a ship bearing the British flag (Dromgoole, 2006:329).

According to the mentioned Act, the granting of licences to divers is the responsibility of the Secretary of State (Dromgoole, 2006:330). Certain authorised persons are permitted under regulations of the Protection of Military Remains Act to board suspect vessels and seize any equipment believed to have been used in unauthorised activities (Dromgoole, 2006:330).

The Act of 1986 further protects sites, in UK territory and in the High Sea, where the vessel at any time since 4 August 1914 (the start of World War I), were in the UK's military service. When human remains are associated with a wreck site, it must be declared a protected war grave (Thomas, 2014:2).

UK and 2001 UNESCO Convention

To date, the UK has not ratified the UNESCO Convention of 2001 for two reasons. Firstly, the 'significance-issue': the Convention clearly states that *all* wrecks over 100 years must be protected regardless of their significance (Dromgoole, 2006:338-339). The UK most likely has the highest concentration of wrecks and within its legislation thus only protects wrecks of significance. It would not be viable for the UK's authorities to protect the tens of thousands of wrecks within their territory (Dromgoole, 2006:338-339). The second objection is that war

wrecks within territorial waters fall within the jurisdiction of the coastal state, and not that of the flag state. The UK is of the opinion that sovereign* rights should be granted to the country of origin in the case of all war/military wrecks regardless of whether they lie within the territorial waters of another state or not (Dromgoole, 2006:339-340).

The UK objected to the 100-year limit set by the 2001 UNESCO Convention, and prefers to use its own Protection of Wrecks Act, according to which only wrecks of "historical, archaeological or artistic importance" are protected (Sokal, 2005:22). Given the number of wrecks within the UK's territorial waters, there are insufficient resources, and it would be near impossible to render effective protection to all UCH sites of 100 years or older. The issue of the ratification of the UNESCO 2001 Convention is currently still subject to a process of review by the UK government (UK UNESCO 2001 Convention Review Group, 2014:7-86).

Offences stipulated by legislation

Apart from the offences and penalties listed under the legislations discussed previously, the Dealing in Cultural Objects (Offences) Act of 2003 outlaws the "tainting of cultural objects" which includes resources recovered from wrecks illegally (Dromgoole, 2006:343-344). The penalties would not only apply to those objects recovered illegally in contradiction with UK laws, but also if it was done in contradiction of any other state's laws (Dromgoole, 2006:344).

According to the above-mentioned Act, no person may "demolish, destroy, alter or repair" any listed monument without permission from the Secretary of State and no permission will be granted for excavation at any site (Dromgoole, 2006:326-327). The Act thus, promotes *in-situ* protection and employs guardians and wardens to manage and monitor monuments. Furthermore, if necessary, public funds may be used to preserve and maintain monuments (Dromgoole, 2006:327).

Subsequently, certain aspects related to UCH in the UK are explicated further.

Museums and databases

The UK does not have a complete database of shipwrecks; however, the National Archives does provide some information on shipping casualties and give references to other sources for further information (UNESCO, 2012c:3). Historic England, as an entity, assess wreck sites and documents these sites on a register, which includes the Heritage at Risk Register. The latter covers certain wrecks that are at risk of illegal activities (Historic England, 2017:1-2).

Numerous museums that exhibit UCH artefacts exist in the UK. A list of these museums are:

- the Bristol Dry Dock,
- Castle Cornet,
- Dover Museum,
- the Group Newport Medieval Ship excavation site,
- the Harbour Museum,
- Hull and East Riding Museum,
- Liverpool Maritime Museum,
- the Mary Rose Museum,
- the National Museum of Northern Ireland's Transport Museum,
- the National Museum and Galleries,
- the Scottish Crannog Centre,
- the Shipwreck Heritage Centre, and
- the Sutton Hoo Cemeteries (UNESCO, 2017c:2-4).

The UK's maritime authorities employ a highly successful programme that promotes awareness and provides education to inform the public of the value of UCH and the necessity that it should be left *in situ** (Dromgoole, 2006:314). This programme elicits the general public's input in protecting and monitoring UCH.

Salvage law in England does not apply to shipwrecks (i.e. those already wrecked or sunk). In this country, the sole aim is to save existing vessels from "imminent marine peril" (Triay, 2014:46). The UK employs a system that rewards salvors. This provides an incentive for divers to act above board and declare their findings to the proper authorities (Dromgoole, 2006:xxxi).

2.3 International best practice

Best practice can be deduced accurately from the 1996 ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage (1996 ICOMOS Charter) adopted in Bulgaria, and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage adopted in Paris (Gribble, 2005:1-2). For the purpose of the present study, international best practice will be deduced from both international developments of UCH and the different case studies, as discussed above, to extract the best international components. The study focuses on South African legislation that deals with protection and conservation of UCH and the implementation of applicable policies. This legislation and its implementation can be measured against international best practice to determine its feasibility and fitness for purpose.

The proposed legislation informed by international best practice should cover specific focus areas of application, as expounded below.

2.3.1 UCH resources and protection

By defining UCH in a broader sense, this eliminates possibilities of misinterpretation or gaps. According to this definition, UCH should cover any heritage resources that are located in water, whether it is partly or fully submerged. It should also include all resources of historic, cultural, archaeological or artistic value. Such resources should be older than 100 years and, in the case of a shipwreck, it should have sunk more than 100 years ago.

In-situ conservation should always be a first option, due to the favourable conservation conditions underwater. Sites should be conserved where they are located by firstly documenting the site and the resources located around the site. The documenting should include photographs, sketches and maps of the area, as well as an assessment made of all the resources' condition. Periodical site inspections should evaluate the condition of the resources and determine whether mitigation is necessary to stabilise the resource or the site.

Only when it is unavoidable should a site be excavated. Definite provisions would be if the safety/stability/condition of the site is feared and immediate action must be taken. Further indicators for excavation are:

- when a site is situated in a location where it is vulnerable to treasure hunting,
- where extremely rough sea conditions threaten the stability of the site,
- or if there is expansion into the area where the wreck is located – for example, construction of marinas or harbours.

States should take action to mitigate the effects of these mentioned activities, or excavate the site to safeguard it for future generations.

Furthermore, all human remains that are found on a wreck site, should form part of UCH and be treated as such. Human remains should be handled with respect at all times and wrecks should be considered to be a protected grave site.

2.3.2 Procedures to identify, assess, excavate and preserve UCH

Strati (1995:37-40) emphasises that a standard process must be followed when working with UCH. This requirement is in accordance with both the 2001 UNESCO Convention and the 1996 ICOMOS Charter. The procedure should begin by locating the wreck site through thorough research and site investigation, or by finding it by accident. Such a chance find would rarely be attributed to a qualified archaeologist, therefore, the public or incidental divers should report such findings to the relevant authorities.

Furthermore, the site should be searched for by either scanning devices, or through direct diving to determine its nature and content. Thereafter, a pre-disturbance survey can be done, to ascertain the condition of the site accurately and explore the other resources the site holds. The survey would entail measuring the sites, and documenting them through photographing, sketching or gridding.

When it is established that an excavation or recovery must take place, the project should adhere to proper archaeological techniques. This means ensuring at least one maritime archaeologist is present during the whole project to oversee the excavation of UCH material. As far as possible, similar procedures for terrestrial archaeology should be applied to UCH. This would include gridding, the proper handling of discovered archaeological material, and documenting of the site during exploration and excavation.

The mentioned documenting entails photographing the location of all the resources found, drawing the site for context, as well as noting the exact location and environment in which the various resources were found. Afterwards this documentation could be used to research the UCH resource. Proper research should be done to identify the name, origin, history, route, or the historical context, of the resource. Thereafter, the research should be published to make it accessible to experts within the field as well as the general public.

Finally, the management of UCH should follow the correct procedures, as outlined in national legislation. This will have a two-pronged effect: the UCH will be preserved for posterity, and the procedures will provide mitigation necessary to save or stabilise a site.

2.3.3 Commercial exploitation and salvage

Commercial exploitation, looting and salvage should be outlawed, except for specified circumstances where the state deems it to be necessary/appropriate/advisable. Should the need arise for salvaging, an application should be submitted to the relevant authority before permission is granted. The application should provide the following details of the proposed project: name, duration, context, objectives, and envisioned outcome. Furthermore, it should

include the funding options, the qualifications of the divers involved, reporting on the project's progress, and stating the expected date of completion.

The trade in illegally excavated UCH resources should be prohibited. This prohibition should include any such offences committed within another country's territory involving UCH, which was imported illegally into the state where it was found.

Salvagers/salvors may be persuaded to declare their findings and hand over recovered resources to museums, if a reward was offered as incentive. As a result, fewer resources would be lost to salvors or looters and more artefacts may enter the conservation and museum sector.

2.3.4 Museums and databases

Detailed databases of all historically significant wrecks should be compiled by state authorities. Such databases should include the following information: possible identity of a wreck (if still not confirmed), the location of the wreck, its possible value and a brief history. This database should be updated periodically as new information becomes available and new sites are located.

It is preferred that a database should be made accessible to the general public. This, however, excludes sensitive information such as photos or details of valuable cargo and/or the location of a high-prized asset. Such data should be made available only to the experts in UCH.

A State Party should establish and manage a dedicated museum(s) with staff who are capable and knowledgeable. This will help conserve applicable UCH resources and present it to the general public appropriately. Such institutions should be state-funded and employ at least one maritime archaeologist who could conserve the resources and research them if needed. Other museums can also be tasked with periodical exhibitions of these resources. The aim should be to display such artefacts to other communities who would not normally have the opportunity to

view such objects. The mentioned databases and museums will also help raise public awareness on the importance of UCH.

2.3.5 Public access, awareness and participation:

Public access to UCH sites should be encouraged. It should be emphasised to the public that visits to these sites must be non-intrusive and non-destructive, prohibiting the taking of 'souvenirs'. Visitors should have the opportunity of diving to submerged sites with reputable and willing dive companies. Alternatively, the public could partake in wreck trails along the coastline to view structures that are partly submerged or on land.

Awareness should be raised in such a manner that it attracts and involves the optimum participants in UCH. If the general public are made aware of the value of these resources, they may be more likely to conserve the sites and report possible illegal activities to the appropriate authorities. Awareness will also educate communities to cherish their own UCH and help the local authorities manage and present the sites. It must be remembered that UCH also involves certain aspects of communities' heritage. Therefore, local communities should be involved in decision-making as well as conservation and management of the sites.

2.3.6 State obligations, state authorities and private organisations

All states should provide relevant legislation to help protect UCH, either within general heritage-protection laws or those aimed specifically at UCH. Such legislation should accurately define UCH, stipulate UCH management, and explain the applicable offences and penalties laid on by the mentioned legislation.

States should provide funding for authorities established especially to identify, assess, research, manage and promote UCH. Such authorities should adhere to both national laws and international agreements, enabling them to manage UCH sufficiently and effectively. Maritime

archaeologists or underwater cultural heritage practitioners should be employed at these institutions to guide the national protection of UCH within the state concerned.

These authorities should be tasked with processing applications for excavation projects directed at UCH, and assessing sites where UCH was affected incidentally. The site inspections should be done according to stipulated standards to ensure adverse effects are mitigated effectively. Applications for authorisations or permits should conform to standards outlined in national legislation, and adhere to specified principles. Applications should detail the planned process, and should include a qualified archaeologist to oversee the handling of the salvaged or excavated UCH material.

Private organisations should be encouraged to promote the conservation of UCH. These bodies must include non-governmental, non-profit heritage conservation organisations, local diving-enthusiast clubs and diving operators. These organisations should strive to create awareness for the protection of UCH and invoke an understanding of and care for UCH among their members or clients. This could be accomplished through well-planned projects or general operations.

States should cooperate not only with neighbouring countries, but also with states whose vessels rest within the former state's territorial waters. Such cooperation should include any other states that may have an interest in the site or UCH in general. The exchange should be prioritised in terms of technology, research and expertise for the preservation of UCH globally for humankind. UCH-related disputes between states should be settled in a peaceful manner and where this is not possible states should seek mediation.

2.3.7 Research, training, and publications

States should ensure that adequate training and education programmes are available to deliver experts for the benefit of UCH, both nationally and internationally. Internships and bursary programmes should be encouraged for students who are interested and have the calling to study within the field.

Students should be encouraged to pursue post-graduate studies, in which they conduct research on factors affecting UCH. Publications by qualified experts should be welcomed and rewarded through state subsidies and incentives from UCH-related governing bodies. This aims to ensure that adequate and up-to-date research is readily available.

Various publications on UCH should be distributed to the public. These could include pamphlets, leaflets, booklets, brochures, and articles in newspapers or periodicals. Information panels at strategic stations, or television advertisements may also be effective in raising public awareness. Publications aiming to raise awareness should be able to reach a large section of the target audience.

To recap: The best practises for UCH legislation should cover the following focus areas: UCH resources and protection principles; management procedures; handling of commercial exploitation and salvage; establishing museums and databases; interactive strategies to raise public awareness, access and participation in UCH; obligations of states, their authorities and private organisations; and UCH-related research, training and publication principles.

The identified focus areas will ultimately be used in chapter 5 to determine the feasibility of South African legislation applicable to UCH and the implementation thereof.

3. THE SOUTH AFRICAN LEGISLATIVE AND INSTITUTIONAL FRAMEWORK FOR CONSERVING UNDERWATER CULTURAL HERITAGE

3.1 The heritage resource: Shipwrecks along the South African coast

South Africa's ideal geographic position at the southern end of the African continent and between the Atlantic and Indian Oceans provided a popular passage for shipping (Sharfman et al., 2012:87; Gribble & Sharfman, 2013:6802). This thoroughfare led to the country's rich and diverse underwater cultural heritage (UCH) that dates back from hundreds of years ago (Forrest, 2006:247). Before the opening of the Suez Canal in 1869 (Suez Canal Authority, 2017:1), ships sailing from Europe to the East had to round the southern tip of Africa. Sharfman et al. (2012:87) note that due to this passage, South Africa is linked to the rest of the world in terms of UCH, which resulted in "a multi-faceted representation of sites, objects and mythologies related to water and maritime heritage that reflect not only local historical and social development, but global cultural change as well".

Currently, there is no indication that the early indigenous people of South Africa built waterborne vessels, and if they did, the unfavourable maritime conditions have destroyed the remnants (Forrest, 2006:247). The earliest documented remains of a shipwreck within South African waters dates to 1505. In that year a Portuguese vessel, only known as the *Soares Wreck*, transporting pepper ran aground near Mossel Bay. Of its wreck, there are unfortunately no known remains (Sharfman et al., 2015:90; Forrest, 2006:247; Staniland, 1999:133).

Forrest (2006:247) notes that by that time, the Portuguese would have sailed around the Cape for almost a hundred years. However, the early Portuguese explorers, Bartholomew Dias de Novaes and Vasco de Gama, only rounded the southern tip of Africa in 1488 and 1497 respectively, to open a trade route between Europe and the East (Sharfman et al., 2012:90; Athiros & Gribble, 2014:10). Considering this fact, it seems highly unlikely that the Portuguese had been sailing around the Cape since 1405. They were possibly preceded by the early Phoenicians. According to legend, the Phoenicians may have rounded the Cape as early as 600 B.C. during the reign of pharaoh Necho (Forrest, 2006:248; Staniland, 1999:133). Given South

Africa's turbulent sea conditions such early shipping ventures would have left some shipwrecks in its wake. Considering the age of these wrecks, and the technological limitations of the time, it is safe to assume that no remains would be left at present.

After the trade route had been established, England and Holland both began rounding the Cape in the 1590s. These states would soon dominate the route and the Eastern trade after incorporating both the English East India and the Dutch East India Companies in the early 1600s (Forrest, 2006:248). Forrest (2006:248) reports that the first documented Dutch shipwreck occurred in Table Bay in 1644, and involved a vessel named the *Mauritius Eiland*. After Jan van Riebeeck had established a Dutch settlement at the Cape of Good Hope in 1652, the number of Dutch vessels sailing around the Cape increased (Forrest, 2006:248; Staniland, 1999:133). During the European 'Age of Discovery', South Africa's maritime traffic was dominated by the fleets of the Dutch East India Company and the East India Companies of the English, Portuguese, French and Danish (Werz, 1993:22).. Numerous shipwrecks were left along the trade route (Forrest, 2006: 247).

