

2759

THE UN REPORT ON NORTH KOREA AND THE
SECURITY COUNCIL: SECURITY AND HUMAN
RIGHTS

The Hon. Michael Kirby AC CMG

THE UN REPORT ON NORTH KOREA AND THE SECURITY COUNCIL: SECURITY AND HUMAN RIGHTS

The Hon Michael Kirby AC CMG*

I. ORIGINS OF GLOBAL THE SECURITY COUNCIL AND INTERNATIONAL COIs

Just as war between nations and peoples is as old as human history, so attempts to prevent, avoid and resolve armed conflicts have historical predecessors.¹

After the wars that followed the American Revolution (1776), the French Revolution (1789) and the ensuing Napoleonic Wars, a move was made, at the Congress of Vienna (1814-1815), to establish a new foundation for international relations. It was one to be “guided by” the five “Great Powers” as then recognised.² It aimed at fulfilling a moral duty to maintain peace in Europe as the foundation for a wider peace in international relations.

Each of the revolutions that preceded the new order, and the German, Russian, Chinese and other resolutions that followed, grew out of demands for the declaration, and enforcement, of inalienable rights

* Chair of the Human Rights Council’s Commission of Inquiry on the Democratic People’s Republic of Korea (2013-14). Justice of the High Court of Australia (1996-2009). Un Special Representative on Human Rights in Cambodia (1993-1996).

¹ Sir Frederick Pollock, *The League of Nations*, Stevens & Sons, London, 1920, 1.

² Austria, France, Great Britain, Prussia and Russia.

belonging to all people. However, the conflicts that followed these resolutions usually represented nothing more than conventional wars fought by nation states. The reconciliation of geopolitical realities with the unfulfilled demands of peoples and individuals was not ultimately resolved in 1815. Nor was it resolved in the international treaties that followed the end of the Great War in 1918. In a real sense, the Second World War was itself the outcome of these earlier failures of the international community. It was in the aftermath of the Second World War in 1945 and the suffering, genocide and nuclear destruction that it revealed to humanity, that the creation of the United Nations became a central war aim of the Allied powers. That aim was fulfilled in 1945 with the establishment of the United Nations Organisation. To understand the new world order that emerged, it is necessary to consider the necessities that gave rise to it.

In the 19th Century, after Vienna, the world, “tired out with war”,³ sought to establish an institutional means to settle the most dangerous international conflicts and to restrain war and the causes of war. The fundamental tenet of the Vienna settlement of 1815 was a recognition of the relevance of the law of nations that was to be observed by all civilised states. Under the umbrella of the Vienna settlement, new methods began to emerge in the 19th Century including international arbitration treaties;⁴ the provision for international commissions of inquiry and mediators; and submission to an international court of disputed claims of international right.

³ Pollock, above n.1, 10.

⁴ Lord Russell of Killowen, “Address to the American Bar Association” (1896) 7 *Law Quarterly Review*, 329.

In these developments the broad outlines of the present international legal order can dimly be discerned.⁵ Thus, in a convention between the United Kingdom and the United States of America, signed at The Hague in 1899, designed to promote “the Pacific Settlement of International Disputes” a template could be seen that was to be the more powerful because of the leading roles of the contracting parties in laying down the mechanisms for securing peace after both the First and Second World Wars.

In the third article of the foregoing Convention, provision was made for the creation of international commissions of inquiry. Their responsibility was to be to investigate and report upon a matter of conflict where conventional diplomatic methods had failed to resolve the dispute. In such a provision lay a recognition of the fact that international conflict was usually multi-faceted and causation was rarely clear cut.⁶ Identifying and clarifying the relevant facts in dispute was often a vital step on the path to resolving the conflict.

These early provisions for international commissions of inquiry proved useful. In October 1904, a Russian fleet, on an outward voyage from the Baltic Sea to the war zone with Japan in the Far East, opened fire on a British fishing fleet on the Dogger Bank.⁷ It did so, allegedly, under the impression of the presence of torpedo boats hostile to the Russian

⁵ The agreements between the United Kingdom and France (1903) and between the United Kingdom and the United States of America (1908) are set out in Pollock, 40-42.

⁶ In Article III it is provided: “In case the High Contracting Parties shall have failed to adjust a dispute by diplomatic methods, they shall at once refer it to the International Commission for investigation and report. The International Commission may, however, spontaneously, by unanimous agreement, offer its services to that effect, and in such case it shall notify both Governments and request their cooperation in the investigation. ... the High Contracting Parties agree to furnish the Permanent International Commission with all the means and facilities required for its investigation and report. The report of the International Commission shall be completed within one year after the date on which it shall declare its investigation to have begun, unless the High Contracting Parties shall limit or extend the time by mutual agreement...”

⁷ Pollock, *ibid*, 51.

ships. The consequent loss of lives and vessels produced an immediate danger of war between Great Britain and the Russian Empire. However, under The Hague Convention of 1899, a commission of inquiry was accepted both by Russia and Great Britain, apparently on the suggestion of the French Government.⁸ The incident had been one “novel, exasperating and at first sight incapable of rational explanation”.⁹ The report of the commission of inquiry was ultimately accepted by all concerned. Armed conflict was avoided. The incident stuck in the minds of national leaders, to reappear towards the end of the Great War of 1914-1918. At that time consideration turned to the mechanics of a permanent League of Nations, advocated by President Woodrow Wilson of the United States of America.¹⁰

In February 1919, after the Armistice of 11 November 1918, the delegates of 14 states presented a draft for such a League to a plenary conference of the Allied leaders in Paris. That conference agreed on the *League Covenant*. As history shows, the League of Nations failed to establish an effective international body. But its Preamble bears some similarity to that of the United Nations, adopted at San Francisco 26 years later.¹¹ Its organisation envisaged that the League would act through an Assembly and a Council and have a permanent Secretariat.¹² Decisions of the Assembly had normally to be unanimous.¹³ The same

⁸ Ibid, 51-52.

⁹ Id, 53.

¹⁰ Id, 74.

