

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

### ABSTRACT

In this article, derived and enlarged from a recorded conversation, the participants explore the methodology of United Nations ('UN') human rights mandate holders as earlier examined by Philip Alston, Sarah Knuckey and others in *The Transformation of Human Rights Fact-Finding*.<sup>1</sup> By reference to his experience in the UN Commission of Inquiry ('COI') on Human Rights Violations in the Democratic People's Republic of Korea ('the DPRK' or 'North Korea'), the Hon Michael Kirby explains: the reasons for, and consequences of, the distinctive methodology there adopted; the challenges of coping with often emotional testimony; available mechanisms for dispassion and their limitations; the tradition of public hearings in inquiries in Australia; approaches to 'the moment of decision' on contested issues; the follow-up to the report of the COI on the DPRK; and several general lessons about effectiveness of formal report writing. The article begins with an introduction by Rebecca LaForgia based on an analysis of recent scholarly examinations of the process of international human rights fact-finding.

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<sup>1</sup> This conversation was undertaken with video recording for use in the class conducted by Dr LaForgia on the transformation of human rights fact-finding. The transcript has been amended, edited and elaborated for clarity and sense and to add references and further reading to enhance the value of the conversation. The authors wish to extend their thanks for: the partial funding by the University of Adelaide Law School; the editing of questions by Mr Philip Elms, Multimedia Project Coordinator, Faculty of the Professions; the private funding of this video recording. Both authors acknowledge the assistance they have derived from the recent publication by two Australian scholars in New York, Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding*, (Oxford University Press, 2016). In an earlier life, Sarah Knuckey was an Associate to Justice Kirby in the High Court of Australia. See also Christina Abraham and M Cherif Bassiouni (eds), *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies*, (International Institute of Higher Studies in Criminal Sciences, 2013).

## I INTRODUCTION

A contested and yet important question in international law is: how do we know facts?<sup>2</sup> In the absence of a compulsory world court that covers all disputes,<sup>3</sup> the question of what we know, how we know it, and who is allowed to say what the ‘truth’ is has legal and political significance.<sup>4</sup> Whatever the area — international humanitarian law, international human rights, environmental law, use of force, or collective security — fact-finding is central to action, inaction, legal judgment, framing of events, and accountability.<sup>5</sup>

We live in an era that has banished certainty, but in which certainty has lost nothing of its allure. It may therefore come as no surprise that fact-finding as a particular institution of international law is witnessing a new popularity ... it has never seemed more essential for efforts at promoting human rights to develop a clear picture of what actually is going on.<sup>6</sup>

The advent of the internet and social media has increased our capacity for information creation and dissemination across and within borders.<sup>7</sup> With this new capacity, the critical skill of discerning fact from opinion and assessing the legitimacy of fact-finding processes is vital. In acknowledgement of this need, in 2015 fact-finding was introduced as a topic in the subject of International Law at the University of Adelaide. Within the already full syllabus, an hour was found to lecture on the topic. However, students found it difficult in a brief, one-hour session to enter into broad critical engagement with international fact-finding. Yet, to omit it would be to omit an important analysis of power and international law:

One could say fact-finding is a form of power. Facts are all-important in justifying international action, as we have been reminded at regular intervals from the invasion of Iraq based on the supposed fact that it possessed weapons of mass destruction, to threats of use of force against the Syrian regime that was accused of using chemical weapons against its population. The failure to produce facts

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<sup>2</sup> Alston and Knuckey, ‘*The Transformation of Human Rights Fact-Finding*’ above n 2; M Cherif Bassiouni, ‘Appraising UN Justice-Related Fact-Finding Missions’ (2001) 5 *Journal of Law and Policy* 35.

<sup>3</sup> Shiri Krebs, ‘The Legalization of Truth in International Fact-Finding’ (2017) 18 *Chicago Journal of International Law* 83.

<sup>4</sup> See generally Frédéric Mégret, ‘Do Facts Exist, Can They Be “Found”, and Does It Matter?’ in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford Scholarship Online, 2016) 27.

<sup>5</sup> Théo Boutruche, ‘Credible Fact-Finding and Allegations of International Humanitarian Law Violations: Challenges in Theory and Practice’ (2011) 16 *Journal of Conflict & Security Law* 105. However, the turn to legalisation of facts is not necessarily accepted as an unmitigated good: see the empirical work of Krebs, above n 3.

<sup>6</sup> Mégret, above n 4, 27.

<sup>7</sup> Ibid 37.

may paralyse action, as when international inaction is justified by the failure to establish that genocide is ongoing (Rwanda, Darfur).<sup>8</sup>

The importance of these examples used by Mégret is largely self-evident. In the context of Iraq, facts, which were later proven to be false, supported the violent invasion of the country. At the other extreme, in the context of Rwanda, facts, which were tragically obvious, did not generate any swift international action. Mégret is alluding to how fact-finding is more than searching for particular truths, it is also the process of constructing consensus around what it is that we believe and consequently what it is that we will act upon. Fact-finding is therefore a complex area of study. This is to be contrasted with traditional fact-finding — for example, within the International Court of Justice. In this context we are on the familiar legal territory of observing the judicial authority to find facts, as part of assessing a dispute. It may well be that a decision is subsequently criticised for the burden of proof or approach the court uses in fact-finding. However, this critique is quite distinct from what it is that we are discussing here. The discussion in the context of this introduction is in the area of fact-finding outside of the compulsory judicial context. As stated above, it is necessary to observe fact finding beyond the compulsory judicial context, as international law often operates without compulsory judicial oversight. There is some responsibility to understand how the truths that are being put before us are being constructed and used to mobilise action and inaction under international law. An approach to this pedagogical problem of how to cover a dense topic in a short time and achieve engagement was to introduce a change in emphasis in the teaching of the topic.