The British overpowered the Dutch at the Cape towards the end of the 18th century. The first British occupation of the Cape occurred in 1795 (Staniland, 1999:133), and the second in 1806 (Forrest, 2006:248). As a result, the number of British vessels wrecked along the Cape coast increased, although vessels from Germany, Portugal, Sweden, France and Denmark still used the route, which means a number of these vessels were also wrecked in the area (Forrest, 2006:248). During the late 19th century, the discovery of both diamonds and gold in the interior of the country led to an increase of merchant ships along the eastern coast, seeing that many viewed this as a chance to accumulate wealth (Forrest, 2006:249). From 1899 until 1902, the Anglo-Boer War raged between the two interior Boer republics and Britain. This caused an increase in troops, supply, and other naval ships frequenting the country (Forrest, 2006:249). The same applies for both World War I and World War II, seeing that the country was a self-governing entity under the British crown and various warships visited the country during the wars (Forrest, 2006:249). Staniland (1999:133) notes that during World War II as many as 133 merchant ships were sunk off the South African coast.

When the Suez Canal was opened in 1869, the trade route between Europe and Asia was shortened considerably. This led to a decrease in ships rounding the Cape for trading purposes,

except those vessels that were too heavy and with too large a size to pass through the Canal (Baraniuk, 2016:1). The closing of the Suez Canal for various reasons, first in 1956 and again in 1967, led to another increase in ships sailing around the Cape to the East (Forrest, 2006:249; Suez Canal Authority, 2017:1). For the period between 1552 and 1914, approximately 1 400 shipwrecks were recorded (Werz, 1993:20). The *South African Shipping News and Fishing Industry Review* of 1981 lists 491 maritime casualties off the coast of South Africa for the period from 1965 to November 1981 alone (Anon, 1981:17).

This proves that even after the formation of South Africa as a unitary and independent state, and after the wars, as well as the diamond and gold rushes, the shipping route around the Cape and the rest of the coastline was still used frequently. However, in 2014 Egypt decided to expand the Suez Canal through an $8 billion project. The project was completed around August 2015 and implied that larger vessels were able to pass through the Canal with ease (Malsin, 2015:1). However, even after the expected decrease in vessels rounding the Cape, Baraniuk (2016:1) states that due to low oil prices, several ships consciously chose to bypass the Canal and rather chose the route around the Cape. This took place in the period from October to December 2015.

From the background given above, it is safe to assume that most of the shipwrecks off the South African coast occurred during the 19th century. The majority of those were British (Staniland, 1999:133), although in total, 38 nationalities are represented in shipwrecks (Sharfman et al., 2012:91; Boshoff, 2013:6794; Gribble & Sharfman, 2013:6802). Therefore, the shipwrecks are not only of national, but also of international importance (Werz, 1993:20). The ships had various usages during different periods: trading, transporting people, establishing colonies, transporting goods for trade to the East, and during the wars around the world (Werz, 1993:23).

The wrecking of ships off the South African coast can be attributed to a wide range of factors. The major reason is the rugged coastline and unfavourable weather conditions (Sharfman et al., 2012:88). During summer, the Cape coast is often pounded with gale force south-easterly winds, whilst in winter north-westerly storms ravage the area and often waves of 10 m or more are formed along the coast (Sharfman et al., 2012:89). Two events are most notorious in the history of the aptly named Cape of Storms: During the "Great Gale of May 1737" and the "Great

Gale of 1865", as many as nine and more than ten ships, respectively, ran aground (Sharfman et al., 2012:89).

The Cape is not the only South African area experiencing regular intemperate weather and unfavourable sea conditions. The east and west coasts are battered by storms as well (Sharfman et al., 2012:89). At approximately 100 km from the Eastern Cape and KwaZulu-Natal shoreline a rise in the continental shelf causes excessively high, so-called "rogue" waves – some of which reach between 20 to 30 m in height – that unexpectedly appear in calm waters (Sharfman et al., 2012:89).

Other contributing factors include poor harbour facilities and limited navigational markers. For example, a shallow sand bar across the entrance at the Port of Durban in KwaZulu-Natal made it extremely hazardous for ships to enter (Sharfman et al., 2012:90). This is still a problem at the Port of Durban. This factor was confirmed during a storm early in October 2017 when a few ships ran aground within the harbour and one ship yet again was stuck on a sandbank (Wicks, 2017:1). Very few lighthouses or other navigational markers were in use during the increased maritime traffic period along the coast. In the early 1900s, ships circumnavigating Cape Point en route to Cape Town often came dangerously close to the shoreline and in some cases, were wrecked (Sharfman et al., 2012:90). One of these was the *Kakapo* that ran aground during a storm on its maiden voyage on 25 May 1900 on the Kommetjie-Noordhoek beach, when the crew mistook Chapmans Peak for Cape Point (Walker, 2010:113; Athiros & Gribble, 2014:136-137). The remains of the wreck are clear from the photo presented in Figure 2 below.

Figure 2: The *Kakapo* shipwreck far onto the shore as seen on 13 February 2016.

Source: De Wet, 2106a.

Other factors that caused shipwrecks include their being over-loaded or unseaworthy when sent out to sail (Sharfman et al., 2012:89).

Due to the reasons mentioned above, certain areas along the South African coast were more notorious than others for causing shipwrecks. These include Table Bay (with 450 wrecks of which Robben Island has 68), Cape Agulhas, Algoa Bay, and Durban, with the rest of the wrecks scattered along the coastline from the Namibian border to the border with Mozambique (Sharfman et al., 2012:90). Seeing that such a large number of ships ran into trouble along the South African coast, lighthouses were erected at various points to guide any vessels circumnavigating the southern tip of Africa safely (SAT, 2015:2). The number of wrecks declined during the 20th century due to the lighthouses and improved safety standards (Staniland, 1999:133).

South Africa has an estimated 2 200 to 3 500 shipwrecks strewn along its approximately 3 000-km coastline (Sharfman et al., 2012:90; Boshoff, 2013:6794; Blandy, 2009:1; SAT, 2015:1; Govender, 2016:1; Davies, 2003:2; Athiros & Gribble, 2014:4; Athiros & Gribble, 2015:4). This amounts to effectively *one* shipwreck for *each* kilometre, which emphasises the importance of conserving these valuable resources. Although most of the shipwrecks occurred during the 19th century, those that have interested archaeologists and salvors were dating from the 16th to the 18th centuries (Forrest, 2006:249). Discovering these wrecks and their artefacts, "captured and fed the public imagination, reinforcing the perception that shipwrecks were no less than a source of treasure, to be recovered by those daring and intrepid enough to go out and help themselves" (Gribble & Sharfman, 2013:6803).

Before the 20th century, the locating and recovering of wrecks, or more accurately their cargo, was motivated mostly by its economic value. Only during the 20th century did scholarly interests in wrecks peak and the true value was realised, in terms of cultural heritage and history (Boshoff, 2013:6794). The 20th century also saw the issue of historical shipwrecks gain public interest with the formation of the Atlantic Underwater Club in 1953 in Cape Town, and thereafter a publication named *Shipwrecks on and off the coasts of Southern Africa* (referred to in Boshoff, 2013:6795). In addition, articles began appearing in the media, for example in the *Cape Argus*

in July 1956, which estimated that £30 million worth of cargo was sunk inside the wrecks off Table Bay (Boshoff, 2013:6795).

Such reports were bound to spark interest from the public, salvors and treasure hunters alike. It also placed pressure on archaeologists to ensure these heritage objects did not disappear completely. A treasure-hunting fever plagued the 20th century. The focus has since shifted rather to preserve the cultural heritage which these sites contain (SAT, 2015:2; Govender, 2016:1). The issue about shipwrecks being found by salvors and treasure hunters is one of ownership tax, which should be paid for the treasure as well as the preservation of these wrecks (Govender, 2016:1).

Before salvage and treasure hunting regulations can be discussed, it is important to understand how the maritime zones along the South African coast are divided and how this division impacts the protection of shipwrecks.

3.2 Maritime boundaries of South Africa

South African maritime boundaries are, apart from those between the Prince Edward and Crozet Islands (French territory) drawn in the Indian Ocean, fairly uncomplicated (Wonnacott, 2001:1). The boundaries are essentially only for practical purposes and although agreed upon, not formally established by either South Africa, France, Mozambique, or Namibia (Wonnacott, 2001:8).

The Maritime Zones Act (15 of 1994) (hereafter: the MZA) defines the various zones or boundaries that apply to the South African maritime area, as well as the jurisdiction within such zones. Firstly, section 2 of the MZA defines a baseline starting at the low water line* with its outer limits as the outermost harbour works (Republic of South Africa, 1994:3). A harbour forms part of the internal waters of South Africa as defined in section 3 of the same Act. In this section the internal waters are defined as all waters inland of the baseline and includes all harbours. The Act states further that any South African law shall be applicable and enforceable within the

internal waters (Republic of South Africa, 1994:3-4). Internal waters, therefore, apart from the waters within the perimeter of any harbour or port of South Africa, entail any dam, lake, natural spring, river, stream or canals within the borders of the country.

Figure 3 below provides an illustrative aid to help understand the different zones within the country's maritime environment.
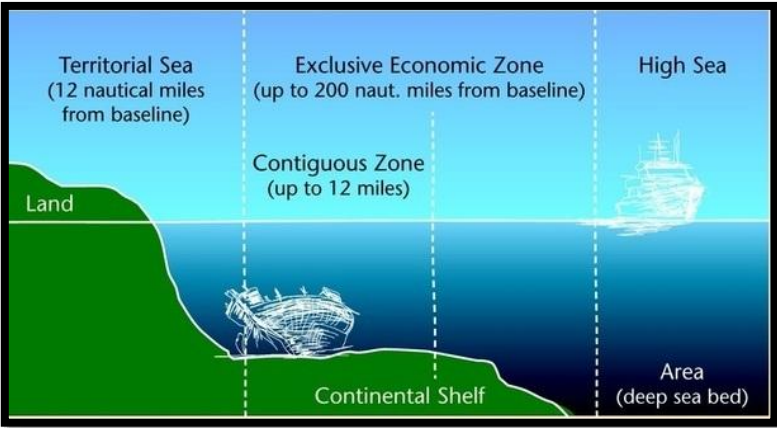
Figure 3: Maritime zones.

Source: Quora, 2016:2.

Territorial waters: This is the first of South Africa's maritime zones, as defined by section 4 of the MZA, namely the sea stretching 12 nautical miles from the baseline. It further states that any South African law shall apply and be enforceable within this area (Republic of South Africa, 1994:4). Within this area, certain actions are deemed to be illegal in terms of section 6 of the Marine Traffic Act (2 of 1981) (MTA), which includes the sinking or wrecking of any ship without permission from the Minister of Transport, and abandoning any ship which is not in distress (Republic of South Africa, 1981:5).

Contiguous zone: This is the next demarcated area, which is defined in section 5 of the MZA as the sea exceeding the territorial waters up to 24 nautical miles from the baseline. Within this area the country has the right to exercise all powers necessary to comply with any "fiscal, customs, emigration, immigration, or sanitary law". Contravention of these laws within the contiguous zone will be deemed to have been perpetrated under the jurisdiction of the South African legal system and will be punishable by a South African court of law (Republic of South

Africa, 1994:4). This zone was declared in 1994 and, in conjunction, a maritime cultural zone was demarcated as well (Dromgoole, 2006:xxxiii). The maritime cultural zone entails the area of the contiguous zone as defined by sections 5 and 6 of the MZA (Republic of South Africa, 1994:4). This area will enjoy the same rights and protections that apply to archaeological or historical objects in the territorial waters, and any South African law shall be applicable and enforceable.

Exclusive economic zone: This demarcated area stretches from the end of the territorial waters up to 200 nautical miles from the baseline. Within this area, any South African law is applicable and enforceable and would have the same rights and powers as the area within the territorial waters, as stated in section 7 of the MZA (Republic of South Africa, 1994:4). The United Nations Convention on the Law of the Sea (UNCLOS) states in article 56 that within this zone, the State, in this case South Africa, has sovereign* rights to exploit the maritime resources (UN, 1982:43). In other words, South Africa has first option on all resources within this area, including, but not limited to, fishing, oil rigging, or the building of any structures.

The continental shelf: The last zone covered under this topic is included in section 8 of the MZA. This section endorses the definition of "continental shelf" in article 76 of the United Nations Convention on the Law of the Sea (UNCLOS), which is discussed in detail in chapter 2 of the present study.

To summarise: The baseline includes all internal waters up to the low-water mark and the outermost edges of any harbour or port. The territorial waters stretch 12 nautical miles into the sea from the baseline. The contiguous and maritime cultural zones coexist within the area beyond 12 nautical miles up to 24 nautical miles from the baseline, thus 12 nautical miles further into the sea from the outer limits of the territorial waters. The continental shelf comprises the area beyond the edge of the territorial waters up to 200 nautical miles from the baseline. Finally, the exclusive economic zone may comprise of the contiguous zone and the continental shelf. Up to the edge of the exclusive economic zone, these demarcated areas are governable by South Africa, which means that any South African law will be applicable and enforceable. The outermost 150 nautical miles of the continental shelf is only subjected to these provisions in certain instances. Thereafter, the rest of the ocean further from the coast is known as the High Seas and the seabed is known as the Area.

It stands to reason that wrecks within these zones are under South African law, thus deemed to be within the jurisdiction of the South African state (not another state). Therefore, activities involving these wrecks must adhere to South African legislation. However, questions remain about the ownership of such wrecks. In other words, to whom does any specific wreck within these zones really belong – the South African state, or a private entity such as a company or an individual? This raises a further question: Which entities have jurisdiction over these wrecks and who is tasked with prosecution in cases where South African law is contravened?

3.3 Ownership and jurisdiction of wrecks within South African waters

Previously the Roman-Dutch principle of *res nullius** (when property has no owner) applied to ownership of wrecks (Govender, 2016:1). The principle *occupatio** was practised, whereby the person who physically holds the materials of such a wreck is allowed to claim ownership (Forrest, 2006:259). For a wreck to be claimed by *occupatio*,* it must be proven that this structure has indeed been abandoned (*res derelicta**) by the owner and, therefore, may be considered *res nullius** (Govender, 2016:1 & Staniland, 1999:140). The original owners retain the rights, and can reclaim their property, however, the longer the period without reclaim, and the less likely real ownership could be re-established (Govender, 2016:1). Forrest (2006:259) notes that the National Monuments Council (or NMC, the predecessor of SAHRA) viewed wrecks, being archaeological resources, as the property of the state. The National Monuments Act (28 of 1969) (NMA), however, did not confirm that such wrecks would not be subjected to *res nullius** and thereby *occupatio*,* which instigated a dispute between salvors and the state (Forrest, 2006:259).

Due to this mentioned deficiency in the NMA, the NHRA, declared *all* archaeological resources as the property of the state. Nevertheless, the latter Act is silent on the question whether ownership asserted under previous legislations is thereby terminated (Forrest, 2006:260). The general assumption is that the legislation applies to *all* wrecks that exceed 60 years, as the Act implies, but does not stipulate if previous ownership is rescinded, which leaves it open to interpretation (Forrest, 2006:260 & Dromgoole, 2006:xxx). The NHRA does, however, specify

that all abandoned wrecks are the property of the state, which thus excludes the principle of ownership by *occupatio** (Dromgoole, 2006:xxxii).

Within South African waters lies a vast collection of foreign vessels such as warships, which can be assumed as the property of the state in whose navy the vessel served, also referred to as the Flag State. The NHRA and other legislation is, however, silent on ownership of such vessels as well (Forrest, 2006:260).

According to section 35(2) of the NHRA, any archaeological or palaeontological material and meteorite are firstly the property of the state. Each of these types of heritage resources is considered to be in the care of the relevant heritage authority responsible for that specific type. The relevant heritage authority must manage and conserve this resource on behalf of the state (Republic of South Africa, 1999:58).

Regarding private ownership of archaeological or palaeontological material and meteorites, section 35(7) provides guidance. With the previous provisions outlined in the NMA, permits were issued for the retrieval of the mentioned items. Section 35 (7) of the NHRA applies to any private individual (not a public entity or private institution as decided by a heritage authority), who possesses any such material or objects and did not have the prescribed permit. The mentioned section provides that within two years of implementing the Act, the said private individual must declare a list of these items to the responsible heritage authority, be it provincial or national (Republic of South Africa, 1999:60; Forrest, 2006:263). This will enable the state to compile a full inventory of these resources as the permits issued will account for the rest of the retrieved items (Forrest, 2006:264).

