

The Asian Human Rights Commission Reports

A Critical Review of The United Nations Secretary General's Special Representative for Human Rights in Cambodia - Justice Michael Kirby's Approach to Human Rights in Cambodia with Recommendations.

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Asian Human Rights Commission

Flat E, 3rd Floor, Kadak Building, 171 Sai Yee Street,
Kowloon, Hongkong.
Tel: (852) - 2698-6339 Fax: (852) - 2698-6367
email: alegrcen@hk.super.net or ahrchk@hk.super.net

A Preliminary Report on the Approach of UN Secretary General's Special Representative for Human Rights in Cambodia, Justice Michael Kirby, to the Human Rights issues in Cambodia

UN rapporteurs and Special Representatives who are mandated to submit human rights reports with a view towards contributing to an improvement of human rights in a given country could sometimes become apologists for violators of human rights and legitimizers of repression. One such instance can be found in the reports and statements on Cambodia by the UN Secretary General's Special Representative for Human Rights in Cambodia, Justice Michael Kirby. During his recent visit to Cambodia in August, Justice Kirby was reported by Reuters as saying that there is no urgency for Civil and Political rights in Cambodia. He further stated that no journalist has been killed in Cambodia this year, implying that though there is repression against freedom of expression, the situation appears somewhat better this year when compared with last year. He further said that the independence of the judiciary will take about twenty to thirty years to achieve. Despite the Special Representative's intentions, these statements support one of the most brutally repressive political systems to be found in Asia. What message do these statements offer to people who live under such repression. It is a message of hopelessness. What effect does hopelessness have on a *culture of deep fear*, built over two decades of suffering that are beyond the imagination of any sane person?

These particular statements, cited above are not exceptions either. Careful reading of Justice Kirby's reports clearly show that the Special Representative has his own interpretation of Cambodia's history and his own views on human rights. Those views unfortunately fall in line with the views of several Asian governments, and the business community which does not consider that human rights should be considered with any urgency. In fact this has come to be known as the debate between the Western view and the Eastern view of human rights. While the Special Representative may deride the Eastern view, and state his belief in the universality of human rights conceptually, his views on Cambodian human rights are relativist and particularistic.

By selecting issues such as AIDS and sexual exploitation of children as the most important human rights issues in Cambodia, he divorces these issues from the civil and political rights issues. However, the heart of the matter is that this separation is artificial. Those who have been dealing with children's issues clearly say, the police and military are involved in the sex trade and the lack of judicial remedies are basic problems related to the sexual exploitation of children. This is what a World Vision worker told a video crew, who made a film on Cambodian Children. Thus the Special Representative's views implies not only a denial of the universality of human rights, but also a practical rejection of indivisibility of rights.

Urgency

In dealing with the issue of urgency in the Cambodian set up, one can see two conflicting perspectives. One is the urgency for capturing new markets in Asia in general and Indochina in particular. To those who follow this perspective, compromise with local elite is essential, despite whatever human rights record they may have. Thirty years of compromise with the Suharto regime in Indonesia is a glaring example of how human rights here become expendable, in favor of a share in the Indonesian market. The killing of about one million people within two months, the destruction of all aspects of democracy including the judiciary, and forms of social control that has created a complete culture of fear, pose no barrier for this military regime to get the best of treatment, so long as it offers a fair share of their markets to those democracies, that woos such markets, with desperate urgency.¹

¹ Justice Kirby's perspective is well reflected in the following statement :

Kirby several times declined to offer an opinion on whether recent events indicated Cambodia was growing more undemocratic. When pressed, he said,

"If you are asking for an impression, I can tell you.

My impression when I arrive here is that Phnom Penh is a cleaner place, it's had lots of coats of paint, the buildings are being renovated, there are lots more commercial enterprises and businesses, and the public area have been tidied up and one can get a sense that there is in Phnom Penh a much more vigorous economy at work.

It will be important to spread that development to other towns and rural areas."

