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VOICE FILE NAME: The Hon. Michael Kirby

SO: Sue Onslow (Interviewer)

MK: Michael Kirby (Respondent)

SO: This is Sue Onslow talking to the Honourable Michael Kirby in Sydney on Friday, 28th March, 2014. Mr Kirby, thank you very much indeed for agreeing to take part in this oral history project. I wonder if you could begin by reflecting, Sir, on the establishment of the Eminent Persons' Group of 2009-2010? Obviously, this came out of the Port of Spain affirmation in 2009, but I wondered if you could lay some background of how you came to be appointed to that group?

MK: I'm not sure how the appointment came about. Sometimes it's better not to know how appointments to national or international bodies occur. However, I was approached, first, I think, by a representative of the Australian government to ask if I would serve; then I received a letter from the Secretary-General, Mr Sharma, and he invited me to serve. I then accepted, and I served. But I'm not aware of the steps that were taken to secure my appointment. They may have arisen out of the fact that I had taken quite an active part over the years in the work of the Legal and Constitutional Affairs Division of the Commonwealth. I had contributed repeatedly to the Commonwealth Law Bulletin. I had gone repeatedly to Commonwealth Law conferences, and presented papers at them. I had not been a member of the political activities of the Commonwealth, but of basically the legal and support systems of the Commonwealth, which is often where it does its best work.

The first time I ever visited Marlborough House was back in the 1970s, when I was appointed the first chairman of the Australian Law Reform Commission. The head of the English Law Commission convened a meeting of the Commonwealth law reform agencies. We gathered in that big dining room in Marlborough House, wandered around the grounds, where Queen Mary had wandered, and that was my first encounter with the Commonwealth Secretariat. After that, I had intermittent contacts with Secretaries General. But the Eminent Persons' Group was really the first appointment to take part in a political-type activity of the Commonwealth Secretariat.

SO: So you also helped – I realise that this was under an UNDP initiative - as an independent co-chair at the Malawi constitutional conference in 1994.

MK: Yes, but I think that was really done not under the Commonwealth umbrella. That was done for Malawi. Indeed, it was done on the initiative of the then

United States Ambassador to Malawi. He it was that suggested me, after I had been to a conference in Malawi. That was a conference on legal issues, I think. But he apparently thought that I might be able to fulfil the duties as an independent co-chair of the constitutional body that was considering amendments at the Malawi Constitution, to get rid of the one-party state, and the life tenure of President Hastings Banda. But that was not a Commonwealth initiative. I think that was an initiative of UNDP, spurred on by the US Ambassador to Malawi, because I remember myself being, at the time, a little surprised that it was the United States which was taking a lead role, rather than the Commonwealth, or Britain.

SO: Yes. I had just wondered, looking at this, given your wealth of experience, had you been approached to help with the South African constitution building before 1994? Or had you, in the 2000s, been asked to contribute to Kenya's revision of its constitution, in a Commonwealth dimension?

MK: Well, the South African initiative happened because of the fact that South Africa was out of the Commonwealth. I was again invited more in a legal capacity to go to meetings in South Africa which were addressed to the role of international law in the development of constitutional and other law. I was never really a member of the successive two committees that drafted the successive constitutions of South Africa. I simply took part in seminars that happened in South Africa. Those seminars were in a series called the Bangalore series of meetings about the role of international law in domestic law-making. I think a series of about seven conferences were held under the joint auspices of Interights, an organisation of human rights law based in London, and the Commonwealth Secretariat's Legal and Constitutional Affairs division. Lord Anthony Lester was the moving spirit of those seminars. Former Chief Justice Bhagwati of India was also one of the leaders of the seminars. I became involved in them. That was how I got into the South African constitutional change. I don't believe I took any active part in the Kenya constitutional amendments.

SO: I was just thinking laterally about your possible involvement in other Commonwealth legal environments as well as your assistance to Commonwealth constitutional change. So thank you very much indeed for clarifying that.

Going back to the establishment of the Eminent Persons' Group: how much did you take your terms of reference directly from the Port of Spain affirmation? Or were you also using the Royal Commonwealth Society's 'Commonwealth Conversation', its dialogue, where it had sought to establish a conversation in wider terms, of what was identified as wrong with the Commonwealth, to support your work in assessing its problems and the identification of solutions?