¹¹ The Preamble of the League of Nations as finally adopted states relevantly: “In order to promote international co-operation and to achieve international peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honourable relations between nations, by the firm establishment of the undertakings of international law as the actual rule of conduct among Governments and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of the organised peoples with one another, the High Contracting Parties agree to this Covenant of the League of Nations.”

¹² *League of Nations Covenant*, Art. II.

¹³ Pollock, above n.1, 99.

was true of the Council.¹⁴ These requirements immediately gave rise to debate about the workability of an institution whose every member had “the decisive power of a veto”.¹⁵

The Council of the League consisted of representatives of the United States of America, the British Empire, France, Italy and of Japan, together with Representatives of four other Members of the League”. The four non-permanent members of the Council were to be “selected by the Assembly from time to time, in its discretion.” Enlargement of the ranks of permanent members of the Council was allowed to the Assembly. Non-members of the Council were to be invited to “sit as a Member” during the consideration of any matter “specially affecting the interests of that member of the League.” Each Member of the Council was to have one vote.¹⁶ The only exception to the equality of votes was provided in article V. It stated that:¹⁷

“All matters of procedure at meeting of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.”

Otherwise unanimity was the rule, save for the appointment of the Secretary-General;¹⁸ reports on disputes referred to the Council;¹⁹

¹⁴ Covenant, Art. IV.

¹⁵ Pollock, *ibid*, 99. Its origins of the design of the League Covenant were traced to the Articles of Confederation of the United States of America, framed in 1777, ratified in 1781; and superseded by the Constitution of the United States in 1787.

¹⁶ Covenant, Art. IV.

¹⁷ Pollock, *ibid*, 105.

¹⁸ Covenant, Art. VI.

¹⁹ *Ibid*, Art. XV.

exclusion of a member state from the League for breach of the *Covenant*;²⁰ and clarification of amendments to the *Covenant*.²¹ Provision of “passive assent” was also accepted (abstention from attendance at the meeting).²² This view was justified by the great inconvenience that would follow if the work of the League were frustrated by the unavoidable absence of delegates.²³

In keeping with the times, many provisions of the League *Covenant* were addressed to the reduction of armaments²⁴ and consideration of threats to peace. Provisions allowed for arbitration of disputes and the institution of inquiries by the Council.²⁵ The establishment of a permanent Court of International Justice was not immediately agreed; but it was expressly envisaged.²⁶ In the event of a dispute, provision was made for the Council immediately to institute an inquiry into the circumstances of the dispute and recommend such action as “may seem best and most effectual in the circumstances.”²⁷

The *Covenant* of the League of Nations notoriously failed to address the basic issues of universal human rights and justice for all peoples. As the successive threats to peace in Manchuria, China, Abyssinia, the Rhineland, Spain, Austria, Czechoslovakia, and Poland revealed, the first global effort to establish an institution to uphold peace and security collapsed because of its own institutional defects.²⁸ After the ensuing war, the successful Allies, in 1945, created the United Nations. In doing

²⁰ Id, Art. XVI.

²¹ Id, Art. XXVI. It required a majority vote of the Assembly and unanimous vote of the Council.

²² Pollock, *ibid*, 106.

²³ Id, 107.

²⁴ Covenant, Art. VIII.

²⁵ Covenant, Art. X.

²⁶ *Ibid*, Art. XII, XIII.

²⁷ Id, Art. XIV.

²⁸ Id, Art. XVII. Pollock, *ibid*, 154.

so, they sought to derive lessons from the past. But, as will be seen, the past profoundly influenced the shape of the new body that they created. This was especially so in the attention which the drafters gave to the constitution, functions and membership of the Security Council of the new body.

II. THE UNITED NATIONS SECURITY COUNCIL

The Security Council of the United Nations, is the keystone in the arch of the United Nations Organisation, established by the United Nations *Charter*.²⁹ In its opening paragraphs, the *Charter* identifies the commitment of the Peoples of the member nations: “to prevent the ‘scourge of war’; to ‘reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women in the nations large and small’; to establish conditions under which international law might be maintained; and to promote ‘social progress and better standards of life in larger freedom’”.³⁰

In order to attain these ends; to practise tolerance and living together in peace; to unite ‘to maintain international peace and security’; and to ensure that ‘armed force shall not be used, save in the common interest’, the *Charter* establishes the United Nations. It defines its purposes,³¹ provides for its membership³² and identifies its principal organs.³³

²⁹ The United Nations *Charter*, adopted 26 June 1945; 3 Bevens, 1153. Entered into force 24 October 1945. See F.F. Martin et al (eds) *International Human Rights Law and Practice: Cases, Treaties and Materials – Documentary Supplement* (Kluwer, The Hague, 1997, 1).

³⁰ United Nations *Charter*, Opening preamble.

³¹ United Nations *Charter*, ch I.

³² *Ibid*, ch II.

³³ *Id*, ch III.

One of those organs was to be “a Security Council”.³⁴ The composition of the Security Council was defined to consist of permanent and non-permanent members. The permanent members were identified as “the Republic” [now styled the People’s Republic] of China; France; the Union of Soviet Socialist Republics [now the Russian Federation]; the United Kingdom of Great Britain and Northern Ireland and the United States of America”.

Originally, the Security Council was to comprise 11 member states. However, this number was later enlarged to 15 member states, 10 in addition to than the permanent members. These 10 were to be elected by the General Assembly with consideration of their ‘contribution ... to the maintenance of international peace and security and to the other purposes of the Organisation’ and also to ‘equitable geographical distribution’.³⁵ The non-permanent members are elected for a term of 2 years. At the times referred to below, Australia was a non-permanent member. Its term ran from 1 January 2013 to 31 December 2014. At the close of 2014, its latest interval as a non-permanent member of the Security Council was drawing to a close.

Notwithstanding the variable composition in the membership of the Security Council, the body itself is a continuously functioning one.³⁶ Meetings of the Security Council are normally held in the ornate room of the Council in the United Nations Secretariat Building at the foot of 42nd Street in East Manhattan, New York. The room is elegant, exuding the concentration of geopolitical power; but appropriate to the high responsibilities imposed on its members. In addition to the members of

³⁴ Id Art 7.1.

³⁵ Id Art 23.1.

