



SPOTLIGHTS

LKI's *Spotlights* feature interviews with global thought leaders on aspects of contemporary international relations.

The United Nations Convention on the Law of the Sea with Professor Andrew Serdy

Interviewed by Barana Waidyatilake*

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***Barana Waidyatilake** was a Research Fellow at the Lakshman Kadirgamar Institute of International Relations and Strategic Studies (LKI). The opinions expressed in this transcript are the speaker's own views and are not the institutional views of LKI.

The Lakshman Kadirgamar Institute (LKI) recently interviewed Professor Andrew Serdy, Professor of Public International Law and Ocean Governance at the University of Southampton, to examine different aspects of the United Nations Convention on the Law of the Sea (UNCLOS) including security dimensions, geopolitical tensions and customary international law. UNCLOS is the primary international convention that governs the world's oceans and seas that entered into force in 1994. UNCLOS is currently ratified by 168 states, but notable non-parties include the US, Turkey, Peru, Venezuela and Eritrea. UNCLOS sets out laws and provisions on maritime and territorial limits, the freedom of navigation, archipelagic status and transit regimes, exclusive economic zones (EEZs), continental shelf jurisdiction, deep seabed mining, marine scientific research, protection of the marine environment, and also includes a mechanism for the settlement of maritime disputes.

Professor Serdy is an internationally recognised academic and practitioner specialising in the Law of the Sea. He formerly served in a number of diplomatic positions in the Australian Department of Foreign Affairs and Trade, and worked on Australia's November 2004 submission to the Commission on the Limits of the Continental Shelf, as well as the Australia-New Zealand maritime boundary delimitation treaty of 2004 and the 2003 Australia-East Timor Agreement on the Unitisation of the Sunrise and Troubadour Petroleum Deposit. He joined the University of Southampton in 2005 to teach international law of the sea and public international law.

See below for a lightly edited transcript, featuring Professor Serdy's responses to questions posed by Barana Waidyatilake, Research Fellow at LKI. The questions and other aspects of this interview are not the institutional views of LKI, and they do not necessarily represent nor reflect the position of any other institution or individual with which the parties are affiliated

LKI: How useful is the UNCLOS in managing the geopolitical tensions in the Indian Ocean and would it help if the United States ratified the convention?

Prof. Serdy: UNCLOS is probably more helpful in the Indian Ocean than it is in other parts of the world, where tensions are closer to the surface. The reason I say that is simply because economics has played a decisive role in international relations, particularly when you are dividing up areas such as seabed or maritime zones. If you don't know what's out there, it is much easier to come to an agreement with your neighbours, to draw a line and agree that what is found on either side will be claimed by the respective states. However, if for example you already know about the existence of petroleum deposits, that is when you start to make a fanciful argument for why the EEZ boundary should be drawn in a way that leaves the deposits on your side even if they are closer to the other side. To that extent, the law of the sea hasn't really been a focus of attention in the Indian Ocean to date.

For countries, such as the US, that have not become party to UNCLOS, it forms a part of customary international law, which is what you might call 'a law habit' that most States

would have. Most States would comply with their obligations under customary international law, unless there were major political issues that required a State to give priority to its vital interests over strict compliance with the law. In that case, it's easier to comply with the law and so there's UNCLOS waiting and ready to help.

Regarding the long-standing refusal of the US to sign or ratify UNCLOS, the world is now used to the US not being party to UNCLOS as well as many other international treaties of broad significance. In some ways it would now be easier to continue going along without the US, although they tend to turn up to all sorts of gatherings, even though they are not a party. I do not know how or to what extent that is still the case under the Trump administration, but previous US Administrations, since Clinton, have all been in favour of the US becoming party to UNCLOS. The reason they have not joined is because they can't get Senate approval. It is unfortunate that they have not been able to join UNCLOS for domestic reasons, but in terms of their international position, it is an expected US position with its own interests to pursue, but it isn't wildly out of line with what the rest of us are doing.

