

# INDONESIA'S OBLIGATION TO PROTECT ARCHAEOLOGICAL AND HISTORICAL OBJECTS FOUND AT SEA BASED ON 1982 UNCLOS

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## Abstract

*The protection of archaeological and historical objects found at sea, one of them was contained in 1982 UNCLOS. Indonesia as the State Party of UNCLOS has the obligation to protect such objects. However, provisions regarding the protection of such objects in UNCLOS was considered as obscure and ambiguity. Otherwise, the protection of such objects furthermore arranged in 2001 UNESCO Convention on Underwater Cultural Heritage. Unfortunately, Indonesia is not the party of the 2001 UNESCO Convention. This fact makes Indonesia's obligation in international law is confined only on UNCLOS. Therefore, the aim of this article is to explain regarding Indonesia's Obligation to Protect Archaeological and Historical Objects Found at Sea Based on the 1982 UNCLOS, and also the regulations and the practices of Indonesia's national law. In the Indonesian legal system, there are several national regulation which cover the protection and preservation of UCH. However, the matter related to the disharmony of laws and regulations for the protection and preservation of UCH, nor the lack of implement regulation, leading the protection and preservation of UCH to less optimal. In this context, Government needs to emphasize that the protection is pure for the purpose of conservation only, or can it be utilized and manageable for commercial purpose in certain condition. Therefore, will create legal certainty concerning the protection and preservation of UCH.*

**Keywords:** *Archaeological and historical objects found at sea, UNCLOS, Indonesia, 2001 UNESCO Convention.*

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## I. INTRODUCTION

Indonesia is the state party of the 1982 UNCLOS (hereinafter referred as UNCLOS).<sup>1</sup> UNCLOS was ratified by Indonesia through Law No. 17 of 1985.<sup>2</sup> For Indonesia, UNCLOS has an important meaning because for the first time the principle of Archipelagic State which has been continuously fought for 25 years by Indonesia

<sup>1</sup> "United Nations Convention on the Law of the Sea", available at [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=en), accessed on 17 June 2019.

<sup>2</sup> Indonesia, Law regarding Ratification of United Nations Convention on the Law of the Sea, Law No. 17 of 1985, SG. 1985-76, Additional SG. No. 3319.

has succeeded in gaining official recognition from the international community. This success was an effort to actualize a national unity in accordance with the Djuanda Declaration of 13 December 1957, also the Archipelago's Insight ('Wawasan Nusantara'<sup>3</sup>) which became the basis for creating Indonesian archipelago as a political, economic, sociocultural and defense-security entity.<sup>4</sup>

In general, UNCLOS regulates the boundaries of the maritime zone and its legal regime along with the rights and obligations of the state parties in it. One that UNCLOS regulates is the obligation to protect archaeological and historical objects found at sea. This is regulated in Articles 149 and 303 UNCLOS. In order to control traffic in such objects, the coastal state may applying article 33 of UNCLOS which regulates the Contiguous Zone. This means that protection of such objects is confined only to 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.<sup>5</sup>

As a state party of UNCLOS, Indonesia has obligations to protect such objects. In practice, an international agreement that has been ratified by Indonesia through the Law (Undang-Undang) or Presidential Regulation (Peraturan Presiden), there is still a need for other legal products to implement these international agreements in the domain of Indonesian national law, or in other words form a new legal product that implements the provisions contained in the international agreement

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<sup>3</sup> 'Wawasan nusantara' means the archipelagic concept; contextually the term is more precisely translated as the "Indonesian archipelagic vision". Wawasan nusantara is a way for Indonesia to look at itself (geographically) as a unity of ideology, politics, economy, sociocultural, security and defense issues. Frederick Situmorang, "Wawasan Nusantara vs UNCLOS", available at: <https://www.thejakartapost.com/news/2013/01/29/wawasan-nusantara-vs-unclos.html>, accessed on 3 July 2019.

<sup>4</sup> Ibid., General Explanation of Law No. 17 of 1985

<sup>5</sup> United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS (entered into force 16 December 1994), Articles 303 (2) and 33 (2); See also, Anastasia Strati, "Protection of the Underwater Cultural Heritage: From the Shortcomings of the UN Convention on the Law of the Sea to the Compromises of the UNESCO Convention" in Anastasia Strati, Maria Gavouneli, and Nikolaos Skourtos, eds, *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After*, Marthinus Nijhoff Publishers, 2006, pp. 28-31.

that has been ratified.<sup>6</sup> The obligation to implement international agreements that have been ratified by Indonesia is not limited to forming legal products that implement them into Indonesian national law, but also in terms of law enforcement. It means that in protecting archaeological and historical objects found at sea based on UNCLOS, Indonesia needs to establish legal products that implement these provisions and then enforce it.