³⁶ JG Starke, *An Introduction to International Law* (4th Ed), Butterworths, London, 1958, 448.

the Security Council, other states, members of the United Nations, are entitled to participate in the Security Council proceedings, without a vote, in the discussion of any questions brought before the Security Council, if the Council considers the interests of that Member State are ‘specially affected’.³⁷ Moreover, a member state of the United Nations, or a non-member, if it is a ‘party to a dispute under consideration by the Security Council, is to be invited to participate, without a vote, in the the discussion relating to the dispute.’³⁸

The Republic of Korea (ROK) (South Korea) and the Democratic People’s Republic of Korea (DPRK) (North Korea) are both member states of the United Nations. Each was admitted to membership on the same day, 17 September 1991. At the times recounted herein, the Republic of Korea was serving as a non-permanent member of the Security Council. DPRK was not a member of the Security Council. Moreover, at no time during the meeting of the Security Council described hereunder, did DPRK seek to participate, without a vote, in the discussion that followed. This was so although that discussion, and the resolution that it envisaged, clearly ‘specially affected’ the interests of DPRK.³⁹ However, DPRK did participate in the earlier deliberations of the Human Rights Council of the United Nations (HRC) and the General Assembly (GA), established by the *Charter* as a principal organ of the United Nations⁴⁰ with the composition, functions and powers and procedural provisions laid down in the *Charter*.⁴¹

³⁷ United Nations *Charter*, Art 31.

³⁸ *Ibid*, Art 31.

³⁹ *Id*, Art 7.

⁴⁰ *Id*, ch IV, Arts 9-22.

⁴¹ *Id*, Art 24.1.

The contrast between the large, sometimes unwieldy, conditions of the General Assembly, meeting in its own chamber, and the Security Council reflects not only their respective sizes but also their differing functions and responsibilities. The Security Council is self-consciously a very serious place. The *Charter* anticipated this, reciting in its first preamble amongst the purposes of the United Nations, one of saving successive generations from war ‘which twice in our lifetime has brought untold sorrow to mankind’. An edge was given to that purpose by the circumstances immediately preceding the commencement of the *Charter* in 1945. In August of that year, over Hiroshima and Nagasaki Japan, two nuclear weapons were detonated, demonstrating devastating huge destructiveness and becoming a warning symbol for the age. Unless the noble objectives of the United Nations, most especially the prevention of war; the attainment of fundamental human rights; and upholding the rule of international law could be assured, the signatories recognised that the future of humanity stood in peril.

It is because of the recognition of that danger that the Security Council bears the ‘primary responsibility under the *Charter* for the maintenance of international peace and security’.⁴² The members of the United Nations, by subscribing to the *Charter*, ‘agree that, in carrying out its duties under this responsibility, the Security Council acts on their behalf’.⁴³ In discharging those duties, the Security Council is required to ‘act in accordance with the Purposes and Principles of the United Nations’.⁴⁴ The members of the United Nations ‘agree to accept and

⁴² Id, Art 24.1.

⁴³ Id, Art 24.2

⁴⁴ Id, Art 25.

carry out the decisions of the Security Council, in accordance with the *Charter*.⁴⁵

Membership of the United Nations is not compulsory for the nations of the world. So much is recognised by the provisions in the *Charter* for defined privileges to be enjoyed by non-members and by the detailed procedures laid down for joining. DPRK was not obliged to join the United Nations. But, having done so, and having ratified numerous international treaties on human rights adopted by the United Nations,⁴⁶ DPRK is required by international law to conform to the obligations so accepted or established.

In many matters the Security Council acts by a consensus. In matters where there are differences amongst the members, the disagreements are resolved by voting. Each member of the Security Council has one vote.⁴⁷ The *Charter*, like the *League Covenant* before it, distinguishes between voting 'on procedural matters' and voting 'on all other matters'. In the case of procedural matters, decisions of the Security Council are made 'by an affirmative vote of nine members,' with no special reference being made to the privileged position for permanent members.⁴⁸ In making decisions on all other matters, an affirmative vote of nine members is required but 'including the concurring votes of the Permanent Members'.

⁴⁵ As explained in para 9 of the report of the COI on DPRK (infra), the DPRK is a state party to the *International Covenant on Civil and Political Rights* (ICCPR); the *International Covenant of Economic and Social Rights* (ICESR); the *Convention on the Rights of the Child* (CRC) and the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW). The compliance of DPRK with obligations to submit state reports on the foregoing treaties has been poor, although within the time period referred to below, DPRK began participating in the HRC procedure of Universal Periodic Review (UPR).

⁴⁶ *Charter*, Art. 27.1.

⁴⁷ *Ibid*, Art. 27.2.

⁴⁸ *Id*, Art 27.2. Provision is there made obliging a Member State to abstain from voting on certain questions where it is party to a dispute.

The Security Council is empowered to adopt its own rules of procedure.⁴⁹ It has done so. The rules of procedure and the conventions, built up by the Security Council over 70 years, create the established custom of the Security Council that influences its operations.⁵⁰ Necessarily, over time, delegations from the Permanent Members of the Security Council gain special expertise in, and knowledge of, the custom of the Council.

The requirements for the adoption of decisions of the Security Council were established between Augusts - October 1944 by a meeting of representatives of the Allied powers, planning the new United Nations Organisation, held at the Dumbarton Oaks mansion, close to Washington D.C.. From the start, the provision for a privileged status for the Allied Great Powers was controversial. Fear was expressed for the smaller nations (including Australia) that a so called 'veto', thereby afforded to the Permanent Members, would be abused.⁵¹

The chief ground advanced to support the provision of a 'veto' was that the main responsibility for maintaining peace and security would necessarily usually fall upon the Permanent Members. The pragmatic ground for the provision of unequal status in voting rights was that, without such privileges, it would be likely that the United States Senate, whose 'advice and consent' was required under the Constitution,⁵² would withhold its consent to United States' ratification of the *Charter*. Moreover, it was far from certain in 1945 that the Soviet Union or, for

⁴⁹ *Charter*, Art. 30.

⁵⁰ Liang Yuen-Li (1947) *British Yearbook of International Law* at 357 – 359.

