

# THE CONCEPTION OF HISTORIC SHIPWRECKS OWNERSHIP IN ACCORDANCE WITH INTERNATIONAL LAW

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## Abstract

*Technology development pushed forward an access to underwater cultural heritage. Diving tools development makes an access to deeper part of sea accessible. This access not only used by researcher and archeology but also by treasure hunter and historical shipwrecks treasure seekers. These events lead the interested party to explore the sea for valuable things. One of them is historic shipwrecks which contain historical, archaeological or economic value. The significance of this historic shipwrecks leads to an issue about ownership. The ownership claims of historical shipwrecks tis starting to become a global issue after the occurrence of jurisdiction clash among the Flag-state country, Finder, Coastal state, or state origin of the cargo. Therefore, it is important to understand the issue further by exploring the conception on regulation of historic shipwrecks at international level through international convention, at national level through its regulation and practice in several countries and also the regulation and practice in Indonesia.*

**Keywords:** *historic shipwrecks, underwater cultural heritage, ownership, flag state, coastal state.*

## I. INTRODUCTION

International concern regarding cultural heritage especially underwater cultural heritage in the passing century begin to develop. It is estimated around 3 million shipwrecks lie under the water which contain of gold coins, vase and other valuable things in it.<sup>1</sup> It is proven by the finding of The Mary Rose Shipwrecks, R.M.S. Titanic Shipwrecks, Belitung Shipwrecks or other historical sites such as Alexandria lighthouse and Cleopatra's palace (Egypt), Ancient Carthage (Tunisia) and Jamaica's Port Royal that was destroyed in 1962.<sup>2</sup>

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<sup>1</sup> Constance Johnson, *For Keeping or for Keeps? An Australian Perspective on Challenges Facing the Development of a Regime for the Protection of Underwater Cultural Heritage*, Melbourne Journal of International Law, 2000. page.3.

<sup>2</sup> UNESCOPRESS, *UNESCO Press Release No. 97-2008*(dapat diakses di <http://www.ioc-unesco.org/index.php>)

The invention of aqualung by Jacques Cousteau and Emile Gagnan in 1942-1943<sup>3</sup> and diving tools development make an access to deeper part of sea accessible. This access not only used by researcher and archeology but also by treasure hunter and historical shipwrecks treasure seekers.<sup>4</sup> This development endangers the existence of historical shipwrecks underwater, which before protected by the sea. This condition leads to several conflicts, one of them is conflict of ownership among flag state, the finder, the country where the shipwrecks are located or where the cargo came from.<sup>5</sup>

The conflict of ownership makes position of the finder of historic shipwrecks in difficult situation, when they face a claim from government.<sup>6</sup> Furthermore, the sprung of movement advocating historical shipwrecks and its cargo as common heritage of mankind create a new color for this matter.<sup>7</sup> The history proves that the issue regarding the regulation of maritime law is always filled with strife about access and control after the marine resources. Many people believe that the adoption of United Nations Convention on the Law of the Sea already settled the 50 years conflict of interest between coastal state and country which hold maritime power.<sup>8</sup> The fact, this prediction is partially right.<sup>9</sup> Another new dispute arises in the case of historical shipwrecks ownership.<sup>10</sup>

The importance of a serious effort to control the ownership of historical shipwrecks is inseparable for its invaluable existence and also historical shipwrecks assumed bond of existence and evidence from culture of the past that allows the people involved to enrich the insight

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<sup>3</sup> UNESCO, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/protection/>

<sup>4</sup> *Ibid.*

<sup>5</sup> David Curfman, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Waters—A New Policy Regime*, 86 Wash. U. L. Rev.181, 2008. Hal.181. Dapat diakses di <http://digitalcommons.law.wustl.edu/lawreview/vol86/iss1/4>

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid*

<sup>8</sup> David J. Bederman, *Historic Salvage and the Law Of The Sea*, University of Miami Inter-American Law Review, 1998. page.2.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid*

of unknown civilizations.<sup>11</sup>

Conflict over historical shipwrecks ownership is not a new phenomenon and not few who took the path of litigation to settle it.<sup>12</sup> For example, *Sea Hunt Inc. and the Commonwealth of Virginia v. the Unidentified Shipwrecked La Galga and Juno* between Commonwealth of Virginia and Spain. Further, in the *Black swans* case between Odyssey, Peru and Peru. It also happens on the case of *Robinson V. Western Australian Museum*. The conflict of historical ownership is a fairly complex problematic to resolve. It's because the conflict of interest among the finder, the flag state and the respective owner of cargo ship.<sup>13</sup>

International cooperation in the historical shipwrecks ownership is a vital necessity. It's because when we discuss about historical shipwrecks, it's not only about the economic value contains in it but also the historical bonds and archeological aspect which severely importance in one country history existence or the world existence in overall. In international level there has been a lot of regulation that accommodate about historic shipwrecks in general, such as Law of Find and Law of Salvage, The United Nations Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, The Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, The United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982), and also UNESCO Convention on the Protection of Underwater Cultural heritage 2001.<sup>14</sup>

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<sup>11</sup> Valentina Sara Vadi, *Investing in Culture: Underwater Cultural Heritage and International Investment Law*, (This Article was presented at the UNESCO Conference IKUWA 3: Beyond Boundaries, Third International Congress on Underwater Archaeology which was held at University College of London, July 9–12, 2008), Vol.42, *Vanderbilt Journal Of Transnational Law*, 2008. page.1.