The teaching moved away from covering the topic in broad themes and theory to an emphasis on the case study of an individual fact-finder. The Hon Michael Kirby generously agreed to be interviewed about his experience as Chair of the United Nations ('UN') Commission of Inquiry ('COI') on the Democratic People's Republic of Korea ('the DPRK' or 'North Korea').<sup>9</sup> This interview was filmed, creating a valuable audiovisual record for the students and the public. The film gave students, in a short space of time, an immediate connection with the Hon Michael Kirby. As his voice and image played in the lecture theatre, or streamed into their homes if they were off-campus, the students watched and listened to him, as a finder of facts, telling the story of grappling with testimony, process and emotion. The aim was to have students engage through the filmed interview in an immediately relatable and practical perspective on fact-finding, in which they could see the fact-finder interviewed about his thoughts, emotions and decision-making — to show, rather than to lecture, and then to link this with supporting scholarly readings.<sup>10</sup> Informal feedback from students confirms that this approach has worked extremely well, and humanised the subject of fact-finding, thereby engaging the students.

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<sup>8</sup> Ibid 28.

<sup>9</sup> Michael Kirby, 'UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea: Ten Lessons' (2014) 15 *Melbourne Journal of International Law* 291.

<sup>10</sup> Ibid.

Following this introduction is an edited written transcript of the Hon Michael Kirby audiovisual interview. However, the edited transcript should not be read simply as a record of a teaching initiative. The interview contributes to some of the deeper themes in the area of international fact-finding. This introduction takes some of the observations and themes from the Hon Michael Kirby interview and places them within several themes that arise from the international fact-finding literature, drawing specifically on the work of Alston and Knuckey<sup>11</sup> and three important themes raised by the work of Mégret.<sup>12</sup> This introduction is therefore a brief companion to the record of the transcript of the interview that follows.

Three particular themes will be explored. Firstly, this interview promotes what can be described as an ‘internal perspective’ of fact-finding: it is a firsthand account of the fact-finder’s experience in creating process, in listening to witnesses, and so on. This firsthand experience, as Alston and Knuckey note from their own experiences, naturally promotes questioning and engagement with facts.<sup>13</sup> Being exposed to these internal reflections is valuable because it naturally promotes engagement and critical questioning, such as: ‘would I have done that?’ or ‘I see why that was done’. This questioning that is promoted in the firsthand account is significant for developing robust methods of fact-finding. Secondly, the interview highlights one of the challenges faced in fact-finding: that of indeterminacy and contestability of facts. The literature deals with this tension. On the one hand, we know that some facts can be contested; yet, on the other, to contest all facts is to leave no consensus, and gives the appearance that legal judgments (based on contested facts) would seem as relativistic legal judgments themselves.<sup>14</sup> One of the methods of distinguishing fact from contested opinion is to engage in a public and legitimate process.<sup>15</sup> The interview with the Hon Michael Kirby is a frank reflection on the importance of process and extracts from the interview will highlight this. Lastly, fact-finding is seen increasingly as based on communication: a cumulative dialogue and engaged activity.<sup>16</sup> It is not a one-off activity in which facts are found and received. To that extent, we are all participants in the communication about facts. This interview, in both the audiovisual and the written versions, is part of that communicative cycle. Lastly, the theme of listening, in the context of facts, is introduced.<sup>17</sup> Facts come from somewhere, and often, at least in the context of international human rights, they are from individuals. The emphasis on listening to individuals is actually part of the ethics of fact-finding.

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<sup>11</sup> Philip Alston and Sarah Knuckey, ‘The Transformation of Human Rights Fact-Finding: Challenges and Opportunities’ in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (Oxford University Press, 2016) 3.

<sup>12</sup> Mégret, above n 4.

<sup>13</sup> Alston and Knuckey, ‘The Transformation of Human Rights Fact-Finding: Challenges and Opportunities’, above n 11.

<sup>14</sup> Mégret, above n 4.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 27, 42.

<sup>17</sup> Ibid 27, 47.

We can see this ethic play out when we consider North Korea, in the recent firing of missiles, to represent a fearful existential entity. However, it is also the case that North Korean individuals, like those who have been listened to for the COI, are this existential entity, 'North Korea'. The ethics of listening to facts on which the Hon Michael Kirby reflects during his interview reminds us of these individuals within the state. This does not resolve the existential crisis; however, it does create a centre from which to remind ourselves of the humanity within the State of North Korea.

*A Reading the Interview for Internal and On the Ground Experience*

The interview that follows is a firsthand account of the chair of the COI on the DPRK, the Hon Michael Kirby. As a firsthand account, it places us closer to the field of decision-making. The questions for the interview were deliberately posed so that they would reach the heart of what it means to be a responsible individual in a fact-finding context. The answers by the Hon Michael Kirby reveal his reflections and thinking as an individual. This is what we might call the 'internal perspective', the idea of being engaged in practically gathering facts. Participation within fact-finding motivated Alston and Knuckey's scholarly work on fact-finding.<sup>18</sup> Their scholarly work originated from questions the authors posed to themselves from the fact-finding they had personally undertaken.<sup>19</sup> The authors noted:

With each investigation, we sought to improve our methods ... yet ... there was little scholarly writing to which we could turn. It became apparent that the richest debates were occurring among the *participants* and subjects of investigations, in the offices of NGOs, over dinner during commission of inquiry investigations, and in other informal locations.<sup>20</sup>

We can see that in Alston and Knuckey's experience, the cycle of participation drives the critical perspective. One objective in reading the interview is to gain this sense of being a participant, of observing the decision-maker, the fact-finder, at work. Seeing and listening to the firsthand account of the fact-finder — in this case, the Hon Michael Kirby — actually reflecting on his processes leads to a decision-making empathy, raising critical questions organically, such as 'if I was in the commission, how would I find the truth?' and 'what would the truth look like?' Through the interviewee's immediacy and candid observations, we can 'take greater account of what

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<sup>18</sup> Alston and Knuckey, 'The Transformation of Human Rights Fact-Finding: Challenges and Opportunities', above n 11.

