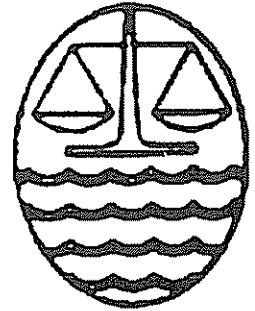




UNITED NATIONS
UNIVERSITY



25 years since the adoption of UNCLOS *Reflecting on the past and the way forward*

Division for Ocean Affairs and the Law of the Sea and the United Nations University

Abstract by

Dr. Hasjim Djalal

When the UN Convention on the Law of the Sea (UNCLOS) was adopted 25 years ago in 1982, there was great expectation that law and order would soon come to the ocean affairs, and that the ocean resources would benefit mankind as a whole. There have been a lot of achievements in this direction since then. The various institutions stipulated in the Convention to deal with the various issues had been established and they have been working up to now in accordance with their respective regimes. At the same time, states have been claiming the various maritime regimes stipulated in the Convention, and the various regional organizations and other UN specialized agencies have continued to deal with the various maritime issues in their respective domain. 25 years after the adoption of UNCLOS, practically every part of the seas and oceans as well as practically every activities at sea have now been under some regulations under one regime or another, including for resources as well as for navigation.

Yet, some problems remain. The problems of maritime claims and delimitation between states as the result of the various maritime zones stipulated in UNCLOS have not been completely settled between the states concerned, and therefore potentials for conflict remain. Moreover, new potential area of conflict may develop such as in the Arctic as the result of the global climatic change that exposes the possibility of exploiting the resources in the Arctic Ocean hitherto hidden. At the same time, the cooperative regime dealing with certain maritime issues such as in the enclosed and semi-enclosed seas have not properly developed, despite some efforts in that direction, such as in the South China Sea.

The developing countries which were expecting the positive results of the transfer of technology of utilizing maritime resources have not generally been able to take advantage from the new regime. In fact, illegal fishing and other illegal acts and crimes at sea continue to take place in some parts of the seas and oceans. On military and security side, some rules are still not so clear, such as the rules on foreign military operations and intelligence gathering activities in the exclusive economic zone of other countries, as well as the various maritime security issues and measures to counter them as the result of increasing threats of international terrorism.

Finally, while academic and think-tank groups played significance roles in promoting the negotiating process before the adoption of UNCLOS, such academic roles appear to have been diminished in the process of proper implementation of UNCLOS at present.

Looking forward, it would be important for all states to accelerate the process of their adherence to the UNCLOS and to all its subsequent agreements and to accelerate its proper implementation in their respective legislations and in settling whatever maritime issues that result, such as in maritime delimitation and coordination of some maritime uses. The academic and think-tank groups could still promote the process and the spirit of cooperation between states.

Biography



Dr. Hasjim Djalal was born on February 25, 1934, in West Sumatra, obtained a BA degree from Indonesian Academy for Foreign Service in Jakarta (1956), M.A (1959) and Ph.D (1961), both from the University of Virginia. He graduated from the Indonesian National Defense Institute (LEMHANNAS) in 1971.

He was Director of Treaty and Legal Affairs of the Indonesian Department of Foreign Affairs (1976-1979) and Director General for Policy Planning (1985-1990). He has served at the Indonesian Embassies in Belgrade, Guinea (Africa), Singapore, Washington DC. and Ambassador/Deputy Permanent Representative of Indonesia to the UN in New York (1981-1983), Ambassador to Canada (1983-1985), Germany (1990-1993) and Ambassador at-large for the Law of the Sea and Maritime Affairs (1994-2000).

He participated fully in the Third UN Law of the Sea Conference (1973-1982) and in its implementation thereafter, as well as in other maritime activities, nationally, regionally and internationally until now.

He was President of the International Seabed Authority (ISBA) in Jamaica (1995, 1996), and currently serves as Chairman of the Finance Committee of the ISBA. Since 1989 he has been the initiator and convener of the Workshop Process on Managing Potential Conflicts in the South China Sea, and has been involved in development of maritime cooperation in the Indian and Pacific Oceans.

Currently, he is a member of Indonesian Maritime Council, Senior Advisor to the Indonesian Minister for Maritime Affairs and Fisheries, and to Indonesian Naval Chief of Staff, and lectures at universities and other high learning institutions in Indonesia.

He has written extensively on the Law of the Sea and Regional issues. His books include (1.) Indonesian Struggle for the Law of the Sea (1979), (2.) Indonesia and the Law of the Sea (1995), (3.) Indonesian Foreign Policy in the 1990s (1997), (4.) Preventive Diplomacy in South East Asia: Lessons Learned (2003), (5) Seeking Lasting Peace in Aceh (2006), and numerous articles in Indonesia and abroad.

