

"Ref: Inquiry into Australia's international efforts to promote and protect
human rights."

Joint Standing Committee on Foreign Affairs, Defence and Trade

25 August 1994.

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COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE

on

FOREIGN AFFAIRS, DEFENCE AND TRADE

(Human Rights Subcommittee)

(Reference: Inquiry into Australia's international efforts to promote and protect human rights)

CANBERRA

Thursday, 25 August 1994

(OFFICIAL HANSARD REPORT)

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JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

(Human Rights Subcommittee)

Members:

Senator Loosley (Chairman)
Senator Teague (Deputy Chairman)

Senator Bourne	Mr Fitzgibbon
Senator Denman	Mr Gibson
Senator Harradine	Mr Hollis
Senator Reynolds	Mr Sinclair

Matters referred:

To examine and inquire into -

Australia's international efforts to promote and protect human rights.

WITNESSES

KIRBY, Hon. Justice Michael Donald, Special Representative of the
Secretary-General of the United Nations for Human Rights in Cambodia,
Law Courts, Queen's Square, Sydney, New South Wales 2001 1193

KIRBY, Hon. Justice Michael Donald, Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia, Law Courts, Queen's Square, Sydney, New South Wales 2001, was called to appear before the committee.

CHAIRMAN—The Human Rights Subcommittee of the Joint Committee on Foreign Affairs, Defence and Trade of the Australian parliament is declared open. The subcommittee is inquiring into Australia's international efforts to promote and protect human rights. I extend a particular welcome to His Honour Justice Michael Kirby who has joined us this evening. He has made a special trip from Sydney. Your Honour, the subcommittee prefers that all evidence be given in public, but if at any time there is material you wish to place before the committee by way of a private session, please indicate that to us and we will be happy to give consideration to that. Do you have any comments to make on the capacity in which you appear?

Justice Kirby—I am President of the Court of Appeal in New South Wales. I think the most relevant capacity in which I am here tonight is as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. I am also the Chairman of the International Commission of Jurists, which is the oldest of the international human rights organisations, based in Geneva. I have or have had various other international connections, but I gather that the main matter that the committee wishes to hear from me about is Cambodia. I have just come back from Cambodia, so that is something that it would be of interest to me to speak of, to exchange views on and get some thoughts on from members of the committee.

CHAIRMAN—Thank you. At this stage I invite you to make an opening statement before we proceed to questions.

Justice Kirby—First of all, I should say that it is always a great privilege for a citizen to come into the parliament, and to be invited here by this committee is a special privilege to me. I am conscious of it and grateful for it. I am grateful to Ms Swieringa for the arrangements that have been made for me to come here tonight.

The Secretary-General of the United Nations appointed me as his Special

Representative for Human Rights in Cambodia in November 1993. Pursuant to my mission, I have been to Cambodia on three occasions in that capacity, though I did go to Cambodia once before my appointment for the purpose of taking part of the training of the judges. The first mission was in January 1994, and I prepared a report which was tabled before the Commission on Human Rights of the United Nations in February of this year. I went again in May and in July, and I have prepared a second report which will be tabled before the General Assembly of the United Nations in November.

I was in Cambodia when the attack on the train on its way to Sihanoukville occurred. In fact, I took the very same route exactly one week before that attack took place—though I went by car, which is a marginally safer way of travelling to Sihanoukville from Phnom Penh. I am therefore very conscious of, and I can feel very deeply, the peril of Mr Wilson and the other people. I understand entirely the way in which this is a matter of the greatest concern to Australians. It is a matter of the greatest concern to me, because it touches human rights and it is relevant to the banditry and lack of observance of human rights by the so-called Party of Democratic Kampuchea, the Khmer Rouge.

However, there are many good things happening in Cambodia, and in the dazzle and glitz of the media coverage which understandably surrounds a bandit attack on a train and the capture of three foreigners, it is very easy to forget the achievements that are going on. Quiet work is being done by newly appointed judges, in the hospitals, in the educational system, and in many other ways. People are trying to rebuild a civil society and human rights in the country.

My job, as I see it, is to go into Cambodia to be the eyes and the ears of the international community; not to go with starry eyes and not to be blind to the problems and the defects; but also not to overlook the achievements that are being made. My second report, in effect, will be a report of good news and bad news; and in every item that I have studied in my last two missions, which will be the subject of the second report, there is good news and bad news.

Take, for example, the prisons. Some of the prisons are truly awful in their

circumstances, with the lack of removal of human excreta, and the basic phenomenon of overcrowding people. Squeezing them into French built colonial prisons which are really quite barbarous is an intolerable blight on human rights. As against that, steps are being taken to improve them. When I was there in May I went to the so-called PJ prison in Phnom Penh. The Police Judiciaire prison is one of the main prisons in Cambodia. I saw there the terrible conditions. The women prisoners were kept huddled in the rain, because the roof leaked, and the male prisoners were kept in cells which were completely darkened. There was virtually no air, they were overcrowded, and the stench of human sweat and of excrement was overpowering.