Kirby, who also visited Kep, Kampot and Kampong Cham on his visit, said that building an economic infrastructure was a crucial ingredient in securing human rights. "[Phnom Penh Post 25 Aug. - 7 Sep]

As against the urgency of the rich to get richer and foreign powers and companies to get a larger share of the market, there is the urgency of the vast section of the people of Cambodia, who in May 1993, surprised the world, by turning up at electoral booths in vast numbers to vote for democracy. They were like the people in Myanmar, who expressed their will in a similar manner in 1989. The May 1993 election was not fought on the issue of immediate economic relief, but on the issue of ending a system of political control urgently. Despite being faced with massive obstacles there had been a constant struggle to by the people and some of the elected representatives to achieve a few basic reforms to make their lives a little bit better. The essential thrust of these reforms is to have less social control over their lives and to reduce the political culture of fear. For this several people have taken risks and paid a considerable price. The basic direction that ordinary people have taken shows their quiet strength, like those of people of Indonesia, Myanmar, etc. Is UN Special Representative for Human Rights telling these people that there is no urgency in achieving your wishes, there is only an urgency for some foreign powers and companies to make more money from your country? (For the peoples' wishes, see Annexure 2, the report of the Cambodian delegates, presented to the South Asian Consultation on the Draft Asian Human Rights Charter - Aug. 1995)

The effect of the approach adopted by the Special Representative is to reduce Human Rights issues to pure humanitarian issues. Prior to the arrival of UNTAC (United Nations Transitional Authority in Cambodia), the efforts of the international community to assist Cambodia consisted of humanitarian assistance, by way of relief work. Many international agencies were allowed to do relief work and there was also a UN Secretary General's Special Representative for Humanitarian Assistance to Cambodia. The times and mandates of these two Special Representatives are different. Earlier the Special Representative for Humanitarian Assistance had resources to rely on, and relief was granted at the request of the Supreme Authority of the country. The UN Special Representative for Human Rights, has no such resources. He could only give advice, whether it is about Aids or child prostitution. He could

only make statements as a coordinator of all UN efforts, a position that is not real, as each Agency acts according to its own wishes.

The human rights mandate is essentially different to a humanitarian mandate, primarily because it is based on a concept of rights. People have a right to be judged by a fair and impartial judiciary. This right exists NOW. The right is recognized in the Covenant on Civil and Political Rights. If it is to be said that people would have to wait for twenty or thirty years to have this right, on what principle is that view based? Certainly not on International Norms and standards on human rights. If the argument is that Cambodians will have to wait for twenty or thirty years before international norms and standards are to be applied, then there is a basic contradiction in having a Special Representative on human rights or Cambodia's position after having ratified five UN conventions relating to human rights including the Covenant on Civil and Political Rights. In Asia we have seen many tradeoffs relating to human rights. Is Cambodia yet another one?

Would a compromise based on "pragmatism" and "realism," in the way it is understood by some persons result in an abandoning of human rights values and the human rights approach?

Special Representative - Human Rights' problems seem to be based on the following grounds

1. *An attempt to quantify violations.*

For example, this year there have not been any assassinations of journalists (compared to last year), implying that there seems to be an improvement, despite the passing of a press bill which has been criticized as repressive, despite the closing down of newspapers and an action against journalists, etc. Such attempts to quantify has led to similar failures. However, unlike in this instance, this quantifying approach has been deliberately taken to give a better impression of repressive regimes, before some compromises are reached.

2. Such attempts to quantify are related to *divorcing particular violations from the specific political and social contexts and the nature of social controls existing in a particular society.* In this way, violations however intensive are separated from the root causes that

give rise to the violations. For example, one year action may be taken by a repressive regime to kill ten journalists in order to instill a culture of fear and after achieving that level of fear there is no need to kill any other journalist for sometime as the culture of silence prevails. Thus after one million people were killed in Indonesia in three months, it was not necessary to do it again. Does that mean that human rights have improved because there were no more massive killings? (For an approach that studies human rights violations in the background of the system see. Annexure 8 : Indonesia- 50 Years of independence - Stability and Unity, On a Culture of Fear, Published by Asian Forum for Human Rights and Development, August 1995).

3. Lack of concern to study and reflect upon the root causes of human rights violations and to deal with the system of social control, may be due to a *lack of personal experience of living under regimes that represent intensive forms of social control* as in Myanmar, Indonesia and Cambodia or to a lesser degree in Singapore, Malaysia, Sri Lanka, Pakistan, Taiwan, etc. There is a limit to which reason could be extended, even when a genuine attempt is made in that direction. Experience in living in the developed part of the world and living under a repressive machinery in the countries as mentioned above is so vastly different, it is not even justified to expect persons from these countries to understand such situations. They are likely to see such repression as a superficial aspect of society rather than as a fundamental one and a continuing aspect, that could be transformed only by special action, directed towards such transformation. On the other hand such outsiders are likely to see such repression as a part of a peoples' common heritage rather than a result of a particular type of political control. In that way one could develop a superior attitude of belonging to "a greater civilization than poor Asians or Cambodians." Such a superior attitude is quite common.