He has received various awards, commendations and decorations for various services to his country.

Abstract by

Prof. Myron Nordquist

The 1982 United Nations Convention on the Law of the Sea has 155 parties twenty five years after it was opened for signature. With hindsight, this near universal acceptance exceeded the expectations of even the most optimistic supporters. This result was not obtained by the Convention as first presented but only came after changes were embodied in a 1994 Agreement. The substance of the 1994 text was limited to the deep seabed regime and the fact that a process was found to incorporate these changes into the Convention was a political and legal miracle. Certainly one lesson is that it was a mistake in 1982 to try to force industrialized powers into accepting multilateral obligations that did not comport with economic reality. Another lesson is that the drafters of the 1982 Convention did not build in sufficient flexibility to take into account advances in science and technology.

The negotiators some times locked in detailed legal rules linked too closely to existing knowledge. Examples of problems emerging from this are seen in the criteria for delimiting the outer limit of the Continental Shelf, the listing of highly migratory species in Annex I and the definition of resources in article 133. A related lesson pertained to the marine environment. When Part XII was negotiated, there was limited experience as few States had laws dealing with protection and preservation of the marine environment. Concepts such as the precautionary principle were not even discussed at the Conference. Another of the Convention's shortcomings was in trusting coastal States to manage responsibly the 90% of the world's fisheries that are within their EEZs. Over exploitation of the living resources in the oceans is now unconscionable and coastal States are hiding beyond sovereignty claims to avoid accountability. A related final lesson to mention is that many States are not exercising genuine control over fishing and tanker vessels flying their flag. Much of the illegal fishing and many of the leaky tankers are tolerated because the Parties to the 1982 Convention built in too many rights and not enough enforceable duties for flag States.

As to the way ahead, the text of the Convention will be the starting point for determining the rules applicable to the facts of each particular case. The Convention is too complex and unforeseen applications far too numerous to support the oft heard statement that it is customary international law. Some rules are universally followed in State practice but many are not. Implementation is certainly not complete. Challenges to freedom of navigation will continue to arise and accommodation will not always be easy. Increasing oil transport in international straits is putting pressure on strait States for more controls and the strategic and military importance of these straits has not diminished. There is still room for disagreement about what is innocent passage and some coastal States will continue to push towards making the EEZ a territorial sea. Deep seabed mining has not yet occurred but when it does, the International Seabed Authority will be found to have realistic regulations. The International Tribunal for the Law of the Sea has not had much business and what it has had has been mostly in provisional measures. The use of ITLOS will steadily increase so long as it does not inject itself into really important matters such as territorial delimitation or military matters without the consent of the States concerned. The Commission on the Continental Shelf is headed for a logjam as States rush to file their submissions over the next several years. It is difficult to see how it will accomplish its work in a timely and satisfactory manner. Lastly, a new generation of LOS experts is taking over in a world greatly changed from 1982. The Cold War is over but global terrorism threatens all. Computers, the internet and embedded reporters provide instant replay changing the game on forming world opinion. But AIDs and malaria still kill millions with little public attention. The way ahead in law of the sea, however, is predictable: the 1982 Convention, while imperfect, will remain the framework for the Rule of Law in the world's oceans.

Biography



Myron H. Nordquist earned his S.J.D. from the University of Virginia School of Law and was the first Senior Fellow at the School's Center for Oceans Law and Policy.

Professor Nordquist now serves as the Associate Director and Editor of the Center for Oceans Law and Policy, and as the Senior Fellow for the Center for National Security Law at the University of Virginia School of Law. Professor Nordquist was a professor of law at the United States Air Force Academy from July 1993 until December 1998. During the 1995-1996 academic year, he was the Charles H. Stockton Professor of International Law at the United States Naval War College. He was Deputy and then Acting General Counsel of the Department of the Air Force from September 1990 until July 1993.

After completing postgraduate work in international law at Cambridge University, Professor Nordquist was an attorney advisor and legislative counsel in the Department of State Office of Legal Adviser from August 1970 until January 1978. While serving in the Office of Legal Adviser, Professor Nordquist was Office Director of the NSC Interagency Task Force on the Law of the Sea and Secretary of the United States Delegation to the Third United Nations Conference on the Law of the Sea. He engaged in private law practice in Washington, DC, from February 1978 until September 1990, specializing in international business law. Over the years, he has taught on the adjunct law faculties at American University, George Washington University, and the University of Denver. He was a Ford Foundation Fellow at Cambridge University in 1970 and a Rockefeller Foundation Fellow at the University of Virginia in 1979. The Mellon Foundation supported his editorial work at the University of Virginia School of Law for many years. In 2005 Professor Nordquist was named as the first Distinguished International Scholar Affiliate of the University of Montana.

