

# COUNTRY-SPECIFIC MANDATE-HOLDERS: THE ROLE OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS IN CAMBODIA

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*As one of the longest-standing country mandates within the United Nations system of special procedures, the role of the Special Rapporteur on the Situation of Human Rights in Cambodia (formerly the Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia) is useful in demonstrating some of the practical limitations faced by country-specific special rapporteurs and representatives. This paper considers the scope and breadth of the Cambodian special procedures mandates and whether grave or systematic human rights violations have been effectively responded to, or whether many of the problems identified by successive mandate-holders have persisted. The paper goes on to address some of the practical limitations faced by country-specific rapporteurs, particularly in poorly resourced post-conflict societies and considers how those constraints might impede the fulfilment of a special procedures mandate. The paper finds that, despite their significant role in assisting Cambodia to establish the Extraordinary Chambers in the Courts of Cambodia (the Khmer Rouge Tribunal) and develop local laws to respond to a number of human rights concerns, many of the recommendations of successive mandate-holders have not been implemented in a meaningful way, or at all. Although a failure to promptly implement certain recommendations is to be expected in a post-conflict society, in many instances critical recommendations have not been acted upon, despite technical assistance and repeated reporting. This paper argues that the refinement of the mandate and the prompt escalation of outstanding recommendations within the UN may properly support the role of those mandate-holders and progress the objective of protecting and promoting human rights.*

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## I INTRODUCTION

In 1991, the *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict* and the *Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia* ('Agreements')<sup>1</sup> set out a roadmap for Cambodian society after the atrocities committed by the Khmer Rouge during the 1970s and the many years of internal and regional conflict that followed. The *Agreements* addressed the practicalities of settling the conflict, but also sought to address the expectations of state actors, non-state actors and much of the international community regarding human rights in Cambodia. In doing so, the *Agreements* contemplated that a special representative of the United Nations would be appointed to address human rights issues in what would, it was hoped, might be a successful post-conflict society.

More than twenty years after the *Agreements*, this paper considers the circumstances role of the Special Rapporteur on the Situation of Human Rights in Cambodia (formerly the Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia) and the extent to which the mandate has been fulfilled. Prior to 2008, a Special Representative of the Secretary-General for Human Rights in Cambodia had been appointed. The special procedures mandate in Cambodia was extended in 2008 at which time the Human Rights Council established the role of 'special rapporteur' to carry out the former functions of the Special Representative to the Secretary-General.<sup>2</sup> This did not substantively change the functions of the mandate, but merely reflected the standardisation of special procedure names.

The Cambodian mandate is one of the longest-standing country-specific mandates within the UN system of special procedures. As such, it is useful in demonstrating some of the practical limitations faced by country-specific mandate-holders. Of the three other country-specific mandates that have been in place for at least as long as that of Cambodia, it seems that there is either significant continued internal conflict in the relevant countries or very limited engagement with the UN.<sup>3</sup> Even though it has at times been a very

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<sup>1</sup> *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, 1663 UNTS 27 (signed and entered into force 23 October 1991); *Agreement Concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia*, 1663 UNTS 27 (signed and entered into force 23 October 1991).

<sup>2</sup> Human Rights Council, *Advisory Services and Technical Assistance for Cambodia: Resolution 9/15*, 9<sup>th</sup> sess, UN Doc A/HRC/Res/9/15 (18 September 2008) para 9.

<sup>3</sup> The mandate of the Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia was established pursuant to a resolution of the Commission on Human Rights: *Situation of Human Rights in Myanmar: Resolution 1992/58*, 48<sup>th</sup> sess, 52<sup>nd</sup> mtg, UN Doc E/CN.4/RES/1992/58 (3 March 1992). The Special Representative was denied access to the country for a period of four years from 2004 to 2008, despite repeated General Assembly resolutions urging the Government of Myanmar to provide access: see *Situation of Human Rights in Myanmar*, GA Res 61/232, UN GAOR, 61<sup>st</sup> sess, 84<sup>th</sup> plen mtg, Agenda Item 67(c), UN Doc A/RES/61/232 (13 March 2007) para 2; *Situation of Human Rights in Myanmar*, GA Res 63/245, UN GAOR, 63<sup>rd</sup> sess, 74<sup>th</sup> plen mtg, Agenda Item 64(c), UN Doc A/RES/63/245 (23 January 2009) para 4.

uncomfortable and/or antagonistic engagement, as will be discussed below, the Government of Cambodia has, to some degree, remained in contact with the special representatives and rapporteurs and other agents of the UN throughout the term of the mandate and has regularly facilitated missions to the country by successive mandate-holders.

When the UN Economic and Social Council ('ECOSOC') embarked upon the creation of special procedures, it was motivated by the need to respond to grave and systematic rights violations. As will be discussed below, the scope of mandates has expanded somewhat since then. As the Cambodian mandate has been in place for over 20 years, it is an opportune time to consider whether grave or systematic rights violations have been effectively responded to or whether many of the problems identified by the Special Representative at the outset have persisted with little evidence of change.

A substantial volume of recommendations has been made by successive mandate-holders since the early 1990s. This paper considers the effectiveness of the mandate by reference to the extent to which those recommendations have been responded to or implemented. It further considers whether the breadth of the mandate and the scope of the matters investigated by successive mandate-holders has meant that responding in a timely and effective manner to grave or systematic rights violations has been made more difficult. Finally, this paper addresses some of the practical limitations faced by special procedures mandate-holders, particularly in poorly resourced post-conflict societies and how those constraints might impede the fulfilment of a mandate.

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The mandate of the Independent Expert on the Situation of Human Rights in Somalia was established pursuant to: Commission on Human Rights, *Assistance to Somalia in the Field of Human Rights: Resolution 1993/86*, 49<sup>th</sup> sess, 67<sup>th</sup> mtg, UN Doc E/CN.4/RES/1993/86 (10 March 1993). For the duration of that mandate, there has been considerable military and political unrest in Somalia: see Ghanim Alnajjar, *Report of the Independent Expert Appointed by the Secretary-General on the Situation of Human Rights in Somalia*, UN GAOR, 7<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/7/26 (17 March 2008) 5 [6]; Ghanim Alnajjar, *Situation of Human Rights in Somalia: Report of the Independent Expert, Mr Ghanim Alnajjar, Submitted in accordance with Commission on Human Rights Resolution 2001/81*, UN ESCOR, 58<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2002/119 (14 January 2002) 3 (referring to 'political crises' and '[n]ew forces of opposition and fragmentation' within the country).

The mandate of the Special Rapporteur on Palestinian Territories Occupied Since 1967 was established pursuant to: Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine: Resolution 1993/2*, 49<sup>th</sup> sess, 29<sup>th</sup> mtg, UN Doc E/CN.4/RES/1993/2 (19 February 1993). In his final report as mandate-holder, Richard Falk notes the refusal of Israel to cooperate with the mandate, their denying him access to occupied Palestine for six years and their failing to respond to urgent appeals: Richard Falk, *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, UN GAOR, 25<sup>th</sup> sess, Agenda Item 7, UN Doc A/HRC/25/67 (13 January 2014) [2].

## II THE BASIS FOR INTERVENTION BY SPECIAL PROCEDURES MANDATE-HOLDERS

The passage of *Resolution 1235* by ECOSOC,<sup>4</sup> to which the special procedures mandates are referable, formed part of the UN's response to apartheid in South Africa. It authorised the then Commission on Human Rights (now the UN Human Rights Council) to examine 'gross violations of human rights'.<sup>5</sup> *Resolution 1235* states that ECOSOC

[d]ecides that the Commission on Human Rights may, in appropriate cases, and after careful consideration of the information thus made available to it ... make a thorough study of situations which reveal a consistent pattern of violations of human rights ...<sup>6</sup>

Following the adoption of *Resolution 1235*, the Commission on Human Rights began to appoint thematic and country-specific special representatives and rapporteurs who would be the means by which the Commission could assess such consistent patterns of human rights violations.

*Resolution 1235* draws on arts 55 and 56 of the *Charter of the United Nations* ('*UN Charter*'). Article 55(c) requires that the UN 'promote ... universal respect for, and observance of, human rights and fundamental freedoms' and art 56 obliges member states to act to achieve those purposes. Although art 55(c) is written in general terms in relation to the 'promotion' of human rights, commentators have considered that it nonetheless imposes a requirement that at least some types of human rights violations must be stopped.<sup>7</sup> This seems to be reflected in the language of *Resolution 1235*, which indicates that the types of human rights concerns that would be examined by the Commission on Human Rights would be 'gross human rights violations' or a 'consistent pattern of violations of human rights'.<sup>8</sup>

Although some tension exists between the UN's obligation to promote human rights as contemplated in art 55 of the *UN Charter* and the obligation of non-intervention in the domestic jurisdiction of states contemplated in art 2(7),<sup>9</sup> it appears to be generally accepted that the investigation of the matters contemplated in *Resolution 1235* does not offend art 2(7) on the basis that gross human rights violations are not matters within the domestic jurisdiction of states.<sup>10</sup>

<sup>4</sup> *Question of the Violation of Human Rights and Fundamental Freedoms, Including Policies of Racial Discrimination and Segregation and of Apartheid in All Countries, with Particular Reference to Colonial and Other Dependent Countries and Territories*, ESC Res 1235 (XLII), UN ESCOR, 42<sup>nd</sup> sess, 1479<sup>th</sup> plen mtg, Agenda Item 11, Supp No 1, UN Doc E/4393 (6 June 1967) ('*Resolution 1235*').

<sup>5</sup> *Ibid* para 2.

<sup>6</sup> *Ibid* para 3.

<sup>7</sup> Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *Human Rights Quarterly* 703, 709; Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia, 2005) 32–3.

<sup>8</sup> *Resolution 1235*, UN Doc E/4393, paras 2–3.

<sup>9</sup> Dominic McGoldrick, 'The Principle of Non-Intervention: Human Rights' in Vaughan Lowe and Colin Warbrick (eds), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst* (Routledge, 1994) 85, 88.

<sup>10</sup> Gerd Oberleitner, *Global Human Rights Institutions: Between Remedy and Ritual* (Polity Press, 2007) 53; Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 2<sup>nd</sup> ed, 2008) 151–2.

What constitutes a gross violation of human rights or a pattern of rights violations is relevant to the mandate of every special procedure, since it justifies the intervention of a mandate-holder into a country's domestic affairs. Commentators have considered that the objective of the *Resolution 1235* procedure is to identify consistent patterns of gross human rights violations rather than to provide a remedy for individual instances of wrongdoing.<sup>11</sup> A state that commits systematic violations incompatible with basic rights in the *Universal Declaration of Human Rights* ('UDHR')<sup>12</sup> is likely to be regarded as one that is engaged in gross human rights violations for the purposes of arts 55(c) and 56 of the *UN Charter* and *Resolution 1235*.<sup>13</sup> Although the phrase 'gross violations of human rights' is not defined, the provision for non-derogable rights in art 4(2) of the *International Covenant on Civil and Political Rights* ('ICCPR')<sup>14</sup> has led some to suggest that a breaches of one of those rights may be regarded as a gross violation. Moreover, the list of thematic mandates under the *Resolution 1235* procedure may also be an indicator of the kinds of matters to be taken to be gross rights violations.<sup>15</sup> The rights to life, equality as well as the rights not to be subjected to slavery, racial discrimination, torture or arbitrary imprisonment are examples of rights that are usually considered to be custom. The systematic breach of one of these rights is likely to be regarded as a gross violation.<sup>16</sup>

In the case of a country-specific mandate-holder, there is the potential for a very wide range of human rights violations to require his or her attention. This is particularly the case in relation to post-conflict societies in transition, where the monitoring role established by the UN may cover the overall human rights situation in the country, with no specific guidance as to the priority with which rights violations are to be responded to or reported on.<sup>17</sup> If the human rights concerns being investigated by a special representative or rapporteur address a broad range of concerns relating to human rights standards that are not sufficiently grave to fall within the scope of *Resolution 1235*, or which address individual acts of wrongdoing, then the special procedures mandate and intervention in the relevant country arguably lack legitimacy. It seems, however, that a mandate-holder may be authorised to intervene in a country on the basis of allegations and evidence of gross rights violations, but then address a broader

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<sup>11</sup> See Oberleitner, above n 10, 53; Nifosi, above n 7, 33.

<sup>12</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) ('UDHR').

<sup>13</sup> Bertrand G Ramcharan, *The Protection Roles of UN Human Rights Special Procedures* (Martinus Nijhoff, 2009) 42.