I then made it my business to try and make sure something was done. Fortunately, the Australian embassy was interested in prisons. It is a non-sexy subject. Most embassies are not interested in that, they are just interested in health care and education and things of that kind, so it is to the credit of our country that the broader picture is being examined. They had a little kitty of money which was made available for the improvement of the PJ prison. Essentially the then ambassador, John Holloway, said, 'We will give you \$5,000 if you can find \$5,000, and we can improve the PJ prison. We can put a sewer in and we can fix the roof over the women.' Fortunately the \$5,000 was found by the Cambodian government. It took only \$10,000 to try to improve it and to raise it to what we would regard as basic human standards. That is in the course of being done, and I think it is to the credit of Australia that there is an interest in such a thing. I am certainly grateful. If Australia had not provided the money, I would have knocked on the French door and on the American door and on the Indonesian door and on every other door until I lifted the situation there.

I visited the Battambang prison which, before the United Nations came—before the UNTAC period—was a horror gaol. It is now in some ways better than some of the gaols in Australia that I have seen as a judge, to which I sometimes have to send people. It is clean, it is airy, and there are good exercise facilities. Prisoners have a lot of time out of their cells, and the cells are not overcrowded. Since I was there in January the prison gaoler has allowed human rights groups to visit to tell prisoners individually and

collectively of their rights—something that was unthinkable in Cambodia previously. Real improvements have been achieved even in the space of this year.

If you take prisons as a sort of microcosm—as Winston Churchill once said, a test for the civilisation of society—you find there are still real problems. There are still a lot of problems to be fixed; but in certain areas, depending on the person who is the chief gaoler, steps are being taken to improve them in a way that would have been unthinkable without the influence of the United Nations—without the intervention of myself and of the human rights agency which is resident in Phnom Penh.

Take the judiciary. The judiciary is still really incipient, because the Khmer Rouge period all the judges were either killed or they fled to Paris and will not come back. They have basically had to train a group of teachers to be their judges. In Battambang, again, I have seen a judge who calls me his big brother. In a way he appears to be a thoroughly admirable man who sits there from 8 a.m. until 8 p.m. His family and his wife live in Phnom Penh. He has no real life except his work, but he is dedicated and I believe he is an honest man, and he is striving to get through his list. He had the assistance there of a man from the Asia Foundation, an English lawyer, who has helped them put better facilities in the entrance of the court to assist the public and to provide better advice to people if they have cases on.

The bad news is that in Sihanoukville one of the judges sentenced the parents of a soldier to a period of imprisonment for an offence, and the result was that the next day the soldier turned up with a truckload of troops with guns at the ready, and the judge and the prosecutor had to flee out the window. I sought to see the people in charge of the military in Sihanoukville—that is one of the main reasons I went down there—and they were not available. It is the only case I had of anybody not being available to see me during my time visiting in Cambodia. The problem of men with guns—the problem of uncontrolled military power, which we have never seen in our constitutional history—is a real problem in Cambodia. It is recognised by the government, and it is a problem which I am constantly addressing.

My methodology is twofold. I prepare a report after a mission. But during the

period between missions I receive, virtually daily, information on the situation as it touches human rights. I send messages to the government with recommendations, technical advice and assistance as to how they can improve the situation.

The thing that most impresses a person going to Cambodia, talking about human rights, is the comparative candour and openness of the government. They will admit mistakes; they will admit that there is a problem with military indiscipline; they will admit that they have a judiciary which is under-trained; they will admit that their prisons are overcrowded; they will admit that there is corruption in the education system, and that the health system does not tackle AIDS and the other problems vigorously enough. I think this is what most impressed the High Commissioner for Human Rights, who came to Cambodia during my last mission and who was there for part of the time.

So, in microcosm, the situation in Cambodia is not all bad news. There are fine people who are striving, in the ashes of a terrible period, to rebuild a civil society. I know that this committee has travelled to the region, and I know that it has a special interest in Cambodia. I believe Australia has a special interest in Cambodia. It is an interest which I, wearing a United Nations hat but inescapably an Australian, am endeavouring to follow through. I am endeavouring to work to assist the government, the people, and the NGOs that have grown up, to rebuild the civil society of Cambodia. It is not made easier by acts of banditry and violence, but it is no good just despairing; you have to go on the long haul of the patient path. That is the endeavour which the United Nations, and certainly I, am engaged. There is so much more I could tell the committee about Cambodia. My report will be available to the committee when it is presented to the General Assembly, which should be on 16 November.

I do want to bring a very simple message that it is not all bad news. It is very important, in a media milieu where you only hear the bad news, to get the corrective that there are lots of small people like the prison governor at Battambang and the judge in Sihanoukville who are people of integrity, and like the NGOs who come to the Cambodian borders to speak up for the ethnic Vietnamese who have been banished to the borders. There are brave and good people in Cambodia, and they deserve our unflinching support:

not blind support that turns a blind eye to wrongs, nor starry-eyed support that ignores the things that are going wrong, but support that goes beyond the bandits and the media hype about a particular case which, terrible though it is, is an individual case that presents only a part of the problems of Cambodia.

CHAIRMAN—Thank you. I want to focus for a moment, if we may, on that problem of military indiscipline to which you referred in Sihanoukville. Our understanding is that it is broader than one region of Cambodia at the moment. Cambodian military people who have been before the committee have spoken to us about it as well. I was just wondering about an Australian role. There has been some discussion publicly about the capacity on the part of the Australian Defence Force to train and to skill some of the Cambodian military personnel. Do you think it would be to advantage in terms of the human rights climate overall if part of our military culture could be passed on in terms of discipline and professionalism?

