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UN COMMISSION OF INQUIRY ON HUMAN RIGHTS VIOLATIONS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA –

TEN LESSONS

The Hon. Michael Kirby AC CMG

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ABSTRACT

In this article, the author, who was Chair of the UN Commission of Inquiry on Human Rights Violations in DPRK (North Korea), derives ten lessons from the Inquiry. These are: (1) The importance of appointing a strong and experienced commission and secretariat; (2) The necessity of adopting a transparent methodology; (3) The desirability of drawing on the power and vitality of oral testimony in public hearings; (4) The importance of engagement with local and international civil society organisations; (5) The utility of assistance from relevant international scholars; (6)The value of continuous engagement with national and international media; (7) The need for effective follow up to the report once delivered; (8) The inevitability of frustrations in the UN system; (9) The utility of recognising the connection between universal human rights and international peace and security; and (10) The appreciation of the significance of the inquiry as an instance of international human rights in action. A number of conclusions about the inquiry are also suggested.

1. ESTABLISHMENT OF THE COMMISSION AND SECRETARIAT

On 21 March 2013, the Human Rights Council (HRC) of the United Nations, by resolution, established a commission of inquiry (COI) on human rights in the Democratic People's Republic of Korea (DPRK) (North Korea)[1]. The resolution was adopted without dissent or call for a vote. It reflected the growing exasperation of the international community over the refusal of the government of DPRK to permit the entry of, or to engage with, officials of the UN human rights system, including the Special Rapporteur designated by the HRC to investigate and report on human

* Chair, UN Commission of Inquiry on DPRK (2013-14); Special Representative of the Secretary-General for Human Rights in Cambodia (1993-6); Justice of the High Court of Australia (1996-2009).

[1] By UNHRC Resolution 22/13.

rights in the country[2]. Although DPRK had ratified four major UN human rights treaties, it had unsuccessfully sought to withdraw from the *International Covenant on Civil and Political Rights* (ICCPR)[3]. And in 2013 it had refused to accept a single recommendation for improvement in its human rights situation, made during its first participation in its system of Universal Periodic Review (UPR). No other member state of the United Nations has had such a lamentable record of non-cooperation.

The COI members comprised the current Special Rapporteur (Mr Marzuki Darusman, Indonesia), together with Ms Sonja Biserko (a Serbian human rights expert) and myself. The latter two members were appointed by the President of the HRC in May 2013. The special Rapporteur served *ex-officio.* I was designated chair of the COI. The initial source of the additional nominations is unclear; but it is believed to have derived from suggestions from national governments and suggestions from international human rights office-holders and organisations accredited to the HRC. As with a number of human rights mandate holders, I had earlier served as a member, and on the executive, of the International Commission of Jurists, being President of that body in 1995-8. My past service as Special Representative of the UN Secretary-General occurred in Cambodia (1993-6), during the former UN Human Rights Commission, to which the HRC is the institutional successor.

In this article, I explain ten of the lessons that I learned from my service as chair of the COI on DPRK. Participation in a multi-member COI is different from service as a Special Rapporteur/Representative. The former role involves gathering, analysing and presenting factual findings, stating conclusions and offering recommendations. The participation of other members, typically from different legal, linguistic and cultural traditions, requires a capacity to act by consensus and to compromise any non-essential differences so as to avoid the potentially damaging impact of non-unanimous activities and conclusions. In the case of the COI on DPRK, there were

[2] There have been two Special Rapporteurs on North Korea: Professor Vitit Muntarbhorn (Thailand) and Mr Marzuki Darusman (Indonesia). The latter, still in office, was also a member of the COI in accordance with the mandate of the HRC.

[3] It was informed, on the basis of the advice of the UN General Counsel, that there was no authority to withdraw. It accepted that advice and continued engagement.

no serious disagreements between the commissioners and the report was expressed unanimously.