There are many historical objects under Indonesian waters, one of which is historical shipwrecks and their cargo. The location of the very strategic Indonesian archipelago located between the Asian and the Australian Continent and flanked by the Pacific and Indian Ocean places Indonesia as one of the important international shipping lanes so that there are many historical sinking vessels. Archaeological and historical objects found at sea have strategic values for national development, especially in the fields of education, economy, social and culture.<sup>7</sup>

It is estimated that there are thousands of archaeological and historical objects scattered under Indonesian waters. In March 2019 alone, there were around 23 thousand archaeological and historical objects that were successfully lifted from within the Java Sea region. These objects were then inventoried and examined by a team from the Ministry of Maritime Affairs and Fisheries (KKP) and the Ministry of Education and Culture (Kemdikbud) to determine the list of prospective state collections on such objects.<sup>8</sup>

The archaeological and historical objects found at sea have values that are as important as the history of the Indonesian nation. Because

<sup>6</sup> In certain cases, there are also international treaties that have been ratified by Indonesia with a legal product and at the same time can directly be used as a legal basis for implementation at the national level. See Eddy Pratomo, *Hukum Perjanjian Internasional Dinamika dan Tinjauan Kritis Terhadap Politik Hukum Indonesia*, PT. Elex Media Komputindo, 2016, pp. 18-34; See also Damos Dumoli Agusman, "Status Hukum Perjanjian Internasional dalam Hukum Nasional RI Tinjauan Perspektif Praktik Indonesia", *Indonesian Journal of International Law*, vol. 5 no. 3, 2008, pp. 488-503.

<sup>7</sup> Roby Ardiwidjaja, "Pelestarian Tinggalan Budaya Bawah Air: Pemanfaatan Kapal Karam sebagai Daya Tarik Wisata Alam," *AMERTA, Jurnal Penelitian dan Pengembangan Arkeologi*, vol. 35 no. 2, 2007, p. 134.

<sup>8</sup> "Menguak Sejarah dari Dasar Laut Melalui BMKT", available at: <http://www.djkn.kemenkeu.go.id/berita/baca/17537/Menguak-Sejarah-dari-Dasar-Laut-Melalui-BMKT.html>, accessed on 17 June 2019.

through these objects can be known the history of the Indonesian nation from the past to World War II and the days of Indonesian independence. Therefore, this article will discuss Indonesia's obligation to protect archaeological and historical objects found on UNCLOS 1982.

## **II. THE PROTECTION OF ARCHAEOLOGICAL AND HISTORICAL OBJECTS FOUND AT SEA BASED ON THE 1982 UNCLOS AND THE 2001 UNESCO CONVENTION ON PROTECTION OF THE UNDERWATER CULTURAL HERITAGE**

### **A. THE 1982 UNCLOS**

UNCLOS provides two provisions specifically regulating archaeological and historical objects found at sea. The first provision is Article 149 which stipulates that all objects of an archaeological and historical nature found in the "Area"<sup>9</sup> shall be preserved or disposed of for the benefit of mankind as a whole. In this context, preferential rights are given to State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

However, objects of an archaeological and historical nature found in the Area is not included in the definition of activities in the Area. Such activities only included exploration and exploitation of the resources of the Area, in this case it is minerals.<sup>10</sup> This means that the International Seabed Authority (hereinafter cited as ISA) which is the overall regulatory body in the Area does not enjoy any jurisdictional powers over Underwater Cultural Heritage (hereinafter cited as UCH).<sup>11</sup>

In this context, Article 149 has not comprehensively regulated the protection of archaeological and historical nature found in the Area. Disputes might arise between countries given preferential rights by Article 149 in interpreting and/or implementing the provision of

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<sup>9</sup> "Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. UNCLOS 1982, p. 26, Article 1 (1).

<sup>10</sup> *Ibid.*, p. 26 and 69, Articles 1 (3) and 133 (b); See also, Eden Sarid, "International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges", *Berkeley Journal of International Law*, vol. 53, issue 2, 2017, pp. 226-227.

<sup>11</sup> Anastasia Strati, "see note 4, p. 33".

Article 149. With regard to this matter, no international organization is designated to be responsible for the administration of archaeological and historical objects found at sea or for the settlement of any disputes that might arise.<sup>12</sup> Moreover, Article 149 does not specify how and where deep seabed cultural heritage will be “preserved or disposed of” for benefit of mankind as a whole, nor does it provide for the funding of such activities.<sup>13</sup>

The second provision is Article 303. In order to protect objects of an archaeological and historical nature found at sea, States shall cooperate for this purpose. Protection of such objects is carried out 24 nautical mile of the baselines from which the breadth of the territorial sea is measured. This is a provision stipulated in Article 303 (2) which states that in order to control traffic in such objects, States may apply the provisions that apply to the Contiguous Zone, as stipulated in Article 33.

The removal of such objects from the sea-bed without any approval from the coastal State would be an infringement within its territory or territorial sea. It also assumes that removals will infringe the customs and fiscal regulations. In other words, Article 303 created a *de facto* maritime zone for the protection of the archaeological and historical objects found at sea, having as maximum breadth 24 nautical miles.<sup>14</sup>

However, submerged archaeological and historical objects do not feature as natural resources of the seabed and are, therefore, not subject to the sovereign rights of the coastal State over the continental shelf and the EEZ.<sup>15</sup> The same applies to archaeological research which is excluded from the scope of marine scientific research and the consent

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<sup>12</sup> Petros Sioussiouras, “The Contiguous Zone as a Mechanism for Protecting the Underwater Cultural Heritage”, in Anastasia Strati, Maria Gavouneli, and Nikolaos Skourtos, eds., *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After*, Martinus Nijhoff Publishers, 2006, p. 68.

<sup>13</sup> Anastasia Strati, “see note 4, p. 33”.

<sup>14</sup> Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, Martinus Nijhoff Publishers, 1995, p. 166; See also Petros Sioussiouras, “see note 11, pp. 69-70”.