⁵¹ H.V. Evatt, *The United Nations* (1948), 55.

⁵² *United States Constitution*, Article II, Section 2, par 2 "provided two thirds of the Senators present shall concur."

that matter, the United Kingdom (acting on behalf of the British Empire) would join the United Nations without the so called 'veto' power. If this recognition of the realities of international relations necessitated the provision for permanent membership of the Council and a privileged vote to the Great Powers it was a design that had several precedents. It was probably a price probably worth paying.

Although the original doubts concerning use of the veto power have been vindicated in some later practice, more recent experience suggests a declining use of the veto power. China, for example, has only used the veto on 10 instances, since its seat was taken by the People's Republic of China. This may reflect changes of strategy. But it may also reflect a custom of the Council that, where a Permanent Member indicates clearly its intention to vote against a 'non-procedural' decision, a proponent will often withdraw the proposal rather than face inevitable defeat. Some commentators, including the recently retired United Nations High Commissioner for Human Rights (Ms Navanethem Pillay) have suggested that, in the particular case of decisions concerned with universal human rights (especially in instances of genocide, crimes against humanity and war crimes) the nature of the subject matter argues against the existence of the veto power.⁵³ However, as an amendment to the power would itself have to run the gauntlet of the exercise of the power, no change is on the horizon.

Controversies have arisen over the years concerning aspects of the functions and voting procedures of the Security Council. Thus, questions have arisen as to whether the Security Council has a general overriding power for maintaining peace and security or whether its

⁵³ N. Pillay, Interview, *International Bar Association Journal* (October 2014).

powers are limited to the express powers stated in Chapters VI and VII of the *Charter*. The ambit of any implied powers that belong to the Council, as necessary for, or inherent in, the proper performance of its functions, is a matter of debate.⁵⁴ In this respect, differences about the exact powers and functions of the Security Council reflect parallel disputes that sometimes arise in municipal jurisdiction.⁵⁵

Many hotly contested issues arose during and after the Korean conflict of 1950-53. At the time of the commencement of that conflict, in June 1950, the USSR was absent from its seat in the Security Council. The China seat was then still occupied by the Government of the Republic of China (Nationalist), to whose credentials the USSR had objected without effect. In the absence of the USSR, the Council found that a ‘breach of the peace’ had been committed in Korea by DPRK forces. It ‘recommended’ assistance by United Nations member states to the authorities of ROK. It also provided for a unified United Nations Command, to defend ROK and to repel the forces that had invaded it.

The USSR returned to its seat in the Security Council and immediately challenged the validity of the foregoing resolutions. One ground of challenge was the participation in the decision of the Republic of China. But another concerned the power of the Council to make “recommendations”, as it had purported to do. A further ground was the lack of the affirmative participation in the decision of the USSR, a Permanent Member. A practice had developed before that time by

⁵⁴ International Court of Justice, *Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations* (1949) *ICJ Reports* 182.

⁵⁵ For example, the principle of constitutional necessity or implied constitutional powers has been considered by the High Court of Australia in *Davis v The Commonwealth* (1988) 166 CLR 79 at 92, 98, 101; *The Commonwealth of Tasmania* (1983) 158 CLR 1 at 203, 253; *Pape v The Commonwealth* (2009) 238 CLR 1 at 60, 84, 88, 118. But see *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 71-72 [125] per Kirby J.

which a formal abstention by a Permanent Member was treated as a sufficient exercise of its voting power. This was a contestable interpretation given the use by the *Charter*, art 27.3, of the adjective “concurring” and taking into account the presumed purpose of so requiring.⁵⁶ This is not the occasion to revisit these controversies. It is sufficient to note that they arose, have never been finally resolved and exist in a context resulting from the post-war division of the Korea Peninsula which from 1911 to 1945 had been ruled by one of the defeated Axis powers, Japan.

Against this background of history, and of the relevant international law and practice concerning the powers and functions of the Security Council, I turn to a description of my own engagement in the activities of the United Nations, as that engagement ultimately resulted in the invocation of the functions of the Security Council. In December 2014, the Security Council addressed its attention once again to the affairs of the Korean Peninsula. I will describe how that engagement originated; how it was played out in the Security Council; and how it raises still more contested questions about the responsibility of the Security Council to respond to grave violations of human rights, happening in a Member State of the United Nations, as those violations may endanger the maintenance of the peace and security of the world.

III. COI REPORT ON NORTH KOREA IN THE UNITED NATIONS

The United Nations Human Rights Council (HRC), in March 2013, established a Commission of Inquiry (COI) on Human Rights in the

⁵⁶ J. Stone, *Legal Controls of International Conflict* (Maitland, Sydney, 1954), 228. See also Starke, above n. 36 at 458.

Democratic People's Republic of Korea (DPRK). I was appointed to chair the COI. The COI completed its work in early 2014. It did so in the face of hostility and non-cooperation on the part of DPRK. In accordance with usual practice the report was originally published at a media conference in the Palais des Nations in Geneva on 17 February 2015. That was the first date on which the electronic version was available.⁵⁷ A month later, on 17 March 2014, the report was presented to the HRC, meeting in the same building. At the end of that month, the report was endorsed by a strong vote of the HRC (30 pro: 6 contra: 9 abstentions).

The HRC then sent the report to the General Assembly of the United Nations in New York. It was assigned to the 'Third Committee'. Eventually, a strong resolution was prepared, co-sponsored by the European Union and Japan. That resolution, amongst other things, called for the COI on DPRK report to be forwarded by the General Assembly to the Security Council. It also called for adoption of the recommendation made by the COI that the Security Council should, in turn, refer the matter of DPRK to the International Criminal Court (ICC).