Section 35(8) notes that these declared objects will remain the property of the owners, who declared the objects, for their lifetime and that a successor must be named to take over ownership when the prior owner passes away (Republic of South Africa, 1999:60). SAHRA encourages owners of these items to bequeath their collections to a recognised and suitable public entity (Forrest, 2006:264).

Should an individual not declare such items, it is assumed that these were recovered after implementing the Act and, therefore, recovered illegally (Republic of South Africa, 1999:60). Such an offence is punishable by "a fine or imprisonment for a period not exceeding 3 months or to both such fine and imprisonment" as stipulated in the schedule of the Act (Republic of South Africa, 1999:88).

The question of ownership regarding these mentioned items is not the only issue that must be cleared up before the conservation of these resources can be understood fully. This implies a further question: Who has the power to apply South African laws in the case of maritime claims? In other words, which entity can exercise admiralty jurisdiction? Only the High Court of South Africa, situated in each of the nine provinces, is capable of exercising admiralty jurisdiction (Shepstone & Wylie Maritime Department, s.a.:2).

Furthermore, in terms of admiralty jurisdiction, any South African law will be over-arching. The High Court may, therefore, apply the law which the parties concerned choose (Shepstone & Wylie Maritime Department, s.a.:4). The 'best evidence' approach is preferred within South African courts. This means that the affidavit must be deposed by someone with factual knowledge of the case. The Admiralty Court, on the other hand, recognises international principles and acts accordingly (Shepstone & Wylie Maritime Department, s.a.:14).

The Admiralty Jurisdiction Regulation Act (105 of 1983) (AJRA) includes historical wrecks as part of a maritime claim, which implies that disputes about ownership of wrecks reside under the jurisdiction of the Admiralty Court (Staniland, 1999:135). It should, however, first be determined whether the case resides under the Admiralty Court's predecessor, the Colonial Court of Admiralty. If this is the case, the AJRA stipulates that the English law as of 1 November 1983 applies within the court, except when a South African statute governs the matter (Staniland, 1999:135-6). Staniland (1999:136) notes that in certain cases, more than a single law can apply, which involves more than one government department. In such a case the common law applies, seeing that the interrelation of different laws is not always clear.

The Legal Succession to the South African Transport Services Act (9 of 1989) (LSSATSA) focuses on the National Ports Authority of South Africa, or NPA, (as successor to Portnet and

the SA Transport Services). The NPA, as a division of Transnet and established under the National Ports Act (12 of 2005), is appointed by LSSATSA as the authority to have jurisdiction over harbours within South Africa. This jurisdiction implies that the NPA has the authority to destroy, remove or raise any wrecked ship (albeit stranded, sunk or abandoned) in a South African harbour, or command its owner to do so. This, however, still must be done with the permission of the Port Captain of the specific harbour or port (Werz, 2006:6).

The LSSATSA also establishes a 'company' which has the power to "raise, remove or destroy any sunken, stranded or abandoned ship or wreck within the area owned by the Company" and also states that the cost of such act can be claimed from the owner of the ship or wreck. If the owner does not pay the total costs, the ship or cargo can be sold to cover the costs. This company is authorised to exercise these rights over historical or culturally significant wrecks as well (Staniland, 1999:139).

A Controller of Customs and Excise is established under the Customs and Excise Act (91 of 1964) (CEA). Such a Controller must be informed of anyone who owns a wreck, and may declare the removal or alteration of any wreck without the permission of the Controller unlawful, unless it is to preserve this item (Werz, 2006:6). Any wreck found or brought into the country, is thus considered firstly the property of the Controller, who at his/her discretion may dispose of the item (Staniland, 1999:137).

The Controller may also sell any wreck and cargo on it. The proceeds of such sale will be used to pay any duty and other expenses the wreck might have incurred. If, after all expenses have been paid, there are surplus funds, these may be paid to the owner if the Controller receives proof of ownership within two years of the sale (Staniland, 1999:137). An abandoned wreck is also considered to be the property of the Controller according to the Act. Therefore, individuals wanting to search for a wreck must first obtain permission from the Controller (Werz, 2006:6).

According to the Merchant Shipping Act (57 of 1951) (hereafter: MSA), as amended, the LSSATSA (both analysed by Werz, 2006:6), and the CEA (Forrest, 2006:259), there is no age limitation on wrecks, and the mentioned Acts cover both new and old wrecks. The following section on legislation and practice for wrecks deals with salvaging.

3.4 Salvage practices and legislation

Throughout the years, salvage activities and expeditions led to the idea that shipwrecks are "exploitable commercial resources" and such activities did not differentiate between old or new shipwrecks (Gribble & Sharfman, 2013:6802). Salvaging and the subsequent treasure hunting phases from the 17th to 19th centuries established the view that shipwrecks are sources of treasure (Gribble & Sharfman, 2013:6803). This led to an immense problem of uncontrolled and unregulated excavation of valuable artefacts on wrecks. Only during the late 1970s, the first perception emerged that viewed wrecks as valuable heritage resources, which provide priceless information on explaining the events of the past (Gribble & Sharfman, 2013:6802).

To salvage a wreck, its location must be either known, or it must be searched for. This can only be done after being issued a licence from the Controller of Customs and Excise and with approval of the Department of Finance. The licence is valid for one year only. There are no fees for the application. Only proof of diving competence is required, along with a surety bond of R2 000.00 as well as a report on and inventory for the project. If any item is salvaged the Controller should be paid 15% royalties on all items of value, which will increase if the items are sold or exported (Werz, 2006:6; Staniland, 1999:136). Should any specifications of the CEA be contravened, the Controller has the right to withdraw or refuse to renew the applicant's license (Staniland, 1999:136).

Maritime liens are extremely important within Admiralty law, because a maritime lien surpasses ownership (Shepstone & Wylie Maritime Department, s.a.:26). Firstly, 'lien*' means "a charge upon real or personal property for the satisfaction of some debt or duty ordinarily arising by operation of law" (Merriam-Webster, 2017:1). Secondly, such a provision can be defined as "a lien arising under maritime law against a ship or its cargo (as for services or supplies tendered or for damages caused by a collision) which may be enforced by a court-ordered seizure of the property in order to satisfy the obligation" (Merriam-Webster, 2017:1).

Seeing that the AJRA does not specifically designate a maritime lien it can be assumed that the maritime lien of 1890, regulating salvage, will apply within the Admiralty Court (Shepstone & Wylie Maritime Department, s.a.:26). The courts of South Africa have jurisdiction over any salvage claims because of specifications outlined in the AJRA (Shepstone & Wylie Maritime Department, s.a.:43). The Wreck and Salvage Act (94 of 1996) (WSA), which incorporates the Salvage Convention of 1989, regulates salvage within South Africa. Where it is silent on a matter, the English law of salvage, as of 1 November 1983, would apply. The WSA specifies that parties involved in salvaging enter into a contractual agreement, named Lloyd's Open Forum of Salvage Agreement (Shepstone & Wylie Maritime Department, s.a.:43).

The WSA states that the Salvage Convention applies within South African borders (Republic of South Africa, 1996:2). According to the website of the International Maritime Organisation, the organisation responsible for this Convention, South Africa, has, however, to date not ratified this Convention (International Maritime Organisation (IMO), 2017a). It should be mentioned, however, that the law of salvage does not apply to any historical shipwreck within South Africa, as the NHRA declares such material as property of the state (SAHRA, 2017a:3).

The WSA explains the procedure which a salvage officer (appointed by section 8) must follow when a ship is wrecked, stranded or in distress. This would include gathering information on the ships' name, its owners, the owners of the cargo, where the ship began its journey, cause for being in distress, its condition – wrecked or stranded, and additional information the officer deems necessary (Republic of South Africa, 1996:8). A salvage officer is also tasked with monitoring the salvaging or looting of any shipwreck and may launch investigations towards such allegations (Staniland, 1999:140). The Minister of Transport may also in such a case, according to section 18 of the Act, order the owner of the ship to have it moved to a designated area, or removed completely, or when an owner does not comply or come forward, sell such a wreck and use the proceeds to compensate for expenses incurred (Republic of South Africa, 1996:10-12). Werz (2006:7) notes that the CEA does not differentiate between new and older wrecks, but on the licence application the applicant is referred to SAHRA for older permits falling within the jurisdiction of the NHRA.

In light of the above-mentioned regulations, the management of wrecks is extremely fragmented. SAHRA is responsible for all resources of national importance and helps Provincial

Heritage Resources Authorities (PHRAs) manage provincial sites. However, any PHRA or local authority does not have jurisdiction over wrecks outside the mentioned baseline. Any such wreck encountered outside the inland waters, and within the territorial sea and contiguous zone, resorts back under SAHRA's jurisdiction (Forrest, 2006:256). Werz (2006:6) states that the management, salvage rights, protection, and removal of wrecks resides under the jurisdiction of different authorities depending on certain conditions such as location and age. Such authorities may allocate these powers to other organisations or individuals, especially for salvaging.

Salvage activities mostly involve wrecks with cargo of value (Sharfman et al., 2012:94). When a ship with valuable cargo is discovered, the sand layer that help protects it is removed. In certain instances, explosives are used to reach the bay where the cargo is stored, thereby damaging or destroying the hull irreparably (Werz, 1993:24). This means that the contextualisation of the wreck becomes impossible: ascertaining its surroundings and the circumstances that brought it to this site. As a result, both context and heritage material are destroyed (Werz, 1993:24).

3.5 Conservation of shipwrecks as heritage resources under South African jurisdiction

South African waters are filled with shipwrecks across periods and of different types. Therefore, it is crucial to protect these heritage resources (Werz, 1993:24). Over time, Government has set out various legislative measures, regulations and principles to regulate the management of archaeological sites (Werz, 2006:5). These measures are relevant for archaeological resources both for management and by providing conservation principles. However, the rolling out of these measures occurred at a slow rate (Sharfman et al., 2012:93). Thus, the conservation of heritage resources in South Africa has remained fragmented.

3.5.1 Development of legislation

The first form of a regulation to protect wrecks or manage salvaging operations, dates from 1884. This regulation was limited to the Table Bay area only, after salvors got involved in disagreements about their rights to wrecks. A notice issued in 1894 stated that prior permission

should be obtained from the government before salvaging activities could be performed (Forrest, 2006:251).

Several decades later, John Wiley of Cape Town asked Parliament on 17 May 1977 for a form of official protection for shipwrecks (Forrest, 2006:251). This request was made by a Member of Parliament 67 years after the South African state had come into existence. This fact indicates that over many decades the state had neglected to implement an efficient system that protected shipwrecks around its coasts. This neglect indicates a trend in South Africa, as in most countries of the world: the awareness of the intrinsic value of heritage, including maritime objects, began gaining momentum only in the second half of the 20th century.

In 1969, the NMA included the protection of archaeological sites. It did not specifically state that shipwrecks should be protected. Although theoretically shipwrecks were protected by the 1969 legislation, for decades this protection was not regulated or monitored properly (Werz, 1993:25). This can be attributed to the fact that archaeologists with diving qualifications, let alone maritime archaeologists, were limited. In certain cases, treasure hunters did work with archaeologists on projects. Recovered artefacts were rarely studied as such, unless they had to be identified for their monetary value (Sharfman et al., 2012:93). Research in archival documents involving shipwrecks, focused on locating and assessing the cargoes of these structures to establish their commercial value (Sharfman et al., 2012:94).

In 1971, the South African Museums Association (SAMA) held a meeting in the Western Cape to discuss the looting of shipwrecks (Boshoff, 2013:6795-6796). Recommendations were made at this meeting to help manage and protect wrecks along the South African coast. The recommendations included:

- Wrecks older than 100 years should become state property.
- Wrecks should be regarded as archaeological resources and be protected as such.
- The NMC should handle the permit applications.
- The South African Police Services (SAPS) should be involved in the prevention of looting.
- More projects should be initiated to raise awareness.

- Funding should be made available to train and employ UCH specialists in government institutions.
- No government institution should purchase underwater historical artefacts from dealers (Boshoff, 2013:6796).

Pressure increased from the public to conserve wrecks due to the widely-reported looting of the *Sacramento* wreck in 1977. The Natal Museum decided to launch a project to locate early Portuguese wrecks which would enable them to protect these sites (Boshoff, 2013:6796). They managed to find the *Saõ Joao* and the *Saõ Bento*, but unfortunately the project was not followed through (Boshoff, 2013:6796).

A change only came with the amendment of the NMA in 1979 to include shipwrecks. This took place after increased interest and pressure from the public during the 1970s (Sharfman et al., 2012:94). This change in legislation meant that wrecks older than 80 years, instead of 50 years as had been the case before, were afforded the same protection as national monuments on land and considered to be of "aesthetic, historical or scientific value" (Sharfman et al., 2012:95; Gribble & Sharfman, 2013:6804). As a result, more shipwrecks were protected (Werz, 1993:25). The NMA did not, however, refer to any other form of UCH.

In terms of heritage conservation, this amendment was not as successful. In theory, shipwrecks were declared officially as protected sites. However, in practice, permits were still issued by the NMC to salvagers, who returned only a limited amount of excavated material to museums (Sharfman et al., 2012:95 & Gribble et al., 2013:6804). Staniland (1999:138) emphasises that even wrecks that were not declared should be protected under the same regulations as those that were.

Despite its shortcomings, this legislative amendment was the first to protect shipwreck sites. Therefore, its significance was recognised (Gribble & Sharfman, 2013:6804). The view of the NMC was that these shipwrecks belonged to the heritage of their Flag States and not of South Africa. Therefore, these wrecks were deemed to be without value to the country. Spending on the protection or research of these sites was regarded as illogical and unnecessary (Sharfman

et al., 2012:95, Gribble & Sharfman, 2013:6805). This mentality was shared with other government departments. Although numerous archaeologists and historians opposed the idea, it took years to change (Sharfman et al., 2012:95). As a result, only 23 wrecks had been declared as national monuments by 1984. Furthermore, since it was not stipulated specifically, the cargo of such shipwrecks was not protected and could still be looted (Forrest, 2006:251).

Archaeologists had no access to sites underwater, since there were apparently no archaeological divers in South Africa. Divers occasionally involved themselves in archaeological projects, mainly to identify and value the discovered artefacts (Gribble & Sharfman, 2013:6803). Due to this situation, researchers could only base their findings on what salvagers or divers told them about these sites, which meant that research was extremely unreliable (Sharfman et al., 2012:95). Divers were often in a hurry to remove loot from the wrecks, and in the process often destroyed valuable 'contextual' information (Forrest, 2006:252). The NMC at first was wary of getting involved in the protection of underwater heritage, seeing that there was no real policy or legislation to guide the activities (Gribble & Sharfman, 2013:6804). Even the second amendment to the NMA, declaring any wreck older than 100 years to be protected, still did not prohibit salvaging (Forrest, 2006:252).

The awareness of shipwrecks' heritage value took root gradually. A paper by the historian at the Port Elizabeth Museum in the 1970s took the view that shipwrecks were heritage resources. This was in response to commercial salvors, who opposed the idea of wrecks considered as valuable historical artefacts. At this stage, wrecks became a highly-contested commodity (Gribble & Sharfman, 2013:6805). Salvors argued that archaeologists were unfamiliar with the conditions involved in excavating and diving to the shipwrecks underwater, which implied that salvors should rather undertake these tasks (Gribble & Sharfman, 2013:6805). A scholarly approach began emerging in the late 1980s and early 1990s, when the University of Cape Town, the National Monuments Council (NMC), and the South African Maritime Museum all appointed maritime archaeologists (Sharfman et al., 2012:95 & Forrest, 2006:250). At this stage, the Port Elizabeth Museum appointed a curator of shipwreck material (Boshoff, 2013:6797). This was also the period when the South African Historical Shipwreck Society was established in the 1980s (Boshoff, 2013:6797).

Before the above-mentioned appointments were made, salvors took advantage of South Africa's limited number of qualified maritime archaeologists. The salvors persuaded archaeologists in the country that these sites had no contextual information left; therefore, salvaging them would not harm the heritage. They also managed to convince museums that they should work with these salvors to rescue the artefacts forthwith before they deteriorated underwater, or were retrieved by treasure hunters and sold (Sharfman et al., 2012:99; Gribble & Sharfman, 2013:6805). The arguments of the salvors were flawed, seeing that the conditions underwater, including the lack of oxygen, sediment formation and the stable temperatures, actually enhanced the conservation of these artefacts (Werz, 1993:21). In reality, such perfect conditions for conservation facilitate preservation of sensitive materials such as textiles, leather, food, and even medicine (Werz, 1993:22).