<sup>15</sup> UNCLOS 1982, Articles 56 (1) and 77 (1); See also Yoshifumi Tanaka, *The International Law of the Sea*, Second Edition, Cambridge University Press, 2015, pp. 130-132 and 147-149.

of the coastal State.<sup>16</sup> Moreover, if archaeological and historical objects are considered to be the benefit of the mankind as a whole, however in Article 303 (3) given special attention to the owner in terms of carry out lifting of such objects from under water for the purpose of personal and commercial interests.<sup>17</sup>

The existence of the two Articles above in UNCLOS has often been criticized by legal scholars. The articles fraught with ambiguity and obscurities. By simply establishing that protection of archaeological and historical objects in the Contiguous Zone and Area, this results in legal vacuum of protection of such objects found in the EEZ, the continental shelf, and even on the high seas. It can be concluded that 1982 UNCLOS has not arranged comprehensively on the protection of archaeological and historical found at sea. Therefore, it is necessary to look at other Conventions that govern the protection of such objects.

#### **A. THE 2001 UNESCO CONVENTION ON PROTECTION OF THE UNDERWATER CULTURAL HERITAGE**

The UNESCO Convention on the Protection of the Underwater Cultural Heritage which was adopted on November 2001 (hereinafter cited as the 2001 UNESCO Convention) is the first comprehensive international agreement on the protection of UCH. The convention has been ratified by 61 States and entered into force on 2 January 2009, as in accordance with the provision of Article 27.<sup>18</sup> The convention seeks to fill the gaps that UNCLOS left open, in particular as regards the protection of archaeological and historical objects found at sea. It

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<sup>16</sup> UNCLOS 1982, Article 246 (2). In UNCLOS, marine scientific research is confined only to the natural environment and its resources. A. H. A Soons, *Marine Scientific Research and the Law of the Sea*, Kluwer Law and Taxation Publishers, 1982, p. 275; See also Chairul Anwar, *Horizon Baru Hukum Laut Internasional: Konvensi Hukum Laut 1982*, Penerbit Djambatan, 1989, pp. 114-116.

<sup>17</sup> Lowell Bautista, "Ensuring the Preservation of Submerged Treasures for the Next Generation: The Protection of Underwater Cultural Heritage in International Law", papers from the Law of the Sea Institute, UC Berkeley-Korea Institute of Ocean Science and Technology Conference, held in Seoul, Korea, May 2012, p. 16.

<sup>18</sup> Convention on the Protection of the Underwater Cultural Heritage. Paris, 2 November 2001, <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha>, accessed on 19 Juni 2019.

deals with all relevant aspects of the protection of UCH including the manner in which authorised activities directed at such heritage have to be carried out in order to meet objective archaeological standards.<sup>19</sup>

The 2001 UNESCO Convention clearly defines what is meant by “Underwater Cultural Heritage”. This is regulated in Article 1 (1) which stipulates:

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

- a. sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;*
- b. vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and*
- c. objects of prehistoric character.”*

Pipelines and cables placed on the seabed is not considered as UCH. The same applies to installations other than pipelines and cables, placed on the seabed and still in use.<sup>20</sup>

The definition is explicit contains an expansive inclusion<sup>21</sup> and clear exclusions<sup>22</sup>. Moreover, the definition also mentions the location where archaeological and historical objects found, namely under water, without differentiating whether it is found in territorial water, contiguous zone, EEZ, high seas, or Area.<sup>23</sup> As long as such objects are the all traces of human existence which having a cultural, historical or archaeological character, and for a period of at least 100 years.

The main purpose of this Convention is to ensure and strengthen the protection of UCH for the benefit of humanity.<sup>24</sup> To achieve this purpose, State Parties shall, individually or jointly as appropriate, take

<sup>19</sup> Markus Rau, “The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea”, Max Planck UNYB 6, 2002, p. 403.

<sup>20</sup> The 2001 UNESCO Convention, Article 1 (b) and (c).

<sup>21</sup> Ibid., Article 1 (a).

<sup>22</sup> Ibid., Article 1 (b) and (c).

<sup>23</sup> Nonetheless, the 2001 UNESCO Convention regulates separate provisions that apply to the protection of UCH in internal waters, archipelagic waters and territorial sea (Art. 7), in the Contiguous Zone (Art. 8), in the EEZ and on the continental shelf (Art. 9 and 10), and also in the Area (Art. 11 and 12).

<sup>24</sup> The 2001 UNESCO Convention., Art. 2 (1) and (3).

all appropriate measures that are necessary to protect UCH, with using the best practical means at their disposal and in accordance with their capabilities.<sup>25</sup> Indeed, Article 2 of the convention sets out the objectives and general principles on which the protection of UCH under the convention is based.<sup>26</sup>

The objectives and general principles which are regulated in Article 2, *inter alia*: cooperation between State Parties in the protection of UCH;<sup>27</sup> the obligation to preserve UCH for the benefit of humanity;<sup>28</sup> the principle of *in situ* preservation as the first option before allowing or engaging in any activities directed at this heritage;<sup>29</sup> the prohibition of commercial exploitation of the UCH,<sup>30</sup> as such, UCH are not allowed to be traded, sold, bought, or bartered as commercial goods;<sup>31</sup> the duty to give proper respect to all human remains located in maritime waters,<sup>32</sup> and activities directed at UCH shall avoid the unnecessary disturbance of human remains or venerated sites.<sup>33</sup> Furthermore, the Convention also ensure that activities directed at UCH must use non-destructive techniques and survey methods in preference to recovery of objects.<sup>34</sup>

