

2772

JUDICIAL COMMISSION OF NEW SOUTH
WALES

LAND & ENVIRONMENT COURT ANNUAL
CONFERENCE

28 MAY 2015

MANLY PACIFIC HOTEL

THE UN REPORT ON NORTH KOREA: HOW
THE UNITED NATIONS MET THE COMMON
LAW

The Hon. Michael Kirby

JUDICIAL COMMISSION OF NEW SOUTH WALES
LAND & ENVIRONMENT COURT ANNUAL CONFERENCE
28 MAY 2015
MANLY PACIFIC HOTEL

THE UN REPORT ON NORTH KOREA: HOW THE UNITED
NATIONS MET THE COMMON LAW

The Hon. Michael Kirby AC CMG*

THE COI REPORT

On 21 March 2013, the UN Human Rights Council (HRC) established a Commission of Inquiry (COI) on human rights violations in the Democratic People's Republic of Korea (DPRK). In May 2013, the then President of the HRC appointed Sonja Biserko (Serbia) and myself (Australia) as members of the COI. By the HRC's resolution, Marzuki Darusman (Indonesia) was ex-officio a member, by reason of his earlier appointment as UN Special Rapporteur (SR) on Human Rights in DPRK. I was appointed to chair the COI.

Having been denied access to, or any cooperation by, DPRK the COI adopted a novel and distinctive methodology: conducting public hearings; engaging the media; involving victims and civil society; carefully providing due process to DPRK, including prior notification of its conclusions and recommendations for their comment.

The COI produced its report on time, within budget and unanimously. The report was publicly released on 17 February 2014 in Geneva.¹ On 17 March 2014, it was

* Chair of the UN Human Rights Council's Commission of Inquiry on Human Rights Violations in DPRK (2013-14); Retired Justice of the High Court of Australia (1996-2009); Special Representative of the Secretary-General on Human Rights in Cambodia (1993-96). All views expressed are personal to the author and do not have United Nations authority.

¹ *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). References to the COI report below are to paragraphs in the published report.

presented to the HRC in Geneva. It there attracted a strong vote from the HRC members (30:6:9). On 17 April 2014, in response to a request, an “Arria” Briefing was afforded for interested members of the Security Council (SC). All members of the SC save China and the Russian Federation attended. So did many other UN member states and civil society organisations, as observers. The COI report was then transmitted by the HRC to the UN General Assembly (GA). A resolution, sponsored by the EU and Japan, called for action on the report and GA referral to the Security Council. A procedural resolution by Cuba to delete references to any such action by the GA, in the light of suggested new levels of cooperation from DPRK, was defeated (40:77:50). Subsequently, the Third Committee of the GA endorsed the EU—Japan resolution (111:19:55).² The plenary GA adopted the resolution (116:20:55).

In early December 2014, on the request of 3 members of the SC (Australia, France and the United States of America), the SC President convened a meeting of the SC to consider the COI report. Prior notice of a procedural motion placing issues of human rights in DPRK on the agenda of the SC was given by 10 SC members. This indicated the existence, already, of a two thirds majority, required by art. 27.2 of the UN *Charter* for decisions of the SC on a procedural matter. On 22 December 2014, the UN SC decided to place the issues of human rights in North Korea on its agenda for ongoing attention. This decision was adopted by a strong vote (11:2:2).³ On a show of hands, the only votes against the procedural resolution were those of China and the Russian Federation.

BEYOND REPORTS AND RESOLUTIONS

Working within the UN system, it is easy for professionals (mandate holders, diplomats, UN employees and academics) to fall into the trap of believing that the provision of a well-received, easy to read, apparently fair and accurate report and consequential supporting votes of the member states (adopted by large majorities) in

² *Situation 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).

³ *The situation in the Democratic People’s Republic of Korea*, UN SCOR, 7353rd mtg, UN Doc S/PV.7353, (22 December 2014).

important bodies of the United Nations constitute, in themselves, a successful outcome for the inquiry. This is not so. The COI on DPRK, at all times, insisted that success of its mandate would only be assured if the human rights of the people of North Korea actually improved in consequence of the COI inquiry and report.

The COI had no UN blue helmets at its disposal to enforce its findings and recommendations. Any thought of measures of force to achieve that end were outside the COI's mandate and never discussed or considered. The risks to human life, property and to the societies and economies of affected countries, arising out of such a response, would be enormous and unthinkable. The decisions at every level in the UN's consideration of the COI report had been impeccable. Every formal step that could have been taken, in accordance with the *Charter* of the United Nations, was taken. Whatever may have happened in other and different mandates, (including those of COIs), the consideration and follow-up of the DPRK report was outstanding. But how are the findings and recommendations in the COI report now to be translated into practical consequences for DPRK citizens? How, if the COI, the SR and the UNHCHR are not permitted access to DPRK, can it be said with any confidence that the COI report has had beneficial consequences for improving human rights in that country in the light of the dire conditions described in the COI report?