A COI of the HRC is independent of the Office of the High Commissioner for Human Rights (OHCHR). Indeed, it must be independent not only of the High Commissioner but of the HRC and of all extraneous influences. Upon appointment, the Commissioners paid a courtesy call on the then High Commissioner, Navanethem (Navi) Pillay, at her office in the Palais Wilson in Geneva. They suggested as a principle that they, and all such mandate holders, should make a formal declaration promising to act with independence and integrity in the service of the United Nations. This proposal (which had been under consideration in OHCHR for some time) was accepted. Later, the President of the HRC transmitted to the commissioners a form of declaration which they severally signed before entering upon the discharge of their mandates.

The commissioners of the COI were not acting as United Nations judges or prosecutors. Their duty was to the mandate given to the COI by the HRC. Essentially, they were engaged as expert fact finders, with a duty to report to the HRC in accordance with its resolution. In the case of the DPRK, that resolution identified nine separate subject matters of human rights upon which a report was required. It also instructed the COI to document human rights violations, victim and perpetrator accounts and to ensure accountability for such wrongs. The COI was obliged to report to the HRC by March 2014[4]. The time under report was not specified. However, by the reference to the DPRK as such, it potentially extended back to the foundation of that state, as a result of an artificial border imposed by the victorious Allies upon the Korean peninsula at the conclusion of the Second World War. That border terminated more than a thousand years of united government, including during 34 years (1911-1945) under Japanese imperial rule.

Taking advantage of my presence in Europe for other purposes, in June 2013 I arranged to call on the OHCHR. Sonia Bakar, an experienced officer of OHCHR with field experience, was designated to assist in the rapid creation of a secretariat

[4] Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (United Nations document A/HRC/25/63). Hereafter "report", pp 3-4; paras [3]-[6].

for the COI on DPRK, which, like the COI itself would be independent of OHCHR. We discussed the qualities and experience that would be desirable for the head of secretariat (Director) and staff members of the secretariat. From around the world, people with relevant experience, or interest, in North Korea contacted me offering their services and seeking engagement. Some had been senior national office holders. However, it was made clear to me, and subsequently to them, that all recruitment would follow OHCHR protocols designed to avoid favoritism and inappropriate selection. I had no effective involvement in the selection of the secretariat. This was undertaken in accordance with the internal processes of the OHCHR.

In my view, this lack of engagement with the COI is an institutional weakness in the selection of the secretariat where the views of appointed commissioners, at least on relevant qualities and background, should be sought and considered. Nevertheless, the speed, efficiency and quality of the appointees to the secretariat quickly produced a team of high talent. Mr Giuseppe Calandruccio, a national of Italy, was appointed head of the secretariat. He had earlier served as deputy head of a COI on the Occupied Territories, chaired by Justice Richard Goldstone (South Africa)[5]. The head of that COI secretariat had been Ms Francesca Marotta (Italy), with whom I had worked closely in Cambodia. Mr Calandruccio was to prove a talented and effective director of the operations of the secretariat of the COI on DPRK.

Eventually, nine officers were recruited to serve the COI. They comprised three men and six women. One (Ms Siobhan Hobbs, Australia) was deployed to the COI by the UN agency, United Nations Women. She took a leading part in one of the substantive investigations of the COI and doubled with special responsibilities for gender issues and advice on that topic for all aspects of the mandate. The secretariat also had the services of two interns who worked on updating relevant regional media and other material. One officer, with much experience in OHCHR, performed administrative (travel and other arrangement) duties. This required knowledge of the sometimes slow-moving arrangements of OHCHR on this score.

[5] The United Nations, Commission of Inquiry on the Occupied Palestinian Territory and Southern Israel, *Report,* (2009) (Richard Goldstone, Chair). See M. Rishmawi, "The Role of Human Rights Fact Finding in the Prevention of Genocide", unpublished paper for international conference on prevention of genocide, 31 March 2014, 2.

The secretariat was a harmonious team. It worked well together, without apparent or reported friction.

