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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

* 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 2008. Subsequently, that Lecture has been published. See [2010] *Australian Year Book of International Law* (forthcoming).

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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 than persisting with procedures that are ultimately highly (or even entirely) dependent upon the co-operation of unlovely autocrats? Why should the UN continue to cloak such people with the appearance of respectability in the field of human rights, by submitting themselves to UN monitoring when the reality is that they only respond to criticism when it pleases them and they ignore it, most of the time, because it does not?

Inherent weakness of the system: The starting point in considering the effectiveness of the UN special procedures (or of any other procedures for the protection of human rights by the United Nations that could be created in their place), is an appreciation of the inherent limitations upon what is politically feasible.

When the United Nations Organisation was created, it was originally contemplated that the protection of fundamental human rights would be one of the foundations upon which the Organisation would be established[1]. Indeed, initially, it was contemplated by some that the *Charter* would include an international bill of rights that would express justiciable rights belonging to the peoples of the member states, in whose name the *Charter* was proclaimed[2].

As in the drafting of the Constitution of the United States of America, time ran out for securing this objective. The drafting of the human rights instrument was postponed. In the early days some of those involved in the design of the UN (including the senior Australian delegate, Dr. H.V. Evatt, past Justice of the High Court of Australia) envisaged the creation of an international court which could enforce universal human rights. The failure to achieve this objective was perceived by such proponents as a fatal flaw in the creation of effective human rights protection, insofar

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1 *Charter* of the United Nations, *Preamble*, Arts.1, 55, 62, 68, 76.

2 The *Preamble* of the Charter of the United Nations begins:
"We the Peoples
Of the United Nations
Determined ...
Have resolved to combine our efforts to accomplish these aims"

as such protection would have to depend on international and national organs for enforcement that might lack the will or means to do so[3].

The UN Commission on Human Rights (CHR) was established in 1946 under the Economic and Social Council of the United Nations. In due course, that body sought to respond to a number of grave instances of human rights violations, particularly in South Africa and Latin America, about which there was a broad consensus among the members of the United Nations.

In 1975, following the *coup d'état* which deposed President Allende of Chile, a working group of the CHR was created to investigate the evidence about that event. In 1979, this working group was replaced by a 'special rapporteur' of CHR. He was afforded a mandate to investigate and report upon allegations of enforced disappearances of government critics in Chile[4]. It was in this evolutionary (and somewhat accidental) way that the 'special procedures' of the United Nations began.

In due course, the special procedures were extended to a number of working groups, special rapporteurs of the CHR and special representatives of the Secretary-General. However, without recourse to an independent court with jurisdiction to find conclusively breaches of international human rights law and to enforce its decisions, the procedures for making investigations, findings and recommendations were inherently dependent upon co-operation on the part of the

[3] A. Devereux, *Australia and the Birth of the International Bill of Human Rights 1946-66,* (Sydney, Federation Press, 2005), 28. Cf. M.D. Kirby, "Herbert Vere Evatt, The United Nations and The Universal Declaration of Human Rights After 60 Years" (2009) 34 *UWA Law Review* 238 at 246.

[4] United Nations, Office of the High Commissioner for Human Rights, *Frequently Asked Questions About the United Nations Special Rapporteurs*, Fact Sheet No.27, UN Office of the High Commissioner for Human Rights, Geneva, 2001.

countries and officials concerned, many of whom were the very subjects of the complaints and reports.

Given these realities, it is only reasonable to judge the UN 'special procedures' within the context of the practicalities within which they were created and presently operate. Although it is true that regional human rights courts have been created for Europe, the Americas and Africa which, to some extent, fulfil the dreams of those who in 1945 envisaged justiciable and enforceable human rights, the prospect of a global human rights court remains elusive. Neither Asia nor the Pacific regions of the world have established a human rights commission, still less a court with enforceable jurisdiction. The creation of a world court of human rights appears as far away today as it was in 1948.

Realism therefore suggests that the UN procedures must be measured not against an ideal criterion, which presently appears unattainable, but by the standards of the institutions that are in place or likely to be attained, at least in the foreseeable future. In judging the United Nations, we should not lose our faculty of critical, even sceptical, assessment. But neither should we lose our sense of realism and practicality, given the geopolitical realities of the world whose nation states make up the membership of the United Nations.

Although the *Charter* might have been proclaimed in the name of the people of the United Nations, their role in the Organisation is no more than symbolic and rhetorical. Not for nothing is the Organisation so created titled the United *Nations*.