The fact that the COI report has cast a sharp light on human rights in DPRK, previously isolated from global scrutiny, may, of itself, have produced some beneficial outcomes. The threat of the possibility of prosecution of DPRK leaders and officials, at some future as yet unspecified time, may instil a measure of caution, improvement and responsiveness on their part. Following the COI's public hearings, publicity and subsequent report, DPRK, for the first time, engaged to some degree with the UN human rights system. It participated in the Universal Periodic Review (UPR) of its human rights record; it produced its own albeit unpersuasive and propagandistic human rights report;⁴ and it promised dialogue with the EU, the SR

⁴ *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.

and others on human rights matters (subsequently withdrawn).⁵ So is it possible that the process has led, or will lead in the future, to some limited improvements?

One very practical and immediate suggestion which the COI on DPRK advanced as a recommendation (COI 1225(a)) was that the UN SC should refer the situation in DPRK to the International Criminal Court (ICC), for action in accordance with the *Rome Statute* establishing that court. So far, that has not been done. Yet the SC's adoption of its procedural resolution on 22 December 2014 makes it easier, procedurally, at any time in the next 3 years (or so long as the SC resolution is continued) for any member of the SC to raise human rights concerns about DPRK and to move in that direction. Of course, such a substantive matter would have to run the gauntlet of the 'veto', provided for in art 27.3 of the *Charter*. A separate proposal of the COI was that the UNHCHR should establish a structure to build on the collection of evidence by the COI, to "ensure accountability for human rights violations in the DPRK" (para 1225(c)). A "field office" is now being established in Seoul, in the Republic of Korea (ROK), with the concurrence of ROK. Documentation of human rights violations by the field office, and others, stands as a clear warning to any who henceforth perpetrate, permit, or do not prevent, grave breaches of human rights in DPRK, particularly crimes against humanity.

Widespread publicity given to the COI report throughout the world means that the country remains under the international spotlight. This will remain so for the foreseeable future. However, the attention and commitment of the international community can sometimes be transient. They may be replaced by other urgent priorities. DPRK could again recede into the background. Initiating consideration of DPRK's actions, including at the level of the SC, is now, procedurally, much simpler than it was before December 2014. But it still requires the commitment of a marathon runner, not a sprinter.

Despite progress, the belligerent response of DPRK to the COI report and the foregoing resolutions; its continuing refusal to make the report available to the

⁵ 'North Korea says it has invited European Union human rights official to visit', *South China Morning Post*, Last updated: 31 October 2014, Available at: <http://www.scmp.com/news/asia/article/1628934/north-korea-says-it-has-invited-european-union-human-rights-official-visit>.

citizens of DPRK; the prohibition on access for the report through the internet or intranet into DPRK; the refusal of requests to invite COI members to DPRK to justify and explain their proposals, all constitute a continuing high level of national non-cooperation, non-accessibility and secrecy. These attitudes undermine and frustrate all legitimate attempts of the UN to ‘take human rights seriously’; to ‘put rights up front’; to ‘secure accountability for grave international crimes against humanity’; and to follow-up on the UN’s commitment to protect the human rights of nationals of countries such as DPRK which do not themselves provide such protection, pursuant to the Responsibility to Protect doctrine.⁶

It was not the responsibility of the COI on DPRK to solve all of the problems arising under the *Charter* and international law affecting DPRK. Its sole responsibility, in accordance with its mandate from the HRC, was to deliver a report containing reasoned factual findings concerning alleged human rights violations in DPRK, including those rising to the level of ‘crimes against humanity’. Action on the COI’s report is fundamentally the responsibility of those to whom the report is delivered: the member states of the United Nations; relevant organs of the UN (HRC, GA and SC); relevant agencies and officials (especially OHCHR); and, if a reference were made to it, the Prosecutor at the ICC and the ICC itself. The COI was neither a prosecutor nor a judicial tribunal. Its sole authority and jurisdiction was to make findings according to the standard of ‘reasonable grounds’ (COI, 68). Having done that, formally, the COI has discharged its functions.

