

# The Lucky Boat and the future of the Australian Bar Association

By Colin McDonald QC\*

As the sun set over Phnom Penh, Nhean Chanearboth sang a haunting Khmer song of a return to her homeland, a smile on her face. Chanearboth sang from the stern of a colonial French relic called the *Lucky Boat* as it chugged along the Mekong River. I felt relieved to be away from Australia and to be an invited guest on that evening cruise. It was late February 2003 and the political rhetoric about weapons of mass destruction and the need for regime change in Iraq was thick in the air. On this river of turbulent past, it was good to be away from the words of war. Yet, as I absorbed the memorable silhouette of Phnom Penh and felt the emotional strength of the song, I sensed even then that a war was inevitable.

The struggle to achieve even the semblance of the rule of law in Cambodia also goes on quietly in too many countries in Australia's immediate region.

The evening cruise on the *Lucky Boat* had been organised and paid for by grateful law and good governance students who had undertaken, or who were soon to undertake, sponsored overseas tertiary study. My host was a talented law student who had been given the opportunity for free tuition at the University of New South Wales Law School later this year. The students were saying thank you and were keen to abide by perceived national sensitivities: in addition to ample Khmer cuisine there was cognac and red wine for the French, a Mekong bourbon and Coca-Cola for the Americans and beer for the Australian. On the boat were gathered about thirty eager young Cambodians, idealistic, hungry to learn and keen to expand their intellectual horizons. The young men and women on the *Lucky Boat* were undoubtedly the future leaders of Cambodia.

The hearts and minds of these future leaders had been won over by good education, the promise of more such education, the power of reason and the professional example of their lecturers. Scholarships from enlightened universities and sensible governments gave these young men and women a reprieve from the poverty from which they all came and hope for the future.

These young Khmers on the *Lucky Boat* were living proof that education, values that withstand intellectual and moral scrutiny and practical relief from poverty are powerful tools in overcoming extremism, intolerance and violence.

All those on board knew the realities of contemporary Cambodia; they knew it was a country ruled by a selfish and corrupt elite which enforced its power by resort to the gun when perceived necessary or advantageous. By being on board the



Former Khmer Rouge commander General Sam Bith appearing in a Phnom Penh court charged with the 1994 kidnapping and murders of Australian, British and French backpackers. Photo: *Cambodge Soir / Khem Sovannara / News Image Archive*

*Lucky Boat* all the young Khmers were demonstrating a commitment to new approaches at problem solving which did not involve the violence with which Cambodia has been afflicted for 30 years.

There was also something to be learned from the guests on board. They were all foreign lawyers who had in the past, in one way or another, been influenced to action by Cambodian refugees. The flight of Cambodian refugees to France, America and Australia in the late 1970s, the late 1980s and early 1990s had confronted some most unlikely persons with unexpected issues of commitment. All of the guests were back in Cambodia using their legal skills – teaching, advising, mentoring. They brought with them their legal expertise, their values and commitment to the rule of law and sought to pass them on. And here on the *Lucky Boat*, their commitment was being acknowledged by the young men and women who will lead the

\* Colin McDonald is a former president of the Northern Territory Bar Association and a former member of the ABA executive. He is currently a board member of the Cambodian Legal Resource Centre in Phnom Penh. In addition to his Australian legal practice, he has practised in Indonesia, East Timor and Cambodia and had extensive dealings with judges, lawyers and government officials in the region.

new Cambodia.

Just how important this involvement of foreign idealistic lawyers is was brought home with the news on 23 April 2003 that Judge Sok SETHA MONY had been assassinated. He had been the judge who sat and convicted ex-Khmer Rouge commander Sam BITH to life in prison for the abduction and murder of Australian David WILSON.

The assassination of Judge Sok SETHA MONY was a reminder that the rule of law in Cambodia remains an aspiration, not a political reality. The assassination made events like the cruise on the *Lucky Boat* more important and demonstrated how difficult the future will be for those young lawyers on board.

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Bipartisan policies of engagement with our region and various aid projects born of such engagement have been interrupted by the events of 11 September 2001 and, closer to home, the Bali bombing on 12 October 2002. Understandable anger, fear and vengeance has followed. Australia has drawn closer to the United States in a very public way.

The government has bolstered defence and security spending. The sense of foreboding I had on the *Lucky Boat* came to pass. It is a matter of history that Australia joined the 'coalition of the willing' and committed our military to war. In doing so, Australia opted for, and participated in a new and potentially dangerous pre-emptive theory of military intervention. War was not the last resort. UN sanction was ultimately not necessary. Sixty years of Australian diplomacy and participation in world institution building went out the door.

As lawyers, we do not necessarily adopt, endorse or criticise executive action. The politics of pragmatism, expediency and the ways of power have no role in the administration of justice.

However, even in the quintessential executive act of going to war, lawyers may have a responsibility to speak publicly, especially on issues affecting the rule of law.