The Commissioner's decision to gather testimony by public hearings imposed novel burdens both on the Commissioners and secretariat. However, the COI, with the support of the secretariat, brought its report to completion on time. Effectively, although the first substantive meeting of the COI was held at the beginning of July 2013, the report was written and finalised by the end of January 2014. It was published online on 17 February 2014. It was formally presented to the HRC in Geneva on 17 March 2014 and to members of the Security Council (SC) in New York on 17 April 2014. It was produced within the budget initially designed by Ms Bakar. Much credit must go to Mr Calandruccio and the secretariat for the efficient discharge of their duties. Whenever one hears of complaints about the inefficiencies of the United Nations (and there are some) it is necessary to remember the talented and efficient officer-holders who work under great pressure to discharge duties of high emotion, urgency and importance, and some danger, to uphold the United Nations principles of universal human rights.

Occasionally, younger, enthusiastic staff members of the COI needed to be reminded that the responsibility for the content and language of the report belonged to the Commissioners and that it was their duty to discharge that responsibility and to be satisfied with every word to which they attaching their name. I insisted upon this principle. I believe that it ensured that the resulting report was readable, comfortable in its English language expression, comprehensive and convincing.

The first drafts of the several chapters of the COI report were prepared by the Secretariat according to an outline and timetable set out by the Commissioners at their regular meetings. There was comparatively little drift in adherence to the timetable. The Commissioners turned the drafts around quickly and efficiently. For example, I made countless, and sometimes significant, textual and verbal changes to the drafts. Whilst there was some give and take, I insisted that the text should accurately reflect the participation of the Commissioners and that they should have the last word on any points of difference. This is the correct delineation of functions between a COI and its secretariat. Understanding that division of responsibilities is

integral to the success of a COI. To his credit, Mr Calandruccio understood this principle well. He ensured that it was carried into effect. The first requirement of a competent COI is the appointment of talented commissioners, prepared to work extremely hard and under time, funding and other pressures. The second requirement is the recruitment of an outstanding and dedicated secretariat, with a strong sense of its own independence and integrity. These vital features were present in the COI on DPRK.

2. A TRANSPARENT METHODOLOGY

At the first face to face meeting of the Commissioners in Geneva in early July 2013, a full day was devoted to the determination of the methodology that would be followed by the COI. The methods of work are explained in the report[6]. Even by the time the Commissioners first met, it was plain that DPRK would not cooperate with the COI. Its permanent mission in Geneva had rebuffed the demand, stated in the HRC's resolution, that DPRK should cooperate fully with the Commission's investigation and permit the COI members to have unrestricted access to visit the country and provide them with all necessary information[7]. To the contrary, the DPRK informed the HRC President that it would "totally reject and disregard" the COI, which it viewed as politically hostile and a creation of its enemies, notably the United States of America, the Republic of Korea (South Korea) (ROK) and Japan.

Faced with this attitude, the COI on DPRK immediately embarked upon a novel, transparent and innovative methodology. My own experience of 34 years as a judge in the common law tradition that is followed in Australia, attracted me to the methodology of public hearings to gather evidence. This has not been the normal methodology followed by previous UN COIs. Most have followed the more informal techniques of information gathering observed in countries of the civil law tradition. One exception to this approach had been the COI on the Occupied Territories, chaired by a former judge of common law background (Justice Richard Goldstone of South Africa). As Mr Calandruccio had served on the secretariat of that COI, he was

[6] Report, pp 4-5 [12]-[20].
[7] Report, 4 [9].

aware of the technique. It had not been entirely successful in the case of Judge Goldstone's investigation. In part, this was because of non-cooperation by one relevant state, namely Israel. Secretariat members in the DPRK COI (most of whom came from civilian legal backgrounds) expressed some reasonable hesitations and concerns about the proposed methodology. There was anxiety about the effective protection of the identity and safety of witnesses; about maintaining security for the COI itself and its personnel, as well as for witnesses and deponents; about preventing possible disruption of hearings and meetings; about procuring, assembling and delivering witnesses according to the comprehensive hearing timetable; about obtaining suitable facilities outside national government premises (which were considered inappropriate); and about the cost implications thought likely to arise.

