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ADELAIDE LAW REVIEW

FACT-FINDING AND REPORT WRITING BY UN HUMAN RIGHTS MANDATE HOLDERS

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Record of a Recorded Conversation between
the Hon. Michael Kirby AC CMG[*] and Rebecca La Forgia[**]

ABSTRACT

1. The report of the COI on DPRK was in some ways unique both in content and in style. What is the basic reason for the difference?

KIRBY: The usual way that inquiries are conducted for the United Nations in the Human Rights Council environment (or other similar environments), is that they are undertaken in the civil law tradition. That is to say, they are usually conducted by professors or diplomats. I am not against professors, being myself a professor of various universities

[*] Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Judge of the Federal Court of Australia (1983-84); Chairman of the Australian Law Reform Commission (1975-84); Chairman of the UN Human Rights Council's Commission of Inquiry (COI) on Human Rights Violations in the Democratic People's Republic of Korea (DPRK).

[**] Senior Lecturer in Law at the University of Adelaide. This conversation was undertaken with video recording for the purpose of use in the class conducted by the Questioner on the transformation of human rights fact-finding. Both participants acknowledged the assistance they have derived, in this connection, from the recent publication of two Australian scholars at New York University, P. Alston and S. Knuckey (eds), *The Transformation of Human Rights Fact-Finding*, (Oxford University Press, Oxford, United Kingdom,2016). See also C. Abraham and M. Sherif Bassiouni (eds) *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, International Institute of Higher Studies in Criminal Sciences, Cambridge, Antwerp and Portland, 2013. In an earlier life, Sarah Knuckey was an Associate to Justice Kirby in the High Court of Australia.

nor officials. Generally, their inquiries are done in private. They are done in a very cost-effective way. The evidence is basically gathered in confidential sessions, conducted in secret.[1]

That is not the common law way. The common law way was originally to have a jury sitting in public. Members of the public were able to watch the proceeding and to judge the fairness of the process and also the accuracy of the outcome. Later juries were generally replaced by judges alone. But they too performed most of their functions in public. There is a lot going for the common law system.[2] This is especially so in the area of international human rights disputes and - allegations of human rights violations.

Of their nature, if they have come before an international court, tribunal or inquiry such matters are generally going to be pretty horrendous. Therefore, it is important that they be carried out, as far as possible, dispassionately, with due process, with fairness to everybody involved, with sensitivity to the witnesses, and in a public forum. In this way those who gather the evidence can themselves be judged. The international community can then judge the fairness of the process and the accuracy of the outcome.

2. In the nature of COIs for the UN Human Rights Council, the evidence is often going to be heart rending. How did you cope with such testimony and preserve dispassion, essential to a convincing report?

[1] See C.M. Henderson (ed.) *Commissions of Inquiry* (, London, 2017) the variety of COIs is described and illustrated.
[2] M.D. Kirby, "The United Nations Meets the Common Law " , *New South Wales Judicial Officer's Bulletin,* 2016 at .

KIRBY: I am told by my partner, Johan, that in the course of our lives together - more than 47 years - I have become a bit remote and cold. That is not unusual for people who have had judicial responsibility. You have, to some extent, to make sure that you are not allowing yourself to get too emotional about the issues before you. Otherwise the blood will rush to your head and you will not be concentrating on what is objectively being demonstrated by the testimony. Feelings and emotions may swamp dispassion and accurate analysis.

Johan's assessment of me is probably right. Over the years, I have become less emotional. At school, a teacher wrote on my annual report, "Michael is a clever student but he needs to become more analytical in thought." Boy, did I take that seriously. I think the law and the requirements of due process require you to do that. Otherwise, you might get so upset by the horrors that you are being told that you do not concentrate on the anterior questions: Who is responsible for this? Who should be made accountable for this? Are the people who are under your spotlight actually the guilty parties in respect of the complaints? All of these questions need to be I kept in mind in the decision-making process.