The 2001 UNESCO Convention recognizes provisions regarding the protection of archaeological and historical objects found at sea as stipulated in Article 303 (2) UNCLOS. Article 8 of the 2001 UNESCO Convention stipulates:

*“Without prejudice to and in addition to Article 9 and 10, and in accordance with Article 303 (2) of the UNCLOS, States Parties may regulate and authorize activities directed at UCH within their Contiguous Zone”*

With regard to that matter, the 36 Rules which contained in the

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<sup>25</sup> Ibid., Art. 2 (4).

<sup>26</sup> Markus Rau, “see note 16, p. 404”.

<sup>27</sup> The 2001 UNCLOS Convention, Art. 2 (2)

<sup>28</sup> Ibid., Art. 2 (3).

<sup>29</sup> Ibid., Art. 2 (5).

<sup>30</sup> Ibid., Art. 2 (7).

<sup>31</sup> Annex of the 2001 UNESCO Convention, Rule 2; See also Lowel Bautista, “see note 14, p. 10.

<sup>32</sup> The 2001 UNESCO Convention, Art. 2 (9).

<sup>33</sup> Annex of the 2001 UNESCO Convention, Rule 5.

<sup>34</sup> Rule 4 of the Annex.



Annex of the 2001 UNESCO Convention,<sup>35</sup> shall be applied.<sup>36</sup> However, it must be understood that based on State practice and international law, including UNCLOS, the provisions contained in the 2001 UNESCO Convention cannot be interpreted as an attempt to modify the rules of international law and state practices relating to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.<sup>37</sup> This means that even though the application of the 2001 UNESCO Convention's Annex (The Rules) of the provisions of Article 33 UNCLOS is in line with the protection of UCH, this does not eliminate the State rights set out in UNCLOS.

Annex of the 2001 UNESCO Convention is an integral part of the Convention. This is as stipulated in Article 33 of the Convention. As the consequences, the Rules create legally binding obligations for the State Parties. Moreover, all activities related to UCH shall not be subject to the law of salvage or law of finds, unless such is authorized by the competent authorities.<sup>38</sup> This must be understood in accordance with the provisions of Article 2 (7), and with the Rules contained in the Annex which forbids the commercial exploitation of UCH.<sup>39</sup>

The 2001 UNESCO Convention is the achievement of States in establishing a set of rules governing the protection and preservation of UCH. This is a follow-up by the States to fill the legal vacuum found in the 1982 UNCLOS. UNCLOS is considered not comprehensive in regulating protection of UCH, and is often criticized by legal scholars because it contains provisions that are ambiguous and obscure, especially in Articles 149 and 303. Therefore, the 2001 UNESCO Convention institutionalizes a comprehensive legal regime for the preservation and protection of UCH. In this context, the 2001 UNESCO Convention

<sup>35</sup> The Rules lay down general principles of protection, such as the in situ preservation of UCH and the prohibition of its commercial exploitation, along with technical rules, such as standards for project design and scope of activity, preliminary work, funding and duration of activities, safety and environmental measures, conservation and site management, reporting and dissemination of information. Anastasia Strati, "see note, p. 39".

<sup>36</sup> The 2001 UNCLOS Convention, Art. 8.

<sup>37</sup> *Ibid.*, Art. 2 (8).

<sup>38</sup> *Ibid.*, Art. 4.

<sup>39</sup> Tullio Scovazzi, "The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage", s.n., s.a., s.l., pp. 16-17.

could be considered as a “complement” for UNCLOS and set a high standard on the protection and preservation of UCH.

### **III. INDONESIAN REGULATIONS AND PRACTICES IN PROTECTING ARCHAEOLOGICAL AND HISTORICAL OBJECTS FOUND AT SEA**

As mentioned, Indonesia is a State Party of UNCLOS. Indonesia ratified UNCLOS through Law No. 17 of 1985. It means that Indonesia has an obligation to implement the UNCLOS provisions to its national legal system. One of them is concerning the protection and preservation of archaeological and historical objects found at sea.<sup>40</sup>

Indonesia, unfortunately, does not ratify the 2001 UNESCO Convention. It means that Indonesia’s obligation, under international law, to protect the archaeological and historical objects found at sea is confined only to UNCLOS, not included the 2001 UNESCO Convention. Whereas UNCLOS has not comprehensively set about the protection of such objects, but the 2001 UNESCO Convention does.

In Indonesian national law, the protection of UCH is regulated in Law No. 11 of 2010 regarding Cultural Heritage.<sup>41</sup> The government is obliged to promote Indonesian culture by maintaining and developing its cultural values, as mandated by Indonesia’s constitution. Cultural heritage of the past is a national heritage, some of which still function in living society. This inheritance, through the determination process, is a Cultural Heritage that must be protected and preserved.

Cultural Heritage is a cultural legacy that can be in the form of Cultural Heritage Objects, Cultural Heritage Buildings, Cultural Heritage Structures, Cultural Heritage Sites, and Cultural Heritage Areas. These are found on land and/or water <sup>42</sup> (cultural reserves found under water referred to UCH) which need to be preserved because they

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<sup>40</sup> In this article, archaeological and historical objects found at sea are equated with UCH.

