

UN SPECIAL PROCEDURES — REFLECTIONS ON THE OFFICE OF UN SPECIAL REPRESENTATIVE FOR HUMAN RIGHTS IN CAMBODIA

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This feature describes the experiences of the writer when serving (1993–96) as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia. It responds to a public lecture by Professor Hilary Charlesworth critical of the special procedures of the UN. It describes the establishment of the UN office and functions in Cambodia following UN Transitional Authority for Cambodia. It recounts the five office holders who have led the UN human rights involvement in Cambodia and acknowledges the limitations and difficulties faced by those office holders. However, it concludes that, on the whole, the creation of external international guardians of human rights can be useful, in practice, in achieving the objectives stated in the UN human rights treaty law. It concludes with several suggestions for the improvement of the special procedures, including in the mode of appointment, training, media involvement, report writing and responsiveness of such office holders and the auditing of their effectiveness. Whilst geopolitical limitations affect the achievements that are possible, the author concludes that the system is not so flawed that it would be better if it were abolished lest it raise false expectations.

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I OBJECTS AND APPROACH

My purpose is to reflect upon the ‘special procedures’ of the United Nations Organisation, created to promote and protect human rights in the world. Between 1993 and 1996, I served as Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia (‘SR’). That office is one of several special rapporteurs, special representatives and other institutions of the United Nations dedicated to particular aspects of human rights and reporting to the chief United Nations human rights organ, formerly the Commission on Human Rights (‘CHR’), and since 2006, the Human Rights Council (‘the Council’).

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After participating in seven missions to Cambodia,¹ engaging with the then King of Cambodia (King Norodom Sihanouk), with the government and with a multitude of civil society organisations ('CSOs') and ordinary citizens, the Cambodian experience is deeply etched in my memory. It is natural that such an experience, and reflections upon it, will give rise to feelings of satisfaction with some of my endeavours and regrets at opportunities missed and achievements that fell short of what might have been desirable. The interval of fourteen years that has elapsed since holding office in Cambodia has afforded me a distance from the busy commitments that it entailed. It affords me a perspective and a measure of objectivity that would have been difficult, or impossible, in 1996.

In a lecture at the Australian National University, Professor Hilary Charlesworth² reviewed some aspects of my work in Cambodia. She did so as an introduction to a reflection on the special procedures of the United Nations and their effectiveness in securing improvements in the human rights of those whom the procedures seek to support. Her lecture concluded that the special procedures, including the Office of SR, represented flawed institutions that were virtually bound to fail the vulnerable people whom they were created to protect and defend. Professor Charlesworth identified what she saw as an understandable tendency on the part of nations and individuals, sympathetic to human rights, to accept inadequate institutional arrangements and insufficient national and international responses to proposals and criticism. She warned against an over-willingness on the part of the international community, and UN agencies and officials in particular, to accept the well-meaning work of those engaged in special procedures when the reality was often that human rights abusers ignored criticism and recommendations directed to their conduct and neglect. She counselled that only when the United Nations demonstrated greater insistence upon compliance with human rights law and invoked more effective sanctions would human rights oppressors truly pay attention. She condemned what she saw as a tendency to excessive self-deception and wishful thinking on the part of UN institutions and of the well-meaning participants in the UN special procedures.

I do less than justice to Professor Charlesworth's views by presenting this summation of them. Her natural politeness softened the sharp corners of the points that she made in her oral presentation. Nevertheless, both in an immediate oral commentary that followed her remarks and now in this published contribution, I feel bound to acknowledge that there is force in what she has said. There is a natural desire on the part of hardworking officials — especially, one might say, those with a commitment to international law and to the protection of human rights — to fall into the double trap of self-deception and wishful thinking. There is certainly a clear need to strengthen the UN human rights machinery and the special procedures as part of these. One purpose of this essay is to suggest a few practical ways by which improvement might be achieved

¹ The seven missions were conducted on: 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.

² Hilary Charlesworth, 'Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict' (The Annual Kirby Lecture on International Law, delivered at the ANU College of Law, The Australian National University, 19 March 2009).

without waiting for the more fundamental reform that could be a long time in coming.

Making full allowance for the foibles of hope and human pride, it is my belief that Professor Charlesworth's assessment needs to be balanced against a recognition of some worthwhile aspects of the work of special representatives and other participants in the UN special procedures. In the end, those who look at the resulting balance may conclude, with Hilary Charlesworth, that the procedures afford little more than a fig leaf, incapable of covering the intolerable abuses of human rights that exist in the world. On the other hand, some observers, weighing the balance, will come (as I do) to a conclusion that there is a real value in the United Nations human rights procedures. They need strengthening and strong support from the Office of the High Commissioner for Human Rights ('OHCHR'). The state of the world is such that more perfect institutions are unlikely to emerge any time soon. Meantime, the special procedures sometimes deliver important practical protections for human rights. And these justify their continuance so long as the participants honestly record and report the shortcomings that occur in the conduct of those to whom their reports are primarily addressed. Thus, the diagnosis proposed by Professor Charlesworth is largely correct. But the prognosis is better than she has suggested.

II BACKGROUND TO THE OFFICE OF SPECIAL REPRESENTATIVE

On 23 November 1993, the then Secretary-General of the United Nations Organisation, Mr Boutros Boutros-Ghali, appointed me to be his Special Representative for Human Rights in Cambodia. The appointment was made pursuant to a resolution of 19 February 1993 of the then UN Commission on Human Rights.³ That resolution welcomed the establishment in Cambodia of an operational presence of the then Centre for Human Rights ('OHR') of the UN Secretariat. The purpose of the OHR was to assist the government of Cambodia; to support the drafting and implementation of legislation to promote and protect human rights; and to provide assistance to bona fide human rights groups in the country.

On 20 December 1993, the UN General Assembly welcomed my appointment by the Secretary-General to undertake the tasks set out by the Commission on Human Rights, namely:

- 1 To maintain contact with the government and people of Cambodia;
- 2 To guide and co-ordinate the UN human rights presence in Cambodia; and
- 3 To assist the government in the promotion and protection of human rights.⁴

The General Assembly resolution envisaged the submission of regular reports to it by the Special Representative.⁵ This was the course that I followed.

³ *Situation of Human Rights in Cambodia: Recommendations of the Special Representative for Human Rights in Cambodia and the Role of the United Nations Centre for Human Rights in Assisting the Government and People of Cambodia in the Promotion and Protection of Human Rights — Report of the Secretary-General*, UNGAOR, 49th sess, Agenda Item 100(c), UN Doc A/49/635 (3 November 1994) [4] ('*Situation of Human Rights in Cambodia — Report of the Secretary-General*').

⁴ *Ibid* [1]; Commission on Human Rights, *Situation of Human Rights in Cambodia*, CHR Res 1993/6, 49th sess, 29th mtg, UN Doc E/CN.4/RES/1993/6 (19 February 1993).

The foregoing steps had a background both in the history of the UN and the history of Cambodia. The *Charter of the United Nations*, adopted in 1945, envisaged that protection of fundamental human rights would be one of the foundations upon which the organisation would be created.⁶ Initially, it had been hoped to include an International Bill of Rights in the *Charter*. However, as with the drafting of the *Constitution of the United States*, time ran out. Drafting the human rights instruments was postponed. In 1948, the General Assembly adopted the *Universal Declaration of Human Rights*.⁷ There followed, in 1966, the *International Covenant on Economic, Social and Cultural Rights*⁸ and the *International Covenant on Civil and Political Rights*.⁹ Still later, other important international treaties were adopted. Together they constitute the framework of international human rights law.