<sup>19</sup> *Ibid* 4:

'Through Philip Alston's mandate as the UN Human Rights Council's Special Rapporteur on extrajudicial executions, [he and Knuckey] jointly undertook investigations in Brazil, Afghanistan, Kenya, the Democratic Republic of the Congo, Albania, the Central African Republic, Ecuador, Colombia, and the United States. Sarah Knuckey has also carried out investigations in Pakistan, as well as of protesters' rights in the United States, and over a long period of time in Papua New Guinea.'

<sup>20</sup> *Ibid* (emphasis added).

actually happens in practice'<sup>21</sup> and thereby create 'critical approaches'<sup>22</sup> beyond what is 'descriptive',<sup>23</sup> thus instilling an engaged inquiring perspective, which is significant for approaching the area of fact-finding.

### B *Legitimacy of Facts/Truth?*

One of the other core themes that the fact-finding literature deals with is the indeterminacy and contestability of interpretations and opinions.<sup>24</sup> This is not new; the contestability of facts and truth has arisen throughout history. However, radical contestability arises particularly in our time because of the amount of information available and the ability to comment on this information:

The Internet has if anything made facts both less and more accessible, and ensured that every 'fact' is immediately in competition with a variety of 'counter-facts.' ... The vast availability of facts and yet the poverty of what often passes as facts is something that the more institutional and formal exercises of fact-finding must reckon with. One of the ironies of the turn to facts, then, is it occurs against the background of a world in which nothing has ever seemed more virtual, and where it has never seemed as easy to contest the uncontestable.<sup>25</sup>

An important challenge of fact-finding in international law is therefore how to manage this question of indeterminacy and contestability. Mégret centres on legitimacy achieved in part through due process as a means of countering indeterminacy:

most importantly, facts are derived from certain recognized *methods* of constructing them. Even a perfectly impartial fact-finder would be suspicious if he failed to follow such a method. Opinion is not necessarily without method, but facts adhere to some presumably exacting and recognized procedure. In the judicial context, the fairness of the procedure is in itself seen as a guarantee of proper fact-finding. The loss of the recognizable dispute settlement element that was so central to classical fact-finding, however, means that it is not clear who the parties to a human rights fact-finding exercise are (indeed, that there are parties at all).<sup>26</sup>

The Hon Michael Kirby speaks of this in several ways. In several sections in the transcript that forms Part II of this article he reflects on how the COI process was undertaken with 'manifest due process', 'fairness' and 'sensitivity to the witnesses', in a 'public forum where the processes and outcomes are subject to informed

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<sup>21</sup> Ibid 3.

<sup>22</sup> Ibid 4.

<sup>23</sup> Ibid.

<sup>24</sup> Mégret, above n 4; see also, for an interesting empirical response to indeterminacy, Krebs, above n 3, 94.

<sup>25</sup> Mégret, above n 4, 37.

<sup>26</sup> Ibid 32 (emphasis in original).

scrutiny'. However, one particular comment by the Hon Michael Kirby — 'those who gather the evidence can themselves be judged' — encapsulates the point Mégret was making on the importance of process.<sup>27</sup> The willingness — indeed, the inherent openness to being judged — seems to encompass a certain acceptance of contestability and indeterminacy; that is, all may not be perfect always. Yet, at the same time, the comment remains faithful to developing something other than mere opinions or impressions towards a publicly verifiable factual position. Reading this section of the interview in particular plays out in a practical context the theoretical dilemmas and observations in the literature on fact-finding, regarding indeterminacy, legitimacy and process.<sup>28</sup>

### *C Communication and Fact-Finding*

The method of communication<sup>29</sup> is also a central to fact-finding. For Mégret, facts are 'social construction',<sup>30</sup> which, in turn, leads to a 'slow accumulation'.<sup>31</sup> Communication is, according to Mégret, how facts can become 'plausible'.<sup>32</sup> We are ourselves part of the construction of facts as we communicate and discuss. The implication of Mégret's views is not that communication would lead to a constant revisiting of the conclusions of the COI. Mégret's point is that the communication of facts assists in them becoming socially relevant facts. Therefore, this interview, which is forming part of teaching, is itself a commitment to this approach to fact-finding. If this is the case, we can see that this interview operates as a case study of how to communicate facts. The Hon Michael Kirby's act of communicating in this interview makes knowledge egalitarian.<sup>33</sup> It is publicly available and produced in an accessible audiovisual form. The interview with the Hon Michael Kirby can be seen as not separate from the COI report but part of this slow accumulation,<sup>34</sup> part of the social construction. It is open to anyone to read the interview, including: political scientists, journalists, and lay readers.

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<sup>27</sup> Ibid 31, 42, 45. Michael Kirby, 'Where does Truth Lie? Challenges and Imperatives of Fact-Finding in Trial, Appellate, Civil and Criminal Courts and International Commissions of Inquiry' (2018) 41(2) *University of New South Wales Law Journal* (forthcoming).

<sup>28</sup> Ibid.

<sup>29</sup> Ibid 41–2.

<sup>30</sup> Ibid 41.

<sup>31</sup> Ibid 42.

<sup>32</sup> Ibid 44.

<sup>33</sup> Krebs, above n 3. Here, Krebs notes the difficulty in representing the truth in legal terms, which she describes as a 'price tag' lacking, she alleges, 'participatory value': at 83. In this sense, the COI counters those tendencies in the way it communicates. See also the difference between determining and disseminating facts: at 136.

<sup>34</sup> Mégret, above n 4, 42.