The action in December 2014, of the partial withdrawal of the testimony of one witness before the COI (Shin Dong-hyuk) became a big factor in the 2015 campaign of the DPRK to discredit our work. However, this development was immaterial to the many conclusions of the COI report, based on testimony from many witnesses. Still the representatives of DPRK addressed a letter of complaint to UN members.⁷ Likewise, the criticism of another witness Park Yeon-mi was mentioned; but with no additional force. If DPRK were serious about defending itself against the record revealed by the many witnesses who gave evidence before the COI, whose

⁶ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Brookings Institution, Washington D.C., 2008, 175ff.

⁷ Identical letters dated 21 January 2015 from the Permanent Representative of the [DPRK] to the United Nations addressed to the Secretary-General and the President of the Security Council, A/69/739-S/2015/47.

testimony is contained in its report, it would invite the United Nations, the international media and members of the COI to visit DPRK, to undertake thorough and well-publicised inspections and to produce fully documented findings. DPRK cannot rely on its own failure to cooperate with the United Nations. Ultimately, the full truth will come out. In the meantime, the world has access to the truth as revealed by many convincing witnesses who came before the COI. The testimony of those witnesses is available online for assessment by the peoples of the United Nations, in whose name the *Charter*, and the UN commitment to universal human rights, is expressed. This was a merit of the transparent methodology adopted by the COI on DPRK. In issue is not just the opinion of the COI. It is the conclusion of the world that has access to the COI's evidence. The report of the COI is powerful because of the transparent methodology it adopted. That methodology drew on the traditions of the Anglo-American common law system. It is to the impact of that tradition in the United Nations that I now turn.

UN AND COMMON LAW TECHNIQUES

The United Nations is constituted by nearly 200 nation states. Of these, nearly 60 have the English as an official language. Those countries, with few exceptions, share the tradition, derived from England, of the judge-made common law system of legal reasoning and practice.

That system is not the one that is most common in the world. That is the civil law tradition, derived from Napoleonic France. Because in the early 19th Century Napoleon conquered most of continental Europe, the majority of European nations adopted the French system. They, in turn, exported it to their colonies. About a third of the world follows the common law and the remainder follows variations on the civil law.

It is not, therefore, surprising that the civilian traditions have greatly influenced the operations of the United Nations. Indeed, they have predominated. This feature of the organisation affects its human rights machinery, including in the Office of the High Commissioner for Human Rights (OHCHR) and the Human Rights Council (HRC).

Recently, the OHCHR produced a book describing the evolving practice of fact-finding missions established by the HRC.⁸ The principles and standards observed by the UN machinery do not vary much as between different inquiries and personnel. All of them accept that they are guided by such values as (1) First do no harm; (2) Independence; (3) Impartiality; (4) Transparency; (5) Objectivity; (6) Confidentiality; (7) Credibility; (8) Visibility; (9) Integrity; (10) Professionalism; and (11) Consistency. However, a review of the persons who have been named to serve in the fact finding missions indicates that (with a few exceptions⁹). Most of the commissions comprised of person who have been, or still are, current or past diplomats, persons with United Nations backgrounds and persons from civil society. It is comparatively rare to have more than one member drawn from current or past judicial service. A feature of the COI on DPRK was that 2 or the 3 commissioners had extensive courtroom experience (Mr Darusman, past Prosecutor-General and Attorney-General of Indonesia and myself, a long serving judge in Australia).

The common law system, shared throughout the world, is not so much now a common body of law as a familiar way of going about the task of inquiring into and resolving disputes. Conventionally, the judge of the common law is not seen as just another government official. He or she generally enjoys higher status; performs most duties in public; gives extensive and discursive reasons for decisions; and performs the duties of office in a public venue, not working at home or in secret. Practitioners of the common law are used to the discipline of due process. This applies not only to judges conducting trials but also other persons assigned to perform public hearings (whether in royal commissions or other public investigations).

Many features of the operations of the COI on DPRK bear the stamp of common law techniques. They mark off that inquiry from others conducted by United Nations mandate holders. I believe that they strengthened the performance of its inquiry by

⁸ United Nations, OHCHR, *Commissions of Inquiry and Fact-Finding Missions on International Human Rights and Humanitarian Law, Guidance and Practice* (UN, New York and Geneva, 2015).

⁹ For example, the International Commission of Inquiry on East Timor (1999) included 3 senior judges: Justice Sonia Picado Sotelo (Costa Rica); Justice A.M. Ahmadi (India); and Sir Mari Carpi (Papua New Guinea), making 3 of the 5 members drawn from the highest judiciary of their countries, two of them common law countries.

the COI on DPRK. Together, they constitute reasons why the report on DPRK is commonly described as a 'gold standard' for future such UN human rights inquiries. On the whole, the civilian procedures are delivered more cheaply and are more cost effective and sometimes more accessible. The common law procedures are especially valuable for their concentration on manifest fairness and due process, in resolving sensitive, fraught and highly contested issues.

