INTERNATIONAL LAWYER

A Dialogue with Judicial Wisdom

Professor Ko Swan Sik

INTRODUCTION

The Journal of East Asia & International Law had a great honor to interview with Professor Ko Swan Sik who has been highly renowned and respected international law scholar of our time. Born at Semarang, Central Java on January 4, 1931 as a son of established law family, Professor Ko studied law at the University of Indonesia and Leiden University, The Netherlands where he obtained doctorate (*cum laude*) in 1957 with the dissertation about 'Multiple nationality.' He practiced law as attorney at his father's law firm at Semarang between 1957 and 1965, while teaching international law (appointed as principal lecturer and in charge of the chair in 1959) at the University of Indonesia during the same period. Since joining the newly established T.M.C.Asser Institute (Dutch inter-university institute of international law) at The Hague in 1965 to set up and lead its public international law department, he moved to Holland and has been staying there as a 'permanent resident.' As Head of public international law department at the T.M.C. Asser Institute, Professor Ko Swan Sik made great contributions to organizing the documentation of the Nethelands State practices systematically in the context of a Council of Europe suggestion for such data collection and ordering by its member states. In 1970, he initiated The Netherlands Yearbook of International Law (Vol.40 as of 2009), together with Professor Herman Meijers of the University of Amsterdam (They continue to serve as honorary editors) under the inter-university support. In 1989, Professor Ko set up the Foundation for the Development of International Law in Asia ("DILA"), an independent legal entity with Sri Lankan jurist M.C.W. Pinto and Indonesian jurist J.J.G. Syatauw. The prestigious Asian Yearbook of International Law has been published under the auspices of DILA and his editorship(Vol.14 as of 2009). In 1988, Professor Ko was appointed chair of international law at Erasmus University Rotterdam until his retirement in 1996. He is now a member of *L'Institut de Droit International*.

Professor Ko is a true man of virtue; he is humble, generous and harmonious. He has been a mentor for many international lawyers in Asia and Africa because of his boundless and warmhearted encouragement, which enabled them to obtain their goals in international law arena. Professor Ko has been often called 'Papa' for younger generation. His life will be cherished as a model of successful international lawyer as well as considerate human being who are truly dreaming and trying to realize peace and justice of the world. The following interview enlightens the wisdom and attainments of this great scholar.

QUESTIONS & ANSWERS

1. You were born in Indonesia and finished your first law degree there in 1953. Then, you moved to Leiden University to get your Ph.D. What brought you to Leiden? Would you tell us about your academic life in Holland and your Ph.D. research topic?

When I graduated in 1953, I was only 23 years old. My father, who was a practicing lawyer, had had the opportunity, a generation earlier, to do part of his study abroad thanks to the generosity of his elder brother. He considered me too young to immediately settle down as a junior in the law firm, and wanted me to broaden my horizon by traveling abroad some time and aquire the same kind of experience as he had been able to acquire himself. That was in fact the reason why I took to Europe, primarily just to "take a look outside," though with a possibility to decide to undertake further studies, should I choose to do so.

As to the choice of the Netherlands as the first or, rather, the main destination of my travel abroad, this can be explained only against the backdrop of Indonesia's then colonial environment and narrow intellectual horizon in which 'the West' and 'Europe' coincided for all practical purposes with 'Holland' and "Western academic excellence" coincided with 'Leiden.' Not quite knowing how to spend my time without any specific goal I started registering as a student at Leiden and attending courses of my choice which I found useful and interesting. International law was already a field that had attracted my interest before, not surprisingly to some extent inspired by my father who was a genuine private law jurist but who had always been interested in issues of international relations and history and had recently developed an increasing academic sense of curiosity toward international law. I also attended private law classes, following my belief that, particularly in the civil law tradition, it is the branch of law in which the development of legal doctrine and theory has been most prolific.

