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Kirby Lecture in International Law

Swimming to Cambodia Justice and ritual in human rights after conflict

Hilary Charlesworth¹

I. Introduction

It is a great honour to deliver the second Annual Michael Kirby Lecture on International Law celebrating Australia's best known and best loved lawyer. I first met Michael Kirby in 1990, when I was a fledgling academic at the University of Melbourne. Since then, like so many others, I have been the beneficiary of the warmth and generosity of his intellectual embrace as well as his penchant for recording each meeting photographically!

At the time of Michael Kirby's retirement from the High Court of Australia in February 2009 there was considerable recognition of his roles as a member of the High Court bench and as President of the NSW Court of Appeal. The speeches at Michael Kirby's High Court farewell centred on his contributions to Australian law and his humane and passionate character. Less attention has been paid to his remarkably diverse international work: Michael Kirby has worked from 1996 for the United Nations Economic, Social and Cultural Organization (UNESCO) on bioethics, for the World Health Organization and now UNAIDS on HIV/AIDS (1988–1992), for the International Labour Organization on South African labour laws (1992–1993), and for the United Nations (UN) Development Programme on constitutional reform in Africa (1994, 1997). He also served as President of the International Commission of Jurists (1995–1998). In this lecture, I focus on one particular period in Michael Kirby's international career, when, starting in 1993, he was appointed the UN Secretary-General's Special Representative for Human Rights in Cambodia. He gave up this role in 1996 on his appointment to the High Court.

¹ Australian Research Council Laureate Fellow; Professor and Director of the Centre for International Governance and Justice, Regulatory Institutions Network, Australian National University. Thanks to Susan Harris Rimmer, Jessica Howley and Henrietta Zeffert for research assistance and to John Braithwaite, Ben Playle and Christoph Sperfeldt for valuable comments.

After sketching Michael Kirby's period as Special Representative, and the international community's engagement with the protection of human rights in Cambodia, I want to consider more generally the role of the international community in such situations and identify both the potential and the limits of protecting human rights in international peacebuilding. I argue that forms of regulatory ritualism have become a feature of the international human rights system.

The title of this lecture is drawn from a one-man performance piece devised by Spalding Grey. I saw it in New York in 1986 and it left a great impression on me. 'Swimming to Cambodia' is essentially an autobiographical monologue about Spalding Grey's trip to South-East Asia to play a minor part (an aide to the American Ambassador) in Roland Joffe's film about the Cambodian genocide,² *The Killing Fields*. But it is also much more than this; the monologue contains meditations on Spalding Grey's childhood, his love life and his anxieties about his career. The monologue is hilarious and shocking at the same time because it treats the Cambodian genocide as a backdrop to Spalding Grey's self-centred woes. It also shows us how the ritual processes of movie-making can reduce massive violence and injustices to digestible dramas and thus produce a distorted account of reality. My argument is that human rights ritualism runs similar risks.

II. Human Rights in Cambodia

Between 1975 and 1979 the Khmer Rouge, a revolutionary movement led by a former academic, Pol Pot, conducted a campaign of mass killings across Cambodia, which it renamed the Democratic Republic of Kampuchea. Estimates are that from one to two million Cambodians were killed in these four years, from direct violence and from starvation and disease.³ Cambodians, then, have suffered

² I note that Gareth Evans has argued that the mass killings in Cambodia do not constitute genocide in a legal sense because all Cambodians were targeted and the massacres were not committed against particular national, ethnic, racial or religious groups: *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (2008) 12. See also the remarks of William Shabas in 'Problems of International Codification – Were the Atrocities in Cambodia and Kosovo Genocide?' (2001) 35 *New England Law Review* 287. However, other scholars contend that a consensus on genocide has emerged: see B Kiernan, 'The Cambodian Genocide – 1975–1979' in S Tatten, W Parsons and I Charny (eds), *Century of Genocide* (2nd ed, 2004) 339, 358–9; and G Stanton, 'The Cambodian Genocide and International Law' in B Kiernan (ed), *Genocide and Democracy in Cambodia: Yale University Southeast Asia Studies* (1993) 41. S Ratner, J Abrams and J Bischoff in *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (3rd ed, 2009) at 244 write that 'the existing literature presents a strong prima facie case that the Khmer Rouge committed acts of genocide against the Cham minority group, the ethnic Vietnamese, Chinese, and Thai minority groups, and the Buddhist monkhood. ...' See also H Hannum, 'International Law and Cambodian Genocide: The Sounds of Silence' (1989) 11 *Human Rights Quarterly* 82.

³ The Group of Experts for Cambodia, Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, 16 March 1999, UN Doc S/1999/231, A/53/850. For a narrative-historical account, see B Kiernan, *Blood and*

horrific violations of human rights; indeed even before the atrocities of the Khmer Rouge, Cambodia had a history of repression and violence.⁴

In late 1978 and early 1979, Vietnam invaded Cambodia and scattered the Khmer Rouge. The reasons for the invasion were complex; they included territorial, political and humanitarian motives. The Vietnamese installed a new government under Heng Samrin in 1979, who, while he remained head of state, was effectively replaced as head of government by Hun Sen in 1985. However China in particular and many other governments including the United States, Singapore, Thailand, the United Kingdom and Australia, continued to recognise the Khmer Rouge (alone until 1982 and then in coalition groups) as the legitimate government of Cambodia in protest at the Vietnamese invasion.⁵

During the Khmer Rouge years, the UN displayed remarkably little interest in Cambodia, with only a single, desultory, attempt made to review its human rights record.⁶ After the Vietnamese invasion, Cambodia attracted much greater attention at the UN, with the invasion, rather than the genocide, regarded as a matter of international opprobrium.⁷ After many unsuccessful attempts to resolve the issue of Vietnam's presence in Cambodia, which were complicated by Cold War politics, the Paris Peace Agreements were adopted in October 1991.⁸ The parties to the Agreements were the four major Cambodian political groups⁹ and nineteen

Soil: A World History of Genocide from Sparta to Darfur (2007) 547.

