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WHERE DOES TRUTH LIE?

THE CHALLENGES AND IMPERATIVES OF FACT-FINDING IN TRIAL, APPELLATE, CIVIL AND CRIMINAL COURTS AND INTERNATIONAL COMMISSIONS OF INQUIRY

The Hon. Michael Kirby AC CMG

WHERE DOES TRUTH LIE?
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ABSTRACT

The author takes three instances to illustrate the difficulties but imperative necessities of fact-finding in formal decision-making. The first concerns the residual fact-finding responsibility of Appellate Courts to scrutinise fact-finding in civil proceedings with an emphasis on incontrovertible facts. The second involves criminal appeals where prosecution presented a compelling case of circumstantial evidence but a retrial was required by an unbalanced judicial direction. The third involves an international commission of inquiry on human rights where the state concerned refused cooperation but demonstrated faulty testimony (later acknowledged) by a witness. Human decision-making is always subject to error, whether on facts or law. However, that risk cannot frustrate the imperatives of decision-making and of explaining relevant fact-finding in the most convincing way possible, so as to discharge the responsibility of decision.

I
THE PROBLEM

Even before the Norman Conquest of England in 1066, there had been moves to replace primitive systems of trial by ordeal or battle with more rational procedures, designed to resolve the matter in contention by

[*] Developed from an address given to the Department of Statistics and Mathematics, Queen's University of Ontario, Canada, 8 June 2015 and to Winton Capital Management in London on 1 October 2015.

[**] Justice of the High Court of Australia (1996-2009); President of the New South Wales Court of Appeal (1984-96); Chair, United Nations Commission of Inquiry on the Democratic People's Republic of Korea (2013-2014).

more acceptable means.[1] From these efforts eventually emerged forms of trial by jury. Eventually, that form of decision-making evolved from participation by local people, who had some knowledge of the matter, to participation by disinterested persons from the locality who could reach a conclusion, based on testimony, acceptable to the community, thereby putting the dispute to rest.[2]

For the most part the verdicts of such juries were final. To guard against corruption and partiality of jurors, a system of review ('attaint') developed.[3] So did procedures for the ordering of new trials.[4] Only in the 19th century (in civil cases) and in the 20th century (in criminal cases) was a statutory "appeal" provided for against judgments based on jury verdicts.

A panel of jurors was also viewed in England, and in its settler colonies, as a guarantee against official oppression. Ordinarily, the jury could be trusted to reach sensible conclusions on the evidence, having been instructed in the applicable law by the judge.

Normally, juries gave no reasons for their decisions. Any reasons had generally to be inferred from the verdicts. Jury trial had the advantage in promoting finality of decision-making. The simplification of trial procedures was necessitated for the elucidation of evidence that was essential if the dispute was to be understood by a jury. On the other hand, unreasoned jury verdicts sometimes gave rise to feelings of injustice. A small avenue for appeal was developed for the case where

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[1] Theodore F.T. Plucknett, *A Concise History of the Common Law* (4th ed., Butterworths, London, 1948), 111-120.
[2] *Ibid,* 124.
[3] *Ibid,* 125.
[4] *Id*, 128.

a verdict was classified as being "against the evidence and the weight of the evidence". A quest for more predictable trials and more reasoned justice led to the decline, over the past 40 years, in jury trial of civil (and even criminal) disputes. Once reasoned justice was adopted as a goal, it became more feasible to permit detailed scrutiny of the outcome of trials. Appeals gave some parties, discontented with the reasons of the primary decision-maker, a greater opportunity to attack the conduct of the trial and the reasons offered by the trial judge to sustain its outcome, formalised in a judgment.

In the United States of America provisions in the national constitution protected jury trial from abolition or curtailment.[5] In Australia, constitutional protections have been read down almost to disappearance.[6] Although some observers (mostly government officials) complained about so called "perverse" jury verdicts, an advantage of the system was that it occasionally allowed juries to do what was 'right' in the circumstances, not necessarily what the strict law might have required. Many convicts sent from England to Australia early days of settlement escaped hanging because a jury "perversely" (contrary to the evidence) found that the property stolen by the accused was worth less than £2: then the criterion for hanging. Logic and reason occasionally have their limits: especially where the law is unjust or out of date, as not infrequently it is. Logical judges may have little leeway. Sensible juries could sometimes provide "corrective" verdicts.

[5] *United States Constitution*, art III and *Bill of Rights*, amendment VI, VII and XIV. In the United States, jury trial has been held available where any non-juvenile criminal prosecution has a potential penalty of 6 months custodial punishment and, in a federal civil case, where more than $20 is at issue. *Baldwin v New York*, 399 US 60 (1970).

[6] *Australian Constitution*, s.80. See the *Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 599; *Re Colina; Ex parte Torney* (1999) 200 CLR 386.

The sharp decline in jury trials in most common law countries in the late 20th Century has increased the facility and utility of appeals. This has enhanced the examination of judicial reasons about factual conclusions, compared with the recorded testimony at the trial. It has therefore turned the minds of judges and other decision-makers to the close examination of the testimony and the judicial processes of reasoning. It has also presented a number of questions as to:

* The way judges themselves should resolve contradictions and conflicts in evidence at a trial;
* The way appellate judges should solve such conflicts in an appeal from the trial decision; and
* The techniques that need to be observed by decision-makers to allow for the consideration of cultural phenomena affecting witness testimony[7] and the increasing scrutiny of what is meant by well-worn legal phrases directed to the moment of decision: such as the need for a "comfortable satisfaction".[8] Or, in criminal cases, "proof on the balance of probabilities" or "proof beyond reasonable doubt?"[9]

Judges sitting in courts of trial and appeal are not the only public officials who have obligations to reach factual conclusions in an acceptable way. Many of the strictures imposed by law on judges apply equally to members of the independent tribunals that now proliferate and statutory bodies (such as university councils) that are sometimes obliged to act in

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[7] E. Kyrou, "Judging in a Multicultural Society" *Law Society Journal* (NSW), April 2015, 20 at 22.
[8] Hayley Bennett and G.A. Broe, "The Neurobiology of Achieving a Comfortable Satisfaction" (2014) 26 NSW *Judicial Officers' Bulletin*, no.8 (September 2014), 65.
[9] The usual standard of proof required in criminal trials. Explaining this expression to criminal juries is permitted in some jurisdictions (Canada) but forbidden in others (Australia) on the basis that juries have been applying it for centuries and know what it means.

a judicial manner. Even beyond such bodies, official enquiries, set up under statute, having duties to reach conclusions and make recommendations, will enjoy a wide discretion as to how they may proceed. Nevertheless, even they can now occasionally be pulled up when they have acted outside their legal remit or conducted themselves in a fashion that offends due process or rational decision-making.[10]

In the case of international commissions of inquiry, attention is normally paid to the standard of proof necessary to establish facts that may give rise to serious conclusions: such as that breaches of international law have been proved.[11] In practical terms, the sanction for improper, illogical, unpersuasive decision-making at this level is usually political. Complaints and criticism are fought out in international meetings, in the media and in learned journals. They can have large political consequences.

