MICHAEL KIRBY: LAWYER IN THE SERVICE OF HUMANITY

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There is a fine tradition of Australian lawyers serving the cause of the United Nations. At the beginning there was Herbert Vere Evatt, one of the best Australian legal minds of his generation, whose contribution to the drafting of the United Nations Charter has been well recognised. The tradition has continued into more recent years where the contribution of Keith Brennan to the Law of the Sea Convention and Sir Ninian Stephen to the environment agenda is well known.

Three Australians have served on the International Court of Justice. One, Sir Percy Spender, whose conservative approach was at times controversial, was an elected member of the Court. Two, Sir Garfield Barwick and Sir Ninian Stephen, were Judges ad hoc in different cases in which Australia was a party. Sir Ninian Stephen has also been elected a Judge of the War Crimes Tribunal for the former Yugoslavia, whose Deputy Prosecutor and other key members of the legal prosecution team are Australians. Professor Philip Alston's contribution to the development of the United Nations' human rights law is described elsewhere. Lord Bruce's work on the FAO, Gareth Evans' on Cooperative Security, Professor James Crawford's on the drafting of a model statute for an International Criminal Court are all high profile examples of Australian lawyers' contributions to the United Nations. But to list these names is to ignore many others whose contributions have been or are likely to be of no less significance.

It is in this great tradition that Michael Kirby stands, and as a man who values tradition, it is something of which he would be pleased. As a person who is – essentially self deprecating in nature, he would also point inevitably to others whose contributions he would argue were greater or more influential. But there is something unique about his own role, particularly as Special Representative of the Secretary General for Human Rights in Cambodia, which makes it worthy of record. His role in Cambodia brings into particularly sharp focus the congruence between the idealism of human rights and the difficult realities facing the United Nations in assisting in the reconstruction in a society devastated by decades of civil conflict. He is the only Australian so far to have been appointed a Secretary General's Special Representative, a rare honour but also an immense responsibility.

He is interesting moreover as an individual whose way into the United Nations was through its wider family of specialised agencies and associated non-government organisations. As he himself has written

"I have not ... taken a direct part in the central political organs of the United Nations. I do not know my way about the great building beside the river in New York. I am still confused to understand all of the committees, the lines of communication and channels of power. But, in a different sphere, I have had the privilege of working with the United Nations and seeing it from the inside. Mine has been principally an experience in the agencies of the United Nations."[1]

For many, whose experience of the United Nations has occurred in such a way, this will strike a chord. It reminds us that relatively little of the work of the United Nations actually occurs in that great glass building beside New York's East River, and far more in the paddy fields of Cambodia or the savannah land of Africa.

The Education of Young Michael

Kirby's journey to the heart of the United Nations began in the unfashionable inner western suburbs of Sydney. He was however fortunate to have parents who encouraged their talented young boy and to be born in a country where a high standard of universal education was regarded as a fundamental right for all its young citizens. It was at primary school that he first became conscious of the wider world and the importance of the notion of cooperation which underpins the United Nations. In his Social Studies class as a ten year old, he recalls seeing a cartoon of two donkeys pulling in opposite directions for two piles of hay set out of their reach. Only when they realised they must cooperate, going together to one pile and then the next could they achieve their goal of eating the hay. He also recalls receiving at school a pocket size United Nations Charter and Declaration of Human Rights. Above all he remembers Empire Day and the sense of being a member of a British family of nations, – with the United Nations a bigger and more amorphous concept. It is unfashionable these days to think of the British Empire as having any positive characteristics. But in terms of making a small boy in an isolated part of the world realise he belonged to something larger than the narrow confines of his home and country, it provided an important service.

He was also fortunate to grow up at a time when governments were committed to fostering talent by giving bright children the opportunity of receiving the best teaching in selective high schools, and not limiting such opportunity to those who could afford the expensive fees of private schools. Thus he went to Fort Street High School in 1951. At this school he was steeped in the fundamentals

[1] M.Kirby, Speech to UNAA, Canberra 2 Sep 1995

of Classics, History, and Literature, mixed with the Natural Sciences, from teachers whose commitment to their discipline was matched by a desire to mould the characters of their students and instil in them a sense of faith and service to humanity. It was at Fort Street too, with its war memorial dominating the playground, that this child of the Second World War and Hiroshima Age, gained a strong sense that the way to prevent war, the way of the future for all rational minded people, was through internationalism.