3. ***Do any particular instances of testimony illustrate the special challenge to dispassionate reporting that you faced?***

KIRBY: Two occasions in the course of the hearings of the Commission of Inquiry (COI) on DPRK (North Korea) I felt I was on the brink of breaking down because the evidence was so awful and so shocking to me. It was such that as an Australian who had been a judge for 34

years, I had not expected that I would ever face anything quite like that. These occasions arose during evidence of the horrible conditions of the detention camps in North Korea. According to that testimony people and their families were put into terrible living and working conditions. Often they were not given adequate food. Detainees were dying overnight of starvation. Their bodies being collected in the morning, just like the bodies in the concentration camps of the Nazis. Then there was the case of a woman who was forced to drown her own baby when she was returned to North Korea from China. This was because the baby was the child of a Han Chinese father. North Koreans are quite racist in their attitudes towards non-Koreans, especially in the case of interracial births. As an Australian, raised in the era of White Australia, I was aware of that attitude. I was alert to the evidence.

These were terrible facts. So graphically, quietly and apparently dispassionately were they told that you felt you had to rebuke yourself that you were overreacting, whereas the witness did not appear to do so. They had gone through their stories in their own mind so many times. They told their stories dispassionately. That was the way the testimony came out. It seemed strange and even unreal that those who had suffered and witnessed suffering could be so dispassionate about the horrors they were recounting.

4. In producing the COI report did you follow methods learned from your earlier responsibilities in Australia?

KIRBY: Sir Zelman Cowen, who was a part-time Commissioner of the Law Reform Commission, once told me that I had to avoid the problem of the centipede. Having so many legs, there was a risk that it could not

make up its mind as to which leg it would use first. In that quandary, it might not move: even for example, when it needed to move, when there was a predator around. That was one of his lessons for us in the Australian Law Reform Commission. It was a lesson I put to good use in the COI on DPRK.

Perfection is often the enemy of the good. If you wait forever, you will never get the report written. Injustice will keep happening in the meantime. You have to recognise that you are a human being. That you may make mistakes. You may even reach very serious mis-assessments of the truthfulness of a witness: as to the accuracy of what you have been told. Yet still you cannot dilly-dally forever. You have to get on with it. I did not have difficulty doing that. Nor did the COI. We produced our report, on time, within budget and unanimously.[3]

Remember that I had had 25 years, a quarter of a century, experience as an appellate judge in Australia. Even longer was my entire judicial career. I had experience as a young lawyer, articled clerk, as a solicitor, a barrister, seeing and taking part in contested cases before Australian courts and tribunals. That was at a time when orality was the dominant feature of the practice of Australian law. Most cases were conducted orally: in court, often before a jury. The case always had its own momentum. It was designed to reach a conclusion. You just had to get on with it and do the best you could with the sometimes imperfect and incomplete materials presented during the hearing. The job of the lawyer was to help the process reach its conclusion: hopefully favourable to one's client.

[3] United Nations Human Rights Council, report of the Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea, A/HRC/25/CRP.1; http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx.

When I sat in the High Court of Australia or in the Court of Appeal of New South Wales I was always working efficiently towards the end product – a judgment supported by detailed and hopefully persuasive reasons. Justice D.L. Mahoney taught me in the Court of Appeal, that the appellate judge should never waste his or her time. You should be trying to identify at least what the problems were that you needed to solve. So I continued a mode of preparation which basically followed a methodology I had adopted as a law student. I drew tree diagrams of arrows and sub-arrows and sub-sub-arrows of the issues. I did this to stimulate and focus my mind. To make sure that I addressed the questions I had to answer. But it also helped with the big branches of the tree, to see the big picture questions and the overall concepts that were in play, as well as the smaller problems that you have to solve that feed into the big picture.[4]

My period of ten years in the Australian Law Reform Commission was also very instructive. I was taught and I should say by a Professor of the University of Adelaide, David St L. Kelly, to conceptualise issues. There I was in the COI, bombarded by all the facts relevant to North Korea. However, I was constantly being directed to factual and legal ends. One such legal end was: does this evidence amount to 'genocide' in international law?[5] Does this evidence amount to a 'crime against humanity' in international law?[6] If so, what are the categories in which

[4] A photograph of on such tree diagram appears in A.J. Brown, *Michael Kirby: Paradoxes/Principles* (Federation Press, Sydney, 2009) p. .

[5] The COI on DPRK received submissions of the commission of 'genocide'. These submissions were analysed in the report pp. 350-351 [paras 1155-1159]. The COI concluded that, in accordance with the definition of 'genocide' in the *Convention on the Prevention and Punishment on the Crime of Genocide*, art 2 (and the Rome Statute, art.6) genocide as so defined had not been established by the evidence. The COI favoured a broader modern content to 'genocide' to include 'politicide'. But it determined that this was not the present state of international law.