<sup>12</sup> Cathryn Henn, *The Trouble with Treasure Historic Shipwrecks Discovered In International Waters*, Vol.19, *University of Miami International Law and Comparative Law review*, 2012. page.144.

<sup>13</sup> *Ibid.*

<sup>14</sup> O'keefee, P.J.2002. *Shipwrecked Heritage: a commentary on the UNESCO Convention on Underwater Cultural Heritage*. Great Britain: Institute of Art and Law. page.32.

## **II. THE OWNERSHIP CONCEPT OF HISTORIC SHIPWRECKS UNDER INTERNATIONAL REGULATION AND INTERNATIONAL PRACTICE**

### **A. THE OWNERSHIP CONCEPT OF HISTORIC SHIPWRECKS UNDER INTERNATIONAL LAW**

The conception of ownership under law of property has a great significance in various area of law. In the process in rem of admiralty law<sup>15</sup>, the jurisdiction of federal court is based on the ownership of ship which act as defendant or artifacts derived from it. The determination about who has a right in the historic shipwrecks discovery relies heavily on the concept of property.<sup>16</sup>

Ownership in general is defined as possession and control over the object in question, together with intent to run this possession and control. The ownership is defined as the merger of two elements of the physical relationship between the holder of property and the object and purpose. This physical relationship is further said in reference to Brown's book on the personal property as "requires the ability to possess and use it".<sup>17</sup>

The basis of actual possession on the historic shipwreck should be distinguished from the basis of ownership of coins or books. In process in rem, usually the court will grant custody rights to the finder which prevent the other party to intervene in an attempt of the finder to have an actual possession over physical form.<sup>18</sup>

The distinction of "actual" and "constructive" has also become a relevant topic for the fulfillment of the historic shipwrecks finder right. Actual ownership occurs when a person physically occupied or controls the object in question. As a comparison, ownership under the constructive possession or under the law concept, is not a real ownership but

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<sup>15</sup> The finder apply a claim againsts the objects found by him. In this case the historical shipwrecks and its cargo. The ship is positioned as defendant by its name or description and give notice to all interested partes.

<sup>16</sup> See *Treasure salvors, Inc. V. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337, 343, (5<sup>th</sup> Cir. 1978). Recognize that United State in the case of lost property the ownership given to the finder.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

designed by the law to achieve a certain clear result. In the case of maritime law, the rights could be developed from the physical possession where the constructive possession is not sufficient to prove a legal right. The application of the broader concept in terms of historical shipwrecks ownership is narrowed by the doctrine of salvage law and law of finds.<sup>19</sup>

The debate about whether it is appropriate for the salvor to salvage historic shipwrecks basically depend on whether the Law of Finds and Law of Salvage, after a hundred years of evolved and used whether it's still relevant to be applied for the historic shipwrecks.<sup>20</sup>

In accordance with Law of Finds the right after a lost property and abandoned is being given to the first person who found it and makes the property under its possession to own it.<sup>21</sup> On the other hand, Law of Salvage did not relinquish right of the owner over the shipwrecks.<sup>22</sup> The facts, under the principle of non-abandonment fiction stated that owner still own the ship no matter how long the ship has been abandoned. Generally, Law of Salvage is designed to encourage individual for taking risk in term of saving.<sup>23</sup> Act of rescuing a vessel in distress requires the technical capability, courage and usually put the live of salvor and its vessel in danger. Therefore, to encourage people to do such action of saving, the finder or the salvor will be given a reward such as percentage of value of the shipwrecks in rescue.<sup>24</sup> In the case, the owner did not abandon the ship so the salvor will not be given any reward for all the object or part of ship that has been saved.<sup>25</sup>

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<sup>19</sup> *Ibid.*

<sup>20</sup> Christopher R. Bryant, *the Archaeological Duty of Care: The Legal, Professional, and Cultural struggle over Salvaging Historic Shipwrecks*, *Albany law review*, 2001. page.6

<sup>21</sup> *Op. Cit.*, See *Treasure salvors, Inc. V. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337, 343, (5<sup>th</sup> Cir. 1978)

<sup>22</sup> *Bryant., Loc.Cit.* See *Colombus-Am. Discovery Group*, 974 F.2d. the salvor is being given reward for the service its rendered.

<sup>23</sup> Kevin Doran, *Adrift on The High Seas: The Application of Maritime Salvage Law to Historic Shipwrecks in International Waters*, *Southwestern Journal of International Law*, 2012. page.3.

<sup>24</sup> *Ibid.*

<sup>25</sup> Russel G. Murphy, *The Abandoned Shipwreck Act of 1987 in the Millennium: Incentives to High Tech Piracy?*, *Tulane Marine Law Journal*, 2003.

## B. THE OWNERSHIP CONCEPT OF HISTORIC SHIPWRECKS UNDER INTERNATIONAL CONVENTION

First, The United Nations Convention on the Means of Prohibiting and Preventing the Illicit Import export and Transfer of Ownership of Cultural Property 1970 regulate that ownership of the cultural heritage belong and subject to national legislation. Therefore, the ownership of historical shipwrecks is subject to national legislation as mention in article 13 below:

*“The States Parties to this Convention also undertake, consistent with the laws of each State:*

- (a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;*
- (b) To ensure that their competent services co-operate in facilitating the possible restitution of illicitly exported cultural property to its rightful owner;*
- (c) To admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;*
- (d) To recognize the indefeasible right of each State Party to this to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.”*

This convention will be retroactively applied, giving a right to the buyer with good faith and give some requirement to be fulfilled in order gain a right of ownership.<sup>26</sup> The convention will be relevant only when the underwater cultural heritage such as historic shipwrecks is under country jurisdiction where it located.<sup>27</sup> If such historic shipwrecks and its cargo are illegally exported, so it is possible to be reclaimed by other country members.<sup>28</sup>

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<sup>26</sup> Megan B. Doyle, *Ownership By Display: Adverse Possession To Determine Ownership Of Cultural Property*, *The George Washington International Law Review*, 2009. Dapat diakses di <http://e-resources.pnri.go.id:2056/docview/758395580>

<sup>27</sup> Patrick J. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, *Institute of Art*, (Great Britain, 2002). Hal. 38.

