

UNIVERSITY OF NEW SOUTH WALES, AUSTRALIA

*HUMAN RIGHTS DEFENDER*

INTERVIEW WITH JUSTICE MICHAEL KIRBY AC CMG  
FORMER SPECIAL REPRESENTATIVE OF THE SECRETARY-  
GENERAL FOR HUMAN RIGHTS IN CAMBODIA

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*Q: Of what benefit was the United Nations Operation in Cambodia (UNTAC, 1993) in laying the foundations for a rebuilding of the Cambodian legal system and in bringing to an end human rights abuses in Cambodia? Has there been an overall improvement or deterioration in the human rights situation in Cambodia since 1993?*

A: In order to answer this it is necessary to understand the devastation which Cambodia faced before the arrival of UNTAC. It had undergone 20 years of the most extreme conditions of war, revolution, *coups d'état*, military devastation, genocide, invasion and foreign rule. It was the *Paris Peace Agreements* and the United Nations presence which changed this. They brought about an election which attracted an extremely high voter turn-out. This was probably the first time Cambodians had ever had a truly free and fair national election. A Constituent Assembly was established. A national constitution was

created. The Constituent Assembly turned itself into a national parliament. Work was done to re-establish the judiciary and the departments of state without which a modern government cannot function. Diplomatic representation in the outside world was re-established. The new Government took its seat in the United Nations and ratified a number of important United Nations human rights instruments. A Special Representative of the Secretary-General was appointed and I was appointed to that office. My successive reports illustrate the way in which the human rights situation improved in Cambodia after UNTAC. Most notable was the establishment of the beginnings of a rule of law state. Unsurprisingly, the initial institutional arrangements were less than perfect. They still are. But they were a marked improvement on what had immediately preceded them. The police and military forces were brought under a degree of discipline, still by no means perfect. Cambodia continued to battle against the Khmer Rouge who rebuffed the constitutional settlement. That fact introduced a major element of instability. But the economy began to pick up and on each successive visit which I made to Cambodia the economy was in a noticeably better state.

Now, it is true, that there has been a deterioration in important respects affecting human rights in the last year. Where central political powers were involved I found it

impossible to secure complete compliance with my advice and with UN principles. Most notably, the expulsion of an elected member from the National Assembly (Mr Sam Rainsy); the effective prohibition of the establishment of opposition parties; the effective ban on access to the electronic media of opposition viewpoints; acts of violence against journalists and other opponents of the government; and eventually non-cooperation with my efforts, demonstrated the serious and continuing difficulties which human rights face in Cambodia. On the other hand, in areas outside the central zone of politics - in the human rights affecting education, health, basic services etc, there were admirable improvements. Moreover, the human rights groups which had sprung up under the protection of UNTAC remain in place. They have great faith in the United Nations. They look to countries such as Australia, and people such as ourselves, to give them vigilant attention and sustained support. We should not let them down.

2. *In the lead up to the UN supervised elections of May 1993, Cambodia became a party to most of the major human rights instruments including the ICCPR, the ICESCR, CEDAW AND CERD. The signature of international human rights instruments is of little effect if the signatory government is itself unwilling to enforce their provisions. Apart from the crucial reporting role played by United*

*Nations Special Representatives in such situations, what can be done to encourage this and other governments to conform to their requirements once the international community has managed to get them to sign?*

- A: The United Nations does not have a military presence in Cambodia, if that is what you are getting at. There is no way the United Nations could or should use force of arms to require a signatory government, such as Cambodia, to conform to international human rights instruments. On the other hand, the signature of such instruments does give the international community the opportunity to call the signatory state to account. This is what has been done in the case of Cambodia. In that case, there is also the additional facility of the appointment by the Secretary-General of a Special Representative for Human Rights.

The role of that Special Representative is to report twice a year in a full written report surveying the state of human rights. This is what I did. I was obliged to report to the Third Committee of the General Assembly in New York in November and to the Human Rights Commission in Geneva in March. My successor (Ambassador Thomas Hammarberg of Sweden) does this now. The representatives of the government of Cambodia are called before the international community to answer criticisms. Now, this is not a perfect system. But it is a notable

advance in international order and in global protection of human rights.

In the case of Cambodia, there was no great difficulty in gaining concurrence for many of my recommendations. Some only were isolated for express disagreement. In the case of other states (eg Sudan) the response to the report of the Special Rapporteur presents one of the few occasions when the government is obliged to account publicly for its alleged violations of human rights. Moreover, the provision of regular reports, based on detailed missions and drawing upon a large body of information, official and unofficial, provides a monitor of the human rights situation and an alert where that is necessary to the watching world.

I had the impression that Cambodia was very conscious of the treaties which it had signed and of the obligation to respond. It was late in responding. But as *Human Rights Defender* has pointed out, Australia has also been late in its responses. The very process of bringing together representatives from all parts of the administration to examine human rights aspects of Cambodia's governmental and legal system has a beneficial and educative human rights effect. As well, selected officers of the Cambodian administration are taken to Geneva and are present in the Commission on Human Rights and the Centre for Human

Rights to see the way in which the global community works upon this issue of common interest.