<sup>41</sup> Indonesia, Law regarding Cultural Heritage, Law No. 11 of 2010, SG. 2010-130, Additional SG. 5168.

<sup>42</sup> The meaning of “in the water” is the sea, rivers, lakes, reservoirs, wells, and swamps. Explanation of Article 4 of Law No. 11 of 2010.

have important values for history, science, education, religion, and/or culture through the process of determining. The cultural heritage protected under Law No. 11 of 2010 is more emphasized on tangible rather than intangible.

Previously, there was Law No. 5 of 1992 regarding Cultural Heritage Objects but has been revoked and declared invalid by Law No. 11 of 2010.<sup>43</sup> The objectives of the Law No. 11 of 2010, i.e., preserve the nation's cultural heritage and human heritage, and promote national cultural heritage to the international community.<sup>44</sup> While the scope of preservation of Cultural Heritage both on land and in water in this Law includes three elements, namely protection, development, and utilization.<sup>45</sup>

The preservation efforts of the cultural reserve are a system that connects these three elements. Therefore, these three elements are a unity that cannot be separated. Each element provides functions to other elements so that the preservation of cultural heritage can be dynamic, not static.<sup>46</sup> Preservation of cultural heritage is necessary because such objects have fragile, unique, scarce, limited and unrenewable properties. Therefore, arrangements and efforts are required to ensure their existence from the threat of physical development, whether in urban, rural, or in the aquatic environment.

The protection of cultural heritage can be done by establishing the boundaries of its breadth and utilization of space through the zoning system based on the results of the study.<sup>47</sup> The development of cultural heritage is carried out with respect to the principles of benefits, safety, reliability, authenticity, and values inherent to it. In this regard, development can be carried out by being directed to spur economic development that the results are used for the preservation of cultural

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<sup>43</sup> Ibid., Art. 119.

<sup>44</sup> Ibid., Art. 3 (a) and (e).

<sup>45</sup> Ibid., Art. 4.

<sup>46</sup> Atisa Praharini, "Menanti Peraturan Pelaksanaan dari Undang-Undang Nomor 11 Tahun 2010 tentang Cagar Budaya", *Jurnal Rechtsvinding Online*, p. 1. [https://rechtsvinding.bphn.go.id/jurnal\\_online/MENCARI%20JALAN%20KELUAR%20KISRUH%20KOALISI%20PRESIDENSIL%20INDONESIA.pdf](https://rechtsvinding.bphn.go.id/jurnal_online/MENCARI%20JALAN%20KELUAR%20KISRUH%20KOALISI%20PRESIDENSIL%20INDONESIA.pdf), accessed on 20 June 2019.

<sup>47</sup> Law No. 11 of 2010, Art. 73.

heritage and improvement of public welfare.<sup>48</sup> While the use of Cultural Heritage can be done by the Government (Central and Regional) and everyone for the significance of religion, social, education, science, technology, culture and tourism. The use of Cultural Heritage must also taking into consideration of the rules of customary law and social norms applicable in the community.

Indonesian government recognizes that Cultural Heritage is a cultural legacy of the nation and mankind so it needs to be protected and preserved. However, in Article 12-22 of Law No. 11 of 2010, the Government also recognizes the status of ownership and control of cultural heritage by people/individuals and even citizens and/or foreign legal entities insofar as foreign citizens/legal entities live and settle in the territory of Indonesia.<sup>49</sup> Moreover, the ownership status of Cultural Heritage by each person can be transferred by being inherited, granted, exchanged, awarded, traded, compensated for, and/or through a court ruling or decision.<sup>50</sup> In this context, the State allows for the existence of a commercial exploitation of the Cultural Heritage.

Law No. 11 of 2010 mandates the existence of several Government Regulations (hereinafter cited as GRs) as implementing regulations of Law No. 11 of 2010. But until now, the various GRs have not been made by the Government. Moreover, at the field there are often clash of rules and issues of delegation of authority between the central and regional governments regarding the management and preservation of cultural heritage.<sup>51</sup> This is a factor that causes the protection and preservation of cultural heritage is not yet maximum.

Even in certain cases, looting of archaeological and historical objects found at sea occurs. For example, looting of warships left by World War II which sank in the Java Sea. The looting allegedly occurred during

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<sup>48</sup> Art. 78.

<sup>49</sup> Art. 14 (1).

<sup>50</sup> Art. 16 (3).

<sup>51</sup> Indriyanti Astuti, "Pelestarian Cagar Budaya Terbentur Ketidaksiapan Aturan Pelaksana", <https://mediaindonesia.com/read/detail/100538-pelestarian-cagar-budaya-terbentur-ketidaksiapan-aturan-pelaksana>, accessed on 22 June 2019.

2014-2017.<sup>52</sup>

In November 2017, the Karel Doorman foundation from the Netherlands cooperation with the United States, Britain and Australia held a 75-year anniversary of Battle of the Java Sea. The Battle of the Java Sea was a combat between allies (Netherlands, America, England, Australia) against Japan in World War II during February 1942. During the battle, around 2100 allied forces were drowned along with dozens of ships in the Java Sea.<sup>53</sup> But when the celebration of the 75th anniversary of the Java Sea was held in 2017, the team of divers found that the remains of the shipwrecks were no longer in their location. This was further reinforced when the team used multibeam sonar to track the whereabouts of the ships, but found only overdrifts on the seabed. The overdrift indicated that the ships had previously been there but had been lifted or removed.