<sup>28</sup> *Ibid.*

Second, the United Nations Convention on the Law of the Sea 1982 (UNCLOS 1982) regulate regarding historic shipwrecks under two articles are article 149 and 303. It is a fact that in the effort to obtain a consensus and create a convention, the substantial regulation of article 149 and 303 was deliberately left vague and ambiguous.<sup>29</sup> However, these two articles have described the applicable international law for historic shipwrecks and its cargo and contain the applicable general principles.<sup>30</sup> Firstly, it's about state responsibility to protect historic shipwrecks in various maritime zones outside the coastal state jurisdiction. Secondly, this obligation is done on the basis of interest of the mankind.<sup>31</sup> Thirdly, in the fulfillment of this obligation the countries are expected to cooperate.

Under article 149 stated about archeologist and historical object in chapter of International Sea-bed Area:

*“All objects of an archaeological and historical nature found in the Area Shall be preserved or disposed of for the benefit of mankind as a whole, particular regards being paid to the preferential rights of the state or the country of origin, or the state of cultural origin or the state of historical and archaeological origin”*.<sup>32</sup>

Furthermore, Article 303 UNCLOS 1982 in correlation with article 33 stated that:

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

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<sup>29</sup> Craig Forest (b), *Historic Wreck Salvage: An International Perspective*, *Tulane Maritime Law Journal*, 2009.page.9.

<sup>30</sup> *Ibid.*, See also Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the sea*, 1995. Page.296-314.

<sup>31</sup> *Ibid.*, See also, *The Concept of the Common heritage of Mankind in International Law*, 1998.

<sup>32</sup> United Nations, [http://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_convention.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm) (diakses pada 25 March 2014, 16:45 Wib)

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

It is very difficult to obtain uniform interpretation regarding these articles, for example this convention did not give any explanation regarding how the archeologist and historic object should be preserved and how is the funding. Whether the preservation intended under this article is preservation in situ or in museum. In the matter of ownership, there is obscurity about which party that should have preferential rights.<sup>33</sup> Although, it could be concluded literally that UNCLOS 1982 lead to preservation situ or if needed could be disposed by giving the rights to the flag state, the state of origin or state of cultural origin. But, based on article 303 paragraphs (1) require a country to protects objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

Third, UNESCO Convention on the Protection of Underwater Cultural Heritage 2001 (UCH Convention), this convention promoting the principle of protection and non- commercial exploitation of underwater cultural heritage such as historic shipwrecks by stating that historic shipwrecks should be protected for the benefit of mankind so the ownership of historic shipwrecks under private party is nearly impossible; the convention regulate that the protection of underwater cultural heritage is contained in four principle such as:<sup>34</sup>

- 1) State responsibility of member state to protect underwater cultural heritage;
- 2) Preservation in situ principle;
- 3) Non- commercial exploitation principle;
- 4) Training and information sharing among member state.<sup>35</sup>

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<sup>33</sup> Forest., *Loc. Cit.*

<sup>34</sup> Unesco, <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/> (diakses pada 26 March 2014, 16:32 Wib)

<sup>35</sup> “... Obligation to Preserve Underwater Cultural Heritage; Preservation as first option ;No Commercial Exploitation; Training and Information Sharing ...”



Basically, UCH Convention focuses on the protection of cultural and historical value of underwater cultural heritage and never explicitly stated preferential rights related to ownership of underwater cultural heritage.<sup>36</sup> Under article 4 it's clearly stated that law of salvage and law of finds are suitable to be applied for the historic shipwrecks.<sup>37</sup> Therefore, the finder of historic shipwrecks will not be the owner of historical shipwrecks in question, as stated below:

*"...Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:*

*(a) is authorized by the competent authorities, and (b) is in full conformity this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection".*<sup>38</sup>

From the article above could be drawn several conclusions that law of salvage and law of finds still could be applied to underwater cultural heritage if: (1) the activity had a permission from competent authority; (2) conducted in accordance with the rules of UCH Convention; and (3) can ensure that the salvage activity of underwater cultural heritage conducted to protect it maximally. So, it could be concluded that the ownership of historic shipwrecks could not be used by the salvor to be traded commercially.<sup>39</sup> Therefore, the convention purpose is to treat the historic shipwrecks as underwater cultural heritage that should be preserved.

### C. THE OWNERSHIP CONCEPT OF HISTORIC SHIPWRECKS UNDER SEVERAL COUNTRIES LEGISLATION

For the issue of ownership of historic shipwrecks, several countries in the world already have an exclusive regulation for historic ship-

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<sup>36</sup> Guido Carducci, *New Development in the law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage*, Vol.96, *America Society of International Law*, 2002. Hal. 420.

<sup>37</sup> Roberta Garabello, *the Negotiating Story of the Convention on the Protection on the Underwater Cultural Heritage*, *In the Protection of the Underwater Cultural Heritage: before and After the 2001 UNESCO Convention* 89, 2003. page.123.