The Commissioners considered all of these possible obstacles to the conduct of public hearings. However, from the start, they determined that the COI's process must be transparent in order to counteract the inevitable attacks and criticisms that would follow concerning the truthfulness and representativity of the witnesses giving testimony to the COI. From the outset, the Commissioners therefore resolved that the collection of testimony at public hearings would be the centrepiece of their inquiry. They considered that this would play a function in raising public consciousness of the suffering of the victims; establish the duration, nature, variety and intensity of their burdens; and that it would help engage the national and international media during the conduct of the inquiry. All of these intuitive judgments of the COI proved to be correct.

At the onset, the COI distributed public calls for evidence. In the available time, its secretariat interviewed more than 240 witnesses. Because of the mandate instruction to ensure that no harm came to witnesses, and because most were refugees who had fled DPRK and had family living there, the majority were not permitted (even if willing) to give public testimony. Their evidence was then received in private, confidentially. However, other witnesses (some 84) gave evidence in public. In a few cases physical disguises were adopted. In others, great care was taken to avoid, by public questioning, inessential identification of places and of people who might be harmed. The DPRK news bureau described the witnesses as

"human scum". Although one or two witnesses may have occasionally added a gloss to their testimony, overwhelmingly they were judged by the COI to be truthful and convincing witnesses. When they were attacked by DPRK, the COI was able to invite everyone with access to the internet (which excluded most citizens in DPRK where such access is prohibited) to view the testimony online and to reach their own conclusions.

The COI also had constant contact with the DPRK missions in Geneva and New York. Repeatedly, the COI invited participation in the hearings; commentary and correction of the draft report when completed; and an opportunity, when the report was produced, to travel to DPRK to brief officials and citizens on its content; and to answer questions. Eventually, the final report was supplied to the Supreme Leader of DPRK (Kim Jong-un), repeating the foregoing offers and concluding with a warning about his own possible future personal responsibility under international criminal law[8]. Such letters were ignored or, where answered, replied to with a reminder of the DPRK's determination of non-engagement.

Specifically, the COI invited DPRK to send a representative to the public hearings. It offered to permit that representative to make submissions and to call testimony on its behalf. It indicated that such a representative could, with leave, question witnesses. Arrangements were made with ROK to accord any such representative(s), nominated by DPRK, diplomatic immunity. No such representation was arranged by DPRK. It is unknown whether, amongst the members of the public attending the hearings of the COI, DPRK arranged for participation or representation anonymously. Because the elite in DPRK has access to the internet, it must be assumed that they, and government agents in and outside North Korea, would have had full access to the entirety of the public hearings held by the COI.

The public hearings of the COI took place in Seoul, ROK (August 2013); Tokyo, Japan (August 2013); London, UK (October 2013) and Washington DC (October 2013). The grouping of public hearings was arranged partly to save costs. Officers of the secretariat visited the venues in advance of the COI Commissioners so as to

[8] Report, annex I, Correspondence with the Supreme Leader of DPRK and First Secretary of Workers' Party of Korea, Kim Jong-un, 20 January 2014, ibid, 22-25.

interview and arrange witnesses, for the hearings. All testimony (for public and confidential consideration) was made available to the Commissioners. The responsibility of eliciting the evidence in public fell on the Commissioners, primarily by questions addressed from the chair. Witnesses were taken through statements provided by the secretariat, using non-leading questions so as permit the witnesses to give their evidence in their own way. Subsequently, the report of the COI contained on most pages references to testimony and small extracts from the transcript of actual evidence. These extracts are generally expressed in much more direct and vivid language than expert chroniclers usually produce. They gave voice to the actual lived experiences of victims. I believe that this technique brings the report of the COI on DPRK to life. It makes it a much more readable document than most UN reports.[9]

The report also demonstrates two features as a result of this procedure of uploading digital images of witnesses and transcripts (in the English, Korean and Japanese languages respectively) on the COI website. First, as demonstrated by Holocaust studies, gathered after 1945, victims often feel guilty about surviving when so many friends and family have perished. Whilst they are naturally upset and angry, once they begin recounting their stories, they normally follow their own chronological course. Normally, they are remarkable for their clarity and understatement.