A current topical example of the responsibility for lawyers to question and to speak was raised in the political bombshell that was unleashed in the United Kingdom in *The Guardian* on 22 May 2003. The legal correspondent of *The Guardian* advised the world that the British Attorney-General, Lord Goldsmith, had in an opinion to his government some two months earlier, questioned the lawfulness of the occupation of Iraq. Lord Goldsmith was quoted as saying:

The government had concluded that the removal of the current Iraqi regime from power is necessary to secure disarmament, but the longer the occupation of Iraq continues, and the more the tasks undertaken by an interim administration depart from the main objective, the more difficult it will be to justify the lawfulness of the occupation.

*The Guardian* legal reporter further commented:

His opinion throws into doubt the legality of the efforts of the US-led Office of Reconstruction and Humanitarian Assistance to form an interim Iraqi administration. It shows how close to the wind the British administration was prepared to sail in its Iraq role.

As lawyers, we in Australia are entitled to ask what advice did the Australian Government receive about the legality of the occupation of Iraq. Lord Goldsmith's advice touched directly on the rule of law and executive action. It has passed without much comment in Australia.

Whilst the attack on the World Trade Centre and the bombing in Bali has drawn Australia closer to the United States militarily and politically, it has not changed our geography. Nor has Australia's close alliance with the United States changed certain realities in our region. Until the institutions of government in those fragile and disorganised countries to our north are strengthened and the causes of terrorism – economic,



Phnom Penh municipality judge Sok SETHA MONY arrives in hospital after being shot five times. The judge later died of his wounds. Photo: AFP / News Image Archive

social and political - are successfully attended to, those countries will continue to be unwilling hosts or breeding grounds for terrorists.

Engagement with our region in non-military ways, in institutional strengthening exercises, is more urgent than ever. It is here that the Australian Bar Association, to which all Australia's independent Bars belong, can play a part even in a modest way. It is here that the Australian Bar Association can expand its role not just in the administration of justice in Australia, but also in promoting the rule of law at home and abroad.

The Australian Bar Association plays an independent and pivotal role in the administration of justice in Australia. It has developed into a sophisticated national body representing the interests and views of barristers. The ABA is justified in

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being proud of its achievements. The ABA organises and hosts excellent professional conferences in Europe and America. It has conducted advocacy courses in Bangladesh. However, in our region the involvement of the ABA has nevertheless been minimal. A perhaps unstated but prevailing view is that the ABA should confine itself to issues of advocacy and, in so far as the outside world is concerned, our contribution is made within the International Bar Association and the Law Council of Australia and that is enough. I am one who respectfully disagrees.

The events since the Bali bombing in October 2002 and Australia's reaction to the arrival by boat in its national waters of asylum seekers demonstrates a powerful case that the Australian Bar Association should develop its own capacity and a preparedness to involve itself in rule of law issues at home and in our region.

The precipitate manner that Australia opted for military unilateralism in Iraq, whatever its political advantages or disadvantages, must sound a caution that lawyers cannot accept in unquestioning fashion government action or the government's explanations on matters that affect rule of law issues.

A sign of maturity and a willingness to grapple with the issues of our time and our region could be the development of a committee of members whose task it is to identify and inform the ABA executive on issues related to the rule of law at home and in our region. There is no shortage of issues: Australia's treatment of asylum seekers, the ASIO legislation, the dysfunctional and crumbling legal system in East Timor, the extra-judicial killings in Thailand, the struggle for constitutionalism in Indonesia and the institutional collapse of the Solomon Islands are but to name a few.

Diplomacy so often involves symbolism. ABA conference organisers might consider a future conference in Hanoi, Phnom Penh, Bangkok or Jakarta. What messages conferences of the ABA in South East Asia would send to our colleagues

in our region is speculative. It would be an excellent means of networking, developing contacts and showing support. The symbolic gesture of such conferences would nevertheless be powerful. For the ABA it would be like moving from Menzies to Whitlam.

The ABA could also endorse and facilitate scholarships for young, promising lawyers from impoverished places like East Timor, Papua New Guinea, Cambodia, Indonesia and our neighbour countries in the western Pacific.

As the Australian Government buys even more sophisticated weaponry which is designed to link into American defence strategies, non-military but independent bodies can help in the war against terrorism. They can help insist that what Australia does at home and abroad is lawful. The ABA can help, in a legal sense, in that hearts and minds struggle that was so evidently

involved on that evening cruise on the *Lucky Boat*. Through being informed, it can act as an independent advocate for the rule of law and the strengthening of national institutions in the weak and disorganised states in our region. It can speak within Australia too, when Australia acts contrary to basic tenets of the rule of law. A committee to inform the ABA executive and identify issues is a step in that process. A resolution by the executive to engage more with our region in practical ways would herald a timely development and expansion in its role. Such a resolution would be an historical event in the life of the Australian Bar Association.

It is time for the ABA to develop new capacity and be in a position to contribute publicly and ethically to the debate about how the rule of law and the administration of justice is best promoted at home and in our region. The bombs going off around us must surely tell us the time has come for us to play our part.

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