<sup>38</sup> The article could be accessed at <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/>

<sup>39</sup> *Ibid.*

wrecks such as United States, United Kingdom, Australia and Spain to settle the matter.

United States regulated about historic shipwrecks under Abandoned Shipwrecks Act 1987 (ASA). Before the adoption of ASA the ownership of historic shipwrecks will be determined by in rem process especially in maritime case by using law of finds and law of salvage.<sup>40</sup> Under American Law, in relation to these two concepts of claiming the ownership of historic shipwrecks that is found by or salvaged, the finder/salvor should filled a claim to the court.<sup>41</sup> The court jurisdiction is based in the “maritime causes of action” that is started and continue as in rem process.<sup>42</sup> Furthermore, the enforcement of ASA replace the use of law of salvage and law of finds, which automatically give a right for the historical shipwrecks in question to the country where the shipwreck is located.<sup>43</sup> In accordance with part 43 *United State Code* (U.S.C.) 2105, *Rights of ownership* sub-chapter 43 *Chapter 39* U.S.C. 2105(a) *Section 6*, 28 April 1988 stated that United States asserts title to any abandoned shipwreck that is (1) embedded<sup>44</sup> in submerged lands<sup>45</sup> of a State;(2) Embedded in coralline formations protected by a State on submerged lands of a State; or (3) On submerged lands of a State<sup>46</sup> and is included

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<sup>40</sup> Russell G. Murphy, *The Abandoned Shipwreck Act Of 1987 In The New Millennium: Incentives To High Tech Piracy?*, *Ocean And Coastal Law Journal*, Vol. 8,2003. Hal.169-170. Lihat Juga Thomas J. Schoenbaum, *Admiralty And Maritime Law*, 4th Ed,2004.page.7.

<sup>41</sup> Linsey Gleason, “Possession” *And The Abandoned Shipwreck Act: Promoting The Discovery Of Historic Shipwrecks And Preventing An Unconstitutional Destruction Of Federal Admiralty Jurisdiction*, *Michigan State Law Review*, Winter 2007, Page.4.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> The term “embedded” means firmly affixed in the submerged lands or in coralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, and any part thereof; 43 U.S.C. 2102, *Definitions Section 3 of ASA*.

<sup>45</sup> *Ibid.*, “... (1) that are “lands beneath navigable waters,” as defined in section 2 of the Submerged Lands Act [43 U.S.C. 1301]; *Lands beneath navigable waters are defined as “all lands permanently or periodically covered by tidal waters . . . seaward to a line three geographical miles distant from the coast line of each such state., or as heretofore approved by Congress, [such boundary] extends seaward (or into the Gulf of Mexico) beyond three geographical miles.”* 43 U.S.C. § 1301(a)(2). *This limit extends to nine nautical miles for Florida, Texas and Puerto Rico. Id. § 1301(b).*

<sup>46</sup> “State” means a State of the United States, the District of Columbia, Puerto Rico,

in or determined eligible for inclusion in the National Register<sup>47</sup>.

United Kingdom regulate about historic shipwrecks under Protection of Wrecks Act 1973. Which regulate about the protection of shipwrecks with its historic, archeologist and artistic value. This matter is regulated under the authority of National Heritage organizations Department for Culture, Media and Sport (DCMS).<sup>48</sup> The historic shipwrecks are under the jurisdiction of United Kingdom if it's located in United Kingdom territorial water. The historic shipwrecks will be protected in the protected zone. So, to visit the historic shipwrecks site will need the permit from the competent authority and the permit only will be given to the professional divers.<sup>49</sup>

Australia regulate about historic shipwrecks under the Historic Shipwrecks Act 1976 (HSA). Generally, HSA give an authority to the minister to declare all the shipwrecks located under territorial water of Australia and with minimum aged 75 years old to be protected under Australia jurisdiction.<sup>50</sup> The HSA purpose is to protect the historic shipwrecks in order the value contain in it preserved also to the interest of recreation, scientific and education.<sup>51</sup>

Furthermore, Spain regulate about ownership of historical shipwrecks in Spanish Historical heritage law No. 16 of 1985. Under this regulation in article 14 stated that cultural heritage located under Spain Territorial water will be protected whether it's movable or un-movable. This regulation is the reflection of UNESCO convention on protection of underwater cultural heritage 2001 (UCH Convention) where the Spain is one of early signatories. In the other side, even though Spain already ratified the UCH Convention but there is no any prohibition to the member countries to make bilateral treaty for the protection of historic shipwrecks. Usually, the treaty concluded between states of

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*Guam, the Virgin Islands, American Samoa, and the Northern Mariana Islands.*

<sup>47</sup> *Ibid.*, the term "National Register" means the National Register of Historic Places maintained by the Secretary of the Interior under section 101 of the National Historic Preservation Act [16 U.S.C. 470a];

<sup>48</sup> Wreck and salvage law could be accessed at <file:///E:/Wreck%20and%20salvage%20law%20-%20Detailed%20guidance%20-%20GOV.UK.htm>

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

historical or archaeological origin.<sup>52</sup> Spain already concluded several treaties regarding underwater cultural heritage with several countries for example with United Kingdom in Cultural Convention between the government of the United Kingdom of Great Britain and Northern Ireland and the Government of Spain 1960, with Brazil (1960), Venezuela (1973), and Ecuador (1975).<sup>53</sup>

