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My Adventure with International Law

*Tommy TB Koh**

I. INTRODUCTION

I studied international law in my final year in the academic year of 1960 to 1961. The course was taught by a part-time teacher. We followed a very conservative curriculum based on a standard British textbook. I remember that I wrote a paper on humanitarian intervention which was published in a student magazine. I did not imagine that 18 years later, I would have to refute Vietnam's invocation of the doctrine of humanitarian intervention to justify its invasion and occupation of Cambodia. Nor could I have foreseen my subsequent involvement with the practice of international law.

The course I took at the University of Malaya was not well taught. It was taught in a very didactic manner. It focused too much on the learning of black letter law. There was no attempt to relate the law in the book to the real world in which we lived. The course was not exciting and challenging. I was so disenchanted that when I went to Harvard Law School, I did not take any courses in international law even though I became acquainted with some of that Law School's legendary teachers in international law, such as, Louis Sohn.

The reason which led me to study international law was my desire to help build a world ruled by law. The quest for a just world order would dominate my thinking for the rest of my life. But, my interest

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in international law was rekindled only when I accepted a posting to the UN in 1968. At the UN, international law was relevant to so many of our daily pre-occupations, everything from the Soviet invasion of Czechoslovakia, to war and peace in the Middle-East, to the right to self-determination and the right to development, to the prohibition of genocide, torture, racial discrimination and gender discrimination. The UN was, however, both an exciting and a frustrating arena for an international lawyer. On one occasion, I remember the Soviet Ambassador telling me that international law should be supportive of Soviet foreign policy and not the other way around. The interrelationship between international law and foreign policy has been a constant refrain in my work.

A. Vietnamese Hi-Jackers: To Extradite or Not to Extradite?

In 1977, a Vietnamese civilian airline was hi-jacked by four Vietnamese and flown to Singapore. The hi-jackers surrendered to the Singapore authorities and asked for political asylum. The government of Vietnam demanded that the aircraft be returned and the hi-jackers be extradited to face trial in Vietnam. The Singapore government returned the aircraft and rejected the appeal of the hi-jackers for political asylum. It had, however, to decide on the fate of the hi-jackers.

Singapore and Vietnam did not have an extradition treaty between them. Singapore was therefore not legally bound to extradite them to Vietnam. Under international law, Singapore had two options: first, to extradite them to Vietnam; and second, to prosecute them in Singapore.

I was then serving as Singapore's Permanent Representative in New York. I decided to canvass the opinions of my colleagues at the UN. The sample I constructed was a microcosm of the UN membership. By a big majority, my UN colleagues were of the opinion that the hi-jackers should not be extradited to Vietnam but should be tried in Singapore. The reason for their preference was their perception that the hi-jackers would not receive a fair trial in Vietnam. The hi-jackers were, in fact, tried and convicted in Singapore.

B. The Law and Politics of Recognition

When Singapore seceded from Malaysia and became an independent country, one of Singapore's pre-occupations was whether other States would recognise Singapore as a new sovereign and independent state. Our early fears proved to be unfounded as no State withheld its recognition. Singapore's membership of the United Nations, the Commonwealth and other international organisations helped to give it legitimacy.

The recognition of the government of a State is usually not controversial. Controversy can, however, arise if there is more than one party claiming to be the lawful or legitimate government of a State. Often, the issue is brought up at the UN in New York in the form of the question, who is entitled to occupy the seat of the country in question. When debated at the UN, especially during the Cold War, the question becomes highly politicised. International law is often subordinated to the primacy of realpolitik.

C. Cambodia's Representation at the UN

The question of Cambodia's representation at the UN came up twice. The first time was in 1970 when King (then Prince) Norodom Sihanouk was overthrown by General Lon Nol. While my personal sympathies were with Sihanouk, who had been a good friend of Singapore, Singapore had no choice but to vote for Lon Nol. Why? Because under international law, the issue is not whether Lon Nol had achieved power lawfully but whether his government was in control of the country. In this respect, international law is based upon reality not morality. Lon Nol ruled Cambodia from 1970 to 1975 when his government was overthrown by the Khmer Rouge. The Khmer Rouge government, which styled itself as the government of Democratic Kampuchea, occupied Cambodia's seat at the UN from 1975.