Justice Kirby—First of all, when I was there I did see Australian Defence personnel. In fact, last night in Melbourne I spoke of one of them, Warrant Officer Craig 'Shorty' Coleman. 'Shorty' Coleman was my escort officer in Battambang, and he is one of the deminers. He is engaged with CMAG, training 150 Cambodian personnel in the Royal Cambodian Armed Forces under him. He is a wonderful man. He is a true example of the finest in our defence services. I think he ought to be acknowledged as one of the really fine Australians who is there.

Certainly in the area of de-mining, which is a tremendous problem in Cambodia, the Australian defence forces have a very important role—which they are already, in part, fulfilling. Our defence forces stand very high in the opinion of the Cambodians because of the magnificent work done by General John Sanderson, whom I have met discussed this with, and who has a continuing and deep commitment to the constitutional reform and rebuilding of Cambodia.

As to the next step of deciding whether we get involved in military training, I think that really is a political decision which the committee has to make. I have to say that I think the Cambodian armed forces need to be fewer in number, have fewer generals and

be more disciplined and better organised. Increasingly they are just a group of bandits who are now turning to a strategy which they did not exercise before of capturing foreigners, extracting ransom and looting the personal possessions of villagers and foreigners. It used to be said that the Khmer Rouge's great strength was their discipline, but they are now increasingly just a group of bandits. No country can pay attention to the important problems of facing the human rights issues if it is constantly distracted by the problem of banditry.

There is a fear in the NGO community that building up the armed forces will lead to a haemorrhage of assistance, to corruption and to the growth of the military segment of Cambodian society. There is a concern that the Cambodians will go the way that Vietnam went before 1975 when it endeavoured to tackle the problem of internal disruption by purely military means. I think that would have to be judged in deciding what foreign countries—and it is not only Australia—did in providing assistance. But there is no doubt that Cambodia has been damaged by the attack on Pailin and the rebuff that was administered to the Royal Cambodian Armed Forces. That has not only damaged them in terms of the military position, but the ethos of the society has been damaged and there is a great loss of confidence in some quarters. If it were carefully managed and limited, I believe that assistance to rebuild the Royal Cambodian Armed Forces on a much more disciplined and professional basis would be a sensible step.

Certainly, underlying virtually all of the problems is the problem of getting civil security; but if it means pouring more money into an undisciplined, corrupt and oppressive military force that raids the courthouses, that oppresses the villagers, that oppresses poor farmers into forced conscription and that hives off more money to the generals, then I do not think that is the way we should go. There is a joke in Cambodia that there are more stars on the generals of Cambodia than there are stars in the sky.

If Australia does go ahead, it ought to be on the basis of assisting Cambodia to get a much more disciplined armed service which was itself trained in the respect of human rights, because without that respect they will never gain the love of the people. If they have only the fear and not the love of the people, they will never rebuild a civil society.

which is the objective of the United Nations.

Senator TEAGUE—In June members of this committee met across the table like this in the adjacent room with the commander of the Cambodian Army and some of the other generals who were with him. I think he would not disagree with the need for this structure and then the resources and some exemplars of discipline to lead the way in that rebuilding of the credibility of a disciplined military within Cambodia. But I want to widen the question to the infrastructure of Cambodia more generally. When you presented your report in Geneva in March, in the accompanying speech you said:

Cambodia is struggling to rebuild the infrastructure that will protect human rights. It deserves more support from the international community than mere words, which are cheap.

Could you expand upon that?

Mr SINCLAIR—The Senate is about to divide, is it not? Do you want to hold your question?

Senator TEAGUE—Yes, it is a division. We will be away for 10 minutes. I have just come from the chair of the Senate and there are several amendments and a motion.

Mr SINCLAIR—It might be better for you to go and divide rather than wait for the answer.

CHAIRMAN—Mr Sinclair, would you take the chair until we come back?

Mr SINCLAIR—Yes, happily. Sorry, Michael, but as you know this happens in this place.

Justice Kirby—Yes, that is democracy.

Mr SINCLAIR—Perhaps we will set aside that question and you can come back to it in due course. Firstly, let me commend you on each of those papers that were distributed to us. We had them sent to us by the secretariat and I found them very interesting. It seemed to me that you raised a number of quite fascinating issues. They are fascinating in the sense that I am concerned that in the period after withdrawal of the United Nations military presence the stability is unfortunately not there, and the PDK seem far too powerful as a result of the failure of the Cambodian military operations.

It must be hard for you as an Australian to divorce yourself from what Australia can do as distinct from what the United Nations can do. It worries me that whatever

human rights abuses you can identify, it will be hard to overcome them unless there can be some reconciliation with the PDK. You mentioned attempting to make contact with them, and I wondered whether you might just tell us how you feel that the situation can be handled. It seems to me that it is fundamental that if government were secure and able then to accept authority, then we could address controlling the Cambodian army; but until you overcome that very powerful minority political party I think you are going to have enormous trouble. Perhaps I could put that to you first. I would be interested to hear how you see that position.

Justice Kirby—First of all, I do try conscientiously to divorce my specifically Australian background from my United Nations activities. The committee will not be unaware of the fact that there are various tensions in the assistance that is being given to Cambodia. For example, in my own area of special interest, in the law, there is a controversy, which is quite significant, as to the extent to which the old legal system should be restored, the French language and texts should be reintroduced, the instruction should be given in the French language—matters of that kind. They are very controversial and they are potentially very divisive. I keep right out of that, because as far as I am concerned you can protect human rights with a common law system or a French civil law system.