### D *The Ethics of Listening as Part of Facts*

Lastly, there is an important ethical dimension to fact-finding. It is a form of listening to the other:

there is *also an ethical dimension to facts*. Refusing to believe what one has no way of disproving, asking for perfection in fact-finding, excluding facts that provoke narrative dissonance, always assuming the worse [sic] in others, engaging in conspiracy theories: all such behavior that presents itself as based on a critique of knowledge may in the end merely reveal moral ineptitude. [The person who does this] is perhaps less a flawed scientist/historian than he is someone who has distanced himself *from the ability to listen to witnesses*, hear sad stories of pain and grief, and, fundamentally, empathize with humanity.<sup>35</sup>

The intersection between listening and facts is a subtle but significant one. Listening has a lineage in political theory.<sup>36</sup> Mégret's observation is, however, a contained idea of the ethical role for the consumer of facts. Mégret is not referring to a direct link which asserts a rehabilitative or cathartic role that listening will play for victims. Indeed, in the example that he gives of the Holocaust many of the victims are dead. Nevertheless, he suggests that there is still an ethical requirement that we remain open to their suffering.<sup>37</sup> The primary intimate listening for the COI on the DPRK has been performed predominantly by the Hon Michael Kirby. Indeed we can see this in reflections of the Hon Michael Kirby in Part II of this article regarding the value of listening in the fact-finding process: 'the COI on the DPRK gave a voice to people who had never previously been *listened to* with respect for their suffering and the affront to their human dignity. They had not previously enjoyed respect for their voices'. Now what remains is listening by the class, the reader, the public of this testimony. It is this remaining element which Mégret suggests has an ethical dimension. He is asking that we do not dispute, deny or require 'perfection', that we remain open to listening to facts and suffering of others. This is a powerful and unifying concept by Mégret: facts are created by the 'ability to listen', and we ourselves participate in the 'ethics' of fact-finding through our 'ability to listen'.

<sup>35</sup> Ibid 46–7 (emphasis altered).

<sup>36</sup> See Susan Bickford, *The Dissonance of Democracy: Listening, Conflict, and Citizenship* (Cornell University Press, 1996); Andrew Dobson, *Listening for Democracy: Recognition, Representation, Reconciliation* (Oxford University Press, 2014).

<sup>37</sup> '[A]ttention requires a profound stilling of the self ... To be genuinely open to another, "all that I call 'I' has to be passive"': Bickford, above n 43, 145 quoting Simone Weil, *Gravity and Grace* (Octagon Books, 1979) 171. See also David Beard, 'A Broader Understanding of the Ethics of Listening: Philosophy, Cultural Studies, Media Studies and the Ethical Listening Subject' (2009) 23 *International Journal of Listening* 7; Jerry Catt-Oliason, 'Essay: On *The Dissonance of Democracy: Listening, Conflict, and Citizenship*' (2005) 19 *International Journal of Listening* 48.



### E Conclusion

The interview transcript that follows enables the reader to see the internal point of view and the moments of decision for a fact-finder; it also reveals the importance of process. Further, the interview acts as a form of open communication and endorses, both explicitly and in the humanity with which the process is described, the ethics of listening in fact-finding. The interview therefore reflects major themes present in the broader debates in fact-finding, in an accessible manner. For the teaching of fact-finding at the University of Adelaide, we are indebted to the openness of the Hon Michael Kirby in describing his experiences and reflections and recording them audiovisually and in writing.

## II DIALOGUE ON THE REPORT OF THE COI ON THE DPRK

*A REBECCA LAFORGIA: The report of the COI on the DPRK was in some ways unique both in content and in style. What were the basic reasons for the differences?*<sup>38</sup>

THE HON MICHAEL KIRBY: The usual way that inquiries are conducted for the UN, in the environment of the Human Rights Council ('HRC') (or other similar environments), is that they are undertaken according to the techniques of the civil law tradition. That is to say, they are usually conducted in a private inquisitorial manner by appointees, usually professors or diplomats. I am not against professors, being myself an honorary professor of various universities. Nor do I disrespect officials. The inquisitorial technique is generally cost-effective. The evidence is basically gathered in confidential sessions, conducted in secret by a process of investigative interrogation.<sup>39</sup>

That is not the usual common law way. The common law technique for eliciting evidence was originally to do so in the presence of a jury, sitting in public. Members of the concerned public were able to watch the proceeding and to judge the effectiveness and fairness of the process and also to assess the accuracy of the outcome. Later, juries were generally replaced by judges sitting alone. But they too performed most

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<sup>38</sup> Please note these are not direct quotes from the original questions — which were much longer and open-ended. These questions as replicated in Part II have been edited down to reflect the core nature of the question asked. This was done to enable the subtitles to be made so that the interview was accessible in class. For assistance in the editing of questions the authors are grateful to Mr Philip Elms, Multimedia Project Coordinator, Faculty of the Professions.

<sup>39</sup> See Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Bloomsbury, 2017). See especially, for a description and illustration of the variety of COIs, Théo Boutruche, 'Selectivity and Choices in Human Rights Fact-Finding: Reconciling Subjectivity with Objectivity?' in Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Bloomsbury, 2017) 287; Alison Bisset 'Commissions of Inquiry and Procedural Fairness' in Christian Henderson (ed) *Commissions of Inquiry: Problems and Prospects* (Bloomsbury, 2017) 309.

of their functions in public. There is a lot to be said for the common law system.<sup>40</sup> This is especially so in the area of international human rights disputes and allegations of serious human rights violations.

Of their nature, if such issues have come, or may in future come, before an international court, tribunal or inquiry, such matters are generally going to involve horrifying or distressing subjects. Therefore, it is important that they be carried out, as far as possible, dispassionately, with manifest due process, with fairness to everybody involved, with sensitivity to the witnesses, and in a public forum where the processes and outcomes are subject to informed scrutiny. In this way, those who gather the evidence can themselves be judged. The international community can judge, with greater assurance, the fairness of the process and the accuracy of the outcome.

*B REBECCA LAFORGIA: In the nature of COIs for the UN HRC, the evidence is often going to be heart-rending. How did you cope with such testimony and preserve dispassion, essential to writing an accurate and convincing report?*

THE HON MICHAEL KIRBY: I am told by my partner, Johan van Vloten, that in the course of our lives together — more than 48 years — I have become more remote and reserved. This is not unusual for people who have held judicial and other similar responsibilities. 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 may rush to your head and you will not be concentrating on what is objectively being demonstrated by the testimony. Feelings and emotions are inescapable in any system of human endeavour. However, they should not be allowed to overwhelm dispassion and accurate analysis. This is true of the work of judges and lawyers in national courts and tribunals. It is also true of decision-makers in international commissions of inquiry.