MK: I think all of the above. We had our letter of appointment. That drew attention to the Port of Spain resolution of heads of government. That was our mandate. But the resolution was in rather general terms. Therefore, there was plenty of leeway for us to shape the direction of our own enquiry, investigation and conclusions. As you would know, Ronald (Sir Ronald Sanders) took the lead as the Rapporteur, by concurrence of the members. He did so at the request of the chairman; and he played a most beneficial and leading role in the EPG. I have to pay a tribute to his ability, integrity, devotion, love of the

Commonwealth, and knowledge of the internal mechanics of the Commonwealth. He was much more aware of those than I was. He was aware of the whole range of activities, whereas my focus had been basically on the legal activities. Moreover, he was the son-in-law of Sonny Ramphal (Sir Shridath Ramphal), and he had had himself a lot of engagement with Commonwealth activities. Therefore, he was much more aware of the broad spectrum. I was rather narrowly focused.

SO: There were four meetings of the committee: there were two in London, then the one in Kuala Lumpur, and then the one in March of 2011, back in London. How elaborate were these meetings? Were they convening to compare notes? Were you drawing upon preparation of reports by others who had been designated to carry out their investigations?

MK: My recollection is that the only meeting that was really elaborate was the meeting in Kuala Lumpur. We there were wined and dined, and treated most royally by the Malaysia government. They are very hospitable people. We were taken to the Prime Minister's residence, at what seemed to be a hundred miles an hour in a series of cars, rushing through the crowded streets of Kuala Lumpur, and causing havoc to everybody else in a way that just could not happen in Sydney, or I think even London. We did have some papers, but a lot of the legwork was done by Sir Ronald. He really prepared documents, and we worked on those. We debated a series of sub-topics. Anybody could raise anything within the frame of reference of the Port of Spain resolution. It set out what [the heads of government] thought was important for the Commonwealth. For example, I thought that the fact of Commonwealth citizenship and nationality status, as a Commonwealth citizen, was being ignored, and given no weight whatsoever in the practical matter of crossing borders into Commonwealth countries. In particular, in the United Kingdom, there is a line for EU, European, passports, and others. I was very concerned to try to get a recommendation for investigation of the possibility of having a second line for Commonwealth citizens. This would give them some degree of priority. It was always offensive, I think, to Australian Commonwealth citizens to turn up in London, just to be dumped into the general line with all sorts of people, including those rebels from the United States of America. But some of my colleagues on the EPG thought that that was completely wishful thinking, and very unlikely to get anywhere. However, I had a supporter in one of the assistant foreign ministers in the United Kingdom, in the House of Lords, (Lord Howell). He rather favoured my idea, and thought it was quite feasible.

SO: Was this David Howell?

MK: Yes, and he, in fact, met us. He would come along, and I think that caused some astonishment on the part of my colleagues, that a minister, and indeed a UK minister, thought that the idea I was supporting might have legs. Anyway, in the end, a proposal was included in our recommendations for investigation by officials of whether something could be done along those lines. I don't know what, if anything, has happened about it. But Lord Howell was in favour of it.

SO: It's certainly worth following up, as you say, because it would give a firm sense of identity?

- MK: Well, there's no identity at all. The only time that citizenship of the Commonwealth matters is when you cross a border. But that is in practical terms. It can matter in sentiment, and it can matter in emotional, nostalgia, warm feelings. But the only time nationality is ever potentially valuable or damaging is when you come to a border.
- SO: You also mentioned in your article that appeared in the Commonwealth Law Bulletin, that there were aspects of new members which you found puzzling: the inclusion of non-former British Colonies, such as Mozambique, such as Rwanda, and that part of your agenda was to look at the criteria for membership, so that there should be a greater degree of transparency?**
- MK: Yes. I rather gathered from things that were written in the public media that Mozambique was invited because of the relationship of President Mandela with Mrs Machel, who later became his wife. She was from Mozambique; and that seemed to me to be a rather unstable foundation for membership of the Commonwealth by a country which had had no real association, and didn't have widespread use of the English language in official and other cases. As well as that, to the extent that you got away from the historical link, you potentially damaged the integrity of the Commonwealth by admitting other members, and thereby transferred the Commonwealth even more than in the existing situation, to a pale reflection of the United Nations, with its strong geopolitical divisions. The African states tend, in the United Nations, to act with a very strong caucus arrangement; they are even more introspective than the Europeans are now. Abandoning the idea of the Commonwealth as a cross-cutting organisation, which links people on every continent simply because of their historical links to the British Crown during the times of Empire, I thought would be a dangerous move. My colleagues were not quite so favourable to that idea either. But they watered down the version of the hesitations that I had expressed. But there is still a mention of it, I think, in the document, in the report to the EPG. However, it wasn't quite as strongly signalling orange lights against further expansion of the Commonwealth. However, maybe a whisper was as good as a clear orange light, because no other non-English-speaking historically-linked country has been introduced into the Commonwealth in recent years.
- SO: Sir, could I ask you about the evolution of the idea of a Commonwealth Human Rights Commissioner?**
- MK: That was seen by all of us, I believe, to be inherent in the proposal to have a charter. Just to have a document called a charter, would seem to have been worthless, or at least unnecessary, when you had already statements in a succession of the closing resolutions of the Commonwealth Heads of Government at CHOGM meetings. There had been many such statements: the Singapore Declaration and so on. The charter would only be turned into something of practical use if you had an office-holder whose responsibility it was to be specially protective of charter values, and stimulating the education and other steps that would be required to make sure that the charter became an actuality. And that it was not just as unknown document amongst Commonwealth citizens, as the CHOGM resolutions are. Those resolutions, no doubt, resonate in the minds of the people who occupy positions in Marlborough House. But the citizens of the Commonwealth are blissfully ignorant of these resolutions.