I must confess that in some ways I think that the French civil law system might be more suitable for Cambodia because, first, there is not the large cadre of advocates which you need in a common law system. They do not even have a large group of judges. Second, in some ways the civil law system is more 'authoritarian'—that is the word that comes into mind. Certainly it is a system which is familiar to the Cambodians. In terms of approaching the matter as an Australian, of course I cannot escape my background and my country; and Australia has had a very important and beneficial role which is generally accepted in Cambodia. But I wear a United Nations hat and I am very careful always to try to do that.

As for the contact with the Khmer Rouge, I made many efforts in my first mission to make contact with them because my estimate was exactly the same as yours: that until

the weeping wound of the division of the country was cured, there would continue to be a source of destabilisation. I am still of that view, though I am now less optimistic that the problem can be easily solved.

I went to the office which the King had provided for the Khmer Rouge in the grounds of the Royal Palace in Phnom Penh. When they did not respond to my entreaties for a meeting, I thought I would go there. In the dark of night, with the moon above, we banged on the gates of the Khmer Rouge office. Ultimately the slit in the gate was opened and my blue passport was put in, and eventually the message came back that when His Excellency the Representative of the Party of Democratic Kampuchea wished to see His Excellency the Special Representative of the Secretary-General of the United Nations, His Excellency the Special Representative would receive a message; and the door was shut. So my endeavours to make contact and to do whatever I could came to nothing.

Later in the year there was the attempt by the King in Pyongyang to make the same contact. He got the representatives present but it broke down and came to nothing. The plain fact of the matter is that, at least until recently, if the Khmer Rouge submitted to the democratic opinion of the people there would not be a great deal of support for them, because so many people have suffered directly and indirectly as a result of the period of the Khmer Rouge rule. I think they are, frankly, concerned that there would not be a great deal of support for them and that therefore their future in a democratic situation is highly problematic. That may explain the reasons for their disinclination to follow through the Paris Peace Agreements, to take part in the election, to make contact with people such as myself or to reach an accommodation under the aegis of the King that would allow them to come into the government and remove this weeping wound.

That being the case, the general feeling amongst many of the observers is that the way ahead lies in solving the problem in the south-east, near Sihanoukville, essentially confining the Khmer Rouge in the west to the area which they occupy on the borders of Thailand, and to some extent endeavouring to forget them and to get on with containing them and building the economic infrastructure which is needed in the rest of the country. The problem that has now been presented by the attack on Pailin and its repulse, and the

bloody nose that the Royal Cambodian Armed Forces received, is that there is a loss of credibility on the part of the Royal Armed Forces. With that, and the fact that the Khmer Rouge forces came within 20 kilometres of Battambang, the second city of Cambodia, there is a real sense of dispirited anxiety. That was the mood of the country which I found on my second and third missions in May and July 1994. That was the mood of the country in which the attempted coup took place in July, and the country was still in that mood when I left it a couple of weeks ago.

So I agree with your diagnosis, but I fear that it is not easily capable of being solved; because if anybody could have solved it, it was the King. He retains the respect of all the factions, he has had connections with all of the factions, but he was not able to bring off an accommodation that was satisfactory to all of them. One cannot but have sympathy for the Royal Cambodian government, which after all did submit to election, which was the subject of an election which was pronounced free and fair, which achieved a remarkable coalition government—which, with all of its faults and weaknesses, is nonetheless at least at the very top, a process of mutual respect—and which is bedevilled by the problem of the destabilisation that is brought about by this group which is increasingly being seen as a group of bandits. That is the situation which, from the point of view of a person whose concerns are human rights, is the destabilising element in this country at the moment.

Mr SINCLAIR—I share a concern about PDK, as you have expressed it. But in the development of the processes of law, to which you also referred, I was most impressed in talking to those who returned from Somalia that there they had not attempted to impose our English form of law, our common law, but to re-establish the Italian law which had been in practice there. You have mentioned due process and other aspects of the conduct of the law as it is now practised in Cambodia in your report, but I wonder to what degree the United Nations supports the re-establishment of the process of civil law. Your visit, presumably, has generated some response from the United Nations, and it is really not for Australia now to impose on Cambodia the system of law they wish to pursue, it is for the Cambodian people—presumably with the backing of the United Nations. Is there some

support within the UN towards the re-establishment of a civil law process? Does the Cambodian government accept that? Where do we go from here? Where does Cambodia go from here?

Justice Kirby—Rebuilding a legal system is not an easy thing when it has been so shattered as the Cambodian one was. You have to start in law schools. One of the problems, as the French advisers to the law school have told me, is that many students think you can buy your way into the law school, you can buy your way through the law school, and you can buy your degree at the end of the law school. What sort of a preparation is that for a life as a lawyer? This has led the French special advisers who are there, paid for by the French government, to introduce blind examinations—which are thoroughly desirable, I think. They are now for the judiciary. They are requiring that the candidates for the judiciary should submit to examinations on which their names are not stated. They are examined by the French examiners, and most of them are failed. The minister wanted to appoint 100 new judges, but only 32 passed. I think the minister ultimately appointed 36, but at least the French effort has been to ensure integrity in the system.

Secondly, in a way the common law is creeping in, because it is an insidious beast. In Battambang my little brother, as he calls himself, was very concerned. He said, 'I don't have a code on this problem. I don't have a law that deals with this. I just have to try to solve the problem reasonably'. I was able to reassure him that for 800 years that has been the system of the common law: that you just build on the wisdom of your earlier decisions and you try to get consistency and reasonableness. I think I left him a little bit more reassured. They just do not have the laws. They say, 'How can we have a rule of law society if we do not have the laws?' Of course, in the civil law tradition you do not have the same capacity as the common law does.