To illustrate these themes I will examine three cases in which I have been involved in making findings of fact: two as a judge and one as a chairman of a United Nations commission of inquiry (COI). The judicial instances will include one civil appeal and one criminal appeal. In each such instance, there were significant differences about the evidence, making it difficult (perhaps ultimately impossible) to be absolutely certain as to what happened in critical circumstances, from which important legal and other consequences flowed. By reference to these three cases, I will explain how the ultimate conclusions were reached; the

[10] *R. v Winneke; Ex parte Australian Building Construction Employees and Builders Labourers' Federation* (1982) 152 CLR 25; *Victoria v ABCEBLF* (1982) 152 CLR 25; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342.
[11] See e.g. United Nations, Commission of Inquiry on Democratic People's Republic of Korea (COI on DPRK), *Report of the Commission*, A/HRC/25/CRP.1 at 16[67]-[68].

differences that arose on the journey to those conclusions; and the aftermath, with a critique of the outcomes.

By providing concrete illustrations of the three controversies, and examining the explanations afforded for their resolution, I will endeavour to throw light on the general process of formal decision-making, including its inherent disputability. The practical dynamics of formal proceedings demand a conclusion. If possible, it should be one that will convince (or at least be understood by) those affected and those who have an interest. But is this always possible?

II

THE HORSE THAT CROSSED THE ROAD: A CIVIL APPEAL

The first case is unremarkable.[12] It arose in an appeal in which I participated in the High Court of Australia in 2003. Because that Court is the highest constitutional and appellate court of Australia, the case was not only important to the parties. It was also important as laying down principles to guide trial judges throughout Australia on the processes of decision-making and appellate judges below the highest court, called upon to resolve an argument that a trial judge had erred in the way the decision was approached or the conclusion finally reached.

Ms Barbara Fox was injured in 1992 when a horse she was riding came into collision on a public road with a van driven by Ms Megan Percy. Ms Fox claimed damages for negligence in respect of Ms Percy's driving of her motor vehicle. The factual contest at the trial, in the appeal court and then in the highest court, was who had been on the wrong side of

[12] *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22.

the road in a sharp bend at the critical moments prior to the collision. If the van was on the incorrect side, Ms Fox was entitled to recover money damages for her injuries, negligently inflicted. If it was the horse ridden by Ms Fox, the van driver was not negligent and Ms Fox's recovery of damages by Ms Fox would be denied. The trial judge in the District Court of New South Wales found against the van driver. The appeal court reversed that decision. The matter came to the High Court of Australia, when two Justices granted special leave to bring the matter to the third level of judicial decision.

In the days of my youth, when cases of this kind were normally decided by civil juries, it was extremely difficult (and rare) for the decision at trial to be appealed. However, because a trial judge, sitting without a jury, is obliged to explain the reasons for the decision, this necessarily exposes the process of reasoning. That reasoning was attacked in the Court of Appeal by the lawyers for Ms Percy. Because motor vehicles in Australia are obliged by law to carry insurance against the risk of negligently harming others, the real party at risk was an insurer. However, the proceedings followed the fiction that this was immaterial. The spotlight at all levels of the litigation was cast upon the conduct of the two women a few minutes before their lives intersected unexpectedly on a country road when the road presented an almost blind left hand turn to the van, travelling down-hill, obliged by law to adhere to the left side of the road.

The horse bearing Ms Fox was proceeding uphill. Speed was not a material consideration in the collision.[13] The impact with the horse brought the van to a sudden halt. An ambulance and the police were

[13] Ibid, 120 [3].

immediately summoned. On arrival, the police officer noticed, and recorded in his notebook, a sketch of the scene. It showed that the van had come to rest on its correct side of the road. It had left a ten metre line of skid marks, behind the van also on the correct side of the centre of the road. This caused the constable to conclude that the vehicle had at all material times been on its correct side of the road. He said so to Ms Fox, before she was taken to hospital by ambulance:

> "It looks like you were in the wrong"[14]

The policeman noticed, and recorded, the apparent presence of alcohol on the breath of Ms Fox; that she "refused to cooperate with police in their enquiries"; and that she had a body tattoo. A blood sample later taken at the hospital in consequence of the collision revealed that Ms Fox had 0.122 grams of alcohol per 100ml of blood. The trial judge accepted that this "would have affected her" in handling her horse. However, on the basis of the impression of truthfulness on Ms Fox's part in giving her evidence at the trial, and a conclusion that the police officer had been hostile towards Ms Fox, the judge accepted an expert traffic engineer's opinion that Ms Percy had, on the probabilities, driven onto the incorrect side of the road causing the collision. He awarded Ms Fox judgment of substantial damages.

When the appeal from the judgment for Ms Fox that followed these conclusions was taken to the Court of Appeal of New South Wales, that court was obliged by its statute to conduct the appeal "by way of rehearing".[15] It was entitled to draw inferences and make findings of

[14] Id, 212 [5].
[15] *Supreme Court Act* 1970 (NSW), s.75A (5).

fact.[16] However, appeal courts normally (and in this case) hear no further evidence. They perform their duties on the basis of the transcript taken at the trial. They therefore do not ordinarily have available to them, directly, any impression that may be given by witnesses as to the truthfulness or otherwise of what they are saying. This is why, for more than a century, appeal courts in England, Australia and elsewhere have repeatedly insisted on a rule of deference on the part of appellate courts in favour of the conclusion of trial judges who enjoy advantages that appellate judges they do not.

Where a judge explains the reasoning to conclusion by reference to impression of witnesses, this has, in the past, usually been fatal to those who challenge trial conclusions based on such evidence. In a series of cases before the decision in Ms Fox's case, the High Court of Australia was insistent on this rule. It demanded that appeal courts show severe restraint because of the "advantages" that trial judges enjoy from seeing witnesses and assessing their credibility. The judicial authority on this point had even gone beyond the principles stated in earlier English cases. It had suggested that there were "subtle influences of demeanour" which experienced judges would call upon to differentiate truthfulness from falsehood. Obviously, appellate judges would ordinarily lack access to these indicia.

Over time, a degree of scepticism came to be expressed by some Australian judges in relation to this supposed special judicial capacity and advantage:[17]

[16] *Ibid*, s.75A (6(b))
[17] *Jones v Hyde* (1989) 63 ALJR 349 at 351; *Avalos v Australian Postal Commission* (1990) 171 CLR 167 at 179; *Devries v ANR Commission* (1993) 177 CLR 472 at 479, 482-483.

* Some great judges in appellate courts began to urge that "an ounce of intrinsic merit or demerit in the evidence, that is to say the value of the comparison of evidence with known facts, is worth pounds of demeanour";[18]
* Scientific evidence based on controlled experiments began to cast doubt on the suggested powers of trial judges which countless experiments showed were not enjoyed by other mortals;[19] and
* Concern was increasingly raised that the rule of extreme deference led to grave injustices; upholding poor and arbitrary judging; and a failure to conduct a real "rehearing", as required by Parliament in expressing the mandate of the appellate court.[20]

This was the importance for the Australian legal system of *Fox v Percy*.[21] It afforded an opportunity for the High Court of Australia to revisit the principles that should have been applied in courts below. Repeatedly, in a number of cases, I had expressed my own serious reservations about the extreme deference rule.[22] The case of the collision of the van with the horse afforded the opportunity to recalibrate the approach not only to be applied in the instant appeal but in all such appeals based on evidentiary conclusions (of which there were many).

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[18] *Société d'avances Commerciales (Société Anomyme Egyptienne) v Merchants' Marine Insurance Co. ("The Palitana")* (1924) 20 Lloyds L Rep 140 at 152 per Atkin LJ. Quoted in *Fox v Percy* (2003) 214 CLR 118 at 129 [20].