Professor Nordquist has edited over 50 books on international law topics. He is Editor-in-Chief of the six volume Commentary on the 1982 U.N. Convention on the Law of the Sea sponsored by the University of Virginia's Center for Oceans Law and Policy. He has authored and delivered uncounted academic presentations as well as numerous scholarly articles or occasional papers, on oceans law, international law and national security law topics. Professor Nordquist is primarily responsible for the substantive planning for the Rhodes Academy of Oceans Law and Policy and for the Center for Oceans Law and Policy's annual meeting and various programs such as the Doherty Lecture. He also edits the Center's annual proceedings which are published in hardcover and distributed to leading libraries around the world.

Professor Nordquist was an officer in the U.S. Marine Corps from 1962 to 1966 making the initial landing at Chu Lai, Republic of Vietnam in early 1965. For this action, he received an accelerated promotion and was awarded several combat decorations, including a "V" for valor.

Biography



Dr. Marjo Vierros is currently a Visiting Professor at the United Nations University Institute of Advanced Studies. In this capacity, she is working on developing an oceans-related programme for UNU-IAS and contributing to projects of relevance to the Convention on Biological Diversity. Previously, she worked at the Secretariat of the Convention on Biological Diversity as Programme Officer responsible for all issues related to marine and coastal biological diversity. Her work at the CBD Secretariat included preparation of background documents for meetings of the SBSTTA and COP, servicing those meetings, and organizing and running a number of expert group meetings. She was also responsible for the

background work undertaken for the in-depth review and updating the programme of work on marine and coastal biological diversity. In addition to her work on marine issues, she has also coordinated the Secretariat's work on protected areas and the ecosystem approach. She represented the Executive Secretary of the Convention in many international meetings, ranging from diplomatic meetings to expert workshops.

Previously, Dr. Vierros has worked for research, conservation and United Nations organizations in several countries. She has extensive experience in tropical marine ecology and coastal management, and has undertaken field research in the Caribbean, Central America, Bermuda and the Pacific. In addition, she has participated in UNEP technical cooperation and capacity building projects in the Wider Caribbean Region, and has designed and implemented educational programmes at the University College of Belize, the Bermuda Biological Station and the School for Field Studies in the Turks and Caicos Islands. She has authored many publications, and was one of the lead authors of the Millennium Ecosystem Assessment (marine fisheries systems).

She has degrees in biology, oceanography and marine biology, and has undertaken postdoctoral research at the University of California and Santa Cruz. She has also been a visiting scientist at the University of Miami and at the Bermuda Aquarium.

¹ Sources from the United Nations University Institute of Advanced Studies.

Biography



David Freestone currently works as Deputy General Counsel, Advisory Services Legal Vice Presidency for the World Bank in Washington DC, a position he holds since 2004. He started his career in the World Bank in 1996, as a Legal Adviser in Environment and International Law. From 2000 to 2004, he was Chief Counsel in the Environmentally and Socially Sustainable Development and International Law at the World Bank. Dr. Freestone also held academic positions, for instance, he was a Professor of International Law at University of Hull, from 1991 to 2002. He was previously a Senior Lecturer, Lecturer and Research Assistant, from 1972 to 1991. He is currently a visiting professor at the UNU-Institute of Advanced Studies in Tokyo, Japan.

In 1986 he founded and became Editor-in-Chief of the *International Journal of Marine and Coastal Law*. He is also the editor of a new Monograph Series: *Legal Aspects of Sustainable Development*, published by Martinus Nijhoff. Dr. Freestone was a member of various editorial committees of different journals; among them, the *Yearbook of European Environmental Law*, 2000, and the *World Bank Legal Review*, 2002.

Dr. Freestone occupied as an international expert different advisory positions. The recent one being a member of the Panel of Arbitrators Established Pursuant to the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, appointed by the PCA Secretary General (2006-2012). He participated previously in the UNEP Group of Experts on the Montevideo III Programme on Environmental Law, Washington DC January 2000 and April 2000.

Dr. Freestone had been a consultant to different institutions and to governments too. For instance, he was an International Fisheries Law Consultant to the *UK Ministry of Agriculture, Fisheries and Food, in London*, where he prepared a Background Review of International Fishery Treaty Regimes for First London Oceans Workshop, in November 1995 (CSD Inter-sessional). During 1995-1996, he was an International Legal Consultant for the *Government of Belize and the UNDP Global Environment Facility Project on Sustainable Development and Management of Biologically Diverse Coastal Resources, Belize*, International Legal Consultant, 1995-96.