North Korea is not a party to the *Rome Statute* establishing the ICC. That Court therefore does not ordinarily have jurisdiction over DPRK, consent to jurisdiction being a primary rule for jurisdiction under international law. However, exceptionally, the *Rome Statute* provides for jurisdiction to be conferred on the ICC by a resolution of the Security Council. It was in this way that, in its report, the COI proposed that the grave and prolonged record of human rights violations, found by it

⁵⁷ Report of the detailed findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, UN Human Rights Council, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1, (17 February 2014).

against DPRK, should be submitted first to a prosecutor of the ICC and then, if that officeholder so decided, by the judges of the ICC.⁵⁸ There were precedents for such referrals. The first such precedent, on 31 March 2005, was afforded in the case of Darfur.⁵⁹ The second such precedent arose on 20 February 2011, in the case of Libya under Gaddafi.⁶⁰

In the buildings housing the United Nations in Geneva and New York, DPRK did not at first appear to be overly concerned by the report of the COI. This was also the case following the vote of the HRC, despite the fact that it was adopted by a majority extremely strong by the standards of HRC decision-making. Nor did the DPRK appear to be excessively troubled by in the General Assembly. However, its delegation took an active part in the deliberations of the Third Committee of the General Assembly, attacking the COI and its report. In the General Assembly, the DPRK also relied on a not so secret weapon. This was the support of a number of countries with which it enjoyed 'fraternal' party and sentimental associations. Foremost amongst those countries were two in Latin America and the Caribbean, Cuba and Venezuela. Venezuela had been one of only 6 countries in the HRC that had voted against the EU-Japan resolution, with a recommendation that would place the COI report on a path potentially leading to the Security Council. Cuba had links to DPRK going back to the days of the Cold War.

During the GA Third Committee's deliberations, a procedural amendment was introduced by Cuba. In its original form it adopted an ostensibly conciliatory tone. It noted a number of steps that had been

⁵⁸ COI report, para 1218.

⁵⁹ United Nations Security Council, Resolution 1593.

⁶⁰ United Nations Security Council, Resolution 1970.

taken by DPRK that appeared to show a greater willingness on its part to cooperate with the United Nations Human Rights machinery. This new spirit of cooperation had come about in the aftermath of the provision of the COI report to the HRC in Geneva. Foremost amongst the conciliatory steps taken by DPRK (and referred to in support of the original Cuban amendment and the ensuing debates) were:

- * The participation of DPRK, effectively for the first time, in the process of Universal Periodic Review (UPR) by which the human rights record of all Member States of the United Nations is reviewed, in cyclical sequence, by the HRC. Whereas initially, DPRK would not concede a single point of criticism voiced in the HRC's UPR review of its record, in 2014 DPRK announced that its position had "evolved", so that it was prepared to accept a number (still a minority) of the recommendations made by the HRC. In support of its amendment, Cuba suggested that DPRK's willingness was an important breakthrough in the relations between DPRK, the HRC and the Office of the High Commission for Human Rights (OHCHR);

- * Additionally, attention is drawn to the fact that, that the Foreign Minister of DPRK had met representatives of the European Union, and an agreement had been reached by which discussions would take place between the EU and DPRK on the issue of human rights in the DPRK;⁶¹

⁶¹ In October 2014, DPRK indicated that it would be opening a human rights dialogue with the European Union. (This was subsequently withdrawn as was all cooperation after the Security Council hearing and vote).

- * DPRK had also produced its own report on its human rights record. This report, prepared by the DPRK Centre for Human Rights Studies was clearly a reflection of DPRK official policy. It had been predicted by DPRK to be a ‘rosy’ report on the state of human rights in the country. So indeed it was. However, at least it showed a willingness of DPRK to debate the issue and to explain its viewpoint;⁶² and
- * Cuba also referred to the offer which DPRK had made, for the first time, to allow the Special Rapporteur on Human Rights in DPRK (Mr Marzuki Darusman) to visit DPRK and to engage with discussions with officials. Previously, no special rapporteur on human rights in DPRK had been permitted to enter the country. Nor had the COI been granted entry. As Mr Darusman was *ex-officio* a member of the COI on DPRK, this prospective invitation was presented as a significant breakthrough, meriting a delay in the adoption of more energetic resolutions and actions by the United Nations, particularly referral of the COI report to the Security Council with a view to conferral by that body of jurisdiction upon the ICC.

Reports at UN Headquarters suggested that representatives of DPRK were almost continuously seen outside the offices of the Cuban delegation, pressing them for strengthening their procedural amendment. Certainly, the procedural amendment caused some anxieties in the circle of the “likeminded nations” favouring a strong resolution. Those nations did not expect any real action by DPRK to

⁶² *Report of the DPRK Centre for Human Rights Studies*, 13 September 2014, originally published on the Korean Central News Agency website (www.kcna.kp) though no permanent url exists for the report on that site, available at: http://www.ncnk.org/Report_of_the_DPRK_Association_for_Human_Rights_Studies.pdf

improve its human rights record without the adoption of strong resolutions by the General Assembly and, hopefully, the Security Council.

Some countries, otherwise generally supportive of the United Nations' human rights efforts, were won over by the Cuban initiative. The procedural amendment appeared to gather a significant number of supporters. A recurrent reason, advanced in the Third Committee for supporting the procedural amendment, was that the General Assembly should encourage DPRK to continue its engagement with the United Nations' human rights machinery. Some countries (such as Thailand) had concerns that pressing forward with a strong resolution, focusing on accountability for human rights violations and threatening engagement of the Security Council and the ICC, might paint DPRK into a corner. Countries that are isolated are sometimes prone to disconnection from reality. Mistakes are easily made and inappropriate, unwise or even violent action may be taken.

Nonetheless, as the Cuban resolution was under consideration by the Third Committee, Cuba took an unusual and damaging step. It amended still further the draft of its proposed amendment. This additional amendment was not fully explained; nor was it appreciated by all members of the Third Committee. Essentially, the Cuban revised amendment deleted most of the EU-Japan resolution. This would thus have left the Third Committee giving virtually no endorsement to the widely felt concerns about conditions in North Korea and about the matters revealed in the COI report. In the immediately preceding years, consensus resolutions had been adopted in the General Assembly recording concerns about human rights in DPRK. Accordingly, the

Cuban resolution, in its final form, would have been a huge victory for DPRK and a large defeat for the endeavour of the United Nations to address human rights in DPRK in a meaningful way.