<sup>14</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

<sup>15</sup> Manfred Nowak, 'Human Rights "Conditionality" in relation to Entry to, and Full Participation in, the EU' in Philip Alston, Mara Bustelo and James Heenan (eds), *The EU and Human Rights* (Oxford University Press, 1999) 687, 695.

<sup>16</sup> Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford University Press, 2009) 69–70.

<sup>17</sup> Nifosi, above n 7, 56.

range of human rights concerns by virtue of the flexibility afforded to him or her in determining the scope of the mandate.<sup>18</sup>

The breadth of a mandate-holder's responsibilities is often remarked upon, with some suggesting that there was no 'master plan' in establishing the special procedures and that in practice they perform a series of roles including the protection and promotion of human rights, the study of a country's human rights situation, diplomacy, a form of prosecution and publicity.<sup>19</sup> The Vienna Conference on Human Rights in 1993 and the emphasis of the resulting *Vienna Declaration and Programme of Action* ('*Vienna Declaration*')<sup>20</sup> on economic, social and cultural rights may have been the catalyst for a broader scope of enquiry for mandate-holders and seems to have led to the establishment of several new mandates.<sup>21</sup> Mandate-holders participating in the Conference also issued a statement noting that 'the evolving collection of these [special] procedures and mechanisms now clearly constitutes and functions as a system of human rights protection'.<sup>22</sup> While this 'evolution' may mean that a wider range of rights considerations have been investigated, recommendations made and rights violations publicised, could it be at the expense of the original reason for appointing mandate-holders, namely the investigation of the most serious patterns of rights violations?

In the circumstances of a post-conflict state with few surviving judicial or civil society institutions, it is reasonable to expect that a wide range of rights violations would confront a mandate-holder who would do their best to respond to those matters. As will be discussed below, this often seems to be the experience of mandate-holders who do much to draw attention to the broad range of human rights concerns raised with them. Most mandates are now subject to an annual decision to renew, meaning that there is potentially a shorter time period for a mandate-holder to have an impact. For this reason, as well as a mandate-holder's limited resources, a more narrowly defined mandate may enable special representatives and rapporteurs to determine which rights violations to prioritise. In the case of a post-conflict society, there may be diplomatic sensitivities associated with the intervention of the UN and the appointment of a special procedures mandate-holder. Various other member states may also experience comparable human rights violations within their territories, but may not be subject to investigation by special procedures. Indeed, if the violation of human rights obligations in general was the basis for appointing a mandate-holder, then it would be difficult to think of a member state that should not be the subject of scrutiny. Broad reporting by a mandate-holder on a wide range of human rights concerns may make it more

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<sup>18</sup> See, eg, Joanna Naples-Mitchell, 'Perspectives of UN Special Rapporteurs on Their Role: Inherent Tensions and Unique Contributions to Human Rights' (2011) 15 *International Journal of Human Rights* 232, 234.

<sup>19</sup> Oberleitner, above n 10, 57–9.

<sup>20</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (12 July 1993).

<sup>21</sup> Ted Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights* (Brookings Institution Press, 2012) 14.

<sup>22</sup> *Joint Declaration of the Independent Experts Responsible for the Special Procedures for the Protection of Human Rights*, UN GAOR, Agenda Items 9, 10, 11 and 12, UN Doc A/CONF.157/9 (18 June 1993).

difficult for the UN and its agents to justify intervention in one state and not others. This may jeopardise the continued confidence of the relevant government or ruling authority and, in turn, the stability and effectiveness of the UN special procedures as a whole. For instance, the relationship between various mandate-holders in Cambodia and the Cambodian Government became quite strained at times. This will be commented on further in Parts III(E) and IV(C).

The appointment of both country-specific and thematic mandate-holders has continued since the Commission on Human Rights ceased to exist and the Human Rights Council ('HRC') was established in 2006, though there have been some changes in process and emphasis since the creation of the HRC. For instance, country-specific rapporteurs are now appointed on an annual basis and the mandate reconsidered at the end of that time. Increasingly, thematic mandates have been established and the HRC has now established the Universal Periodic Review ('UPR') process. The UPR goes some way to ensuring that all UN member states are subject to a review of the fulfilment of their human rights obligations, while also responding to the concerns of some states about the practice of 'naming and shaming' — a practice associated with country-specific special procedures. However, since country-specific special procedures remain in place in addition to the UPR, it is arguable that they should be concerned less with a state's broad compliance with its human rights obligations and more with the most serious rights abuses that require immediate action.

The scope of rights to be investigated by a mandate-holder is also of importance because his or her reports will be considered by the HRC and may also be considered by the UN General Assembly ('UNGA') or even by the Security Council,<sup>23</sup> thus potentially influencing the development of human rights practices within the UN. For example, it has been observed by commentators that the reporting of mandate-holders may have impacted upon the future strategy of the Commission on Human Rights and had the potential to prompt further action by it.<sup>24</sup> There has also been the suggestion that reports of country-specific and thematic special representatives and rapporteurs accepted by organs of the UN and relied upon in the UN's response to gross rights violations may constitute evidence of customary international law.<sup>25</sup> It has further been suggested that the status of thematic mandate-holders may, if accompanied by *opinio juris*, enable the mandate-holder to affect the development of customary international law.<sup>26</sup>

<sup>23</sup> For instance, the then President of the Security Council noted that the Security Council considered and relied upon reports of a special rapporteur in relation to the human rights situation in Iraq: *Note by the President of the Security Council*, UN SCOR, 47<sup>th</sup> sess, 3059<sup>th</sup> mtg, UN Doc S/23699 (11 March 1992). Also by way of example, the Special Rapporteur on the Protection and Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism has, as part of his or her mandate, a requirement to maintain regular dialogue with a committee of the Security Council: Commission on Human Rights, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Resolution 2005/80*, 61<sup>st</sup> sess, 60<sup>th</sup> mtg, UN Doc E/CN.4/RES/2005/80 (21 April 2005) para 14(e).

<sup>24</sup> Nifosi, above n 7, 58–9.

<sup>25</sup> Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1989) 12 *Australian Year Book of International Law* 82, 98.

<sup>26</sup> Beate Rudolf, 'The Thematic Rapporteurs and Working Groups of the United Nations Commission on Human Rights' (2000) 4 *Max Planck Yearbook of United Nations Law* 289, 297. Note that it has not been suggested in the same commentary that this would apply to country-specific mandate-holders.

Although this may not be the case in relation to a country-specific mandate-holder, his or her reports are still likely to influence the activities of the UN in the ways described above. It may also be the case that recommendations of such mandate-holders are either formally endorsed by the UNGA or are noted favourably and become part of the practice of the UN and other mandate-holders. At the very least, it is likely that the views of such mandate-holders on human rights standards will be influential.

In these circumstances, one might expect that the UN would benefit from greater consistency across the reports of mandate-holders and from confining the scope of the role to particular rights violations. It may be appropriate for a mandate-holder to provide an initial report to the HRC and the mandate could then be refined so as to address those human rights concerns that it considers constitute gross violations of human rights. Under the current arrangements, an individual representative or rapporteur has a relatively unchecked opportunity to report on an extremely wide range of human rights matters and potentially elevate a variety of matters to the status of gross or systematic human rights violations within organs of the UN.

### III MANDATE OF THE CAMBODIAN SPECIAL REPRESENTATIVE AND ITS EFFECTIVENESS

The mandate of the Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia was established pursuant to the *Agreements*,<sup>27</sup> together with the Commission on Human Rights' *Resolution 1993/6*.<sup>28</sup> The mandate-holder is appointed by the Secretary-General. Five mandate-holders have been appointed in the 20 years since the position was established and all of them have brought a particular focus to their reports and recommendations, influenced by the prevailing circumstances of the country during their tenures. Many of the recommendations and findings made by the mandate-holders for Cambodia have been concerned with establishing a framework for human rights protection within the country and with reporting on widespread deficiencies in relation to human rights.

While the *Agreements* did not set out much detail on the scope of the Cambodian mandate, it is articulated slightly more clearly in *Resolution 1993/6*:

- (a) To maintain contact with the Government and people of Cambodia;
- (b) To guide and coordinate the United Nations human rights presence in Cambodia;
- (c) To assist the Government in the promotion and protection of human rights;
- (d) To report to the General Assembly at its forty-eighth session and the Commission on Human Rights at its fiftieth session under the agenda item entitled 'Advisory services in the field of human rights'.<sup>29</sup>

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<sup>27</sup> *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, 1663 UNTS 27 (signed and entered into force 23 October 1991) art 17; *Agreement concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia*, 1663 UNTS 27 (signed and entered into force 23 October 1991) art 3.

<sup>28</sup> Commission on Human Rights, *Situation of Human Rights in Cambodia: Resolution 1993/6*, 49<sup>th</sup> sess, 29<sup>th</sup> mtg, UN Doc E/CN.4/RES/1993/6 (19 February 1993) ('*Resolution 1993/6*').

<sup>29</sup> *Ibid* para 6.



*Resolution 1993/6* merely refers to the ‘promotion and protection of human rights’ without elaboration.<sup>30</sup> This gives considerable discretion to the mandate-holder to determine what he or she investigates and, from the reports of various occupiers of the role since 1993, it is not clear that mandate-holders consider all of the matters being reported on as being of the gravity that *Resolution 1235* and arts 55 and 56 of the *UN Charter* seem to expect. This rather broad discretion seems to be a feature of many special procedures mandates.<sup>31</sup> Indeed, the first Cambodian mandate-holder, the Hon Michael Kirby, has observed that the language of the mandate did not reflect the sense of urgency of the *Agreements* and that ‘[t]he terms of the mandate were seen by some observers as weakening the Office of the [Special Representative] from the outset’.<sup>32</sup>

It is difficult to settle upon the yardstick by which effectiveness in carrying out a special procedures mandate might be measured. Recognition and implementation of human rights obligations can be incremental in any society, let alone one facing financial and resource limitations and in which a major conflict has only recently ended. The difficulty in evaluating the effectiveness of human rights work is not confined to the role of special procedures. As others have observed, it is difficult to demonstrate a causal connection between improvements in a country and the work of the UN and, even if improvements do occur, they are likely to be attributed to internal factors in a country rather than external actors.<sup>33</sup>

Moreover, by basing the measurement of effectiveness on responses to recommendations made by mandate-holders, recognition is not given to the work which is undoubtedly done by the mandate-holder and his or her staff in supporting non-government organisations (‘NGOs’), local human rights groups and civil society actors in general.<sup>34</sup> That this is very valuable work is not disputed, but if it is to be regarded as a key part of the role of a mandate-holder, then it should be made clear at the outset when articulating the scope of the mandate so that the relevant host government may understand that this is a function of the role.

While their often expansive enquiries and recommendations may shed light on a variety of human rights violations that the international community might not otherwise be aware of, those recommendations may not ultimately be acted upon by the relevant state or may not be given a sufficient degree of emphasis in the resolutions and deliberations of organs of the UN. Some have taken the view that there is an inherent value in mandate-holders producing a record of alleged human rights violations even if they are not immediately acted upon and that the mandate-holder provides invaluable support to other human rights organisations

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<sup>30</sup> *Ibid* para 2.

<sup>31</sup> Naples-Mitchell, above n 18, 234.

<sup>32</sup> Michael Kirby, ‘UN Special Procedures — Reflections on the Office of UN Special Representative for Human Rights in Cambodia’ (2010) 11 *Melbourne Journal of International Law* 491, 496.

<sup>33</sup> Philip Alston, ‘Hobbling the Monitors: Should UN Human Rights Monitors be Accountable?’ (2011) 52 *Harvard International Law Journal* 563, 574.

<sup>34</sup> Mandate-holders and commentators have reflected upon these functions of the role: see, eg, Kirby, ‘Reflections on the Office of UN Special Representative for Human Rights in Cambodia’, above n 32, 507; Piccone, *Catalysts for Change*, above n 21, 23.

and NGOs within the relevant state.<sup>35</sup> This author has no doubt that these have the potential to be worthy functions, but questions whether they should be functions of a special procedures mandate-holder operating in a post-conflict country. Striving to respond to a wide range of human rights concerns may be at the expense of responding effectively and swiftly to gross rights violations, which is critical to the capacity of a state to move on from conflict and establish a human rights framework as part of a process of state-building.