Particular difficulties: I have to acknowledge that, in the performance of my duties as Special Representative for the Secretary-General for Human Rights in Cambodia (SR), there was a gradual, and ultimately steep, decline in the relationship between my functions and the Royal government of Cambodia. Seven missions were conducted by me during the interval in which I served as SR[5]. At the very first, there was a high level of co-operation to which I paid tribute in the first report that I delivered to the CHR in February 1994[6]. However, a marked deterioration in the attitude of the government of Cambodia followed the presentation of my second and later reports successively to the CHR in Geneva and to the Third Committee of the UN General Assembly in New York. My practice in concluding the successive missions to Cambodia with a transparent media conference at the Press Club in Phnom Penh necessarily included selected words of criticism, as elaborated in my reports, addressed to particular human rights problems. This too appeared to provoke official animosity and resentment.

By 1995, the second Prime Minister of Cambodia (Hun Sen), head of the Cambodian Peoples' Party (CPP), declined to meet me during my mission, as had formerly been customary. My reports to the UN after that time led to a letter, addressed to the Secretary-General by the rqo co-prime ministers of Cambodia, requesting exploration of the termination of the UN human rights mandate in Cambodia by the end of 1995.

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[5] My seven missions to Cambodia as SR were conducted 21-28 January 1994; 26-28 May 1994; 16-30 July 1994; 16-18 November 1994; 19-27 January 1995; 5-16 August 1995'and 6-16 January 1996.

[6] United Nations, *Report of the Special Representative of the Secretary-General on the Situation of Human Rights in Cambodia* (submitted pursuant to Commission on Human Rights Resolution 1993/6 – *Addendum*, 50th Sess, Agenda Item 19, UN DocE/CN/4/1994/73/Add.1 (21 February 1994) [1].

The Secretary-General (Boutros Boutros Ghali) responded to this request by dispatching his Special Envoy, Mr. [later Sir] Marrack Goulding (UN Undersecretary-General for Political Affairs) to visit Cambodia. Mr. Goulding managed to repair relations for a time. However, they subsequently deteriorated still further. Hun Sen was reported as stating, in a public outburst in front of senior officials, that I was a 'crazy lawyer whom [he had] hated as long as [he had] known' me[7]. The refusal of the Prime Ministers to meet me during my missions, the public insults and broadsheet attacks on me (and on the then Prime Minister of Australia (Mr. Keating)) produced a very difficult situation. To this was added the actual danger resulting from death threats launched against me, broadcast by the Khmer Rouge clandestine radio.

My appointment to the High Court of Australia, announced in December 1995, came at a time when the appointment of a different holder for the office of SR was probably essential, and certainly desirable. I completed my remaining mission in early 1996, upon which I reported later that year[8]. But following my departure from office, the treatment of my successors as SRs repeated many of the elements of bullying, undiplomatic conduct, and resentment that had marred the later portions of my term.

Each of the succeeding Special Representatives of the Secretary-General was, in turn, treated to the same regime of non-co-operation; calumny; and demand for replacement. The fourth Special Representative, Professor Yash Ghai CBE, an experienced and

[7] Reported in N. Carter, 'Cambodian Leader "Hates" Justice Kirby', *The Courier Mail* (Brisbane), 8 March 1996, 7.

[8] United Nations, *Report of the Special Representative of the Secretary-General on the Situation of Human Rights in Cambodia* (submitted in accordance with Commission Resolution 1995/55, 52nd Sess, Agenda Item 17, UN DocE/CN/4/1996/93 (24 February 1996) [106].

respected legal scholar who had played a part in constitutional work for several countries, probably faced the most tumultuous of difficulties. In his last report, delivered in 2008, he said[9]:

> "I have to repeat many of the recommendations of [sic] the first Special Representative made in his first report, as the government showed little disposition to take any positive action. This state of affairs may raise a question as to whether there is any point in extension of the mandate."

Professor Ghai complained about his treatment at the hands of Cambodian officials, but also the lack of effective support that he had received from the United Nations itself[10]:

> "If the UN Council on Human Rights decided to exact [scil extend] the mandate of the Special Representative, as I would urge it to do, it would be very important that my successor should have the full support of the Council, the UN family and the international community. I cannot say that I had a great deal of such support, and this merely encouraged Cambodia's Prime Minister, Mr. Hun Sen, constantly to insult me. He called me deranged, short-tempered, lazy, while the government spokesperson, Mr. Khiu Keinereith, called me uncivilized and lacking Aryan culture. Mr. Hun Sen also accused me of telling lies and accepting my appointment merely to get a salary. He described the international human rights organizations and myself as acting like animals. He degraded my country, Kenya, saying it was becoming a killing field and Mr. Khiu Keinereith said that the Kenyans are rude and servants. The office of the High Commissioner for Human Rights, Geneva did not come to my defense and as it also declined to issue a statement explaining that I receive no salary, I was forced to do so in my own name."

On the face of things, this sorry chronicle appears to lend support to what I take to be the central thesis expressed by Professor Charlesworth. That is, that any 'special procedures' created for the

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[9] United Nations, Statement by Professor Yash Ghai, (Statement delivered at the 9th session of the Human Rights Council, Geneva, 15 September 2008, p.2.