[19] *Fox v Percy* (2003) 214 CLR 118 at 129 [31]. Citing evidence collected by Samuels JA in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 348.

[20] *State Rail Authority (NSW) v Earthline Constructions Pty Ltd* (In Liq) (1999) 73 ALJR 306 at 330 [89]-[91]. Citing *Lend Lease Developments Pty Ltd v Zemlicka* (1985) 3 NSWLR 207 at 209-210.

[21] The principal reasons in *Fox v* Percy were written by Gleeson CJ, Gummow J and myself. The other Justices participating, McHugh J and Callinan J, reached the same ultimate conclusion.

[22] See e.g. *State Rail Authority v Earthline Constructions Pty Ltd (in liq.)* (1999) 73 ALJR 306 at 330 [89]-[90].

In the end, the High Court of Australia was unanimous in upholding the decision of the Court of Appeal and rejecting the appeal by Ms Fox.

Relevant to the reasoning of the court on this point were the following considerations:

- There was incontrovertible evidence, in a contemporary document, that verified the police testimony as to the position of the van after, and immediately before, collision and the exact markings on the road of its skid marks. These skid marks were never satisfactorily explained by the trial judge although they strongly undermined his conclusions;
- Reasoning from the objective facts, it was more likely that Ms Fox's horse might have strayed to the incorrect side of the road, if not properly controlled, because this would involve no more than the horse cutting the corner without attention to the centre markings visible to, and understood by, humans but not by horses. Moreover, the van would normally hug the left hand side of the road in descending the decline and the skid marks strongly suggested that this is what it had done; and
- The high level of alcohol confirmed by the hospital blood test taken soon after the collision was at least consistent with a possibility that Ms Fox had exercised inadequate control over her horse to direct it to the outside left side of the road around the bend, thereby avoiding reducing any sort of collision with oncoming traffic. The constable's notation of the smell of alcohol and the tattoo were not necessarily evidence of hostility to Ms Fox. The reference to the tattoo was immaterial to the collision but the alcohol was not. The constable was obliged by police regulations

to make such notations of personal features and possibly material features. His immediate confrontation of Ms Fox with his intuitive conclusion fulfilled a due process requirement, rather than indicating an attitude of hostility.

It is my belief that, as a result of this decision of the High Court of Australia, including in the joint reasons, in which Chief Justice Gleeson, Justice Gummow and I gave the reasons of the Court,[23] a change has occurred both in reasoning by judges at trials and in intermediate appellate courts. Now deference to the judicial impression of witnesses is a last consideration, after exhausting any relevant contemporaneous evidence and analysis of the inherent logic of the proved facts. Technology is coming to the aid of the law and the courts. The endless stream of emails and text messages, all phone location records and other objective testimony makes it much less usual for judges and decision-makers now to rest their conclusions on the fragile foundation of human assessment of truthfulness, based on witness appearances. In my view, this is a desirable change in the appellate instruction about the processes of judicial reasoning about contested facts. Analysis of the detailed evidence and the logic of the circumstances will trump judicial impressions, unless the judge has no other way to decide between the evidence of the parties.

[23] *Fox v Percy* (2003) 214 CLR 118 at 130 [34].

III

THE INTERSTATE MURDER: A CRIMINAL APPEAL

The second case[24] involves a criminal appeal brought after the conviction of an accused person (Jean Eric Gassy), a resident of Sydney, against his conviction of the murder in Adelaide of Dr Margaret Tobin, the Director of Mental Health for South Australia. Here the conflict was not between contradictory evidence about the same facts so much as the assessment of circumstantial evidence and whether it proved the guilt of Mr Gassy to be requisite criminal standard of proof and whether the accused had received a fair trial of the issues presented for decision.

Unusually, Mr Gassy represented himself argument before the High Court of Australia and, by majority,[25] he enjoyed an exceptional victory.

Dr Tobin had played a role in events leading to the de-registration of Mr Gassy as a medical practitioner (psychiatrist) in New South Wales. In 1993 she had expressed concerns to the authorities in that State about his mental condition. After Mr Gassy's de-registration, Dr Tobin moved to South Australia to take up her new position in that State. Her death came years later when she was shot 4 times when leaving an elevator on the 8th floor of a building in Adelaide housing her office. Although she had moved to Adelaide, Mr Gassy had continued to live in Sydney.

The Crown case at the trial was that Mr Gassy had driven rapidly to Adelaide; effected the homicide; and then returned immediately to

[24] *Gassy v The Queen* (2008) 236 CLR 293; [2008] HCA 18.
[25] *Ibid* Gummow, Kirby and Hayne JJ; Crennan and Kiefel JJ dissenting.

Sydney leaving a trail of evidence behind linking him to the murder. However, there was no satisfactory CCTV or other identification evidence to establish irrefutably his involvement in the homicide and his guilt of Dr Tobin's murder. Nor did Dr Tobin, who survived the attack for a short time, identify her attacker or mention Mr Gassy's name before she expired. To find him guilty, the jury were obliged to rely on a mass of circumstantial evidence to decide that the Crown had proved Mr Gassy's guilt beyond reasonable doubt. The trial judge so instructed the jury.

The circumstantial evidence in the case was undeniably very strong, having been collected by a police forensic investigation commenced immediately following Dr Tobin's death. It was intelligent, painstaking and imaginative. Following the murder, Mr Gassy was identified as an immediate potential suspect. Enquiries were made at and about an interstate venue in Brisbane, Queensland, where Dr Tobin had earlier addressed a conference and also at garages and motels on the main direct road between Sydney and Adelaide in the days immediately before and after the shooting. The Brisbane evidence strongly suggested that Mr Gassy had registered as a guest at a motel near the conference venue in Brisbane whose staff picked him from a collection of police photographs. As well, a gun shop in Brisbane also identified Mr Gassy from police photographs as a person who had ordered a slide for a particular pistol at the time of the Brisbane conference. This slide was a part of the pistol necessary for firing. A motel record in Brisbane also revealed a guest who had used a factious name and address similar to that used at a motel on the road to and in Adelaide where, it was postulated, Mr Gassy had later stayed for sleep on his fateful journey.

The original Adelaide motel registration form of the hotel reception in Adelaide also matched a carbon copy of hotel registration documents found in a white bag retrieved from a rubbish dump of the town on the road from Adelaide to Sydney. It had been discarded by a man who had used the fictitious address and paid in cash at the motel and who answered to the general description of Mr Gassy. CCTV film taken at a service station in the town between Adelaide and Sydney was not sufficiently clear to confirm, with certainty, the identity of Mr Gassy. But the person shown in the film was seen to deposit a white bag in a rubbish bin, answering to the description of the bag later recovered. It was from a white bag found at the town dump that police retrieved the carbon copy of the original motel registration form. The vehicle hired by a person matching the appearance of Mr Gassy used a similar false identity and paid in cash. Moreover, the vehicle allegedly used by him revealed a mileage used during the hire equivalent to that involved in a return journey between Sydney and Adelaide.

Mr Gassy's primary complaint against his conviction in his appeal was a technical one. Although he had appeared for himself at his trial, he had asked the trial judge for permission to allow a barrister to represent him during a legal procedure within the trial. That application had been refused by the trial judge. Mr Gassy also complained about the suggested lack of balance of the trial judge's directions to the jury when they returned after long deliberation, seeking additional assistance from the trial judge. The trial judge's further direction included an expression of a factual conclusion that Mr Gassy "must have been carrying a pistol" in Brisbane and "must have gone" to Adelaide for the reason of killing Dr Tobin. These were factual conclusions at the heart of the Crown case

which were reserved to the jury's decision, following a fair and accurate summing up by the trial judge.