Under the law of Spain, Spain has not abandoned or relinquished ownership or other interest except by specific action. This stance has been proven under the case of Nuestra Senora de las Mercedes.<sup>54</sup> In this case Spain, questioned the rights of Odyssey (commercial salvage firm) to salvage historic shipwrecks that later identified as Spain Shipwrecks Nuestra Senora de las Mercedes which contain around 900.000 coins. Spain claim that Odyssey violates the law of Spain therefore should be responsible for the damaged caused. Finally, the court decides that Odyssey should paid compensation to the Spain.<sup>55</sup>

#### D. THE OWNERSHIP CONCEPT OF HISTORIC SHIPWRECKS AT INTERNATIONAL PRACTICE

The law of historic shipwrecks has remained largely undeveloped until recent years, when technology improved to the point that it became possible and feasible for companies to undertake search and salvage operation.<sup>56</sup> Since 1985, The case of La Galga and Juno and Titanic have laid a foundation for understanding substantive law and jurisdiction in historic shipwrecked salvage and recently the case of Black swan is now testing the previous determination.<sup>57</sup>

The case of La Galga and Juno is about two Spain Vessels that drown in Virginia territorial water around 1750 and 1802. La Galga is a ship

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<sup>52</sup> Esposito. C. dan Fraile. C. *The Unesco Convention on Underwater Cultural Heritage: A Spanish View*, (Leiden dan Boston: Martinus Nijhoff Publishers, 2004).

<sup>53</sup> *Ibid.*

<sup>54</sup> *Odyssey press release*, 18 Mei 2007. Could be accessed in [www.odysseymarine.com/news-media.htm](http://www.odysseymarine.com/news-media.htm).

<sup>55</sup> *Ibid.*

<sup>56</sup> Brooke Wright, *Keepers, Weepers, or no finders at all: the effect of international trends on the exercise of U.S. Jurisdiction and Substantive law in the salvage of historic wrecks*, *Tulane Maritime Law Journal*, 2008. Page.2.

<sup>57</sup> *Ibid.*

under the command of Spain navy that had mission to protect a convoy of Spanish merchant ships, while transporting battalion of marines, some Spanish Royal Property, and some English prisoners to Spain.<sup>58</sup> However, La Galga encountered hurricane and drown. Not far from the wreck of la Galga drown the wrecks of Juno. The Juno, a thirty-four-gun frigate, was commissioned in the Spanish Navy in 1790. She set sail from Veracruz, bound for Spain, on January 15, 1802.<sup>59</sup> She carried soldier and their families, plus various civilian officials. While still near America, the Juno was overcome by a strong storm.<sup>60</sup> Although Spain ordered an investigation, the Juno was not discovered until the wrecks of La Galga was also found in the late 1990s.<sup>61</sup>

Two hundred years later maritime salvage companies Sea Hunt salvage La Galga and Juno under the permission of Virginia Marine resources Commission. In this case Virginia submits a claim of ownership for La Galga and Juno in accordance with ASA 1987 that giving a right to the state of territorial water where the abandoned shipwrecks located. To avoid intervention from other parties in the salvage operation that being conducted, Sea Hunt filled a in rem process that asked the court to declare that those shipwrecked never been a subject to Spain Prerogative jurisdiction and subject to ASA and law of finds.<sup>62</sup> Alternatively, Sea Hunt asks for the salvage award for its operation to be granted.

Regardless, La Galga and Juno are warship, these two shipwrecks are subject to rule of express abandonment in accordance with precedent from fourth circuit in the case of Columbus-America.<sup>63</sup> Sea Hunt is Success in proving that through 1763 treaty Spain explicitly already abandoned its right over La Galga therefore the right over La Galga

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<sup>58</sup> *Ibid.*

<sup>59</sup> Kevin Berean, *Seahunt, INC. v. The Unidentified Shipwrecked Vessel or vessels: How the Fourth Circuit Rocked the Boat*, Brooklyn law review, 2002. Lihat juga <http://www.admiraltylawguide.com/circt/4thseahunt.html>.

<sup>60</sup> *Ibid.*

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

<sup>62</sup> *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F. 3d 634 - Court of Appeals, 4th Circuit 2000 - Google Scholar could be accessed <http://csc.noaa.gov/data/Documents/OceanLawSearch/Sea%20Hunt,%20Inc.,%20221%20F.3d%20634%20%284th%20Cir.%202000%29.pdf>

<sup>63</sup> *Ibid.*

is under Virginia government.<sup>64</sup> In accordance with ASA, Sea Hunt is permitted to continue its salvage operation.<sup>65</sup> On the other hand, there is no any proof that Spain already abandoned Juno therefore the Spain still has right over Juno in accordance with ASA. Furthermore, the issue whether Sea Hunt is entitled to the salvage awards for its salvage operation is a pending issue.

In May 2007, Odyssey announced its discovery of shipwrecks in Atlantic Ocean. The shipwrecks contain of 600.000 silver coins, a hundreds of gold coins and another artifact.<sup>66</sup> All the coins and artifact are being exported to the United State with valid and legal import permit in accordance with law. As a response, Spain filled a suit against Odyssey in Tampa Court, Florida. In accordance with Spain administrative document the shipwreck that was found named Nuestra Senora de Las Mercedes that sailing from Montevideo to Cadiz in 1804, a Spanish Ship, therefore it's belong to Spain. The Tampa Court forced Odyssey to disclose the location of the shipwreck. In the end, Spain asks all the Coins to be given to Spain on the basis that the coin is Spain to have.<sup>67</sup> Black swan drew where the position of American Court in exercising its jurisdiction over historic shipwrecks that located in international water.