At a quite early stage, I came to the conclusion that merely attending classes would not really make my European sojourn worthwhile. Thus, I decided to try my luck with a doctoral thesis. The question of the nationality status of the minority group of Chinese descent in Indonesia of which I am a member was most topical at the time and, luckily, the current state of the literature on the subject of multiple nationality was such that another review of the matter from a purely legal perspective seemed quite warranted. It is most gratifying to be able to say in hindsight that my endeavours proceeded favourably and proved most useful in developing and enhancing my sense of legal

discipline. My four-year European stay was made additionally satisfactory by the unexpected fortune of alternating the tough and solitary, mainly library, work by a year's stay in a German academic atmosphere which turned out to be my best European experience.

2. After teaching and practicing law for a number of years in Indonesia, you came to Holland in order to join the newly established T.M.C. Asser Institute as head of its public international law department. What did you do at the T.M.C. Asser Institute? What are the contributions of the Institute to the development of international law?

The rather satisfactory result of my Doctoral studies has doubtlessly contributed to or, as I suspect, played a decisive role in the offer made to me as a foreigner to join the newly established so-called (Dutch) Inter-university Institute of International Law at The Hague (named T.M.C.Asser Institute after a Dutch international lawyer and 1911 Nobel Peace Prize laureate) The institute was sub-divided into three departments for public international law, private international law and the law of the (then) European Communities. The basic idea underlying the new institute was the pursuit of a fuller cooperation between the Dutch universities and an enhanced coordination of their research programs in the three fields within its scope, instead of the then existing almost complete lack of harmonization of direction, orientation and efforts in the field of legal research and even the lack of personal contacts. By way of illustration, one of my most surprising experiences, particularly in the earlier part of my Institute period, was the lack of acquaintance among the various staff members from the different universities in a small country like the Netherlands, with I myself as a foreigner introducing them to each other. Cooperation and coordination was supposed to enhance effectiveness.

During my time at the Institute it lent its services, in the context of its intra-Netherlands activities, to initiating and carrying out joint inter-university projects for research and educational purposes. In its external activities the Institute, always by way of joint inter-university effort, initiated and took up the management of, *inter alia,* the Netherlands Yearbook of International Law in 1970 and took over the management of the Netherlands International Law Review. Another example of its endeavours was the editing of a three-volume work on international law as practiced and interpreted in the Netherlands. By way of contribution to a regional, all-European, effort, the Asser Institute also initiated and since that time maintained responsibility for, the compiling and ordering of materials of Netherlands state practice in international law.

3. You are a founding member of the Foundation for the Development of International Law in Asia("DILA"). DILA has been making great contribution to the development of international law in Asia; one of the biggest contributions is the publication of the Asian Yearbook of International Law. Would you tell us the past and future of DILA?

The great satisfaction I had from my work at the Institute and the unrestricted cooperation which I received from faculty members and institutions in the Netherlands did not, however, cause the loss of my national identity and, consequently, I maintained interest in Asian matters and developments. In 1983 it so happened that I was assigned to participate in the organization of an international symposium for the commemoration of the fourth centenary of the birth of Hugo Grotius. As part of the effort to emphasize the international character of the gathering I was to select and invite a number of speakers from outside Europe, particularly Asia, which I did. The ensuing broader contacts with these Asian colleagues led to the idea of starting initiatives in an Asian context and resulted in the publication, in 1990, of a multi-authored volume on a topic of international law "in Asian perspective" that was intended to be the beginning of a series under that name. Unfortunately a second volume has yet to appear.

The practical failure of continuing the "in Asian perspective" series led, around 1988, to the alternative idea of starting a regular periodical publication which has since been the Asian Yearbook of International Law. The option for an annual rather than a higher frequency periodical was a quite conscious one but not relevant in the present context. Another aspect, however, may be quite relevant to be noted here. The possibility of financial consequences of the publication project and the wish of preventing individual persons from being burdened with such responsibility gave rise to the decision of founding a separate legal entity under whose auspices the Yearbook would be published. The entity that finally came about and that was DILA happens to be molded in the formal structure of a "foundation" under Dutch law for the simple reason that the founders, M.C.W. Pinto (Sri Lanka), Ko Swan Sik (Indonesia) and J.J.G. Syatauw (Indonesia) had their residence in the Netherlands. The official founding of DILA took place on December 21, 1989 by deed of a notary public in The Hague.