But in terms of business law there seems to be a general feeling that that will go the way of the English speaking countries in the region. One of the main motivations that underpins the rebuilding of human rights in Cambodia is the desperate desire of the Cambodians to get a bit of the action which is so advantageous economically to the

countries in their region—particularly Thailand and Vietnam, but also Malaysia and Singapore and even Southern China. All of those countries, without exception—including, now, Vietnam—use English as either their primary foreign language or their second local language. With English comes English language business law, either from the United States or from Australia and England. So I think the likelihood is that they will move towards a common law type of business law, or at least a system that would be familiar to us; because who is going to write contracts in French in that region? They ask themselves that and they know the answer to it.

In terms of the UN effort, the International Bank for Reconstruction and Development has a team there, and I have been encouraging them in the view that one of their main objects should be to collect the laws of Cambodia. There are quite a lot of laws still being used that go back into the period of the various regimes that have existed before, but they are all over the place. The International Bank is going to give money to the Cambodian government to try to get a set of statutes which will give the beginnings of a rule of law type society. So that is being done.

International donors such as the Asia Foundation are talking about establishing a second law school, which will be a law school of complete integrity, possibly with an English language medium. That is being encouraged by the minister. They simply do not have the funds—nor does the UN—to set up a whole big infrastructure for teaching the law and for following it through. We cannot get sucked into the black hole of Cambodian administration, but certainly my effort has been to try to encourage the United Nations instrumentalities, and other friendly countries that are up there, to assist in rebuilding the legal system.

Countless lawyers have written to me from Australia—solicitors in small towns and barristers in New Zealand have written—saying, 'If there is anything we can do, we are willing to do it.' Somehow I have got to try to mobilise those people, and I think that instead of sending them up to work individually with judges—because there is a big problem with language—the way to do it is to arrange seminars at which teams of them can come up and we can have the facilities for language assistance to translate into

Khmer. The judges could be doing their work during the day and coming to these sessions at night. They just do not have enough judges, they have so many cases, prisoners are waiting trial, and you cannot really stop the whole business of the courts. It is a very complicated problem; but you cannot just say it is complicated, you have got to do little things which together will help to provide a rule of law community.

Mr SINCLAIR—I just want to say thank you. Unfortunately I have got another commitment, but it has been very nice to see you.

Senator TEAGUE—My earlier question was to ask you, Justice Kirby, to elaborate on the appeal you were making for international assistance and world recognition by a number of countries to assist Cambodia to rebuild the infrastructure that will protect human rights. Would you like to elaborate on that?

Justice Kirby—I made that speech in March. At that time Cambodia was the flavour of the month. Certainly it was a very fashionable cause, and the international community was inclined to think: 'We put UNTAC in there and UNTAC cleared it all up. This is one of our success stories, so let us show a little bit more interest and then it will all be fixed up.' Since then, two terrible things have happened: Rwanda broke out, and the attack on Pailin failed. Therefore, for both internal and external reasons, Cambodia is now much less fashionable—much less a matter of attention.

The concern is that the world, distracted by other places such as Rwanda, will think that Cambodia has been fixed up and that there is nothing much left to do there; or that because of the urgency of finding assistance for the refugees in Rwanda, we do not have to think about the 5,000 ethnic Vietnamese refugees who were escorted under the blue flag of the United Nations up to the border at Chrey Thom to wait in sanctuary until after the elections were over. They are still there 18 months later, as the committee may have seen, with their children, with their hands and arms full of abscesses because they are drinking unboiled water. They are receiving no education, and are in a terrible situation of deprivation of basic rights. So when I said that there is a need for the international community to put in more than words, I was essentially trying to convey to that very large and very disorganised meeting, which is the Commission on Human Rights

of the United Nations, that Cambodia still needs the attention of the international community: the sustenance, the money and the funds.

In a way, I think the dependence of Cambodia on the continuing attention of the international community and funding from the international community is one of the means that I have available to ensure that my role as the eyes and ears of the international community still has a utility. I believe that is recognised in a country which has not had a long human rights tradition. It would be easy to say, 'The Special Representative thinks this and that. We thank him for his views and we will just on with doing it the Khmer way.' But they have ratified numerous international instruments, they do speak with candour about the problems, they do recognise the need to improve many things, and they do appear to listen to my advice and that of the High Commissioner for Human Rights.

I have not proceeded through the media. I have not proceeded by banging on the table. I have proceeded, if I may say so, in the Asian way; which is non-confrontational, which is endeavouring to lead them and to assist them, and which is respectful of their society, their legitimacy and their culture. That is the way I intend to continue to do it, so long as I am the Special Representative; because I think that is the only way that there is a chance that on some matters, such as the judges and the prisons and perhaps AIDS—which I think is going to be a high priority area—perhaps I can have some effect that will be useful for the human rights of the people of Cambodia.

Senator BOURNE—You mentioned the ethnic Vietnamese before, and in your first report here in particular you say that the Khmer Rouge are pretty bad with them still. Just before the election, when I was there, all four factions standing for the election were saying some unsavoury things about ethnic Vietnamese; and to a certain extent, although I really did not like to get into it, they were using it as an election bid. Whoever disliked the Vietnamese more was likely to get votes because of that. Has that situation with the other three improved? Do you think it is likely to improve, particularly with the refugees now on the border?