Commentators have noted that attempts have regularly been made by certain states to limit the intervention of country-specific representatives and rapporteurs and, in some instances, mandates have been resisted by particular states through their failure to invite special representatives and rapporteurs to conduct missions, thus frustrating the mandate.<sup>36</sup> In other cases, such as the Cambodian mandate, the relationship between the relevant government and the mandate-holder has been vexed at times (see below).<sup>37</sup> For example, it is somewhat troubling that in the final report of the most recent mandate-holder, the observation is made that the Cambodian Government did not appear to properly comprehend the work of the Special Rapporteur or the mandate itself.<sup>38</sup> As will be seen below, the scope of the recommendations made throughout the term of the mandate were very broad and, at times, the priority given to particular recommendations was not clear on the face of the reports of the mandate-holders or Secretary-General. Indeed, it seems that it was only in the latter years of the mandate that mandate-holders confined themselves to three or four key areas of concern.

A great many of the recommendations of successive mandate-holders were not responded to comprehensively or, in some instances, at all, by the Cambodian Government, as will be discussed in more detail below. In a number of instances, the UNGA did not satisfactorily facilitate recommendations being implemented.<sup>39</sup> If the scope of a mandate-holder's enquiries were confined to key human rights concerns and they were provided with greater guidance and direction from the UN, there may be fewer tensions over issues of sovereignty and the scope of the role may be made clearer to the governments of states the subject of investigation.

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<sup>35</sup> Kirby, 'Reflections on the Office of UN Special Representative for Human Rights in Cambodia', above n 32, 506–7, 509.

<sup>36</sup> Alston, 'Hobbling the Monitors', above n 33, 573.

<sup>37</sup> See, eg, Yash Ghai, Special Representative of the UN Secretary-General for Human Rights in Cambodia, 'Cambodia: The Statement by Professor Yash Ghai' (Speech delivered at the 9<sup>th</sup> Session of the Human Rights Council, 23 September 2008) <<http://www.humanrights.asia/news/forwarded-news/AHRC-FST-062-2008/?searchterm=yash%20ghai>>.

<sup>38</sup> See Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, Surya P Subedi, UN GAOR, 24<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/24/36 (5 August 2013) [63].

<sup>39</sup> See Michael Kirby, *Report of the Special Representative of the Secretary-General on the Situation of Human Rights in Cambodia*, Mr Michael Kirby, Submitted in accordance with Commission Resolution 1995/55, UN ESCOR, 52<sup>nd</sup> sess, Provisional Agenda Item 17, UN Doc E/CN.4/1996/93 (26 February 1996) [96]–[97] ('Kirby's Report on the Situation of Human Rights in Cambodia 1996'). See also Surya P Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs' (2011) 33 *Human Rights Quarterly* 201, 216–17.

If the role of mandate-holders were confined solely to investigating and reporting on instances of gross or systematic human rights violations, the effectiveness of mandate-holders could, to some extent, be referable to whether such rights violations had ceased or been reduced in response to their recommendations and actions. At present, making such a causal connection would be difficult given the breadth of recommendations made by mandate-holders across a broad range of human rights issues. Nonetheless, this paper looks at the recommendations of each of the holders of the Cambodian mandate since its establishment and considers the responses of the Cambodian Government and organs of the UN to those recommendations. In addressing the effectiveness of the existing mandate, it looks at the extent to which recommendations have been expressly supported and/or implemented and the period of time taken to implement such recommendations. It is important to note that observations made about the effectiveness of the mandate should not be regarded as observations about the mandate-holders themselves, particularly in view of the limitations faced by them in their roles (see below).

#### A *The Hon Michael Kirby — 1993 to 1996*

While not specifically reflecting on whether the reported human rights concerns amounted to gross violations of human rights, Kirby's first mission report addresses a wide range of issues described as requiring urgent attention. These include additional funding for hospitals and schools, measures to support the justice system and protect civil rights and additional funding for the protection of cultural heritage.<sup>40</sup> The report refers to recommended actions to support both the economic and social rights of the Cambodian population, as well as civil and political rights.<sup>41</sup> Though important in putting other rights violations in Cambodia into context, shedding light on economic and social rights does not seem to reflect the limited basis upon which UN special procedures were intended to apply to the affairs of a state. After the *Vienna Declaration*, thematic mandates concerning the implementation of economic and social rights were established and some consideration was given, within the UN, to the prospect that violation of certain economic and social rights might constitute a gross or systematic rights violation.<sup>42</sup> It is also apparent that economic, social and cultural rights were matters that were regularly raised with Kirby during his country visits and would no doubt have been difficult to avoid reporting on.<sup>43</sup> Despite this, since economic and social rights are not widely regarded as being custom<sup>44</sup> the basis upon which country-specific special

<sup>40</sup> Michael Kirby, *Report of the Special Representative of the Secretary-General, Mr Michael Kirby, on the Situation of Human Rights in Cambodia Submitted pursuant to Commission on Human Rights Resolution 1993/6 — Addendum*, UN ESCOR, 50<sup>th</sup> sess, Agenda Item 19, UN Doc E/CN.4/1994/73/Add.1 (21 February 1994) [12] ('*Kirby's Report on the Situation of Human Rights in Cambodia 1994*').

<sup>41</sup> See, eg, *ibid* [13]–[25], [26]–[55].

<sup>42</sup> Stanislav Chernichenko, *Definition of Gross and Large-Scale Violations of Human Rights as an International Crime: Working Paper Submitted in accordance with Sub-Commission Decision 1992/109*, UN ESCOR, 45<sup>th</sup> sess, Provisional Agenda Item 4, UN Doc E/CN.4/Sub.2/1993/10 (8 June 1993) [14].

<sup>43</sup> For a discussion of economic, social and cultural rights, see Kirby, 'Reflections on the Office of UN Special Representative for Human Rights in Cambodia', above n 32, 497.

<sup>44</sup> Kälin and Künzli, above n 16, 70.

representatives and rapporteurs should report on those matters is not clear. Nonetheless, the recommendations contained in the Special Representative's 1994 report were considered and endorsed — in full — by the UNGA in *Resolution 49/199*.<sup>45</sup> *Resolution 49/199* noted that the Special Representative had reported on serious human rights violations, but did not differentiate between the types of rights reported on or discuss whether there was a need to respond to different types of rights violations in priority to others.<sup>46</sup> That is, it did not draw a distinction between gross violations of human rights and other human rights concerns addressed by the Special Representative.

Guidance from other organs of the UN on this issue is of some importance. As will be discussed below in relation to Cambodia, resource limitations have been referred to by both the Cambodian Government and by mandate-holders as impediments to properly implementing recommendations. In view of this, putting forward competing recommendations relating to the implementation of economic and social rights may be poorly received by a host government facing genuine fiscal constraints. This risks the credibility of the mandate and the capacity of mandate-holders to make recommendations that will be implemented.

The Special Representative's second and third missions, and recommendations arising from those missions, were reflected upon in a report by the Secretary-General to the UNGA.<sup>47</sup> The Secretary-General reviewed the action taken on the Special Representative's first report and, in respect of the right to health, education, cultural rights, judicial independence and the right to a fair and open trial, noted that there had been no significant change since the Special Representative's previous report.<sup>48</sup> The circumstances reported on in relation to judicial independence and the rule of law were also said to face increasing challenges.<sup>49</sup> The Secretary-General's report noted some positive changes in the prison system, though reflects that the overall circumstances remained inadequate in respect of access to defenders and NGOs and conditions of detention.<sup>50</sup> The report also referred to favourable developments in relation to the development of a draft press law.<sup>51</sup>

The Secretary-General's report on the second and third missions of the Special Representative made a series of observations and recommendations regarding the prosecution of perpetrators of murder, torture, rape and other serious human rights violations during the 1970s and subsequent periods of conflict. Similar observations were made in successive reports of mandate-holders up until 2005. These were also the subject of specific and increasingly emphatic comment by the UNGA, such as in *Resolution 52/135*,

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<sup>45</sup> *Situation of Human Rights in Cambodia*, GA Res 49/199, UN GAOR, 49<sup>th</sup> sess, 94<sup>th</sup> plen mtg, Agenda Item 100(c), UN Doc A/RES/49/199 (13 March 1995) para 5 ('*Resolution 49/199*').

<sup>46</sup> *Ibid* para 10.

<sup>47</sup> *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*, UN GAOR, 49<sup>th</sup> sess, Agenda Item 100(c), UN Doc A/49/635 (3 November 1994).

<sup>48</sup> *Ibid* [47]–[61].

<sup>49</sup> *Ibid* [51].

<sup>50</sup> *Ibid* [55].

<sup>51</sup> *Ibid* [56].

which noted ‘with concern the lack of response by the Government of Cambodia to several of the recommendations contained in the previous reports of the Special Representative, and urges that it respond as soon as possible’.<sup>52</sup> The Special Representative, the Commission on Human Rights and the UNGA continued to express grave concern about the failure of the Cambodian Government to ensure that those responsible for the most serious human rights violations under the Khmer Rouge were dealt with under criminal law.<sup>53</sup> Ultimately, the continued focus on this issue by the UN and successive Special Representatives led to the establishment of the Khmer Rouge Tribunal,<sup>54</sup> but this did not occur quickly. In the meantime, a number of mandate-holders reported on many of the same concerns about grave human rights violations (as will be discussed below), which were in turn referred to in UNGA resolutions.<sup>55</sup>

In the Secretary-General’s report of October 1995, the implementation of recommendations from previous reports was assessed and it was noted that

most of the recommendations made in earlier reports remain to be implemented. In many cases, neither the Special Representative nor the Centre for Human Rights is aware of the action, if any, which the Government has taken. In other cases, implementation of the recommendations require resources — financial, technical and human — which are not necessarily available to the Government (health, education, improvement of physical conditions of prisons etc).<sup>56</sup>

The Secretary-General took care to emphasise that the effects of war, genocide, the complete breakdown of a society and Cambodia’s international isolation could not be easily or quickly remedied and that a full evaluation of the implementation of recommendations was required.<sup>57</sup> Despite all of this, the Secretary-General also noted that ‘the failure of the Government of Cambodia to acknowledge and to respond to the recommendations and the reports of the Special Representative is less than satisfactory’.<sup>58</sup>

Enhanced procedures for consultation with the Cambodian Government were put in place within the UN in the hope that greater and more prompt attention would be given to recommendations. Kirby continued to make recommendations on a wide range of rights concerns. Among these were concerns about the operation of the judiciary, the effective impunity granted to members of the civil service against criminal prosecution and the ill treatment of opposition members

<sup>52</sup> *Situation of Human Rights in Cambodia*, GA Res 52/135, UN GAOR, 52<sup>nd</sup> sess, 70<sup>th</sup> plen mtg, Agenda Item 112(b), UN Doc A/RES/52/135 (27 February 1998) para 4 (*‘Resolution 52/135’*).

<sup>53</sup> See, eg, *Situation of Human Rights in Cambodia*, GA Res 53/145, UN GAOR, 53<sup>rd</sup> sess, 85<sup>th</sup> plen mtg, Agenda Item 110(b), UN Doc A/RES/53/145 (8 March 1999) para 16.

<sup>54</sup> The Extraordinary Chambers in the Courts of Cambodia was established by: *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, signed 6 June 2003, 2329 UNTS 117 (entered into force 29 April 2005).

<sup>55</sup> See, eg, *Resolution 52/135*, UN Doc A/RES/52/135; *Situation of Human Rights in Cambodia*, GA Res 54/171, UN GAOR, 54<sup>th</sup> sess, 83<sup>rd</sup> plen mtg, Agenda Item 116(b), UN Doc A/RES/54/171 (15 February 2000).

<sup>56</sup> *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*, UN GAOR, 50<sup>th</sup> sess, Agenda Item 112(b), UN Doc A/50/681 (26 October 1995) [13].

<sup>57</sup> *Ibid* [13]–[14].

<sup>58</sup> *Ibid* [13].

of parliament, among other things.<sup>59</sup> As will be apparent from later recommendations and observations of each of the mandate-holders to follow Kirby, these matters (among others) have been the subject of longstanding recommendations without yielding a satisfactory response.

By the time of his final report, the schedule of cumulative recommendations made by the Special Representative during his term and the evaluation of their implementation had reached some 54 pages in length. He noted that

in some areas (eg right to health, culture, education and reporting obligations) there has been good progress and appropriate follow up. In other areas, such as judicial independence and the rule of law, police and military, prisons and other custodial institutions, and the rights of vulnerable groups, implementation and follow up have been much more limited. In some areas, such as the Press Law, the recommendations of the Special Representative were, in important respects, not followed.<sup>60</sup>

Kirby goes on to reflect that administrative recommendations made to the UN itself to alleviate some difficulties experienced by him had also largely not been followed.