D. Choice of Two Evils

On Christmas Day, 1978, Vietnam invaded and occupied Cambodia. Vietnam overthrew the Khmer Rouge and installed a new Cambodian government in Phnom Penh. At the UN General Assembly, in 1979, a huge fight took place over the representation of Cambodia. The world was faced with an invidious choice between two evil options: the murderous regime of the Khmer Rouge or the puppet government of Vietnam. I had the un-enviable task of leading the ASEAN team in arguing that allowing the Khmer Rouge to retain Cambodia's seat was the lesser of two evils. My argument was that the other option was worse because it would condone Vietnam's invasion and occupation of her smaller neighbour, Cambodia, and establish a bad precedent in international law and practice. My involvement with Cambodia, which began in 1965, would continue until 1991, when the Paris Agreement was signed. Today, the Khmer Rouge threat is gone. Cambodia is, once again, sovereign and independent. The country is at peace and the government and people are busy rebuilding their country after 20 years of war and destruction. The Cambodian story could be a source of inspiration to the people of Afghanistan.

E. Establishment of Diplomatic Relations with China

I had one other experience with the practice of recognition. In 1990, I was asked to lead Singapore's delegation to negotiate with China on the establishment of diplomatic relations between our two countries. Although Singapore and China did not have formal diplomatic relations, the two countries enjoyed a warm and substantive friendship. Also, Singapore had no diplomatic relations with Taiwan or the Republic of China. The only reason for the delay in establishing diplomatic relations with China was that, because of Singapore's ethnic composition, it preferred to wait until Indonesia had re-established its diplomatic relations with China.

The negotiations with China were successfully completed after three rounds of talks, one in Singapore and two in Beijing. What were the sticking points in the negotiations? There were three. First, Singapore did not want to humiliate our old friend, Taiwan. Second, Singapore wished to retain the right to send its national service men to Taiwan for training. Third, Singapore was unwilling to downgrade certain agreements which it had concluded with Taiwan. Given the tremendous goodwill existing and the benign intervention of leaders on both sides, the two delegations successfully concluded the negotiations in September. A ceremony was held at the UN in New York, on 3 October 1990, to witness the establishment of diplomatic relations between the two countries. In the past 11 years, the relationship between China and Singapore has flourished in all fields.

F. The Law of the Sea

Singapore has one of the world's two busiest ports. Singapore lives on its trade with the world. The bulk of world trade is sea borne. It is therefore logical for Singapore to be interested in the law of the sea. The opportunity for Singapore to play an active role in the evolution of the law of the sea arose in the late 1960s, when the UN began the preparatory process leading to the convening of the Third UN Conference on the Law of the Sea. Several distinguished Singaporeans, including Professor S Jayakumar, Justice Chao Hick Tin and Mr S Tiwari, were members of our delegation to the Conference. By a stroke of fate, I was drafted to serve as President of the Conference during the two concluding years. The point I wish to make here is that this was not a mere codification conference. In addition to codifying pre-existing law, the Conference also made new law. Concepts such as the exclusive economic zone, transit passage, archipelagic sea-lane passage, common heritage of mankind, *etc*, are new in international law. I have written

extensively on the 1982 UN Convention on the Law of the Sea as well as on the negotiating process leading to its adoption.

G. International Maritime Organisation

The international organisation identified by the 1982 UN Convention on the Law of the Sea as 'the competent authority' is the International Maritime Organisation (IMO). The IMO's vision is safe ships and clean seas. Towards that end, it encourages states to become parties to treaties to promote the safety of navigation and to combat marine pollution. Our own Maritime and Port Authority of Singapore (MPA) works closely with the IMO. Together, they run many training courses in Singapore.

H. The Straits of Malacca and Singapore

One of my, as yet, unfulfilled ambitions, is to implement article 43 of the 1982 Convention with respect to the Straits of Malacca and Singapore. Article 43 enjoins coastal states and user states to cooperate to ensure the safety of navigation and to prevent and combat pollution in the international straits. At present, the three straits states – Indonesia, Malaysia and Singapore – cooperate closely. Of the user states, only one, Japan, has been cooperating with the straits states, both financially and in other ways, such as, by undertaking hydrographical surveys of the straits. I have convened two conferences, in 1993 and 1996, and have succeeded in bringing together all the stakeholders. I have, unfortunately, not been able to forge a consensus on how article 43 should be implemented. I intend to try again.