- SO: I think the Sri Lanka communiqué announcement runs to some 11,000 words.**
- MK: Oh, my God! I didn't know that. I've never had the misfortune of reading it.
- SO: But what you're identifying, then, is a particular attachment [of the Commonwealth] to process, and grand declarations, rather than, in fact, practical value in implementation.**
- MK: Yes. Also, I had had some dealings with the human rights mechanisms, as they were emerging in the United Nations' system. I had known personally each of the successive six High Commissioners for Human Rights (I think it's six) – José Ayala-Lasso, Mary Robinson, Sergio di Mello, the Brazilian who was killed in the line of duty; Louise Arbour, Navi Pillay and now Prince Zeid Al-Hussein. They were able, in their different ways, to stimulate, encourage, provoke, criticise, but get attention to the UN instruments. And to raise the profile and extract a cost for ignoring the agreed values.
- SO: So was there debate within the EPG, that a proposal for a Human Rights Commissioner for the Commonwealth risked duplicating the work of a UN Human Rights Commissioner?**
- MK: Well, there was debate about whether a Commissioner would just be duplication. But as we were minded to propose a Charter, an idea which arose in the very first meeting, and was suggested by Tun Abdullah Badawi, the Chairman of the EPG, we didn't think that that would be effective if there was no mechanism, or office-holder, to translate it from the language of a document into real activity. Also, we believed that we had the support of the Secretary-General on that matter, because never once during the deliberations did Secretary-General Sharma indicate his disagreement with it. We were guests invited into the chamber of the CHOGM meeting in Perth. When he there declared that he was not in favour of it, it came both as a surprise and a blow to the EPG. This was because we thought that, if he had been opposed to it, he would have told us. But he didn't.
- SO: So, following your meetings - and you said that you had four before the report was presented to the Secretary-General earlier in the summer of 2011...**
- MK: It wasn't quite like that. The Secretary-General sat at the table, and was there present during all of the debates. He was not a stranger who was up there in his room, waiting humbly for our recommendations. He participated.
- SO: Thank you for saying that he was actually physically present at the meeting, when these discussions were taking place.**
- MK: Oh yes, present and active, and very useful. Of course, he's very knowledgeable about the internal operations and programmes and so on. He took a constructive and active and opinionative role. This made all the more surprising the fact that what all of us regarded as a key proposal was torpedoed at a critical moment during the Perth CHOGM, when the Secretary-General said he didn't agree with it, and didn't think it was necessary.
- SO: And you'd had absolutely no inkling of his opposition beforehand?**

MK: No, no inkling. None.

SO: How about the discussion over CMAG, the Commonwealth Ministerial Action Group? I know that was part of your remit to consider the extent to which it could be augmented in its ability to correct 'serious and persistent violations'.

MK: Yes, well, again the Secretary-General took an active part. I do have recollections that he had expressed some hesitations about the formula that we came up with. But not to the point that he turned really a full circle, and came down totally opposed to the proposal, as he did in the case of the Commissioner on Electoral Democracy, the Rule of Law and Human Rights. It wasn't just a Human Rights Commissioner, it was a Commissioner to have responsibility for implementing the Charter. I am, at the moment, the mandate holder and chair of the Commission of Inquiry of the United Nations on North Korea. I therefore know, and work close up, with the agencies of the United Nations concerned with human rights. I see how important it is to have a Commissioner who will be brave and challenge the political organs of the Association. It is sometimes difficult for the Secretary-General of the United Nations to do some things. However, if you have a guardian watchdog who's biting at your heels every now and again, and causing an issue to come onto the agenda, and stirring the debates, and speaking from a point of view of principle, rather than pure pragmatism, it is more likely that the institution will work. Indeed, it is respecting the fact that the political head is going sometimes to be in an awkward situation, when criticisms on human rights, rule of law, or electoral democracy bases, are raised. The ultimate job of the Secretary-General is to keep the Association together, and functioning. The job of the Commissioner is to stand up for principles. That is sometimes awkward and difficult for the SG to do, as indeed it is in the United Nations.