The Crown argued that, even if there were errors in the trial judge's ruling and the supplementary directions, they were ultimately immaterial because of the compelling strength of the combined circumstantial evidence tendered against Mr Gassy. The prosecution case relied on numerous pieces of objective evidence (not all of which I have mentioned in full detail). The prosecution contended that this evidence demonstrated Mr Gassy's guilt "beyond reasonable doubt".

Two Justices of the High Court of Australia (Justices Susan Crennan and Susan Kiefel) upheld this last submission. However, three Justices (Justices Gummow and Hayne and myself, in separate reasons) concluded otherwise.

Under South Australian law (and indeed under the common form criminal appeal legislation applicable at the time in most jurisdictions that derived their criminal law and procedure from England) a provision applies that is designed to discourage success in appeals by prisoners who are clearly guilty on the evidence but who can point only to some technical error or slip arising in the course of a trial.[26] Justices Gummow and Hayne rejected this argument by the Crown on the basis that, in a case of circumstantial evidence, such as Mr Gassy's, it was crucial that the jury should not be misled by a direction strongly favourable to the Crown, about the way in which the jury should reason to their verdict. I had sympathy for that approach. However, I also had sympathy for the view expressed by the dissenting Justices. This was because I

[26] In South Australia, the "proviso" appears in *Criminal Law Consolidation Act* (1935) (SA), s.353.

concluded that "in the large canvas of [Mr Gassy's] trial, I am not convinced that the error complained of alone would justify relief. Nor in terms of its consequences would it attract an argument based on the suggested category of "fundamental" departures from the hypothesis of a fair trial."[27]

This conclusion in my reasons took me back to analysing closely the prosecution's contention that there was no "substantial miscarriage of justice [that] had actually occurred" because the factual testimony presented at the trial was so overwhelming in proof of Mr Gassy's guilt as to be compelling. This, in turn, took me through all of the factual evidence that I have already mentioned. This demonstrates the way in which appellate judges can sometimes become embroiled in detailed assessments of the testimony given at the trial (and the inferences that arise from that testimony) in discharging the appellate duties imposed upon the appellate court.

I made it clear that the "mosaic of evidence" presented in the prosecution case was extremely strong.[28]

> "Individually, the elements in the mosaic might be questioned or doubted. However, when placed together and in relation to each other, the resulting case was in my view powerful. … I am brought to the conclusion that the present case is a borderline one… Definitely, it is at the cusp."

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[27] *Gassy* (2008) 236 CLR 293 at 315 [64].
[28] *Ibid*, 321 [90]-[91].

During their deliberations the jury in the trial had sent a message, asking the judge to explain what was meant by the expression "beyond reasonable doubt". In Australia, juries must be told that these words are well known and of longstanding and that the jury must give them their ordinary meaning. With the benefit of this somewhat opaque direction, the jury continued their deliberations.

To the question, where did the truth lie in the criminal prosecution of Mr Gassy at his trial, the answer, overwhelmingly, was that it probably lay with the conclusion that he was guilty of the crime. However, that answer to that question, on its own, was insufficient to sustain his conviction. This was because of a number of legal requirements that presented other, and different, questions before the overall issue of proof of guilt could be treated as determinative. First, the Australian system of criminal justice is accusatorial in its essential character. It is not simply adversarial and it is not inquisitorial. The onus of proof of guilt remains throughout on the prosecution. The accused does not have to prove his or her innocence. Secondly, the proof of an accused's guilt must be established to a very high standard: namely "beyond reasonable doubt". Probability or comfortable satisfaction are not enough. Yet the incontrovertibility of the combined evidence of every element in the case would be too strong a burden to cast on the prosecution. Thirdly, the accused person is ordinarily entitled to have the issue of guilt decided by a jury of 12 citizens who have been accurately instructed about the law. Although appellate judges have a reserve role to play, it is a serious step to take away the right to trial by jury where, because of a material misdirection, an earlier trial is found to have miscarried.

In my reasons in the *Gassy* case, I tried to explain how I resolved the quandary presented by the even split between my colleagues (2:2). I could not respond that it was just too difficult. Or that I could not make up my mind. It was my duty to reach a decision. Still, it was obligatory for me (effectively with the casting vote) to describe, in some degree, my mental processes. Not only was this important for Mr Gassy, potentially facing a very long prison sentence as well as calumny and condemnation if his conviction were confirmed. It was also important for the community concerned about a brutal homicide of a public official in its midst but also, potentially, about the costs of a lengthy second trial. This is what I said:[29]

> "The trial had reached a critical point and the judge was perfectly correct to attempt to save it. However, that endeavour could not be at the cost of [surrendering] manifest impartiality and neutrality and a fair presentation to the jury of [Mr Gassy's] case. … For the judge to give the jury a clear and firm reminder of the prosecution case, at that critical point, without equally reminding the jury of [Mr Gassy's] main arguments, placed [him] at a very great disadvantage. Not least was this important because, from the duration and the announced difficulties of the jury's deliberations, it is apparent that Mr Gassy had succeeded with some or all of them on at least on some of his criticisms of the prosecution case. … The reasons for manifest judicial impartiality and neutrality derive from the very nature of the judicial function and the purposes of a public criminal trial. They are reflected in fundamental principles of human rights as expressed in international law. They have been repeatedly stated in the reasons of this and other courts. They

[29] *Id* 322-323 [95]-[97] (footnotes omitted).

were well explained by [the dissenting judge] in the [appeal] court below."

In the result, I favoured ordering a new trial so that the problem presented by the suggested lack of balance in the judge's final redirections would not be an ingredient. Whilst this would be inconvenient and expensive for the community, Mr Gassy stood in risk of receiving a life sentence of imprisonment, if his guilt of murder were confirmed. I therefore joined in the orders for quashing the first verdict and ordering a retrial.

There is a postscript to this case. Mr Gassy was retried in Adelaide before a new jury and a different judge. Once again, he was found guilty and convicted. A further appeal was brought by him but dismissed by the Court of Criminal Appeal of South Australia. Another application was made for special leave to appeal to the High Court of Australia.[30] That application (which raised different objections) was rejected. Interestingly, the first jury deliberated for two and a half days.[31] The second jury took only three hours to reach their guilty verdict. The prosecution case in both trials was basically the same, namely the combination of the circumstantial evidence pointing to the guilt of Mr Gassy, especially:

(1) Evidence that Mr Gassy had travelled to Adelaide at the critical time;

(2) Evidence of his involvement with a hand gun of the relvant type;

[30] *Gassy v The Queen* [2010] HCASL 189 (22 September 2010) per Heydon J and Bell J.
[31] (2008) 236 CLR 293 at 322 [92] –[94].

(3) Evidence of his earlier presence in Brisbane where Dr Tobin was lecturing;

(4) Evidence of opportunity to kill Dr Tobin in Adelaide; and

(5) Evidence of a motive to kill Dr Tobin.

Different decision-makers sometimes view the same evidence in contested trials in different ways. The task of reasoning to a conclusion is neither automatic nor mechanical. It may be affected by perceiving the same evidence in different ways. This might be affected by the attitudes and values of individual decision-makers. This is so, however much the law must operate upon assumptions of pure rationality, logical reasoning and compliance with legal directions. The most that formal judicial process can provide is a close and reasoned analysis of the recorded evidence and argument; a scrutiny of the legal accuracy and fairness of the trial judge's part in the proceedings; and an explanation by appellate judges of the processes they have followed in discharging their review of the trial and application of the legal principles binding on them.