After the 1979 amendment of the NMA, a committee was appointed to investigate ways in which shipwrecks and their contents could be included in future legislation. This committee, however, argued that wrecks could not be granted the same protection as national monuments logistically and had no value to the public (Gribble & Sharfman. 2013:6806). Boshoff (2013:6797) notes that in 1981 the legislation was altered again to protect wrecks older than 100 years. The NMC during this time issued salvaging permits for sites that were dispersed widely and unidentifiable, on condition that the correct techniques were followed and 50% of the artefacts donated to a recognised institution (Boshoff, 2013:6797). A further amendment to the NMA in 1989 provided for the protection of wrecks older than 50 years, effectively outlawing salvaging without a permit (Forrest, 2006:252).

Only a few items were donated to museums by the treasure hunters. As a result currently, there is a lack of historical artefacts from shipwrecks in the few museums that focus on maritime history (Sharfman et al., 2012:93-94). The NMC, in 1986, posited the idea of an 'amnesty programme' where divers were expected to declare any illegally retrieved objects to authorities within a certain time frame. Such a timely declaration would not result in prosecution. However, when the time to declare the objects expired, anyone who still possesses such objects would be prosecuted (Boshoff, 2013:6797-6798). This meant that from then on, a definite catalogue could be compiled of objects in South Africa, both in private and state possession, which provided a broader view of objects from maritime heritage in this country (Boshoff, 2013:6798).

In 1988, during a symposium, it became clear that instead of a method for conservation and interpretation, maritime archaeology was still regarded as a method that divers used for gaining access to shipwrecks (Boshoff, 2013:6800). Under the NMA, it was illegal to salvage or loot shipwrecks without a permit, and offenders could be prosecuted. Such prosecution only occurred once, when divers removed the propeller of the *Sybille* wreck near Lamberts Bay. The *HMS Sybille* struck a reef on 16 January 1901, and after numerous attempts to salvage the wreck, she eventually broke up in pieces (Athiros & Gribble, 2014:142-149). Most of the fittings and the ship's guns were removed in the days following the disaster (Athiros & Gribble, 2014:147). The state, given its limited number of experts and researchers in the field, lost the case after failing to date the propeller accurately and prove that it was taken from the *Sybille* (Forrest, 2006:252-253).

In 1991, a project was launched where divers and researchers cooperated with a maritime archaeologist on a shipwreck. The public was invited to participate (Werz, 1993:25), with the South African Navy as support (Boshoff, 2013:6799). In 1992, the South African Cultural History Museum (SACHM) introduced stricter permit criteria for improved regulations that guided the salvage of shipwrecks in South Africa (Boshoff, 2013:6799). The first, purely archaeological, project was, however, launched in 1993 with the survey of the *Brunswick*, which had been wrecked in Simons Bay in 1805 (Sharfman et al., 2012:94; Boshoff, 2013:6799). During the 1990s, the NMC contracted Lynn Harris, a South African-American expert in maritime archaeology, to compile a more comprehensive database listing shipwrecks along the South African coast (Boshoff, 2013:6799).

The 'Save our Shipwrecks Trust' was formed in 1994 by a group of archaeologists and individuals from the business sector in Cape Town. This Trust presented archaeological courses developed by the Nautical Archaeology Society (NAS), which had been introduced to the South African public and interested parties by Lynn Harris. The Trust, however, was dissolved after a few years following the death of one of the founding members (Boshoff, 2013:6799). A few years later, the South African Institute of Maritime Archaeology (SAIMA) was founded in Simons Bay in 1996 by archaeologist Bruno Werz (Boshoff, 2013:6799). This institution contributed to the protection of, and public interest in, shipwrecks.

From the information above, it is evident that before 1994, the protection of underwater cultural heritage (UCH) was not a priority for the South African state and that the legislative measures in the NMA were not sufficient to protect shipwrecks against looting by treasure hunters. The activities mentioned in this sub-section can nevertheless be regarded as steps that contributed to the development and implementation of the current legislation, which is discussed in the following sub-section.

3.5.2 Current legislative framework

After 1994, impact assessments were made compulsory before any development could take place. Since that time, archaeological consulting firms have become more prominent. In the period since 1990, a new regime was introduced for environmental management. This led to the adoption of the National Environmental Management Act, Act 107 of 1998 (NEMA) and its associated regulations for environmental impact assessment (EIA). It became mandatory to perform an EIA, which included assessing the heritage value of the site intended for development (Sharfman et al., 2012:97). The new heritage legislation in the form of the NHRA needed to address various previously neglected parts of heritage, including that of UCH. However, the legislation focused mainly on shipwrecks as the 'only' underwater cultural heritage worth conserving. The subsequent shift from 'just wrecks' to the broader all-inclusive UCH, discussed in more detail in chapter 1, occurred during a period when international perspectives on the subject were changed and found expression in various policies and conventions (Sharfman et al., 2012:98).

After the introduction of the NHRA in 1999 and its implementation in 2000, all wrecks older than 60 years were granted protection as a heritage resource, and unless ownership could be proven, it became state property to be managed by state entities (Sharfman et al., 2012:98). From then on, wrecks were considered as part of 'archaeological capital' and not a resource on its own. Therefore, it became necessary to formulate regulations for the issuing of permits that regulate any work to be done on wreck sites (Sharfman et al., 2012:98). The legislation does not specifically rule out commercial exploitation of shipwrecks. However, the status of a shipwreck as an archaeological asset owned by the state, does imply that such exploitation is deemed illegal without the required permission (Gribble & Sharfman, 2013:6807).

South Africa's heritage resources are known as the national estate, and according to section 3(2) of the NHRA, these include: "(*f*) archaeological and paleontological sites;", "(*i*) movable objects, including (i) objects recovered from the soil or waters of South Africa, including archaeological and paleontological objects …" (Republic of South Africa, 1999:12-14). Section 3(3) of the NHRA lists specific criteria that must be applied to determine the value of a heritage resource earmarked for inclusion in the national estate. The criteria applicable to maritime archaeology and shipwrecks are:

> (a) its importance in the community, or pattern of South Africa's history; (b) its possession of uncommon, rare, or endangered aspects of South Africa's natural or cultural heritage; (c) its potential to yield information that will contribute to an understanding of South Africa's natural or cultural heritage; (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group; and (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period … (Republic of South Africa, 1999:14).

Unless they are declared as World Heritage Sites or Grade I heritage resources of national significance, archaeological resources reside under the jurisdiction of a PHRA. However, shipwrecks located within the country's territorial waters and maritime cultural zone, in turn, reside under SAHRA's jurisdiction according to section 35(1) of the NHRA (Republic of South Africa, 1999:58). If a wreck is discovered, section 35(3) states that it should be reported immediately to the nearest heritage authority or museum, which will convey it to the responsible authority (Republic of South Africa, 1999:58). Any person who fails to do so, is liable to a fine or six months imprisonment or both as stated in section 51(1)(e) and the schedule of the NHRA (Republic of South Africa, 1999:78, 88). The NHRA stipulates in section 35(4):

> 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 paleontological site or any meteorite; (b) destroy, damage, excavate, remove from its original position, collect or own any archaeological or paleontological 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 paleontological material or object, or any meteorite; or (d) bring onto or use at an archaeological or paleontological site any excavation

equipment or any equipment which assist in the detection or recovery of metals or archaeological and paleontological material or objects, or use such equipment for the recovery of meteorites (Republic of South Africa, 1999:58).

Any person who violates this section is liable to a fine or imprisonment of three years or both a fine and imprisonment, as stated in section 51(1)(b) and the schedule of the NHRA (Republic of South Africa, 1999:78, 88). Other penalties the NHRA may enforce, include seizing equipment used to perpetrate any such illegal activities; obtaining a court order to repair or rebuild damaged heritage sites; or compensation for the repairs or rebuilding (Heritage Western Cape, s.a.:1). In this way, the NHRA protects wrecks older than 60 years and any other that SAHRA classifies as important. It is clear that various parties have to be consulted about activities at the sites of wrecks. These include SAHRA, the Minister of Transport, SAPS, the South African National Defence Force (SANDF), and the Division of Customs and Excise of the South African Revenue Service (SARS) (Govender, 2016:2).

In terms of the NHRA, a shipwreck constitutes a heritage site. An UCH site may have artefacts or debris spread over an area. Such an area may be declared as a 'site' or 'protected area' to aid in the preservation of the material associated with that wreck (Forrest, 2006:258). The NHRA specifies a protected area as "such area of land surrounding any wreck as is reasonably necessary to ensure its protection". The inclusion of the word 'land' suggests that it only refers to the seabed (or internally a riverbed), and thus not the waters above it. Vessels may still pass by above the site (Forrest, 2006:259).

Objects of cultural significance recovered from "the soil or waters of South Africa", thus also from wreck sites, are declared "heritage objects". These are protected by the NHRA and may not be exported (Forrest, 2006:263). Objects recovered before and after the NHRA came into force, may only be exported for research purposes or exhibitions with a permit, and should be returned once the project is completed (Forrest, 2006:264). Any objects being exported must still pass through a customs port as stipulated by the CEA (Forrest, 2006:265). A permit may be refused if an object is of "outstanding significance" and "national importance".

Should the above happen with a privately-owned object, the owner may request SAHRA to purchase the object. In this regard, SAHRA has three options. Firstly, the issuing of the permit may be delayed to seek another possible buyer, ideally a museum. Secondly, SAHRA may purchase the object themselves after consultation with the Minister of Finance. If a fair offer is accepted by the seller the permit to export will be refused (Forrest, 2006:265). The third option, to allow the permit to be issued, will only be used when neither of the above options have brought the desired outcome (Forrest, 2006:266). Objects recovered before 1999, may thus still be exported from the country for the antiquities market in cases where South African buyers could not be found (Forrest, 2006:266).

Legislation for provincial heritage is aligned with the NHRA. The Kwazulu-Natal Heritage Act (10 of 1997) (KZNHA) presents similar principles in section 26(6) as those in the NHRA's section 35(4) above, with the exception that these principles focus exclusively on archaeological and palaeontological sites and meteorites within the province's border. This section of the KZNHA states that any activities listed in section 26(6) (or section 35(4) in the NHRA) can only take place with a permit issued by Amafa aKwaZulu-Natali (the PHRA of Kwazulu-Natal) (KwaZulu-Natal Provincial Government, 1997:11). This Act states that a person who commits an offence in terms of its regulations (i.e. not applying for a permit, excavating or damaging an archaeological site, and using prohibited equipment for the excavation) will be charged with committing such an offence. These charges can be laid at the nearest SAPS-office while the case will be handled in the Magistrates Court in the area concerned (KwaZulu-Natal Provincial Government, 1997:15).

The Provincial Heritage Resources Regulations (24 of 2002) (ECPHRR) of the Eastern Cape include similar principles as those of the NHRA and the KZNHA listed above. The regulations establish a PHRA, which will be responsible for the heritage resources within the Eastern Cape, just as is the case with the KZNHA above (Eastern Cape Provincial Government, 2002:1).

The established PHRA of the Western Cape, Heritage Western Cape (HWC), stipulates that any individual or organisation can report a heritage-related crime, either to the nearest heritage authority, or to the SAPS. If a case is opened by the SAPS, the heritage authority must be informed of the case number to ensure the matter is followed up and addressed (Heritage Western Cape, s.a.:1; Western Cape Provincial Government, 2012:1). Heritage Western Cape

includes shipwrecks as a resource under their management and protection. They even include an Archaeological, Palaeontological and Meteorites Permit Committee (APM) (Western Cape Provincial Government, 2012:1), which is responsible for permit applications in the province.

According to the above-mentioned regulations, heritage inspectors other than SAPS and customs officials may be appointed in terms of the NHRA. These officials have the right to inspect any property or claims that a heritage-related offence has been committed (Forrest, 2006:266).

In 2000, the Iziko Museums were formed in Cape Town as a Flagship Institution in terms of the Cultural Institutions Act (119 of 1998), incorporating several existing museums under a single umbrella institution. This meant transforming the South African Maritime Museum (formed in the late 1990s) into the Iziko Maritime Centre (Boshoff, 2013:6801; Forrest, 2006:250). Iziko's main priority at the start was addressing the imbalances within the heritage industry. Iziko commenced with a project, funded by the National Lotteries, to find the *Meermin* wreck of 1766. On 9 April 1766 the *Meermin*, carrying slaves from Madagascar, ran aground near Struisbaai after the slaves took control of the ship and murdered some of its crew (Walker, 2010:72-76; Athiros & Gribble, 2015:47-49). This wreck could add to important historical information about the history of slavery in South Africa, and it was therefore an important project. The Iziko Maritime Centre was involved in a secondary project of SAHRA involving a nationwide survey of underwater heritage in general around the coast (Boshoff, 2013:6801; Gribble & Sharfman, 2013:6808). The survey project was also funded by the National Lotteries in the form of a three-year grant of R4.2 million (Forrest, 2006:255). This survey resulted in the mapping of four sites, which was supposed to be part of a pilot project for an online trial atlas around 2013 (SAHRA, 2012:4).

During the early 2000s, SAHRA began working on a Shipwreck Policy that specifically prohibited the commercial exploitation and salvage of particularly wrecks of historical significance (60 years of age or older). It also proposed guidelines on how archaeologists and researchers should conduct work at such sites. This policy, incorporating aspects of the 2001 UNESCO Convention (see ch 2, section 2.1.2.1), was accepted by SAHRA in 2005 (Sharfman et al., 2012:98; Gribble & Sharfman, 2013:6807). As expected, salvors opposed this policy strongly. Under the previous legislation of the National Monuments Act and even the early

period when the NHRA applied, permits could still be issued to salvors. Since 2005, this policy made it more difficult to issue such permits. Before this policy was implemented, the Department of Arts and Culture (hereafter: DAC) declared that it conflicted with legislation and, therefore, had it repealed (Sharfman et al., 2012:98). "In conflict with the legislation" might be stated harshly, seeing that the policy was derived from the legislation at the time. The possible, and perhaps most likely, problem might have been the lack of public consultation during the drafting period of the policy (Gribble, 2017:1).

It must be noted that the Shipwreck Policy of SAHRA also provided broad guidelines on UCH. The policy covered the following aspects:

- *in situ** preservation of shipwrecks;
- the conservation of all resources acquired from a wreck in a sustainable manner;
- the prohibition of all commercial exploitation;
- the respectful handling of any human remains found during activities at the sites of wrecks;
- the use of non-intrusive methods;
- activities to raise public awareness;
- training and education;
- limited public access to shipwreck sites; and
- comprehensive documentation of such sites (Gribble, 2005:3-4).

The DAC, alongside SAHRA, began the process of drafting their own shipwreck policy, which was completed around 2010, to be implemented after the ratification of the 2001 UNESCO Convention, as discussed under section 3.6 below (Sharfman et al., 2012:98; Gribble & Sharfman, 2013:6807). However, up to September 2017 this policy has still not been accepted. No specific reasons for this could be established in the available sources. The new policy includes the following aspects:

- the scope of UCH in the country – maritime and inland sites, types of UCH, intangible association;
- the legislative context – national laws, role of SAHRA and its MUCH-unit;
- the international context – conventions, recommendations and charters;
- the promotion of an integrated approach to conserve UCH – DAC and other role-players, museum obligations;

- the management of UCH sites – identification, assessment and grading, preservation and protection, documentation, permits and standards for activities at sites, monitoring;
- the handling of sites in danger; and
- the promotion of awareness – capacity building, education, public awareness (DAC, ca.2010:10-41).

Certain aspects of this policy require further discussion to clarify the state's obligations towards conserving UCH.

Firstly, SAHRA and its specialised unit's responsibilities are as follows:

- Establish a national policy for UCH;
- Coordinate the management, identification and documenting of UCH sites;
- Assist all authorities in managing UCH;
- Provide expert advice;
- Promote public awareness and education in UCH;
- Protect and monitor all UCH sites;
- Partner with other institutions to manage or research UCH sites;
- Assist in the implementation of projects related to UCH;
- Publish research on UCH;
- Aid in the drafting of legislation and policies for UCH (DAC, ca. 2010:16-17).