Although at the time of his 1996 report both the mandate and the *Agreements* were still only relatively recently established, the failure of the Cambodian Government to respond to a wide range of important recommendations made by the Special Representative was troubling and raises questions about the construction of the mandate itself. It transpired that this was not confined to the term of the first mandate-holder. At that time, it may have been prudent for the HRC or other organs of the UN to reflect more closely upon ways in which the mandate could be refined so as to give greater emphasis and priority to a limited range of the most critical recommendations. The resource limitations facing Cambodia and the difficulties faced by it during its post-conflict reconstruction are well understood but, in view of such limited progress against a large volume of recommendations, it may have been beneficial to confine the mandate to certain key matters and then seek to progress them as matters of priority. This seemed to occur later and, in particular, during the most recent term of the mandate.

The *Agreements* provided that Cambodians are entitled to the rights protections afforded by the *UDHR* and other international instruments.<sup>61</sup> Article 19 of the *UDHR* contemplates freedom of expression, as does art 19 of the *ICCPR*, to which Cambodia became a signatory in 1992. It is in relation to these rights that it is not immediately clear what the scope of the Special Representative's (now Special Rapporteur's) mandate should be. While Cambodia, like other signatories, is expected to comply with treaty obligations to which it has agreed to be bound, it is another matter to make all breaches of international instruments a matter for reporting by a special procedures

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<sup>59</sup> *Kirby's Report on the Situation of Human Rights in Cambodia 1996*, UN Doc E/CN.4/1996/93, [35], [51].

<sup>60</sup> *Ibid* [103].

<sup>61</sup> *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, 1663 UNTS 27 (signed and entered into force 23 October 1991) art 15; *Agreement concerning the Sovereignty, Independence, Territorial Integrity and Inviolability, Neutrality and National Unity of Cambodia*, 1663 UNTS 27 (signed and entered into force 23 October 1991) art 3.

mandate-holder. At para 52 of the 1994 report, for instance, Kirby discusses laws for the regulation of freedom of expression in relation to the media and remarks that they should be

compatible with ... applicable international human rights principles and should ensure continuance of the greatest possible freedom of expression compatible with the respect for other human rights (privacy, reputation, freedom from incitement to racial hatred, etc) and with other limitations reasonably imposed by law and compatible with the necessities of a democratic society.<sup>62</sup>

Though this statement does address potential contraventions of treaty obligations, it seems to go somewhat further than protecting against gross violations of human rights.

Acknowledging the recommendations in *Kirby's Report on the Situation of Human Rights in Cambodia 1994*, the UNGA stated that it '[e]ncourages the Government of Cambodia to enact a press law which is consistent with international standards and which promotes press responsibility while protecting freedom of expression'.<sup>63</sup> The Special Representative's report and *Resolution 49/199* seem to consider that there are clearly established standards in relation to matters such as press laws and freedom of expression.<sup>64</sup> The UNGA does not make it clear, however, what is meant by 'international standards' in relation to press laws. Nevertheless, by the time of the mandate-holder's February 1995 report, a draft press law had been proposed. At this time, Kirby raised concerns about the inclusion in those laws of provisions for broad criminal sanctions in relation to 'civil defamation and threats to national security or national institutions'.<sup>65</sup>

The link between a free press and a functioning democracy<sup>66</sup> may present a compelling reason for trying to ensure robust media laws in a post-conflict society. It does, however, seem to go beyond the original rationale for the UN special procedures, namely investigating and reporting on gross and systematic rights violations. Having ratified the *ICCPR* and the *Agreements*, it might have been expected that the rights protections of the *UDHR* would be observed in Cambodia and that a right of freedom of expression and of the media should have been observed. However, similar deficiencies in rights protections are likely to exist in states that are not the subject of intervention by a special procedures mandate holder. The extent to which a mandate-holder should prioritise recommendations on matters such as this is questionable, particularly

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<sup>62</sup> *Kirby's Report on the Situation of Human Rights in Cambodia 1994*, UN Doc E/CN.4/1994/73/Add.1, [52].

<sup>63</sup> *Resolution 49/199*, UN Doc A/RES/49/199, para 16.

<sup>64</sup> See *ibid*; *Kirby's Report on the Situation of Human Rights in Cambodia 1994*, UN Doc E/CN.4/1994/73/Add.1, [52]–[54].

<sup>65</sup> Michael Kirby, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Michael Kirby, Submitted Pursuant to Commission Resolution 1994/61 — Addendum*, UN ESCOR, 51<sup>st</sup> sess, Provisional Agenda Item 21, UN Doc E/CN.4/1995/87/Add.1 (13 February 1995) [32].

<sup>66</sup> See Hilary Charlesworth, 'Kirby Lecture in International Law: Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict' (2010) 29 *Australian Yearbook of International Law* 1. Charlesworth suggests that '[o]ne strategy to develop a local human rights culture is to support a free media': at 15.

when it ultimately took more than a decade for the Khmer Rouge Tribunal to be established and manifestly gross human rights violations to be acted upon.

In the case of Cambodia and human rights norms relating to freedom of expression and freedom of the press, it seems that the mandate-holder's repeated recommendations did move the Cambodian Government some way towards putting in place improved media laws,<sup>67</sup> though those laws were still the subject of human rights concerns.<sup>68</sup> Those recommendations were also endorsed in resolutions of the UNGA.<sup>69</sup> Thus, it can be seen that a mandate-holder can make a significant contribution to the development of human rights in a post-conflict society such as Cambodia while also influencing future recommendations of other special rapporteurs/special representatives and the position of the UNGA regarding particular human rights norms. But is this an appropriate role for a mandate-holder and is this what had been anticipated when the system of UN special procedures was put in place?

### B *Mr Thomas Hammarberg — 1996 to 2000*

The recommendations of Thomas Hammarberg initially concerned four principal areas. These were in respect of the rights of the child, rights violated by the use of land mines, the rule of law and administration of justice and the exercise of political rights, including freedom of expression.<sup>70</sup> During his subsequent missions to Cambodia, the scope of his enquiries broadened to include observations on economic rights and the right to education, though these were not given the same degree of emphasis in the remarks of the Secretary-General and UN resolutions in response.<sup>71</sup>

The recommendations made in Hammarberg's first report in late 1996<sup>72</sup> drew a swift and seemingly constructive response from the Government of Cambodia.<sup>73</sup> However, the response does refer to material limitations as a reason for the Government's inability to fully or promptly implement a response to

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<sup>67</sup> See, eg, *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*, UN GAOR, 50<sup>th</sup> sess, Agenda Item 112(b), UN Doc A/50/681 (26 October 1995) [45].

<sup>68</sup> *Ibid.*

<sup>69</sup> *Resolution 52/135*, UN Doc A/Res/52/135, paras 9–10, 14; *Situation of Human Rights in Cambodia*, GA Res 50/178, UN GAOR, 50<sup>th</sup> sess, 99<sup>th</sup> plen mtg, Agenda Item 112(b), UN Doc A/RES/50/178 (28 February 1996) para 5.

<sup>70</sup> 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*, UN GAOR, 51<sup>st</sup> sess, Agenda Item 110(b), UN Doc A/51/453 (4 October 1996).

<sup>71</sup> *Resolution 52/135*, UN Doc A/Res/52/135, paras 4–6, 8–9, 22.

<sup>72</sup> *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*, UN GAOR, 51<sup>st</sup> sess, Agenda Item 110(b), UN Doc A/51/453 (4 October 1996).

<sup>73</sup> *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 — Addendum: Comments and Clarifications Submitted on 17 September 1996 by the Government of Cambodia on the Report of the Secretary-General on the Human Rights Situation in Cambodia*, UN GAOR, 51<sup>st</sup> sess, Agenda Item 110(b), UN Doc A/51/453/Add.1 (29 October 1996) ('*Comments and Clarifications by the Government of Cambodia*').



certain recommendations.<sup>74</sup> Several mandate-holders have expressed frustration that the responses of the Cambodian Government to their recommendations have not yielded substantive, practical outcomes in Cambodia. A failure to take steps to implement some recommendations might be expected, particularly in resource-limited post-conflict societies. However, without meaningful endeavours to implement key recommendations, or other recommendations of successive mandate-holders over many years, the effectiveness of the mandate is called into question. For instance, in his report of 31 January 1997, the Special Representative found that, in respect of the rights of the child, a local criminal law enacted to respond to incidences of kidnapping, trafficking, sale and exploitation of humans had not been enforced and had not resulted in a single conviction, despite it having been in place for more than a year<sup>75</sup> and despite it being the subject of Cambodia's written response to Hammarberg's recommendations.<sup>76</sup> Similar observations have been made by other mandate-holders.<sup>77</sup>

The Secretary-General's report on the Special Representative's third mission notes that Hammarberg had expressed concern about the provision of structural impunity to the military by virtue of the operation of the *Law on the General Status of Civil Servants of the Kingdom of Cambodia 1994* (Cambodia) ('*Law on Civil Servants*') and also referred to evidence of widespread corruption being left unchecked under that arrangement.<sup>78</sup> In relation to the Special Representative's third and fifth missions, the Secretary-General's report refers to allegations of torture by police and extrajudicial executions by military personnel of persons held in custody.<sup>79</sup> However, it seemed that some progress was being made on these issues when the Second Prime Minister of Cambodia agreed that investigation of these matters was required.<sup>80</sup> The report also noted some progress by police in combating child prostitution and trafficking and further engagement with the Government on this issue, at that time at least.<sup>81</sup>

On the question of impunity and instances of political violence, however, matters escalated at this time. The Secretary-General's report refers to the events of 5–6 July 1997 which saw widespread political violence and what the Special

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<sup>74</sup> Ibid [20], [30].

<sup>75</sup> Thomas Hammarberg, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Thomas Hammarberg, Submitted in accordance with Commission Resolution 1996/54*, UN ESCOR, 53<sup>rd</sup> sess, Provisional Agenda Item 18, UN Doc E/CN.4/1997/85 (31 January 1997) [43]–[53].

<sup>76</sup> *Comments and Clarifications by the Government of Cambodia*, UN Doc A/51/453/Add.1, [6].

<sup>77</sup> See, eg, Peter Leuprecht, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Peter Leuprecht, Submitted in accordance with Resolution 2001/82*, UN ESCOR, 58<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2002/118 (28 December 2001) [38]; *Situation of Human Rights in Cambodia: Note by the Secretary-General*, UN GAOR, 57<sup>th</sup> sess, Agenda Item 109(c), UN Doc A/57/230 (27 September 2002) [19].

<sup>78</sup> *Situation of Human Rights in Cambodia — Report of the Secretary-General*, UN GAOR, 52<sup>nd</sup> sess, Agenda Item 112(b), UN Doc A/52/489 (17 October 1997) [15].

<sup>79</sup> Ibid [17], [28].

<sup>80</sup> Ibid [29].

<sup>81</sup> Ibid [25].

Representative had described in his statement as a coup d'état.<sup>82</sup> In response, the Secretary-General noted the events described by the mandate-holder and made a particularly strong statement calling for the investigation of political assassinations and violence and for an end to the widespread instances of impunity.<sup>83</sup> In turn, the Commission on Human Rights and the UNGA each expressed their concern about these matters by resolution.<sup>84</sup>

In February 1998, Hammarberg produced a summary of the matters previously reported on and an evaluation of the extent to which recommendations of the mandate-holders had been responded to or implemented by the Cambodian Government.<sup>85</sup> The report noted that no action had been taken to amend the *Law on Civil Servants* to combat impunity and, most seriously, that arrests, prosecutions and effective investigations had not proceeded in relation to serious political violence.<sup>86</sup> Indeed, it goes on to say that

[t]he call by the General Assembly, the High Commissioner for Human Rights and the Special Representative for serious investigations into the executions in July/August 1997 has not resulted in a comprehensive inquiry into these killings or in prosecutions in the individual cases.<sup>87</sup>

In his report of 17 September 1998, which concerned the eighth to tenth missions of the Special Representative, the Secretary-General noted that the UNGA had been particularly concerned about the conduct of national elections, the question of impunity, the independence of the judiciary, the use of torture, ill treatment of prisoners and child prostitution and trafficking.<sup>88</sup> Indeed, in *Resolution 52/135*, the UNGA noted its 'grave' and 'serious concern' about a range of rights violations including extrajudicial killings, torture, corruption in the judicial and prison systems, impunity, the use of land mines and the failure of the Cambodian Government to respond satisfactorily to previous recommendations.<sup>89</sup> Given the hierarchy of terms used in UN resolutions and statements to emphasise the relative importance of matters under consideration,<sup>90</sup> it is notable that the Secretary-General does not give the same degree of emphasis to the mandate-holder's observations on economic rights or the right to education, and *Resolution 52/135* does not refer to rights violations in these areas.