Fort Street has a strong legal tradition, with H.V.Evatt himself being one of its notable old boys of whose contribution to internationalism Kirby was well aware. So it was not surprising that this outstanding young student, who had excelled, and indeed dominated his classes in History and English, should go on to the University of Sydney to study law. In international law he was taught by Professor Julius Stone, whose Jewish heritage gave a personal edge to the gross failure of international law in the 1930s and 1940s which the holocaust represented. It was a fascinating period for the United Nations as its commitment to self determination assisted with the coming to independence of many former imperial possessions. As these emerging nations became new member states they tripled the size of the organisation in two decades. Kirby was no narrowly focused swot committed only to his studies, but also actively engaged in student politics. One of his contemporaries was the equally intellectually formidable Peter Wilenski, who was himself to go on to be one of Australia's most significant Ambassadors to the United Nations. Kirby recalls amongst the minutiae of student politics vigorous debates over issues of self determination, and in particular West Irian, which at the time was in the process of passing from Dutch rule into incorporation in Indonesia.

However at this stage it was the law, and the domestic scene, that dominated his life as he moved into professional practice. Yet being the sort of man he is, it was the issues of reform which grabbed his attention and energies. In 1975 he became Chairman of the Australian Law Reform Commission, at the youthful age of 36. In this capacity he was quickly brought back in touch with the international world.

International Human Rights

While there is a tendency to see the world of international affairs and the United Nations as predominantly a matter for governments, it is worth recalling great numbers of international non-government organisations which play an in increasingly important role in promoting the internationalism of human rights, the enviroment, social issues and so forth. For Kirby, the highly respected legal human rights "ngo", the Geneva based International Commission of Jurists, played an important role in developing his involvement in the United Nations' broader work. Involved closely with its work since the 1980s, he became its Chair in 1992.

His first engagement with the formal inter-governmental bodies of the international system was through the OECD and the Commonwealth, where his domestic work on law reform issues led to him being asked to provide advice at the international level. In particular, his close interest in individual rights at the domestic level at immediate resonances at the international level. He became involved in the National commission of UNESCO, at a time when UNESCO itself was under increasing international criticism. In 1983 he attended his first United Nations meeting as an Australian delegate to the General Conference of UNESCO, the intellectual arm of the United Nations system, in Paris.

Kirby's obvious skills and commitment made an immediate impression. He was appointed to a special Committee to advise UNESCO on the rights of people to self determination, chaired by Judge M'baye of Senegal, the Vice President of the International Commission of Jurists. Membership of the Committee gave Kirby the opportunity to raise the right to self determination of those peoples of the Soviet Union, such as in the Baltic states, Armenia and other parts then suffering under Moscow's domination and which have since become new nations. His own views clashed with the Soviet delegation's depiction of their Union as one happy family. It gives him some satisfaction that history soon proved his own belief that this unhappy Union would soon disintegrate in the face of its peoples assertion of their right to self determination.

The ever active Kirby quickly established himself as a recognised expert in UNESCO on the rights of people. He served on three other Committees working on this issue, and seeking to identify and describe the notion of "people". It was a difficult, and politically highly charged, debate and one that continues in other fora of the United Nations, including on the issue of indigenous people. Kirby believes it was to UNESCO's credit that it also engaged in this task and brought to bear on it the expert minds of the world's intellectual community.

He soon moved into other areas of UNESCO and wider United Nations activity. He was appointed to a UNESCO advisory body on the teaching of human rights, and to its International Bioethics Committee. From this he was asked to serve on the World Health Organisation's Global Commission on AIDS as this dreadful disease emerged in the 1980s to devastate all regions of the world. Kirby believes AIDS continues to be a global challenge of "the greatest urgency and importance"[2], and has worked closely with fellow Australian Elizabeth Reid in helping to develop the United Nations' response to the challenge.