SO: How did you account yourself then for Secretary-General Sharma's opposition in the Perth CHOGM executive session? Do you think he was swayed by pragmatic considerations of costs? Swayed by (again) possible sensitivities to his own position, and the ambit of his office, that he'd perhaps been "got at" by another Commonwealth head who felt that this was inappropriate?

MK: I don't know. You will have to speak to him, if you haven't already done so.

SO: I'm waiting to interview him towards the end of his office.

MK: Yes. First, he was running for re-election, I think. Certainly he wanted another term. Second, there would be a number of participants in Perth, and at all CHOGM meetings, who are natural born autocrats. They would not like to have the stimulation of a Commissioner. Third, he is a naturally very courteous and circumspect official, with a background in diplomacy. My own view is twofold, that the High Commissioner for Human Rights in the United Nations should only ever have one term. This is because, if he or she has the possibility of a second term, or more terms, there is a natural tendency to try to ensure that you get re-elected. Whereas if you only had one term, that would not be a problem. Better to have a longer one term than to have the spectacle of a High Commissioner having to try and trim the sails in order to get re-elected. Second, in terms of the Commonwealth Secretary-General, I would never myself recommend the election of an official. I think the Secretary-General of the Commonwealth should always be a former

politician. Politicians are much more likely to be brave and strong than officials. Officials are likely to be process-obsessed, and not obsessed with the principles and the ultimate purposes of the organisation. I think that could be demonstrated by contrasting the success of the successive Secretaries-General of the Commonwealth. The most successful, in my view, have been former politicians, rather than officials.

SO: Yes, so that would be Sonny Ramphal and Don McKinnon, as quintessential politicians rather than international servants.

MK: Even Don McKinnon became, in the end, rather cautious, I thought. I wrote to him, urging him to take up the issue of the oppressive laws against homosexuals in Commonwealth countries, saying that, in his second term, he didn't have to court favours. So he could be brave and strong, standing for a matter of principle. However, he didn't do so. So it may be that my view is an over-simplistic view of the best qualities. But the danger is that officials, or people too long in office, will be too obsequious, and anxious to get on well with everybody, instead of anxious to make sure that the organisation is not seen as a bunch of hypocrites who are propounding great, resounding principles, but breaching them. And not doing anything, particularly not doing anything institutionally, to make sure that those principles are fulfilled, even when (as will eventually be the case) it is uncomfortable to do so.

SO: The Port of Spain affirmation also called for improving the Secretariat's performance, and I wondered the extent to which you recall a debate about the "good offices" section, the "good offices" role of the Secretary-General, in the EPG report. Was this the topic of much discussion?

MK: Yes, there was. There was discussion of the "good offices" role. But we were concerned about the standard of the Secretariat, and the extent to which it was up to scratch, when compared with other international bodies with which we severally had associations. I had had associations, over the years, with a large number of the agencies of the United Nations, and also with the OECD. Patricia Francis had had associations with, and was a chief executive of an agency. Everybody had some connection with some other body. We were inclined to think that the Commonwealth Secretariat was an ultra-cautious group of officials who were obsequious, and inclined to non-transparency in a way that was more reflective of the techniques of administration that existed during the British Empire, and out of harmony with the techniques of administration which the more modern members of the Commonwealth had introduced in their own administration, often reluctantly, and often against the strongest possible opposition of the public service.

SO: I wonder, sir, the extent to which that you'd identified this as being possibly reflective of Indian bureaucratic culture, rather than just the British Empire, and the bureaucratic culture? Obviously, there's cross-fertilisation between 19th and early 20th century British bureaucratic cultures and India's own civil service. The British civil service itself had contributed to the formation of the Secretariat right from the start in 1965.

MK: I wouldn't stereotype it as just Indian. In my experience, travelling to a number of Commonwealth countries, they are a type of time capsule. They are a time capsule of a period of administration which was marked by the *Official*

Secrets Act, by no *Freedom of Information Act*, no ombudsman, very little judicial review – judicial review confined essentially to lawfulness and insanity. The decisions of officials being challenged for judicial review had to be shown to be *Wednesbury* unreasonable. This was waived after the case involving the *Wednesbury* picture theatre in England. You had to show that no rational official could ever rationally come to the decision in question, in order to disturb it. That is such a high bar to get over, that very little relief was given by the courts. All of these things have changed in Britain and Australia, Canada and New Zealand, and South Africa now.

SO: But you have this time capsule?