⁴ Ibid. See also B Kiernan, *How Pol Pot Came to Power – A History of Communism in Kampuchea, 1930–1975* (1985).

⁵ While Australia withdrew recognition in October 1980, the Khmer Rouge continued to receive recognition and support from China, the United States, Singapore, Thailand and the United Kingdom for the next decade. In 1990 Cambodia's seat in the UN General Assembly reverted to 'Cambodia' from 'Democratic Kampuchea'. For a detailed account, see Kiernan, above n 2, 339–75.

⁶ S Ratner, 'The Cambodian Settlement Agreements' (1993) 87 *American Journal of International Law* 1, 3.

⁷ Ibid 4–6. See also N Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (2000) 78–110.

⁸ The Paris Peace Agreements comprise: 1. Final Act of the Paris Conference 1663 UNTS 28 (signed and entered into force 23 October 1991); 2. Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, with annexes on the UNTAC mandate, military matters, elections, repatriation of Cambodian refugees and displaced persons, and the principles for a new Cambodian constitution 1663 UNTS 56 (signed and entered into force 23 October 1991); 3. Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia 1663 UNTS 249 (signed and entered into force 23 October 1991); and 4. Declaration on the Rehabilitation and Reconstruction of Cambodia 1663 UNTS 283 (signed and entered into force 23 October 1991). These instruments represent an elaboration of the 'Framework for a Comprehensive Political Settlement of the Cambodia Conflict' adopted by the five permanent members of the United Nations Security Council on 28 August 1990.

⁹ The Kampuchean People's Revolutionary Armed Forces; Prince Norodom Sihanouk's Funcinpec party; the Party of Democratic Kampuchea (the Khmer Rouge); and the Khmer People's National Liberation Front.

countries interested in the region, including Australia. The Agreements created a Supreme National Council comprising representatives from all Cambodian political factions which then delegated all necessary powers to implement the Agreements to the UN.¹⁰

The Agreements established the UN Transitional Authority in Cambodia (UNTAC) and gave it responsibility to monitor the ceasefire, oversee the demobilisation of the various armies and create a new political system.¹¹ The creation of UNTAC, an initiative led by Australia,¹² was the first time that the UN had taken over the functions of government across a country.¹³ It was designed in large part to allow China a face-saving method of withdrawing its support for the Khmer Rouge.¹⁴

Strangely, the Agreements made almost no reference to the Khmer Rouge period, or how to deal with its legacy. The preamble made an elliptical reference to it by stating that 'Cambodia's tragic recent history requires special measures to assure protection of human rights and the non-return to the policies and practices of the past.' Human rights, however, figured prominently in the Agreements. For example Article 15 declared that:

All persons in Cambodia and all Cambodian refugees and displaced persons shall enjoy the rights and freedoms embodied in the Universal Declaration of Human Rights and other relevant international human rights instruments.

Cambodia itself agreed 'to ensure respect for and observance of human rights and fundamental freedoms in Cambodia' and to allow Cambodian citizens to engage in human rights activities. It committed to 'take effective measures to ensure that the policies and practices of the past shall never be allowed to return' and to observe its obligations under relevant international human rights treaties.¹⁵ In turn, other parties agreed to promote human rights in Cambodia.¹⁶ Article 16 of the Agreements provided that 'UNTAC shall be responsible during the transitional period for fostering an environment in which respect for human rights shall be ensured'.¹⁷ It established a 'Human Rights Component' with staff responsible for the promotion of human rights. The focus of the Human Rights Component's work

¹⁰ Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, above n 8, s 3, art 3-7.

¹¹ See also SC Res 745 (1992).

¹² Evans, above n 2, 110.

¹³ See B Kondoch, 'Human Rights Law and UN Peace Operations in Post-Conflict Situations' in N D White and D Klaasen (eds), *The United Nations, Human Rights and Post-Conflict Situations* (2005) 19, 86; see also Ratner, above n 6, 12-25.

¹⁴ Evans, above n 2, 110.

¹⁵ Agreement on a Comprehensive Political Settlement of the Cambodia Conflict, above n 8, s 3, art 15(2)(a).

¹⁶ *Ibid*, art 15(2) (b).

¹⁷ *Ibid*, art 16. See also art 17.

was human rights education, human rights monitoring during the transition to democracy and investigating human rights complaints.¹⁸

UNTAC's mandate to protect human rights was novel in peacebuilding projects. No similar provisions had been included in previous UN-brokered peace settlements and the human rights mandate was considered a radical innovation.¹⁹ UNTAC translated its human rights mandate in various ways. It held a human rights conference in Phnom Penh in late 1992 and the following year UNTAC's head, Yasushi Akashi, proposed the appointment of a Special Rapporteur on Human Rights to the UN Commission on Human Rights, as allowed for by article 17 of the Agreements.²⁰ In the end the role was designated as a Special Representative, rather than a Rapporteur. The change was significant as a Special Representative would be appointed directly by the UN Secretary-General, with a greater chance of identifying strong and independent experts for this task.²¹ A Special Rapporteur, by contrast, would have been appointed by the UN Commission on Human Rights (now the Human Rights Council), a process subject to the intense UN politics of regional blocs.