The DAC and its Minister must perform the following functions:

- Supervise the management of UCH;
- Draft a national policy and legislation for UCH;
- Fund the implementation of the policy and legislation;
- Liaise with other national and provincial governmental departments and other states (DAC, ca. 2010:20).

The Shipwreck Policy further notes the responsibilities of the SANDF, SAPS, South African Revenue Services (SARS), and of museums that have a maritime collection. This policy also explains the procedures for identifying, documenting and protecting UCH, as well as raising

awareness and facilitating public participation in UCH. Criteria and levels of grading UCH sites are also included in the policy.

A second permanent position within the Maritime and Underwater Cultural Heritage (MUCH) unit of SAHRA was created in 2005. In collaboration with the Dutch government and the African Centre for International Heritage Activities (CIE), a non-profit organisation established to promote MUCH in Africa as well as develop capacity and infrastructure in this field, the MUCH launched a skills-development programme to promote UCH. This programme used the courses of the Nautical Archaeology Society (NAS), a non-governmental organisation based in the United Kingdom, dedicated to advance education in nautical archaeology for their field schools (Boshoff, 2013:6801; Gribble & Sharfman, 2013:6808; Sharfman, 2016).

In 2011, various old projects were revisited by Iziko and SAHRA. Seal-hunting sites on Marion Island were reinvestigated. A new project was launched to help train young non-white female archaeologists (Boshoff, 2013:6801-6802). The MUCH Unit attempted to expand the concept of UCH from being limited to shipwrecks to a more inclusive view of all such heritage linked to South Africa's maritime history (SAHRA 2012:2). The Unit further provides training to law enforcement personnel enabling them to enforce the necessary principles of the NHRA (SAHRA, 2012:3).

After the establishment of SAHRA, followed by the Iziko Museums, the role of maritime archaeologists was enhanced in excavation and protection of wrecks. The Slave Wrecks Project was established to deal with wrecks such as the *Meermin* and *Saõ José* in South Africa and other projects internationally. This initiative is regarded as the beginning of a new era in South African protection of UCH (Sharfman et al., 2012:100). The field has, however, remained extremely limited. In 2012, there were only four permanent government-employed maritime archaeologists (Sharfman et al., 2012:102). In 2017, the situation has not improved significantly. There are only approximately eight people working in the UCH field in South Africa, both in the government and private sectors (Sharfman, 2017:1). The MUCH Unit of SAHRA partners with various other organisations and government entities. These are: The Centre for International Heritage Activities, the Branch Oceans and Coasts of the Department of Environmental Affairs (DEA), Iziko Museums, Ezemvelo Kwazulu-Natal Wildlife, the Robben Island Museum, the University of Cape Town, the University of Fort Hare, the University of Kwazulu-Natal, the University of South Africa, the University of the Western Cape and the Wildlife and Environment

Society of South Africa (WESSA) (SAHRA, 2012:5) and later The African Centre for Heritage Activities (ACHA).

Conservation management of heritage resources in South Africa remains fragmented between multiple government departments. Cultural heritage resources fall under the jurisdiction of the DAC. World Heritage Sites, including natural, cultural or mixed sites, fall under the jurisdiction of the DEA. Heritage specialist reports for EIAs are submitted to provincial environmental departments. On mining property, a different conservation management regime applies under the Department of Mineral Resources.

This fragmentation of conservation management also applies to UCH. Where a shipwreck is located on the shores or in the waters within the parameters of a declared National Park, according to these parks' rules, no one is allowed to remove any item from the park. This includes fauna and flora and any heritage object, which includes any part of a shipwreck. In this regard, a few formal agreements relate to UCH. Section 93(12) of the Marine Living Resources Act (18 of 1998) (MLRA) asserts: "… no person shall break up any wreck, hulk or vessel in a fishing harbour without the written consent of a fishery control officer" (Republic of South Africa, 1998:51). The DAC Draft Shipwreck Policy states that "DAC will enter into an intergovernmental agreement with the Department of Environmental Affairs (DEA) to ensure the protection and promotion of underwater cultural resources …" (DAC, ca. 2010:21). Figures 4-5 below provide photos of a shipwreck, the *Thomas T Tucker* within the boundaries of the Cape of Good Hope Nature Reserve which forms part of the Table Mountain National Park. The *Thomas T Tucker* wrecked on the rocks at Olifantsbos within the Nature Reserve on 27 November 1942 (Walker, 2010:113).

Figure 4: The *Thomas T Tucker* shipwreck on the rocks in the Cape of Good Hope Nature Reserve as viewed on 13 February 2016.

Source: De Wet, 2016b.

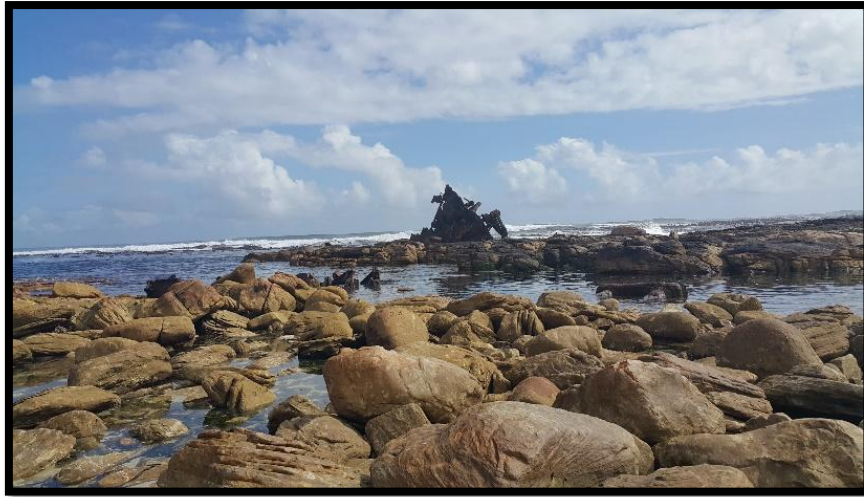**Figure 5**: The *Thomas T Tucker* shipwreck on the rocks in the Cape of Good Hope Nature Reserve as viewed on 13 February 2016.

Source: De Wet, 2016c.

Permits

For salvaging attempts on older wrecks, both a licence to search and a permit from SAHRA will be needed (Werz, 2006:7). Permits within South Africa would generally only be issued for applications with "strong scientific basis, clear research questions, adequate funding, suitable provision for artefact conservation and curation, and will result in the generation of new knowledge about underwater cultural heritage" (SAHRA, 2017a:3).

The Regulations published on the NHRA in 2000 (NHRA Regulations), contain two separate sections, which are important for the present study. Both sections explicate the processes to be followed when applying for a permit covering archaeological sites. The first, in chapter 4, focuses on permits for archaeological and palaeontological sites and meteorites. This section refers to the regulations outlined in section 35(4) of the NHRA. Section 11 of NHRA Regulations states further that such an application should be made on the official "Application for permit" form of SAHRA. The application should provide the following: information on the notice of declaration in the Gazette; description and location of the site; action intended and its motivation; duration of permit needed; personal particulars of applicant; information on the participating institution; information on curating institution; additional information SAHRA may require (Republic of South Africa, 2000:9-10; Forrest, 2006:261-262). It is worthwhile to note that section 12, on the other hand, clearly states that permits will only be issued to persons whom SAHRA deems fit, in other words, qualified to carry out such work (Republic of South Africa, 2000:10).

Further regulations covering the actual process after permit approval and the subsequent curation of such objects are outlined in sections 13 and 14, with section 16 explaining the process of submitting reports on the process (Republic of South Africa, 2000:10-13).

The second section within the NHRA Regulations, particularly important for the present study is the application for permits covering wrecks as outlined in chapter 8. Such an application is necessary in terms of section 35(4) of the NHRA. Section 25(1) of the regulations repeats section 35(4)(a, b, d) of the NHRA, with section 25(2) stating that should a person wish to export wreck materials or objects, chapter 7 of the regulations for the export of a heritage object should

be followed (Republic of South Africa, 2000:18). The application for excavating, altering, or disturbing any wreck should be made on the specific official application form for wrecks from SAHRA.

The above-mentioned application form should provide the following: the name, date and location of the wreck along with the nearest port to the site; information of the collaborating institution and an agreement between this institution and the applicant; motivation for and cost of the project and the source of the funding; location of the storage of objects; particulars of maritime archaeologist, divers, and the applicant; copy of the applicant's salvage licence; and information on previous permits issued to the applicant (Republic of South Africa, 2000:18-19). Werz (2006:7) also mentions that the particulars of the archaeologist who takes part in the project must be included on the application form. The application can be done through SAHRA's online system, SAHRIS (SAHRA, 2017:3).

Other sections of the NHRA Regulations stipulate the commenting on such an application; the area allocated to an applicant with a permit; procedures to settle disputes; and extension of the permit. The regulations also state that, for wrecks older than 1850, either a maritime or terrestrial archaeologist should be part of the team in order for a permit to be granted (Republic of South Africa, 2000:21). Sections 29 and 30 of the regulations set certain standards as a general 'best practice' for projects involving wrecks and its objects. Such best practice entails: efficient recordkeeping, documenting and inventories; respect for conservation, the environment and human remains. The regulations include: effective communication with team members and other ships in the vicinity of the wreck; ensuring a safe environment for all (explosives prohibited); the removal of certain materials; payment of duty for such objects. Furthermore, only the team listed on the permit application will be allowed to partake. The regulations also focus on keeping logbooks during the projects and handling the costs involved (Republic of South Africa, 2000:21-23).

Section 30 further explains the 'best practice' for curating, which entail: an agreement between parties on the accessioning, conservation and storing of objects; SAHRA inspections of such storing facilities; no disposal of objects allowed; and division of recovered materials (Republic of South Africa, 2000:24). According to section 32, a report on the project must be submitted

annually to SAHRA, stating the progress as well as future plans for the project (South Africa, 2000:25).

Should it be suspected that a project is in progress without a permit, thus illegal, the responsible authority has the power to command the owner (of the wreck or project) to cease such activity immediately. The mentioned authority may also investigate the allegations of such illegal activity, facilitate mitigation and permit application, and recover any costs incurred from the owner if no permit application is made within two weeks, as stated in section 35(5) of the NHRA (Republic of South Africa, 1999:60). Section 35(6) notes that the responsible authority also can serve a notice to prevent further activities or projects that target a specific wreck (Republic of South Africa, 1999:60). Should an owner or project manager ignore the notice, this party shall be liable to a fine or one-year imprisonment or both, as stated in section 51(1)(d) and the Schedule of the NHRA (Republic of South Africa, 1999:78, 88).

SAHRA applies specifically rules 1-4 of the Annex in the 2001 Convention, including the following provisions: *in situ** preservation is given preference; minimal invasive and non-intrusive activities are allowed; and commercial exploitation is prohibited (Forrest, 2006:262).

Where the KZNHA does not contain specific sections regulating permit application, the Eastern Cape Provincial Heritage Resources Regulations (ECPHRR) in turn, does, which is mostly almost identical to those of the NHRA Regulations as published in the Government Gazette. The ECPHRR also prohibits all the activities referred to in section 35(4) of the NHRA, and lists two applications for a permit that are relevant to the present study's topic – archaeological or palaeontological sites, or meteorites, with the same specifications and regulations as listed above in section 11 of the NHRA Regulations (Eastern Cape Provincial Government (South Africa), 2002:4-6).

Regarding permit applications for wrecks, chapter 12 of the ECPHRR lists an identical procedure as well as regulations as in chapter 8 of the NHRA Regulations listed above (Eastern Cape Provincial Government (South Africa), 2002:7-11). There is, however, a clear difference between the National Heritage Resources Act (NHRA) and the NHRA Regulations on the one hand, and the KwaZulu-Natal Heritage Act (KZNHA) and ECPHRR on the other hand. Under

the former two, South African Heritage Resources Agency (SAHRA) is responsible for the permit applications, whereas in the case of the two provinces, applications are submitted to their PHRAs. In the regulations outlined by Heritage Western Cape (HWC) in terms of section 25(2)(h), an identical process for applications is required as in the NHRA, KZNHA and ECPHRR. Therefore, the same process must be followed as explained above (Western Cape Provincial Government, 2003:2-37). HWC notes on its website that it possesses the power to enforce the NHRA and enforce all the same regulations as KZNHA and ECPHRR listed above (Heritage Western Cape, s.a.:1).

It is worth mentioning that during three years of research, the researcher was unable to locate any form of legislation on provincial heritage for the Northern Cape. However, the PHRA, established in the province under the regulations set out in the NHRA, Ngwao Boswa Kapa Bokone (NBKB or Heritage Northern Cape), asserts that they have the power to enforce the NHRA in the province and thereby, the processes listed above (Ngwao Boswa Kapa Bokone, s.a.[a]:1). This institution, however, does not list any archaeological or palaeontological heritage as part of their mandate or their responsibility (Ngwao Boswa Kapa Bokone, s.a.[b]:1).

To conclude, it must be emphasised that to only visit a protected shipwreck, without disturbing it in any way, a permit is not required (SAHRA, 2017a:3).

3.6 International influences and collaboration

South Africa has a wide variety of shipwrecks along the coast, originating from different nationalities. Therefore, disputes are possible over the ownership of especially the cargo of any wreck. Such was the case with the *HMS Birkenhead* wreck. The *HMS Birkenhead* was carrying British reinforcement troops to Port Elizabeth when it struck a pinnacle of rock, near Danger Point on 26 February 1852, and sunk (Athiros & Gribble, 2015:71-74; Venter, 2014:197). In addition to previous looting and salvage operations, a dispute arose between South Africa and Britain with regards to the ownership of the wreck. This eventually led to an agreement according to which the parties divide equally any gold found at the wreck site (Staniland, 1999:134).

In 1997, two maritime archaeologists employed by the state visited Australia to present papers at the Australian Institute of Maritime Archaeology Conference. They also visited a number of maritime museums and investigated the state of maritime archaeological conservation in the country (Boshoff, 2013:6799). This was not the first time a South African representative visited Australia to investigate the legislative framework of its maritime archaeology. H.J. Deacon visited the country in 1985 and focused particularly on the legislation (Boshoff, 2013:6800). In 1999, the two archaeologists were again invited to the country to collaborate on a shipwreck project on the Great Barrier Reef (Boshoff, 2013:6800).

The project of the *Meermin* wreck (see 3.5.2), resulted in the collaboration between SAHRA, the George Washington University, and the United States Park Services' Submerged Resources Centre. The undertaking was called the African Slave Wrecks Project and was funded by the Ford Foundation (Boshoff, 2013:6801). This project also helped generate public awareness through a travelling exhibition and a documentary. Later the project partnered with the National Association of Black Scuba Divers and the Smithsonian's new Museum of African American History and Culture. This new partnership led to the discovery, excavation and conservation of the *Saõ José wrecked in* 1794 (Boshoff, 2013:6801).

Closer to home, Dromgoole (2006:xxxvi) suggests that South Africa may have impacted the state of underwater cultural heritage (UCH) in bordering states. Therefore, South Africa should consider assisting these states in protecting their UCH sites. This might lead to more efficient protection of UCH within the whole southern African region.

3.6.1 South Africa and the 1996 ICOMOS Charter and 2001 UNESCO Convention

A maritime archaeologist employed by the NMC and later SAHRA, Mr John Gribble, led the South African delegation to the UNESCO meetings in Paris between 1998 and 2000, for the drafting of the 2001 Convention. He also became a member of the International Committee on the Underwater Cultural Heritage (ICUCH) of ICOMOS, just after the ICOMOS Charter was drafted in 1996 (Forrest, 2006:254; Gribble, 2016:5).

South Africa further voted in favour of both the ICOMOS Charter in 1996 in Sofia, and the UNESCO Convention in 2001 (Forrest, 2006:254). This means that the South African state was involved in the formulation and adoption of the two major instruments of underwater cultural heritage management. Thus, the South African government was in favour of these instruments from the start.

In the early 2000s, SAHRA formulated regulations that cover the issuing of permits for work on wreck sites. These regulations and SAHRA's Shipwreck Policy were influenced significantly by both the 1996 ICOMOS Charter and the 2001 UNESCO Convention (Sharfman et al., 2012:98).

The DAC began public consultations on the ratifying of the 2001 UNESCO Convention around 2005, which encountered strong opposition from especially salvors (Sharfman et al., 2012:98). The Department began the ratifying process in 2011 (Sharfman et al., 2012:98), but only 'Accepted' the Convention on 12 May 2015, and has not yet ratified the Convention (UNESCO, 2017a:1).