In 1946, under the Economic and Social Council, the UN established the Commission on Human Rights. In the 1960s and 1970s, the CHR sought to respond to grave instances of human rights violations in South Africa and Latin America, about which there was a broad consensus amongst the members of the UN. Thus, in 1975, following the coup that deposed President Salvador Allende of Chile, a working group of the CHR was exceptionally created. In 1979, this body was replaced by a ‘special rapporteur’, with a mandate to investigate and report upon allegations of enforced disappearances of government critics in Chile.¹⁰ Thus began the ‘special procedures’ of the UN.

In the course of time, these procedures extended to a number of working groups, special rapporteurs of the CHR and special representatives of the Secretary-General. The SR was one such office and an instance of the special procedures. I entered into the functions of the SR immediately following my appointment. I conducted immediate consultations with relevant officers of the Secretariat in the CHR in Geneva and with representatives of the French government in Paris. The French government was singled out because of its historical links with Cambodia and the leading part that France had played in convening the Paris Peace Talks which facilitated the UN presence in the country. I quickly organised my first mission to Cambodia which took place

⁵ *Situation of Human Rights in Cambodia — Report of the Secretary General* [4], referring to *Situation of Human Rights in Cambodia*, GA Res 48/154, UN GAOR, 48th sess, 85th plen mtg, Agenda Item 114(c), UN Doc A/RES/48/154 (7 February 1994).

⁶ *Charter of the United Nations* Preamble, arts 1, 55, 62, 68, 76 (‘the *Charter*’).

⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plan mtg, UN Doc A/810 (10 December 1948). The *Constitution of the Kingdom of Cambodia 1993* art 31 (‘*Cambodian Constitution*’) states that the Kingdom of Cambodia ‘shall recognise and respect human rights as set out in the Charter, the [UDHR], the covenants and conventions related to human rights, women’s and children’s rights’. See Lily O’Neill and Göran Sluiter, ‘The Right to Appeal a Judgment of the Extraordinary Chambers in the Court of Cambodia’ (2009) 10 *Melbourne Journal of International Law* 596, 606. Cf Padraic J Glaspy, ‘Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia’ (2008) 21 *Harvard Human Rights Journal* 143.

⁸ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 November 1976).

⁹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁰ UN Office of the High Commissioner for Human Rights, ‘Seventeen Frequently Asked Questions About the United Nations Special Rapporteurs’ (Fact Sheet No 27, UN Office of the High Commissioner for Human Rights, 2001).

from 21–28 January 1994. A report on that mission was provided to the CHR in February 1994.¹¹

The background of the conflict in Cambodia is well known. In colonial times, the country was a protectorate of France. In a series of coups in the 1970s, its postcolonial government was deposed and stable government disrupted. The disruption was, in part, an outcome of the major war then happening in neighbouring Vietnam. Ultimately, Cambodia was overrun by a revolutionary regime of the Khmer Rouge. That regime introduced anarchistic policies and disruption of orderly life, followed by an intense genocide in which more than 1.3 million persons lost their lives.¹² The Khmer Rouge regime of ‘Democratic Kampuchea’ held power in Cambodia between 1975 and 1979. It was only ended by an invasion from Vietnam (1978–79). Ultimately, the Vietnamese-led forces prevailed. They established their government in the Cambodian capital Phnom Penh. However, Khmer Rouge elements remained in control of parts of the country and ‘Democratic Kampuchea’ retained the Cambodian seat at the UN. The initial failure of Western countries to recognise the new government in Phnom Penh occasioned a deep sense of resentment in Cambodia, having regard to the barbarity of the genocidal regime which that government had overthrown.

In 1991, the contesting factions in Cambodia signed the Paris Peace Agreement. This provided for a UN peacekeeping mission to be known as the UN Transitional Authority for Cambodia (‘UNTAC’). The Paris Agreement provided, in some detail, for the protection of human rights during UNTAC and in the post-UNTAC period. Article 17 of the Agreement provided that, after UNTAC:

The United Nations Commission on Human Rights should continue to monitor closely the human rights situation in Cambodia, including, if necessary, by the appointment of a Special Rapporteur who would report his findings annually to the Commission and to the General Assembly.¹³

One of the leading actors in the achievement of the Paris Peace Agreement was the Hon Gareth Evans QC, then Australia’s Minister for Foreign Affairs.

Encouraged by the success of the UNTAC engagement in Cambodia, two steps were taken. The first was the creation of an OHR in Phnom Penh. This was the first such permanent human rights office outside Geneva. The second was the creation of the Office of SR. Within the Commission on Human Rights there were sensitivities about each of these steps. The mandate of the SR, as adopted by the HRC, set out above, omitted the duty to ‘monitor closely’ the human rights situation in Cambodia, as had been stated in the language of the Paris Peace Agreement. The duties assigned (‘maintain contact’; ‘guide and

¹¹ UN, *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 Doc E/CN.4/1994/73/Add.1 (21 February 1994) (Michael Kirby, Special Representative).

¹² See, eg, David Chandler, *The Tragedy of Cambodian History: Politics, War and Revolutions Since 1945* (Yale University Press, 1991); Ben Kiernan, *The Pol Pot Regime: Race, Power and Genocide in Cambodia under the Khmer Rouge* (Yale University Press, 1996).

¹³ *Agreement for a Comprehensive Political Settlement of the Cambodia Conflict*, 1663 UNTS 27 (signed and entered into force 23 October 1991) art 17. See UN Department of Public Information, ‘The United Nations and Cambodia 1991–1995’ (United Nations Blue Book Series Vol II, United Nations, 1995) 93.

co-ordinate'; 'assist') were negotiated language. But they failed to reflect the sense of urgency expressed in the Paris Peace Agreement. The terms of the mandate were seen by some observers as weakening the Office of the SR from the outset.¹⁴

Two other developments may be noted by way of background. The first is that, coinciding with UNTAC and the appointment of the SR, a large international meeting was held in Vienna, Austria in 1993 to review the state of human rights in the world and the effectiveness of the UN in affording protection of them.¹⁵ Arising out of this meeting was a resolution, ultimately accepted by the UN General Assembly, calling for the creation of a high level UN official to lead the initiatives of the organisation on human rights: the High Commissioner of Human Rights ('HCHR'). The first holder of that office, Mr José Ayala-Lasso, an Ecuadorian diplomat who had played a leading role in securing agreement to the creation of the Office, commenced duties in Geneva not long after my appointment as SR.

Secondly, the selection of the SR presented sensitive issues to be resolved by the Secretary-General. Cambodia had earlier been seen as falling within a French sphere of influence. France had played a leading role in organising and procuring the Paris Peace Agreement. Older members of the Cambodian officialdom were francophone. A proposal was made to appoint Mr Kéba Mbaye, a Senegalese national and former judge of the International Court of Justice, to the post of SR. Reportedly, difficulties arose affecting this appointment. It was at that stage that Mr Gareth Evans proposed my appointment.