There were few sunken warships which came from the Netherlands, the United Kingdom and the United States. It was noted that there were 3 shipwrecks from the Dutch World War II which were looted in the Java Sea, namely Hr. Ms. De Ruyter, Hr. Ms. Java, and Hr. Ms. Kontenaer. 3 British ships, namely HMS Encounter, HMS Exeter, and HMS Electra. And 1 ship from the US, USS Perch. So that there are a total of 7 ships which are allegedly looted in the Java Sea and its surroundings.<sup>54</sup>

This incident had made the Indonesian government protested by several countries of origin of the ships.<sup>55</sup> Even some international media also reported on this incident, making it an international public

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<sup>52</sup> Aqwan Fiazmi Hanifan, "Misteri Raibnya Bangkai Kapal Perang Belanda di Laut Jawa", <https://tirto.id/misteri-raibnya-bangkai-kapal-perang-belanda-di-laut-jawa-cDph>, accessed on 22 June 2019.

<sup>53</sup> Silvita Agmasari, "Kenangan Pertempuran Laut Terhebat Sepanjang Perang Dunia Kedua" <https://nationalgeographic.grid.id/read/13307474/kenangan-pertempuran-laut-terhebat-sepanjang-perang-dunia-kedua?page=all>, accessed on 22 June, 2019.

<sup>54</sup> Andrew Fock, "Expedition: Battale of the Java Sea Revisited", the Report from the Java Sea Expedition, pp. 1-69.

<sup>55</sup> Pascal S Din Baju, "Kapal Perang Hilang di Laut Jawa, Belanda dan Inggris Protes ke Indonesia" <https://internasional.kompas.com/read/2016/11/18/08300091/kapal.perang.hilang.di.laut.jawa.belanda.dan.inggris.protes.ke.indonesia?page=all>, accessed on 22 June 2019.

spotlight.<sup>56</sup> In any case, the shipwrecks have become the graves of many soldiers who died in their fought of World War II and also became the witnessed of Indonesian and world history.

It was alleged that looting was carried out by salvage companies that had obtained permission from the Indonesian authorities. The motive used by looters is through the permit of the clearance of sea lanes from the Ministry of Transportation.<sup>57</sup> The reason is that the existence of the shipwrecks disrupts the shipping lanes so it needs to be cleaned from the seabed.<sup>58</sup>

This arises important question regarding the status of the shipwrecks left over by World War II. Are these ships constituting as a UCH (archaeological and historical objects found at sea) according to Indonesian national law? Shipwrecks as objects of cultural heritage are implicitly contained in Law No. 11 of 2010.<sup>59</sup> Article 5 states that objects that can be proposed as cultural heritage if they meet the criteria:

1. at least 50 years or more;
2. representing the shortest style period of 50 years;
3. has special meaning for history, science, education, religion, and/or culture; and
4. Has cultural values for strengthening the nation's identity.

Searching for cultural heritage or presumed as a cultural heritage

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<sup>56</sup> Kate Lamb, "Lost Bones, A Mass Grave and War Wrecks Plundered Off Indonesia", <https://www.theguardian.com/world/2018/feb/28/bones-mass-grave-british-war-wrecks-java-indonesia>; Olof van Joolen, "Fraude Met Wrakken Javazee", [https://www.telegraaf.nl/nieuws/1574831/fraude-met-wrakken-javazee?utm\\_source=tirto.id&utm\\_medium=referral&utm\\_content=/sindikar-penjarahan-kapal-perang-dunia-ii-memalukan-indonesia-cQqC](https://www.telegraaf.nl/nieuws/1574831/fraude-met-wrakken-javazee?utm_source=tirto.id&utm_medium=referral&utm_content=/sindikar-penjarahan-kapal-perang-dunia-ii-memalukan-indonesia-cQqC).

<sup>57</sup> The Minister of Transportation had denied that he had issued a permit to remove warships that had sunk in Indonesian waters. Liputan6.com, "Menhub Bantah Izin Pengangkatan Bangkai Kapal Perang Karam", <https://www.liputan6.com/bisnis/read/3243474/menhub-bantah-izinkan-pengangkatan-bangkai-kapal-perang-karam>, accessed on 22 June 2019.

<sup>58</sup> Tirto.id., "Sindikar Penjarahan Kapal Perang Dunia II Memalukan Indonesia", <https://tirto.id/sindikar-penjarahan-kapal-perang-dunia-ii-memalukan-indonesia-cQqC>, accessed on June 22 2019.

<sup>59</sup> Cultural Objects are natural objects and/or man-made objects, both movable and immovable, forming a unit, group, or parts or remnants related to agriculture and the history of human development. Art. 1 (2) Law No. 11 of 2010.

through excavation, diving, and/or lifting on land and/or water is prohibited by the Government. Searches can be made when obtaining permit from the Government or the Regional Government according to their authority. Even searches can only be done through research while taking into consideration of the property and control rights of the location.<sup>60</sup> In this context, Law No. 11 of 2010 prohibits the existence of searches without permit from the Government, whether it is a search for cultural heritage or presumed as a cultural heritage. So that means that the shipwrecks are also prohibited from being lifted from under the Java Sea if they do not have permit from the Government.