MK: The time capsule goes on in the other countries of the Commonwealth. It's not only in that respect, but in many other respects. It was reflected in the officialdom that we saw in Marlborough House. This is not to reflect on their honesty, but simply on their extreme caution. Their fear of controversy. Their objection to a more vibrant and active engagement with issues, people and civil society that could bind the Commonwealth more strongly together. One of the officers who was most impressive in the dialogues with the EPG was Steve Cutts. He was younger, more energetic, more direct, plain-speaking, more willing to look at innovations. He had had a background in the OECD. In my experience, chairing two expert groups of the OECD, that was even more dynamic than the United Nations. It was the association of the rich countries of the world. Therefore, one perhaps would expect it would be dynamic. But Steve Cutts came along, and talked very frankly about the salary levels of the officers of the Commonwealth Secretariat and other practical defects. Often because many of the Commonwealth Secretariat come from Commonwealth countries where salary levels are much lower, they are not paid at, nor really worth, the salary of a top official in an intergovernmental agency. You're not going to get, and keep, top officials if you don't pay them appropriately. Particularly in an expensive city like London. Steve Cutts left the Commonwealth Secretariat after the EPG. He's now working for the United Nations in New York, I think. I was not surprised that he moved on.

SO: Yes, he is. I saw him in Cambridge in January.

MK: Well, he would be a very good acquisition to whoever got him, because he's just a very clever, modern and innovative official.

SO: And effective.

MK: And effective, yes, and willing to speak up, and be very clear. That's the sort of person that we needed as a Commissioner. A Commonwealth citizen who would call a spade a spade. However, instead, it's a timid, frightened, cautious bureaucracy. There's nothing really to put a burr under the saddle to stimulate the whole system. That is why whatever caused the Secretary-General to either change his mind, or keep his mind secret until the last minute, so that it did maximum damage to withdraw support from it amongst the Heads of Government, whatever caused him to do that, it was antithetical to the best interests of the Commonwealth. It was damaging to the Commonwealth Secretariat. When my role in North Korea is finished, I propose to write to the Secretary-General, telling him just that. What he did was to strike a body blow at the guts of the central idea of the reform which the EPG put forward. And he did it in a way that respectfully, I thought, was dishonourable. More importantly, it deprived the reforms suggested of real

teeth. It left the Charter hanging on the line as something limp and rather worthless. It's just more words, and it's not really an effective institution. If there's one thing the British taught the world, it was that to get progress, you usually have to have an institution. You've got to institutionalise it. That is usually done by an office-holder, or a group of office-holders. You thereby have a chance, if you appoint good people, to get the creaking bureaucracy, which is all-pervasive everywhere in this world, to operate in an effective way. In the age of Twitter and social networks, and jumbo jets, and the human genome, the Commonwealth is not going to survive unless it can be more 'with it'. It needs stimulus. It needs a burr under the saddle. That was what the EPG unanimously had in mind in suggesting the Commissioner. The Charter without the Commissioner was really an empty vessel. Subsequent events had demonstrated that fact.

SO: Sir, you mentioned in your *Commonwealth Law Bulletin* article that you felt that the Commonwealth Foundation, with its agenda of strengthening civil society, and its broader remit and activities of collaborating and co-ordinating with NGOs, civil society, professional bodies, is a dynamic and valuable institution. What did you feel the Secretariat should concentrate on? If the Charter should have a Human Rights Commissioner, to act as that burr under the saddle, as you said, a willingness to take a strong political stance, and identifying and calling to account according to the principles of the Charter, what did you feel the Secretary-General and the Secretariat should concentrate on?

MK: The Secretary-General would inevitably sometimes get to a position that he or she disagreed with the Commissioner. In the end, the political organs would have the last say. The Secretary-General would have the last say. That's fine. In the North Korea exercise, we may well be facing that outcome in due course via veto by China, in the UN Security Council, of any action to deal with the grave crimes against humanity that have been disclosed. That's how the system works. That's all right – everyone understands that is how the institutions operate. But at least in the United Nations system, you do have a High Commissioner for Human Rights. You do have independent commissions of enquiry. They're made up of strong people. These are people who are principled and brave. Principle and courage seem to be the qualities that are missing in the Commonwealth. Maybe they are even unwelcome. For an easy life, with high emphasis on ceremony and words. If that is the essence perhaps you don't need this stimulation. But if the organisation is going to survive and flourish, well I'm sorry, but you do need to have a lot more energy than is presently visible. You need occasionally to annoy and irritate those who defy or ignore the principles of the Charter.

SO: In the run up to the Perth CHOGM, I know that you and your colleagues on the EPG had already presented the report. I understand that you had drafted the charter yourself? – am I right in this?

MK: Well, I played a part, a big part, in doing that. But it was approved by all of us. Amendments and suggestions were made by all of us. Then, subsequently, there were further amendments proposed by officials, before the final form of the Charter, after Perth, was adopted.