The Geneva connection expanded, with another Geneva based organisation, the International Labor Organisation asking Kirby to serve on a mission to South

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[2]UNAA Speech, 2 Sep 1995, p2

Africa in 1992, as progress towards a post apartheid future was being made, to advise on how South African labour laws should be reformed to make them compatible with ILO standards. Now President of the Court of Appeal in New South Wales, Justice Kirby was accompanied by Justice William Douglas of Barbados and Justice Lala of Mauritius. From quite different regions of the world, they were bound together by the best traditions of the common law which their home nations, and South Africa, had inherited from British rule. Stripping away the pervesions of apartheid, and building on the progress in international labour law since the Second World War, they able to present practical recommendations which have been put into effect by the new democratic regime in South Africa.

53 of the United Nations' 185 members are African nations. The neglected continent of Africa, unknown to most of the outside world till the nineteenth century, and still not properly integrated into the wider international economic system, is where an increasing concentration of United Nations attention is required at the end of the twentieth century. So it is not surprising that Kirby found himself engaged in other commissions for the United Nations in Africa. Of particular importance was his chairmanship, at the behest of the United Nations Development Program, of the Constitutional Conference of Malawi in 1994. This conference helped serve the transition of the country from the one party rule of Hastings Banda, under whom individual and political rights had been grossly abused, to a succesful multi-party system in which the rule of law has again been firmly established.

Cambodia

It was thus against a background of considerable experience and standing in a wide range of United Nations bodies and international human rights issues that Michael Kirby was approached to be the Secretary General's Special Representative for Human Rights in Cambodia. The Secretary General had known him from earlier years when they had worked together as members of the International Commission of Jurists, and he knew Kirby was a man on — whom he could rely to achieve a task which would require both diplomacy and determination. It made sense as well to have an Australian, in the light of Australia's considerable contribution to the United Nations operation in Cambodia. The Australian Government was strongly committed to his nomination, and the Foreign Minister, Gareth Evans, delighted at the appointment of a colleague and friend who shared his own commitment to a better Cambodia.

There are around thirty such appointments as Special Representatives or Rapporteurs on Human Rights issues (such as the Status of Women) or country situations. Of these Cambodia was one of the most challenging. When he was appointed in November 1993, the country which had been devaststed by decades of war had only just come through a difficult election process which

had been boycotted by one of the major parties, and resulted in an outcome which was in effect a delicate balancing of royalist and communist factions. Establishing a culture of respect for human rights in a country whose legendary "killing fields" had become a symbol of some of the worst abuses of human rights in this vicious century, and where mutual mistrust and armed threats still continued, was never going to be easy.

Yet when he stepped down in May 1996, following appointment as a Justice of the Australian High Court, Kirby was able to report progress to the Commission on Human Rights during his two and half years and seven missions to Cambodia while Special Representative. The health budget of Cambodia had been increased by 60% in 1996, and serious steps were taken to grapple with Aids, Malaria and other endemic diseases. Human rights was being taught in schools. A law on cultural property, including for the World Heritage listed Angkor Wat, had come into force. A woman Minister had been appointed with special responsibility for women's rights. A high level of press freedom had been established, although some journalists were under threat and before the Courts. Progress had been made in applying international environemntal standards. Human rights NGOs were actively engaged in building a civil society and commitment to democratic governance. A Human Rights Commission of the National Assembly had been established, and the UN Commissioner of Human Rights visited and signed a memorandum of understanding with the Government of Cambodia. At the apex of the Cambodian structure, Kirby had found King Sihanouk an important voice for moderation, who spoke up for the rights of prisioners, ethnic minorities and press freedom.[3]

But the King was ill, and civil society not firmly established, while ambitious politicians jockeyed to extend their power. Kirby himself had received death threats and warnings, including at the highest political levels. Nothing daunted, he still travelled throughout the country and called the situation as he saw it. In reporting to the Commission on Human Rights he expressed his concerns about the "unreasonable obstacles" placed in the way of registration of an Opposition political party. He highlighted "worrying evidence of a reversion to autocracy" in the political process.

This included areas such as in access to the media, where he noted access to radio and television was effectively denied to Opposition opinion. Not mincing his words, he asserted that without such access, "elections become a charade". With respect to the National Assembly itself, he was gravely concerned by the expulsion of elected members contrary to his advice. Still much remained to be done in providing for the rights of women, respect for the rights of indigenous people, and the protection of the environment, particularly Cambodia's forest

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[3] M.Kirby, "Cambodia - A Departing Assessment", Report to Commission on Human Rights, Geneva, 1 April 1996

resources. More needed to be done to provide for a fully independent and properly paid and incorruptible judiciary. Prisons were still in a dreadful states, with tuberculosis, scabies and malnutrition rampant in some prisons.