The Special Representative's mandate referred to the obligation to maintain contact with the people of Cambodia as well as with its government; the duty to assist the government in the promotion and protection of human rights in Cambodia; and the task of reporting to the United Nations.²² The co-Prime Ministers, Prince Norodom Ranariddh and Hun Sen, who were part of a coalition formed after national elections conducted by UNTAC in May 1993, gave their full support for the work of the Special Representative in November 1993. Michael Kirby was appointed later the same month.

Consistently with his famed work ethic, Michael Kirby kept up an exhausting pace in the role as Special Representative. His reports appended his schedule in visits to Cambodia: the days were filled with briefings and meetings across Cambodia with all levels of government, NGOs, embassies, workers, business people, and the media.²³ Michael Kirby was a sympathetic, but fearless, advocate

¹⁸ *Ibid*, Annex 1.

¹⁹ Yasushi Akashi, Opening address delivered at the Human Rights Conference, Phnom Penh, 30 November 1992.

²⁰ Statement by Yasushi Akashi to the forty-ninth session of the Commission on Human Rights. Following Akashi's proposal, the Commission adopted CHR Res 1993/6, requesting the Secretary General to appoint a Special Representative.

²¹ I thank Philip Alston for this observation.

²² CHR Res 1993/6.

²³ See Michael Kirby's reports as Special Representative: Situation of Human Rights in Cambodia, 21 February 1994, UN Doc E/CN.4/1994/73/Add.1; Situation of Human Rights in Cambodia, 24 February 1994, UN Doc E/CN.4/1994/73; Situation of Human Rights in Cambodia, 3 November 1994, UN Doc A/49/635; Situation of Human Rights in Cambodia, 24 January 1995, UN Doc E/CN.4/1995/87; Situation of Human Rights in Cambodia, 13 February 1995, UN Doc E/CN.4/1995/87/Add.1; Recommendations made by the Special Representative of the Secretary-General on matters within his mandate, 26 October 1995, UN Doc A/50/681; Situation of Human Rights in

of human rights in Cambodia. Although his reports always pointed to some examples of progress in human rights protection, they also chronicled serious concerns. Unlike many other Special Representatives and Special Rapporteurs, Michael Kirby wrote the reports largely himself. This may explain why they were much more direct than the standard bland and elliptical UN documents.

Michael Kirby's final report to the Commission on Human Rights in February 1996 acknowledged advances in some areas, including an increase in the health budget, the appointment of a woman as the Minister for Women's Affairs, the growth of civil society, especially the numerous human rights non-government organisations (NGOs), and the role of King Sihanouk in defending human rights.²⁴ In comparison to the problems he identified, however, these advances seemed modest. Michael Kirby pointed to the obstacles in registering an Opposition political party and the thwarting of Opposition access to the media. He had criticised the expulsion of politician Sam Rainsy from the Cambodian Parliament in 1995 and said that 'It would be a tragedy if Cambodia were to return to a system of government where only one point of view could be given an effective voice.'²⁵ Michael Kirby also noted the spread of HIV/AIDS infection in Cambodia.²⁶ His report chronicled the tremendous disadvantages Cambodian women faced and called for effective protection against physical and sexual violence and for more women in public positions.²⁷ He described the abuse of the rights of Indigenous peoples, the destruction of the environment, and the corruption of the judiciary (whose salaries were then US \$20 per month).²⁸ Other concerns Michael Kirby identified were the appalling conditions in the prison system where prisoners contracted tuberculosis, scabies and malnutrition²⁹ and the deportation of ethnic Vietnamese Cambodians to Vietnam, where they would face political persecution.³⁰

A sense of how far Michael Kirby had ruffled Cambodian political feathers emerged in the final report with Michael Kirby noting that in his last year co-Prime Ministers Prince Ranariddh and Hun Sen had refused to meet with him.³¹

Cambodia, 26 February 1996, UN Doc E/CN.4/1996/93.

²⁴ Situation of Human Rights in Cambodia, 26 February 1996, above n 23, [17], [57], [16].

²⁵ Michael Kirby, 'Cambodia — A Departing Assessment' (Report delivered to the United Nations Commission on Human Rights, Geneva, 1 April 1996) <http://www3.lawfoundation.net.au/resources/kirby/papers/19960401_camapr96.html> at 13 April 2011.

²⁶ Situation of Human Rights in Cambodia, 26 February 1996, above n 23 [17]–[21].

²⁷ Ibid [56]–[72].

²⁸ Ibid [56]–[91], [24]–[33], [35](a).

²⁹ Ibid [38]–[41]. See also K Cain, H Postlewait and A Thomson, *Emergency Sex and Other Desperate Measures: True Stories from a War Zone* (2004) 45–7, 51–2 for a description of conditions in Cambodian prisons.

³⁰ Situation of Human Rights in Cambodia, 26 February 1996, above n 23, [2]–[13].

³¹ Ibid [106].

Apparently Hun Sen thought that Michael Kirby should change his attitude towards Cambodia. Michael Kirby responded to this criticism in a speech in 1995, saying:

If this means backing away from legitimate and honest criticism of the Cambodian government and institutions where I see departures from fundamental human rights, I am afraid that I cannot conform. It would be a betrayal of my duty [to the UN and the international community]. Above all it would be a betrayal of the Cambodian people.