I was then serving as President of the Court of Appeal of the Supreme Court of New South Wales. I was also at the time the Chairman of the Executive Committee of the International Commission of Jurists ('ICJ') in Geneva. Several of the special rapporteurs and special representatives of the UN had been chosen from amongst the Commissioners of the ICJ. My nomination was agreed to by me and eventually accepted by the Secretary-General. I held the Office of SR until, in February 1996, I was appointed as a Justice of the High Court of Australia. Following that appointment, I concluded my prearranged mission and other responsibilities but tendered my resignation because of the duties of my new judicial office. It was a privilege to serve the UN and the people of Cambodia in the Office of SR. My service extended over two and a half years.

III THE FIVE CAMBODIAN SPECIAL REPRESENTATIVES

My service as SR in Cambodia started favourably enough. So much so that, on the cover of my first report, I stated:

The Special Representative wishes to express his sincere appreciation to the Royal National Government of Cambodia for the full co-operation received

¹⁴ Dennis McNamara 'The Protection and Promotion of Human Rights' in Nassrine Azimi (ed), *The United Nations Transitional Authority in Cambodia: Debriefing and Lessons* (Kluwer, 1995) 165. I am indebted to Christoph Sperfeldt for this and other insights contained in his article: Christoph Sperfeldt, 'Special Representatives of the Secretary-General (SRSG) for Human Rights in Cambodia: 15 Years of UN Human Rights Presence through Special Envoys, 1993–2008' [2009] (unpublished).

¹⁵ UN Office of the High Commissioner for Human Rights, *World Conference on Human Rights, 14–25 June 1993, Vienna, Austria* (April 1995) Office of the High Commissioner for Human Rights <<http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx>>.

during his mission, in particular in facilitating visits to various institutions such as prisons, courts and hospitals.¹⁶

Most Westerners concerned about human rights (especially if they are lawyers) tend to think first of civil and political rights. Important as those rights are, the most important lesson I learned during my service as SR was that this is not the way that ordinary citizens viewed issues of human rights, at least in Cambodia as I found it. For Cambodians, so soon after the terrors and destruction of the Khmer Rouge regime, civil and political rights were important. There was great pride in the successful completion of the national election (the first free and fair elections that Cambodians had ever participated in). However, the issues that were brought home to me as SR were often concerned with aspects of economic, social and cultural rights. This justified the decision of Eleanor Roosevelt and those who drafted the UDHR, to include such rights in that document. Protection of such rights was promoted in the treaty provisions that followed.

Typically, in my meetings with CSOs and ordinary Khmer people, the aspects of human rights to which they attached the greatest sense of urgency were:

- The right to health — especially emergency health care for accidents and injuries;
- The right to enjoy their cultural treasures — especially protection of the cultural heritage of Angkor Wat, which was seriously threatened by looting and international trafficking; and
- The right to education — especially the education of young girls.

All the items were referred to in my first report as SR. Indeed, they were the priority issues recounted in that report.¹⁷ Other matters of priority concern referred to in my first report included:

- Improvement in security — and the control of armed groups;¹⁸
- An end to the harvesting of land mines by Khmer Rouge elements and also by the Cambodian military;¹⁹
- Instruction in safe sexual practices and contraception to prevent the spread of HIV/AIDS;²⁰ and
- Accession to international obligations expressing human rights standards.²¹ These included the signature by the King to an agreement with the United Nations for the operation for the Centre for Human Rights in Phnom Penh.

Because, in 1994, Cambodia was still in a transitional phase, with weak or non-existent constitutional institutions, many recommendations were addressed to issues of civil and political rights. These included judicial independence and the rule of law; fair and open trials; protection of freedom of the press and of

¹⁶ UN, *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 Doc E/CN.4/1994/73/Add.1 (21 February 1994) [1] (Michael Kirby, Special Representative).

¹⁷ *Ibid* [13]–[25].

¹⁸ *Ibid* [75].

¹⁹ *Ibid* [77].

²⁰ *Ibid* [80]–[81].

²¹ *Ibid* [83]–[88].

peaceful assembly; defence of the rights of non-governmental organisations; issues of land rights; control of the police and military; and improvements in the conditions of prisons. In the beginning, there was little conflict over my efforts in Cambodia. Meetings with governmental leaders, including the two Co-Prime Ministers, were arranged and fulfilled with courtesy and with apparent attention to the respective viewpoints expressed.

In July 1994, I was accompanied on my mission by Mr Ayala-Lasso, the then HCHR. His presence ensured dialogue with each of the Co-Prime Ministers. However, the relationship with the government of Cambodia deteriorated in 1995. The deterioration appeared to be occasioned by the reports that I gave successively to the Third Committee of the General Assembly in New York and to the CHR in Geneva. It was my practice, at the conclusion of each mission to Cambodia, to make a statement, and to answer questions, at the Press Club in Phnom Penh in a briefing to which all members of the Cambodian media were invited. The media reportage of these events was generally accurate, at least in the English language newspapers. However, some of the Khmer language reports, when translated, were found to be provocative and combative.

In each of the seven reports written by me concerning my missions to Cambodia, I was careful to balance the praise that was due to the Cambodian government, officials and the people, on the progress that had been made with criticism that was necessary if I was to fulfil my responsibilities with appropriate integrity. Being fair and accurate came easily to me because of my then already long service as a judge in Australia. Being polite and sensitive to local viewpoints was something I learned in dialogue with officers of the OHR in Phnom Penh, including those who were Khmer-speaking. The problem that arose was that some members of the government were not used to any criticism. They resented it, especially when it was made public in Cambodia.

Resentment and hostility did not constitute a universal attitude of the Ministers and members of the National Assembly. However, resentment was certainly exhibited by the then Second Prime Minister, Hun Sen, the head of the Cambodian Peoples' Party ('CPP'). Such resentment came to the boil in 1995 when my reports referred to problems of abuse of power by military and police personnel and restrictions on freedom of expression and on the activities of CSOs.²² The reports led to a letter being addressed to the UN Secretary-General by the two Co-Prime Ministers requesting exploration of the possibility of terminating the UN human rights mandate in Cambodia by the end of 1995. A result of this letter was a request by me for support from the UN at the highest level. Subsequently, the Secretary-General arranged for his Special Envoy, Mr (later Sir) Marrack Goulding, UN Under-Secretary-General for Political Affairs to visit Cambodia. Following his visit, the Co-Prime Ministers agreed to the

²² UN, *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 Doc E/CN.4/1994/73/Add.1 (21 February 1994) [26]–[55] (Michael Kirby, Special Representative).

continuance of the OHR in Phnom Penh and to renewed cooperation with the Office of SR.²³

The respite was, however, short-lived. When a former Finance Minister, Mr Sam Rainsy, criticised the government, he was expelled from the FUNCINPEC (Royalist) Party led by the First Prime Minister, Prince Ranariddh. This action led to moves by the latter to have Mr Rainsy expelled from the National Assembly, explained on the footing that his seat belonged to the FUNCINPEC Party. This claim did not appear to be supported by the language of the Constitution. Moreover, it constituted an arguable interference in the rights of free expression by a member of the Assembly and a departure from principles of democratic governance. As SR, I therefore made representations to the government, to the National Assembly and to foreign donors.²⁴ These steps occasioned much hostility on the part of the Co-Prime Ministers. They refused to meet me during my sixth and seventh missions to Cambodia (1995–96). At about the same time, allegations were spread in an anonymous bilingual news-sheet in Phnom Penh making unsubstantiated allegations against me and also against the then Prime Minister of Australia. The Second Prime Minister, Hun Sen, attacked me in a public outburst in front of senior officials. He was reported as saying that I was a ‘crazy lawyer whom I have hated as long as I have known him’.²⁵

Coinciding with these attacks were serious death threats against me, broadcast on the clandestine Khmer Rouge radio station. There was also some lessening of other governmental access, reflecting the non-cooperation of the Co-Prime Ministers.