The report goes on to discuss the implementation of the Special Representative's existing recommendations. Once again, amendments to the *Law*

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<sup>82</sup> Ibid [40]–[41].

<sup>83</sup> Ibid [44].

<sup>84</sup> Commission on Human Rights, *Situation of Human Rights in Cambodia: Resolution 1997/49*, 53<sup>rd</sup> sess, 58<sup>th</sup> mtg, UN Doc E/CN.4/RES/1997/49 (11 April 1997); *Resolution 52/135*, UN Doc A/Res/52/135.

<sup>85</sup> Thomas Hammarberg, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Thomas Hammarberg, Submitted in accordance with Commission Resolution 1997/49*, UN ESCOR, 54<sup>th</sup> sess, Provisional Agenda Item 17, UN Doc E/CN.4/1998/95 (20 February 1998) [154]–[167].

<sup>86</sup> Ibid [156]–[157].

<sup>87</sup> Ibid [158].

<sup>88</sup> *Situation of Human Rights in Cambodia — Report of the Secretary-General*, UN GAOR, 53<sup>rd</sup> sess, Agenda Item 110(b), UN Doc A/53/400 (17 September 1998) [3]–[4].

<sup>89</sup> *Resolution 52/135*, UN Doc A/Res/52/135, paras 4–6, 8–9, 22.

<sup>90</sup> See, eg, Tomuschat, above n 10, 150.

on *Civil Servants*, which had been recommended by the Special Representative and sought by local judges to respond to the problem of impunity, had not been implemented.<sup>91</sup> Serious crimes, including political assassinations, were found not to have been investigated satisfactorily and the Secretary-General announced several new measures in response to this and the problem of impunity, including the appointment of further expert investigators.<sup>92</sup> In relation to torture and the mistreatment of prisoners, and despite repeated findings by the mandate-holder, evidence of such serious offences continued at the time of the report.<sup>93</sup>

The Special Representative's report of his 11<sup>th</sup> and 12<sup>th</sup> missions to Cambodia<sup>94</sup> gives its own summary of his cumulative recommendations and a critique of the extent to which those recommendations had, at that time, been responded to by both the UN and by the Government of Cambodia. He mentions that the major recommendations have been reflected in relevant UN resolutions on Cambodia but, '[t]hrough the Government has recognized the need for major structural reforms in the field of human rights, this work has not yet come very far'.<sup>95</sup>

This is replicated in the Secretary-General's comments on the implementation of the mandate-holder's recommendations in the report considering Hammarberg's 13<sup>th</sup> and 14<sup>th</sup> missions, which took place later in 1999.<sup>96</sup> Referring again to major structural problems in the human rights field, the ongoing problem of impunity and an apparent failure to investigate politically motivated crimes,<sup>97</sup> the Secretary-General's report reflected upon the enormity of the task of responding to these and other problems.<sup>98</sup> The report also noted that the new coalition Government of Cambodia had committed to responding to a number of the grave concerns raised by the Special Representative by legislative means and by taking firm measures against corruption. The report further acknowledged that while international resources and support continued to be critical, the main responsibility for responding to human rights concerns rested with the Cambodian Government.<sup>99</sup> Despite this, in his final report of January 2000,<sup>100</sup> many of the same matters regarding structural reforms were raised again. In a positive step, amendments to the *Law on Civil Servants*, which had been pursued throughout Hammarberg's term in response to the ongoing issue of impunity, had recently been implemented. Critically, however, little

<sup>91</sup> *Situation of Human Rights in Cambodia — Report of the Secretary-General*, UN GAOR, 53<sup>rd</sup> sess, Agenda Item 110(b), UN Doc A/53/400 (17 September 1998) [139].

<sup>92</sup> *Ibid* [140].

<sup>93</sup> *Ibid* [144].

<sup>94</sup> Thomas Hammarberg, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Thomas Hammarberg, Submitted in accordance with Commission Resolution 1998/60*, UN ESCOR, 55<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/1999/101 (26 February 1999).

<sup>95</sup> *Ibid* [148]–[149].

<sup>96</sup> *Situation of Human Rights in Cambodia — Report of the Secretary-General*, UN GAOR, 54<sup>th</sup> sess, Agenda Item 116(b), UN Doc A/54/353 (20 September 1999).

<sup>97</sup> *Ibid* [117]–[118].

<sup>98</sup> *Ibid* [121].

<sup>99</sup> *Ibid* [122]–[123].

<sup>100</sup> Thomas Hammarberg, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Thomas Hammarberg, Submitted in accordance with Resolution 1999/76*, UN ESCOR, 56<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2000/109 (13 January 2000).

progress had been made on the investigation or prosecution of those responsible for the gravest crimes during the Khmer Rouge period, or of very serious instances of political violence taking place more recently.<sup>101</sup>

Returning to the question of the effectiveness of the mandate, it is important to note that the Special Representative recorded the instances of political violence in 1997 and drew the attention of the UNGA to grave human rights violations that had taken place. Despite this, the Cambodian Government continued a pattern of failing to implement, in a meaningful way, the recommendations of the Special Representative, many of which had built upon the recommendations of his predecessor.

In view of the considerable political unrest at the time, it is questionable whether a special procedures mandate could have achieved much during this period. Given the repeated failure of the Cambodian Government to implement key recommendations, however, the terms of the mandate might have usefully been reviewed and refined at that time and key recommendations given much greater emphasis by the UN.

### C *Dr Peter Leuprecht — 2000 to 2005*

Peter Leuprecht's first report of January 2001 addressed his first two missions to Cambodia. At the outset, Leuprecht noted his intention to address civil and political rights as well as economic, social and cultural rights<sup>102</sup> and to 'pay serious attention to poverty as a fundamental human rights issue'.<sup>103</sup> Though the alleviation of poverty by the international community is highly desirable, it is difficult to understand why this should be a particular focus of the mandate-holder for Cambodia as distinct from so many other states, including developed states, which also face intractable problems of poverty. The resource limitations of Cambodia were frequently reflected on in reports of both the Secretary-General and the previous mandate-holders, and impacted upon its ability to achieve a number of structural reforms in the field of human rights, but it is surprising to note that poverty is mentioned as a stand-alone focus of a mandate-holder. It is also surprising to see among the Special Representative's formal recommendations a proposal for a different allocation of the national budget,<sup>104</sup> as hoped for as that may be. In circumstances where the Government of Cambodia was yet to finalise the process for trials of those accused of war crimes including genocide, this seems a curious recommendation.

Leuprecht's report of January 2001 also revealed evidence of ongoing incidences of torture, particularly of people in custody.<sup>105</sup> It further revealed ongoing and serious allegations of political violence in Cambodia.<sup>106</sup> The report noted that a number of investigations into such violence had not been

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<sup>101</sup> See *ibid* [85]–[87].

<sup>102</sup> Peter Leuprecht, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Peter Leuprecht, Submitted in accordance with Resolution 2000/79, UN ESCOR, 57<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2001/103 (24 January 2001)* [4].

<sup>103</sup> *Ibid* [4].

<sup>104</sup> *Ibid* [100].

<sup>105</sup> *Ibid* [31].

<sup>106</sup> *Ibid* [24]–[30].

satisfactorily carried out.<sup>107</sup> It was further noted that the Prime Minister had ‘expressed the view that political violence does not occur in Cambodia’.<sup>108</sup> Many of the issues raised by his predecessors in relation to prison conditions, the independence of the judiciary and enforcement of laws relating to impunity were raised again in the January 2001 report.<sup>109</sup> Indeed, on all of these fronts, it appears that little practical progress had been made.

In his report of December 2001, Leuprecht indicated that a renewed focus had been given to combating political violence by the Cambodian Government.<sup>110</sup> Notwithstanding this, many of the matters raised previously by him and by his predecessors in relation to the problems of impunity<sup>111</sup> and the independence and effective functioning of the judiciary<sup>112</sup> remained the subject of further recommendations. He notes, for instance, that

[d]espite numerous, and in some cases voluminous, plans, reports and strategies, as well as institutions, dealing with judicial reform in Cambodia, there is little to report in terms of implementation or progress in this area. At last year’s meeting of the Consultative Group in Tokyo, donor countries expressed their concern about the lack of action in the area of judicial reform.<sup>113</sup>

The Special Representative’s next report in September 2002<sup>114</sup> followed the Cambodian local elections earlier that year. The report emphasises the continuing problems with judicial independence including corruption, executive interference and the associated problem of impunity, noting that ‘[p]lans and institutions to tackle legal and judicial reform have multiplied. However, practical results seem to be inversely proportional to the growing number of plans and institutions’.<sup>115</sup>

This is important in the context of the cessation in early 2002 of negotiations between the UN’s Office of Legal Affairs and the Cambodian Government on the establishment of a tribunal for crimes committed during the Khmer Rouge period. Almost ten years after the *Agreements*, the critical infrastructure necessary to conduct judicial proceedings in relation to the most serious human rights violations experienced in Cambodia was not in place.<sup>116</sup> This left Cambodia with the options of a tribunal comprised of foreign judges who were not under the auspices of the UN, or a wholly domestic tribunal. In view of the dire problems associated with the functioning of the judiciary, detailed in many reports by various mandate-holders, this was a very bad outcome.

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<sup>107</sup> Ibid [27]–[29].

<sup>108</sup> Ibid [24].

<sup>109</sup> Ibid [95]–[98].

<sup>110</sup> Peter Leuprecht, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, Peter Leuprecht, Submitted in accordance with Resolution 2001/82, UN ESCOR, 58<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2002/118 (28 December 2001) [20].

<sup>111</sup> See *ibid* [76]–[77].

<sup>112</sup> Ibid [49]–[52].

<sup>113</sup> Ibid [38].

<sup>114</sup> *Situation of Human Rights in Cambodia — Note by the Secretary-General*, UN GAOR, 57<sup>th</sup> sess, Agenda Item 109(c), UN Doc A/57/230 (27 September 2002).

<sup>115</sup> Ibid [19].

<sup>116</sup> Ibid [39]–[41].

Judicial reform, the problem of impunity and the legal framework of Cambodia in general remained the most elusive of the recommended reforms, according to Leuprecht's December 2002 report — a report prepared in the lead up to the nation's 2003 parliamentary elections.<sup>117</sup> The report reflects on a number of longstanding issues of concern, including corruption and a lack of independence in the court system, impunity and a failure to enforce laws against the trafficking of human beings, which had been implemented during the term of the previous mandate-holder.<sup>118</sup> For example, recommendations made by the Special Representative for the restructuring of the Supreme Council of the Magistracy and an independent inquiry into mob killings had been made in reports from 2001 to 2003 and continued to be noted in reports until 2005.<sup>119</sup> By this point in the term of the Cambodian mandate, recommendations had been made by successive mandate-holders in relation to key questions of judicial reform and impunity with what appeared to be limited success. On these critical issues, it appears that the mandate has had limited effectiveness and it may have been helpful had the HRC revisited the mandate to emphasise the concerns of the international community about the stagnation of these matters. Where there are repeated recommendations on the same matters across several years, presumably it would be worthwhile escalating those matters within the HRC or through other avenues within the UN.

In his final report in his capacity as Special Representative, Leuprecht's concluding remarks noted that wide-ranging recommendations had been made in his previous reports, many of which he found it 'necessary to reiterate since the problems that they were meant to address remained'.<sup>120</sup> He states that he

deplors the fact that Cambodia has not progressed further on the road to pluralistic democracy, rule of law and respect for human rights. What we are witnessing at present does not seem to demonstrate progress towards these goals, but an increasingly autocratic form of government and growing concentration of power in the hands of the Prime Minister behind a shaky façade of democracy.<sup>121</sup>

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<sup>117</sup> Peter Leuprecht, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Peter Leuprecht, Submitted in accordance with Resolution 2002/89*, UN ESCOR, 59<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2003/114 (18 December 2002) [11], [24].

<sup>118</sup> *Ibid* [11]–[29], [63]–[69].

<sup>119</sup> *Situation of Human Rights in Cambodia — Note by the Secretary-General*, UN GAOR, 56<sup>th</sup> sess, Provisional Agenda Item 131(b), UN Doc A/56/209 (26 July 2001) [88], [95]; *Situation of Human Rights in Cambodia — Note by the Secretary-General*, UN GAOR, 57<sup>th</sup> sess, Agenda Item 109(c), UN Doc A/57/230 (27 September 2002) [84], [92]; Peter Leuprecht, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Peter Leuprecht*, UN ESCOR, 60<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2004/105 (19 December 2003) [62], [65]; Peter Leuprecht, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Peter Leuprecht*, UN ESCOR, 61<sup>st</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2005/116 (20 December 2004) [86]–[87] ('*Leuprecht's Report on Human Rights in Cambodia 2004*').