In summary, the following are the particular characteristics of the COI on DPRK which the Commissioners adopted by agreement. Although the other two commissioners were themselves from countries of the civil law tradition, they agreed to adopt these features in the work that we undertook:

1. *Personal responsibility:* UN human rights investigations sometimes necessarily involve large teams. Working as part of a bureaucracy can be efficient and useful. However, in the common law system the judge or independent decision-maker takes personal responsibility for what is written in discharge of the functions of office. When I served as Special Representative for Human Rights in Cambodia, I insisted on writing every word of my reports. This was virtually unprecedented. In the COI on DPRK, a first draft of chapters was prepared by members of the COI Secretariat. However, every word was carefully considered by the Commissioners. Because I was a native English speaker and because the primary report was written in English, I assumed the responsibility of ensuring that the language used was uniformly comfortable and natural. However gifted a person maybe writing in a language other than a native tongue, it is useful to filter the text through a person for whom direct and accurate expression is instinctive.
2. *Public hearings:* Very few UN inquiries until the present have included public hearings. The report on the Gaza Conflict (2009) experimented with public hearings, possibly because its chair was Justice Richard Goldstone (South Africa) an experienced judge from a country familiar with the common law.¹⁰ Because the COI on DPRK could not gain access to that country, the

¹⁰ *UN Guidance and Practice*, 128.

Commissioners agreed that it was essential to undertake public hearings so that they, and the witnesses they called, could be judged for their honesty and representatively. Moreover, taking this course proved useful for settling the matter in issue and provided an opportunity for victims to have the respect and vindication of a careful public hearing. Some UN officers assisting the COI were unhappy about the public hearings. They were concerned about security issues (which was reasonable) and about the departure from ordinary practice (which was not). Once public hearings in Seoul, Tokyo, London and Washington DC got underway, all participants became enthusiastic for their value and convinced of their special work in the inquiry on DPRK.

3. *Media participation:* A further advantage of public hearings is that media can be invited to attend. At first, media were rationed so that they were assigned particular dates and times. I persuaded the officials simply to allow media to attend on the basis of access to those first turning up. The regular review in national and international media of the victim testimony raised interest. Moreover, it increased attention to the COI's work and encouraged editorials insisting upon effective responses to the great wrongs that the evidence revealed.¹¹
4. *Witness Testimony:* The COI could not visit DPRK and gather testimony on the ground. However, there is a large pool of refugees from DPRK in Republic of Korea (ROK) (South Korea). They came forward in large numbers that had ultimately to be cut off. Otherwise the COI would not have been able to complete its report on time. In the end, more than 200 witnesses were interviewed, 80 of them in public hearings. If nothing else were achieved by the COI on DPRK, according dignity to those who claimed to be victims and permitting them to recount their experiences to the highest levels of the United Nations, became a kind of vindication on their own. Witnesses were handled with respect by the COI Secretariat which judged whether (even if they wishes to do so) it was safe for them to give evidence in public. Because the public hearings were themselves filmed, their testimony shortly

¹¹ M.D. Kirby, "Human Rights and Media: The Experience of the Commission of Inquiry on North Korea" [2014] *Denning Law Journal* (page 1).

became available through the internet worldwide. The filmed record of the public hearings is still available on the internet as a permanent record of the work of the COI. It constitutes a reminder to the conscience of humanity that accountability is required for the wrongs that the evidence brought to notice.

5. *Non-leading testimony:* Because the COI did not have the luxury of counsel assisting but had to take responsibility for eliciting the evidence itself, it relied heavily on the statements, taken from witnesses, by its Secretariat. The Commissioners shared the responsibility of eliciting witness testimonies. This was done in a non-leading way, so as to permit them to recount the human rights violations of which they spoke, in their own language, at their own pace, illustrated by their own experiences. The experience of the common law is that often, this technique secures the most telling expression of complaints. Where necessary, the Commissioners would cross question the witnesses if their testimony appeared inconsistent with other evidence or exaggerated in any way. The fact that Mr Darusman and I had long professional experience in eliciting evidence in these ways, ensured that the testimony of witnesses was respected, but not unquestioned.
6. *Transcript:* In addition to the oral testimony which is available online (occasionally with steps taken to hide the identity of the witness), transcripts were prepared with the aid of funds provided by the governments of ROK and Japan. These transcripts also were posted online. They constitute an efficient source of the testimony of complaints brought to the notice of the COI by its witnesses. They constitute a permanent record and a significant source for the future history of Korea. This too is a tradition common in the continuous oral trial tradition of the common law.
7. *Illustrated reasons:* The reasons of the COI, set forth in its report, were written in the discursive style of the common law. Civilian judges and inquirers conventionally present their conclusions in an abbreviated style revealing typically only the ultimate conclusions that they reach. Decision-makers in the common law tradition are much more descriptive in their reports. Moreover, the COI copied the tradition of the common law by