In the other case, Titanic is arguably the most famous shipwreck in history, and it facts are well known. After she sank in 1912, her Wreckage lay over 12.000 feet of water, undiscovered, until 1985.<sup>68</sup> At that time, a joint French-American expedition began the salvage operation. In 1987, thirty-two dives successfully recovered 1800 artifacts. These artifact were taken to France for conservation and in 1993, France awarded title to the artifacts to an American Company, the predecessor of RMST. Also in 1993, RMST brought a suit in rem in the Eastern District of Virginia against artifacts recovered during these dives and against the vessel itself.<sup>69</sup> In adjudicate this case, the court use con-

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<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> <http://www.shipwreck.net/blackswan.php,21:13> (*Black swan project overview*)

<sup>67</sup> *Ibid.*

<sup>68</sup> Paul R. Spencer, *Broadcasting Video Online From 5000 Feet Underwater: A Proposal To Help Ensure An Archaeological Duty Of Care For Historic Shipwrecks*, *California Western Law Review*, 2012. Page. 3.

<sup>69</sup> *Ibid.*

structive in rem jurisdiction to the remains of Titanic by taking two artifacts of Titanic to the court. The base of using in rem jurisdiction upon historic shipwrecks that located under international water is rests upon the fiction that res is not divided and... Possession of some of it is constructively possession of all.<sup>70</sup> This consideration is drawn from the maritime law history, from the creation of jus gentium until constitution of federal court jurisdiction over all the maritime cases.<sup>71</sup> Jus gentium is a concept of rule that based on the acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.<sup>72</sup>

In the end, the case is settled through Titanic Maritime memorial Act 1986 (“Titanic Act”).<sup>73</sup> This Titanic Act is a base of consultation between United States, United Kingdom, Canada and France for the research and conservation. In June 18, 2003 United Kingdom ratified the convention and in June 18, 2004 United States become the second state that ratified it. Titanic become one example of Country cooperation to protect historical shipwrecks and avoid conflict between party of interest.<sup>74</sup>

### **III. THE OWNERSHIP CONCEPT OF HISTORIC SHIPWRECKS UNDER INDONESIAN LAW**

#### **A. THE OWNERSHIP CONCEPT OF HISTORIC SHIPWRECKS IN ACCORDANCE WITH INDONESIA REGULATION**

Under Indonesia Constitutional law 1945, Article 32 paragraph 1 stated that state guarantees the Indonesian national culture amid the civilization of the world, with freedom of the community in maintaining and developing the cultural values.<sup>75</sup> As mention in the preamble of In-

<sup>70</sup> Marian Keigh Miller, *Underwater cultural heritage: is the Titanic still in peril as courts battle over the fuure of the historical vessel?*, *Emory international law review*, 2006. page.16.

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

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

<sup>73</sup> Titanic Act, *the RMS Titanic Maritime Memorial Act 1986*, it could be accessed at <https://www.govtrack.us/congress/bills/112/s2279/text>

<sup>74</sup> *Ibid.*

<sup>75</sup> Indonesia, Constitutional Law year 1945, the fourth amendment, published by Secretary-General and Registrar of the Constitutional Court of the Republic of Indonesia, 2010. (*Undang-undang Dasar Negara Republik Indonesia 1945, perubahan keempat*,

Indonesia constitutional law *Undang-undang Dasar 1945* regarding cultural heritage it stated in accordance with *Ketetapan Majelis Permusyawaratan Rakyat No. II/MPR/1988* that Indonesia cultural heritage that reflects the noble value of the nation, must be protected, nurtured and developed to strengthen appreciation and practice of Pancasila, improve the quality of life, strengthen national identity, strengthen self-esteem and national pride, strengthen the spirit of national unity and able to be a driving force for the realization of Country goals in the future.

In relation thereto, it is a responsibility of government to take all the necessary steps for the effort of protection the countries cultural heritage. Indonesia regulate about protection of cultural heritage including historic Shipwrecks under law No. 5 of 1992 as amendment to law No. 11 of 2010 regarding cultural heritage. The regulation is created as a concrete step to improve the welfare of the people and as well as raise the nation civilization through cultural heritage.<sup>76</sup>

In accordance with this regulation all the cultural heritage that aged for 50 years or more will be regarded as cultural heritage. Therefore, if a shipwreck has aged for 50 years or more, it will be regarded as historical shipwrecks. In the term of ownership, this regulation defined ownership as the strongest rights upon cultural heritage by taking into account its social function and duty to preserve.<sup>77</sup> As general this regulation allows the ownership of cultural heritage for individual, country, foreigner or foreign corporation that having domiciled in Indonesia. However, under article 26 paragraph 4 this regulation prohibit any activity of salvaging or searching of historical shipwrecks without permit in Indonesia territorial water and violation of this regulation will be given a penal sanction as mention in article 103. Furthermore, Indonesia government already issued a policy that all the salvaging operation of historical shipwrecks in

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*diterbitkan oleh Sekretaris Jenderal dan Kepaniteraan Mahkamah Konstitusi republik Indonesia, 2010)*

<sup>76</sup> An article by Junus Satrio A., notable expert the head of Indonesia Archaeology experts, ex-vice chairman of Directorate for Cultural heritage preservation and Museum (*Direktorat Pelestarian cagar Budaya dan Permuseuman*), Ministry of Culture and Education. It could accessed through <http://iaaipusat.wordpress.com/2012/03/17/perlindungan-warisan-budaya-daerah-menurut-undang-undang-cagar-budaya/>

<sup>77</sup> Indonesia, Law no.11 of 2010, Art. 1 paragraph (7). (*Indonesia, Undang-undang tentang Cagar Budaya, Pasal 1 ayat (7), LN 2010 NOMOR 130, TLN 5168*).