Moreover, cargo from the sinking vessels are regulated in Presidential Decree No. 19 of 2007 regarding the National Committee for the Lifting and Utilization of Valuable Objects of the Sinking Vessels (Keppres No. 19 Tahun 2007), as amended by Presidential Decree No. 12 of 2009 regarding Amendment of Presidential Decree No. 19 of 2007 regarding the National Committee for the Lifting and Utilization of Valuable Objects of the Sinking Vessels (Keppres No. 12 Tahun 2009).

In the Presidential Decree, the definition of the Valuable Objects of the Sinking Vessels as stipulated in Article 1 which states that Valuable Objects of the Sinking Vessels is a valuable object that has historical, cultural, scientific and economic values that have sunk in Indonesian waters,<sup>61</sup> the EEZ, and the continental shelf, at least 50 years old.

Besides mentioning definitions, could be seen from this provision that the location of Valuable Objects of the Sinking Vessels which is an underwater object is in Indonesian waters, EEZ, and continental shelf.<sup>62</sup> This is different from what was arranged in the UNCLOS 1982, especially Article 149 and 303 *jo.* 33, which determines that the protection of archaeological and historical objects is only limited to the Contiguous Zone and Area.

Otherwise, protection of UCH which is found in internal waters, archipelagic waters, territorial sea, EEZ, and continental shelf are

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<sup>60</sup> Art. 26 (2) and (4), Law No. 11 of 2010.

<sup>61</sup> Indonesian waters are the territorial sea of Indonesia and its archipelagic waters and internal waters. Indonesia, Law regarding Indonesian Waters, No. 6 of 1996, SG. 1996-73, Additional SG. 3467.

<sup>62</sup> It can be concluded that Valuable Objects of the Sinking Vessels is an UCH.

regulated in the 2001 UNESCO Convention, not in UNCLOS. In internal waters, archipelagic waters and territorial sea, Art. 7 (1) of the 2001 UNESCO Convention stipulates that in the exercise of their sovereignty, States Parties have the right to regulate and authorize activities directed at UCH in their internal waters, archipelagic waters, and territorial sea. Furthermore, the Convention imposes upon states twin duties: first, to apply the Rules to activities directed at UCH; and second, to inform a State which is a party of the 2001 Convention and in certain instances other states with a verifiable link of the discovery of a vessel or aircraft belonging to that State.<sup>63</sup>

In the EEZ and on the Continental Shelf, all States Parties have a responsibility to protect UCH.<sup>64</sup> No authorization shall be granted for an activity directed at UCH located in the EEZ or on the Continental Shelf except in conformity with the provisions of Article 10. A State party in whose EEZ or on whose Continental Shelf UCH is located, has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including UNCLOS.<sup>65</sup>

The interesting conclusion is that even as a state party from UNCLOS, Indonesia does not carry out its obligations to protect archaeological and historical objects found at sea according to what is stipulated in UNCLOS. Vice versa, in protecting UCH it can be said that Indonesia refers to the 2001 UNESCO Convention. This is interesting because Indonesia is not (not yet) a party of the 2001 UNESCO Convention.

However, archaeological and historical objects found at sea must still be protected and preserved by Indonesia. That the shipwreck along with its cargo objects, both those have been designated as cultural heritage and those presumed of being cultural heritage, are protected and preserved by the State as long as they meet the established criteria. The provisions of Indonesian national law in addition to setting the definition of the location of the shipwrecked and its cargo area, also

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<sup>63</sup> Art. 7 (2) and (3). See also Lowell Bautista, "Gaps, Issues, and Prospects: International Law and the Protection of Underwater Cultural Heritage", *Dalhousie Journal of Legal Studies*, p. 75.

<sup>64</sup> Art. 9 (1) of the 2001 UNESCO Convention.

<sup>65</sup> *Ibid.*, Art. 10 (2).



determine some of the elements.

There are 3 elements that have been stipulated regarding shipwrecked and its cargo. These elements, namely:

1. its value is very important for the history, science and culture of the Indonesian nation;
2. its nature gives a typical and style unique;
3. the number and type are very limited and rare.

If it meets these elements, it can be proposed to become a cultural heritage object and be controlled and managed by the State.<sup>66</sup>

Shipwrecked and its cargo has an important meaning for the Indonesian nation. Aside from being a source of history and science, including the marine wealth of the Indonesian people that can have economic benefits. It is estimated that there are hundreds of locations of shipwrecks and its cargo locations spread in Indonesian waters starting from the waters of the Riau Islands, Karimata Strait, Bangka Belitung Waters, to the Java Sea. Many of these locations have not been explored and verified by the Government of Indonesia.

Archaeological and historical objects found at Indonesia's sea are not only in the form of sunken ships and valuable objects. There are a number of sites and underwater objects that have important historical and cultural values for the Indonesian nation. They are the Cirebon Java Sea Site, Sumpat Bay and Karang Heliputan Sites in Riau Islands, East Belitung Site (Laram Mampango Ship), Batu Hitam (Tang) Site in Batam waters, Gelasa Strait Site (Teksing) in Bangka Belitung, and Situs Kepulauan Seribu in the waters of the Kepulauan Seribu.<sup>67</sup> This shows that there are indeed many archaeological and historical objects in Indonesian waters and become the nation's assets.