Although the founding of the foundation was primarily intended to meet the contingency of financial responsibility in connection with the publication of the Yearbook, it is incorrect to consider the foundation as an organization for the exclusive purpose of publishing the Yearbook or, in other words, as some kind of publishing enterprise. On the contrary, the foundation embodies a rather broad program of academic activities in the field of international law in Asia or relating to Asia, thereby

aiming at promoting contacts among Asian jurists, enhancing their endeavors in the field of research and education, improving their information of whatever developments in the field of research and literature in the field concerned, and promoting the recording and dissemination of relevant Asian materials. This program stands intact, although I should like to admit quite candidly that not much of it has yet been realized.

4. I would like to ask you one more thing in line with the previous question. Recently, the Asian Society of International Law was set up with similar principles and purposes to DILA? What is the position of DILA towards the Asian Society of International Law?

The question of the position of DILA *vis-à-vis* the Asian Society of International Law ("AsSIL") is one which I am not competent to answer since I am not in a position which entitles me to speak on behalf of DILA. I shall, however, try to set out, though briefly, my personal views regarding the matter. I have always considered the initiative to set up an AsSIL regrettable, for the simple reason that, as your question rightly notes, DILA and AsSIL essentially share the same principles and purposes. I do regret that the initiators of AsSIL have not chosen the way of approaching DILA and expressing their wish to participate in taking responsibility for DILA or, for that matter, to take charge of specific projects in DILA, or to start specific desirable projects under the umbrella of DILA, or even proposing changes in DILA's organization in accordance with their vision, instead of deciding on setting up a separate organization right away. On the other hand, everybody is of course free to establish a new organization and from that perspective we have never raised objection against the AsSIL.

Starting from the factual present situation, it is my belief that the two organizations will unavoidably overlap in most if not all of their aspirations and efforts and, necessarily, compete in the pretty limited Asian market of available human resources. In my opinion they should, therefore, make all possible effort, in an atmosphere of goodwill, to undo the consequences of this duplication and diminish any unfortunate competition or even rivalry that could arise between the two organizations. The question if this should be achieved by merger of the organizations or otherwise is, in my opinion, not paramount. If, for whatever reasons, consensus on a formal merger is not yet attainable in the short term, I would suggest that, in the meantime and by way of alternative, joint efforts should be made towards a high decree of coordination. Very briefly, on the organizational side the two organizations could set up a joint coordinating committee, conceivably consisting of the chairmen and vice chairmen of the two organizations. Substantively it could be envisaged that every project initiated by

either side is thrown open for participation by the other side and, besides, be offered to the other side for presentation as a project "under the joint auspices of <DILA and AsSIL>."

5. Some people say, "international law was not and is still not as protective of Asian countries as it has generally favored the colonial West where its rules and norms originated in the first place." Do you agree with this statement?

The question is exceedingly broad in scope and susceptible to different interpretations. I take the liberty to restrict myself to make some short, far from original, remarks.

The scenario may refer to a state (or certain group of states) being treated differently from another in the application of a certain legal norm, although they do not carry different characteristics which are legally relevant for the application of the norm in question. In such a case the different treatment is of course to be considered in contravention of the law. The scenario may, on the contrary, refer to a case in which the legal norm to be applied does differentiate between states on the basis of different characteristics which result in a legally correct difference in treatment. Such difference may turn out to be less protective for one and more protective for the other, and yet be legally correct. One may wonder how this can happen.