Secondly, the horrors recounted do not require exaggeration in order to have an impact. The low key way in which the testimony was ordinarily given by the witnesses before the COI was generally a feature that made it more impressive. Anyone in doubt should watch the online hearings and judge both the testimony and the methodology for themselves. That methodology proves that, in today's world, no country can entirely exclude itself from investigation by the human rights organs of the world community. If the door is slammed by violators, investigation can take place outside the territory in question, drawing upon refugees who are pre-vetted to ensure that they are genuine, reliable and not unduly biased as a result of any ordeal they may have suffered. Substantially, the selection of witnesses was undertaken by the COI's secretariat. Their written notes were careful and thorough. They drew

[9] Cf Jacob Presser, *Ashes in the Wind: The Destruction of Dutch Jewry.*

attention to lines of inquiry that, they suggested, should not be pursued, lest it identify places and people causing danger or harm to the witnesses or their families.

3. THE POWER & VITALITY OF WITNESSES IN PUBLIC HEARINGS

In earlier and entirely different engagements with the United Nations, I learned an important lesson from a great international civil servant engaged in the system, Dr Jonathan Mann (World Health Organisation, Global Program on AIDS). At the outset of the AIDS epidemic in the mid 1980s, he insisted that it was essential to listen to the voices of people living with HIV and others who were vulnerable to infection. They should always be given a platform and be engaged. They should not be spoken *at* or *of;* but *with*. This approach informed the approach of the COI to its witnesses. In some cases the COI relied on written statements. In other cases, involving confidential testimony, witnesses were seen and heard in private sessions. A proportion of witnesses were seen and heard in public hearings. Their testimony was recorded digitally; is online; and is supported by written transcripts, also published online. Documents and records referred to in testimony were admitted as exhibits.

Many journalists, and some national representatives in the HRC, questioned whether witnesses could be reliable given that a majority (experts apart) were refugees who had already taken a decision to leave DPRK. They questioned whether (because enhanced barriers at the borders between DPRK and China have reduced the flow of asylum seekers into China since 2012) the testimony of the witnesses was out of date and therefore unhelpful. However, the COI had no difficulty in securing witnesses. In ROK there are already more than 26,000 refugees from DPRK. Significant numbers are also present in other countries. Many came forward and offered assistance. In the end, the COI had to terminate the flow of witnesses so as to concentrate on selecting, and analysing, a representative sample who could speak to the nine point mandate given by the HRC.

As to reliability, the assessment involves, in part, a judgment based on impressions of credibility and non-exaggeration. And, in part, on corroboration by other witnesses unknown to the person giving testimony, including effective corroboration by satellite images and documentation available, both from DPRK itself and from UN and other agencies operating in DPRK (such as World Food Program (WFP)). Statements about the persecution of the religious minorities are, to some extent, confirmed by published official data on religious adherents, deriving from DPRK records. Statements about the pernicious *Songbun* system of social caste, are confirmed by speeches by DPRK officials, including successive Supreme Leaders. Remarkably, those leaders appear to be proud, and not ashamed, of labelling people at their birth with a social caste (classified as 'core', 'wavering' and 'hostile' classes), upon the basis of which opportunities to education, housing, employment, political advancement and food accessibility are decided.

The COI accepted for itself a rigorous standard of proof, common to United Nations COIs of reported human rights violations[10]. It accepted the "reasonable grounds for belief" standard. It judged available testimony against the legal obligations binding on the DPRK as a State Party to the United Nations *Charter* and to international human rights treaties and as a State subject to customary international law[11].