On the other hand, my last two missions went ahead as planned. Access to CSOs was unimpeded. Several governmental officials afforded me full courtesy and cooperation. Above all, I was received in audience by His Majesty King Sihanouk who expressed interest in, and support for, my work and that of OHR in Phnom Penh. Most especially, the King expressed his support for the strategies addressed by me to responding to the HIV/AIDS epidemic. These strategies included community education and the distribution of advice and condoms to sex workers. The King was aware of the difficulties presented by non-cooperation of the government. However, both orally and in writing, he repeatedly expressed his support for the work of the SR, upon which work he and his officers were regularly briefed.

In my last report as SR, I noted the refusal of the leaders of the Cambodian government to receive me, urging that dialogue was the way to overcome

²³ *Role of the United Nations Centre for Human Rights in Assisting the Government and People of Cambodia in the Promotion and Protection of Human Rights — Report of the Secretary-General*, 50th sess, Agenda Item 112(b), UN Doc A/50/681/Add.1 (26 October 1995) [10], [13].

²⁴ See *Recommendations Made by the Special Representative of the Secretary-General for Human Rights in Cambodia on Matters within His Mandate — Report of the Secretary-General*, 50th sess, Agenda Item 112(b), UN Doc A/50/681(26 October 1995) [49].

²⁵ Nick Cater, ‘Cambodian Leader “Hates” Justice Kirby’, *The Courier-Mail* (Brisbane), 8 March 1996, 7.

differences, to repair misunderstandings and to improve the human rights situation in Cambodia.²⁶

After the conclusion of my service as SR, four subsequent office holders were appointed, three as Special Representatives of the Secretary-General, and one as Special Rapporteur, following a change in the designation and mandate of the office.

My mandate concluded on 30 April 1996. My successor as SR was Ambassador Thomas Hammarberg of Sweden. He was appointed to hold office from 1 May 1996. He did so until 31 December 1999. He, in turn, was succeeded by Professor Peter Leuprecht of Austria who served from 18 August 2000 until 31 October 2005. He, in turn, was succeeded by Professor Yash Ghai of Kenya (concurrently a professor of law in Hong Kong). He served from 1 November 2005 until 23 September 2008. It was following Professor Ghai's resignation that he was replaced by Mr Surya P Subedi of Nepal who has served as Special Rapporteur for Human Rights in Cambodia since 25 March 2009, under re-designation of that office by the Human Rights Council.²⁷

Each of the subsequent SRs, until the retirement of Professor Ghai, ultimately faced difficulties similar to my own in gaining access to the Cambodian head of government. Mr Hammarberg's mandate coincided with an outbreak of violence following a breakdown in July 1997 in the relationship between Prince Ranariddh and Mr Hun Sen and their respective political parties. In the result, Prince Ranariddh left the country. Mr Hammarberg described the circumstances as involving a 'coup d'état'.²⁸ As SR, Mr Hammarberg concentrated on issues concerning children's rights, a matter in which he had special expertise. He conducted more missions to Cambodia than the other SRs.²⁹ On most of the missions, he secured meetings with Hun Sen, who was by July 1996 the sole Prime Minister.

As SR, Ambassador Hammarberg gave great emphasis to the trial of the remaining leaders of the Khmer Rouge, a matter that I too had raised in discussions with the Co-Prime Ministers but without positive outcome. A difference emerged over whether (as the UN wished) an independent international tribunal should be established, or (as Hun Sen insisted) any such tribunal should be part of the Cambodian judiciary. The latter was resisted by the UN Secretariat, in part because of fears of political interference with Cambodian judges. Many leaders of the Cambodian government, including Hun Sen himself, had held relatively minor offices under the Khmer Rouge regime. In the end, notwithstanding 'protracted and at times difficult' negotiations,³⁰ Extraordinary Chambers of the Courts of Cambodia were created. They were to include

²⁶ UN, *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 Doc E/CN.4/1996/93 (26 February 1996) [106] (Michael Kirby, Special Representative).

²⁷ Human Rights Council, *Advisory Services and Technical Assistance for Cambodia*, CHR Res 9/15, 9th sess, UN Doc A/HRC/RES/9/15 (18 September 2008).

²⁸ *Situation of Human Rights in Cambodia — Report of the Secretary-General*, 52nd sess, Agenda Item 112(b), UN Doc A/52/489 (17 October 1997) [41].

²⁹ The number of missions was: Kirby (7); Hammarberg (16); Leuprecht (11); Ghai (4).

³⁰ *Khmer Rouge Trials — Report of the Secretary-General*, 57th sess, Agenda Item 109(b), UN Doc A/57/769 (31 March 2003) 1–2.

some international participants. However, the majority would be Cambodian. The outcome has been strongly criticised by informed observers.³¹

Towards the end, Mr Hammarberg's fate was no different from the other SRs. Hun Sen declined to meet him. He concluded his mandate at his own request on 31 December 1999. His service for human rights continued by his election as Secretary-General of the Olof Palme International Centre in Stockholm (2002–05) and his later designation in 2005 as Commissioner for Human Rights by the Council of Europe's Parliamentary Assembly.

Professor Peter Leuprecht, who entered upon his mandate in August 2000, after a gap of eighteen months, was a professor of international law with chairs in Austria, France and at McGill University in Canada. During his service, he paid much attention to reform of the national judiciary in Cambodia, reporting upon the disparities that he saw between the letter of the law and its practice in Cambodia.³² He was hard-hitting in his criticisms of the culture of impunity which he found in Cambodia and about the failure of the country to progress towards 'pluralistic democracy, rule of law and respect for human rights'. In December 2004, he reported in blunt terms:

What we are witnessing at present does not seem to demonstrate progress toward these goals but an increasingly autocratic form of government and growing concentration of power in the hands of the Prime Minister behind a shaky facade of democracy.³³

Needless to say, Prime Minister Hun Sen declined to meet Professor Leuprecht, who ceased visiting Cambodia a year before his eventual resignation as SR in October 2005.

The last SR of the Secretary-General was Professor Yash Ghai. He holds degrees from Oxford, Harvard and the University of East Africa and was a Fellow of Yale Law School, as well as of Uppsala and Warwick Universities. Professor Ghai had taken part in important constitutional work for several governments of Pacific countries as well as for UN agencies. He was appointed SR on 1 November 2005. Perhaps understandably, his focus was on constitutionalism. But that was to take him directly into dangerous waters. Professor Ghai expressed disappointment at what he described as the 'particular massive disregard of the Constitution' and the disregard of the reports of the successive SRs:

³¹ Christina Son and Grant Niemann, 'Cambodian Extraordinary Chambers — A Mixed Tribunal Destined to Fail' (2009) 33 *Criminal Law Journal* 105. The death in custody of the accused Ta Mok before trial was attributed by some media reports to government intervention. See 'Cambodia's Hun Sen Denies Government Behind the Death of Ta Mok', *Asian Political News*, 7 August 2006; *Phnom Penh Post*, 28 July-10 August 2006, cited in Sperfeldt, above n 14.

