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NORTH KOREA: IS IT A PIPE DREAM?

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KOREA: IS IT A PIPE DREAM?

The Hon. Michael Kirby *

A recent article by a Canberra journalist, published in *The Age* online, suggested that I was “whistling in the wind” when I proposed that the Supreme Leader of North Korea would possibly be rendered liable for crimes against humanity committed during his watch as ruler of the reclusive nation. The writer’s argument was that the young ruler was unlikely to respond to suggestions that he was at personal risk, except by battening the hatches more tightly and refusing to have anything to do with the global community. Better, he suggested, to try to accommodate him in some way, so that he would not feel threatened by the human rights guardians at the United Nations. After all, his response to being threatened (and that of his parental and grand parental predecessors in office) was to excessively build the fourth largest army on the planet. And to exit the *Nuclear Non-Proliferation Treaty*, building nuclear weapons and missile delivery systems that cause concern in neighbouring countries: South Korea, China and Japan.

Let us go back to the beginning, to see if this criticism is justified. As I view it, it imputes a much grander role to me, and the Commission of Inquiry (COI) that I have been chairing, than we deserve.

The Commission was created by the Human Rights Council of the United Nations in March 2013. It arose out of the frustrations felt by the Council and the Special Rapporteur whom the Council had appointed (Mr Marzuki Darusman, past Attorney-General of Indonesia) to look into human rights abuses in North Korea. Effectively,

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the Democratic People's Republic of Korea, as North Korea is formally called (DPRK) had refused to have any dealings either with the Council or Mr Darusman. It was the Special Rapporteur who recommended the creation of the COI, to upgrade the contacts and secure more information.

When the resolution of the Human Rights Council was adopted in March 2013, it passed without a vote: a most unusual step given that some countries always object to nation-specific inquiries on human rights, such as then proposed. In the case of North Korea, it seems, the global community was increasingly fed up with the DPRK's attitude of non-cooperation, although it had blithely signed most of the main human rights treaties. Gradually its supporters had drifted away. Soon after the COI was created, I was asked to join it, together with the Special Rapporteur and a human rights expert from Serbia, knowledgeable about crimes against humanity, Sonja Biserko.

Our job was substantial, but basically simple and limited. We were asked to conduct an inquiry and to prepare a report dealing with 9 specified matters. These ranged from abductions, political prison camps and starvation of the population to discrimination, lack of access to news and information and the conduct of public executions.

Not for us was the luxury of deciding that we would give no report lest it upset the Supreme Leader. Or that we would pull our punches, in case telling as it was would set back the cause of reconciliation and progress. Engaging in highly nuanced world of international diplomacy was not our *métier*. We were not asked to do manipulative contortions with the facts. All we were asked to do was to inquire, make findings and, if appropriate, offer conclusions and recommendations. This is what we did.

Journalists (not our Canberra friend) repeatedly state that the COI took a year to complete its investigation. It is true the resolution to create the body was passed in March 2013. But it was not until May 2013 that the members were named. Not until July 2013 did the Commission have its first meeting. The entire report had effectively to be written by the first weeks of 2014, so that it could be translated into

the five additional UN languages for presentation to the Council in March 2014. As it happens, we brought the report in on time; within budget; and unanimously. Contrary to the commentator, the report was not written in a hostile style, antagonistic to DPRK and its political or social system. I was unburdened by too much knowledge about the “hermit kingdom”. So it was possible for me and my colleagues essentially to stick to the evidentiary material placed before us. And it was plentiful.

At the outset, the government of DPRK refused to have anything to do with the Inquiry. They said that it was politically motivated by their enemies (meaning primarily the United States, South Korea and Japan). We offered to come to them; to answer questions; to listen to their concerns; and to invite them to send a representative. We sent them our draft report; we submitted it to Kim Jong-un as soon as it was ready; and we offered to come to Pyongyang to see officials and to answer questions from their citizens. All of these offers were rebuffed or ignored.

This is why we hit upon a procedure for inquiry which is common in English speaking countries; but not so common in the rest of the world or in the United Nations system. Most UN inquiries operate in the low key, private fact-gathering way common to the legal tradition that spread from Napoleonic France to most of humanity. But we did it in the more transparent, painstaking and careful way of the English tradition. Open hearing rooms. Public testimony. Non-leading questions. Hour after hour of evidence, spoken by often shattered victims, telling of the grim ordeals to which they and their families had been subjected.