Where there was any doubt or uncertainty as to any finding or conclusion (as in the suggested deployment in and by DPRK of chemical weapons) the COI refrained from expressing a final conclusion, leaving several matters of that kind for the future. Similarly, where international law was in a possible state of evolution (as in the possible availability of the international crime of *genocide* in cases of annihilation of a section of the population on grounds of political belief[12]) the COI held back from expressing a conclusion on the possible infringement of such a law. However, it did indicate its inclination in that respect. There was already so much material (and findings on so many human rights violations and crimes against humanity) that this principle of prudent restraint appeared to be appropriate. The tone of the writing of

[10] Report of Detailed Findings of the COI (hereafter "Detailed Findings") part E, 15-18 [63]-[78].
[11] Detailed Findings 15 [63]-[64].
[12] See "A Case of Political Genocide?" in Detailed Findings, 351 [1155]-[1159].

the report of the COI is restrained. Substantially, it is left to the voices of the victims to express, in vivid language, the ordeals and violations they have experienced.

In accordance with its mandate, the COI was extremely careful to attend to its duties to undertake proper record keeping; protection of the confidentiality and identity of victims; and the safe archiving of its materials[13]. On the recommendations of the COI, the High Commissioner for Human Rights was urged to continue the collection of evidence and to establish a secure archive for the safe-keeping of all information gathered by, or for, the COI[14].

The relatively small secretariat of the COI on DPRK ensured that the members were aware of the cross-cutting issues and the interrelationship of particular themes (such as gender discrimination) involved in the study of particular mandate items.

In the end, there were no significant breaches of confidentiality and security affecting witnesses, either in the public hearings of the COI or otherwise. Special assistance was provided by United Nations Security for the conduct of the public hearings and in the COI's movements between venues. Only on two occasions during the public hearings was anything said, or revealed, which was of potential embarrassment. A firm instruction from the chair had the effect of curtailing media reportage of that item and the transcript and record were redacted to delete the identifiers. There was no disruption of public hearings or any instance of undue danger nor concern on the part of witnesses.

One witness who later saw the report of the COI, suggested that the editing of the report of that person's testimony had potentially given an incorrect impression of what was said. Although it was not possible later to edit, or amend, the published report of the COI to meet this concern, a letter was given to the witness by the COI affirming the full detail of what had been said, as appearing in the official transcript. The existence of the transcript, and its broad availability, provided a proper

[13] Report, 6 [23].
[14] *Report* 20 [93(d)]; Detailed Findings, 371 [1225(d)]. After the report of the COI was delivered, an agreement was announced in May 2014, between OHCHR and the Government of ROK, for the establishment in ROK, as recommended by the COI, of a field office, *inter alia* to continue the collection and recording of testimony by victims of human rights abuse in DPRK.

protection for the witness. No doubt future public hearings, in other COIs and contexts, will present new and different challenges. However, the COI on DPRK, by conducting public hearings, afforded victims an opportunity to recount experiences important to them; to tell of their suffering; to be given a respectful hearing and opportunity to be taken seriously and treated with dignity; and to have their testimony (or such of it as was safe to disclose) presented in public and utilised in the discharge of a United Nations Inquiry and report. Hopefully, such testimony will be available at some time in the future to ensure accountability on the part of persons accused of grave abuses of human rights and used appropriately in selected prosecutions.

4. *CIVIL SOCIETY ENGAGEMENT*

Because of its small secretariat and limited budget, the COI on DPRK had to secure a measure of assistance and support from outsiders. These included relevant governments. There were numerous meetings throughout the COI process with representatives of the governments of interested countries. Although DPRK itself refused repeated requests to engage with it, the COI called on (and reported progress to) the governments of Australia, China, France, Indonesia, Japan, the Republic of Korea, Lao DPR, the Russian Federation, Thailand, the United Kingdom and the United States of America.