IV

A KOREAN WITENSS WHO RECANTED: INTERNATIONAL COMMISSION OF INQUIRY

My third case illustration comes from a process of decision-making outside the familiar environment of judicial courtrooms in Australia.

In 2013, the United Nations Human Rights Council (HRC) established a Commission of Inquiry (COI) to investigate, and report on, alleged human rights abuses in the Democratic People's Republic of Korea

(DPRK) (North Korea).[32] The inquiry followed many years of disturbing reports about North Korea. Although a Member State of the United Nations since 1993, DPRK had not cooperated with the United Nations human rights machinery. It had not permitted access to their country by successive special rapporteurs, appointed by the HRC to visit to investigate reported abuse. It had not invited the High Commissioner for Human Rights (HCHR) to visit. Effectively, it had closed its borders, only allowing a trickle of tourists who were kept under close watch and restricted in their movements. DPRK is commonly referred to as a "hermit kingdom".

Getting up to date, accurate and representative evidence to respond to the nine point mandate of the COI's inquiry, was bound to be extremely difficult. As expected by the COI, the government of DPRK, through its mission in Geneva, ignored requests from the COI to permit its members and staff to visit the country. It maintained that stance throughout the COI's inquiry. When, in the end, copy of the draft report was transmitted electronically through the Geneva embassy of North Korea to the Supreme Leader of DPRK (Kim Jong-un), with a warning that he might be himself personally accountable for crimes against humanity found in the report, this too was ignored. However, DPRK was certainly aware of the inquiry. It regularly denounced the COI and its members. When it criticised the inquiry and its procedures, the members and the United Nations, offered to come to Pyongyang to explain their report and to answer questions. This offer was also ignored.

Faced with such intransigence, the COI appreciated the importance of the compulsory procedure of *subpoena* (lit. "under the power"),

[32] United Nations, Human Rights Council Resolution 19/13 (2014). The report is UN document A/HRC/25/63.

developed in national legal systems to ensure that parties, relevant persons and records relevant to a proceeding are bought by those subject to them before those with the responsibility of decision. The COI did not enjoy that facility. Whilst the HRC strongly and repeatedly urged DPRK to cooperate with the COI, its injunctions fell on deaf ears. Yet, obviously, such want of cooperation could not, of itself, prevent the COI from discharging its mandate, any more than a national court or inquiry would simply surrender its responsibilities in the face of non-cooperation.

The three members of the COI came from differing cultural and legal traditions. Two (Mr Marzuki Darusman, Indonesia and Ms Sonja Biserko, Serbia) derived from countries that follow the civil law traditions, ultimately traced back to the laws of France and Germany. My own experience had been in the common law tradition, derived ultimately from England. Most UN inquiries are carried out by professors and public officials selected from civilian countries.

The COI on DPRK gave a great deal of attention, at the threshold to the question as to the methodology that it should adopt in order to overcome (as far as possible) the hostility and non-cooperation by the subject country.

The COI was not itself a court or tribunal. It was not authorised to prosecute, still less to arraign, or to determine the guilt of, the DPRK, its institutions or named officials. The object of UN COIs in the area of human rights is to be "effective tools to draw out facts necessary for wider accountability efforts."[33] Self-evidently, all such inquiries must

[33] UNSC *Report of the Secretary-General on the Rule of Law in International Justice in Conflict and Post Conflict Societies* (2011) UN Doc S/2011/634 [24]; UNHRC, *Report of the Secretary-General on Impunity*

themselves conform to United Nations human rights law. This means that they must accord natural justice (due process) to those who are the subject of the inquiry and protection to those who must give testimony and may for that reason be at risk. The COI on DPRK took these obligations seriously.

The methodology adopted by the COI on DPRK included:

(1) Advertising publicly to invite witnesses to identify complaints about which they could testify and to offer testimony;
(2) Conducting public hearings to receive such testimony so far as could be safely procured in public (with other evidence received in private);
(3) Filming recordings of such public testimony and placing it online, accompanied by written transcripts in relevant languages;
(4) Inviting national and international media to attend and cover the testimony and to draw it to global attention;
(5) Producing a report written in simple, accessible language;
(6) Indicating clearly in the report the findings made by the COI and the evidence upon which such findings was based;
(7) Providing a draft of the report to the nations most immediately concerned, with an invitation to correct, or comment on, factual or legal conclusions;
(8) Publishing with the report any such comments (comments were received and published from China and attached as an annex to the report); and

(2006) E/CN.4/2006/89. See also G. Palmer, "Reform of UN Inquiries", ch 36 in Festschrift for Roger Clark, Victoria University of Wellington, New Zealand, 2015 (Brill, Leiden, 2015), 595.

(9) Engaging with media in all forms to promote knowledge of - and to secure understanding of, support for – the COI's conclusions and recommendations.

The COI was aware that false testimony by witnesses could potentially damage the credibility of its findings. Therefore, it took care to limit the witnesses to those who, on preliminary interview by the COI's secretariat, appeared to be consistent with other testimony, honest and trustworthy. The COI also secured the agreement from the Government of the Republic of Korea (ROK) (South Korea), exceptionally, to permit DPRK to send representatives or advocates, or to engage lawyers who could make submissions on its behalf and, with permission of the COI, make submissions and to ask questions of other witnesses. This offer was communicated to DPRK. In giving testimony, the witnesses were examined in the manner of "examination in chief". This course permitted the witnesses to give their testimony, in a generally chronological way, in their own language, and in a fashion that was comfortable to them. It gathered evidence by non-leading questions asked by a commissioner. The COI did not cross examine witnesses unless it considered this course to be essential to clarify apparent inconsistencies or to address doubts raised in the minds of COI members concerning the evidence. The "non-leading" mode of examination allowed witnesses to speak for themselves. It afforded the COI a mass of compelling evidence relevant to its mandate in language that was vivid, direct and compelling.

The testimony procured by the COI was subsequently organised under the headings of the nine point mandate received by the COI from the HRC. In each case, analysis in the report of the issues and the overall effect of the testimony were supplemented in the COI report by short

extracts from the transcripts. These passages added vigour to the report which second person chronicles would have commonly lacked. Part of the power of the report of the COI on DPRK derives from the care devoted by the members and the secretariat to provide a readable text. The object was to ensure that the conclusions and recommendations grew naturally and logically out of the preceding passages of testimony, evidentiary extracts, recommendations and analysis.

To the criticisms of the report expressed by DPRK and of what it called the 'self-selected' character of the witnesses, the COI repeatedly responded with appeals to permit COI members to visit the country to conduct a transparent investigation among a wider pool of witnesses and on the spot. This appeal was ignored. Moreover, the testimony of more than 80 oral witnesses (taken and recorded in Seoul, Tokyo, London and Washington D.C.) was placed online and is still available on the internet. This means that people everywhere throughout the world (except in the DPRK) can view and hear the witnesses for themselves read the transcripts of their testimony, and reach their own conclusions as to their truthfulness, balance and representativity.[34]

The objections and then the alternating "charm offensive" and bullying tactics adopted by DPRK, following publication of the COI report, are all recorded online. Sharp but respectful exchanges between the DPRK Ambassador at the United Nations and me are also captured online (and available on the internet). These allow both the political actors and the general international public to evaluate the COI's report. Certainly in the

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[34] A paper by the author on the methodology of the COI appears in NSW*Judicial Officers' Bulletin* 2015 (November 2015).

first instance, the political actors in the organs of the United Nations indicated their conclusions by overwhelming votes endorsing the report, recorded successively in the HRC, in the General Assembly and even in the Security Council of the United Nations. In the Security Council, by a procedural resolution not subject to the veto[35] the human rights situation in DPRK was added to the agenda of the Council by a two third majority (11:4) with two abstentions; and two against. Two Permanent Members of the Security Council, China and the Russian Federation, on a show of hands, voted against placing the subject of North Korea on the Security Council's agenda.