When the extent of the Cuban further amendment of its procedural motion became known, there was immediate drift away from endorsement by member states. In the result, the Cuban amendment was defeated (40 states pro; 77 con; and 50 abstaining). After this defeat, the Third Committee voted on the EU-Japan resolution. It was then adopted by 111 states pro; 19 con; and 55 abstaining.⁶³ The vote on the resolution was reported to the plenary meeting of the General Assembly. A few more member states came on board the majority consensus. One additional state voted against. The result of the plenary vote in the General Assembly was 116 pro; 20 con; with 55 abstentions.⁶⁴

Even the European Union appeared to waver during the course of the General Assembly discussions on the Cuban resolution. The EU was keen to proceed with the dialogue about human rights directly with DPRK. In this, it possibly overestimated its persuasive capacity and also the possibility that without effective pressure, discussions with DPRK would result in outcomes beneficial for the citizens in DPRK. Nonetheless, the United States of America at that stage engaged with the EU delegation. It encouraged the EU to support the original approach of the “like-minded” countries. In consequence, that approach won the day in the General Assembly. It followed that the final

⁶³Situation of human rights in the Democratic People’s Republic of Korea, UN GAOR, 3rd Comm, 69th sess, 46th mtg, Agenda Item 68(c), A/C.3/69/L.28/Rev.1, (18 November 2014).

⁶⁴ Situation of human rights in the Democratic People’s Republic of Korea, UN GAOR, 69th sess, Agenda Item 68(c), UN Doc A/RES/69/188, (18 December 2014).

resolution of the General Assembly did as the COI report had recommended. It proposed that the General Assembly should transmit the COI report to the Security Council. It urged that the Security Council should refer the situation of human rights in the DPRK to the prosecutor of the ICC, with a view to consideration being given to a prosecution that would render those found guilty of violations of human rights (including crimes against humanity) accountable for such crimes.

So far, the United Nations procedures had fully endorsed the report of the COI. It then became important to ensure the Security Council would act.

In December 2014 an element of urgency was introduced into action by the Security Council. This was the approaching change in the membership of the Council at the end of 2014. Australia had been a non-permanent member of the Security Council for 2 years. Its mission to the United Nations was led by two experienced professional diplomats: Ambassador Gary Quinlan (Head of Mission) and Ambassador Philippa King (Deputy Head). Within the Security Council, Australia had taken a leading role in drawing attention to the condition of human rights in DPRK. This was so although the Australian Missions in Geneva and New York properly kept their distance from the COI. They respected my own independence and that of the COI. They did not presume upon the fact that I was an Australian national. They recognised that, in discharging my duties as chair of the COI, my allegiance was not to Australia but to the United Nations and to the principles stated in the international law of human rights, established by United Nations treaties.

Ironically, DPRK is itself a party to many human rights treaties. Ten years earlier, DPRK had sought to withdraw from the *International Covenant on Civil and Political Rights*. However, at the time, it was informed by the head of the Office of Legal Affairs in the Secretary-General's office (Mr Hans Corell) that no provision existed under the ICCPR for a nation to denounce the treaty. Therefore, DPRK could not do so. DPRK accepted this advice. It made no further attempt to withdraw from the ICCPR. To this day it remains a party to the ICCPR, as well as to other human rights treaties.⁶⁵

In April 2014, a preliminary exposure of the COI report to members of the Security Council had occurred. On the initiative of three members of the Security Council (Australia, France and United States of America) an Arria procedure had been invoked. This is a procedure, named after a diplomat who had first devised it, by which, without convening a formal meeting of the Security Council, a briefing could be requested on a matter of actual or potential concern to the Council. Such a briefing was requested in relation to the then available report of the COI on DPRK. That meeting was duly held in the United Nations building (although not in the Security Council chamber) on 17 April 2014. Ambassador Gary Quinlan chaired the meeting. All members of the Security Council attended the meeting except China and the Russian Federation.

Prior to the meeting, a member of the delegation of the Russian Federation called on the COI in the United Nations Headquarters in New York. They sought to explain the Russian absence from the Arria briefing. The explanation offered was that the Russian Federation did

⁶⁵ COI report, paras 9 and 1220 (q)(r). DPRK is a State party to the ICCPR, ICESCR, CRC and CEDAN. It has signed but not yet ratified the *Disabilities Convention*.

not agree with country specific commissions of inquiry, and thus with the report of the COI on DPRK. No particular error or mistake in the COI's report on DPRK was raised. China had expressed a similar view, both in the HRC and was later to do so in the Third Committee of the General Assembly. Notwithstanding this approach, the Arria briefing proceeded to receive reports from each of the three COI members. Grave concern was expressed in the meeting over the contents of the COI report.

As has been mentioned, under the *Charter* of the United Nations, for any substantive decision to be adopted, it is necessary to secure a majority of nine member states in the Security Council. However, by article 27.3 of the United Nations *Charter*, that majority must include the five Permanent Members (China, France, the Russian Federation, the United Kingdom and the United States). It is this provision that gives rise to the so-called 'veto' under the *Charter*. However, article 27.2 of the *Charter* provides that a 'procedural' resolution may be adopted by a vote of nine of the member states in the Security Council. No mention is there made of the participation of the Permanent Members.

On the assumption that there was a strong possibility of a 'veto' by either, or both, of China and the Russian Federation of any substantive resolution on human rights in DPRK (such as referral of the human rights situation in DPRK to the ICC), attention came to be addressed amongst the 'likeminded states' in the Security Council as to the ways in which as much as was practically possible could be achieved. Preferably, this should be attempted before the end of 2014 when the composition of the Council would change. One Member State that would be joining the Security Council in 2015 was Venezuela. It would be replacing a Latin American country less favourable to DPRK and its

protection. Naturally enough, this pending change in the Council focused the attention of those intending to pursue an initiative to proceed with a procedural step, not subject to the veto, during December 2014.

In late November 2014, an attempt was made to secure nine, and if possible more, member states in the Security Council to signify their support for the procedure proposed: a procedural motion placing the state of human rights in DPRK on the Security Council's agenda. The initiators of this procedural motion decided to circulate a letter which, on its face, would demonstrate that the nine concurring votes were already in place.