³² *Situation of Human Rights in Cambodia — Note by the Secretary-General*, 58th sess, Agenda Item 119(b), UN Doc A/58/317 (22 August 2003) [38].

³³ Peter Leuprecht, *Situation of Human Rights in Cambodia — Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, 61st sess, Agenda Item 19, UN Doc E/CN.4/2005/116 (20 December 2004) [76].

[I]nstead of responding to the concerns raised by the special representatives and United Nations bodies, a frequent response of the Government has been evasion or accusation, scapegoating and intimidation.³⁴

He lamented that the people of Cambodia ‘have to be taught to fear the rulers, by their caprice and unpredictability, and especially brute force’.³⁵

Professor Ghai pointed to the large financial contributions provided to Cambodia by the international community and that these had continued despite ‘widespread violations of human rights’.³⁶ Needless to say, his report resulted in severe criticism of him and of his mandate by the Cambodian government. As in my own case, the criticisms became increasingly personal. In September 2008, the Cambodian government urged the termination of his mandate by the Human Rights Council.

In the result, Professor Ghai’s appointment was not extended by the Secretary-General. Instead, the Human Rights Council, acting on the initiative of its President, appointed Mr Surya Subedi of Nepal as a country Special Rapporteur. In a statement sent to the Council by Professor Ghai, he recorded some of the difficulties he had faced in obtaining a visa in time for his last mission to Cambodia, the rules for the grant of such visas having been ‘tightened’ after his earlier visit. On the basis of country reports, he nonetheless reviewed what he said were ‘irregularities’ that had resulted from the disregard of the recommendations he had made concerning the conduct of elections in Cambodia. Such failures had, in his opinion, raised ‘serious doubt on the legitimacy of the election and the reality of democracy in Cambodia’.³⁷ He remarked:

I have had to repeat many of the recommendations that 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 concluded that the mandate should be extended. However, he tendered his resignation as SR, with thanks and admiration ‘for the many Cambodian individuals who have fought for human rights under extremely difficult and sometimes dangerous circumstances’. One passage in Professor

³⁴ UN, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, 4th sess, Agenda Item 2, UN Doc A/HRC/4/36 (30 January 2007) [98] (Yash Ghai, Special Representative).

³⁵ UN, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, 7th sess, Agenda Item 10, UN Doc A/HRC/7/42 (29 February 2008) [73] (Yash Ghai, Special Representative).

³⁶ *Ibid* [99].

³⁷ Sima Samar, ‘Statement by Professor Yash Ghai’ (Statement delivered at the 9th session of the Human Rights Council, Geneva, 15 September 2008).

Ghai's last report bears repeating in full:

If the UN Council on Human Rights decided to exact [scilicet 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 Kieu Keinereith, called me uncivilized and lacking Aryan culture. Mr Hun Sen also accused me of telling lies in 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 Kieu Keinereith said 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 received no salary, I was forced to do so in my own name.³⁸

The foregoing history, and especially the circumstances disclosed by the fourth SR, Professor Ghai, appear to bear out fully the conclusions urged by Professor Hilary Charlesworth, to which this paper responds. If the government of Cambodia ignores the important recommendations of successive SRs, if no sanction is exacted by the HCHR or the Council, if no corrective action is demanded by the international community (including donors) and if neither polite admonitions nor increasingly blunt speaking makes a difference, is there any point in continuing with the Office of SR?

If the Prime Minister of Cambodia is able to bully local personalities and to attempt the same treatment of representatives of the UN Secretary-General, should that organisation tolerate the continuation of the services of a Special Representative or Special Rapporteur operating under such conditions? If, at the highest level, the government of Cambodia vents its anger against senior office holders of the UN by insulting, personal and demeaning attacks, does continuation of the office merely lend an appearance that something is being done to protect human rights in Cambodia, when the actuality is that (when it matters most) nothing will be done? Is it better for the UN to be engaged with Cambodia through a SR, or is it preferable to draw a line at such uncivilised behaviour and to make it clear that attempts to confront human rights abuses by reason, dialogue, proposals and mutual respect have basically failed?

In microcosm, the difficulties evidenced, particularly in the last report of Professor Ghai, reveal systemic problems that have been voiced about the conduct of the Human Rights Council itself. The Council was set up in 2006 as a replacement for the defective CHR, in the hope that it would be a part of Secretary-General Kofi Annan's attempt to reform the UN system. The Council was weakened by the withdrawal from its membership of the United States during the administration of President George W Bush. The then Ambassador of the US, Mr John Bolton, explained the initial US vote against the establishment

³⁸ Ibid.

of the Council, saying: '[w]e want a butterfly. We don't intend to put lipstick on a caterpillar and call it a success.'³⁹

Whilst such thinking ignores the fact that 'butterflies were all at one time well-nourished caterpillars', the withdrawal of the US from engagement with the Council has further weakened it by removing an important voice on behalf of a society, the US, that has strong human rights credentials.

The expectation that the Human Rights Council would avoid the spectacle of election of nation states with poor human rights records has not been borne out by experience. As Vaclav Havel, a recognised champion of human rights and former President of the Czech Republic observed in May 2009, commenting on the voting of the General Assembly to fill the vacancies on the Council:

Governments seem to have forgotten the commitment made only three short years ago to create an organisation able to protect victims and confront human rights abuses wherever they occur. An essential pre-condition was better membership than the Council's predecessor, the UN Commission on Human Rights ... because for too long it had allowed gross violators of human rights, such as Sudan and Zimbabwe, to block action on their own abuses. The Council was supposed to be different ... Like the citizens of Azerbaijan, Cuba, Russia and Saudi Arabia, I know what it is like to live in a country where the State controls public discourse, suppresses opposition and severely curtails freedom of expression ... Activists and journalists in Azerbaijan and Cuba appealed to the international community not to elect their nations to the Human Rights Council. States committed to human rights and to the integrity of the Council can no longer remain indifferent.

Countries should have expressed their solidarity with the victims of human rights abuses and reclaimed the Council by simply refusing to vote for human rights abusers in this shamefully uncontested election.⁴⁰

If this is the state of the Human Rights Council, and if it is a fact that the OHCHR did not intervene to protect Professor Ghai and to point out that he received no salary, can the world have confidence in the UN special procedures? Should countries such as Australia simply decline to participate in such charades? Is such participation, as Professor Charlesworth suggested, no more than the triumph of starry-eyed hope over repeated experience?

IV JUSTIFICATION OF SPECIAL PROCEDURES

Despite the undeniable weaknesses in the UN human rights special procedures so described, there are a number of features of them that need to be given due weight before writing them off as so ineffective that they should be abandoned until the international community sets its house in order.

My conclusions in this respect rest on my own experience in Cambodia engagement. At the beginning, that engagement was structured and cooperative, a feature that remains in my memory. A different view of the utility of the Office of SR might be held in the light of experience later in the mandate. However,

³⁹ James Bone and Richard Beeston, 'Apologise or We'll Cut Your Funding, US Envoy Tells UN', *The Times* (online), 9 June 2006 <http://www.timesonline.co.uk/tol/news/world/us_and_americas/article673161.ece>.