One substantive matter where the concurring decision of the Permanent Members would be essential to validity concerned the COI's recommendation that the case of North Korea should be referred to the International Criminal Court so that prosecutorial decisions might be made, and if so decided, trials conducted to render those ultimately found guilty of grave crimes accountable before the people of Korea and the international community.[36] That substantive resolution has not, so far, been voted on by the Security Council.

Under the Security Council's procedural resolution of December 2014, the issues of human rights in DPRK remain on the agenda of the Council for three years at least. Hopefully, a time will arrive when a consensus will be formed that at least the gravest findings on the part of the COI should be fully considered by a prosecutor with appropriate powers to initiate action. Under international law, where a nation state fails to ensure accountability for grave human rights crimes, the other members

[35] United Nations, *Charter*, Art. 27.2.
[36] COI Report (A/HRC/25/CRP.1) 370 [1225(a)].

of the international community, in the United Nations, have a "responsibility to protect" those who are left unprotected by their country of nationality.[37]

In reaching its conclusions, the COI explained the origins of its mandate,[38] its methodology[39] and the interpretation that it took of its mandate as well as its methods of work.[40] Specifically, the COI described the standard of proof that it applied to accepting the testimony of witnesses and in deriving conclusions from that testimony so as to respond to its mandate.[41] On the issue of differentiating probative from non-probative evidence, the COI said:[42]

> "Consistent with the practice of other United Nations fact-finding bodies, the Commission employed a 'reasonable grounds' standard of proof' in making factual determinations on individual cases, incidents and patterns of state conduct. These factual determinations provide the basis for the legal qualification of incidents and patterns of conduct as human rights violations and, where appropriate, crimes against humanity. … There are 'reasonable grounds' establishing that an incident or pattern of conduct has occurred when the Commission is satisfied that it has obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinary prudent person has reason to believe that such incident or pattern of conduct has occurred. The standard of proof is lower than the standard required in criminal proceedings to sustain an indictment, but it is sufficiently high to call for further investigation into

[37] *Ibid*, 363-365 [1204]. See G.J. Evans *Responsibility to Protect,* Brookings Institution, Washington D.C., 2008.
[38] *Ibid*, 5-6 [6]-[12].
[39] *Id*, 6-8 [12]-[20].
[40] *Id,* 10-13 [28]-46].
[41] *Id*, 15-18 [63]-[78].
[42] *Id,* 16 [67]-[68].

> the incident or pattern of conduct and, where available, initiation of the consideration of a possible prosecution. The findings of the Commission appearing in this report must be understood as being based on the 'reasonable grounds' standard of proof, even where the full explanation… is not necessarily expressed throughout the text of this report."

After the publication of the COI report, and the action of the three organs of the United Nations after they had received it, an event occurred which the DPRK used in an attempt to destroy the credibility of the COI report and its processes. In January 2015, the DPRK released a video film concerning a witness who had given evidence before the COI and who had subsequently taken part in conferences and meetings recounting his alleged experiences when escaping DPRK. Shin Dong-hyuk (Shin) was an articulate, engaging young man whose story about how he had escaped from DPRK was unique, in that he claimed that he had fled from the highest security detention camp in DPRK, reserved for the most dangerous political detainees and their families.

Shin's story was not only recorded in the transcript of the COI. It was the subject of an earlier best-selling book by Blaine Harden, a United States journalist. [43] A filmed image later released by DPRK showed a person, later confirmed as Shin's father, who stated that Shin's testimony and account of his experiences were false; that he was given to falsehood; and that he should return to DPRK and seek forgiveness for his falsehoods. Shin subsequently acknowledged that his critic was indeed his father and that parts of his story in the book (and hence of his testimony to like effect before the COI) were not factually correct, including in relation to his being detained in Camp 14; the age at which

[43] B. Harden, *Escape from Camp 14*, Penguin, New York, 2013.

he was allegedly tortured; and the alleged circumstances by which he had escaped. Three other witnesses have been identified by DPRK who are claimed to had made false allegations against their homeland. However, Shin was the only one of these who gave evidence to the COI in its public hearings.

The question thus becomes to what extent the entire report of the COI, its conclusions and recommendations, are damaged, or undermined, by the exaggerations acknowledged by Shin and the possibility that other witnesses, not yet identified or acknowledged may have similarly falsified or exaggerated their testimony? Unsurprisingly, DPRK has asserted that the entire COI report on human rights in their country has collapsed. It has called for the United Nations to make an apology to DPRK and to rescind its condemnatory resolutions against DPRK.

Because Shin had been prominent in the international media reports which preceded, and accompanied, the COI hearings, he was called first amongst the witnesses who gave oral evidence at the public hearing to the COI in Seoul.

Some support for the DPRK criticisms was later voiced by an assistant professor of political science in Singapore (Jiyoung Song) in an article "Unreliable Witnesses" published in August 2015. [44] In her article, Ms Song referred to a practice of paying North Korean refugees for interviews on human rights experiences (fees said to be up to $US200/hour were mentioned); receiving second hand accounts without adequately checking for reliability; allowing witnesses to change their

[44] Jiyoung Song, "Unreliable Witnesses: The Challenge of Separating Truth from Fiction When it Comes to North Korea", available http://www.policyforum.net/unreliablewitnesses/

names allegedly to protect their families from retaliation but thereby making objective scrutiny and follow-up more difficult; using "older white male interviewers" to collect testimony who are not native Korean speakers and who could not detect nuances in witness evidence; receiving testimony through interpreters; paying insufficient attention to gender, age and social status considerations; and failing adequately to follow-up inconsistencies possibly derived from perceived self-advantage.

Ms Song concludesd [45]

> "In my 16 years of studying North Korean refugees, I have experienced numerous inconsistent stories, intentional omissions and lies. I have also witnessed some involving fraud and other illicit activities. In one case the breach of trust was so significant that I could not continue research. It affected my professional capacity to analyse and deliver credible stories in an ethical manner but also had a deep impact on personal trust I invested in the human subjects I sincerely cared about."

Any person who has been involved over time in the gathering and examination of testimony, offered in connection with serious formal proceedings before courts, tribunals or inquiries, designed to illicit the truth about significant and potentially disturbing subjects, knows that the process is full of difficulty and far from perfect. Each of the members of the COI on DPRK had extensive experience, over many years, in receiving, scrutinising and evaluating evidence. I did, appearing successively as a clerk, lawyer and advocate in courts over 16 years and then as a judge and inquiry commissioner in Australia over 34

[45] *Ibid,* 6.

years. I had also held earlier and later United Nations offices that involved gathering of testimony, evaluating it and expressing conclusions.[46]

Of course, long experience is not a guarantee of infallibility. As already pointed out, I have long been sceptical about the claimed capacity of judges to possess an ability to differentiate truth from falsehood with unerring accuracy based on their impression of witnesses. Commissioner Marzuki Darusman likewise had long experience in the law and in the courts in Indonesia as Prosecutor-General and Attorney-General of that country. These posts, and daily legal practice of the law would have given him experience similar to my own. Commissioner Sonja Biserko, also had long engagement with civil society organisations addressing the intensely disturbing evidence of communal hatred, violence and alleged genocide in countries of the former Yugoslavia, including her own country, Serbia.