<sup>120</sup> *Leuprecht's Report on Human Rights in Cambodia 2004*, UN Doc E/CN.4/2005/116, [78].

<sup>121</sup> *Ibid* [76].

D *Professor Yash Ghai — 2005 to 2008*

Professor Yash Ghai's report of January 2006<sup>122</sup> focused on the justice sector and rule of law, freedoms of association, assembly and expression, impunity and a failure to enforce the law and land rights. He reiterated the concerns of previous Special Representatives in relation to many of these issues and noted that, having reviewed the recommendations of his predecessors in the role, 'many are still valid, as the problems they aim to address remain unresolved'.<sup>123</sup> He goes on to state that 'little progress has been made in enacting fundamental laws despite very considerable external technical and financial assistance for this task'.<sup>124</sup> Ghai further noted that most of those laws had been on the agenda for the preceding decade.<sup>125</sup>

In his report of January 2006, the Special Representative addressed matters going to freedom of expression, association, assembly and relating to legitimate political activity in some detail. Specifically, he referred to the increased use of local defamation laws to stifle political adversaries. Ghai concluded 'that governmental use of defamation, disinformation and incitement laws are inconsistent with the *Constitution of Cambodia* and international human rights treaties'.<sup>126</sup> In reaching that conclusion, Ghai noted that other mandate-holders had commented on the criminal law of defamation and have indicated that

the *International Covenant on Civil and Political Rights* does not contemplate injury to Governments as a legitimate restriction on freedom of speech; that special protection should not be given by the criminal law to senior public officials; that the question of truth or untruth should be a matter for the prosecution to establish, and that imprisonment for defamation should not be permitted.<sup>127</sup>

While it may be highly desirable that criminal laws of defamation be repealed, given that equivalent laws were at that time still in force in a number of member states,<sup>128</sup> and since the matter was not raised by the HRC in relation to Cambodia in previous reports when it had the opportunity to do so, it seems that the Special Representative may have been seeking to expand the scope of international human rights protections. Indeed, at one point the Special Representative refers to a decision of the Sri Lankan Government to repeal its own comparable laws and notes that Government's statement to the Human Rights Committee that it would be 'joining growing international consensus' on the issue.<sup>129</sup> This would seem to suggest that while there may have been a move towards the repeal of such laws, this was not yet a universal view.

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<sup>122</sup> Yash Ghai, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, Yash Ghai, UN ESCOR, 62<sup>nd</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2006/110 (24 January 2006) ('*Ghai's Report on the Situation of Human Rights in Cambodia 2006*').

<sup>123</sup> *Ibid* [65].

<sup>124</sup> *Ibid* [70].

<sup>125</sup> *Ibid* [27].

<sup>126</sup> *Ibid* [54].

<sup>127</sup> *Ibid* [51].

<sup>128</sup> *Ibid* [50].

<sup>129</sup> *Ibid*, quoting Human Rights Committee, *Consideration of Reports Submitted by State Parties under Article 40 of the Covenant: Fourth Periodic Report — Sri Lanka*, UN Doc CCPR/C/LKA/2002/4 (18 October 2002) [360].

In view of the UN's original focus on gross violations of human rights in establishing special procedures, if particular human rights concerns are also apparent in countries not the subject of special procedures it is questionable whether recommendations about such matters should fall within the mandate. Ghai went on to indicate that criminal laws of defamation remained on the statute books of a number of countries, though they were rarely used. He noted, for instance, that such laws exist in France, though they were no longer applied in practice.<sup>130</sup>

It has been suggested that attempts have been made to limit the role of mandate-holders by states that regard human rights as a reflection of Western values, and that mandate-holders are therefore only concerned with promulgating those values.<sup>131</sup> There has also been some commentary to the effect that certain developing states are concerned about the extent to which country-specific mandate-holders intervene or 'name and shame' such countries. This may also be a factor in the reduction of the number of such mandate-holders in recent years in favour of thematic mandate-holders who are thought to be less likely to highlight particular countries for mention.<sup>132</sup> Indeed, it has been suggested that the HRC's focus on establishing thematic mandates rather than country-specific mandates was intended to counter assertions of political bias in the establishment of country-specific mandate-holders, which single out certain states and might be seen to disregard the rights violations of other states.<sup>133</sup>

Consensus within the population of a post-conflict society will also be important in ensuring compliance with human rights standards. The alternative is for the international community to attempt, through special representatives and rapporteurs, to apply particular human rights standards which may not yet have the support of a fragile post-conflict society. It is desirable that a post-conflict society be assisted and encouraged to have a robust system of human rights protections, but such protections must be understood and accepted by the domestic population in order to be meaningful.<sup>134</sup>

In his report of January 2007,<sup>135</sup> Ghai refers to the commencement of proceedings in the Extraordinary Chambers of the Courts of Cambodia to try senior Khmer Rouge leaders. He states, however, that

[t]he purpose of the trials, to recognize the value of and promote respect for human rights, to acknowledge the evils of impunity, and to strengthen the rule of

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<sup>130</sup> Ibid.

<sup>131</sup> Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 39, 221.

<sup>132</sup> See, eg, *ibid* 219–20, 227. For the code of conduct of mandate-holders, see Human Rights Council, *Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, 5<sup>th</sup> sess, 9<sup>th</sup> mtg, UN Doc A/HRC/Res/5/2 (18 June 2007) annex ('*Draft Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*') ('*Code of Conduct for Special Procedures Mandate-Holders*').

<sup>133</sup> Rudolf, above n 26, 290.

<sup>134</sup> Michael Kirby has noted the evolution of human rights recognition and the particular difficulties facing Cambodia in that regard: Michael Kirby, 'United Nations Special Procedures: A Response to Professor Hilary Charlesworth' (2010) 29 *Australian Year Book of International Law* 17, 24–5.

<sup>135</sup> Yash Ghai, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia*, Yash Ghai, UN GAOR, 4<sup>th</sup> sess, Provisional Agenda Item 2, UN Doc A/HRC/4/36 (30 January 2007) ('*Ghai's Report on Human Rights in Cambodia 2007*').



law and the machinery of justice, will be futile unless the Government agrees to stop practices, documented in this and in previous reports of special representatives, which undermine these very objectives.<sup>136</sup>

In observations which are revealing about the effectiveness of the mandate, Ghai notes that

few of his own or his predecessors' recommendations had been implemented, that human rights continued to be violated on a systemic scale, and that this could not be explained away by poverty or massive violations of human rights during the period of Democratic Kampuchea.<sup>137</sup>

Ghai was careful to stress that this was notwithstanding the limitations faced by a country that had so recently experienced war and which continued to face widespread poverty. As such, his report takes 'a longer-term view, concentrating on problems of a systemic nature which must be tackled if Cambodia is to flourish and its people are to have decent lives'<sup>138</sup> and goes on to say that, it being the 15<sup>th</sup> year since the *Agreements*, it was timely to address the fulfilment of their provisions.<sup>139</sup>

Ghai once again reflected that few recommendations of mandate-holders had ultimately been implemented and he invited the Cambodian Government to inform the HRC about firm measures taken, and to be taken, to respond to those recommendations and the recommendations of treaty bodies, the General Assembly and the former Commission on Human Rights.<sup>140</sup> He reiterated those recommendations and went so far as to say that 'deliberate and systemic violations of human rights have become central to the Government's hold over power'.<sup>141</sup>

#### E *Professor Surya Subedi — 2009 to 2013*

Professor Subedi was appointed in 2009 to take up the Cambodian mandate, albeit under a changed title. However, the Human Rights Council's decision in 2008 to change the title of the Cambodian special procedures mandate-holder to 'special rapporteur' did not substantively change the functions of the mandate.

In view of the way in which the Cambodian Government had responded to his predecessor's reports and recommendations, Professor Subedi's reports between 2009 to 2011 sought to preserve a workable relationship with the Cambodian Government and focused predominantly on reforms relating to the judiciary and law reform, the functioning of the Parliament and land and housing rights.<sup>142</sup>

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<sup>136</sup> Ibid 2.

<sup>137</sup> Ibid [9].

<sup>138</sup> Ibid [10].

<sup>139</sup> Ibid [11].

<sup>140</sup> Ibid [107].

<sup>141</sup> Ibid [106].

<sup>142</sup> Surya Subedi, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Surya Subedi*, UN GAOR, 12<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/12/40 (31 August 2009) [25]. On the endeavours by Subedi to emphasise 'constructive dialogue and technical assistance' in view of the Cambodian Government's hostility to the mandate, see Piccone, *Catalysts for Change*, above n 21, 94.

His report of August 2009 does, however, note the failure of the Cambodian Government to respond to requests for prioritising areas of dialogue.<sup>143</sup> In his report of July 2012, the Special Rapporteur addressed the reform of Cambodia's electoral processes in light of recent elections and made recommendations in relation to this and the ongoing issue of land disputes.<sup>144</sup> He noted major flaws in the electoral process and that most recommendations made by bilateral and multilateral agencies to reform the country's electoral process had not been implemented.<sup>145</sup> In his concluding remarks, the Special Rapporteur observed that the *Agreements* established the 'rule of law, human rights and democracy as major pillars of the new political architecture for the country'.<sup>146</sup> He then put forward the view that the peace process could not be considered 'complete until the democratic institutions created under the *Constitution* are able to work effectively and independently' and emphasised that there is a stake for the international community in relation to this.<sup>147</sup> While this author may agree with the aims expressed by the mandate-holder, this is a matter that seems to broaden the scope of both his role and that of the UN in Cambodia to an unrealistic degree, notwithstanding the very obvious human rights concerns which continue to be faced by Cambodia. Apart from any other considerations, if all states with deficient democratic institutions were subject to country-specific special procedures, the UN may find itself somewhat under-resourced.

In his final report of August 2013, Subedi reflected upon the progress made on the implementation of previous recommendations, and noted that he received a 'frosty' reception from the Cambodian Government during an earlier mission.<sup>148</sup> Although the Cambodian Government engaged with him to some degree during his final mission, his remarks made it clear that his position was made difficult and that, like his predecessors, he was subject to personal criticism, including allegations of bias.<sup>149</sup> The report found that a significant number of recommendations had not been acted on and that the circumstances reported on had largely gone unchanged. For example, he noted that the state of the judiciary had 'not fundamentally changed since 2010',<sup>150</sup> and that there had been some regression in the protection of human rights in relation to parliamentary reform.<sup>151</sup>

In his concluding remarks, the Special Rapporteur restated a series of recommendations made previously that had not been actioned and noted that

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<sup>143</sup> Surya Subedi, *Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Surya Subedi*, UN GAOR, 12<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/12/40 (31 August 2009) [9].

<sup>144</sup> Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P Subedi*, UN GAOR, 21<sup>st</sup> sess, Agenda Item 10, UN Doc A/HRC/21/63 (16 July 2012) [25]–[30], [51]–[58].

<sup>145</sup> *Ibid* 2.

<sup>146</sup> *Ibid* [59].

<sup>147</sup> *Ibid*.

<sup>148</sup> Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P Subedi*, UN GAOR, 24<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/24/36 (5 August 2013) 1.

<sup>149</sup> *Ibid* 2.

<sup>150</sup> *Ibid* [16].

<sup>151</sup> *Ibid* [31].

‘[t]here still seems to be a lack of proper comprehension of the nature of the work and mandate of the United Nations Special Rapporteur for the country’.<sup>152</sup>

If the role of special representatives and rapporteurs were confined to investigating and reporting on gross human rights violations and this was the subject of greater guidance and direction from the UN, there may be fewer tensions relating to issues of sovereignty and the scope of their role may be clearer to governments of the countries the subject of their investigations. In the case of post-conflict states such as Cambodia where existing tensions are already an obstacle to resolving human rights concerns, this may be particularly helpful and may make the carrying out of the mandate more effective.