⁴⁰ Vaclav Havel, 'UN is Electing the Worst Offenders', *The Australian* (Sydney), 14 May 2009, 14. Mr Havel was President of the Czech Republic from 1993–2003.

even allowing for this consideration, the following are reasons why, despite the demonstrated defects, the utility of the special procedures outweighs the disadvantages arising from the limitations later imposed on the relationship:

1 *The Special Representative as a Reminder*

The existence of the SR is a reminder to the government and people of Cambodia that human rights exist; that they are recognised in the Constitution of their country; and that there are mechanisms in the world for receiving and investigating serious complaints. Professor Ghai, despite his unpleasant experiences, did not finally advocate termination of the mandate. He paid tribute to Cambodian individuals and NGOs that continued to stand up for human rights.⁴¹ The existence of an external monitor, with power to report to the Council — and, in the first place, to the Secretary-General — is a reminder of the interconnections that exist in the world today. In this circumstance, the maintenance of a public record of inaction and abuse is preferable to a situation where there is no international record and the abused must suffer in silence without an international voice expressing and chronicling the wrongs done to them.

2 *Encouragement to NGOs*

One consequence of the UNTAC period in Cambodia was the emergence in Cambodia of many NGOs. Such bodies have connections, through the internet and otherwise, with international supporters and sources that provide affirmation of their activities and legitimacy. Despite the attacks on such bodies (as ‘animals’) and even their exclusion from practical engagement in Cambodia and other like countries, the presence of such NGOs provides support to vulnerable groups. They record what is happening. The worst abuses of the Khmer Rouge happened in silence because of the substantial incapacity of the victims to make their complaints known beyond Cambodia.

Each successive SR dealt with Cambodia’s NGOs. The relationship so forged afforded a measure of strengthening the resolve and courage of the NGOs and a reassurance that their demands, being based on UN treaty law which Cambodia had accepted in the years immediately after UNTAC, were not unreasonable but were justified. The loneliness of human rights defenders in oppressive states can be contrasted with the situation where they have access to international guardians and reporters. This has been a useful function served by the SR. One of the worst doubts that human rights advocates can suffer concerns their own justifiability and reasonableness. Whenever I spoke to NGOs about the dark years of the Khmer Rouge regime, they recorded the isolation that they had felt and the value they saw in their new international connections.

3 *Office of Human Rights*

The Office of Human Rights in Phnom Penh quickly established an enviable reputation for hard work, integrity and appropriate support for the local NGOs.

⁴¹ Samar, above n 37.

This pattern occurred under successive directors because of the courage and principles of the international and local officers.

In Cambodia, the mandate of the SR has provided an international voice for the cause of human rights and an avenue for complaint when the OHR came under criticism. Moreover, the SR became, effectively, a voice for the investigations undertaken by the OHR in Phnom Penh. Typically, reports of the SR were framed in terms of the activities of that office. Supporting the resident officers is important, given the isolation that can exist when operating under an autocratic regime. Whilst withholding praise for OHCHR in Geneva, Professor Ghai was full of admiration for the 'assistance and support' of the 'hard-working staff' of the Office in Cambodia.⁴² That staff performs many functions quietly, encouraging courageous NGOs and supporting well-intentioned initiatives of the bureaucracy and National Assembly when these were consonant with human rights principles.

4 *Voice to the Media*

The SR also affords a voice to national, regional and international media on the situation of human rights in Cambodia. The regular missions conducted provide the SR with an opportunity to meet local media and to report on the good and bad news arising during the successive missions to the country. Although the electronic media, even during my service, was controlled by the government and the military, the print media was less so, certainly in the case of foreign language newspapers. These journals, with their online editions, afforded useful avenues for the expression and assessment of the human rights situation in Cambodia. They sometimes published criticisms of the government that were not carried in the Khmer language media. The fact that very large numbers of young people in Cambodia have secured instruction in the English language means that the outreach of the international media is far greater now than it was previously. The SR's voice, containing criticism and recommendations for improvement of the human rights situation in Cambodia, therefore represented a useful and sometimes discordant note in a sea of local media panegyrics.

5 *Protection for National Assembly*

In all countries, tensions can arise between the legislature and the government. It was so in Cambodia during my mandate. The SR and the OHR were able to provide support and guidance on human rights questions to elected members of the National Assembly. In particular, the Human Rights Commission and the specialised committees of the National Assembly could look to the OHR for guidance about human rights principles. Even in an autocratic government, supporters for respect for fundamental human rights exist. It is simply a matter of finding them and encouraging their efforts until the situation improves. The lesson of history is that it does improve. The SR can therefore help to maintain awareness and enthusiasm until that day arrives, although naturally the encouragers must observe due proprieties and avoid entanglement in local politics.

⁴² Ibid.

6 *Particular Issues*

In my experience, the SR could sometimes prove influential in promoting attention to particular human rights issues that would otherwise, probably, have been ignored. Thus, from the start, the HIV/AIDS epidemic was given a very high priority in my work and reports in part because of my earlier involvement in the World Health Organisation Global Commission on AIDS. Initial resistance to my efforts in this regard eventually fell away as the seriousness of the rising rate of HIV infections demanded attention, even from the most sceptical.

During my first mission, I discovered that the rates of HIV infection in Cambodia were rising at a cumulative level of one per cent each year. Later, as a result of initiatives taken with the assistance of international donors, the rapid infection rate fell and eventually plateaued. I consider that this was an important achievement for the Cambodian people to which the UN and the OHR in Phnom Penh contributed substantially.

Likewise, the conditions in prisons gained attention from my missions that they would probably not otherwise have done. My inspection of prisons, from the very outset of my mandate, revealed atrocious conditions. The reports on my findings led to appeals to foreign missions in Cambodia for funding to help the Cambodian authorities to improve prison conditions, at least to a minimum level.

Similarly, encouragement of the work of UNESCO in protecting and safeguarding the cultural treasures, such as the Angkor Wat, helped protect this priceless heritage, important both for the culture of Cambodia and for its tourist economy. In matters of this kind, the SR could have a useful impact where interventions on contested political questions might be ignored. Some human rights issues are not especially sensitive in political quarters. It is upon such topics that the SR and the OHR, by appropriate professionalism, can contribute significantly to the protection of human rights.

7 *Coordination of UN*

One of the roles of the SR in Cambodia was to endeavour to coordinate the human rights initiatives of the several UN agencies which established offices in Phnom Penh, immediately following the UNTAC period. During my visits, I arranged to see the UN agency heads and officials, both together and separately, concerning initiatives through which the UN could make practical contributions to the defence of human rights. On some topics, such as containment of HIV/AIDS, several agencies were involved, including the World Health Organization, the International Labour Organization and the UN Development Programme. The coordination of the UN human rights efforts could be assisted by the appointment of a SR. This is not heroic work. It involves organisational strategy. In my experience, it was an important and constructive part of the activities of the SR.

8 *High Level Involvement*

Professor Ghai, in his last report as SR, mentioned what he saw as a lack of support he had received from OHCHR in Geneva. I offer no conclusion on that complaint as I have no capacity to evaluate it. However, I can say that at every

stage in my work as SR, I received support and assistance at the highest level within the UN.