He added (and it is hard to disagree with this) 'it is not in my character to back off'.³²

Michael Kirby's replacements as Special Representative were Thomas Hammarberg of Sweden (1996–2000); Peter Leuprecht of Austria (2000–2005); and Yash Ghai of Kenya (2005–2008). In 2009, the UN Human Rights Council appointed Surya Subedi of Nepal to the post of Special Rapporteur on the situation of human rights in Cambodia for a one-year term.³³ The appointment of a Special Rapporteur, rather than a Special Representative, for a one-year, rather than a four-year, term signalled a change in UN oversight of human rights in Cambodia. It should be noted, however, that the Human Rights Council has moved to end many of the country mandates adopted by the Commission on Human Rights, and Cambodia is one of the few remaining.

Almost all the issues Michael Kirby addressed in his three years as Special Representative remain problems today in Cambodia. As Special Representative, Yash Ghai referred to the widespread dispossession of the lands of villagers and Indigenous people, endemic corruption and the constant harassment of political parties.³⁴ He observed that 'violations of human rights and the rule of law were systemic, were integral to the political and economic systems through which the government rules and [were] central to the ruling party's hold on power.'³⁵ Human rights workers, trade unionists and journalists have all been the targets of political

³² M Kirby, 'Human Rights, The United Nations and Cambodia' (Speech delivered at the Peter Wilenski Memorial Lecture, Canberra, 9 September 1995).

³³ Advisory Services and Temporary Assistance for Cambodia, 18 September 2008, UN Doc A/HRC/9/15. The appointment was extended for one year in October 2009 (UN Doc A/HRC/12/25) and again in October 2010: UN Doc A/HRC/15/L.17. Professor Subedi has conducted two country visits (in 2009 and 2010). See Advisory Services and Technical Assistance for Cambodia — Report of the Special Representative of the Secretary-General [sic] for Human Rights in Cambodia, Surya Subedi, 31 August 2009, UN Doc A/HRC/12/40; and Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, 16 September 2010, UN Doc A/HRC/15/46. For Professor Subedi's reflections on his role see S Subedi, 'The UN Human Rights Mandate in Cambodia: The Challenge of a Country in Transition and the Experience of the Special Rapporteur for the Country' (2011) 15 *The International Journal of Human Rights* 249.

³⁴ Report of the Special Representative of the Secretary-General on Human Rights in Cambodia, 30 January 2007, [80]–[85] UN Doc. A/HRC/4/36; and see generally Report of the Special Representative of the Secretary-General on Human Rights in Cambodia, 24 January 2006, UN Doc E/CN.4/2006/110.

³⁵ Yash Ghai, *Wall Street Journal (Asia)*, 8 September 2008.

violence. These claims are supported by evidence from both international and Cambodian human rights groups.³⁶

What then can we say about the success of international peacebuilding in Cambodia? UNTAC was described by William Shawcross in 1994 as 'an international triumph'.³⁷ However it is clear that this was a premature assessment. UNTAC put a great deal of energy into organising elections in May 1993 and overcame the Khmer Rouge-organised boycott of the elections.³⁸ It also successfully arranged the return of 372,000 refugees from Thai border camps.³⁹ UNTAC was unable however to guarantee a ceasefire and to disarm and demobilise the military factions.

UNTAC also made little headway in establishing a viable system of justice and in protecting human rights. Human rights abuses during the UNTAC period included the slaughter of ethnic Vietnamese, intimidation and violence leading up to the first election in May 1993, and the maltreatment of prisoners.⁴⁰ The UN was accused of failing to protect the Vietnamese adequately, and legitimising the ethnic cleansing through establishing the 'Safe Passage' operation to remove the Vietnamese.⁴¹ And there was evidence that UNTAC itself did not observe human rights standards: for example its first two prisoners were held without the possibility of a trial.⁴² Most significantly, UNTAC was unable to address the issue of accountability of individuals for the Khmer Rouge violence, as this was not included in its mandate. UNTAC's mandate expired in 1994, but the UN has continued a human rights mission in Cambodia through the Office of the High Commissioner for Human Rights as well as the ongoing mandate of the Special Rapporteur.

³⁶ Cambodian League for the Promotion and Defense of Human Rights (LICADHO) reports death threats against human rights workers, with no action taken by the state in prosecuting those responsible. See LICADHO press release, "Action needed over persecuted human rights defenders" (25 September 2008). Accessed at <<http://www.licadho-cambodia.org/pressrelease.php?perm=190>> at 6 April 2011. See also Human Rights Watch, World Report 2011, Cambodia chapter, commenting that at least ten journalists have been killed in the past 15 years and that pending legislation on non-governmental organisations and trade unions is expected to further tighten restrictions on freedom of association. See also Surya Subedi's observations in Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, 16 September 2010, above n 33, [33]–[39].

³⁷ Quoted in R M Jenner, 'UNTAC: "International Triumph" in Cambodia?' (1994) 25 *Security Dialogue* 145.

³⁸ Ibid 148.

³⁹ Ibid 149.

⁴⁰ Ibid 147.

⁴¹ Ibid 147–8.

⁴² See M Doyle, *UN Peacekeeping in Cambodia: UNTAC's Civil Mandate* (1995) 47. Trevor Findlay has argued that the head of UNTAC, Yasushi Akashi, found it difficult to stand up to the Cambodian government: see T Findlay, *Cambodia: The Legacy and Lessons of UNTAC* (1995) 66.