incorporating short passages throughout the text, derived from the transcripts of evidence (both public and confidential). A witness can often describe an ordeal in language much more vivid than the attempt of a reporter to mediate and synthesise the evidence and impression of a witness. A part of the power of the report of the COI on DPRK is, I believe, derived from the substantial use made of witness statements. Although this is a common place in judicial decisions or inquiry reports in common law countries, it is not so common in the civil law tradition where reports appear to common lawyers' eyes to be largely conclusory. Common law tradition adds the flesh and bones to the essential reasons. Witness testimony gives depth, colour and emotion to the necessarily staid writing style of a report of an official report.

8. *Due process*: According parties under suspicion and other witnesses due process ("natural justice") is common to all legal systems; but particularly strong in the common law. The duty to give notice to a person who might be adversely affected by a conclusion or words expressed in a report is a fundamental principle observed in common law countries.¹² It was this principle that led me, in the COI, to give notice to the present Supreme Leader of North Korea (Kim Jong-un) that adverse conclusions might be drawn concerning him and other officials. This principle explains the letter that was sent to the Supreme Leader that appears in facsimile in the COI report.¹³ Some commentators expressed doubt over the propriety of a COI writing in this way to a virtual Head of State. However, the common law duty of procedural fairness and due process necessitated giving a proper warning. Accordingly, whether precedent or not, it was a course that had to be followed.
9. *Conclusions and recommendations*: The syllogistic form of the explosion of reasons in court hearings and inquiries, after the common law tradition,

¹² *R v Mahon; ex parte Air New Zealand* [1984] AC 808 (PC). The Judicial Committee of the Privy Council found that Justice Mahon, as Royal Commissioner into the Mount Erebus air disaster in Antarctica, acted in excess of his jurisdiction and in breach of the rules of Natural Justice by going on to make findings, without pre-warning, of conspiracy by ground staff to cover up errors without having put that to them. See also *National Companies and Securities Commission v News Corporation* (1984) 156 CLR 296 at 315-316, 225-326.

¹³ COI Report, annexe I "Correspondence with the Supreme Leader of the Democratic People's Republic of Korea and First Secretary of the Workers' Party of Korea, Kim Jong-un (letter 20 February 2014, page 23 of Summary).

requires the expression of the outcomes in a way that will be easily accessible to the parties, lawyers and other readers. Throughout the COI report, care was taken to record the precise *findings* that the COI made. A failure to make and record findings is a common complaint of appellate courts, addressed to the reasoning of primary decision-makers. The COI on DPRK left no one in doubt as to its reasoning and findings. The object was then to provide conclusions and recommendations that flowed logically and persuasively from the text of the report. Care was taken in the presentation of the report, the inclusion of pictorial images and the layout, to make the report user-friendly. The paragraphs of the report are numbered and cross referenced. Maps, photographs and other images (with plenty of headings and subheadings) make the COI report on DPRK a much less painful read than the reports of other like UN bodies. I consider that the personal responsibility that each Commissioner took for the text of the report played an important function in enhancing readability. Although such intrusive editing is not universal, or even common, in UN reports (many of which are extremely opaque), the very close scrutiny and repeated redrafts of chapters of the report speak highly of the sense of responsibility which the Commissioners assumed.

Every judge and lawyer who works in the common law system knows only too well its faults. It has been described as a “Rolls Royce” system.¹⁴ It tends to be expensive, slow and often inaccessible to the problems of disadvantaged individuals and groups. However, the very features that give it this reputation may sometimes make it specially suitable for the high risk, high profile determination of international conflicts having multiple issues and raising high passions and strong emotions. In particular, the high transparency of common law techniques of hearing, sifting, analysing testimony and reaching conclusions is the reason why methodology may be specially useful to the mandates of the United Nations on human rights. The report of the COI is itself online. It was delivered after due consideration, on time, within budget and unanimously. Its methodology helped to secure the high level of success as it proceeded through the HRC to the UNGA and from there to the

¹⁴ W. Zeidler, “Graduation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure” (1981) 55 *Australian Law Journal* 390. Dr Zeidler was the President of the German Constitutional Court.

Security Council. Living beyond a successful report to successful outcomes is the challenge that now faces the United Nations system. But the power of the report makes it more difficult to ignore it and that is another lesson from the experience of the common law.