Cheadle, Thompson and Haysom Inc. Attorneys along with the Heritage Agency did a review of all heritage legislation in South Africa in 2010 on behalf of the DAC. In their document they make certain recommendations on heritage legislation and policies and, most importantly, the 2001 UNESCO Convention. The first recommendation is that South Africa has to enforce the Convention from 12 August 2015 onwards, and ensure that South African legislation at the time and other possible international commitments are not in conflict with the Convention. Certain amendments to the NHRA may be necessary to ensure compliance, however, for the implementation of the Convention no amendments would be needed (Cheadle et al., 2010:239).

The first problem they noted is that the DAC and SAHRA are not in agreement about commercial salvaging. The DAC considers commercial salvage as a viable option that must be allowed. SAHRA on the other hand, is of the opinion that commercial salvage would damage historical shipwrecks irreparably. Therefore, in the past, SAHRA has not permitted such salvaging (Cheadle et al., 2010:240). Secondly, it is suggested that an underwater heritage or

shipwreck policy be developed and implemented in accordance with both the NHRA and the 2001 UNESCO Convention to ensure the country's compliance (Cheadle et al., 2010:252).

After the reintroduction of the Slave Wrecks Project during the 2000's, international collaboration developed with institutions such as the Smithsonian Museum of African American History and Culture, the George Washington University, and the US National Parks Service's Submerged Resources Centre among others (Sharfman et al., 2012:99-100).

The current legislative measures within South Africa, including national and provincial legislation and regulations, on paper, are sufficient. Various legislations consider the damaging, salvaging or looting of shipwrecks as illegal; or they stipulate that some form of permit or licence application is necessary for any intended actions. The heritage legislations and regulations provide sufficient principles for the overall protection and conservation of shipwrecks. It would, therefore, seem that the South African regulatory framework, in theory, is sufficient. The question, however, remains: How well is UCH protected in South Africa in practice? This raises further questions: Do the responsible authorities implement the regulations sufficiently? Do they actually have the capacity to implement these regulations?

This leads to an issue that must be addressed in the following chapter (ch 4), namely, whether the legislative and regulatory measures to protect UCH in South Africa have been applied effectively. In other words, the focus will be on whether they created a satisfactory regime for conservation management.

4. <u>FEASIBILITY OF SOUTH AFRICAN LEGISLATION</u>

From the empirical study, certain problems came to light regarding underwater cultural heritage (UCH) in South Africa. Most of these problems were confirmed by the literature study. For convenient analysis the problems are divided into six sections: academic framework, institutional framework, conservation and projects, awareness and promotion, legislative framework and law enforcement. All these aspects are analysed in this chapter to determine the current status of legislative protection for UCH in South Africa.

4.1 Academic framework

Opportunities are extremely limited at higher education institutions in South Africa for students to receive training in the management of UCH. No South African university boasts a maritime archaeology or maritime and UCH management programme (Sharfman et al., 2012:102; Boshoff, 2016:1; Gribble, 2016:1, SAHRA, s.a.[a]:3). The University of South Africa (UNISA), the University of Cape Town (UCT) and the University of the Witwatersrand (Wits) all allow postgraduate courses with a focus on Maritime Archaeology (SAHRA, s.a.[b].:2). For the rest, students planning to pursue a maritime archaeological career have to study overseas (Sharfman, 2016:1,9). This gap causes a lack of professionals entering the workforce. As stated previously, Lynn Harris introduced certain courses of the Nautical Archaeology Society (NAS) in South Africa post 1993. These short courses aimed to train interested parties in UCH to a certain degree (Boshoff, 2013:6799). It is, however, unclear whether these courses are still being presented in the country, and the NAS makes no mention of South African courses on their website (NAS, 2013:1).

Research on UCH in South Africa is extremely limited. There are major research gaps, with publications on the topic few and far between (Sharfman, 2016:9). Furthermore, scant South African sources are available, which suggests a lack of researchers in the field. This scarcity of researchers seemingly will be a continuing tendency, seeing that the lack of qualifications in maritime archaeology hampers the training of new researchers.

4.2 Awareness and promotion

A major challenge in South Africa must first be addressed before the state of UCH management in the country can be elevated to a higher level. The public's perception and knowledge of UCH has to improve. In most cases UCH is located under water, which makes heritage resources associated with these artefacts inaccessible and invisible for most people. Furthermore, most of the ships wrecked along the South African coastline, were in the service of European owners. As a result, UCH is generally regarded as European heritage, and not South African, thus not worthy of citizens' time and effort (Sharfman, 2016:1). The public's exposure to UCH throughout has been limited to news articles about discoveries by treasure hunters. Therefore, the general public still regards UCH as a source for acquiring treasure (Sharfman et al., 2012:99).

There are regular incidences of theft where movable objects are taken from shipwrecks. The general public (not treasure hunters, or metal-detector wielding salvors), often finds shipwreck artefacts when strolling along the beach. Ignorance of the legislation that regulates such objects cause numerous individuals to assume a "finders-keepers" approach. These artefacts thus are considered as a token, a keepsake from people's holiday excursions, and rarely are delivered to a recognised institution or qualified expert (Mrubata, 2016:1). This means that even with the amnesty programme launched together with the implementation of the NHRA, and despite the action declared illegal, a large number of UCH objects remain in the hands of private individuals. These items may entail valuable coins or other cargo, or a piece of rusty metal removed from a shipwreck. Such objects may have historical significance and value to research directed at a specific topic, or they may be inconsequential. These items are, however, considered as part of the national estate if it was taken from a shipwreck older than 60 years, and are protected as such.

Ignorance by the public (as well as divers and treasure hunters) on the topic and legislation, adds to the overall challenge of UCH protection in South Africa (Sharfman et al., 2012:104; Werz, 1993:25). There are limited public programmes that raise awareness and facilitate public participation (Sharfman, 2016:8). Communities are unable to contribute to the NHRA in any way and the institutions are found to be largely inaccessible, through no fault of their own, but rather because they are often located far away. Furthermore, the legislation is not reviewed regularly and even when this happens, the participation process involves only a certain section of the

public. The communities, therefore, cannot define their own heritage, and thus do not attempt to get involved (Sharfman, 2016:3).

Recommendations on how the communities can get involved will be discussed in the concluding chapter (ch 5). In certain instances, the public has played a significant role in combatting illegal activities. A case to illustrate such involvement is the *Sybille*'s propeller in 1999, when a member of the public reported the illegal action to the authorities (Boshoff, 2016:3; Gribble, 2016:1; Athiros & Gribble, 2014:147). If the public is made aware of the value of UCH and the illegality of any form of salvaging and treasure hunting, individuals can alert the authorities to possible illegal activities. Awareness-raising, therefore, is of the utmost importance.

The issue of low-level public awareness may be due partly to the limited museums that focus on UCH. Apart from the Shipwreck Museum in Bredasdorp, Iziko's Maritime Centre in Cape Town and the Natal Maritime Museum in Durban, few others embrace such a resource. Both the East London Museum and the Dias Museum in Mossel Bay also feature UCH collections, but without an exclusive focus on UCH, or through knowledgeable experts on their staff. Museum exhibitions are insufficient for awareness-raising, seeing that these exhibitions do not emphasise the value and importance of UCH and explain the legislation protecting it. Of all the above-mentioned institutions, only Iziko's Maritime Centre employs fulltime maritime archaeologists. SAHRA planned to open an underwater museum, which would be ideal to help raise awareness; however, to date this has not materialised (Sharfman et al., 2012:102). A typical example of UCH collection can be seen in the photos presented in Figures 6-8 below.

Figure 6: Artefacts from the *Birkenhead* wreck in the Bredasdorp Shipwreck Museum.
Source: De Wet, 2016d.

Figure 7: Artefacts from the *SS Maori* wreck in the Bredasdorp Shipwreck Museum.

Source: De Wet, 2016e.

Figure 8: Artefacts from the *Sybille* wreck in the Bredasdorp Shipwreck Museum.

Source: De Wet, 2016f.

SAHRA has begun raising awareness through information boards placed at certain locations, for example, the *Maori*, *Birkenhead*, *Pietermaritzburg* and *Sybille* sites. These boards are meant partly as tourist information on a shipwreck route, but also to educate the community in the area (Gribble, 2016:3). The plan is to erect such signs in visible areas near the wreck sites, mostly in public spaces, for optimum visibility and, if possible within the premises of a government institution such as a museum, harbour, etc (Gribble, 2016:4). This project will help raise awareness and ensure local inhabitants and visitors alike realise UCH's value and the need for conservation. Signage may also get stolen and sold for scrap metal, therefore, it should be kept as low-cost as possible, with materials that do not fade easily and can last for an extended period before needing replacement.

Currently four of these signs have been placed for the shipwrecks mentioned in the previous paragraph. Two of these are seen in the figures 9-10 below:

Figure 9: The *SS Maori*-sign at Hout Bay harbour.
Source: Michell, 2017a.

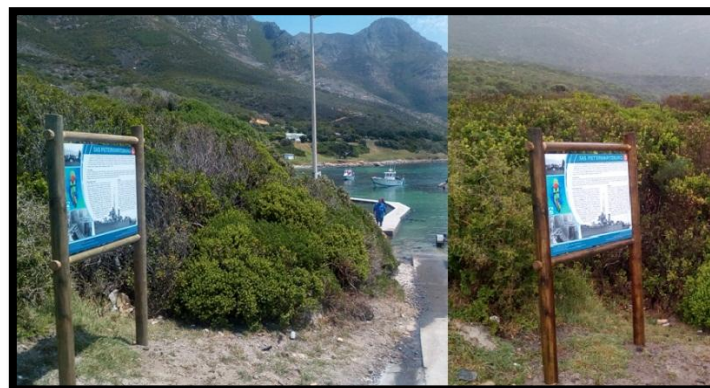**Figure 10**: The *SAS Pietermaritzburg*-sign at Millers Point.
Source: Michell, 2017b.

The current museum exhibitions and signage at wreck sites alone are not sufficient. More needs to be done to educate the wider public on the importance of UCH and thereby, forge a culture of appreciation and preservation of such resources. Specific recommendations on this matter will be made in the concluding chapter (ch 5).

4.3 Law enforcement

Most divers/salvors continue their treasure hunting, purposely hiding their finds from organisations such as SAHRA and often remain hostile towards these authorities. This implies the complete loss of artefacts that were recovered during such a project (Sharfman et al., 2012:102; Brits, 2015:2). A reason may be the high value placed on scrap metal (Sharfman et al., 2012:104; Gribble, 2016:1; Sharfman, 2016:7), although rusted metal will have significantly less value (Gribble, 2016:3). Salvors are also after valuable loot, which they are able to sell, and usually gather as many items of porcelain and gold coins as possible (Sharfman, 2016:10). Other divers are of the opinion that instead of protecting wrecks for future generations, these structures should be excavated and displayed to the general public at present (Blandy, 2009:2; Sharfman, 2016:11). There seems to be a change, however, from the public's side on reporting illegal salvaging to the authorities. This tendency is reflected by the numerous reports from individuals about perceived unlawful activities (Sharfman et al., 2012:104-105).

Enforcing the law and investigating illegal activities surrounding UCH, resides under the jurisdiction of SAPS, as there is no separate specialised unit tasked with this area. Members of the SAPS are typically found to be overworked and relevant departments understaffed. Thus, they are unable to monitor all UCH sites effectively (Boshoff, 2016:1). Nevertheless, it is also found that SAPS members are willing to assist where possible, and are extremely supportive, possibly because UCH is a diversion from their usual daily cases (Gribble, 2016:1). Cases involving UCH would usually be the responsibility of the SAPS's water wing division (Gribble, 2016:1).

One of the largest problems that members of the SAPS face, is simply that they are not familiar with the particular legislation to enforce this matter (Boshoff, 2016:1; Gribble, 2016:2). In Cape Town, SAHRA and Iziko have presented workshops for SAPS officers to train them in UCH legislation. Other provinces, however, seemingly do not have the necessary expertise for such endeavours (Boshoff, 2016:2; Gribble, 2016:1). These programmes, furthermore, only reach individual officers, and not a whole section or station. Should these individuals move to another area inland or retire from law enforcement, new employees are not trained similarly in UCH. Ongoing training of law enforcement officers is, therefore, required. Within the National Parks, SANParks officials also play a major role in policing shipwrecks within the parks' limits (Gribble,

2016:3). However, their staff are also not trained properly in UCH protection, and are unable to monitor all possible UCH sites within the limits of the National Parks (Gribble, 2016:3).

4.4 Institutional framework

Due to improved reporting of illegal activities, SAHRA and similar institutions can manage UCH sites better and mitigate the impact of transgressions at these sites (Sharfman et al., 2012:105). Various institutions are tasked with the protection of UCH. These role-players are SAHRA, Iziko, SANParks, and various museums. This creates a gap since the institutions report to different national departments and do not necessarily communicate with each other on strategies. If this deficiency is not managed properly, it can halt the protection of UCH. A major challenge in this regard seems to be the communication and interaction between various role-players.

As stated previously, the current number of qualified experts (maritime archaeologists) within the UCH field in South Africa totals approximately ten, including public employees as well as private practitioners (Sharfman, 2017:1; Boshoff, 2016:1; Gribble, 2016:1; Sharfman, 2016:1, 8). There is a general shortage of qualified heritage practitioners in South Africa, who include maritime archaeologists (Wares, 2016:3; Sharfman, 2016:8). SAHRA, as the national protection institution, has only three positions within their MUCH unit available who are responsible for all UCH sites in South Africa, up to 24 nautical miles off the coast (Gribble, 2016:1; Sharfman, 2016:3). Currently, SAHRA's MUCH unit has to fulfil multiple tasks. These are the following: process permit applications; assist with environmental impact assessments (EIAs) and heritage impact assessments (HIAs); liaise with the public and stakeholders; facilitate public participation; and handle general site management (SAHRA, 2012:2). The smaller museums, especially in the Western Cape such as the Dias Museum, receive support and assistance from the provincial departments (PHRAs) and from SAHRA and Iziko on matters relating to UCH (Mrubata, 2016:1). This is, however, not necessarily the case for the other museums in the Eastern and Northern Cape as well as in KwaZulu-Natal, as they are located further away.

Current experts also have the added burden of deciphering previously damaged or recovered sites, seeing that for an extended period, detailed records were not kept of recoveries (Gribble & Sharfman, 2013:6803; Sharfman, 2016:10). Even after the permit-control system had been

introduced, permits for valuable wrecks were still issued under certain circumstances (Gribble & Sharfman, 2013:6806). This left a major gap in the context of South African UCH, seeing that valuable content and context were lost – which experts currently struggle to recapture.

This shortage in staff means that the limited number of experts currently at the institutions have their hands full with an established culture of unchecked looting and 'treasure hunting' (Sharfman et al., 2012:107). Looting leads to the disappearance of valuable artefacts and historical context. Numerous wrecks have been damaged irreplaceably over the years, with immense losses as these represent a narrative that cannot be restored (Werz, 1993:24).

According to Gribble, certain divers still have a positive attitude about being included in wreck projects and work harmoniously alongside SAHRA. On the other hand, divers also view the legislation as unfair and that it excludes them completely from salvaging (Gribble, 2016:8).

Within the private sector, various non-governmental organisations (NGOs) operate within the field of UCH. These NGOs also conduct projects in South Africa focussing on UCH. The African Centre for Heritage Activities (ACHA) is one such NGO, whose projects (including UCH) span Mozambique, Senegal, Tanzania, Madagascar and South Africa. They also assist UNESCO in sub-Saharan Africa, and work closely with both Iziko and SAHRA in South Africa (Sharfman et al., 2017:1).

Another NGO operating within UCH in South Africa is the African Institute for Marine and Underwater Research, Exploration and Education (AIMURE). Established in 2012, the organisation serves to support African marine, maritime and underwater studies. One of its major projects is to locate the *Haarlem* wreck, which stranded in Table Bay on 25 March 1647, and its survivor camp and to excavate and research this event alongside international partners (AIMURE, 2016:1). These organisations are able to assist in UCH protection within South Africa.

Both public (SAHRA, Iziko) and private (ACHA, AIMURE) institutions, however, experience problems of financial shortages (Sharfman et al., 2012:104; Gribble, 2016:1; Sharfman, 2016:9). The government regards UCH as a "resource-intensive discipline", where the amount of resources spent does not justify the results of conservation efforts (Sharfman et al., 2012:105). Funding allocated to projects and to hire more personnel is limited. According to the researcher's perception, after interviews with respondents involved in UCH, the general feeling is that heritage is not a main priority for the government and donors to fund, or to add more personnel positions within the institutions.