My partner's assessment of me is probably right. Over the years, I have become less emotional. At high school, an excellent teacher, Ron Horan, wrote on my annual report, 'Michael is a good student. But he will need to become more analytical in thought.'<sup>41</sup> I puzzled over this comment at the time; but I came to take it seriously. The law and the law's requirements of due process require you to do that. Otherwise, you might get so upset by the wrongs and horrors that you are being told that you do not concentrate on the anterior questions: Who is responsible for this? Who (if anyone) should be rendered accountable for this? Are the people who are under your spotlight actually the guilty parties in respect of the complaints? All of these questions, and many more, need to be kept in mind in the decision-making process.

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<sup>40</sup> Michael Kirby, 'The UN Report on North Korea: How the United Nations Met the Common Law' (2015) 27 *New South Wales Judicial Officers' Bulletin* 69.

<sup>41</sup> A J Brown, *Michael Kirby: Paradoxes & Principles* (Federation Press, 2011) 40.

C REBECCA LAFORGIA: *Do any particular instances of testimony in the COI on the DPRK illustrate any special challenge to dispassionate reporting that you faced?*

THE HON MICHAEL KIRBY: On two occasions in the course of the hearings of the UN COI on the DPRK I felt that I was on the brink of breaking down because the evidence was so awful and so shocking to me. As someone who had served as an Australian judge for 34 years, I had not expected that I would ever face anything quite like what I was hearing. These occasions arose during evidence about the horrible conditions of the detention camps for political prisoners established in North Korea. According to that testimony, people and their families were put into frightful living and working conditions. Often they were not given adequate food. Detainees were dying overnight of starvation. Their bodies were collected in the morning, just like the bodies in the concentration camps of the Nazis.<sup>42</sup> Then there was the case of a woman who was forced to drown her own baby when she was returned to North Korea from the People's Republic of China ('China').<sup>43</sup> This was because she had left her homeland illegally and her baby was the child of a Han Chinese father. North Koreans are often racist in their attitudes towards non-Koreans, especially in the case of interracial births. As an Australian, raised in the era of the White Australia policy,<sup>44</sup> I was aware of that attitude. I was sensitive to such evidence.

These were terrible facts. They were so graphically, quietly and apparently dispassionately told by the witnesses that you felt you had to rebuke yourself that you were overreacting, whereas the witnesses did not appear to do so. They had gone through their stories in their own mind so many times. They told their stories unemotionally. That was the way the testimony came out. It seemed strange and even a little unreal that those who had suffered and witnessed such suffering could be so apparently dispassionate and even uninvolved in the horrors they were recounting. However, I came to conclude that this was way they had learned to endure the unendurable. If one visits a Holocaust museum and views the filmed interviews recorded

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<sup>42</sup> United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25<sup>th</sup> sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1 (7 February 2014) ('*Report of the Detailed Findings of the COI on the DPRK*') 244 [780]–[781].

<sup>43</sup> *Ibid* 125–6 [432].

<sup>44</sup> The immigration policy of the Commonwealth of Australia based on the near total exclusion of immigrants of non-Caucasian ethnicity. One of the first legislative measures to enforce the Policy was adopted in colonial times by the Parliament of Victoria in 1855. By this Chinese immigration was restricted. An inter-colonial conference in 1896 concluded that the same policy should apply to other non-'white' races. Despite resistance by the British Secretary of State for the Colonies because of Imperial sensitivities, he eventually suggested the use of a dictation test. This applied until 1958. The Commonwealth followed the colonial practice, which enjoyed broad cross-political support. See, eg, *Pacific Island Labourers Act 1901* (Cth). The Policy was gradually abandoned after 1958. Peter E Nygh and Peter Butt (eds), *Butterworths Australian Legal Dictionary* (Butterworths, 1997) 1266.

by survivors of the Nazi brutalities displayed there, one sees examples of a similar phenomenon. Human memory and feelings discover ways to cope with horrifying experiences. In any case, in some circumstances the quest for total dispassion may be illusory and impossible.

*D REBECCA LAFORGIA: In producing the COI report did you follow methods learned from your earlier responsibilities in Australia?*

THE HON MICHAEL KIRBY: Sir Zelman Cowen,<sup>45</sup> who was a part-time Commissioner of the Australian Law Reform Commission ('ALRC') in the 1970s (1976–77), once told me that I had to avoid the problem of the centipede. Having so many legs, there was a risk that it might not make up its mind as to which leg it would use first to move forward. In that quandary, it might not move at all: even for example, when it needed to move, when there was a predator around or an urgent obligation to be fulfilled. That was one of his lessons for us in the ALRC. It was a lesson I put to good use in the COI on the DPRK.

Perfection is often the enemy of the good. If you wait forever for perfect and overwhelming evidence, you may never get the report written. In the meantime, injustice will keep happening. You have to recognise that you are a human being. You may make mistakes. You may even reach serious mis-assessments of the truthfulness of a witness: as to the accuracy or inaccuracy of what you have been told. Yet still you cannot dilly-dally. 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 with unanimity.

Remember that, on my appointment, I had already had 25 years — a quarter of a century — of experience as an appellate judge in Australia. My entire judicial career was even longer. I had experience as a young lawyer, as an 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 daily practice of Australian law. Most cases were conducted in continuous oral trials: in court, and often before a civil or criminal jury. The case always had its own momentum. It was designed to reach a conclusion with defined parameters as to time and procedures. You just had to get on with it and do the best you could, sometimes with the 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. And to make sure that the most convincing evidence available was tendered and admitted to fulfil that objective. Training of this kind promotes attention to an efficient methodology. The effective use of the limited available time for a hearing is an important element of the daily practice of litigation before Australian (and other) national courts.

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<sup>45</sup> (1919–2011); Former Dean of Law at Melbourne University, Vice Chancellor University of New England and University of Queensland, and Governor-General of Australia (1977–82): A J Brown, above n 48, 112.