SO: But, in the run up to Perth, I know that you had presented your considered and amalgamated report to the Secretary-General, with a

view to it being published before the heads of government meeting. I know from talking to Sir Malcolm Rifkind that you were immensely irritated at the delay in publication.

MK: Yes. In fact, we were told that the report of the EPG was not to be disclosed publicly. Sir Malcolm, as only a former British Foreign Secretary might do, threw his copy of the report down on the table at our final press conference. He declared that he was revealing it here and now. He made it available. I think the rest of us were a bit inclined to go along with the rules. But he'd had enough. He took the view that the report should be disclosed. So he disclosed his copy. After that, of course, the wall of the dam broke. The report became public. But it didn't save the proposed office of the Commissioner. This was because the role of the Commissioner had been torpedoed by the Secretary-General.

SO: Mr Kirby, to what extent was the presentation and consideration of the EPG report also tangled up in Australian politics around the Perth CHOGM meeting?

MK: I don't remember that that was a factor. I do remember that the Perth CHOGM was memorable because of the big Australia barbecue attended by the Queen, just before she left Australia on what may have been her last visit. The very enthusiastic reception by the citizens in Perth of the Queen was overwhelming, and heart-warming, I thought, myself. But I don't know that Australian politics intruded.

SO: I'm just wondering of the tension between Kevin Rudd and Julia Gillard, if that played out at all?

MK: I don't think that that was noticeable. Mr Rudd was the Foreign Minister, and he chaired a session of CHOGM which was dealing with issues of the Charter and so on. He basically had quite a lot of success getting it through. He was a good Foreign Minister. He was in his element, and respected as Foreign Minister. And he was a former Prime Minister present at CHOGM in Perth. I don't think that the Gillard/Rudd issue, although very disruptive elsewhere in Australian public life, was a big factor. I don't have a recollection that it was a big issue in Perth.

SO: Speaking of a big issue in Perth though, to what extent do you recall, or did you have inside knowledge, of tensions around the choice of Colombo as the next Commonwealth heads of government meeting?

MK: I don't really think that was up for debate. This was because it had originally been decided that the 2009 CHOGM would be held in Colombo. Then, because of the state of the conflict in Sri Lanka, it was switched to Perth. However, this was agreed on the footing that the next CHOGM would be held in Colombo. It was only a postponement, not a vacation of the venue.

SO: I just wondered if you recalled any private discussion saying that this is not going to be appropriate, if we're emphasising that this should be the venue to accept a report for a charter which emphasises the importance of universal human rights?

MK: Don't forget that I wasn't there as a politician, to take part in the politics of CHOGM – I was there basically as an "expert", or official. Also I, from my own

work for a decade as the chair of the Australian Law Reform Commission, knew that my role was important, but subordinate. All we had to do was to make our proposals, report them, and then the decision-making on them was a matter for the Heads of Government. So I didn't really get involved in the issues relating to the suitability of Sri Lanka. This was because I would have regarded that as at a level of politics that really wasn't the role of the EPG to offer. The Heads of Government would know the difficulties that Sri Lanka would present as a place for debating, and following up, issues of human rights.

SO: I wondered how far you, as an Eminent Persons' Group, remain in touch with a view to seeing how far the Secretariat has addressed issues that you raised in your report, and whether there is any consistent pressure for the Secretariat to both respond or to implement your recommendations?

MK: We demitted office at the CHOGM meeting. We were *functus officio*. We had delivered our report, and therefore we had no future corporate existence. That was the legal position, and we all understood that. We've therefore not pretended to a corporate existence that we don't have. However, members of the EPG have kept in touch by email contact over the years since Perth, largely I should say, this has happened because Sir Ronald has given a series of very powerful lectures, and he has shared them with us. I've been deflected into other activities concerned with the United Nations. I haven't been as active as both Sir Ronald Sanders and Senator Hugh Segal in Commonwealth concerns. They have been the two most engaged members, Senator Segal was appointed by Prime Minister Harper of Canada to be a Commonwealth emissary on Commonwealth matters. He has made some excellent addresses, which he sends to us. He sometimes discusses and debates them with us as he thinks appropriate.

SO: So what would you say, as an expert and a long-term, highly-qualified professional involved in Commonwealth law matters, for the Commonwealth going forward, is part of its strength? Or do you see it, in fact, progressively dwindling into being an increasingly irrelevant international organisation?