No attempt had earlier been made in the Security Council to adopt such a procedural motion relating to human rights in a member state, since the situation in Myanmar (Burma) was placed on the agenda of the Council in 2007. Such a motion was concededly an exceptional procedure. It was reserved to exceptional circumstances. There was always a possibility that a dissenting country might challenge the interpretation of the *Charter* as applied to the motion and whether it was truly "procedural". Such a challenge could raise an issue of construction of the *Charter* that has never been finally resolved. However, in the practice of the Security Council it has generally been assumed, by the juxtaposition of the two sub-articles of article 27 of the *Charter*, that the 'veto' reserved to the Permanent Member States is limited to non-"procedural" matters and that in "procedural" matters, the participation of the Permanent Five (P5) states in the majority is not obligatory. In the end, neither China nor the Russian Federation challenged this construction of the *Charter* in the instant case. Accordingly, the

gathering of signatures to demonstrate the support of more than nine members of the Security Council became a matter of priority.

The non-permanent members of the security council at the end of 2014 were Argentina, Australia, Chad, Chile, Jordan, Lithuania, Luxembourg, Nigeria, Republic of Korea (ROK) (South Korea) and Rwanda. ROK is traditionally wary of any action, both in international and national institutions, relating to DPRK that might impede the long-term objective of ROK to achieve reunification of the two states on the Korean Peninsula.

Some indications from ROK showed that it might not be willing, at least initially, to support the proposal in the COI's report that the situation in DPRK should be referred to the Prosecutor of the ICC. That step had been denounced by DPRK as offensive to its dignity and that of its leader. However, that still left the possibility of placing the issue of human rights in DPRK on the continuing agenda of the Security Council. If this were done, it would render it much easier for any Member State in the Security Council to raise the issue under the proposed agenda item. No additional procedural requirement to permit it to do so would be necessary.

The adoption of a procedural motion placing human rights in DPRK, as relevant to international peace and security, would not only be important as affirming the *Charter*-based proposition that peace and security is closely connected with observance of universal human rights. In the event of any possible changes of the human rights situation in DPRK, the feasibility of a further initiative to secure action for rendering DPRK accountable for serious wrongs would become much simpler. By

inference, this was the reason why DPRK was so strongly opposed to any step that would place its human rights record before the Security Council as an agenda item. It was a concern that this might happen in the Council that led to the energetic resistance by DPRK, with Cuban support, in the General Assembly to the very notion that its “internal” affairs should be placed on the agenda of the Security Council.

The task of collecting the signatures of Security Council Member States to the draft procedural motion fell in the first instance to the three Members that had earlier taken a lead in the expression of the Council’s concerns. Those countries were two permanent members of the Council: France and the United States of America. The third country in this *troika* was Australia, a Non-Permanent Member of the Council, shortly to complete its term.

Rwanda, a country with a strong engagement with universal human rights, for reasons of its own history, initially felt anxiety about joining in the endorsement of the *troika*’s letter requesting the President of the Council to add human rights in DPRK to the Council’s agenda. Against such a move was the fact that the two other African states, then serving on the Security Council, (Nigeria and Chad, which held the presidency during December 2014) indicated that they would abstain. The focus of their concerns was upon Africa. They may also have had reasons for resisting attention to the “internal” human rights concerns of a member state. Such a precedent might one day return to bite them. Supporting the procedural course also raised a question as to why an African state should take such an exceptional step in respect of a country in which it had no significant past or present engagement, DPRK.

Eventually, the United States of America explained the reasons for its stance, in support of the procedural resolution. Rwanda eventually agreed to sign the diplomatic letter.

Chile, under its new President (a past head of UN Women in the United Nations – Michelle Bachalet) appeared to be a member state likely to support human rights everywhere and especially because the COI report had referred repeatedly to the special deprivations of human rights of women in DPRK and the existence of large detention camps into which entire families disappeared in DPRK. Nevertheless, Chile was initially reluctant to sign on to the *troika's* letter. It had few engagements with DPRK. Those advising the Chilean position were reluctant to join the “like-minded” initiative.

As chance would have it, the Foreign Minister of ROK paid an official visit to Chile at this time. He took the opportunity of his visit to explain reasons for a Chilean engagement with the COI report and for placing the situation of human rights in Chile on the Security Council’s agenda. The role of Chile in the special procedures for human rights of the United Nations has frequently been important. One of the first mandates in the “special procedures” on human rights, created by the United Nations system, was established in 1975 in consequence of complaints about the disappearance of victims of human rights violations in Chile.⁶⁶ Eventually, the deep concerns that had motivated the COI in calling for an effective response from the United Nations system reached their relevant officials in Santiago de Chile. Chile agreed to sign the diplomatic letter.

⁶⁶ Ted Piccone, *Catalysts for Change: How the UN’s Independent Experts Promote Human Rights* (Brookings Institution, Washington, 2012, 12.

Jordan was provisionally prepared to sign the letter. However, it was reluctant to be the ninth member state required by the United Nations *Charter*. It was this concern that made it important for the *troika* to procure the support of Rwanda and Chile. With their support together with the support of the 'likeminded' nations, a total of 10 states supporting the proposal was guaranteed. Without one of these, the number of participating states would have fallen short. Jordan did not want itself to be the occasion of the majority expressed in article 27.2 of the *Charter*. In the result, Jordan was not placed in that position. It was one of 10 states that agreed to sign the diplomatic letter.

Argentina later also indicated that it would vote for the resolution, although not signing the diplomatic letter. In a way similar to the position that Thailand adopted in the Third Committee of the General Assembly, Argentina may have preferred not to face the choice. But when it did, it supported the procedure suggested by the majority. This guaranteed 11 states in favour of the proposed addition of human rights in DPRK to the agenda of the Security Council.

Australia had held the presidency of the Security Council throughout November 2014. During that month, Ambassador Quinlan and Ambassador King had assumed a very active role in proposing a number of initiatives in the Council. It was a more than usually active presidency. In the result, 3 of the 4 major initiatives advanced by Australia were adopted by the Council. Only one of its initiatives, which was opposed by the Russian Federation, did not succeed.