[6] The definition of 'crimes against humanity' under international law was explained by reference to the Charter of the International Military Tribunal at Nuremburg in 1945 and the jurisprudence of the Nuremburg and Tokyo

the evidence ticks that box? Do the facts justify such a serious conclusion? Or do they prove another human right violation, which does not amount to a crime against humanity? So all of that is going on in your mind, working all the while with the tree diagrams. Now I come to the final point.

Actually, how the mind responds to a particular factual dispute or legal dispute is puzzling. It is not much written about. Judges do not tend to write about it. I wrote an article on the topic many years ago after a speech I gave at Charles Sturt University. It is published in the *Australian Bar Journal*, *Bar Review*.[7] It addresses the moment of decision. How you reach the moment of decision? How, when you are sailing towards a particular conclusion, suddenly some feature of the law or of the facts comes at you like an iceberg. The Titanic is moving towards this iceberg. You have got to get out of the way as quickly as possible because your postulate simply does not work. You realise that your initial conclusion was wrong. That conclusion will not stand. It will not convince you. And if it does not convince you, it will not convince others.

Why is there so little written about the moment of decision and how judges make decisions? Or in this case, about how a Commission of Inquiry makes a decision? You are like the centipede. You just run and you get the task done. Then you look back on the reasons you have prepared for the conclusion you prefer. You redraft and redraft them yet again and redraft them yet once more. In the High Court, I believe that I redrafted my reasons more than anybody else. Taking pains over

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Tribunals and more recent international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). See COI report, 320 ff [para 1026] ff.

[7] M.D. Kirby, "Judicial Decision Making and the Moment of Decision" (1998) *Australian Bar Review*

making the text accessible and understandable is a very important duty of any formal decision-maker. Certainly, I have always taken clarity and accessibility of my reasons very seriously.

5. Have there been any immediate outcomes to the report of the COI on DPRK?

KIRBY: Very recently, I went to New York on another mandate[8] that I received from the Secretary-General, Ban Ki-moon. I saw him, and he again made the point that the report of the Commission of Enquiry on North Korea was objectively, an extremely important document in the UN system. Many of the people who work in human rights have been very impressed by the common law procedure. It is not the usual way the UN human rights mandates are usually discharged. But it aims to be manifestly fair.

The English, it is often said, were always obsessed with procedure. So much so that they often did not pay enough attention, to the actual outcome and what was actually decided. Their concern was that the inquiry should be conducted fairly and lawfully and without irrationality. However, if you have sound procedures, it is normally much more likely that you will reach sound outcomes. The sound procedures of the UN COI on DPRK report, and our way of conducting the inquiry is now regarded as a sort of 'gold standard' for the system. So that is one very good outcome that has already happened.

[8] The reference is to the appointment in 2015 as a member of the UN Secretary-General's High Level Panel on Access to Essential Medicines and as Chair of the Expert Advisory Group of that Panel (2015-16). The report of the HLP was delivered in September 2016. It also undertook public hearings in London and Johannesburg with telecommunications links to Bangkok.

Other inquiries in the UN system are copying. In the future, we will see more Commissions of Inquiry following similar techniques, adapted to their particular circumstances. There are quite a lot of COIs running – at this time – for example into human rights abuses in the Central African Republic, Syria, Tunisia, and Eritrea. I expect that some at least of these COIs will experiment with, and use public hearings. They will use the transcript of the public hearing, as the COI on DPRK did quoting it in the report, to give voice to the victims who have come to the United Nations to give their testimony and to register their human rights complaints and accusations.

Secondly, the report has already led to the establishment of a field office in Seoul in the Republic of Korea, (South Korea).[9] This is continuing, in a sense, the work of the Commission of Inquiry. If the matter of DPRK's human rights abuses is not referred in the short term to the International Criminal Court or to some other tribunal or some other body and prosecuted, I still have confidence that in due course that will happen.