4. *Absence of a theoretical framework to deal with the issue of underdeveloped state structures:*

The usual human rights approach is to make recommendation to the violating State, with the view that the State will implement these recommendations. The presupposition is that the State has the capacity to implement the recommendations. This approach is valid for

those States which have evolved their state structures over a period of time. (For further elaboration of this aspect see pages 28 - 32 of Annexure 4) However, there are many States in the Third World, which have only very fragile State-structures. Cambodia and Myanmar are extreme examples of these. Every attempt to improve human rights has to be accompanied by efforts to assist in the development of these structures. For example, in Cambodia, if the judiciary is to improve there needs to be genuine assistance to improve judiciary. A technical assistance program, backed with sufficient funds and qualified persons without vested interests, is essential for the initiation beginning of change .

The Special Representative could have made a comprehensive plan for this and could have made a call upon the international community to assist in the implementation of the program. To do this it is absolutely essential for the Special Representative of Human Rights to clearly make himself distinct from any interest group, particularly those who have had a vested interest historically. The misery of the people should not be used for big powers to develop their new spheres of influence. (For a part of such a plan for judicial reform see Annexure 6).

5. *Lack of resources to back his technical advice with substantial assistance:*

Since UNTAC, the United Nations has failed to provide Cambodia's Human Rights programmes with usable funds (See Annexure 5). This has also contributed the diminishment of the prestige of this human rights programme. Advice without assistance breeds contempt and cynicism. That is how this programme is treated now. For example, the Special Representative during his last visit could not even get an interview with the two Prime Ministers(See Annexure 3).

The Special Representative must prove himself capable of appealing to the conscience of the international community to help Cambodia to pull itself through its present impasse, and to reap the fruits of the work of the United Nations Transitional Authority in Cambodia and of the election of May 1993.

Recommendations

- (a) That the Special Representative, in his next report, state clearly and strongly the link between the promotion of Civil and Political Rights and Economic, Social and Cultural Rights and the urgency of dealing with all human rights issues;
- (b) That the Special Representative, in his next report, examine the impact of the new development policies on the population in Cambodia, with particular reference to the poorer sections and on the environment. And make recommendations from a human rights perspective for an improvement of the situation;
- (c) That the Special Representative, in his next report, state the link between the making of laws, for example laws to safeguard children, and the machinery for the implementation of such laws;
- (d) That the Special Representative, in his next report, examine the experience of all the Commissions appointed for human rights issues in Cambodia since September 1993, and examine their successes and failures and reasons thereof: Some of these commissions are the Human Rights Commission, Commission on Prostitution, Commission on Children and on Women. Another important commission was the one appointed to examine the allegations made in the report made by the Cambodia Office of the UN Center for Human Rights on Secret Prisons;
- (e) That the Special Representative, in his next report, describe the nature of the appeals courts that exist in Cambodia, their functions, powers, performance so far and make recommendations from the point of view of promoting the independence of the judiciary;
- (f) That the Special Representative, in his next report, examine the validity of the laws passed without examination by the Constitutional Council: examine the reasons for delays in the appointing of this body and make recommendations for its speedy appointment and the basic framework for its functioning;

- (g) That the Special Representative, in his next report examine the issue expelling of members of National State Assembly of Cambodia, the illegality of those expulsions, and implications for human rights;
- (h) That the Special Representative, in his next report, make detailed suggestions on the improvement of the judiciary, examining also why the recommendations he has already made have not been carried out. For example, how could the issue of salaries of judges be resolved? What are the suggestions for this purpose? It is submitted that the Special Representative should call upon the international community to give massive financial support for a judicial reform program. If the Special Representative believes strongly that an independent judiciary is not possible in Cambodia, he should state so unambiguously;
- (i) That the Special Representative, in his next report, review the work of the UN programs (including the programs of the UN Center for Human Rights) candidly and make recommendations for the future, and appeal for the resolution of problems such as funding and other bureaucratic problems. Further, he should examine how greater expertise, with a profound understanding of local realities, could be brought in, to increase UN input for promotion of human rights;
- (j) The Special Representative should be constantly in touch and consult with the Asian human rights community, which has developed ways of dealing with repression and cultures of deep fear. It is suggested that he call a consultation with persons such as Justice Krishna Ayer and, Justice Bhagawathie of India, Dr. Adnan Buyung Nasution from Indonesia, Justice Dorab Patel and I.A. Rehman of Pakistan, Acharn Sulak Sivaraksa and Somchai Homlaor from Thailand, etc., to discuss ways of dealing with human rights issues in Cambodia. This list is not exhaustive. It is meant to indicate that there are persons who have lived through political cultures similar to Cambodia's and who have been involved for a long time in evolving strategies to promote and protect basic rights. Calling for such a consultation is no slur on the competence of the