Let us remind ourselves that in dealing with international law one cannot but strictly hold to a number of basic presumptions, axioms or "rules of the game." One (A) consists of legal equality and legal consistency as demonstrated in the previous paragraph. Another, (B), is the irrefutable difference between the structures of the international and national legal orders or, put in other words, the irrefutably unique nature of the international legal order. The national legal order implies the presence of a central holder of authority and power as an inherent element of that order, which is not, unless exceptionally, the case in the international legal order. A third presumption (C) consists of the well-accepted fact that in the unique international legal order new law may ensue from unilateral claims or conduct of one state or a group of states against the wishes of another state or another group of states, in a field previously not yet covered by a legal rule or even in contravention of existing law, after being legitimized by effectivity, recognition or acquiescence. Consequently the law that has resulted from a certain factual constellation of division of power (in the most general sense of the word) among competent international legal subjects (say, states) may well be more favorable to some group of states while less so to another group. A subsequent replacement by a more balanced regime could occur by changing the law, either by agreement or, once more, by acceptance of a unilateral claim or conduct to that effect.

6. Not many Asian and African states had chances to participate in creating general international law before World War II. Even now there are some limitations for us to enjoy these opportunities. This being the case, why should Asian and African states accept generally recognized international customs primarily based on the western stance?

As is the case with the previous question I feel compelled to limit myself to some brief comments. The situation before World War II was of course to a large extent determined by the small number of independent Asian and African states which participated as fully competent legal subjects in the international community. But where they did exist and were, though exceptionally, able to exert real influence in international relations by their economic and military power and capacity, they certainly left their impact also in the law-creating process. Japan may be mentioned as a case in point.

The allegation that "even now there are some limitations for us to enjoy these opportunities" certainly contains elements of truth but is too insubstantial in its generality. With regard to the great number of new states that have emerged after World War II, their recognition by the existing international community of states as separate or independent states was of course contingent upon their acceptance of the general (mainly customary) international law in force at the time. Once they had become members of that community all the existing modes of law-creation were available to them including those by essentially extra-legal methods as referred to in the comments on question No.5.

7. As an international lawyer, you spent many years studying systematic state practices. While taking my Ph.D. course in Erasmus University Rotterdam, you used to tell me about the importance of state practice for understanding the structure of international law. What is the real significance of state practice in international law?

As we know, the importance and role of State practice in the field of international law is apparent in various situations, such as the making of customary international law. It is also rather clear in connection with the presumption (C) as referred to in the comments on question 5. In the context of Asia, I am inclined to suggest that enhanced mutual familiarity of each other's practice in the field of international law among the states and international lawyers in Asia would greatly benefit the development of a better understanding of Asian perceptions of international law.

8. With the current trend of globalization, many people are working in foreign countries. Thus, problems of 'multiple nationality' arise with these migrant workers. What would be the best option to resolve such quandries?

Multiple nationality does not arise as a specific consequence of the phenomenon of migrant workers (or, for that matter, 'expats') but, as we know, because of 'conflicts' or 'incompatability' between different national legislations on the acquisition and loss of nationality. It is difficult to provide a compact answer to the question posed because the phrase 'nationality problem' is not unequivocal and could even refer to problems of a non-legal nature.

In the case of workers who happen to possess the nationality of their country of sojourn and also that of another country, the former state is entitled under international law to ignore the foreign nationality and to treat the person as its national (only), and the general practice is in accordance with that principle. If the country of sojourn is (politically) not favourably inclined toward its nationals having, in addition, another nationality, and if some existing arrangement, such as a treaty on the matter, enables or even obliges such a person to choose between his two nationalities, it generally appears advisable for the person to opt for the nationality of the country of residence if he intends to remain in that country for the rest of his life.

It is not possible to think of a 'nationality problem' in every case of multiple nationality. It is quite possible to have situations of multiple nationality which do not raise problems at all, in which case the situation does not require any 'solution.'

9. What is your vision for the 21st century? Will it be more peaceful and cooperative than the previous century? What should the international community keep in mind for a peaceful future?

This is not a legal but basically a political question and I confess that I lack expertise for the analysis of political questions.

10. Would you give a piece of advice for youngsters in East Asia for designing their life?

I am not an educational expert, either. I have always fretted about and regretted the mistakes I have, or think to have, made in educating my own children, so, who am I to give advice to others? I do think everything in life is relative in nature and that each individual case requires its own solution.

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