Gathering the numbers necessary to support the diplomatic letter was not safely in place by the end of November 2014. However, by the beginning of December 2014, 10 Member States had agreed to join in the proposal and a further vote was possible. Thus, on 5 December 2014, the ambassadors for Australia, France and the United States of America wrote a letter to the President of the Security Council. Their letter indicated that the three initiators could count on 10 supporting member states. That indication made it clear that the majority required in the *Charter* for a procedural resolution was committed. The requisite number was in place.

Notwithstanding this, China still strongly opposed the addition of human rights in North Korea to the agenda of the Security Council. It made its objection plain. There followed a closed (confidential) session of the Security Council. This, in turn, later led to an open meeting of the Council.

The Chadian ambassador (Mr Cherif) was initially unfavourable to the listing of the *troika's* motion. In part, this may have been occasioned by an irritation at another initiative being pressed by a country (Australia) that had already advanced so many initiatives during November 2014 and was attempting, in December 2014, to advance a further initiative during a month in which Chad would ordinarily take the leading role.

Nonetheless, under the *Charter* and the rules of the Security Council, the *troika* was entitled to point out that the president really had no discretion when requested by a member of the Security Council to add a matter to the Council's agenda. Clearly this was so because three members were making a request and they could call on the support of a

further seven members. Accordingly, a date early in December having been declined. Eventually 22 December was offered by the President. That date was accepted.

So it was that on 22 December 2014, in the chamber of the Security Council of the United Nations in New York, the procedural motion moved by Australia, France and the United States and supported by 10 signed up members of the Council (and eventually one more) came on for consideration. The Chadian President himself took the initiative for calling for a vote by show of hands on the proposal to add human rights in DPRK to the Security Council's agenda. It was in this way that the vote was finally taken by the Security Council. In the result, eleven members of the Council supported resolution. Two members, China and the Russian Federation, opposed. Two members, Chad (the President) and Nigeria abstained. The motion was thus declared by the President to have been adopted⁶⁷. The provisional agenda item was added to the Security Council's order of business.

The agenda item will remain on the order paper of the Security Council for 3 years. If, before the end of that 3 year period, a then member of the Security Council asks for the matter to remain on the agenda, it will so remain. For the time being, it must be anticipated that such a request will probably be made, at least so long as no substantial improvement has been demonstrated in the circumstances of human rights in DPRK.

IV. RELATIONSHIP OF PEACE AND SECURITY IN HUMAN RIGHTS

⁶⁷ The situation in the Democratic People's Republic of Korea, UN SCOR, 7353rd mtg, UN Doc S/PV.7353, (22 December 2014).

The recommendation of the COI for the endorsement by the Security Council of the referral of the matter of human rights in DPRK to a Prosecutor of the ICC,⁶⁸ for consideration by that court, has not so far been considered by the Council. A decision to make such a recommendation would certainly require the concurrence of the Permanent 5 members of the Security Council, as provided for in article 27.3 of the *Charter*. However, the fact that the Security Council now has the issues of human rights before it on its own agenda, make it procedurally simpler to bring forward any future procedural or substantial question that concerns human rights in North Korea, at the request of a single member of the Council. It may be done simply. It may be done as a matter of urgency.

Although it may be said that strongest and most practical of of the recommendations of the COI, to secure accountability for the grave and prolonged abuses of human rights found its report, has not yet been acted on, an important achievement has undoubtedly been occurred up. Moreover, as the special rapporteur on human rights in North Korea (Marzuki Darusman) has repeatedly pointed out, during debates in the General Assembly, the very fact that DPRK was so resistant to referral of its human rights record to the Security Council makes it plain that it regards such referral as a serious step. So it is.

The United Nations has embraced the principle of accountability for grave international crimes.⁶⁹ Clearly, crimes against humanity, found by the COI in the case of DPRK are grave crimes against international law. The United Nations has also embraced the principle of 'rights up front'.

⁶⁸ COI report, paras 1201, 1202, 1205, 1225 (a).

⁶⁹ COI report para 1995 f.f.

That is, in its programmes and actions, it has resolved that it will always place the protection of human rights at the forefront of its agenda.⁷⁰ Additionally, a strong resolution of the General Assembly has committed the global community to the principle of Responsibility to Protect (R2P).⁷¹ This means that, where a nation fails its own people and cannot be looked to by those people for protection of their human rights, the international community will assume the obligation of such protection.

The report of the COI on DPRK convincingly demonstrates that the government and institutions of DPRK cannot be relied upon to protect the human rights of the people of that country. The obligation of protection therefore falls upon the international community. The failure to provide that protection is itself a grave cause of instability and potential violence and disruption within and beyond DPRK. Especially because of the presence of nuclear weapons in DPRK; the development of an increasingly sophisticated missile delivery system; and the existence of the fourth largest standing army in the world, DPRK presents grave dangers to the peace and security of its region and to international peace that attracted the attention of the Security Council.

The Security Council recognised the interconnection of human rights and peace and security, in the case of DPRK by adopting a resolution bringing the issues of nuclear weapons and connected questions onto its agenda.⁷² On 22 December 2014, a further matter was added to the Security Council's agenda, without prejudice to the earlier agenda items, namely the condition of human rights in DPRK. This is not only a step

⁷⁰ COI report 1225 (g).

⁷¹ UN World Summit Outcome Document A/RES/60.1 para [139], COI report para 1204. G.J. Evans, *The Responsibility to Protect*, Brookings Institution, Washington D.C., 2008, 175.

⁷² The Security Council Resolution 1718 regime establishing the DPRK Sanctions Committee continued by S/RES 2141 (2014).

important for the protection of the human rights of the people of North Korea. It is also a step forward in the recognition of a proposition left implicit in the *Charter* of the United Nations. In a fragile and vulnerable world, international peace and security are intimately connected with the protection of human rights everywhere.

The demonstration of this interconnection is already an important achievement of the Human Rights Council's COI on DPRK. So is the strong follow up to the COI's report by all of the applicable organs and agencies of the United Nations. So far, everything that could have been done, in accordance with the *Charter*, has been done. Taking the matter further will require leadership from the United Nations and a strong resolve on the part of member countries concerned about the state of human rights in the DPRK and the perils for regional and international peace and security that the present conditions in DPRK present.