Justice Kirby—We in Australia, who went through nearly a century of bipartisan white Australia, realise how easy it is to play on people's fears and on ethnic hatred and

fears. Your perception was very acute. It is my experience that one thing that tends to unite Khmers of all walks of life, including in the non-governmental human rights agencies, is their common fear of being submerged by their two big neighbours, especially the ethnic Vietnamese. Even a wonderful Khmer human rights activist who is very closely involved in de-mining said to me: 'They play their music too loud, and they eat different food that smells terrible. They are very bad fishermen. They fished out Vietnam and now they are trying to fish out our country. They do not mix, and when they have made their fortune they will go back and take it all back to their own country.' I have heard all those things before in my lifetime. Therefore, I have tried in my work to get through to those people who can be spokespeople for reconciliation and for recognising the fundamental humanity and for being concerned about the children, even if they are not concerned about the adults.

To some extent, you can make progress. There are some marvellous leaders of the human rights community who will stand up for ethnic Vietnamese, and recognise that if they are the third generation living in Cambodia they have some entitlement to respect for their basic rights. But it is a real problem. I suppose if we were in a country that was locked between two ethnic communities which have been traditionally rivals over centuries of history, and we had a destabilising civil war going on with a group in that destabilising faction who played on ethnic fears, we might feel the same way. It is constantly said that the country is being overrun by four million—that was the last figure—ethnic Vietnamese, aided by the 'Vietnamese backed government in Phnom Penh'. These lies and pure racist propaganda that are put out by the PDK are played over the radio, and play on the consciousness and fears of the Khmer people.

It needs leadership from the top. It has to be said that His Majesty the King has given some leadership of this issue and has insisted that those who have proper papers and who have been there over an extended period, who have lived there and who can speak Khmer, are entitled to stay. But that does not always trickle down to all of the politicians, who are answerable to the people who are suffering the pressures of fear and hatred that not only the PDK but others play upon; so it is a super-sensitive issue.

It is one where I got my nose slightly bloodied immediately I was appointed. The BBC asked me what I thought were going to be the main issues. I said there would be five, and I listed five. The fifth of them was the situation of the ethnic Vietnamese. As a result, His Majesty issued a pronouncement from Beijing condemning me and saying that I should look after the situation of Australian Aborigines, but subsequently he withdrew his demarche. The problem at that level has been solved, but it is a signal of how very sensitive this question is, and how I have to tackle it with respect for their history but also with insistence upon fundamental human rights.

I have made strong representations about the 5,000 at Chrey Thom, and I did so when I saw Prince Sirivudh just before I left in July. He assured me that this matter was in the forefront of his attention. He said that many in the government had themselves been refugees, so they could understand the plight of these refugees. He assured me that when the immigration, nationality and refugee laws were introduced into the National Assembly, which was expected to be soon, they would address the special problem of ethnic Vietnamese who have been living in Cambodia for a considerable time.

Senator BOURNE—I have a short question on the ethnic group on the other border. Do you think the problem is still as bad as it was with the Thai military—some Thai generals, in particular—and their links with the Khmer Rouge?

CHAIRMAN—Unofficial links with the Khmer Rouge.

Senator BOURNE—Totally unofficial links.

Justice Kirby—Yes.

Senator DENMAN—I know that the literacy rate amongst women in Cambodia is low. What is being done to redress that? What percentage of women are in universities, politics, law and those sorts of things?

Justice Kirby—First of all, the Minister for Education is himself Australian trained and a graduate, I think, of Monash University. He introduced a very strict new matriculation examination. It is, again, a double-blind examination. The result was that instead of getting of the order of 4000 matriculants, they got about 600. But introducing fairness and integrity into the process is going to be the first step in ensuring that there is

equal opportunity for people of equal talent in the educational system. As you will have seen from my first report, the situation in Cambodia is that there is a very great disproportion in the population. Cambodia's population has a significant majority of women, because of the wartime situation and the deaths that have been suffered. So there is that problem, and many of the women are having to do work in the farms and are not receiving education.

There is no doubt that women's empowerment is a very important method of improving the human rights situation in Cambodia, and that involves women's education. When I saw the Minister for Education, he realised this. His life in Australia and his background here made him much more alert to the issue than I think people would be who had not left Cambodia. It is a very slow process, of course. If one could have a crash program to improve the situation of female literacy and education, that would be highly desirable. But, although there is a slow improvement, which I mentioned in my first report, nothing much has happened this year that changes the basic appalling statistics.

In the area of AIDS, if I can mention that, I think that is also a matter of women's empowerment. This is one of the chief lessons that the World Health Organisation teaches in Africa and in Asia: that the way to ensure control of the spread of the virus is to empower women. That is a very difficult thing to do in countries which have not empowered women in matters such as sexuality. When I spoke about this in Cambodia, all eyes were lowered. It is a very modest society. But I told them quite bluntly, and I said this from the Prime Minister down, that one only of the very few good things about their isolation was that they had possibly been given a breathing space in terms of the spread of the HIV virus. But that isolation has finished, and they are in a epicentre of the rapid spread of the virus, without the very vigorous efforts that are being made in Thailand, against a 20-year background of the use of condoms and other measures of family planning. They do not have that, and they are extremely resistant to condoms, because they see that as in part a plot to try to reduce their population when, after war and revolution and with large neighbours, they need to increase their population.