Despite the international community's initial reluctance to encourage accountability for the crimes of the Pol Pot era, the Extraordinary Chambers in the Courts of Cambodia (ECCC) were established after six years of negotiation.⁴³ The ECCC is unique as a Cambodian domestic court that operates with international assistance. It has both international and Cambodian judges. While the majority on each panel is Cambodian, 'super-majority' requirements mean that no decision can be taken by Cambodian judges without the support of at least one international judge, and no decision can be taken by the international judges without the support of at least two Cambodian judges.⁴⁴ The first trial before the ECCC was of the chief of the Toul Sleng prison in Phnom Penh, Kaing Guek Eav who oversaw the torture and execution of some 16,000 people designated as enemies of the revolution.⁴⁵ The remaining surviving four leaders of the Khmer Rouge, including Pol Pot's deputy, Nuon Chea, are to face trial in 2011. This has been a significant step in Cambodia, engaging the Cambodian population in great numbers, with 78,000 people attending the ECCC hearings by early 2011. The trials have allowed public discussion of the Khmer Rouge atrocities to an unprecedented degree. However, concerns have been raised about whether the ECCC is sufficiently removed from the regular Cambodian judiciary, which is both funded minimally⁴⁶ and has traditionally been closely controlled by the ruling Cambodian Peoples' Party. There has also been criticism of alleged political interference in the ECCC and corrupt employment practices.⁴⁷

From a human rights perspective, there has been a great deal of human rights talk in Cambodia but very little actual progress on the protection of human rights. There are many human rights NGOs, but the repressive political atmosphere constrains their activities. The resignation in 2008 of Michael Kirby's successor, Yash Ghai, the fourth Special Representative, underlines these problems. The Cambodian government refused to meet with Professor Ghai on any occasion. Prime Minister Hun Sen said in a speech in late 2007 that the UN should spend its money on 'troubled countries such as Kenya, Sudan, Somalia, Iraq and

⁴³ For an account of the development of the tribunal, see generally T Fawthrop and H Jarvis, *Getting Away with Genocide?: Elusive Justice and the Khmer Rouge Tribunal* (2005).

⁴⁴ Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003, article 3. See also Law on the establishment of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes committed during the period of Democratic Kampuchea, 10 August 2001, NS/RKM/0801/12, Chapter IV.

⁴⁵ Kaing Guek Eav, aka Duch, was sentenced in 2010 to 35 years in prison. As at April 2011, the ECCC is considering Duch's appeal.

⁴⁶ In its 2008 report, the Centre for Social Development noted that the Cambodian court system receives only 0.28 percent of the national budget (US \$ 3.3 million) compared with the ECCC's budget of \$ 134.4 million: <<http://www.csdccambodia.org>> at 11 April 2011.

⁴⁷ See Open Institute Justice Initiative Report, *Recent Developments in the Extraordinary Chambers in the Courts of Cambodia* (2010).

Afghanistan' rather than on Professor Ghai's airmen.⁴⁸ Hun Sen criticised Professor Ghai in quite extraordinary terms as 'deranged', a 'short term tourist' and 'lazy', while a government spokesperson called him 'uncivilised and lacking Aryan culture'.⁴⁹

At the time of his resignation Professor Ghai said 'the government has absolutely no interest in the promotion of human rights, the whole state exists on systematic violations of political, economic, social rights.'⁵⁰ Strikingly he went on to complain that he also did not get support from the Office of the High Commissioner for Human Rights in Phnom Penh after the Cambodian government's personal attacks on him. The reason for this seems to be that Professor Ghai was too frank and direct in his criticisms of human rights violations. Professor Ghai also criticised the international community for sustaining the Cambodian government through unconditional aid programs.⁵¹

III. Human Rights Ritualism

Since the end of the Cold War, questions of human rights have come to occupy considerable space on the international agenda. They attract support at all levels: politically, financially and even militarily. This may be an advance on the deference paid to state sovereignty during the Cold War, but it also has many critics. For example David Kennedy has argued that the international human rights movement has become too powerful, focussing on the law and litigation and squeezing out other emancipatory discourses.⁵² Other scholars have contended that the international human rights movement has operated as a handmaiden to a neo-liberal economic agenda. They have suggested that the idea of human rights as the claim of the oppressed against tyranny has been overwhelmed by a version of human rights as the rights of the entrepreneurial middle classes to economic benefits.⁵³ Thus Tony Evans presents the promotion of international human rights as simply an aspect of the globalisation of production.⁵⁴

While human rights norms can be manipulated to serve particular economic and political projects, I think that they nevertheless retain moral and social value. We do not have to subscribe to a view of rights as the immutable essence of humanity to acknowledge that the international human rights system can play a role in

⁴⁸ C Sakada, 'Prime Minister of Cambodia criticises Yash Ghai again' *Phnom Penh Post*, 30 January 2008.

⁴⁹ See comments to the Human Rights Council, UN Press Release, September 15, 2008.

⁵⁰ ABC Radio Australia, 'Human rights increasingly challenged in Cambodia', 3 October 2008.

⁵¹ Ibid.

⁵² D Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004).

⁵³ See, eg, C Hughes, 'Human Rights Out of Context (or, Translating the Universal Declaration into Khmer)' in White and Klaasen, above n 13, 191, 195.

⁵⁴ T Evans, 'Human Rights and the "Empire of Civil Society"' in White and Klaasen, above n 13, 177.

pressuring states to lift their game in the way that they treat the people within their jurisdiction. Human rights standards may only be a negotiated, provisional, account of the minimal conditions of lives of dignity and worth, but they have radical potential as a set of claims that can be made by everyone, regardless of their circumstances. A central issue for proponents of human rights is how international standards can be deployed to change behaviour; in other words, how human rights principles can regulate the flow of events. International human rights scholars have tended to focus on the law as the sole form of regulation in the field. The concept of regulation is however much broader than law and has been defined as 'the intentional activity of attempting to control, order or influence the behaviour of others'.⁵⁵ It can also be understood as encompassing unintentional effects of agency.⁵⁶ Regulation thus encompasses political, social, economic, psychological pressures as well as legal rules. The most durable form of regulation is self-regulation through commitment to a normative order.