Special Representative himself, but only an indication of the need to emphasize cultural orientation. AHRC would be willing to offer its services to facilitate such a consultation;

Annextures

1. A Review of Justice Kirby's Recommendations Regarding Impunity to Human Rights Violators.
2. The Submissions of the Cambodian Delegation at the Southeast Asian Consultation on the Draft Asian Human Rights Charter.
3. Some Recent News Reports of Reuters on Cambodia.
4. A papers titled "Regional Activities Related to Local Realities in the Context of Internal Contradictions Within the Global Human Rights Framework."
5. Phnom Penh Post Interview on the Incident of Monica Oliveros, 16 - 29 June, 1995.
6. Some Recommendations for Cambodia Office of Assistance to Judicial Reform - August 1994
7. Cambodian Politics and the Traffic in Heroin - Letters to the Editor, Eastern Express and South China Morning Post - Hong Kong-19th August 1995.
8. Indonesia, 50 years of after Independence, Stability and Unity On a Culture of Fear- Forum Asia - August 1995

A Review of Justice Michael Kirby's Recommendations Regarding Impunity to Human Rights Violators

"The most important human rights issue facing Cambodia today is that of impunity for human rights violators," stated the Amnesty International report dated 14th March, 1995, on Kingdom of Cambodia, human rights and the New Government. The cause for this situation as mentioned was the lack of political will and the ability of the Cambodian authorities to bring the violators to justice. In fact, this matter has been mentioned a thousand times, in other reports of local organizations and international agencies too. The UNTAC Human Rights Component which had a most extensive human rights monitoring mandate and the physical capacity for such investigations, demonstrated this point by advising the UNTAC leadership to take the initiative in arresting and prosecuting violators, as a measure for ensuring a free and fair elections in May 1993. UNTAC did take that initiative and arrested four persons, kept them in a prison made and maintained by the UNTAC military. However even after eight months, the UNTAC was unable to bring them to trial in a court, as it was the official position of the UNTAC that there were no competent and independent courts to try these prisoners. This experience pointed to the causes of impunity that human rights violators enjoy in Cambodia.

It was unfortunate, that the UN General Secretary's Special Representative for Human Rights in Cambodia, did not give serious attention to the experience of UNTAC. He of course was not a part of the peace keeping operation and did not have the field experience of dealing with human rights issues in a situation such as Cambodia. It is useful to reflect on his ideas about this "number one" human rights problem in Cambodia.

In his March 1995 report - Cambodia - Problems and Achievements - the issue of impunity is not mentioned at all. The continuing problems according to the report are, ethnic minorities, HIV/AIDS, Prisons and Courts, Press Law, Security- land mines, Food and Deforestation, And the National Assembly. However valuable his comments are, he has been unable or unwilling to

connect different aspects of human rights problems to a central core. This makes the issue of looking for cures more difficult. It may even be a more philosophical approach of an upper class intellectual from an affluent country, who wishes to take a more leisurely view of things getting resolved by themselves in the course of history. In his last visit in August this year he went even further stating that while civil and political rights issues are important they are not urgent. This is not an accidental statement or slip of the tongue. He usually approaches the basic human rights issues relating to the political and legal system, with a considerable degree of fatalism.

The only directly related institution, from his list, to the issue of impunity are the courts. For this he devotes one sentence. "There remains an urgent need for the training of judges and advocates and provision of laws so that Cambodia may become a rule of law society." Later he even sees notable achievements in this field, "the judicial officers striving to overcome inefficiencies of an undeveloped legal system."