[10] *Ibid*.

international defence of human rights by the United Nations must have practical utility. If such procedures are ignored with impunity, their proponents insulted and left unsupported by the UN, a point will be reached when it will be preferable to discontinue them. Then, at least, countries that oppress human rights will be left without the fig leaf of an apparent human rights monitor of the United Nations whose effectiveness is undermined both by the nation or the subject matter under scrutiny and by the international agency that credentials the rights guardian.

I acknowledge at once the force of the criticisms expressed by Professor Charlesworth. I admit that they gain particular strength from the closing statement, on departure from office, of Professor Yash Ghai, the last Special Representative[11].

Nevertheless, whilst making every proper allowance for the risk of wishful thinking and 'starry eyed' optimism, (as well as a natural inclination to self-justification in an office in which I worked very hard to succeed) I still consider that, on balance, the years I spent as SR in Cambodia were well spent. I am certainly not convinced that it would have been preferable that the 'special procedures' had not been invoked in Cambodia. Briefly, I will outline my reasons for coming to this conclusion.

THE UTILITY AND IMPROVEMENT OF SPECIAL PROCEDURES

The utility of special procedures: Despite the very obvious limitations described by Professor Charlesworth, and acknowledged by

[11] After the resignation of Professor Yash Ghai as Special Representative, the mandate of the Secretary-General was not extended. Instead, the Human Rights Council, acting on the initiative of its President, appointed Mr. Surya Subedi of Nepal as a country special rapporteur.

me above, my experience suggests that the existence of the office of SR was useful in the support, and defence of human rights in Cambodia in a number of respects:

- In reminding the government and people of Cambodia, in a repeated and very public way, of the existence and content of universal human rights; of their recognition in the Constitution of Cambodia; and of their ratification in international treaties to which Cambodia had put its signature;
- In the support given to non-governmental organisations in Cambodia, which flourished after the Paris Peace Accords and the United Nations Transitional Authority for Cambodia (UNTAC). This meant that many Khmer people took part in civil society organisations. Their involvement with the SR and with the UN Office of Human Rights in Phnom Penh, reinforced a civic view that things would improve and that there was a cohort of citizens demanding and expecting improvement;
- In the way that the Office of Human Rights (OHR) worked closely with the SR and providing the effective secretariat for his activities. Although there were limitations facing me as SR in gaining access to the Khmer language print media and to the electronic media controlled by the government, the OHR was a constant and ever-present reminder of the commitment of the United Nations to the human rights of all Cambodians. The SR and the OHR also provided support to and, to some extent, international protection for, the minority voices in the society of Cambodia;
- In the likelihood that many particular issues would not have been raised, or raised effectively, without the appointment of the SR. In my own case, my repeated insistence that HIV/AIDS was a crucial human rights issue urgently facing Cambodia was ultimately

accepted by medical experts, government officials and finally the government itself. What human rights could not persuade the government to do, the fear of a huge economic burden procured a satisfactory strategy to meet the emerging and novel dangers of HIV. The co-operation of UN agencies with local NGOs and medical experts in this regard probably saved thousands of lives and sustained an ongoing commitment to HIV prevention strategies;

* Likewise, co-operative efforts to protect and save the cultural treasures at Ankor and elsewhere in Cambodia represented real and tangible achievements for the UN agencies and through them for the people of Cambodia themselves; and
* In the co-ordination of UN staff in the defence of human rights was an important element in the work of the SR.

I do not accept the suggestion that the devoted work of officers of the UN, working in the field in Cambodia, and particularly my colleagues who worked in very difficult circumstances in the OHR in Phnom Penh was wasted. These officers of the UN constituted a voice for the voiceless. They became a practical medium for upholding human rights, wherever there was a window of opportunity.

Additionally, the reports of the SR in New York, Geneva and at the conclusion of missions in Phnom Penh, represented not only a voice to the people of Cambodia themselves, but also to the foreign missions, UN agencies and international donor agencies operating in the field in Cambodia.

In my time and after, the SR's report was highly detailed. It drew on intensive work performed in the months preceding each mission. In this sense, the SR became a voice to the international community for the OHR in Cambodia. On some issues (such as press freedom and the defence of political speech), the government of Cambodia was intolerant and excessively sensitive of criticism. Yet on other issues (such as land mine clearance, preservation of cultural treasures and pursuing HIV strategies), the government was willing to listen. In my experience, it was even anxious for technical assistance which the SR could sometimes help to procure.

No doubt the foregoing list, measured against the acknowledged defects, will be seen as a mixed bag of success and failure. It would be wrong, however, to assume that it was an unrelieved story of ineffectiveness and failure. Attacks by the Prime Minister on the SR naturally attracted headlines in Cambodia. But behind these events, the important, patient work of the UN agencies proceeded. I have always regarded the agencies of the United Nations (rather than political organs such as the Human Rights Commission (now the Council on Human Rights) as the means by which the major achievements of human rights are notched up. So, in my view, it was in Cambodia when I held the responsibility of SR.