When I served on the High Court of Australia (and in the Court of Appeal of New South Wales) I was always working efficiently towards the end product — reasons for judgment supported by detailed, and hopefully persuasive, evidence and arguments. Justice D L Mahoney, in the Court of Appeal, taught me that the appellate judge should never waste his or her time. You should always be trying to identify at least what the problems were which you needed to solve. So I continued a mode of preparation that basically followed a methodology I had adopted as a law student. I continuously drew tree diagrams of arrows and sub-arrows and sub-sub-arrows identifying the issues. I did this to stimulate and focus my mind. To make sure that I addressed precisely the many questions I had to answer. This also helped identify the big branches of the tree, to ensure that I would retain a focus on the big picture and the overall concepts that were in play, as well as the smaller problems that I had to solve that fed into the resolution of the big picture.<sup>46</sup>

My service of ten years in the ALRC was also very instructive. In the early years of that service I was taught by a Professor of the University of Adelaide, David St L Kelly, how to conceptualise issues. There I was in the COI on the DPRK, bombarded by a huge number of diverse facts relevant to North Korea. However, my mind was constantly being directed towards particular factual and legal ends. One such legal end was: Does this evidence, if accepted, amount to ‘genocide’ in international law?<sup>47</sup> Does this evidence, if accepted, amount to a ‘crime against humanity’ in international law?<sup>48</sup> If so, what are the categories in which the evidence ticks that box? Are there any categories where it fails to meet the legal requirements? Do the facts justify such a serious conclusion? Or do they prove a different human right violation, which does not amount to a ‘crime against humanity’? All of this is going on in your mind, in my case working all the while with the tree diagrams. Now I come to the final point.

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<sup>46</sup> A photograph of one such tree diagram (photo 28.1) appears in *ibid*, 390.

<sup>47</sup> The COI on DPRK received submissions about the alleged commission of ‘genocide’. These submissions were analysed in the *Report on the Detailed Findings of the COI on the DPRK*, UN Doc A/HRC/25/CRP.1, 350–1 [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*, opened for signature 9 December 1948, 1021 UNTS 278 (entered into force 12 January 1951) art 2 (and the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 6) genocide had not been established by the evidence. The COI members favoured a broader modern content to ‘genocide’ to include ‘politicide’: *Report on the Detailed Findings of the COI on the DPRK*, UN Doc A/HRC/25/CRP.1, 351 [1158]. But it was determined that this was not the present state of international law and that, accordingly, genocide had not been established: at 350 [1157].

<sup>48</sup> The definition of ‘crimes against humanity’ under international law was explained by reference to the *Charter of the International Military Tribunal at Nuremburg*, opened for signature 8 August 1945, 251 UNTS 280 (entered into force 8 August 1951) and the jurisprudence of the Nuremburg and Tokyo Tribunals and more recent international criminal tribunals for the former Yugoslavia and Rwanda; see *Report on the Detailed Findings of the COI on the DPRK*, UN Doc A/HRC/25/CRP.1, 320–22 [1026]–[1032].

How the mind responds to a particular factual dispute or legal dispute constitutes something of a puzzle. There is not much written about it. 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 Review*.<sup>49</sup> It addresses what I called ‘the moment of decision’. How does one arrive at the ‘moment of decision’? How, when one is moving towards a particular conclusion, do some features of the law or of the facts suddenly come at the decision-maker like an unexpected iceberg? The *Titanic* of one’s mind is moving towards this iceberg. You have got to get out of the way as quickly as possible because your postulated decision simply does not work and, if it collides with the proposed reasoning it will manifestly bring the forward momentum of one’s reassuring to a shuddering halt. You realise that your initial conclusion was wrong or at least, unconvincing. That conclusion will not stand. It will not convince you. And if it does not convince you, it will almost certainly 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 UN COI makes a decision? It is, I think, because the judicial or other formal decision-maker is like the centipede. You just run forward and you get the task done. Then you look back on the reasons you have prepared for the conclusion you have preferred. You redraft and redraft them yet again; and redraft them yet once more or many times. In the High Court of Australia, I believe that I typically redrafted my reasons more than other judges. Taking pains over making one’s 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. Clarity will help argumentation. Either it will reveal why the reasoning should be accepted. Or it will disclose the weaknesses which, unrepaired, will make the reasoning unconvincing either as a matter of fact or of law or both.

*E REBECCA LAFORGIA: Have there been any immediate outcomes to the report of the COI on the DPRK?*

THE HON MICHAEL KIRBY: After the report of the COI on the DPRK was delivered to the HRC, I went to New York on another mandate<sup>50</sup> that I received from

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<sup>49</sup> Michael Kirby, ‘Judging: Reflections on the Moment of Decision’ (1999) 18 *Australian Bar Review* 4.

<sup>50</sup> The reference is to the appointment of the Hon Michael Kirby 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 UN Secretary-General’s High-Level Panel on Access to Essential Medicines was delivered in September 2016. It also undertook public hearings in London and Johannesburg, the latter with telecommunication links to Bangkok: Ruth Dreifuss and Festus Gontabanye Mogae (co-chairs), ‘Report of UN Secretary-General’s High-Level Panel on Access to Essential Medicines’ (Final Report, UN Secretary-General’s High-Level Panel on Access to Health Technologies, 14 September 2016) annex 2 (*How the High-Level Panel Reached its Conclusions*). Earlier, in Judith Levine, ‘Rights, Risks, Health’ (Final Report, UN Development Programme, Global Commission on HIV and the Law, 9 July 2012), a similar methodology of public

the Secretary-General, Ban Ki-moon. I was received by him, and he again made the point that the report of the Commission of Inquiry on North Korea was an extremely important document in the UN system. Many of the people who work in human rights have been impressed by our COI's adoption of common law procedures. This is not the usual way that the UN human rights mandates are discharged. The usual way involves inquisitorial investigation behind closed doors. The common law methodology places a premium on the adoption of procedures that are undertaken in public and are manifestly fair.