During his visit to Australia in 1996, I had the opportunity to call on the Secretary-General, Boutros Boutros-Ghali, in Sydney. We had an intensive discussion about the situation in Cambodia, upon which he had been fully briefed. I pay tribute to the work of Mr Marack Goulding, Mr Francesc Vendrell (of the Secretariat in New York) and Mr José Ayala-Lasso (HCHR), Mr John Pace, Mr José Gómez del Prado, Ms Francesca Marotta, Mr Daniel Premont and Mr Christophe Peschoux (of the Secretariat in Geneva). Although elements of the financial support for the work of the SR were intensely frustrating, the support of these UN officers was unstinting. Moreover, it was imaginative and positive in its outlook and problem-solving in its approach.

In the case of Mr Christophe Peschoux, based at the OHR in Phnom Penh (together with other outstanding officers), the work of human rights often involved physical dangers, hardship and personal courage. It is therefore a source of pain to me to hear opinions that all of this effort was lacking in utility. I agree that, within the political zone, such might be the ultimate conclusion. But within non-political affairs, where technical assistance, advice, support and funding were forthcoming, the SR and the OHR were able to strengthen local Khmer and international efforts for the protection of universal human rights. Often their work had to be performed quietly and with understatement. However, by the selfless activities of the local and international staff, working on an agenda planned cooperatively with the SR, we were often able to make useful advances for the practical protection of a wide range of human rights.

9 *Voice to Democracies*

In addition to the work of the SR in Cambodia, the occasions of regular reports to the CHR and the General Assembly were availed of to arrange side meetings with interested member states; international human rights organisations; donors and also critics. Some critics existed in countries in Cambodia's near region. They were suspicious of international human rights law and of the Office of the SR. They were especially critical of attention devoted to logging activities that by their nature were despoiling the Cambodian environment and threatening the habitat of indigenous peoples and species.

On the other hand, other countries in the region utilised access to the SR to encourage protection for the human rights of their own nationals or of ethnic communities in Cambodia, otherwise isolated and disadvantaged by their non-Khmer background. Work of this kind is sensitive and demands patience and quiet persistence — as, for example, the efforts to protect pockets of Vietnamese-speaking people living in Cambodia for generations. This was an important aspect of the work of the SR and vital for the protection of minority rights in Cambodia.

10 *Independent Report*

The fact that the SR has an obligation to report both to the CHR (now the Council) and the General Assembly afforded him or her a platform to identify the good and bad news so far as human rights was concerned. It can be acknowledged that such reportage generally involved a rather weak sanction.

However, the expectation that countries will respond to criticism of their human rights record before the international community will sometimes be effective and rarely, or never, inconsequential.

For those who have made such reports, the responsibility to be fair and balanced weighs heavily. So does the obligation to be respectful, practical and realistic. Until the last three decades, there has been no such system of answerability. To see called to account the representatives of governments who, at home, are beyond account is proof that some progress is being made in the world. Unaccountable suppression of human beings is the methodology of tyranny. The present sanctions against oppressors may be weak. But total immunity from responding has been removed, certainly in the case of a country such as Cambodia.

To complaints that the sanctions against the Cambodian government are too weak, there are several responses. First, weak sanctions are better than none. Secondly, out of weak sanctions may grow more effective ones. Thirdly, the object of an office such as the SR is not, as such, to put governments on trial or to demand punishment for oppressors. It is to engage everyone concerned in the dialogue, to remind them of international human rights law and to offer them technical support and assistance to improve their situation. Such offers may be rebuffed (and usually will be) in matters of political concern. But in other activities, technical assistance can quite frequently strengthen the defences of human rights.

Fourthly, in the current state of the world, it seems unlikely that the resolve, personnel and funding of the UN will be there to redress effectively every demonstrated departure from international human rights law. Save for exceptional times, such as in Cambodia during UNTAC, the UN is not usually in a position to enforce its will against human rights oppressors, even if their activities cause grave disquiet. The operations of the UN, and the existence of the veto in the Security Council for the permanent members, make any substantial organisational change in the short run unlikely. Meantime, there are human rights abuses that need to be addressed. The system of special procedures and the voting of the Human Rights Council may indeed be defective. But they are all that the world at present offers. It therefore behoves us to make the most of them whilst hoping (and perhaps planning) for a better system in the future.

In the end, the conclusion that I reach is that the marginal utility of the present system is greater than the marginal cost of maintaining it, and of thereby giving an appearance of human rights protection which is illusory or seriously imperfect. Perhaps the work of land mine clearance, of HIV prevention, of NGO support and of human rights recording would have gone on in Cambodia if no SR had been provided for in the Paris Peace Agreement. But the existence of the Office, deriving its authority from the facility of report to the Secretary-General, the CHR (now the Council) and the General Assembly, strengthened some aspects of human rights protection in Cambodia.

As a signal of the commitment of the wider world to human rights principles, as stated in international law, this guardian has played a limited, but important, role in a country that purchased such a global investment by its enormous suffering. Whilst, therefore, I fully understand the defects to which Professor Charlesworth, Professor Ghai and other critics point, I do not agree with a

conclusion that the SR system is so flawed that it would be better if it were abolished.

V IMPROVEMENT OF SPECIAL PROCEDURES

There remain a number of initiatives that could be adopted to improve the system of special procedures. First and foremost is the need to strengthen the system at the top. This would involve:

- The closer engagement of the Office of the Secretary-General of the UN;
- The effective reform of the HRC to meet the defects identified by Vaclav Havel;⁴³
- The full re-engagement in the HRC of the US as a permanent member of the UN with a renewed commitment to multilateral engagement; and
- The provision of appropriate funding and the appointment of suitable personnel on grounds of expertise rather than simply geographical qualifications.

The Office of the High Commissioner also needs to be strengthened, institutionally and in other ways, so that the High Commissioner will feel able to come to the defence of office holders such as the SRs and to support them, as I was supported, when the office holders come under the attack of regimes unused to criticism and accustomed to bullying or worse. The adoption of a convention by which the HCHR enjoys a longer but non-renewable term might be one way to ensure that the person so appointed is released from inappropriate pressure from the Council or members of it to back off provision of support where proper conduct and defence of human rights principles suggest that support should be given. A preoccupation with winning a renewal in the Office of the High Commissioner (never, so far, achieved) is an institutional defect that it would be best to remove.

The following are a few additional proposals that might be considered to strengthen the UN special procedures so as to meet the criticisms voiced by Professor Charlesworth, Professor Ghai and others, many of them justified:

1 *Appointments of SRs*

The fact that the Special Representatives are appointed by the Secretary-General and not by the Council has often meant that those office holders were usually persons of very considerable experience and qualifications. They did not have to run the gauntlet of election or selection by a body, normally now voting on regional lines. Having said this, some of the Special Rapporteurs I have known have been persons of the highest calibre. Still the wider range of personalities that may be selected by the Secretary-General — and the direct line that those office holders then hold to the highest official of the UN — strengthens that source of appointment. This is a consideration to be taken into account in the design of special procedures and in finding the correct balance between Special Representatives of the Secretary-General and the Special Rapporteurs of the Council.

⁴³ Havel, above n 40.

2 *Training of SRs*

Before I entered upon my mandate, I received no training or instruction on what was to be expected of me. Nor was there a written protocol explaining the immunities I enjoyed under UN treaty law and the requirements I was obliged to follow. In 1993, this was simply something to be learned on the job. Self-evidently, the provision of advice and of information to strengthen performance as a SR is highly desirable.