He pulled no punches too in highlighting where he saw some of the lack of political will to deal with human rights concerns lay. While he welcomed the cooperation generally he obtained from members of the Cambodian Government, he highlighted the fact that the co-Prime Ministers had been "unavailable" to see him during visits to Cambodia in his final year of service. Demonstrating the combination of diplomacy and determination his task required, he commented "the refusal of dialogue because occasionally the advice is unwelcome, is not an appropriate or effective way of clarifying differing perspectives and isolating areas in which cooperation can be fruitful"[4].

Is it fair to expect the development of a high level of human rights in a country like Cambodia? After all, are these not largely a Western concept, inappropriate for an Asian civilisation? Was Cambodia not a country still "partially at war" with the notorious Khmer Rouge guerrillas? Kirby was not only aware of such criticisms, but took them on quite directly.

With respect to the first two, he noted in an address in Hobart in 1995 that:

"The provision of an "Asian exception" for human rights has been rejected by the United Nations, most recently by speeches at the Beijing conference on Women's rights. By definition, universal human rights are just that : a common heritage of all humanity. Human rights provide one of the three pillars upon which the United Natiosn has been established - securing peace and disarmament; attaining economic and social development; and building the new world order upon the foundation of individual human rights and the rights of peoples".[5]

To the latter point, regarding the ongoing struggle with the Khmer Rouge, Kirby responded that this was a "mini excuse" with the Khmer Rouge largely isolated and few in number. The real problem, he noted, was that "autocracy is a very hard condition to expel from a culture if there has been no culture of democracy". But the international community did have a right, he asserted, to insist on progress in human rights and political freedom in Cambodia when it had invested so much effort, funding and manpower in bringing about peace and democratic elections in Cambodia.[6]

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[4]ibid, p7
[5]M.Kirby, "A Challenge for the Future - The UN - Strengths and Weaknesses", UNAA Conference, Hobart, 10 November 1995
[6]Transcript of Interview with Peter Thompson, ABC Radio, 2 April 1996

Such international pressure, attention and action, indeed Kirby's very role, would not have been possible without the United Nations, and he remains strongly committed to what he sees as the essentially beneficial nature of the world organisation. But Kirby is no starry eyed admirer of the United Nations. He has been working with it for too long not too see that it needs to work better. Being the thoughtful man he is, he has also put forward his own considered views on United Nations reform, noting the structures of the organisation have failed to keep pace with the new demands it faces today. He has called for a "radical change"[7] in its personnel policies, noting that personnel policies based on geographical distribution rather than merit have encouraged time servers in the organisation. Based on his experience in Cambodia, he has also drawn attention to the need for the United Nations to do more to protect its employees, who often face very dangerous situations.

More fundamentally, he has called for structural change, particularly in the organisation's Human Rights bodies. Although by its very structure the United Nations is an organisation of member states, Kirby argues the time has come in the changing world we face, for these structures to recognise the impact of technology and the international economy. Rather than being constrained by the voting patterns of member states, which may hamstring the United Nations in addressing conflict, Kirby has challenged the organisation to address the causes of conflict by "working towards institutions and rules that could provide and alternative non-violent solution to this endemcic problem"[8].

Conclusion

In 1996, shortly before this was chapter written, Kirby stepped down as Special Representative for Human Rights in Cambodia. However his contribution to the United Nations and the broader cause of internationalism is surely far from over. His continuing commitment to the institution, and confidence in the ongoing development and enhancement of a rules based approach to international relations and human rights, guarantees his active engagement even within the constraints imposed on an Australian High Court Justice. Meanwhile his substantial contribution to date, and his indefatigable schedule as a highly sought after speaker, will ensure his influence and example will continue to inspire other young Australians, lawyer and non-lawyer, into international service. Kirby serves in a fine tradition, but perhaps more than any other Australian lawyer, he has laid solid foundations for that tradition being continued by others into the next century.

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[7] M.Kirby, "A Challenge for the Future - The United Nations, Strengths and Weaknesses", UNAA Conference, Hobart 10 Nov 1995, p.9

[8] ibid, p.11