The English, it is often said, were obsessed with procedure. So much so that they sometimes failed to pay enough attention to the outcome itself and what was actually being decided. Their concern was that the impugned decision should be conducted fairly, lawfully and without irrationality. However, experience tends to show that if one has sound procedures, it is much more likely that the decision-maker will reach sound outcomes. The sound procedures adopted by the UN COI on the DPRK, and our way of conducting the inquiry is now regarded by many observers as a kind of 'gold standard' for the system. Certainly, it has revealed new and different methodologies that COIs in the future may consider and adapt as appropriate. So that is one good outcome that has already happened.

Other inquiries in the UN system have copied the COI on the DPRK in this respect. I believe that, 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 in operation — at the present time — for example there are COIs on human rights abuses in the Central African Republic, Syria, Tunisia, and Eritrea. I expect that at least some of these COIs will experiment with, and use public hearings.<sup>51</sup> They will use the transcript of the public hearing, as the COI on the DPRK did, quoting it in the report. Doing this gave a direct voice to the persons claiming to be victims who came to the UN to provide their testimony and to register their human rights complaints and accusations.

Secondly, the report of the COI on the DPRK has already led to the establishment of a field office in Seoul, Republic of Korea ('South Korea').<sup>52</sup> In a sense, this is continuing the work of the Commission of Inquiry itself. If the DPRK's human rights abuses are not referred in the short to medium term to the International Criminal

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hearings was adopted. Earlier still, the ALRC adopted the distinctive methodology of public hearings: see Australia Law Reform Commission, *Annual Report, 1975* (Report No 3, Australian Law Reform Commission, 1975), 40–1 [83]–[84]; Australian Law Reform Commission, *Annual Report, 1976* (Report No 5, Australian Law Reform Commission, 1976), 49–50 [93]–[94].

<sup>51</sup> The COI on Human Rights in Eritrea (chaired by an Australian diplomat, Mike Smith) made a limited use of public hearings in conducting that inquiry.

<sup>52</sup> The COI on the DPRK recommended the establishment of a field office ('structure') to document and gather testimony of victims and witnesses: see *Report on the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc A/HRC/25/CRP.1, 371 [1225](c).

Court (or to some other UN tribunal or some other body and prosecuted) I still have confidence that in due course prosecutions will happen.

When prosecutions are 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's brief in an international tribunal with jurisdiction to deal with such international crimes. The preparatory work is already occurring. To that extent, accountability is already progressing. That was a suggestion made to the COI on the DPRK by Prince Zeid Raad Hussein Sayed, the present UN High Commissioner for Human Rights ('HCHR'). He urged that human rights mandate holders, where appropriate, should gather testimony in the form of a prosecutor's brief so that it could later be picked up when accessibility to jurisdiction arrives.<sup>53</sup>

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

Most of the testimony one sees today in Holocaust museums around the world will never result in the stories being legally vindicated or considered with a view to establishing individual accountability. This is simply because of the passing of too much time since the events deposed to, the death or disappearance of the perpetrators, accusers, witnesses and so on. Nevertheless, there is still a value, including an educative value, in dignifying the individual human beings who tell their versions of what they have gone through. It is educative because that is a way new generations will learn. It is the way we can ensure that those who come later will not forget what has happened even though they will not be able to secure accountability for the cruelty and wrongs that have happened. Conferring to and recording the histories is important for the peace of mind of victims themselves and for us also to see and hear them. In the case of the DPRK, it becomes part of the history of the people of the Korean Peninsula. Collected and recorded to await the time that will come when it will be accessible for the lessons that it teaches.

This has already been an achievement of the COI on the DPRK. If we had just seen witnesses in private and talked with them, taken a few notes and summarised their complaints in a briefer report, it would not have had the same impact on the international community. Sometimes just going through a transparent procedure and doing it in a formal and respectful way, has an importance in itself. When the COI on the DPRK had a female witness, I generally asked Sonja Biserko, one of the COI commissioners, to take that witness through her statement. I did this in case there was a cultural problem of a woman speaking to a male. I was there, presiding.

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<sup>53</sup> This recommendation was made to the COI on the DPRK by Prince Zeid before his appointment as HCHR, during the COI's consultations in New York.



However, I just fell silent. I believe that this variation in the procedure worked well. The women appeared more comfortable and forthcoming in answering questions from a woman who was a member of the COI then they would have been in answering questions from me.

All of the commissioners adopted the common law methodology although two of them, respectively from Indonesia and Serbia, were from countries that followed the civil law procedural traditions. In the absence of North Korea or its officials whom we had invited to participate in the public hearings, we gathered the oral testimony of the witnesses by the technique of examination-in-chief. There was no cross-examination unless the COI arrived at a point where 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?’ In the result, the voice of the evidence remained the authentic voice of the people who are coming to complain of human rights violations and crimes against humanity by the DPRK. Their voices and their versions of the facts; not ours.

*F REBECCA LAFORGIA: Are there any general lessons as to the effectiveness of the COI on the DPRK that can be drawn at this time?*

THE HON MICHAEL KIRBY: The chief lesson of the COI on the DPRK is, I suppose, that the UN 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, and genocide where it applies, and other human rights violations. It has to respond. The world is dangerous. The nuclear weapons and long-range missile delivery systems that exist in North Korea today are an indication of how potentially dangerous that country is for its own people and for others in its region and potentially beyond. The human rights situation in the DPRK is closely interconnected with dangers for international peace and security and with dangers for the attainment of justice — another objective of the UN, expressed in the *Charter of the United Nations* (‘*Charter*’).<sup>54</sup>

We conducted our enquiry in the manner described. We took pains to ensure that our report would be readable. I consider that the UN report on the DPRK is a ‘page turner’. I possess a privately bound version of the report. However, it should be on sale at airports around the world. It is very readable. Moreover, the world needs to know about our findings. This is because of the dangerous situation in North Korea.

Three years after the report was delivered to the UN, it twice came before the UN Security Council. In March 2014 the report was discussed at a formal meeting of the Council and the Office of the High Commissioner for Human Rights was authorised to brief the Council.<sup>55</sup> In late February 2016, the Security Council unani-

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<sup>54</sup> Preamble para 3.