I repeat that the system is not perfect. It depends very much upon the sanction of international opinion and hence upon media attention and diplomatic action. There is no doubt, in the case of Cambodia, that the government is very sensitive to reports on the human rights situation. Doubtless this is because they affect the support of donor countries and groups. Because of the past, the international community is sensitised to reports of human rights abuses in Cambodia. That is no bad thing. I hope that the interest is sustained but backed up by effective help for the protection of human rights in Cambodia.

*Q: In your final report of 1 April 1996 you refer to "worrying evidence of a reversion of autocracy" in Cambodian government. Cambodian rulers would be well aware of the success other Asian leaders have had in promoting economic development through policies which place a priority upon economic, social and cultural rights over civil and political rights. Given that it is difficult to ignore the success generated in part by the pursuit of such policies, is it not more likely that Cambodia will fall into line with other Asian states in pursuing an authoritarian style of government in order to encourage economic development?*

A: It is true that Cambodia will probably be more likely to follow the human rights patterns of its neighbours than, say, those of Australia, Britain or the United States. This is saying no more than that Cambodia is part of its historical, ethnic, cultural and spiritual environment.

The United Nations does not accept an "Asian exception" to international human rights norms. This was rejected at the UN Vienna Conference on Human Rights in 1993. Moreover, Asian leaders cannot be stereotyped. The struggles for fundamental human rights and democracy in the Philippines, the Republic of Korea, Burma and more recently Taiwan indicate that the view that "Asian values" warrant a radically different approach to human rights is not one universally shared in Asian societies or by Asian leaders. There are autocratic tendencies in politicians in every country. But in some countries, long constitutional history and struggles, as well as the development of mature legal systems and the acceptance of political conventions, ensure that basic rights are respected.

I anticipate that Cambodia will continue to place its priorities in the areas of economic, social and cultural rights. I also expect that there will continue to be serious problem areas in civil and political rights, particularly those which concern democracy and the rendering of government truly accountable to the people. Perhaps Western



commentators have to learn the importance of economic, social and cultural rights which they tend to take for granted and which Western lawyers tend to ignore. On the other hand, there is no doubt that respect for basic civil and political rights is less than perfect in Cambodia. Much will depend upon the coming generation. In the case of some of the autocratic leaders still in power, like the leopard, it is quite possibly too late to hope for a change of spots. But the long-term is not bleak. Most Cambodians of my acquaintance understand that UNTAC has afforded them a unique opportunity to rescue themselves from factionalism, war, brutality and self-destruction. They look about them and see the remarkable economic lift-off of countries of their region, particularly Thailand and now even Viet Nam. They will never have a similar opportunity to join that lift-off. Most of them realise this. The economic imperative is therefore an important stimulus to modern political and legal developments. The other side of the coin of economic liberty is a necessary advance in legal and political liberty.

- Q. Australia has inherited and built upon a governmental, legal and judicial system (and to an extent a respect for freedom of expression) developed over a period of centuries in England and Europe. Cambodia appears not to have benefited from such a direct inheritance and the genocide of 1975-1979 destroyed most of the existing legal*

*structures developed to that point. Is it possible to rebuild such a system without the benefit of these historical underpinnings? If so, what is the best course to follow in doing so?*

A: It should not be assumed that all memories of law have been destroyed in Cambodia. The Cambodians remember the period of the French Protectorate. Their criminal legal system is still profoundly affected by the tradition introduced by the French. Similarly, in the period immediately prior to UNTAC, the influence of Vietnamese (and through it Russian) law was considerable. Many of the judges (most of them associated with the Cambodian Peoples' Party) - formerly the communists - were trained in Viet Nam.

There is no gainsaying the fact that we in Australia are the heirs to the heroic constitutional history of England and the struggles over eight centuries by which the people ultimately asserted their rights over the Crown and other powerful interests. We cannot expect similar revolutions to be telescoped into a couple of years in Cambodia. Every attention must be given to endeavouring to build on such historical underpinnings as still exist. That is why I never favoured the pressure from some quarters to abandon the system of criminal justice modelled on the French criminal law. This was the one with which Cambodians are

familiar. In some ways it is one more suitable to a society without a large profession of lawyers. It is the one which is now spreading its influence, and being rebuilt, throughout Cambodia. But it is still in a much undeveloped state, not least because the salaries paid to judges are limited to about \$US20 per month. Clearly this is inadequate and gives rise to the actuality, or appearance, of corruption.

There are many countries in the world which do not have the advantages - economic and historical - which we enjoy. But they are now striving to build societies which respect the rule of law and uphold basic human rights. It is the duty of the United Nations, and it is the privilege of countries such as Australia, to help Cambodia to rebuild its governmental, legal and judicial systems. Some progress has been made; but much remains to be done.

An urgent priority is to train lawyers and judges. Australian lawyers are now increasingly becoming involved in the proposed establishment of a second Law School in Cambodia. The foreign language medium of this School will be English. It seems likely to me that commercial law of Cambodia (especially in relation to the economically vibrant countries of the region) will be greatly influenced by common law traditions and approaches. So this is an area where Australian lawyers can help. I hope that they will

do so. The path ahead is not strewn with roses. On the other hand, it is not as bleak as some news commentaries would suggest. Human rights defenders are realists; but they are also optimists.