4.5 Conservation and projects

Currently, co-operative programmes and projects involving other countries are regulated by the NHRA, which stipulates that such liaising and assisting can only take place if the Ministers of DAC and Foreign Affairs approve (Forrest, 2006:269). However, given the lack of experts and funding, only a few projects in South Africa focus on UCH protection, and research is limited. Recent and current projects include the Lake Fundudzi maritime cultural-landscape project (Sharfman, 2016:1; Wares, 2016:2), research targeting seal hunting at Marion Island, funded by the National Research Foundation (NRF), and probably the largest project investigating slave wrecks since circa 2003 (Boshoff, 2016:1).

The Lake Fundudzi cultural landscape was the first inland UCH area to be declared a national heritage site in 2014. The Lake is a sacred area to the Venda people and of significant value for its intangible heritage (SAHRA, 2017b:1; Wares, 2014:1). The Slave Wreck Project (or SWP) seeks to help countries "preserve and protect irreplaceable heritage related to the historical slave trade …" (SWP, s.a.[a].:1). SWP (s.a.[b].:1) states that UCH is under threat from "highly sophisticated treasure-hunting firms, less systematic … salvage activities by sport divers, and coastal development", which all add to the pressing need for conservation. These projects, along with the project to research the vessels used for seal hunting at Marion Island, aid the protection of valuable UCH resources associated with South African maritime history. Such projects ensure that valuable and much needed research into UCH in South Africa is published and they assist in both local awareness-raising and international cooperation for projects.

4.6 Legislative framework

Most of the other applicable laws (e.g. AJRA, LSSATSA, CEA, and MSA) only focus on shipwrecks and their contents as a salvaging opportunity, with no mention of the heritage value. In terms of the NHRA, all objects forming part of a shipwreck and its cargo can be culturally significant when measured against the criteria in section 3(3) of this Act. When the significance of such an object has been established, it is considered to possess intrinsic value and is, in terms of the NHRA, worthy of protection and conservation. This creates a problem since salvaging typically does not take into account the possible heritage value of such wrecks and its cargo (Werz, 2006:5).

The relationship between the applicable Acts has not been explained fully (Staniland, 1999:142). These Acts do not necessarily contradict one another, but in most cases do not consider the other Acts. Salvors are able to acquire licences and permits for excavation of shipwrecks, only for those the NHRA allows. However, the various Acts involved, as discussed in Chapter 2, do not all refer applicants for permits or licences to other applicable legislation such as the NHRA or CEA (Sharfman, 2016:8). The onus rests on the applicant to find out whether other laws do apply, but applicants rarely make the effort.

South Africa, unlike several other countries such as the UK, does not have legislation that specifically regulates the protection of UCH. However, by including UCH in a general heritage-protection Act (i.e. the NHRA), there is sufficient protection for UCH under the broader concept of archaeological resources (Forrest, 2006:254). Separate legislation may thus not be necessary for protection. By including UCH within the broader concept of archaeological resources, the Act is even more thorough than article 1 of the 2001 UNESCO Convention (Forrest, 2006:258), the benefit of which is discussed further in chapter 5.

However, the definition of UCH as a component of archaeological resources, only applies within South African territories. UCH artefacts outside South African territory can, therefore, not be declared as state property and do not enjoy the same protection under the NHRA. This is the case, seeing that these objects are recovered possibly from beyond 24 nautical miles within South Africa's EEZ and, therefore, not actually imported into the country (Forrest, 2006:268).

Forrest (2006:269) suggests that all UCH from within South African territory and those UCH resources brought into South Africa from any part of the world (including this country's own EEZ), should be regarded and protected in the same manner.

A further problem is that the NHRA does not sufficiently address the issue of UCH resources from outside South Africa's maritime jurisdiction, which are brought into the country (Forrest, 2006:267). When an artefact is illegally imported, the Act does make provision for an agreement with the 'reciprocating' country. The 2001 UNESCO Convention tasks State Parties to prevent any import from any other countries, not just State Parties to the Convention or a reciprocating state (Forrest, 2006:267).

The NHRA also does not take into account that certain UCH resources may be derived from outside any country's jurisdiction (high seas). Therefore, these objects do not 'belong' to any 'reciprocating' country to bargain with. The obvious route to follow would be locating the Flag State of the vessel from which the artefact originates, but this is not stipulated and may not always be possible, seeing that researchers could be unable to determine the origin of a ship or to determine which ship an object came from. According to the 2001 UNESCO Convention's section 18, such resources should be seized by South African authorities (Forrest, 2006:267-268). The NHRA also does not outlaw South African nationals who, on board vessels within international waters, practise illegal activities involving UCH (Forrest, 2006:268). This is in contrast with the UNESCO Convention from 2001.

There is a further complication due to the legislation specifying that only wrecks of 60 years or older are worthy of conservation (Staniland, 1999:142; Sharfman, 2016:5). The issue is that wrecks younger than 60 years, which may also be extremely valuable, can legally be looted and stripped of valuable parts before they reach the 60-year mark. The NHRA does, however, stipulate that SAHRA can protect sites younger than 60 years if such a wreck is deemed relevant, as with the *SAS Pietermaritzburg* (Gribble, 2016:4; Sharfman, 2016:12). The *SAS Pietermaritzburg* was disposed of on 19 November 1994, and therefore has not been a wreck for 60 years as prescribed by the NHRA. However, the Simon's Town Historical Society applied to SAHRA in 2012 to have the wreck declared a national heritage site because of its involvement in World War II and its influence within the South African Navy. SAHRA approved the application by a notice in the Government Gazette on 23 August 2013 (Athiros & Gribble,

2015:165-168). Nevertheless, as SAHRA's MUCH unit only consists of three employees, this can only happen if the public, divers, or other organisations point out such sites to this unit. In other words, the unit tasked with UCH does not have the capacity to locate all wrecks younger than 60 years, which may be of significance.

Exploitation of UCH for commercial gain remains a major problem in this field (Sharfman et al., 2012:104). Sharfman et al. (2012:102) explain: "South Africa's legislation indirectly allows for commercial exploitation of maritime UCH, the consequences of which are … destructive."

Public policies regulating UCH have not been formulated clearly. In the run-up to the adoption of the NHRA in 1999, a policy for heritage management and conservation was not developed in detail. The 1996 White Paper on Arts, Culture and Heritage, in its chapter 5 dealing with heritage, focused on the institutional framework for heritage management rather than specific policies for management and conservation (RSA, 1996a:20-23). Since 2015, a process was initiated to revise the White Paper, but the focus in the latest draft (draft 3 of June 2017) of the revision remains on the institutions that are responsible for heritage management, not the policies based on the objectives of heritage management in the country (DAC, 2017).

As is evident from the above, unlike most other forms of South African legislation, the formulation of the NHRA was not based on a previously developed policy as outlined in a White Paper. Instead, policy-making was left to SAHRA, the statutory body for heritage management created by the NHRA. Section 13(1)(a) of the NHRA stipulates that one of SAHRA's functions is the following:

> … 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 (NHRA, 1999:26; emphasis by the researcher).

In section 47(1) of the NHRA it is stated further that SAHRA and the PHRA's:

> (a) must, within three years after the commencement of this Act, adopt **statements of general policy** for the management of all heritage resources

owned or controlled by it or vested in it; and (b) may from time to time amend such statements so that they are adapted to changing circumstances or in accordance with increased knowledge; and (c) must review any such statement within 10 years after its adoption (NHRA, 1999:72; emphasis by researcher).

The lack of clearly defined policies impacts on the protection of UCH. A major problem is that the NHRA does not completely outlaw commercial salvaging, whereas the 2001 UNESCO Convention explicitly forbids it, unless approved by the relevant authority (Gribble, 2016:4-5; Sharfman, 2016:6).

A worrying tendency is the numerous exports from South Africa of valuable artefacts of cultural heritage, including those taken from wrecks (Forrest, 2006:250). Historically such exports have occurred too often and the possibility remains that this tendency will continue in the present and in future. The reason is that SARS (Customs and Excise) does not monitor all South Africa's borders, and its control is limited to border posts on main routes, harbours and airports. Furthermore, this unit of SARS is also not only responsible for monitoring cultural heritage, but has to cope with various other illegalities such as imports/exports of drugs or firearms as well. It is not this unit's main priority to monitor illegal exports of cultural-heritage resources; therefore, such exports can easily 'slip through the cracks'. Customs and Excise officers do, however, attempt to minimise such instances, but they too may not be trained sufficiently and may be understaffed.

The current penalties for illegal UCH activities (as discussed in ch 3, section 3.5.2), are not severe enough. The fines and prison sentences may seem strict for individual divers, but to a salvor or treasure hunter selling the artefacts at auction houses, such punishment is insubstantial (Gribble, 2016:7). As a result, salvors continue their activities since facing the mentioned penalty is not a sufficient deterrent. Cases can be successfully prosecuted through the legal system if it is performed properly and with the necessary resolve. The NHRA does stipulate that any equipment used can be confiscated, be it a vehicle, boat, metal detectors, diving gear, or other means of salvaging (Gribble, 2016:7). Such a threat may even be a larger deterrent if applied and implemented correctly.

4.7 Concluding remarks

The above-mentioned aspects combined, add to the feasibility of South African legislation. The major challenge for the management and conservation of UCH in South Africa is not to amend the current legislation. It is rather to engage in capacity building for the effective and efficient enforcement of the law and for sustainable conservation management of UCH resources.

Without sufficient academic programmes at tertiary institutions, experts are not being trained, and research is not conducted on UCH. This in turn leads to fewer people planning to enter the field, partly since they are uninformed about UCH, which stems from a lack of public awareness.

Seeing that the public is not sufficiently educated and made aware of UCH and its value, law enforcement becomes difficult. People are unknowingly involved in illegal activities because they are unaware of the NHRA. Salvors continue with their illegal projects since they are fully aware that the SAPS members are not trained in this area as well as badly understaffed and, therefore, unable to monitor all wrecks. When salvors do get apprehended, the prosecutors are often poorly experienced in applying the NHRA. Furthermore, as indicated, the NHRA's penalties are too insignificant to be a sufficient deterrent.

Institutions such as SAHRA face major challenges in managing UCH with their limited staff and funding. The public are not involved enough to help report all illegal activities, and institutions are thus mostly unaware of such offences. Due to the shortage of staff, the proper authorities are limited to launching ad hoc conservation projects, which is clearly insufficient for conservation management of UCH.

All the above-mentioned limitations impede the full application of the NHRA to streamline the conservation management of UCH. The 'ideal protection' of UCH, as envisaged by the NHRA, is unattainable. The reason is the lack of tertiary programmes to provide more experts, low funding for awareness-raising, and insufficient conservation and training programmes, which results in an uneducated public. Due to a lack of capacity, the law enforcement and prosecution for this

field are far from satisfactory. The various aspects are interlinked, adding to the growing challenges facing UCH protection in South Africa.

Almost all the interviewed experts agreed that the legislation is sufficient to a certain extent, although somewhat outdated in certain cases. Therefore strategic adjustments are necessary to ensure full compliance with the 2001 UNESCO Convention (Wares, 2016:1). However, the interpretation and implementation of the legislation is problematic (Wares, 2016:1; Boshoff, 2016:1-3; Gribble, 2016:1; Sharfman, 2016:7). This can be blamed partly on the mentioned lack of capacity and funding for institutions, which hamper proper management of UCH, as stipulated in the legislation (Wares, 2016:1).

It is clear from both the previous and current chapters that there are definite gaps within the management of UCH in South Africa. The following chapter will discuss and evaluate these gaps and make recommendations on how to address them.

5. <u>CONCLUSION AND OPERATIONAL FRAMEWORK</u>

There are estimated to be approximately 2 200 known shipwrecks along South Africa's coastline, and the likelihood of more, even older, wrecks being found over time (Sharfman et al., 2012:90, 91; Boshoff, 2013:6794; Blandy, 2009:1; SAT, 2015:1; Govender, 2016:1; Davies, 2003:2). Therefore, the need for conservation is evident. Legislation on UCH should be sufficient to assist both the institutional framework and law enforcement agencies in protecting wrecks along the country's 3 000-km coastline.

The question the present study aimed to answer was whether South African legislation and institutions succeed in protecting its underwater cultural heritage (UCH) when compared to international best practice. Firstly, UCH was defined as follows: "Underwater cultural heritage consists of wrecks, ruins, submerged landscapes, caves and wells, and traces of marine exploitation" (UNESCO 2012a:1). This includes shipwrecks with its cargo and numerous remnants that sank together with the vessel.

Shipwrecks provide valuable insights into the past. The various resources that went down with the ship represent their own narrative. Those narratives may contain information of the time during which the vessel set sail. It may reveal characteristics, culture or nationality of the people on board the ship as well as their lifestyle. The cargo, which the vessel was conveying, may shed light on the popular trading merchandise of the time. The wreck and its cargo may reveal clues regarding the wars or conflicts of that era. It may also provide scientific information of shipbuilding techniques and seafaring practices of the particular period. Such facts reinforce the need for protection in light of the incalculable value of these resources, which often are irreplaceable.

Within South Africa, UCH is protected under the National Heritage Resources Act, 25 of 1999, and relies for protection on both national and provincial agencies/authorities and other stakeholders involved with heritage resources. This includes the DAC and SAHRA as well as the various PHRAs, NGO's such as ACHA, and law enforcement entities.

It is important to ascertain the feasibility of South African legislation applicable to UCH. Therefore, the status quo, as explained in Chapters 3 and 4, should be compared to international best practice. These guidelines were deduced in Chapter 2 from studying both international regulations and national legislations of France and the United Kingdom (UK), and dividing them into different components or viewing them in terms of particular focus areas of application (FAA) – which are revisited and expanded further in the subheadings below.

UCH resources and protection

The NHRA's use of an all-encompassing definition for UCH, is in accordance with international best practice and reduces possible misinterpretation or gaps. This definition covers all heritage resources found underwater or on land and includes wrecks, which are older than 60 years and of significance. Significance, in this regard, could be linked to criteria covering the following areas: archaeological, historical, artistic, educational, commercial, economic or tourism (Strati, 1995:14-17). The stipulated 60-year old minimum could be problematic when considering the protection of younger wrecks. The legislation does, however, also permit for wrecks which SAHRA, in section 2(ii)(c) (NHRA, 1999:6), deems worthy of conservation – regardless of its age.

The penalties for the offences listed in the NHRA and discussed in Chapter 3 of the present study, were found to be insufficient and ineffective. Stricter punishments and penalties should be employed as a possible deterrent to looters and treasure-hunters.

Other legislation (i.e. Maritime Zones Act [MZA] and those discussed in Chapter 3) containing measures to protect UCH, should also be considered when attempting to protect these resources or commencing a legal excavation project. Within these 'other' forms of legislation, certain issues also need attention. The MZA, in section 6, only refers to "archaeological or historical objects", not sites. This implies that only the objects from shipwrecks are of importance and not the wreck as a whole or the site on which it is situated. Many of these 'other' Acts also determine that the entities established under these legislations may decide to destroy wrecks in specific circumstances (discussed in Chapter 3), even historical wrecks.

All the mentioned legislations should be incorporated and role-players working within the field should take note of the necessary regulations that apply to their situation (Sharfman, 2016:8). The interrelation of these different legislations is not clear throughout. As a result, management of these legal frameworks is fragmented. Nevertheless, an integration remains crucial for the conservation of sites, and prosecution of illegal activities, both involving more than one legislation. The relevant Acts can also be incorporated by compiling sufficient and comprehensive guidelines for UCH conservation.

Establishing UCH as a heritage, historical, and archaeological resource, ultimately has lagged. As a result, numerous artefacts were lost before proper legislation were implemented. Some of these artefacts were recovered during the grace period when the National Heritage Resources Act replaced the National Monuments Act. Nevertheless, certain artefacts have been lost permanently.

Although *in-situ* conservation is practised at times, from the interviews it was clear that this is rarely possible within the South African context. The general consensus among participants was that resources should rather be removed and conserved by professionals, than left *in situ** and risk looting. Decisions on whether to conserve or excavate, are handled on a case-by-case basis. The following aspects should be considered: the merits of the wreck, its value, its resources, and its condition (Sharfman, 2016:11). *In-situ* conservation of wrecks would furthermore imply that only a select few visitors would be able to view these sites. Should a wreck be conserved *in situ**, the nearest museum may consider presenting a recording or documentary of this UCH, or exhibit a reconstructed scale model of the ship or site.