<sup>55</sup> The events leading up to and including the 7355<sup>th</sup> Meeting of the Security Council in December 2014 are described in Jawoon Kim and Alan Bloomfield, ‘Argumentation, Impact, and Normative Change: Responsibility to Protect after the Commission of

mously imposed increased sanctions on North Korea.<sup>56</sup> That resolution secured the affirmative vote of the Russian Federation (‘Russia’) and China. This indicates that, when people who have very great responsibilities — including the five permanent members of the Security Council — meet together in the one place, the propinquity, the presentation of the dangers, and the existence of a compelling report will sometimes compel humanity to respond.

Critics may say: ‘Well, the Security Council has not referred North Korea to the International Criminal Court’. ‘The UN has not set up a special tribunal’. ‘No actual person or perpetrator has been rendered accountable, still less convicted and punished.’ All of this is true. However, these are still comparatively early days. The abuses described in the COI report have been going on for almost 70 years. In the past, the world turned away. Now the world is not turning away. The world has commissioned, and received, 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 UN as a whole.

The people of the world are the expressed foundation of the UN *Charter*.<sup>57</sup> The *Charter* begins, ‘We, the people of the United Nations.’ When the members of the COI were writing the report, we had in mind the realities. 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 even part of it. One of the ways of making it compelling was to speak over the heads of the leaders, to the citizens of the world community. It was the reaction of the people of the world community to the horrors of the Second World War and of the instances revealed of genocide that helped produce the UN *Charter* in 1945, the establishment of the UN and to Eleanor Roosevelt’s *Universal Declaration of Human Rights* in 1948.<sup>58</sup> Unless humanity builds a world that respects and upholds universal human rights, we will never have peace and security. Addressing global human rights is therefore a most urgent necessity for human survival.

Another positive feature of the COI report, I think, is that virtually everything that the COI asked of the UN to do was basically done. So far, if it was within the power of

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Inquiry Report on North Korea’, (2017) 9 *Global Responsibility to Protect* 173, 190.

<sup>56</sup> The UN Security Council has imposed sanctions on the 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 (15–0–0) of the five permanent (‘P5’) members of the Council: SC Res 2270, UN SCOR, 7638<sup>th</sup> mtg, UN Doc S/RES/2270 (2 March 2016); SC Res 2276, UN SCOR, 7656<sup>th</sup> mtg, UN Doc S/RES/2276 (24 March 2016). This followed the fifth nuclear test conducted by the DPRK and the launch of a long-range missile towards Japan. In pursuance of the last-mentioned resolution, China announced that it was curtailing importation of coal from the DPRK in 2017, previously a major source of hard currency.

<sup>57</sup> *Charter*, preamble para 1.

<sup>58</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948).

the UN and its officials, almost everything the COI recommended has been followed up. We can therefore be pleased that this global institution, established 70 years ago, is shown to be working for the good of peace and security. But also for the good of universal human rights.<sup>59</sup> If the Security Council has not yet referred the case of the DPRK to a prosecutor of the ICC this is inferentially the result of the veto power in the *Charter*. To that extent it represents not a failure of the *Charter* but the operation of that instrument as it was intended in 1945. This may be disappointing. However, it is virtually certain that, without the veto power for the permanent members neither the United States nor the Soviet Union would have ratified the *Charter*. The present situation demands the redoubling of efforts to persuade China and Russia to endorse the referral of the DPRK and some of its identifiable officials to a prosecutor of the ICC or some other UN tribunal. The steady increase in the severity of sanctions imposed by unanimous votes of the Security Council demonstrates, time, patience, persuasion and circumstances can sometimes result in outcomes that were seriously unattainable.

*G REBECCA LAFORGIA: You have said that the report of the COI on the 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?*

THE HON MICHAEL KIRBY: The COI report on the 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. Informal translations have also been made in Korean and Japanese languages. However, inescapably the idiom and style is English. English is a peculiar language. We have recently celebrated the anniversary of the death of William Shakespeare, 400 years ago. He was the greatest example of English as a language of literature. However, it is also now a language of global politics, economics, technology and of human rights. English represents the marriage of two linguistic streams. These are the basic Anglo-Saxon language of the Germanic tribes of the north of Europe, and the Latinist French language that was brought to England by the clerks of William the Conqueror in 1066. The dual services of the language makes English a powerful language for poetry and literature. Yet it can be devilishly ambiguous. Ambiguity is good for lawyers because, out of ambiguity, comes many problems of the law: interpretation, misunderstandings, uncertainty and so on.

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. However,

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<sup>59</sup> The key recommendation of the COI 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’ is found in *Report on the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, UN Doc A/HRC/25/CRP.1, 370 [1225](a). However, another recommendation in the same sub-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.

when they write English, especially in the law or other formal contexts, they tend to do so in the manner of the Norman clerks who wrote in mediaeval French. I try to write substantially as I speak. I do this consciously because that is the simple language that is normally spoken. If my writing is clearer, 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 to write as I speak. This is the way the report of the COI is written: in a plain, simple version of English; direct, unadorned, understandable. A great language for communication. I do not know how the COI report on the DPRK reads in Chinese or Arabic. But in English I regard it as clear and powerful. This style tends to demand an effective response, prompt accountability and follow-up. Nothing less will do in the context.

There are some simple rules that lawyers, law students and UN report writers need to learn. Avoid use of the uncertainties of the passive voice. Utilise short sentences. Adopt direct speech. Take out the obscurities. 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 as clear and direct as I could make it. Sometimes I was a bit longwinded because I became interested in a particular issue of law or some particular facet of the facts. But I did try to write clearly. For some reason, that seems to have been effective. At least scholars and students have told me so. Sir Anthony Mason, past Chief Justice of the High Court of Australia, once said: ‘If you want to know what a case is really about, you start with the Kirby judgment’. Maybe in the Palace of the Supreme Leader of the DPRK in Pyongyang, Kim Jong-un is complaining about the clarity and readability.