In any case, when that is ready to happen, the relevant material will have been gathered and recorded in a format that can be used as a statement for a prosecutor in an international tribunal dealing with international crimes. The preparatory work is already occurring. To that extent, accountability is already progressing. That was a suggestion made to the COI or DPRK by Prince Zeid Raad Hussein Sayed, the current UN High Commissioner for Human Rights. He urged that human rights mandate holders, where appropriate, should gather testimony in

[9] COI Report recommended the establishment of a field office ("structure") to document and gather testimony of victims and witnesses. See COI report, p 371 [para 1225(c)].

the form of a prosecutor's brief so that it could later be picked up when the moment of jurisdiction arrives.[10]

Thirdly and more basically, the COI on DPRK gave a voice to people who had never previously enjoyed the dignity of being heard. They had not previously enjoyed respect for their voice. They had been harassed and brutalised in North Korea. Even when they arrived in to South Korea, they were members of a minority community. To some extent - they could not express themselves in the way that commanded attention, understanding, respect and redress.

Most of the people one sees today in filmed images in Holocaust museums around the world will never have their stories vindicated or considered for accountability. This is simply because of the passing of time the death of the perpetrators, witnesses and so on. Still there is a value, including an educative value in dignifying the individual human being who tells what they have gone through. It is educative because that is a way new generations learn. It is the way we can ensure that those who come later never forget what has happened. That they never forget the cruelty and wrongs that have happened. It is also important for victims themselves and for us also to see and hear them.

This has already been an achievement of the Commission of Inquiry on DPRK. If we had just seen witnesses in private and talked with them, taken a few notes and summarised their complaints in the report, it would not have had the same effect or impact. Sometimes just going through a transparent procedure and doing it in a dignified and

[10] This recommendation was made to the COI by Prince Zeid before his appointment as HCHR during its consultations in New York.

respectful way, has an importance in itself. When we had a female witness, I generally asked Sonja Biserko, one of the COI commissioners, to take the women victim through her statement. I did this in case there was a cultural problem of a woman speaking to a male. I was there, presiding. However, I just fell silent. And the variation in the procedure worked. I felt that the women were more comfortable and forthcoming answering questions from a woman who was a member of the COI.

All of the commissioners adopted the common law role. In the absence of North Korea or its officials, we proceeded to gather the oral testimony of the witnesses by the technique of examination in-chief. There was no cross-examination unless we got to a point that we did not fully believe what was being said or needed more information. Generally, our questions were:, “And what did you do then?” or, “What happened then?” or, “What did you see?” so that the voice of the evidence would be the authentic voice of the people who are coming to complain of human rights violations and crimes against humanity. Their voices and versions of the facts; not ours.

6. Are there any general lessons as to the effectiveness of the COI on DPRK that can be drawn at this time?

KIRBY: The lesson of the COI on DPRK is that the United Nations has imperfections. Human beings appointed to Commissions of Inquiry, like myself, have imperfections. Yet the world has to address the ongoing challenges of crimes against humanity, genocide where it applies, and other human rights violations. It has to respond. The world is dangerous. Just the nuclear weapons that exist in North Korea are an indication of how potentially dangerous that country is for its own people

and for others in its neighbourhood. The human rights situation in DPRK is closely interconnected with peace and security dangers and with dangers to the attainment of justice – another objective of the United Nations, expressed in the *Charter*.[11]

We conducted our enquiry as we did. We took pains to ensure that our report would be readable; I consider that the report a page turner. I possess a self-bound version of the report. However, it should be on sale at airports. It is very readable. Moreover, the world needs to know about our findings. It needs to know, in view of the dangerous situation in North Korea.

Two years after the report was delivered to the United Nations, it has twice come before the UN Security Council. In late February 2016, the Security Council unanimously imposed heightened sanctions on North Korea.[12] That resolution secured the affirmative vote of the Russian Federation and China. I believe that this indicates that, if you get people together who have very great responsibilities, including the permanent five members of the Security Council, in the one room, the propinquity, the dangers and a compelling report will demand that humanity responds.

Observers will say: "Well, they have not referred North Korea to the International Criminal Court". "They have not set up a special tribunal". "No actual person or perpetrator has been punished." All of this is true.

[11] United Nations *Charter*, Preamble.

[12] The United Nations Security Council has imposed sanctions on DPRK in a series of resolutions. Additional sanctions were imposed in 2016 and 2017, the last being the most severe so far, adopted unanimously, with the concurring votes of the P5 members of the Council, on February 2017. This followed the fifth nuclear test conducted by DPRK and the launch of a long range missile towards Japan. In pursuance of the latest resolution, China has announced that it will curtain importation of coal from DPRK in 2017, previously a major source of hard currency.