I endeavoured to suggest that in those areas of the large cities where there are

concentrated brothels they should make arrangements for vans to be available for the provision of condoms and sex education and hygiene education. It is not just HIV, but HIV is the major and most urgent problem. Fortunately, the Minister for Women's Affairs is another Australian trained minister. Unusually, it is a he, but I emphasised to him that this was really a top priority. I emphasised it to the National Assembly committee on health, and I hope that by constant badgering and nagging I can really bring this home, because in terms of human rights it is one of the top priorities. I was a member of WHO Global Commission on AIDS, so I have a special interest in AIDS. I think we in Australia have lessons to give to other countries. I think it is really one of the examples of political leadership in this country that a cross-party agreement was achieved through Dr Blewett and Senator Peter Baume. I think that has really been an achievement here, where we can teach other countries lessons that, at the bottom line, life is so precious that we have got to try and put in place steps that will protect a human life in the face of the AIDS epidemic.

Mr GIBSON—I want to make the focus broader, beyond Cambodia and some of the lessons that you have raised in Cambodia, and the comments that you made before, to looking at the broader issues of human rights in our region and Australia's role in that. You made a very telling point before about the way in which you have tried to get some understanding of the issues in a non-confrontational way—'the Asian way' was the term you used. Is Australia going about its promotion of human rights in the region in the wrong way? Are we too confrontational in the way in which we try to encourage our neighbours to adopt some of the political and legal standards that we maintain in this country? Should we be adopting a different tactic to encourage some of our neighbours to develop legal structures and operations within their societies that reflect the human rights values that we hold important? Should we be doing some of the things that you have been doing in Cambodia—actually doing things a more physical, direct way—or are we a bit too obnoxious or chauvinistic in our attitudes? How should we be doing it?

There are a lot of Australians who have a lot of concern about human rights abuses, about the structures of some societies and their lack of recognition of basic human

rights, but they are countries that we are seeking eagerly to be involved with economically. We have this dilemma and, unfortunately, it is often painted as a dichotomy: 'You cannot promote this and still do that, because one is going to be counterbalancing the other.' How should we go about doing that without doing the negative things that we sometimes seem to do and threatening our other relationships with these countries?

Justice Kirby—First of all, I have a legitimacy in my role as a result of the Paris Peace Accords, because one of the four elements of the Paris Peace Accords was that the new society in Cambodia would be built on the basis of human rights. In a sense that arose from the unique, terrible suffering that Cambodians went through—that virtually everybody went through. In a conversation with Hun Sen, the Second Prime Minister, I once heard him say something which I have never forgotten. He said, 'You must understand that the First Prime Minister and I, both of us separately, suffered terrible deprivations of our human rights. It gives us a bond together and it makes us understand the need to ensure that together we do better in respect of human rights.' It appeared to be a completely sincere statement. My understanding is that the two prime ministers have a very good working relationship. Although they come from different backgrounds and different political allegiances, at least on this issue they have a general consensus.

I go in there wearing a United Nations and not specifically an Australian hat, but the United Nations has its legitimacy in there because it is given that by the Paris Peace Accords. It is invited by the government of Cambodia to assist it in the examination of human rights problems and in advice and technical assistance in order to cure those problems. Not every country will invite that sort of assistance.

Indeed, in the work of the Commission on Human Rights Cambodia is in this respect a unique case. The Commission appoints special rapporteurs to a whole range of countries and on particular themes. We had the first meeting of the special rapporteurs and special representatives in June. I sat down with the special rapporteur for the Sudan and for Haiti and all the other trouble spots. There were about 25 or 30 of us. But Cambodia is the only place where there is an invited office of the Centre for Human Rights: a

permanent presence that is giving day by day assistance, that is providing advice on laws and on policies, that is speaking to ministers every day, and that is investigating the most acute cases of abuse such as the so-called secret prisons and military violence. All of this being done with the full cooperation of the Cambodian government because it all flows from the Paris Peace Accords and, I believe, from the conviction of these ministers, with their varying enthusiasms, that there is a need for it, that it is useful to them and that it is a means of getting international assistance and financial support. That is something that Australia does not have in its relationship with most of its region.

Of course, this is a topic on which politicians can never win. If you go softly, you will be condemned for not badgering the Indonesian government about East Timor at every possible moment. If you badger Indonesia at every possible moment about East Timor, they will not bother to listen to you about other matters. I think that generally speaking we have become sensitive of our need to communicate in language and by means that will be effective. In that sense, in my Cambodian role I am merely acting out the growing realisation of Australians that their geography puts them in a part of the world with a unique opportunity in the next century and, in a sense, with a unique responsibility. Getting the right mix of adherence to principle and useful representations at the same time is not an easy thing, and of course you will make mistakes from time to time; but I think we have not done too badly as a country, and I believe that countries in our region are listening to us.

On the television the other night I saw that the Foreign Minister (Senator Evans) was in Indonesia and he made his expression of Australian concern about East Timor. I heard him say it. I think that does reflect a very strong view in Australia, just as when we see people from the People's Republic of China we should express our concern, as I know the Senate and the House have done, in respect of Tibet. We have to be honest to ourselves and faithful to the beliefs of our people, but we do not have to do it in a rude or in what would be regarded as crude and insensitive way. I think we can do it in a way that is effective and more likely to be listened to.