Regulation of behaviour through human rights standards is complex. The UN human rights mission in Cambodia illustrates the intricate politics of the international human rights system. For example, in some international quarters there has been a sense that Cambodian culture is inhospitable to ideas of human rights and that the Cambodians are at a primitive stage in developing human rights ideas.⁵⁷ This has promoted the view that the role of the international community is to guide the Cambodians to better human rights protection. The effect of this approach has been to prevent the development of local human rights expertise and remove human rights questions from local debates.⁵⁸ Caroline Hughes has argued that the international community's promotion of human rights in post-conflict Cambodia can be best understood as ritualism in the sense that ideas of rights lost their radical political potential and become a more technical exercise of creating 'responsible citizens' in an efficiently run state mainly through the mechanism of education.⁵⁹ Even this more modest goal has not been achieved, according to Hughes. There is a widespread perception in Cambodia that protection of human rights requires professional, probably international, assistance and is far removed from the daily oppression of the poor by officials.⁶⁰ In this sense, Cambodia remains in a type of permanent human rights transition.⁶¹

How can we understand the weakness of the international human rights system in achieving political and social change in post-conflict societies such as Cambodia? I want to suggest that the idea of regulatory ritualism can be helpful in

⁵⁵ J Black 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 1.

⁵⁶ C Parker, C Scott, N Lacey and J Braithwaite, 'Introduction' in C Parker, C Scott, N Lacey and J Braithwaite (eds), *Regulating Law* (2004) 1, 2.

⁵⁷ Hughes, above n 53, 202.

⁵⁸ Ibid 210.

⁵⁹ Ibid 196, 205–6.

⁶⁰ Ibid 211.

⁶¹ Ibid 212.

this context, drawing on the work of my colleagues, John Braithwaite, Valerie Braithwaite and Toni Makkai. Ritualism is one of the five types of adaptation to a normative or cultural order identified by sociologist Robert Merton. Merton's four other types of adaptation are conformity (acceptance of both normative goals and the institutionalised means to achieve them), innovation (acceptance of normative goals but supporting alternative (perhaps even perverse) means to fulfill them), retreatism (resistance to both normative goals and their formal institutions) and rebellion (replacing normative goals and their institutions with new ones).⁶² Ritualism occurs when there is no acceptance of particular normative goals, but great deference is paid to the formal institutions that support them. It can be defined as 'acceptance of institutionalized means for securing regulatory goals while losing all focus on achieving the goals or outcomes themselves.'⁶³

Valerie Braithwaite has elaborated the idea of 'motivational postures' in the context of taxation regimes, extending Merton's work on responses to authority. The postures Braithwaite identifies are: disengagement (the rejection of the legitimacy of rules); resistance (a challenge to rules, but acceptance of the legitimacy of authority); capitulation (grudging compliance, but with no acceptance of the purpose of the rules); and commitment (believing in and actively pursuing the goals of regulation), a situation in which self-regulation is most likely to work.⁶⁴

In their study of aged care in three Western countries, Braithwaite, Makkai and Braithwaite found that nursing homes only rarely actively resisted regulation.⁶⁵ It was much more common for operators to avoid confrontation with regulators and to agree to the language and techniques of regulation, for example by filing a plan of correction or changing a policy. This strategy usually favoured the preservation of the *status quo* both because regulators did not have sophisticated follow-up mechanisms and because the new plans or policies could be observed in a perfunctory way.⁶⁶ Braithwaite, Makkai and Braithwaite term this 'regulatory ritualism'.

So too in the field of human rights, rights ritualism is a more common response than an outright rejection of human rights standards and institutions. Rights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses. Countries are often willing to accept human rights treaty

⁶² R Merton, *Social Theory and Social Structure* (1968).

⁶³ J Braithwaite, T Makkai and V Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (2007) 7.

⁶⁴ V Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (2009). For an application of this theory to peacebuilding in Indonesia see J Braithwaite, V Braithwaite, M Cookson and L Dunn, *Anomie and Violence: Non-Truth and Reconciliation in Indonesian Peacebuilding* (2010).

⁶⁵ Braithwaite et al, above n 63, 130.

⁶⁶ Ibid 131.

commitments to earn international approval, but they resist the changes that the treaty obligations require.

In the UNTAC era, the Cambodian government generally participated in the international human rights system. It became a party to four major treaties — the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention against Torture (CAT), and the Convention on the Rights of the Child (CROC) in 1992, with UNTAC's encouragement.⁶⁷ Cambodia has managed however to largely deflect the impact of these human rights obligations. One method has been the failure to implement treaty commitments into national law.⁶⁸ Another has been Cambodia's diffident record of reporting under the treaty system.⁶⁹ In other words, its participation in the international human rights system can be understood as a form of rights ritualism. The international community has tacitly endorsed this ritualism, perhaps as the path of least resistance in a political system that is inhospitable to human rights claims. The problem of rights ritualism is not confined to developing countries; indeed Australia is a party to seven of the nine core UN human rights treaties and yet has been reluctant to fully implement their provisions.⁷⁰

As we have seen, rights ritualism in Cambodia has sometimes edged closer to disengagement at various points, for example the government's refusal to meet with Michael Kirby in 1996. Yash Ghai's 2008 resignation from the post of Special Representative suggests that the Cambodian government may have abandoned ritualism for active human rights resistance when faced with tough criticism.⁷¹