Each of the commissioners in the COI on DPRK was aware that witnesses can sometimes be fraudulent and dishonest; occasionally irresponsible and exaggerated; and not uncommonly confused and forgetful. However, decision-makers with the responsibility to undertake an inquiry (including from the United Nations) and to reach conclusions cannot allow the inescapable imperfections of human nature and decision-maker capacity to paralyse them. Nor can they permit the possibility that they have sometimes been deceived by a witness to dominate their reaction to the testimony of witnesses generally, as Ms

[46] For example as a member of the International Labour Organisation Fact-Finding and Conciliation Commission on Freedom of Association, Inquiry into South Africa (1991-92); as United Nations Special Representative of the Secretary-General for Human Rights in Cambodia (1993-6); and as a member of the United Nations Development Programme Global Commission on HIV and the Law report, *Risks, Rights & Health*, New York, July 2012.

Song appears to have done. To permit disappointment with one or even a number of witnesses to destroy one's faith in the investigatory process as such, as such, is to allow one's personal sense of pride and importance (or even outrage at cases of deception) to overcome the duty to press on and to reach and explain reasoned conclusions in an inquiry that is objectively significant. Especially so because, as Ms Song has acknowledged, a general conclusion can be reached and "there is no doubt that the North Korean regime has violated serious human rights".[47] If this is so, members of a United Nations inquiry, established by the HRC, do not have the luxury to walk away from their duty nor to exaggerate the occasional dangers. Nor to allow personal ego or pride to overcome their professional fact-finding obligations.

In the case of the COI on DPRK, each of the Commissioners, at the time of embarking on their duties, made a solemn undertaking before the UN High Commissioner for Human Rights (Ms Navi Pillay) that they would act with integrity, impartiality, independence and professionalism.[48] Subsequently, this undertaking was reduced to writing, signed and deposited with the President of the HRC. As well, before any witness was asked questions at a public hearing by a member of the COI, would request the witness to declare publicly that the evidence that they would provide to the COI would be the truth. Each witness so declared. Similar procedures were followed in respect of witnesses interviewed privately.

Further considerations need to be noted in light of Ms Song's article. It is important that scholars working in circumstances where free criticism

[47] J. Song, above n.44, 2-3.
[48] These are qualities identified in the *Bangalore Principles of Judicial Conduct*. See United Nations Office on Drugs and Crime, *Commentary on the Bangalore Principles of Judicial Conduct* (UNODC, Vienna, 2007).

of officials is possible should not lend credence to the strategy of DPRK which is to attack witnesses and independent investigators who record faithfully and carefully evidence of grave abuse. [49]

* No monies were paid to witnesses as such, appearing before the COI on DPRK, in order to induce them to give their evidence. In the normal way, compensation or reimbursement was usually provided; generally by civil society organisations whom the witnesses had come to trust, to cover transport and accommodation where needed. Most such witnesses have faced difficulties in re-establishing their lives in new countries. Most would not otherwise have the funds to travel to, and appear before, a body such as the COI. There is nothing unusual or reprehensible in any of these arrangements;
* DPRK would not allow the COI access to its own territory despite repeated requests. The COI could not therefore go to places in North Korea where it might investigate relevant matters for itself, on the ground. It was obliged to invite testimony, including from escapees, refugees and experts – all of them resident outside DPRK. There was no difficulty in securing testimony in response to the COI's invitation. There are more than 30,000 escapees who have received sanctuary in ROK (South Korea). In the end, gathering evidence had to be terminated in order to ensure compliance with the tight deadline for report by early 2014 required of the COI by the HRC;
* The reliability of most escapees and refugees from DPRK can be considered against the fact that very few escapees or refugees

[49] Steven Borowiec, "North Korea's New Tactic: Discredit Those Who Report Human Rights Abuses - Analysis" in *Eurasia Review* (March 2015).

have decided to return to DPRK and very few indeed of nationals of ROK has ever sought sanctuary in the North;

* Several of the witnesses before the COI gave evidence that effectively corroborated the testimony of others. In particular, evidence concerning detention camps in DPRK, starvation and lack of food; restrictions on travel and movement; controls over access to media and the internet; harsh treatment for returnees coming from China and especially for religious adherents; and totalitarian presentation of propaganda uniformly supporting the regime in DPRK, all came in similar terms from the mouths of several witnesses who did not know the other witnesses offering like testimony;
* Testimony was filmed, transcribed and (where it was received in public hearings) is available online. Exceptions were provided for witnesses whom the COI regarded as likely to be endangered if they gave evidence in public. It is exposed to the assessment of people everywhere as well as experts and functionaries of DPRK in a most transparent way;
* Satellite images of DPRK available to the COI confirm what appear to be the buildings of detention camps following the general lines of the oral testimony given by oral witnesses. This is so although DPRK denies the existence of such camps. Moreover, by way of contrast with images of ROK, China and Japan, these satellite images demonstrate the continuing bleak physical, economic and humanitarian situation in DPRK;
* Opportunities were given to DPRK, in respect of testimony gathered in ROK to appoint lawyers (or representatives) to safeguard their interests and, with leave, to ask questions of all witnesses. Their refusal to accept this possibility makes it

unpersuasive now for DPRK to rely on any alleged imperfections of some of the evidence to which it is the main contributor by its total lack of cooperation;

* The COI report did not simply accept and present or summarise the claims of witnesses. The commissioners were assisted by a skilled secretariat, whose members were themselves independent of other UN organs and agencies, including the OHCHR. Members of the secretariat provided advice and analysis on witnesses and their testimony and their relevance to mandate issues. However, they accepted, as they were bound to do, that the commissioners had the right and duty to have the last word on all matters in the COI report. Some parts of individual testimony of witnesses were not included in the COI report because the COI was unsure as to their reliability. For example, an account suggesting the performance of unconsensual medical experiments in DPRK was not included for that reason. Similarly, the COI ultimately rejected witness suggestions of the international crime of genocide, because of the view it took as to the state of the evidence before it and the legal requirements for proving "genocide" under the current terms of international law.[50] Although some witnesses on religious persecution argued for a finding of genocide, the COI did not accept their contention. It acknowledged the radical reduction of the population of religious adherents in DPRK in recent decades. It expressed some sympathy for a broader definition of 'genocide' than was available to the COI in current international circumstances. However, it postponed any finding of genocide affecting religious minorities because the relevant evidence was "difficult or impossible to

[50] COI report, 350-351 [1155]-[1159].