MK: I see it dwindling, and become increasingly irrelevant. Indeed, a question may arise as to whether it survives the demise of the Crown, because the Queen has been a kind of cement that has kept the Commonwealth having a distinctive continuity and identity. Heads of Government of the Commonwealth like to be in the presence of the Queen. I think her presence has been one of the attractions of going, and getting Heads of Government, as distinct from second heads or third heads. Sir Ronald Sanders has published an excellent paper on the upcoming meeting in Malta, in which he has insisted on the importance of the retreat. He says that only Heads of Government should be allowed to go there. He argues that, if you dilute that event with officials and lower functionaries, then it's not going to really work. It was the very fact that it was Heads of Government that were meeting together that led to the informality, self-confidence and give-and-take and friendliness which had been a feature of Commonwealth meetings up till the last decade.

SO: So you're identifying not simply the Monarch as head of the Commonwealth, but the importance invested in the persona of the

Queen; and also the importance then of the selection of the next Secretary-General, because you began our conversation by emphasising this question of leadership, the need to take political risks in the interests of the Commonwealth?

MK: Officials, by their inclination, are people of process. They're not people of principle, taking risks. They want to avoid risks. Officials tend to be risk-averse. So I think it has proved with Secretary-General Sharma. He may have done useful things in the course of his distinguished service as SG. But if any were risky, I can't recall them to mind at the moment.

SO: Do you see the Commonwealth revitalising itself along the lines of a smaller club? Sir Ron Sanders always emphasises that the Commonwealth is a club, that it has rules, though, and you have to abide by them; and whether it will shrink to exclude those who don't have a shared sense of identity, and who don't share an overt and ongoing commitment to universal rights?

MK: I don't much like the idea of a club, because that has notions of superiority and totally common values. The Commonwealth will never be an organisation of totally common values. It is simply too diverse. The British in their Empire both secured too many countries with too many people on too many continents to have a monochrome organisation as the residue of that historical link. What has to happen, as it seems to me, is that it has to have some core principles to define the utility of retaining it, except as an historical, nostalgia trip. When we tried to give a core document, the Charter, plus a Commissioner, in order to express core values and give substance to the Commonwealth, they took the one, rejected the other. Yet the one without the other is completely toothless. It's not even as strong as an instrument endorsed freshly at the end of a CHOGM meeting by Heads of Government. It looks grand. But it has no bite. That is the tragedy of the EPG of 2009. The idea was a good idea, from Tun Badawi. The execution of the idea involved a good proposal from the EPG. The institutional suggestion was an essential component of the good idea. However, the institutional suggestion was rejected in the pursuit of a quiet life. But that quiet life will ultimately be fatal to the Commonwealth as leaving nothing behind but a nostalgic value.

SO: Sir, you mentioned that, in a few days' time, you were going to be going to the Caribbean to meet with Caribbean leaders?

MK: I've been invited by the Prime Ministers and the Health Ministers of the Caribbean English-speaking countries, to come to a meeting in Kingston. That meeting will take place on 8th/9th/10th/11th of April 2014. The focus of the meeting will be the HIV AIDS epidemic in the Caribbean. That was itself an important focus of the attention of the EPG. I brought that up repeatedly during our meetings. Particularly when we had our meeting in Kuala Lumpur. I endeavoured to have the urgency of getting reform of the laws that impede effective HIV strategies removed from Commonwealth countries. The members of the EPG, I think it's fair to say, or some of them, were a bit reluctant at first to go down that track. They were aware that, on issues such as homosexuality, there were Commonwealth member countries that were very conservative. They were unlikely to welcome suggestions that the laws on that subject should be disturbed. But to their great credit, the members of the EPG were open-minded enough to listen to the arguments. Especially so when I was able to point to another body on which I had served, or was

serving at the time, the United Nations Development Programmes Global Commission on HIV and the Law. That body was chaired by former president of Brazil, Fernando Henrique Cardoso. That body was putting out documentation which showed, quite graphically and by reference to statistics and other information, that in the Caribbean, for example, those countries which were members of the Commonwealth, which still had criminal laws against gays, had the highest levels of HIV by far. Countries whose legal systems were derived from France and Spain, which didn't have criminal laws against gays, and which could therefore reach out to gay people and get them involved in self-protection and use of condoms, and reducing the spread of the virus, did better. There was a huge disparity between these countries. There was a very vivid graph in the UNDP documentation, which showed that this was true of Commonwealth countries, save only, I think, it was for Bermuda, which had abolished the laws against homosexual conduct.

SO: Probably because it's a British Crown colony.