⁶⁷ See K Berry, 'UNTAC as a Paradigm: A Flawed Success' (1995) 7 *Global Change, Peace and Security* 87, 98; and Doyle, above n 42, 45–7. Cambodia had ratified the International Convention on the Elimination of all Forms of Discrimination (CERD) in 1983. It is a party to the Optional Protocol to the CAT (2007) and the Optional Protocol to the CEDAW (2011). It is worth noting that Democratic Kampuchea (the Khmer Rouge government) signed the ICCPR and ICESCR on 17 October 1980. These signatures were objected to by a number of states (Mongolia, Hungary, Bulgaria, Belarus, the Russian Federation and Czechoslovakia) on the basis that 'only the People's Revolutionary Council of Kampuchea [is] the sole authentic and lawful representative of the Kampuchean people.' The objection went on 'The signing of the Human Rights Covenants by an individual, whose régime during its short period of reign in Kampuchea had exterminated about 3 million people and had thus grossly violated the elementary norms of human rights, each and every provision of the Human Rights Covenants is a regrettable precedence [sic], which discredits the noble aims and lofty principles of the United Nations Charter, the very spirit of the above-mentioned Covenants, gravely impairs the prestige of the United Nations.'

⁶⁸ See, eg, CEDAW Concluding Observations, 3 February 2006, [9]–[42] UN Doc CEDAW/C/KHM/CO/3.

⁶⁹ Cambodia is overdue to report on the ICCPR (due 2002), the CEDAW (due 2009) and the CROC (due 2009). It has met its current reporting requirements under the ICESCR and CAT. It is due to report on the CERD by 28 December 2012.

⁷⁰ See generally H Charlesworth, M Chiam, D Hovell and G Williams, *No Country is an Island: Australia and International Law* (2006).

⁷¹ Another example of resistance is the Cambodian government's campaign to remove

Overall, however, the strategy of rights ritualism seems to have been successful for Cambodia in flying under the radar of international scrutiny.⁷²

Human rights discourse in peacebuilding is made complex by the fact that in post-conflict societies, as the case of Cambodia illustrates, there are typically weak state institutions and struggling legal and educational systems. The economic system is often dysfunctional with high rates of unemployment. Political repression makes claims of human rights difficult and dangerous, which keeps local human rights organisations subdued. It also leaves the field to the internationals.

The process of international promotion of human rights after conflict reflects the power of symbolism in international and national politics. Participation in international human rights processes and institutions is imbued with symbols and rituals. Cambodia illustrates Murray Edelman's observation that concentrated interests (in this case the Cambodian government) receive tangible rewards (such as international aid funds and political power) while diffuse interests (for example local human rights NGOs) get symbolic rewards (such as statements about the importance of human rights) rather than rewards that can make a difference or challenge the distribution of political power.⁷³

IV. Conclusion

The engagement of the international community in Cambodia highlights the need to rethink strategies to protect human rights. I have argued that the regulatory literature may be useful in this task. The challenge is to move countries from positions of disengagement, resistance or capitulation to a position of commitment with respect to the international human rights system. If, for example, we understand Burma as a state that has disengaged from the human rights system, the strategy of 'principled engagement' may be the best response.⁷⁴ If China is understood as a once-active resister of the human rights regime, we can see that it has moderated its resistance in response to a degree of dialogue and international pressure.⁷⁵

How can we work against human rights ritualism, so often present in international peacebuilding? The regulatory literature offers the idea of continuous

Christophe Peschoux as head of the Cambodian office of the UN High Commissioner for Human Rights. See Thomas Miller, "'Sometimes We Have to Speak Out, We Cannot Remain Silent": Peschoux', *Phnom Penh Post*, 25 March 2011. Christophe Peschoux suggests that one reason for Cambodia's sensitivity to criticism by the UN is the occupation of Cambodia's UN seat by the Khmer Rouge until 1990. He recommends that the UN apologise to the Cambodian people for this episode to 'help turn the page of this sad chapter of the UN history in [Cambodia]'.

⁷² See, eg, Evans, above n 2, 160.

⁷³ M Edelman, *The Symbolic Uses of Politics* (7th ed, 1976) 23–24.

⁷⁴ M Pedersen, 'Prospects for Political Change in Burma' Centre for International Governance and Justice Issues Paper 13, November 2009, available at <http://cijg.anu.edu.au/cijg/link_documents/IssuesPapers/IssuesPaperNo.13.pdf>.

⁷⁵ A Kent, *Beyond Compliance: China, International Organizations, and Global Security* (2007).

improvement, which emphasises incremental, constantly monitored steps, rather than great leaps forward.⁷⁶ It means 'doing better every year than the previous year in terms of a regulatory objective'.⁷⁷ This can be achieved by moving from a culture that administers blame to a culture that encourages learning,⁷⁸ a development that would be useful in the field of international human rights protection. At the same time, there is a need to guard against the process of continuous improvement itself becoming ritualised.⁷⁹ A move to a learning culture requires the engagement of local actors, above all. The challenge is to translate human rights in ways that can be invoked by local people, connecting the international standards to specific political and social structures and understanding human rights principles as cultural practices than a top-down regulatory regime; Sally Engle Merry calls this 'vernacularisation'.⁸⁰ One strategy to develop a local human rights culture is to support a free media and the professionalisation of investigative journalism, as has happened in Indonesia.⁸¹ It is also critical that the international community itself observe human rights standards and reject immunity for violations.⁸²

The Universal Periodic Review (UPR) process developed by the UN Human Rights Council may be a valuable mechanism in countering human rights ritualism.⁸³ The UPR scrutinises the human rights record of all UN members over a four year cycle, thus undermining the sense that there are some countries with incorrigibly bad human rights records and some countries of impeccable human rights virtue. Because the UPR involves peer-review, in the sense that countries are reviewed by other countries, it may have greater clout and effect than review by the individual expert members of the UN human rights treaty bodies. Cambodia was reviewed under the UPR in 2009 and the Cambodian government accepted all 91 recommendations generated through the UPR.⁸⁴ The impact of these recommendations will allow an assessment of human rights ritualism in Cambodia.