His February 1995 report - Recommendations following mission to Cambodia (19 to 27 January 1995) has the same style of lacking a central core or a thrust, while dealing with diverse issues. The implications that could arise due such an absence could be seen when he recommends the establishment of an anti-corruption board. The precondition of success for any such institution is the existence of a solid system of effective prosecutions of the offenders. The Independent Commission Against Corruption (ICAC) in Hong Kong, cited as an example by Justice Kirby, is rooted in a system of prosecution built in the British colony over a long period. The ICAC's development is a good example to illustrate the link between the legal system that does not tolerate any form of impunity and the control of corruption. Like in many of Justice Kirby's recommendations the main weakness in this one is that he does not pursue an idea to its logical conclusion and therefore suggestions are vague. Very often they look like wishful thinking. In the February report, the word impunity is mentioned once, in a paragraph dealing with an attack on Western tourists, "Special Representative recommends that there should be no impunity for persons actually convicted as responsible for such crimes." However, the issue of impunity is taken up in one paragraph later in the report though the word impunity is not mentioned.

"Special Representative recommends that a high level interdepartmental committee be established, with representatives of the Ministry of Defense, Interior and the Ministry of Justice to investigate and report upon judicial complaints concerning refusal or neglect of the Military, police or other officials to execute court warrants directed at military police or political personnel or members of their families. Nobody should be above the law. Yet the Special Representative continues to receive complaints from the judiciary concerning abuse of authority and the difficulty, in practice of bringing those responsible (except in most grave offenses) before court for punishment. [This sentence could create the impression that people are brought to justice in the most grave cases- perhaps what Justice Kirby had in mind was the 1994 coup case suspects- However here too the principle is the same, that bringing people to court by way of a political decision.] Such an interdepartmental committee should also investigate instances of threats to judicial officers and where appropriate, initiate proceedings according to law, for their investigation and if proved punishment."

Justice Kirby does not go into the essential details that need to be attended to if such a high level committee is to be set up. One such detail that need to be addressed is, under what law would that committee function? There is no law relating to the functioning of such committees in Cambodia, as there are some other countries. Thus there is a need to create that law, or take the view that someone could appoint the committee and the committee could function in whatever way they like. Would any one be bound to comply with the orders of such a committee? This take the argument to where it began, that is if the police, military, politicians or any other person does not comply with court orders, why should they feel obliged to obey the orders of this committee? How high powered should the committee be to ensure compliance? The implication is that they should be more high powered than the judiciary? If one wants to spend time in creating such a high powered committee, why not spend such valuable time more usefully by trying to resolve the problems relating to the improvement of judiciaries for the enforcement of their orders? The improvement of higher courts is an essential aspect of achieving that aim. There are many other suggestions in that direction, that have come since the UN involvement, beginning with the UNTAC. Justice Kirby's thinking regarding this high powered committee is similar to his view on the Corruption Control Committee mentioned above. Judging by the experience of Commissions

that have already been appointed, such as the human rights commission, appointment of new committee is no way of ensuring the promotion and protection of human rights.

If there is any institution that needs to be created urgently it is the Constitutional Council. A well known Cambodian NGO leader, Kek Galabru, had this to say about this matter at a recent international meeting:

"The Constitution says, that there should be a Constitutional Council. All the laws passed by the National Assembly must be submitted to this Council. In Cambodian language the word used is MUST. The laws MUST be examined by the Constitutional Council. What does this mean? It means that the seventeen laws (17) so far adopted by the National State Council are not legal. Out of the nine members of the National State Assembly, three must be appointed by the His Majesty the King, three by the President of the National State Assembly and three by the Supreme Council of Magistracy. So the King immediately appointed three members. Six others have not been appointed because the CPP did not want to have this Constitutional Council. If this Constitutional Council exists, an MP could have raised a matter like the press law. This Constitutional Council could look into the matter and determine if it is against the spirit of the Constitution or not. But as we do not have the Constitutional Council, all the laws are illegal. We wrote to His Majesty the King as his majesty is the Guardian of Democracy. He wrote and said you are right. All the laws adopted by the National State Assembly are not legal, according to the Constitution."

At a recent conference held at Phnom Penh to discuss the possibility of prosecuting Khmer Rouge leaders for massacres and atrocities committed during the Pol Pot period, the nature of the judicial institution in Cambodia came up. According to the reports it was felt that the Cambodian Judiciary as it is at present was not suitable for conducting such prosecution. One of the experts of this conference had stated that the system of justice is "simply not in shape now." On the other hand the Second Prime Minister, Hun Sen, stated at the same conference: "If we cannot bring the Khmer Rouge to justice for killing millions of people, then there is no point in speaking about human rights in Cambodia." This reinforces the position that if there is to be any human rights or

justice in Cambodia, a 'radical judicial reform program' need to be put in place. It is hoped that Justice Michael Kirby will take some initiative to urge for such a radical judicial reform program.