Under the current system, the almost limitless human rights monitoring and reporting roles of mandate-holders may have contributed to the sometimes poor reception of their recommendations by states the subject of their mandates. This seems to be at least in part due to a lack of clarity about the scope of their mandate. In view of this, it would be advisable that the scope of a mandate-holder’s reporting role be more narrowly cast so that matters relating to gross and systematic rights violations are addressed as a matter of priority. In theory, this would mean that states may more readily implement recommendations of high priority and, to the extent that they do not do so promptly, mandate-holders, the UN and civil society can more easily identify this failure and either provide further technical assistance or pursue their compliance through diplomatic or other means. The annual renewal of mandates gives the UN a good opportunity to more narrowly cast the functions of mandate-holders and to seek specific action by states in response to highly focused recommendations. Although establishing a hierarchy of human rights concerns may appear undesirable, it would also provide greater clarity to the scope of any enquiries to be undertaken by mandate-holders in relation to economic and social rights. In post-conflict societies with competing and pressing demands on resources, this will be especially important.

#### IV CONSTRAINTS ON THE ROLE OF SPECIAL PROCEDURES MANDATE-HOLDERS AND THE CONSEQUENCES FOR HUMAN RIGHTS DEVELOPMENTS

##### A *Direction Provided to Special Representatives and Rapporteurs on the Scope of Their Investigations*

A special representative or rapporteur in a society during the period immediately after the cessation of conflict, such as Cambodia, is likely to be reporting on human rights violations and making recommendations about human rights deficiencies in circumstances in which few judicial, law enforcement or governance structures remain in place (if such structures existed at all prior to the conflict). The mandate-holder must consider the relevant international instruments and standards that might apply and the extent to which it is reasonable to expect a newly post-conflict state to meet those obligations. In the absence of clear direction, which might focus the mandate-holder’s attention on gross violations of human rights, this is almost a process of human rights ‘triage’ — calibrating human rights deficiencies according to the most urgent

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<sup>152</sup> Ibid [63].

needs of citizens and the post-conflict society. Though no reference is made to a distinction between gross human rights violations and other human rights concerns, the comments of Professor Ghai, in his report of January 2006, suggests, for example, that there may be some matters that are not raised with the government of a newly post-conflict society because they are less pressing.<sup>153</sup> Other mandate-holders have remarked on the broad scope of their mandates and have explained their attempts to prioritise activities based on the gravity of the circumstances in issue and the potential impact of their role.<sup>154</sup>

Thematic mandate-holders report on a particular human rights circumstance in a global context and their mandates involve some degree of direction from the UN about the nature of the rights to be investigated. Despite this, there appears to have been little meaningful guidance for country-specific mandate-holders about the way in which they may approach the application of human rights norms or the work to be undertaken within their mandate.<sup>155</sup> To try to respond to this concern, the *Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council* ('Code')<sup>156</sup> was adopted in June 2007 by the HRC following a review of the system of special procedures. Regrettably, the direction provided by the *Code* relating to the work procedures for mandate-holders is still very vague and limited, particularly in relation to post-conflict societies in transition. For example, art 6(c) of the *Code* contemplates that mandate-holders will '[e]valuate all information in the light of internationally recognized human rights standards relevant to their mandate, and of international conventions to which the State concerned is a party'.

In the context of a post-conflict country, the reference to international conventions may not be particularly relevant since it may not be a signatory, or the events of the conflict may render its accession to international instruments virtually meaningless.<sup>157</sup> It is perhaps for this reason that art 6(c) refers first to standards and then to international instruments, which will generally not be applicable to states that are not party to them.<sup>158</sup> However, even the obligation to evaluate all information according to 'internationally recognized human rights standards' is extremely broad and would require a special representative or rapporteur to understand how other organs of the UN have interpreted the particular human rights standards. Article 6(c) then also requires the special representative or rapporteur to determine whether such standards are relevant to

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<sup>153</sup> Ghai's Report on the Situation of Human Rights in Cambodia 2006, UN Doc E/CN.4/2006/110, [52].

<sup>154</sup> Naples-Mitchell, above n 18, 242 (discussing the work of former mandate-holder, Nigel Rodley).

<sup>155</sup> Nifosi, above n 7, 148.

<sup>156</sup> *Code of Conduct for Special Procedures Mandate-Holders*, UN Doc A/HRC/RES/5/2, annex.

<sup>157</sup> See, eg, the communications of various countries in relation to their reservations about Democratic Kampuchea's accession to the *International Covenant on Civil and Political Rights: Multilateral Treaties Deposited with the Secretary-General: International Covenant on Civil and Political Rights* (22 July 2014) United Nations Treaty Collection, 74 n 3 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-4.en.pdf>>; *Multilateral Treaties Deposited with the Secretary-General: International Covenant on Economic, Social and Cultural Rights* (22 July 2014) United Nations Treaty Collection, 17 n 4 <<https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf>>.

<sup>158</sup> Nigel S Rodley, 'On the Responsibility of Special Rapporteurs' (2011) 15 *International Journal of Human Rights* 319, 328–9.

their mandate. Presumably this would require the country-specific mandate-holders to be familiar with the scope of inquiry of thematic mandate-holders to try to limit the potential for overlap with their role.<sup>159</sup> Considering the very limited resources and support which seem generally to be available to mandate-holders,<sup>160</sup> which will be discussed further in Part IV(B), the obligations imposed by art 6(c) of the *Code* are very wide.

Prior to the *Code* being developed, guidance for special representatives and rapporteurs in relation to their role, conduct, responsibilities and the support afforded to them by the UN was provided by the *Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission* ('*Regulations*')<sup>161</sup> and the *Manual on Operations of the Special Procedures of the Human Rights Council* ('*Manual*').<sup>162</sup>

While the *Regulations* form part of the terms of appointment of each special representative and rapporteur,<sup>163</sup> the *Manual* provides guidance to mandate-holders on the manner in which they carry out their respective roles. In the main, the *Manual* addresses the interaction of mandate-holders and governments. For special representatives and rapporteurs in post-conflict states, it is notable that only three paragraphs are dedicated to addressing the relationship between mandate-holders and non-state actors, though the *Manual* recognises that this relationship is likely to be a significant one where a peace process is underway.<sup>164</sup> Much of this guidance is merely concerned with ensuring that the mandate-holder is not seen to endorse the legitimacy or claims of non-state actors. With such limited guidance it seems that there is a broad discretion afforded to mandate-holders in post-conflict societies in relation to the way in which they engage with non-state actors who may ultimately be instrumental in forming government, keeping a peace process on track or influencing the way in which human rights are implemented and adhered to.

Engagement with non-state actors may be important in ensuring the representation of groups in dialogue on human rights abuses and in promoting the transition of a post-conflict society. In 2001, the Secretary-General requested that the Inter-Agency Standing Committee arrange a working group for the development of a manual of best practices for engaging with non-state armed groups.<sup>165</sup> Guidelines and a manual on this issue were produced in 2006,<sup>166</sup> but

<sup>159</sup> This is contemplated to some extent in relation to coordination among mandate-holders: *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Effective Functioning of Human Rights Mechanisms*, UN ESCOR, 56<sup>th</sup> sess, Provisional Agenda Items 4 and 18, UN Doc E/CN.4/2000/5 (6 August 1999) ch IV(A).

<sup>160</sup> See, eg, Naples-Mitchell, above n 18, 244.

<sup>161</sup> *Secretary-General's Bulletin — Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission*, UN Doc ST/SGB/2002/9 (18 June 2002).

<sup>162</sup> *Special Procedures Mandate-Holders, 'Manual of Operations of the Special Procedures of the Human Rights Council'* (Manual, Office of the High Commissioner for Human Rights, August 2008).

<sup>163</sup> *Secretary-General's Bulletin — Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission*, UN Doc ST/SGB/2002/9 (18 June 2002) [5].

<sup>164</sup> *Special Procedures Mandate-Holders*, above n 162, [81]–[83].

<sup>165</sup> *Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict*, UN SCOR, 56<sup>th</sup> sess, UN Doc S/2001/331 (30 March 2001) [26].

they are confined to humanitarian negotiations and are largely focused on immediate humanitarian concerns arising from conflict, rather than contemplating engagement with such groups for the purposes of assisting them with attaining long-term representation within a post-conflict society.

Nevertheless, in the case of Cambodia, successive mandate-holders engaged extensively with a wide range of governmental and non-governmental actors in carrying out their roles.<sup>167</sup> Indeed, the Secretary-General's 1994 report on the recommendations of the Special Representative speaks very favourably of the then mandate-holder's engagement with both governmental and non-governmental actors in relation to human rights in Cambodia. The report notes that the practice has been very useful in:

- (a) encouraging and facilitating the regular exchange of information on human rights activities implemented or planned in Cambodia; ... and (c) bringing to the attention of the Special Representative human rights issues in Cambodia relevant to his mandate of particular concern to the international community.<sup>168</sup>

A mandate-holder may, therefore, have a significant role to play in the engagement of important non-state actors and this may in turn have consequences for the way in which human rights development takes place in a post-conflict country. For example, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, addressed the human rights obligations of non-state actors in relation to the Liberation Tigers of Tamil Eelam ('LTTE') in his report on Sri Lanka.<sup>169</sup> In it, he suggested that the LTTE's exercise of significant control over territory and population and its discernible political structure meant that, even as a non-state actor, it should be called upon to respect human rights norms.<sup>170</sup> In particular, Alston notes that the LTTE should be expected to observe 'respect for the rights to freedom of expression, peaceful assembly, freedom of association with others, family life, and democratic participation' among other things.<sup>171</sup> The same approach was

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<sup>166</sup> Gerard McHugh and Manuel Bessler, 'Guidelines on Humanitarian Negotiations with Armed Groups' (Guidelines, United Nations Office for the Coordination of Humanitarian Affairs, January 2006); Gerard McHugh and Manuel Bessler, 'Humanitarian Negotiations with Armed Groups: A Manual for Practitioners' (Manual, United Nations Office for the Coordination of Humanitarian Affairs, January 2006).

<sup>167</sup> See, eg, Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia*, UN GAOR, 15<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/15/46 (16 September 2010) [10]; *Ghai's Report on Human Rights in Cambodia 2007*, UN Doc A/HRC/4/36, [3].

<sup>168</sup> *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*, UN GAOR, 49<sup>th</sup> sess, Agenda Item 100(c), UN Doc A/49/635 (3 November 1994) [9].

<sup>169</sup> Philip Alston, *Extrajudicial, Summary or Arbitrary Executions: Report of the Special Rapporteur, Philip Alston — Addendum*, UN ESCOR, 62<sup>nd</sup> sess, Provisional Agenda Item 11(b), UN Doc E/CN.4/2006/53/Add.5 (27 March 2006) ('*Extrajudicial, Summary or Arbitrary Executions*').

<sup>170</sup> *Ibid* [26]. See also Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88 *International Review of the Red Cross* 491, 505.

<sup>171</sup> *Extrajudicial Summary or Arbitrary Executions*, UN Doc E/CN.4/2006/53/Add.5, [85].

subsequently taken by a number of mandate-holders in a joint report on the circumstances of Lebanon and Israel.<sup>172</sup>

Alston's basis for applying such obligations to the LTTE refers to 'the demand of the international community, first expressed in the *Universal Declaration of Human Rights*, that every organ of society respect and promote human rights'.<sup>173</sup> Save for the guidelines and manual mentioned above, the way in which special procedures mandate-holders engage with non-state actors is, to a large degree, at the discretion of the mandate-holder. Indeed, in one instance, a Special Rapporteur considered that her mandate only allowed for limited consideration of the role of non-state actors.<sup>174</sup>

## B Resource Limitations

In the still relatively limited writing on the role of special procedures mandate-holders, regular reference is made to the practical limitations faced by mandate-holders by virtue of limited resources and limited guidance.<sup>175</sup> The remarks of individual mandate-holders in recent interviews about their experience of country-specific and thematic mandates reveals that many have found the resources available to them limited and that this has a corresponding impact on the scope of work that they can undertake.<sup>176</sup> The recent report of the Brookings Institution regarding the role played by mandate-holders in relation to human rights also reflects this, noting in its recommendations the 'chronic under-funding of the Special Procedures' and proposing substantial additional training and guidance for mandate-holders.<sup>177</sup>

There also appears to be inconsistency in the form of recommendations made by individual mandate-holders<sup>178</sup> and potential resource limitations in the state they are investigating. This makes it practically difficult to implement recommendations, even if they are accepted by the state. This is likely to be a more pronounced problem in post-conflict societies, which lack appropriate infrastructure and suitably qualified personnel to give effect to recommendations. For instance, in comments responding to the 1996 report of the

<sup>172</sup> Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari*, UN GAOR, 2<sup>nd</sup> sess, Agenda Item 2, UN Doc A/HRC/2/7 (2 October 2006) [19].

<sup>173</sup> *Extrajudicial, Summary or Arbitrary Executions*, UN Doc E/CN.4/2006/53/Add.5, [25].