From their side, maritime archaeologists utilise detailed site descriptions and documentation when excavating resources to keep record of the original location of each object and the site as a whole. Care is given to following international standards of maritime archaeology when excavating, and at least one maritime archaeologist is present.

All human remains found on a wreck site are deemed as part of the heritage within South African legislation as "graves and burial grounds", in section (3)(2)(g)(vi). Therefore, it is a crime to interfere with the remains in any way (NHRA, 1999:14).

Procedures to Identify, assess, excavate, and preserve UCH

Institutionally and by involving the private sector, South African maritime archaeologists and stakeholders employ a similar process as outlined in the 1996 ICOMOS Charter. The mentioned process is, however, not listed in any regulation. Thus, until the Shipwreck Policy is passed by Government, the procedure commences by locating the wreck site thorough research and site investigation, should a member of the public report the find.

After locating the site, a team including at least one maritime archaeologist, search the site. This is done by magnetometers or similar devices, or by diving to determine the site's nature, and which resources are included. Proper protocol is followed when removing any resources. Furthermore, archaeological techniques are employed to conserve the resources as soon as possible after their removal from underwater by a maritime archaeologist. At times, research papers are published about excavations and finds by one of the maritime archaeologists involved with the project. Thereafter, UCH resources are preserved and managed by archaeologists at various museums, including Iziko museums. Should sites be stabilised, maritime archaeologists employed by SAHRA or Iziko will manage the project, as they are qualified government employees who manage South Africa's UCH.

Commercial exploitation and salvage

The NHRA does, to a certain degree, outlaw commercial exploitation, looting and salvage. Nevertheless, there remains a gap in legislation that allows salvors to apply for a permit and salvage a particular wreck. This takes place when SAHRA deems salvage acceptable, for example, if the object may pose a danger to the general public, or prove less significant after

assessment. SAHRA handles permit applications and determines which salvage projects gets approved.

The application's contents were listed in Chapter 3 of the present study. In essence, it includes details on the project, the wreck, the team, the funding, the duration, and the qualified maritime archaeologist's details. The trade in illegally excavated UCH resources is prohibited. Any such offences are dealt with by the SAPS, SARS and SAHRA.

Museums and databases

SAHRA has a detailed database that records all known wrecks. The database includes the identity of the wreck, its location and other information related to the wreck, which SAHRA deems necessary. Certain information on this database is accessible to the public, however a number of wrecks' locations are not made public, to ensure safety of the assets.

SAHRA's MUCH unit manages all UCH within South Africa both inland and along the 3 000-km coastline stretching 24 nm into the ocean. SAHRA employs only two to three full-time maritime archaeologists, which means one national employee for every 1 000 – 1 500 km of coastline. SAHRA has, however, made an effort to change public perceptions of UCH and the "national understanding of the significance of underwater heritage" (Gribble & Sharfman, 2013:6).

The Iziko Maritime Museum and Natal Maritime Museum exhibit UCH resources and relevant information. Both these museums have qualified staff on hand for conservation (Iziko currently employs two maritime archaeologists). The East London Museum, Bartholomeu Dias Museum in Mossel Bay, and various other museums along the coast depict South Africa's shipping history and include a few UCH resources. However, not all the mentioned museums have personnel or staff who are qualified to conserve or interpret UCH resources, much less employ a qualified maritime archaeologist.

It is recommended that stronger relations should be built between larger institutions and the smaller museums. This will ensure that public awareness programmes and travelling exhibitions are successful. Improved education programmes are necessary within museums, including programmes for both the public and museum staff (Wares, 2016:2-3). Museums are situated in the communities, within the areas where heritage crimes are often committed. Thus, museums can help combat illegal salvaging by raising awareness and encourage the reporting of illegal activities to the appropriate authorities (Wares, 2016:2).

Within the private sector, ACHA assists government and private entities, and individuals, with UCH management and conservation within the country and has two maritime archaeologists on staff. This brings the total number of qualified maritime archaeologists in the country to fewer than ten for approximately 2 700 – 3 000 wrecks. This figure does not include other UCH resources such as submerged landscapes or fish weirs, which can also be found along the coast and also require conservation. The findings, therefore, have shown that the UCH sector of heritage in South Africa is badly understaffed.

More museums focusing on UCH within South Africa may help raise awareness among the general public and communities surrounding the sites. Kingsley (2011:223) notes that during the infancy of UCH awareness, 300 000 people visited the *Mary Rose* wrecks in Portsmouth, 25 million went to see the *Vasa* wreck in Stockholm, and in 1973 approximately 113 500 people watched how the hull of a 14th century Greek ship was being reassembled. Since then even more people have become aware of UCH and would be interested to visit museums or sites that depict maritime history and historical artefacts. A maritime underwater museum was planned on the KwaZulu-Natal coast to be funded by the Department of Arts and Culture (SAHRA, 2012:3). However, to date, no further developments have taken place.

In light of the mentioned deficiencies, there seem to be three options for museums: excavate and display UCH resources; study and preserve resources *in situ*;* or reconstruct a ship within a museum for visitors to experience (Dromgoole, 1999:ix).

Public access, awareness and participation

Accredited diving companies offer tours to UCH sites, and the public are encouraged to visit in a non-intrusive and non-destructive manner. However, it is difficult to ascertain whether visits to every designated site are conducted in this manner. The reason is that the general public is largely uninformed and are usually unaware that disturbing UCH sites is against the law.

Awareness should be raised in such a manner that it attracts the optimum visitors. It is important that the general public is made aware of the value of UCH. In such instances they will be more likely to conserve the sites and report possible illegal activities to the appropriate authorities. Awareness will also ensure that communities develop an understanding and care for their own UCH and help the local authorities manage, preserve exhibit and interpret the sites. Within South Africa, awareness programmes are held from time to time at designated locations. These programmes are, however, unable to reach the majority of the communities involved and cannot be presented as frequently as is necessary. This is mostly due to SAHRA's lack of capacity (staff included).

Furthermore, it was found that UCH also involves important aspects of community heritage. This means local communities should be involved in decision-making, conservation and managing of the sites. Improved awareness programmes targeting the public are required to advocate the protection of UCH and help members identify illegal activities within their communities (Wares, 2016:2). This is currently not the case, which means communities have little or no say in their heritage, and cannot report illegal activities if they are badly informed. A change in public perception is needed for UCH protection to be successful (Gribble & Sharfman, 2013:6808). In this regard, more inclusive awareness programmes are necessary to elicit public participation in and understanding of UCH (Gribble & Sharfman, 2013:6808; Sharfman, 2016:4). Sharfman et al. (2012:104) point out that as the interest in shipwrecks increases, more members of the public tend to report illegal activities. This underlines the necessity to focus more on educating the public on UCH and raising awareness in an effort to combat random diving and looting.

State obligations, state authorities and private organisations

The NHRA of 1999 does define UCH accurately, stipulate management of these resources, and explains any offences and penalties based on the regulations. The legislation, however, has already been in effect for 17 years in 2017, and may need to be reviewed. As Forrest (2006:254) states, adjustments to the legislation may be wise to address the issues particularly facing certain heritage resources such as UCH. Changes within legislation should completely outlaw salvaging. This would make the task easier for heritage practitioners, maritime archaeologists and law enforcement agencies (Sharfman et al., 2012:105). Looting will, however, remain a problem, thus, stricter penalties should be imposed as deterrent for this offence.

Regarding the NHRA as legal framework for UCH, Forrest (2006:269) explains:

> The NHRA provides a comprehensive and effective framework for the protection and management of cultural heritage generally. At least in relation to UCH found within South African waters, the present provisions are capable of providing a sound protective regime that implements the Convention.

The mentioned legislation does not make provision for South African UCH found beyond the territorial waters, or within other countries' territorial waters.

The state provides funding to SAHRA and state-owned museums to identify, assess, research, manage and promote UCH. These authorities adhere to both national and provincial legislation and the available regulations on the national legislation. However, to date, there is no national Shipwreck Policy available for the state to regulate the managing and protection of wrecks along the South African coast.

The following initiatives are proposed: co-operative programmes, capacity-building strategies, development projects by institutions and legislative change in general. This will help create a more integrated system to strengthen UCH management in South Africa (Sharfman et al., 2012:104).

Experts at SAHRA, Iziko, ACHA as well as other authorities and organisations already involve other countries and organisations in research projects and regularly liaise with other interested and affected parties when necessary. The state has also assisted and cooperated with neighbouring states to manage UCH resources in their territories. The way forward would be the inclusion of regional countries and agencies in projects, where the South African state shares its knowledge and limited capacity. This will help establish a standard of inclusive UCH protection within the region (Sharfman et al., 2012:105).

Improved oversight for UCH protection would require better liaising with the SAPS, and the training of law enforcement officers on this topic (Wares, 2016:2; Boshoff, 2016;4; Gribble, 2016:2). The SAPS have the authority to act on illegal activities, which is crucial to combat offences involving UCH (Wares, 2016:2). However, due to a shortage of human resources, the SAPS are not in a position to give priority attention to UCH offences. The relevant South African UCH authorities should improve its permit systems. This will help the SAPS identify valid or invalid permits immediately when investigating possible illegal activities, thereby make arrests and seize property if necessary (Wares, 2016:2; Sharfman, 2016:7).

The findings also showed that SAPS members are unable to monitor and investigate UCH-related crimes on their own due to a lack of capacity. In this regard, Gribble and Sharfman (2013:7) suggest that programmes for community policing and volunteering should be established. This will empower the public to monitor UCH-related crimes and report it to the SAPS, who could then take action. Entities such as SANParks could be involved to police UCH resources located within national parks. Such assistance will aid law enforcement's monitoring of illegal activities around the resources (Gribble, 2016:3-4). This would require more direct liaising with SANParks to train their rangers and educate their employees about the value of the wrecks and the legislation surrounding it.

Research, training and publications

Currently, no tertiary programme for maritime archaeology is presented in South Africa. Post-graduate programmes are only available after prior arrangement with a university such as UCT. Should South African individuals, therefore, plan to study within the field, they must first study abroad to qualify themselves. Internships and bursary programmes are available for students within the heritage sector in general at various state-funded departments and overseen by relevant authorities. It is therefore necessary to address the serious lack of skills within UCH in the country and establish a sustainable tertiary programme to train practitioners for UCH (Sharfman et al., 2012:104, 106; Boshoff, 2016:4; Sharfman, 2016:9).

To date, limited research material is available on UCH in South Africa. Research on UCH should be promoted and encouraged (Sharfman et al., 2012:106). Various publications in this field should further be distributed to the general public. Currently, few such publications are available and only at strategic sites such as Cape Point Nature Reserve. The public can be involved and educated by utilising social media (which SAHRA has done), as well as better-planned newspaper and magazine articles or television programmes and documentaries. There is also Shipwreck Trails along certain routes, with pamphlets and information signage, which help raise public awareness of UCH. These trails are not officially included in tours, and tourists have to guide themselves by relying on the signage and the information available on the internet on sites such as Shipwreck Hiking and on shipwreck.co.za.

Concluding remarks and proposed UCH operational framework

The research conducted a literature and empirical study as well as compared the status quo of heritage conservation and legislative frameworks to international best practice. From the findings it was clear that the legislation – the NHRA – in itself is not problematic and is sufficient for UCH protection. However, the largest issue facing such protection in South Africa is the implementation of the legislation and its enforcement by the relevant authorities. More sustainable protection and management of UCH requires the following proactive measures: "introducing a more widespread, multi-disciplinary approach … incorporating environmental

concerns, tourism initiatives, scarce skills development, job creation programmes and education …" (Sharfman et al., 2012:105). In this regard Sharfman et al. (2012:107) note:

> It is only through the application of strong policy and international convention together with awareness raising and training initiatives, that the challenge facing the governance of MUCH can be addressed.

South African UCH is important to all citizens (Davies, 2003:2) and, therefore, necessitates protection. Seeing that the findings showed the legislative measures are effective, particular attention should be paid to its implementation. This should entail a comprehensive strategy operated by the relevant institutions, private sector, law enforcement and prosecution, tourism industries and other government authorities such as SANParks and SARS.

The above-mentioned comprehensive strategy should include aspects from all the discussed focus areas of application (FAA) within UCH management, and could culminate in a framework incorporating best practice, as shown below.

FAA	Core principles of best practise
UCH resources and principles	Formulate a broad definition of UCH within South Africa to include the following: the definition of UCH within the DAC draft policy (DAC, p. 8); the definition of wreck (DAC, p. 9) and the NHRA's section (2)(ii)(*c*); include all human remains at the site within its definition for protection.
	Clearly state significance parameters: archaeological, historical, artistic, educational, commercial, economic, technological and tourism value of the site or object.
	Include stricter penalties than those listed within NHRA (thus revisits and amends the NHRA). This could include penalties in line with those in France (see ch 2, section 2.2.1).

	Explain the influence and significance of all 'other' applicable legislation. Focus on cases where established entities are allowed to destroy wrecks.
	List the UCH-related conservation options for assessment on a case-by-case basis. This would include excavation and *in-situ* principles.
Procedures to identify, assess, excavate, and preserve UCH	Clearly define procedures of work for all team members involved in an excavation project. This should include measures for locating the site; searching the site; excavation techniques; *in-situ* conservation; monitoring; and conservation measures for the removed resources.
	Apply best practise for all museums conserving and exhibiting UCH resources. Include relevant conservation principles, exhibition methods, interpretation principles, and the presentation of resources to the public and tourists.
	Provide guidelines on involving divers in research and excavation projects when the qualified capacity is lacking or needed elsewhere. These divers should adhere to maritime archaeological standards when working at sites.
Commercial exploitation and salvage	Outlaw random exploitation and salvaging of UCH resources completely.
	Allow salvaging only when deemed appropriate by SAHRA. Apply clear principles to determine cases where it is allowed and provide supervision of at least one maritime archaeologist per site.
	Establish details of permit applications for use. Utilise SAHRA's existing application form.

Museums and databases	Outline the procedures for using SAHRIS as a shipwreck database. The database should include all UCH.
	List all museums and authorities involved with UCH countrywide, and the number of employees necessary to focus on UCH.
	Establish procedures to support smaller museums.
	Empower all museums with strategies, procedures and financing to hold awareness-raising programmes within their communities.
	Enable SAHRA's MUCH-unit to allocate grants or subsidies to all museums conserving or exhibiting UCH or maritime history of South Africa.
	Increase funding allocated to SAHRA's MUCH-unit to expand its capacity and employees in order to sufficiently execute their duties.
Public access, awareness and participation	Provide measures for accredited diving companies to offer non-intrusive tours to the public visiting shipwrecks.
	Establish a strategic plan to present for awareness-raising programmes and workshops around the country.
	Encourage public participation in decision-making processes.
State obligations, state authorities and private	Include procedures and plans for NGO's in projects and involve them in excavations.
	Establish state-funding principles and support measures.
	Formulate measures for liaising with other countries.

organisations	Provide sufficient training for government employees involved in UCH management. This includes SAPS and Customs officials, SANParks rangers, and officials at the national departments.
Research, training and publications	Establish a tertiary training programme at an accredited tertiary institution.
	Establish internship and bursary programmes and incentives for UCH training.
	Public-awareness publications should provide information on tourist routes, and provide signage at all applicable sites.
This framework would enable the relevant UCH authorities to amend the legislation applicable, or compile a policy regulating UCH within South Africa.	

It should be remembered that human resources in the field of specialised UCH conservation management in South Africa are severely limited. Therefore, this field cannot easily be expanded from within, without support from external partners. This requires a collaborative effort, involving all relevant stakeholders, under the strong leadership of personalities who manifest a combination of expertise and passion for UCH.

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GLOSSARY

In situ   - at the site.

Lex specialis   - a law governing a specific subject matter, a specific law.

Lien   - charge upon property to settle a debt arising by operation of law (eg. maritime).

Low water line   - mean height of low-water for a tidal cycle of 18,6 years.

Occupatio   - where physically having possession of property grants its ownership.

Res derelicta   - owner has abandoned something leading to *res nullius**.

Res nullius   - when property has no owner.

Sovereign(ty)   - state of independence or self-government.