Indonesia will be disallowed except for research.<sup>78</sup>

On the other side, Indonesia President Decree No.12 of 2009 issued that underwater cultural heritage still accessible to be salvaged and utilized. Further under Indonesia law No.1 of 2014 about the management of Coastal Area and small islands, historical shipwrecks is defined as resources that could be exploited economically. In practical level, practical reason also being a basis of the prevailing of President Decree No.12 of 2009 over Law No.11 of 2010.<sup>79</sup>

This condition causes a conflict of interest between the two ministries involved, the Ministry of Education and Culture and the Ministry of Maritime Affairs and Fisheries. As a result, since 2010 when Law No. 11 of 2011 has been issued on cultural heritage, the two ministries agreed to do a moratorium on granting permits removal of historic shipwrecks as well as the issuance of ownership permit.

## B. THE OWNERSHIP CONCEPT OF HISTORIC SHIPWRECKS IN ACCORDANCE WITH INDONESIA PRACTICE

Since the last decade several historical shipwrecks had been found under Indonesia water. Indonesia actively involved under several claims of historical shipwrecks that found within its territories. There are several landmark case occurred that involved Indonesia Government in the case of Historical ownership.

### 1. Flor De la Mar Historical Shipwrecks

At the of 1511, one of Portuguese ship under the command of Alfonso d'Alburque which sail for collecting the rich of the east drown under Malacca Strait. The Ship was named after *Flor de la Mar* Convoy which contains gold that taken from Malacca Sultanate. In 1989, Indonesia government granted permission to the Singapore Salvage Firm to search for the Flor de la Mar shipwrecks. The year after, the Salvage firm found the shipwrecks under Indonesia water in Malacca Strait. Upon the finding, Malaysia claims the ownership of the Flor de la Mar belong to Malaysia, because the shipwrecks contains the prop-

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<sup>78</sup> Junus Satrio A. *Op. Cit.*

<sup>79</sup> Direct interview with Junus Satrio Atmodjo, *Op.Cit.*

erty which taken from Malacca Sultanate.<sup>80</sup>

Based on *Republik* Newspaper in 18 March 1993, the case will be brought upon the International Court of Justice, Malaysia stated that Indonesia Government is not responsive enough to settle the case of historical shipwrecks ownership. However, until the end both countries ownership claims was never been settled.<sup>81</sup>

## 2. Geldermalsen Historical Shipwrecks

Around 1986-1987, Indonesia involved under historical shipwrecks ownership with Netherland under the case of *Geldermalsen*. *Geldermalsen* was a ship owned by VOC (*Verenigde Onstindische Compagnie*) which drown at Riau, Indonesia territory. In 1985, Michael Hatcher salvages the *Geldermalsen* without permit from Indonesia Government.<sup>82</sup> Indonesia government stated that such salvage was an act of looting from Indonesia.

On 18 April- 2 may 1986<sup>83</sup> all the material such as a vase that was salvaged from *Geldermalsen* had been auction in Christie Auction House which sold out for 10 Million Dollar at that time.<sup>84</sup> The auction price was never been returned to the Indonesia Government. This case was a lost for Indonesia Government which triggers the awareness of Indonesia Government to take a serious action to mitigate such case to occur in the future.<sup>85</sup>

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<sup>80</sup> Robert F Marx and Jenifer Marx, *The Search for Sunken Treasure: Exploring the World's Great Shipwrecks* (Toronto: Key Porter Books, 1993), Hal. 65-66. Lihat juga "Malaka Tuntut Harta Karun *Flor de la Mar* dari Indonesia" dalam republika 18 Maret 1993. Hal.1.

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

<sup>82</sup> Arvin CC Mogot, Pengaruh Tenggelamnya Kapal Asing Beserta Isinya di Perairan Indonesia terhadap Kedaulatan Indonesia atas Wilayah Perairannya (Studi tentang Kapal Geldermalsen yang Tenggelam di Perairan Indonesia Tahun 1752) (*The Impact of a Foreign Shipwreck and Its Treasure Found in Indonesian Waters on Indonesian Jurisdiction Over Its Territorial Waters (the Geldermalsen/1752 Case Study)*), (Yogyakarta: Universitas Gadjah Mada, 1993), Page.68-69.

<sup>83</sup> *International journal of nautical Archaeology*, Vol.17, November 1988 could be accessed at <http://onlinelibrary.wiley.com/doi/10.1111/j.1095-9270.1988.tb00672.x/abstract> (22 May 2014, 04:46 Wib).

<sup>84</sup> Patrick J. O'keefe, *Op. Cit.*, Page.6-7.