Improvement in the special procedures: I accept Professor Charlesworth's criticisms of the way special procedures are organised. A number of practical improvements could be accomplished in the conduct of special procedures and in the activities of the several UN special representatives and special rapporteurs:

* There is unevenness in the experience and performance of SRs. A possible need exists for a more transparent procedure for appointments. Clearer published criteria for selection of SRs might improve the consistency in the quality of such office holders;
* Before entering upon the duties of an SR, it would be desirable that improved facilities for training and preparation should be made available. In my own case, it was necessary, effectively, for me to learn a full raft of diplomatic skills on the job with no systematic instruction other than that available from the members of the UN secretariat;
* The Council on Human Rights has lately reduced the number of country mandates. The geopolitical considerations that influence election of countries to the Council necessarily affect the consequent adoption and maintenance of special procedures for particular subject areas and countries;
* The Office of the High Commissioner for Human Rights needs to lend consistent support to SRs. If the complaint of Professor Ghai is even partly correct, he was not adequately supported when he came under attack by the Cambodian government for doing no more than to perform his duties. The tone and language of those attacks exceeded proper diplomatic conduct. The UN high office-holders had a duty to make this plain;
* Improved use of the media is required if the sanction of SR reports is to be rendered effective. The UN generally needs to become more competent in communications and especially in the use of the new information technology by which, today, most people receive news and opinions;

- The style of report writing by the SR needs to drop the passive voice and the usual impenetrable features of most UN documentation;
- The international donor community needs to be engaged more closely by the SRs and called in aid when the going gets tough;
- SRs should continue to meet as a group annually, to share experiences and to explore the common difficulties and strategires in discharging their missions; and
- It is essential that there should be effective auditing of SR reports. The production of a report, in itself, may do nothing whatever to improve human rights. The failure of those to whom the SR's reports are addressed to act on the recommendations should be regularly monitored and repeatedly drawn to the notice of the Council on Human Rights and the United Nations more generally.

AN EVOLVING INSTITUTION

In the constitutional history of the English-speaking people, it took a millennium for them to advance even to the current imperfect systems of governance, to ensure a measure of democratic elections, the rule of law and the protection of universal human rights. What began in 1215 at Runnymede evolved further by 1649 when the English Parliament asserted itself against the rule of King Charles I. That assertion went a step further in 1688 with the overthrowal of King James II and in 1776 in the America Revolution.

In Australia, it was not until 1992, in the *Mabo* decision[12], that the land rights of the Aboriginal people were finally recognised in law. The last 50 years have seen numerous improvements throughout the world in the

[12] *Mabo v Queensland [No.2]* (1992) 175 *Commonwealth Law Reports* 1.

protection of women, communists, sexual minorities, prisoners and other vulnerable individuals and groups. Similar stories of advancement may be written for other cultures and in every nation. Perfection is not attained overnight. It is not reasonable to expect that it could be different in a shattered, war-torn community such as Cambodia, devastated by war, revolution and genocide.

In securing universal human rights, it is essential to adopt an historical perspective whilst at the same time recognising the particular urgencies of the contemporary world. Those urgencies derive from the special dangers of proliferation of nuclear weapons and other instruments of mass destruction; the apparently rapid forces of climate change; the ravages of HIV/AIDS, tuberculosis, malaria and other diseases; and the rapid and astonishing development of informatics, biotechnology and other forces for change.

Viewing the advance of universal human rights and the role of the United Nations and its 'special procedures' in securing these ends, it is natural to be impatient with the emerging institutional weaknesses, inefficiencies and more than occasional instances of institutional and individual hypocrisy, duplicity and incompetence. Nonetheless, I remain convinced that the world has made important progress in the little more than 60 years since the *Universal Declaration of Human Rights* was adopted by the UN General Assembly in 1948.

When seen from the perspective of the urgent needs that exist in the world and the terrible sufferings of millions in war and genocide in the last century, the imperfections of the Organisation are all too obvious. But when measured against the neglect of the preceding centuries and

the difficulty of securing any agreement and action, the achievements have been notable and incontestably valuable. We must hope that they are only the beginning of a true new world order. And we must act on our hopes so that they become a reality.

This is the spirit in which I embarked on my responsibilities as SR for Cambodia. The effort was not futile. Neither was it as successful as it should have been. The challenge before the UN itself, its SRs, and the global community is to continuously reduce the imperfections and to increase and expand the achievements. Healthy self-criticism, appropriate candour and realistic scepticism are essential. So is courage, flexibility and imagination. But despair and abandonment are not the way to improve global human rights in practice.

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