Generally speaking, I think Australia, under different governments, has been doing

that, and basically that is what I have been trying to do in my role in Cambodia. I would not have criticism of the way we have been doing it. We have been trying to have influence without just bullying and believing that, just because we say it, these countries of multi-millions and of ancient histories and cultures will pay attention to us.

CHAIRMAN—If I may, I have a broader question on your philosophical approach. I am referring to your 1993 article in the *University of New South Wales Law Journal* which you were kind enough to give to the committee, 'The Australian use of international human rights norms'. You refer to your conversion in Bangalore in somewhat Pauline terms and you say, at page 28:

Familiarity with basic principles of human rights (and the jurisprudence which has collected around their elaboration) will arm the judge with ready means to respond, with assurance and in a thoroughly professional way, to perceived injustice. It will provide the judge with a body of international principle by which to explain the reasons in a particular case.

I thought that was an eloquent summary of the impact of international principles upon Australian law. Would you care to elaborate further on the direction in which you see international principles taking the Australian judicial and legal system?

Justice Kirby—This is one of my hobbyhorses. It is like a dorothy dixer to be asked this question in this place. For some years now I have been propounding a thesis which was regarded as entirely heterodox when I first expressed it but which is now increasingly accepted. It is that in the tradition of the common law, when you get to a gap in the common law where there is no clear case on the problem and there is no statute that deals with the problem, or there is only a statute which is ambiguous, you can fill the gap or resolve the ambiguity where it is relevant by reference to the jurisprudence which is developing around the international conventions. The alternative is to do what we do virtually every day, and that is to construe the ambiguity or fill the gap by reference to our Sunday school lessons and to our mother's instruction when she was ironing when we were little children, or our early days in school, or the simple verities of life in our society.

The new thesis is that there is a discipline which is growing in the international community, which we can look at and select and use as we, as judges in Australia,

consider to be appropriate. That was heterodox because when I was at law school you were taught that international law was out there floating in the sky, and unless it was brought in by the legislature and made part of domestic law you just ignored it.

Since then we have had the miracles that have thrown us together: the jumbo jet, telecommunications, and international faxes. We have got international problems such as AIDS. We have got a world that watches, when it goes home, the perils of Rwanda. In a sense, it seems to me we are at a point like Runnymede. We are at a point where we are not yet in a world of international government, but where judges have a choice. In reality, it has to be said that in, say, 40 per cent of cases you do have a choice, because there is no clear precedent and the statute is either silent or ambiguous. Then it is useful, I believe, to have regard to the jurisprudence that is building up, and it is your choice that makes it part of the law of Australia. You, an Australian judge, make it part of our jurisprudence in Australia. In that sense it is made part of our law, either by parliament or by the judges.

When I first propounded this thesis it was regarded as really barmy, but I think increasingly it is finding its way into decisions in all parts of this country. In the Mabo decision, Justice Brennan said in a passage that it was inevitable that, with time, the International Covenant would come to influence the way we see our basic rights. We should not be fearful of this, because the International Covenant is a pure Anglo-American instrument—basic common law rights. It therefore is a development that is happening, and happening slowly, which is not going to frighten anybody. Of course, not everybody endorses this point of view; but if we look at where we are in terms of the developments of the international community, I think it is the way of the future. It is certainly one that is increasing in acceptance in the Australian judiciary.

CHAIRMAN—You actually trace the roots of this development back to the Bill of Rights of 1688, which is unquestionably part of our law in a number of jurisdictions.

Justice Kirby—Yes.

Senator TEAGUE—You also referred to St. Paul's Epistles.

Justice Kirby—Yes, I threw everything in there! If I were not a suitably modest person, I would say that it was almost a political speech. It is an interesting development

in our law. I think it is quite a healthy development. The important point to remember is that the international instruments do not become part of Australian law as such. They only become part of Australian law if they are made part of Australian law by parliament or by the judges. We, the judges, are modest law makers, or should be. I am a person most respectful of parliaments, and I think the judges should be modest law makers and not do great and bold things—at least, not too often. But there is a role for judicial law making and I see it, I have to tell you, in 40 per cent of my cases. When you get to the Court of Appeal level the statute, with all respect to parliament, is ambiguous.

With the common law precedent, they will come up to me and they will quote a case in 1700, and really it has seemed to me that at least as relevant as drawing upon what some highly intelligent judge in England in 1700 said—in an utterly different time, in utterly different circumstances, and on the other side of the world—is to look to what equally highly intelligent people in our world today, struggling with problems of relevance to human rights, have been doing to solve those problems.

CHAIRMAN—Thank you, Your Honour. It has been a very valuable session for us. We are delighted you were able to join us. We are better briefed on Cambodia, and we are better equipped to deal with the Cambodian issues and broader concepts in the making of our report in October. Please be assured you are always a welcome visitor to this committee. We will look forward to further contact with you. We wish you further success in your role as the UN Special Representative on Cambodia and in the other human rights tasks that you undertake. Thank you very much for joining us this evening.

Justice Kirby—Thank you very much, Mr Chairman. I will keep the members of the committee, for whom I have the highest regard and respect, fully informed of my work in Cambodia and elsewhere.

CHAIRMAN—Thank you. I thank the committee secretariat, *Hansard* and staff. The committee is now adjourned.

Resolved (on motion by Senator Teague, seconded by Senator Bourne):

That this subcommittee authorises publication of the evidence given before it by Justice Kirby this evening, including publication on the parliamentary database.

Committee adjourned at 7.20 p.m.