<sup>85</sup> Direct interview with Indonesia Government Authority Siti Zainab, a staff under Ministry of Maritime and Fisheries under *Panitia Nasional pengangkutan Benda Ber-*

### 3. Belitung Historical Shipwrecks

In 1998, a local fisherman accidentally found the wrecks of Arabian ship which contains Tang dynasty material. As the result, Government of Indonesia take an action to prevent the looting to develop further by assigning New Zealand Salvage Company to salvage all the wrecks of the historical shipwrecks without public knowledge.<sup>86</sup>

In two years after permit to salvage the shipwrecks was granted to Seabed Exploration, Seabed Explorations salvage around 63.000 artefact which after sold to the government of Singapore under the price of 32 Million Dollar.<sup>87</sup> Singapore government build a museum to display the Belitung Shipwrecks and working together with Smithsonian Institution to exhibit it to the world for 5 years exhibition plan trip.<sup>88</sup>

However, Indonesia Government act which granted permit to salvage for commercial purpose create a controversial because such action is contravened with Underwater Cultural heritage convention which promote to protect Under water Cultural Heritage. Actually, Indonesia Government Action is a legal action under Indonesia Law number 5 year 1992 regarding Cultural Heritage. Such regulation allowed Government to grant a permission to salvage Underwater Cultural heritage in Indonesia's water because all of underwater cultural heritage belong to the country and need to be preserved.<sup>89</sup>

Furthermore, Under Indonesia Presidential Decree number 25 year 1995 stated that to the company that salvage the Underwater Heritage will be given a compensation which will be paid from Government Budget. Unfortunately, at the end of Indonesia Government only obtain 5 million Dollars from the total selling price. Practically counting, if Singapore Museum give a tariff around 8 dollar for every entries like

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*harga Asal Muatan Kapal yang tenggelam.*

<sup>86</sup> Patrick Coleman, *Unesco and The Belitung Shiwrecks: The need for a Permissive definition of "Commercial Exploitation"*, *George Washinton International Law Review*, Vol.45. Page.847. could be accessed at docs.law.gwu.edu/stdg/gwilr/PDFs/45-4/6-%20Coleman%20Note.pdf

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Elizabeth Burruman, From the President: The Belitung Shipwrecks*, *Archaeology*, sept-Oct, 2011. Dapat diakses di <http://archive.archaeology.org/1109/departments/president.html>.

Vase Museum in Sweden, within 4 years all the money the Singapore Government had spent for buying the Belitung Shipwrecks will be returned.<sup>90</sup>

In recent years, Indonesia enacted a new Regulation Law No. 11 year 2010 regarding cultural heritage which preserved and protect the Historical Shipwrecks from commercial salvage. Under the new law, Indonesia prohibit any party to salvage historical salvage under Indonesia water.<sup>91</sup>

#### IV. CONCLUSION

The journey of historical shipwrecks ownership is not a new issue but the problem arise is getting more complicated since the development in diving technology. The access to the historic shipwrecks is getting easier which attract a lot of party with interest to search and claim it. Several cases mention above such as La Galga and Juno or Black Swan prove proved to the world how costly and difficult are the competition upon ownership claim of historical shipwrecks.

International Community has already strike to define about ownership claim upon historical shipwrecks among the countries or parties involved through several convention such as *The United Nations Convention on the Law of the Sea* 1982 (UNCLOS 1982), *The United Nations Convention on the Means of Prohibiting and Preventing the Illicit Import Export and Transfer of Ownership of Cultural Property* 1970, and *UNESCO Convention on the Protection of Underwater Cultural Heritage* 2001. Several country also already take a serious concern by adopting or creating their own national regulation about historical ship-

<sup>90</sup> UNESCO, *Submerged Archaeological Sites: Commercial Exploitation Compared To Long-Term Protection*, could be accessed at: [https://plus.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDgQFjAD&url=http%3A%2F%2Fwww.unesco.org%2Fnew%2Ffileadmin%2FMULTIMEDIA%2FHQ%2FCLT%2Fpdf%2FUCH%2520Commercial%2520Exploitation%2520versus%2520Protection\\_07.pdf&ei=FKCPU73oMsH58QXX5oGIAw&usq=AFQjCNGNHXOSus8tzPOQSVmQs9r0kPpyag&sig2=i8fcg-ET5O4XA\\_zdx\\_fANA&bvm=bv.68235269,d.dGc](https://plus.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&uact=8&ved=0CDgQFjAD&url=http%3A%2F%2Fwww.unesco.org%2Fnew%2Ffileadmin%2FMULTIMEDIA%2FHQ%2FCLT%2Fpdf%2FUCH%2520Commercial%2520Exploitation%2520versus%2520Protection_07.pdf&ei=FKCPU73oMsH58QXX5oGIAw&usq=AFQjCNGNHXOSus8tzPOQSVmQs9r0kPpyag&sig2=i8fcg-ET5O4XA_zdx_fANA&bvm=bv.68235269,d.dGc)

<sup>91</sup> Indonesia Law. *Undang-undang tentang Cagar Budaya*, UU No. 11 Tahun 2010, LN No. 130 Tahun 2010, TLN No.5168.

wrecks such as United States with its *Abandoned Shipwrecks Act 1987* (ASA), United Kingdom with its *Protection of Wrecks Act 1973*, Australia with its *The Historic Shipwrecks Act 1976* (HSA) and Spain with *The Spanish Historical Heritage law No. 16 of 1985*.

Indonesia is also an example of a country that try to define the ownership claim upon historical shipwrecks and still have to find a way to settle it. The involvement of Indonesia in several Historical Shipwrecks Ownership claim trigger an awareness for Indonesia Government to be more active in preserve it for the Country. The development of technology also becomes one of the reasons for the growing exceptional concern of world society since last millennia upon historical shipwrecks ownership. In the recent light, the cooperation among interested parties being a popular choice to settle the ownership claim and Titanic is one of the iconic examples of it. However, the development of international regulation and national legislation is still going to be rapid in years to come.

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