LKI: We have seen several incidents happening with submarines and there are several concerns regarding the use of submarines in the Indian Ocean and the South China Sea. *Do submarines and the new technologies that are used in submarines present any challenges to the principle of freedom of navigation? Do they challenge the spirit of transparency in the principle of freedom of navigation, particularly if the ability of everyone to transparently see their activities is affected?*

Prof. Serdy: There are checks and balances built into UNCLOS and there is an application of the ordinary rule in the territorial sea, which is that submarines have to travel on the surface and display their flags to indicate transparency. However, it was a hard-fought compromise for UNCLOS Part III regarding transit passage. During the Cold War period, it was in the interest of both superpowers, to accept the 12-mile territorial sea limits, as opposed to the old three or six-mile territorial sea, that certain straits should not fall entirely under the standard territorial sea regime. That's why we have the international obligations of transit passage, where submarines travel submerged, in their "normal mode."

I think that compromise has pretty much stood the test of time. In fact, one can go so far as to say that in the early 1980s, the days immediately after UNCLOS was adopted, there was quite a degree of wariness about the US. Without becoming party to UNCLOS, the US was already seeking to rely on Part III on the basis that it was part of customary international law, and the reaction of many other States was that if the US wanted to benefit from the treaty, it should become party to the treaty. So I think that was an objection that could well have been made at that time. Regardless of whether the US is or is not a party to UNCLOS, the events of the past 35 or so years have led UNCLOS to be a generally recognised as part of customary law on navigation. Things might start to get more interesting when much smaller devices, rather than submarines of the classic kind, are commonly found- and the question of what rights of navigation do such equipment benefit from arises. We have already had an instance between the US and China where the US claims the particular device is entitled to

the freedom of navigation and China disagrees, saying that this is merely equipment and is not entitled to the freedom of navigation. For the moment those two States have agreed to disagree so we don't quite know where things will end up on this but obviously that is an area where some sort of balance is needed in the next few years.

LKI: As we have also spoken a little bit about customary international law, in general, *how do you feel about the relationship between UNCLOS and customary international law, and specifically are there any existing or emerging issues amidst this sort of customary International law, UNCLOS and interrelated issues?*

Prof. Serdy: I don't see any major issues in terms of the relationship between UNCLOS and customary international law simply because UNCLOS is so widely accepted. I would not necessarily go as far as the Americans do and say that all of UNCLOS bar Part XI is customary, but that is simply because of the very technical nature of some rules that you find. For example, much of Article 76 on the continental shelf and other similar technical parts of UNCLOS by their very nature could not become broadly accepted as a part of customary law because of these technicalities. Broadly, the outlines of the navigation regime and the resources regime of UNCLOS have been accepted and I think there is very little disagreement about such policies. The one thing that people sometimes forget is that dispute settlement can never enter attain a customary law status, so there is a compulsory regime of dispute settlement in Part XV of the convention that cannot be activated on the basis of customary law. This is simply because of the way that international law itself is structured and that consent to third-party dispute settlement always has to be present and for that, you need to be part of the treaty.

LKI: In your opinion, *which countries are investing most in research on the law of the sea through think-tanks and institutions?*

Prof. Serdy: One tends to find 'law of the sea' activities in a concentration at a limited number of institutions. I am always amazed that there seems to be more law of the sea specialists in Australia, where I come from, than there are in the UK where I have now made my home. Australia itself is really at the forefront of the law of the sea and there are some very important institutions conducting work on the law of the sea. The Netherlands is also worth mentioning, as their research is very highly regarded. Beyond that, there is a great deal of activity taking place in China, and there has been much growth from quite a low base of knowledge. It is astounding that almost overnight there are new experts who can really hold their own in any kind of discussion. It's really amazing that within a short period of time this expertise, which has taken the rest of us 15-20 years to develop at the individual level, has been developed in States across the Indian Ocean region.

Further Reading

The Lakshman Kadirgamar Institute. (2019). *Takeaways - Professor Wolfrum on the Dispute Settlement System under UNCLOS: Current Trends*. [online] Available at: <https://www.lki.lk/publication/takeaways-professor-wolfrum-dispute-settlement-system-unclos-current-trends/> [Accessed 17 Jan. 2019].

Serdy, A. (2017). Election of Seven Members of the International Tribunal for the Law of the Sea. *Asia-Pacific Journal of Ocean Law and Policy*, 2(2), pp.347-351.

UN. (1982). *Overview - Convention & Related Agreements*. [online] Available at: http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm [Accessed 22 Jan. 2019].

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