Journalists asked us how we could be sure we were getting the truth. And would our sample not be biased because substantially made up of refugees who had fled North Korea? Our answer was provided by an innovation we introduced on top of the public hearings. We recorded the testimony in digital format. We uploaded it to the COI website. We took necessary steps to exclude witnesses from the public hearings who had families surviving in North Korea. We saw them in private. But that left plenty of witnesses, with evidence specific to our mandate who could tell us, in direct language, what they had been through. It built up a powerful reservoir of believable testimony. Very rarely did we feel the witness was exaggerating. And

much evidence was corroborated by other witnesses who did not know each other. Some was confirmed by objective testimony, including satellite imagery available to the COI, public speeches and assertions of the DPRK leaders and statistical data gathered by UN agencies operating inside the country.

We had no difficulty gathering witnesses. In fact we had to stop interviewing witnesses when it became clear we had covered out bases and time was running out for the essential tasks of analysis, writing the report and getting it published.

The result is, I believe, a powerful and convincing document which speaks directly to the reader. It is enlivened by countless extracts from the transcripts of witness testimony. This is not the dull prose of most UN documents, written in the passive voice. It is a potent story of great and continuing wrongs, of a type, variety, intensity and duration that have no parallels since Hitler's Nazi terrors and the Soviet gulags of Stalin.

The great power of the DPRK report is that it collects all this material in the one document. True it is, this is 400 pages long. However, there is an entire industry of writings about North Korea. Millions of words we have digested all of the available material touching on the 9 point mandate given by the Human Rights Council. We have identified, with precision, the findings: making reference to the evidence we recount. We have added conclusions based on those findings. And to our report we have appended a long list of recommendations, most of which you will not see in journalistic accounts of the Commission's inquiry.

One of the specific points the HRC asked us to address was whether any of the violations of human rights which we found rose to the level of a "crime against humanity". This is a well-defined crime under international law. It involves deliberate acts of violence targeted at particular groups in a society, as a matter of state policy, causing death and grievous harm. There was plenty of evidence of such activities. We were then asked to identify who would be accountable for such crimes. We answered that question too, truthfully. Such crimes are continuing in nature. Those who allow them to continue, when they might have prevented or stopped them, are liable under international law, even though they were not present when the crimes

originally began or occurred. So this is where Kim Jong-un comes in. In submitting our report to him, as Supreme Leader and Head of the Korean Worker's Party, we would have been less than candid if we had not made his potential personal liability clear to him. And so we did.

When our report was uploaded in the English language version on the internet on 17 February 2014, it rightly attracted much attention around the world. As I said then: this was like the discovery of the concentration camps after the Second World War. People at that time said "if only we had known". Well, now we know. No one with access to the internet can plead ignorance. The world is now aware of to the dreadful crimes against humanity happening in the here and now.

When the report was formally delivered to the HRC on 17 March 2014, it caused visible shock to the members of the Council. It was denounced by the Ambassador for DPRK. But the Council voted overwhelmingly to act upon its recommendations, including the one that proposed that the Security Council be asked to refer the case of North Korea to an international tribunal, such as the International Criminal Court. This had been done earlier in the cases of Darfur and Libya. But the case of DPRK is very much worse.

The last step in the drama of this Commission of Inquiry is the provision to the highest organ of the United Nations, the Security Council in New York, of a briefing of the conclusions of the North Korea COI. The fact that this has been called on quickly, by the initiative of France and the United States (permanent members) together with Australia, currently a non-permanent member, shows how strongly feelings are running in international circles that something must be done to terminate the ongoing death and destruction of citizens and groups and to bring about change in North Korea.

So is this still "whistling in the wind?" Is it so because China, and possibly the Russian Federation, will resist action on the report? In the Human Rights Council, China was aggrieved by criticism of its own record in sending refugees who enter China back into North Korea, although it knows of the grave punishments that often await those returned. China is a great country that has made large strides in

defending the human rights of its own citizens. It cannot be comfortable with an unstable neighbour at its doorstep, particularly one which has access to nuclear weapons and missile systems. Already, the Security Council has the issue of nuclear weapons in North Korea before it. It has imposed sanctions by votes in which all permanent members have joined. Universal human rights are not completely separated from international peace and security: the major function of the Security Council. Countries that starve their populations and commit multiple crimes against humanity are prone to cause disputes and create situations dangerous to peace and security in the world. The very fact that one of the highest office holders in North Korea, Jang Song-thaek, uncle by marriage to the Supreme Leader, was dragged away, tried and executed in the space for four days in December 2013 show the instability of the current situation.

DPRK is not a land of glorious mass games and oddball leaders. The rigid military and student choreography is symbolic of totalitarian rule. It is not a land of humorous encounters between Denis Rodman and Kim Jong-un. It is a land of gross human rights abuses that must be acknowledged, terminated and redressed. The principles of universal human rights, on which the United Nations was founded demands that this be done. But so does the safety of the region and international peace and security: the other great principle of the UN *Charter*. A moment of truth has arrived for our world. The Commission of Inquiry on North Korea has answered its mandate. This is not “whistling in the wind”. This is a demand for human dignity and justice.