I. International Environmental Law

In 1990, the UN decided to convene, in 1992, the sequel to the historic 1972 Stockholm Conference on the Environment. The 1992 Conference would be known as the UN Conference on Environment and Development (UNCED) or the Earth Summit or the Rio Summit, in short. The UN set up a preparatory committee for the Summit. I was convinced by my good friends, Chan Heng Chee, our then Ambassador to the UN and Kishore Mahbubani, our then Permanent Secretary, to make a bid to chair the preparatory committee. Proceeding on the false assumption that the job would be easy compared to the Law of the Sea Conference, I agreed. I subsequently found that the issues were highly politicised and it was extremely difficult to forge a consensus in Rio. An account of the Earth Summit's negotiating process is contained in my Singapore Law Review Lecture, delivered on 15 December 1992, and published in the Singapore Law Review.

Chairing the UNCED negotiations gave me an opportunity to contribute to the development of international environmental law. I chaired the drafting of the Rio Declaration of Principles, which can be described as 'soft' law. I also chaired the negotiations on the monumental document known as Agenda 21, setting out an agreed programme of work in each sector for the next 20 years. Two environmental treaties, on Climate Change and Bio-Diversity, were opened for signature in Rio. Subsequently, a good friend, Parvez Hassan and I were able to play a modest catalytic role in the founding of the Asia Pacific Centre for Environmental Law (APCEL) which is based at the NUS Law Faculty.

J. International Trade Law

My involvement with the WTO and international trade law came about accidentally. In 1996, the WTO held its first Ministerial Conference in Singapore. I was one of a group of officials, from MTI and MFA, assisting our then Minister for Trade and Industry, Mr Yeo Cheow Tong. By tradition, the Minister of the host country was elected Chairman of the Conference. The then Director-General of the WTO was Mr Renato Ruggiero. One of the reasons for the success of the Conference was the seamless way in which the Chairman and the Director-General and their officials worked together. For an account of the negotiating process, see my lecture: 'The WTO's First Ministerial Conference: The Negotiating Process', delivered on 19 March 1997, at the book launch of the Singapore Society of International Law.

K. Helms-Burton Act

Since the 1996 WTO Ministerial Conference, I have been appointed three times to serve on dispute panels, twice as Chairman. The first case was a dispute between the European Union, as complainant, and the United States, as respondent. The European Commission had requested the WTO for a ruling on the legality of the Helms-Burton Act, which imposed sanctions against Cuba. The European Commission argued that the Act's extra-territorial effect contravened both WTO law and international law. The case was political dynamite and was fortunately settled before the panel met.

The second case was brought by the US and New Zealand against Canada. The two complainants argued that Canada had acted in contravention of WTO law by subsidising its milk and dairy exports. The legal issue of subsidies in agriculture was a very important one. The panel ruled in favour of the complainants and was upheld on appeal.

The third case was brought by Australia and New Zealand against the US. The US had invoked its domestic safeguards law against the

import of lamb meat from Australia and New Zealand. The legal issue was whether the US law was consistent with the WTO law on safeguards. The panel found in favour of the complainants and was upheld on appeal.

II. CONCLUSION

Looking back on the last 40 years, I have three concluding thoughts. First, I am struck by the vast expansion in the scope of international law. The international law I studied as a law student did not adequately prepare me for my subsequent career. In the past four decades, the law has grown and changed in so many areas. For example, in the field of human rights, international humanitarian law, international criminal law, law of treaties, law of the sea, air and space law, trade and technology law, intellectual property rights, refugees and internally displaced persons, inter-state and intra-state conflicts, *etc.* The curriculum of law schools should reflect the revolution which has taken place in international law.

Second, the teaching of international law should be modernised. Teaching should not focus on the regurgitation of black letter rules. Instead, international law should be taught as a dynamic body of rules which is constantly growing. Greater reliance should be made of case classes so that students can appreciate the relevance to and impact of the rules on real life situations. Whenever possible and appropriate, law teachers should attempt to use current legal problems in their classes. Students should be encouraged to do attachments with foreign ministries, defence ministries, international organisations, non-government organisations, and other agencies in order to experience, at first hand, the interactions between law and practice.

Third, international law teachers have an important job to do in educating the legal profession, the judiciary and the general public on the relevance and importance of international law. There is, at present, a huge gap of knowledge between the international lawyers and the rest. Let me illustrate my point with a personal anecdote. Recently, one of my good friends, who has held one of the highest offices in Singapore, wrote me a series of letters. In those letters, he contended that there is no such thing as international law. The arrest and extradition of Milosevic to the Hague to stand trial for war crime redoubled his conviction that the world is ruled by power not by law. His letters have convinced me that we, the teachers and practitioners of international law, have a lot to do in convincing a sceptical world that, however imperfect, international law exists and that it impacts many aspects of our lives.