However, these are still very early days. The abuses described in the COI report have been going on for about 70 years. In the past, the world turned away. Well, now the world is not turning away. The world has a detailed report. The report is not just addressed to politicians and to national leaders. It is addressed to the people of the world and to the United Nations as a whole.

The people of the world are the foundation of the *Charter*.[13] The *Charter* begins, "We, the people of the United Nations." So when we were writing the report, we had in mind the politics. We had in mind the difficulties. We targeted the report in a way that we hoped would be compelling to anyone who read it or part of it. One of the ways of making it compelling was to speak over the heads of the leaders and to speak to the citizens of the world community. It was the reaction of the people of the world to the horrors of the Second World War and of the instances of genocide that led to the *Charter* in 1945 and to Eleanor Roosevelt's *Universal Declaration of Human Rights* in 1948.[14] Unless we build a world that respects human rights, we will never have peace and security. Addressing global human rights is therefore a most urgent necessity for humanity's survival.

Another positive feature of the COI report, I think, is that virtually everything that the COI asked of the United Nations was basically done. So far, almost everything we recommended has been followed up, if it was within the power of the United Nations and its officials. We can therefore be pleased as human beings that this global institution, set up

[13] United Nations *Charter*, Preamble.
[14] United Nations, General Assembly Resolution A/ of 10 December 1948.

70 years ago, is sometimes working for the good of peace and security. But also for the good of universal human rights.[15]

7. You have said that the report of the COI on DPRK is readable. Why is this important? How can reports of inquiries, judgments and other legal documents be made readable? Are there any simple lessons that lawyers and law students should follow?

KIRBY: The COI report on DPRK was written in the English language. It was translated (at least in summary) into the other UN languages: Arabic, Chinese, French, Spanish and Russian. However, inescapably the idiom and style is English. English is a very peculiar language. We are celebrating at this time the anniversary of the death of William Shakespeare, 400 years ago the greatest exponent of English as a language of literature. But it is also a language of politics and of human rights. English represents the marriage of two linguistic strands of the human family. The basic Anglo-Saxon of the Germanic tribes in the north of Europe, and the Latinist French language that came over to England with William the Conqueror in 1066. That makes the English language a wonderful language for poetry and literature. Yet it can be devilishly ambiguous. Of course, is very good for lawyers because out of ambiguity came the problems of the law; interpretation misunderstandings, uncertainty and so on.

[15] One of the key recommendations of the COI has not been implemented to the date of publication of this article. This refers to the recommendation that "the Security Council should refer the situation of the [DPRK] to the International Criminal Court for action in accordance with that Court's jurisdiction". See COI report, p 370 [para 1225(a)]. However, another recommendation in the same paragraph, that "the Security Council should also adopt targeted sanctions against those who appear to be most responsible for crimes against humanity" has, in part, been fulfilled.

Generally speaking, those who speak English as their first language have a different vocabulary in the kitchen where they speak as the Anglo-Saxons did. But when we write English, especially in the law, we tend to do so after the manner of the Norman clerks who came over with William I. However, I think I write substantially as I speak. At least I try to do so, because that is the simple language that is normally spoken. If my writing is clearer, than others it may be because I have a different balance than many in the expression of the English language. I try to make it very direct. I try and write as I speak. This is the way the report of the COI is written: The plain, simple version of English: direct, unadorned, understandable. A great language for communication. I do not know how the COI report on DPRK reads in Chinese or Arabic. But in English it is clear and powerful. It beckons the reader to demand prompt and effective responses. Nothing less will do.

There are some simple rules that lawyers and law students and UN report writers need to learn. No passive voice. Short sentences. Direct speech. Take out the obscurities and make the text short and clear. That is what I try to do. That is why I kept revising my reasons as a judge: to try and get it clear. Sometimes I was a bit longwinded because I got interested in a particular issue of law or of some particular facet of the facts. But I did try to speak clearly. For some reason, that seems to have been effective. At least scholars and students have told me so. One of the accolades I most cherished as a judge was given to me by that great Chief Justice of the High Court of Australia, Sir Anthony Mason: 'If you want to know what a case is really about, you start with the Kirby judgment. Maybe in the Palace in Pyongyang, Kim Jong-un is complaining about the same thing.