It would also be prudent if advice were given to appointees concerning such considerations as personal security; avoidance of any conflict of interests; attention to the risks of surveillance and interception; and information on the proper lines of communication, including within the UN system itself. The effectiveness of the SR is likely to be enhanced by the provision of training and information at the initial stage. Similarly, it needs to be emphasised that the criteria for the SR's activities are UN treaty provisions on human rights and not, as such, the intuitive judgments of the SR.

3 *Country Mandates*

A tendency is evident in the current practice of the Council to reduce the number of country mandates for the special procedures of the UN. Two such mandates were recently terminated: Cuba and the Democratic Republic of the Congo.⁴⁴ The disinclination of the Council to establish country mandates, even when the need for special procedures and technical assistance in many countries is evident, is a further ground for reconsidering the role and organisation of the Council in relation to such human rights officials. Particularly if, as Vaclav Havel has suggested, the Council repeatedly includes well-known human rights offenders, leaving it to the Council to identify needs for reports and appointees, as SRs will endanger effective identification of needs and possibly ensure the nomination of appointees of variable quality.

4 *Strengthening the Council*

Self-evidently, strengthening the membership, procedures and methodology of the Human Rights Council is therefore a precondition to more effective technical assistance and special procedures on human rights.

5 *UNHCHR Protection*

There is also a need to continue the enhancement of the capacity of the OHCHR to support SRs and other special procedures, including by the establishment of local offices, such as existed in Cambodia; the provision of appropriate financial support and personnel; and the assurance of defence against unwarranted attacks such as may be made on the SR in the course of performing the duties of office.

6 *Improved Media*

If a major sanction available to the SR is reporting to the General Assembly and the Human Rights Council, there is a need to greatly improve the media

⁴⁴ See Sperfeldt, above n 14.

support available to follow up the reports once delivered by the SRs. On only one occasion, following a report to the General Assembly, was a significant media interview arranged for me by the media department in New York. There may be a need to enhance outreach to private and electronic news services and to utilise the internet more effectively in spreading information about SR reports, their findings and recommendations.

7 *Style of Reports*

My practice as SR was to write my own reports, to provide them to the officers of the OHR whilst I was still in Phnom Penh and to settle the final draft in dialogue with those officers and colleagues in Geneva. The writing style of UN reports is often an obscure and bureaucratic one. Because the report is formally that of the Secretary-General, it has conventionally been produced using a manner of expression in the third person ('the Special Representative saw', etc). This turgid and old-fashioned bureaucratic style should be modernised; although I naturally conformed to it.

Pending such an institutional revolution, media releases summarising SR reports should be encouraged, written in a media-friendly style and released in conjunction with the delivery of reports so as to promote outreach and awareness. Consideration should be given to the use of new media (for example, blogs, YouTube and Twitter) to create greater awareness than presently exists about the SR reports. The broader the coverage of report findings, the larger will be the real sanctions imposed for non-observance of SR recommendations.

8 *Donor Community*

The Cambodian UNTAC and elections were a major achievement of the UN. They attracted significant donor funding. Where that funding exists, it is important for those responsible for special procedures to provide reports and updates to the donors. Such engagement should go beyond the formal provision of reports. It should encourage dialogue, the provision of suggestions and discussion of useful programmes. A more active engagement of the donor community might sometimes result in effective sanctions to support the work of the SRs.

9 *Meetings of SRs*

At the time of my appointment, regular meetings of office holders engaged in UN special procedures were organised, generally on an annual basis, in Geneva. Particular themes were explored (such as HIV/AIDS) which traversed several of the mandates. If it is not already done, such annual meetings should also provide opportunities for the exchanges of experience; discussion of techniques of cooperation; and illustration of procedures likely to enhance the implementation of SR proposals. Such discussions should, in turn, be fed by officials of OHCHR into a handbook for provision to SRs on their appointment. To my knowledge, some very experienced and talented persons have been appointed as SRs and also to participate in human rights working groups. The sharing of their experience and wisdom would enhance the Office of SR and ensure that adaptability and

imagination, rather than an inflexible template, guides the activities of SRs in the challenging tasks assigned to them.

10 *Auditing the Process*

The SRs are accountable, in a general way, to the Secretary-General and, now, to the Human Rights Council. They are accountable to the international community more generally, including the human rights community, through the publication of their reports, now more freely available on the internet. The internet should contain appropriate information to permit easy access to SRs, together with details about their background and experience. The OHCHR should maintain a list of human rights experts from all regions of the world, who might be suitable for appointment as SRs with due attention to considerations of diversity in geographical region, gender, professional expertise and other factors. It should not be assumed that the work of a SR is concluded on the filing of a report. There is a need to audit the utility of reports and follow-up on SR recommendations. The responsibility for such audits falls mainly on the OHCHR. The object should be both to evaluate the effectiveness of the work of SRs, country offices and other personnel, and also of countries and organisations to whom the SR recommendations are addressed. The tendency in some UN agencies to regard an expert report as an end in itself needs to be reversed.

The Brookings Institution Foreign Policy Program in Washington, DC has initiated a research project to study the impact of the UN special procedures and the OHCHR and its field offices.⁴⁵ The research project, designed to take eighteen months, is aimed to measure the effectiveness of each of these organs, viewing them in the context of the creation of the new Human Rights Council. Pursuant to the resolution of the General Assembly when it created the Council, that Council itself is subject to a five-yearly review in 2011.⁴⁶ The report of the Brookings Institution will no doubt contain proposals for the improvement of the special procedures and the work of the OHCHR. It may be hoped that this essay will contribute to that review, providing as it does an insight from the perspective of one who participated in the special procedures. An awareness of the strengths and limitations of the procedures is necessary; but also a consciousness of the international political dynamics within which the special procedures must find their place in the UN institutional hierarchy.

VI STEPS ON HUMANITY'S PATH

As a school child in Australia in 1949, I received a copy of the *UDHR*. It was notable in those post-War years for its small pocket size, its oblong shape and its publication on air mail paper, rare at that time. Along with every Australian school child in the 1950s, I was taught the contents of the *UDHR* which had been adopted by the General Assembly of the UN with an Australian, Dr H V Evatt (a past Justice of the High Court of Australia), in the chair. To serve the UN and the cause of universal human rights is a high honour for any

⁴⁵ Brookings Institution, 'The Impact of UN Human Rights Mechanisms', Summary (in possession of the author).

⁴⁶ *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, 72nd plen mtg, Agenda Items 46 and 120, UN Doc A/RES/60/251 (3 April 2006) [16].

person, but especially for one raised in the noble aspirations of the *Charter* and the instruments of human rights that it contemplated and that have followed its adoption.

It was a particular privilege to serve as the Secretary-General's Special Representative in Cambodia, a country that has suffered grievously from genocide and other affronts to fundamental human rights. As I have endeavoured to show, the institutional arrangements for the consideration and implementation of the reports made on Cambodia (and other special procedures) have been far from perfect. Recent hopes that they would improve have not been fulfilled. Yet such offices are still important as a step on the path of humanity to a safer world founded on peace and security, economic equity and the protection of human and peoples' rights, as the *Charter* promised.

These are aspirations I have held in my mind for sixty years. They are not yet fully realised. Sometimes they are not realised at all. But our failures do not excuse us from endeavouring to fulfil the aspirations. The alternatives are too discouraging to contemplate. And the achievements, while sometimes diminished by humanity's own limitations, are steps in the right direction on the path that we must take.