<sup>174</sup> See *Promotion of Human Rights and Fundamental Freedoms while Countering Terrorism: Note by the Secretary-General*, UN GAOR, 64<sup>th</sup> sess, Provisional Agenda Item 71(c), UN Doc A/64/211 (3 August 2009) [22].

<sup>175</sup> Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 39, 217–18.

<sup>176</sup> See, eg, Naples-Mitchell, above n 18, 241–2.

<sup>177</sup> Ted Piccone, 'Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights' (Report, Brookings Institution, October 2010) 41. See also Kirby, 'United Nations Special Procedures', above n 134, 13.

<sup>178</sup> Paulo Sergio Pinheiro, 'Being a Special Rapporteur: A Delicate Balancing Act' (2011) 15 *International Journal of Human Rights* 162, 169; Navanethem Pillay, 'Opening Statement by Ms Navanethem Pillay, United Nations High Commissioner for Human Rights to the Human Rights Council 13<sup>th</sup> Session' (Speech delivered at the 13<sup>th</sup> Session of the Human Rights Council, 27 January 2010).

Secretary-General on the human rights situation of Cambodia, the Government of Cambodia emphasised the limitations arising from financial constraints, unskilled personnel and related resourcing issues and the resulting difficulties in implementing recommendations.<sup>179</sup>

While these are observations relating to whether a mandate-holder's recommendations for a particular country can be implemented, a failure to implement those recommendations in turn impacts on the development of human rights norms. The issue of resourcing and training also goes to whether it is realistic to expect a mandate-holder to attend to all of the matters that may arise from a very broadly drafted mandate when there is little hope of effective change due to such practical limitations.

### C *Implementation of Recommendations and the UN's Response*

Whether a mandate-holder can effectively fulfil his or her role, and thereby contribute to human rights development, will also be affected by the attitude of the government or authority in the relevant country and its preparedness to engage on human rights issues. Despite the regular reporting of the mandate-holders for Cambodia, the response of the Cambodian Government to key human rights issues raised in those reports has often been extremely slow. For instance, human rights concerns arising from impunity in prosecution, the treatment of prisoners and the failure to prosecute gross human rights violations, including torture and rape, have been repeatedly raised in the same terms in reports spanning the terms of several mandate-holders.<sup>180</sup> Although many of these matters are in turn the subject of UNGA resolutions,<sup>181</sup> which express concern at the lack of action and responsiveness of the Cambodian Government, the pace of change on these issues is often extremely slow. This is quite apparent in the comments of various previous mandate-holders who make it clear that it has taken much time and many repeated recommendations before key changes in local laws or government action have been made. The frustration of Professor Ghai in this regard is apparent in his report of January 2007 where he states:

<sup>179</sup> *Comments and Clarifications by the Government of Cambodia*, UN Doc A/51/453/Add.1, [30].

<sup>180</sup> Thomas Hammarberg, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Thomas Hammarberg, Submitted in accordance with Commission Resolution 1996/54*, UN ESCOR, 53<sup>rd</sup> sess, Provisional Agenda Item 18, UN Doc E/CN.4/1997/85 (31 January 1997) [13]–[15], [79]–[80], [96]; Peter Leuprecht, *Situation of Human Rights in Cambodia: Report of the Special Representative of the Secretary-General for Human Rights in Cambodia, Mr Peter Leuprecht, Submitted in accordance with Resolution 2000/9*, UN ESCOR, 57<sup>th</sup> sess, Provisional Agenda Item 19, UN Doc E/CN.4/2001/103 (24 January 2001) [34]–[35], [98]; Ghai's *Report on the Situation of Human Rights in Cambodia 2006*, UN Doc E/CN.4/2006/110, [72]; Surya P Subedi, *Report of the Special Rapporteur on the Situation of Human Rights in Cambodia, Surya P Subedi*, UN GAOR, 24<sup>th</sup> sess, Agenda Item 10, UN Doc A/HRC/24/36 (2 August 2013) [6]; Kirby's *Report on the Situation of Human Rights in Cambodia 1996*, UN Doc E/CN.4/1996/93, [41]; *Situation of Human Rights in Cambodia: Note by the Secretary-General*, UN GAOR, 58<sup>th</sup> sess, Provisional Agenda Item 119(b), UN Doc A/58/317 (22 August 2003) [26]; Ghai's *Report on Human Rights in Cambodia 2007*, UN Doc A/HRC/4/36, [108].

<sup>181</sup> See, eg, *Resolution 52/135*, UN Doc A/Res/52/135. *Resolution 52/135* notes the Cambodian Government's failure to respond to previous reports of the Special Representative: at para 4. *Resolution 52/135* also addresses a failure to take action in relation to specific recommendations and conclusions of the mandate-holder: at paras 5–7, 9.



The Special Representative reiterates his invitation to the Government to inform the Human Rights Council about the concrete measures that it has taken and that it intends to take to respond to the recommendations that he and his predecessors have made, and to the recommendations of the treaty bodies and the international community through resolutions of the General Assembly and the Commission on Human Rights.<sup>182</sup>

In some circumstances, states the subject of reporting have been less than willing to facilitate the role of mandate-holders and have not enabled them to move freely in the country or have access to the organisations or people from whom valuable evidence could be obtained.<sup>183</sup> This has, at times, made it difficult for mandate-holders to carry out their roles and thereby contribute to the development of human rights norms.<sup>184</sup> Of particular concern are the observations made about mandate-holders, sometimes by former holders of the roles themselves, regarding the failure of the UN and its agencies to defend special representatives and rapporteurs against assaults on their reputation by states the subject of the mandate and the implications of this for their continued roles.<sup>185</sup>

This was apparent during Professor Ghai's period as Special Representative, when he felt it necessary to issue a press release defending his role, commenting on the unwillingness of Cambodian Government ministers to meet with him for the purposes of fulfilling his mandate and responding to particularly harsh criticism of him meted out by the Cambodian Government.<sup>186</sup> In his concluding statement to the HRC, Ghai noted the importance of his successor having the full support of the UN. He considered that he had not received such support and felt that this had encouraged Cambodia's then Prime Minister to regularly undermine and insult him.<sup>187</sup>

A criticism of the current arrangements, which appears to be a widely held view among special representatives and rapporteurs, has been that there is little or no follow up of recommendations by the HRC (or its predecessor body) or the Office of the High Commissioner for Human Rights and that it is extremely difficult to secure a response from the government of the subject state.<sup>188</sup> The most recent mandate-holder for Cambodia has cited this as a particular weakness of the system of special procedures mandate-holders and notes 'the absence of an effective follow-up procedure to submitted reports, to communications sent to governments alleging violations of human rights, or even to urgent appeals made

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<sup>182</sup> *Ghai's Report on Human Rights in Cambodia 2007*, UN Doc A/HRC/4/36, [107].

<sup>183</sup> See generally Kirby, 'United Nations Special Procedures', above n 134, 6–8; Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 39, 224.

<sup>184</sup> Piccone, 'Catalysts for Rights', above n 177, 38.

<sup>185</sup> See, eg, Kirby, 'Reflections on the Office of UN Special Representative for Human Rights in Cambodia', above n 32, 503–4. See also Michael Kirby, 'Human Rights, the United Nations and Cambodia' (Speech delivered at the 1995 Peter Wilenski Memorial Lecture, Canberra, 8 September 1995).

<sup>186</sup> 'Special Representative of the Secretary-General for Human Rights in Cambodia' (Press Release, 17 December 2007) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=5158&LangID=E>>.

<sup>187</sup> Ghai, 'Cambodia: The Statement by Professor Yash Ghai', above n 37.

<sup>188</sup> Pinheiro, above n 178, 169.

as a preventative measure'.<sup>189</sup> This is very apparent from comments made by previous Special Representatives for Cambodia, who make it clear that it has taken much time and many repeated recommendations to enable key changes in local laws or government action to be made.<sup>190</sup>

The UPR process may have prompted the consolidation of recommendations and could see some improvement in this area.<sup>191</sup> Likewise, the HRC's Open-Ended Intergovernmental Working Group, established in 2009 to review the work and functioning of the HRC, is also reviewing the working methods, resources and training of mandate-holders, among other things.<sup>192</sup> It may be the case that this will respond to some of the practical constraints presently facing mandate-holders and which have been the subject of criticism, given that these constraints ultimately affect the capacity of mandate-holders to contribute to the development of human rights within the states on which they are reporting.

Considering the extent of the criticism from both former mandate-holders and other commentators, one would hope that these constraints will be addressed. It seems unrealistic to expect that individual special representatives and rapporteurs with already broad mandates, limited resources and little guidance on the human rights norms about which they are expected to report, can achieve all that they are expected to achieve and do so while maintaining cordial relations with the states about which they report. Although these are comments that concern all mandate-holders, the particular resource limitations of post-conflict societies, and the potential sensitivities which may exist in relation to matters affecting their sovereignty, mean that it is especially important for such states that these constraints facing country-specific representatives and rapporteurs be addressed.

## V CONCLUSIONS

In view of the more than 20 years of reporting under the Cambodian mandate, there is much more that could be said in relation to the role of the Special Rapporteur on the Situation of Human Rights in Cambodia (as it is now called) in the development of human rights in a post-conflict society. Although it seems that the scope of the role is substantially wider than was envisaged at the time of establishment of the UN special procedures, the efforts of individual representatives and rapporteurs in addressing human rights concerns with few resources and in less-than-ideal circumstances in Cambodia have been considerable, particularly in a society that has suffered greatly from serious rights violations.

The mandate-holders played a significant role in enabling Cambodia to establish the Khmer Rouge Tribunal, develop local laws to respond to at least some pressing human rights concerns and managed to develop good relationships and provide technical assistance to the Cambodian Government, NGOs and civil society organisations. Regrettably, however, many recommendations made by

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<sup>189</sup> Subedi, 'Protection of Human Rights through the Mechanism of UN Special Rapporteurs', above n 39, 216.

<sup>190</sup> See, eg, Ghai, 'Cambodia: The Statement by Professor Yash Ghai', above n 37.

<sup>191</sup> Pinheiro, above n 178, 169.

<sup>192</sup> *Report of the Open-Ended Intergovernmental Working Group on the Review of the Work and Functioning of the Human Rights Council*, UN GAOR, 2<sup>nd</sup> sess, UN Doc A/HRC/WG.8/2/1 (4 May 2011) [22]–[62].

successive mandate-holders have not been implemented in a meaningful way, or at all, by the Cambodian Government despite them having been restated in numerous mission reports and supported by observations of various organs of the UN. Although a failure to promptly implement some recommendations might be expected in the context of a post-conflict society facing other pressures, in many instances key recommendations relating to questions of judicial reform, the problem of impunity and political violence have not been acted on despite technical assistance and repeated reporting. Although highlighting and recording details of those matters is important, a persistent failure to action recommendations indicates that the mandate has not been effective in those areas. This is not for want of effort by mandate-holders, particularly in view of their resource limitations and difficulties in securing country visits and dialogue with relevant officials. Instead, it seems to warrant the refinement of the mandate itself and the prompt escalation of outstanding recommendations within the UN in order to properly support the role of mandate-holders and achieve the protection and promotion of human rights.

Under the current system, the very broad functions of special representatives and rapporteurs may have contributed to the sometimes poor reception of their recommendations by states the subject of their mandates and thereby diminished their effectiveness. This may be, at least in part, due to a lack of clarity about the scope of their mandates. The annual renewal of country-specific mandates gives the UN a good opportunity to cast the reporting role of mandate-holders more narrowly and to seek specific action by states in response to highly focused recommendations so that gross and systematic rights violations are addressed as a matter of priority. It is hoped that this would lead states to implement recommendations of high priority more swiftly and, to the extent that this is not the case, mandate-holders, the UN and civil society may be better placed to pursue their compliance through diplomatic or other means.

It is clear from the extensive reports of the various mandate-holders in Cambodia since 1991 that each has had a desire to assist in building a robust system of rights protections and a rights culture to support it. Nevertheless, whether that is an appropriate role for a special procedures mandate-holder of the UN is open to debate. While the precise terms of mandates have been broad, the basis for the system of special procedures still requires that the intervention be motivated by a response to gross human rights violations. Accordingly, the terms of any future mandates should be more narrowly defined and existing mandates renewed for stricter and more achievable purposes. To the extent that other human rights concerns are not captured by more narrowly cast mandates, these might best be referred to other organs of the UN or international agencies. Perhaps then states the subject of such mandates that do not respond to recommendations in a timely and meaningful fashion will be held up to greater scrutiny than is currently the case.