Considering that these assets need to be protected, preserved and

<sup>66</sup> Art. 2 of Presidential Decree No. 12 of 2009 jo. Art. 5 of Law No. 11 of 2010.

The meaning controlled by the State includes the power to regulate (regelendaad), take care of (bestuursdaad), manage (beheersdaad), and supervise (toezichthoudendaad). Constitutional Court's Decision No. 149/PUU/VII/2009, p. 92.

<sup>67</sup> Dit. PCBM Kementerian Pendidikan dan Kebudayaan RI, "Jejak-jejak Karam di Laut Nusantara" <https://kebudayaan.kemdikbud.go.id/ditpcbm/jejak-jejak-karam/>, accessed on 23 June 2019.

managed for national interests. However, things needs to be considered is that in Law No. 11 of 2010 still permits the existence of commercial exploitation from UCH, for example the permit to transfer of UCH property rights through traded or exchange and ownership status by anyone and even citizens/foreign legal entities. In fact, if the state in managing the UCH is purely aimed only at conservation and preservation, commercial exploitation should be prohibited. Furthermore, in Law No. 11 Year 2010 as a whole, Valuable Objects of the Sinking Vessels management should only be for the significance of conservation, considering Valuable Objects of the Sinking Vessels has historical and scientific value for the Indonesian nation. Yet, there are still several provisions in the Law that permit the management and utilization of Valuable Objects of the Sinking Vessels for commercial purposes.

Regarding the commercial exploitation of Valuable Objects of the Sinking Vessels, this is also stated in Law No. 32 of 2014 regarding Maritime.<sup>68</sup> Article 27 (4) states that the removal of valuable objects as long as the sinking vessel is part of maritime services. Maritime services are carried out based on marine economic policies.<sup>69</sup> This only makes it more ambiguous about the protection and preservation of UCH. In Law No. 11 of 2010 explained that cultural heritage, one of which is UCH, is a cultural and human heritage that needs to be protected and preserved. However, on the other hand, the Law still allows for the commercial exploitation of UCH, even in Law No. 32 of 2014.

With regard to this matter, the Indonesian government through the Ministry of Maritime Affairs and Fisheries had issued a moratorium on licensing surveys and the lifting of cargo of shipwrecked. But this is only valid until 31st December 2016.<sup>70</sup> This moratorium was issued as a follow-up to Law No. 11 of 2010 which categorizes shipwrecked and its cargo as UCH, whose management is a government's obligation, which so far has been carried out by the Government and Private Business

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<sup>68</sup> Indonesia, Maritime Law, Law No. 32 of 2014, SG. 2014-294, Additional SG No. 5603

<sup>69</sup> *Ibid.*, Art. 27 (1) and (2).

<sup>70</sup> Indonesia, Minister of Maritime Affairs and Fisheries, Minister of Maritime Affairs and Fisheries Regulation regarding Termination (Moratorium) of Survey Licensing and Lifting of Valuable Objects from Sinking Vessels, Number 4 of 2016, Ps. 3

Entity based on business approval.<sup>71</sup>

This means that the Indonesian Government is aware that shipwrecked and its cargo is a UCH that shall be protected and preserved. It's just that this is still hindered by the disharmony of national legislation and the absence of implementing regulations from Law No. 11 of 2010. Therefore, Indonesia needs to explicitly establish the direction and objectives of UCH management, especially shipwrecked and its cargo, whether it is purely for conservation or can be commercialized/traded.

#### **IV. CONCLUSION**

The protection towards archaeological and historical objects found at sea is not regulated comprehensively in UNCLOS yet. Provisions in Articles 149 and 303 *jo.* 33 related to the protection of such objects are considered ambiguous and obscure. Moreover, the protection of such objects is confined only in the Area and Contiguous Zone. This matter results legal vacuum for the protection of such objects which found in another maritime zones.

To cover the matter, UNESCO in 2001 established the 2001 UNESCO Convention on Protection of the UCH. This Convention is considered to be more comprehensive and complete for the protection of the UCH. Unfortunately, Indonesia is a non-State Party to the 2001 UNESCO Convention but a state party in the UNCLOS only. This condition made the obligation to protect such objects for Indonesia in International Law is confined to the UNCLOS.

In the Indonesian legal system, there are several national regulation which cover the protection and preservation of UCH, one of them is Law No. 11 of 2010 regarding Cultural Heritage. However, the matter related to the disharmony of laws and regulations for the protection and preservation of UCH, nor the lack of implement regulations of Law No. 11 of 2010, lead the protection and preservation of UCH into less maximized.

Furthermore, the aim of the protection policy on UCH has yet been

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<sup>71</sup> Kusnul Nur Kasanah, "Menanti Kepastian Arah Pengelolaan BMKT" <https://setkab.go.id/menanti-kepastian-arah-pengelolaan-bmkt/>, accessed on 23 June 2019.

set firmly by the Government. In this context, The Government needs to establish that the protection of the UCH is pure for the purpose of conservation only, or can it be utilized and manageable for commercial purpose in certain condition. This is important to be establish by Indonesia's Government considering that all this time the permits for lifting Valuable Objects of the Sinking Vessels has been given to some private business entity/Investor. Therefore, the legal certainty concerning any things related to the protection and preservation of UCH nor activities related to it and the utilization for commercial purpose are all needed.

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