[gather] without access to the relevant archives of DPRK".[51] Care was observed both in conducting confidential interviews and in undertaking the public hearings, to pose questions in such a way as to extract only first-hand information known to the speaker. It was not necessary to its conclusions for the COI to rely on second-hand or purely hearsay accounts;

* Whilst it is true that cultural considerations are relevant to testimony received through interpreters, this is an inescapable feature of collecting evidence in multicultural societies, including those from which each of the commissioners and most members of the COI secretariat derived. There is nothing peculiar or special to the DPRK in this regard. Many of the conclusions reached by the COI are similar to those earlier, and subsequently, recorded by Korean civil society organisations in South Korea that conducted their interviews in the Korean language, with complaints questioned by Korean native speakers. On the issue of gender, the COI adopted a practice of ensuring, so far as possible, that female witnesses were interviewed confidentially by female investigators. Most of the female witnesses in the public hearings of the COI were questioned primarily by Commissioner Sonja Biserko in the first instance; and
* Finally, so far as the evidence of Shin Dong-hyuk is concerned, adjustment can be readily made for his partial recantation and the withdrawal of his testimony that he had been detained in Camp 14 (as well as certain other evidence he had given about his parents). That still left evidence by Shin that was entirely believable, reliable and corroborated by other witnesses. In any case, the quotations from Shin's testimony, actually contained in the COI report, are

[51] *Id,* 365 [1211].

relatively few. Those recorded verbatim are immaterial to the point of his recantation. None of the other persons named as unreliable by Ms Song gave public evidence to the COI or were relied on by the COI or its secretariat.

In the big picture of human rights violations in DPRK, found to be "systematic, widespread and gross" extending over many years and affecting millions of people, the subtraction of part of the testimony of one witness, Shin Dong-hyuk, has no consequence for the overall impact of the witness testimony received by the COI on DPRK. It does not require withdrawal of a single conclusion or recommendation of the COI. Any more than, in municipal jurisdiction, conclusions and recommendations of a large and significant inquiry would have to be withdrawn or disbelieved in their entirety because it was later found that part of the testimony of one witness was false, careless or exaggerated in identified respects.

Reflecting on the recantation by Shin, Blaine Harden wrote in August 2015 in language that I find convincing: [52]

> "If there's one truth to be gleaned from… memoirs [of escapees from DPRK], it is about the centrality of lying. For me, it is a haunting issue. Shin Dong-hyuk, the subject of my 2012 book, "Escape from Camp 14", misled me for 7 years about some details of his life in North Korea's gulag. When I asked him why had done it, he said the complete truth was simply too painful. He chose to tell me (and human rights groups and UN investigators) an expurgated story, which he wore as body armor for

[52] B. Harden, "How can we know North Korea stories are true?" in *Washington Post*, August 9, 2015, B1 and B5.

> life in the free world. It protected him from trauma he was unwilling to relive. It hid behaviour he was ashamed to disclose. He had no idea, he said, that the precise details of his life would ever be considered important. Shin's experience in North Korea was particularly gruesome. His body is covered with scars from repeated torture. He is stunted from malnutrition. As a young teen, he betrayed his mother and brother, causing their execution. Psychologists agree that victims of such severe trauma almost always tell stories that are fragmented, self-protective and intermittently untrue. But Shin's relationship to the truth is not completely foreign to other defectors now writing memoirs. … Some skepticism, then, is probably in order for readers coming fresh to memoirs about North Korea. But for what it's worth, I believe these books. They are consistent with a recent UN investigation that found overwhelming evidence that crimes against humanity are being committed in North Korea. For journalists who have spent hundreds of hours interviewing defectors believe these memoirs ring true about North Korea's culture of cruelty and lies."

V
CONCLUSIONS

Scientists, mathematicians and statisticians commonly search for truthful and reliable data. To the extent that they can work with incontestable facts, objective observations and unwavering digital symbols and numbers, their lives are rendered easier. The uncomfortable elements of human imperfections can then, to that extent at least, be subtracted.

In resolving disputes and contests over what has happened in the past, or what is happening now, in individual countries and elsewhere in the

world, it is usually not so easy to delete the human element. Decision-makers work with imperfect materials. But these are the materials that make up our societies and our world. Where the issue presented for decision is straightforward, in a civil case, the question where truth lies can be pursued by the decision-maker, applying well-worn rules to come to a conclusion that is probably objectively correct description of what happened in contested circumstances. The obligation to give reasons subjects the decision maker to discipline and the conclusion to subsequent analysis and review. High courts of law may have the last word for legal purposes. But in a free society, that does not prevent other citizens from continuing to question the official decision and possibly to demand fresh analysis and further consideration.[53]

Where a case involves criminal charges, and potential punishment with loss of liberty, reputation and other humiliations and burdens, the simplistic question "where does truth lie?" may be complicated because of other considerations. In such a case, the risk of error on the part of the decision-maker is more intolerable. Hence error must more carefully be guarded against.

In a multifaceted inquiry at an international level, it is true that there are serious dangers of fraudulent, false, exaggerated, confused and unreliable testimony, sometimes affected by the consequences of psychological trauma, political motivations and even idealistic aspirations. Yet in this case, as in national formal decision-making, the decision-maker does not have the luxury of walking away. He or she

[53] This occurred in Australia following the death of an infant Azaria Chamberlain, allegedly taken by a dingo (wild dog), which was the subject of several cases and ultimately a Royal Commission that cleared the mother of a charge of murder. See *Chamberlain v The Queen* [No.1] (1983) 153 CLR 514; [No.2] (1984) 153 CLR 521.

must do the best that is possible in the circumstances to unveil the truth. A measure of scepticism about the sources of the evidence used is usually appropriate. Certainly, caution should be used in accepting the testimony of witnesses generally. Decision-makers need to be made aware of the neurobiology of decision-making and what it means to have a "feeling" of "actual persuasion" or a belief that a conclusion can be classified as "beyond reasonable doubt". [54]

Similarly, the decision-maker needs to be aware of cultural considerations that can influence the way evidence is given when it comes through the medium of a different language or culture.[55] We now know how some evidence, given with conviction and certainty, can be erroneous, simply because of the operation on our fallible human recollection of unconscious psychological factors such as expectations, interests, hopes and desires. [56]

Formal decision-making in a court, tribunal or a commission of inquiry involves a process that has many uncertain and some missing points of reference. But the journey must generally be taken and it must be completed if important questions are to be brought to a conclusion. Those engaged in that process must have clear eyes and an honest objective to come to the right destination. Because of our human weaknesses, we will all sometimes fail in the journey. However, that risk does not release us from the obligation to pursue the place where truth lies.

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[54] H. Bennett and G.A. Broe above n. 8 at 67-68.

[55] E. Kyrou, above n.7. Justice Kyrou raises a number of novel questions and offers suggestions.

[56] For example observations on the dangers of identification evidence in *Domican v the Queen* (1992) 173 CLR 555.

According to Scripture, when Pontius Pilate was told by Jesus that he had come into the world to bear witness unto the truth, the Roman Governor asked the question: "What is truth?"[57] He did not stay for an answer; but he immediately declared to the angry crowd: "I find in him no fault at all". Yet instead of sticking to his own conclusion, he attempted a dishonest compromise by offering up a murderer, only to find that the rabble was not to be appeased. So he felt forced to proceed to a gravely unjust decision.

In official decision-making, the discovery of truth is not scientific. However, when it found, recording and explaining it can help to prevent or correct an injustice in a civil case and bring to a temporary conclusion a criminal accusation. On the global stage, truth can shine the light of knowledge on a country of terrible wrongs. Truth alone is not enough for justice to be done. But without truth injustice may go unnoticed and unrepaired. That is why, with all the risks, humanity and its institutions stubbornly search for the truth. The fact that it is sometimes very difficult to discover and that we may not be absolutely certain that we have done so, is not an excuse for giving up the effort and explaining and describing the destination we have arrived at.

[57] *St. John's Gospel,* Ch. 18, v.38.