⁷⁶ J Braithwaite, *Regulatory Capitalism* (2008) 150.

⁷⁷ J Braithwaite and P Drahos, *Global Business Regulation* (2000) 25.

⁷⁸ Braithwaite, above n 76, 150–1.

⁷⁹ Braithwaite et al, above n 63, 207–8.

⁸⁰ S E Merry, *Human Rights and Gender Violence* (2006) 228–29. See also N D White, 'Towards a Strategy for Human Rights Protection in Post-Conflict Situations' in White and Klaasen, above n 13, 486–7.

⁸¹ L Williams and R Rich (eds), *Losing Control: Freedom of the Press in Asia* (2000).

⁸² A Devereux, 'Searching for Clarity: A Case Study of UNTAET's Application of International Human Rights Norms' in White and Klaasen, above n 13, 293.

⁸³ The Universal Periodic Review mechanism was established by GA Res 60/251 (2006).

⁸⁴ See Report of the Working Group on the Universal Periodic Review – Cambodia, 4 January 2010, UN Doc A/HRC/13/4. See also G Sweeny and Y Saito, 'An NGO Assessment of the New Mechanisms of the UN Human Rights Council' (2009) 9 *Human Rights Law Review* 203; F Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7 *Human Rights Law Review* 109.

The capacity of the human rights treaty bodies and the special procedures of the Human Rights Council to regulate human rights practices should not be underestimated, however.⁸⁵ Individuals can shape international systems through what John Braithwaite and Peter Drahos have called 'webs of dialogue and persuasion'.⁸⁶ By strategic institutional engagement, individuals can enrol organisational power (public support) to assist the pursuit of particular normative goals, thus creating a 'micro-macro' system of change.⁸⁷ Such strategies can include 'model-mongering' – identifying a clear and powerful model for action — or being a norm entrepreneur.⁸⁸ Michael Kirby's work in making HIV/AIDS a matter of international concern is a good example of the micro-macro process by which individuals can affect the international arena.

Michael Kirby's time in Cambodia not only reflects the qualities of the man himself – his energy, courage and commitment — but it also brought great honour to Australia. Michael Kirby's name is almost invariably brought up in encounters with international lawyers around the globe and it has given all Australian international lawyers a positive aura abroad. Michael Kirby was the first in a line of distinguished Special Representatives, a post that has now disappeared because of political friction. His human rights work in Cambodia, and more recently, underlines the significance of courageous human rights investigations and at the same time the delicate balance of criticism and encouragement that is crucial to reducing human rights ritualism, and promoting commitment to a human rights culture.

⁸⁵ See (2011) 15 (2) *The International Journal of Human Rights*, a special issue on the role of the Special Rapporteurs in the development and promotion of international human rights norms. See also T Piccone, *Catalysts for Rights: The Unique Contribution of the U.N.'s Independent Experts on Human Rights* (2010).

⁸⁶ Braithwaite and Drahos, above n 77, 553–7, 560.

⁸⁷ *Ibid* 494–7, 560. Fleur Adcock's PhD in progress at the National Centre for Indigenous Studies at the ANU makes such an argument in the context of the Human Rights Council's Special Rapporteur on Indigenous Peoples.

⁸⁸ Braithwaite and Drahos, above n 77, 560.

United Nations Special Procedures: A Response to Professor Hilary Charlesworth*

*The Hon Michael Kirby AC CMG***

I. Special Procedures — A Cautionary Tale

The emerging questions: As we have come to expect, Professor Hilary Charlesworth's observations on the United Nations special procedures to protect human rights are balanced and powerfully argued. She has made a number of important points, many critical, with which I agree. I am grateful to her for using the lecture named after me as a springboard for examining an aspect of my public career which has so far attracted very little attention in Australia.

Because of the many defects in the system of special procedures of the United Nations that she recounts, an inevitable question is posed: whether the system has so many faults that it risks unduly raising false expectations. In short, does it clothe the United Nations with a deceptive veneer of vigilance in guarding human rights on vulnerable issues and in vulnerable countries? Do the flawed procedures that the United Nations offers run the risk of lulling the UN organs, the watching public, and even perhaps the Special Representatives and Special Rapporteurs themselves, into a false assessment of their own achievements?

There are more questions suggested by Professor Charlesworth's analysis. Does the natural human tendency (at least amongst those committed to the attainment of universal human rights), of optimism and idealism, produce a narcotic attitude of wishful thinking? Under the spell of false optimism and unjustified wishful thinking, is there a risk that Special Representatives and Special Rapporteurs of the United Nations will give unjustified credit to tyrants if only to affirm the utility of the UN efforts to which so much well-meaning energy on their part is devoted? And the bottom line for all these questions is whether the foregoing risks outweigh the admittedly limited advantages which the UN special procedures procure when it comes to the actual protection of human rights against the wilful conduct of oppressors who are effectively unrestrained?

In short, would it be better to fold up the tent of special procedures and work towards eventual machinery that would be more principled and effective rather

* Based on remarks offered by the author following the delivery by Professor Hilary Charlesworth of the 2nd Kirby Lecture at the Australian National University, College of Law in 2009. Subsequently, that Lecture has been published. See (2010) *Australian YBIL* 1.

** Justice of the High Court of Australia (1996–2009); Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia (1993–96).