MK: It might have been Barbados, I'm not sure. It was one of the Commonwealth countries of the Caribbean. They were doing all right. But Jamaica was doing horrendously poorly. To their great credit, the members of the EPG, who came from different cultures, different religions, and different backgrounds, were brought round to see that this was a big Commonwealth issue, a special Commonwealth problem. The result of that realism was that there were very specific recommendations that there should be the removal of the laws against gays, as part of the aspect of the Commonwealth's response to HIV. When that recommendation went up to the Heads of Government, it was put in terms of the removal of laws that involve "discrimination". The Heads of Government, or their officials, added a rider. This said that it will be a matter for each Commonwealth country to decide, what is "discrimination". But that was a way of saying, 'Well we're just going to continue doing what our culture and our religion suggests we should.' The net result of this has been that the levels of HIV in Commonwealth Caribbean countries, and in African countries as well, have remained extremely serious. It's become doubly urgent, because the first-line therapies are now developing of side-effects. There's a need to move to the second-line therapies. These are much more expensive because they're under patent and not available in the form of cheaper generic pharmaceuticals. That means that it's going to be much more expensive to fight the war on AIDS in the Caribbean, Africa and India. That means, in turn, that the Caribbean Heads of Government and Ministers of Health are facing this danger. So they've invited me to come back to Jamaica, and to talk to them about this issue. I'm not sure that that arises out of the EPG report. It may arise out of the UNDP report. I know that UNDP has something to do with the organisation of the meeting. Probably the Commonwealth Secretariat would never do anything so courageous and challenging.

SO: But, Sir, why should they be separate? It seems, there is this cross-fertilisation of ideas between the EPG and the UNDP?

MK: It should be. But the initiative has not come from the Commonwealth. The initiative, I think, has come from PANCAB, whatever that is – Pan-Caribbean, AIDS initiative no doubt. I don't know if it's going to have non-Commonwealth countries. I think it might be just be English-speaking Commonwealth participating countries, in the Caribbean. It's going to be a serious meeting. I'm told that leaders are now facing up to the necessities. Certainly, they want me there to try and help in that process by encouraging respectful but truthful

dialogue. That was one of the best things about the EPG report. Yet I don't know that it has had much impact. But that is because of the rider, that it's a matter for each Commonwealth country to decide what is "discrimination". That is, I think, something officials may have put into the resolution to guard their patch.

SO: But that suggests a strongly positive outcome, in fact, from the EPG report, of the Commonwealth implementing progressive legal, and then consequential, social change in a regional function.

MK: The EPG report may be part of one of the ingredients that had played a part in organising the meeting I will certainly be referring to the EPG report. And to the way in which the Commonwealth leaders, or the Commonwealth, advisory group, came round to its recommendations. It was very interesting to me, because as a gay man myself, I didn't know whether the EPG would see the importance of these links. I was very open about my sexuality. There was no question about that. It was a case of all cards on the table. It would not have been a surprise to me if some, at least, or maybe even most, of the members of the EPG had said, 'Oh, we're not going there – the Commonwealth isn't ready, or this is very, very controversial, this is political'. But they said, above all this is about life. These are human lives of Commonwealth citizens. This is people dying a painful death prematurely. It is doing great damage to their economy. Therefore, if we deal with it in the context of HIV/AIDS, as a special Commonwealth problem (which are the words in the EPG report) we are doing the right thing- objectively, scientifically, legally right. That was the spirit in which the Commonwealth approached the matter. The Secretary-General, to his credit, has given rather cautious, and sometimes rather tepid, support on this issue. He's said the right things on occasion. But it hasn't been a whole-hearted, energetic push. He has not said boldly: you can't leave the tap on getting money from rich countries to give anti-retroviral drugs to poor Commonwealth countries, but leaving the tap on by allowing people to just keep getting infected, because you have no real outreach to them. Or because you're hostile to them. Because you stigmatise them. Because you criminalise them. Because you penalise them. Because you harass them by the police. To do all this and then to wonder why they're not getting the essential messages, and not responding, and coming forward, having the test, getting onto the drugs, and so on, should not really be surprising.

SO: Sir, can I say then that the EPG exercise was a classic case of idealistic pragmatism?

MK: I would rather say, the EPG acted on principle. The implementation has been watered down by so-called, pragmatic officials and politicians. The EPG came to a conclusion, yes. This is what is right. Therefore Christian, Muslim and atheists, from all the continents serving on the EPG, said, 'This is what we should do'. They were brave and strong. That's exactly the sort of thing a Commissioner of an EPG should be appointed to do. By persuasion, respectful dialogue, inter-action, ceaseless effort, energy, intelligence, education, you will ultimately get through to people. However, if you don't have the institution, and you don't have the personnel, and you don't have good and courageous people, then it'll just drift along. No-one will be upset. But nothing important will be achieved. Sadly, on HIV/AIDS and homosexual offences, that is where we are in the Commonwealth. If anything, things have actually got worse since the EPG report. That costs the lives of

Commonwealth citizens. And this is the true price the Commonwealth pays for lack of strong and principled leadership.

SO: Mr Kirby, thank you very much indeed.

[END OF AUDIOFILE]