The missions of the foregoing countries were uniformly courteous and some made helpful suggestions, several of which were followed. For example, one country urged the COI, where justified, to give credit to DPRK for any advances that were found in its protection of human rights. This was done, for example, in relation to the suggestion that DPRK had discriminated against citizens on the basis of disability. Information was secured by the COI that indicated that DPRK had signed (but not yet ratified) the *United Nations Convention on Persons with Disabilities*; and had possibly changed its previous practice of removing disabled people from Pyongyang because of the poor impression they were felt to occasion. The advent and availability of cell phones and the widening of inter-citizen contacts as a result was also acknowledged. But, in truth, the instances of improvement were few, or none at

all, in relation to the mandate headings of reported cases of torture and inhuman treatment; arbitrary arrest and detention; discrimination; freedom of expression; freedom of movement; enforced disappearances and abductions. Whilst the number of abductions of foreign nationals by DPRK has diminished in recent years, instances of abductions of DPRK nationals from China are still reported.

Because of the fierce propaganda contest that exists in and near the Korean peninsula, care had to be taken in the use of media reports and in accepting the official positions of affected governments. For instance, widespread reports, that following his execution in December 2013, that the uncle of the Supreme Leader, Jang Sung-thaek had been fed to wild dogs, was eventually traced to a Chinese social media source. It was a fictitious rumour. So was a report that the former girlfriend of the Supreme Leader Kim Jong-un had been executed by firing squad in connection with indecent behaviour. In May 2014 she appeared in a television program praising the Supreme Leader. The COI kept an appropriate distance from the governments of concerned countries, and all of them. It was appropriately sceptical of Korean and other news reports.

In ROK, Japan, the UK and US, the Commission made contact with national bodies concerned with particular aspects of the mandate and representatives of victims and their families. These bodies played a useful role in stimulating attention to the condition of human rights in DPRK when (as is often the case), the record tends to lapse for want of up to date information.

International human rights bodies proved invaluable in providing testimony; affording contact with victims; making submissions to the COI; supporting side events at the HRC, GA and SC; and participating in, and stimulating, the drafting of United Nations resolutions and procuring follow up to the COI report. Human Rights Watch (HRW) played an important role in ceaselessly advocating the creation of the COI. Its proposal attracted the support of Mr Darusman, as Special Rapporteur. HRW has long been engaged in DPRK issues. Similarly, Amnesty International facilitated contact with expert and other witnesses, particularly in London and Washington DC. It provided the COI with satellite imagery that was important to contradict the assertion of DPRK that there were no political prison camps in North Korea.

Amnesty International, which had conducted visits to DPRK, was extremely helpful in supporting the COI. So were the International Commission of Jurists and the International Service for Human Rights, regular NGO players in the activities of the HRC in Geneva.

At all stages, the COI insisted upon its independence from governments and also from NGOs. However, this did not prevent proper access to Korean and other national institutions and civil society organisations and the receipt of expert and useful testimony, reports, literature and other information. The COI also made contact during its investigations, including following delivery of its report, with international think tanks with generalist interest groups, such as the Robert Kennedy Foundation in Washington DC. After the report was delivered, the COI made contact with The Graduate Institute Geneva, the Geneva Academy of International and Humanitarian Law, the Asser Institute in the Netherlands and The Hague Academy for Global Justice, as well as the Gresham College in London. Engagement was likewise made with the Holocaust Museum and Brookings Institution (Washington DC) and with the Council on Foreign Relations (New York), coinciding with the COI briefing to members of the Security Council. Following the delivery of the COI report contact has been established with international bodies of lawyers, such as LAWASIA and the International Bar Association (IBA); universities and concerned NGOs in ROK and the Asia Society and United Nations Association in the United States of America. Whilst always remembering the principle of independence, and that a COI of the United Nations is not a lobbyist or civil society body, there is no doubt that such organisations play a useful supportive role in the discharge of the functions of a COI. So it proved in the case of the COI on DPRK.

5. *ACCESS TO INTERNATIONAL SCHOLARS*

Members of the secretariat of the COI were, to a greater or lesser extent, experienced in international law and practice. One member of the secretariat was designated legal adviser to the COI. He had post graduate training and experience

in Europe and the United States of America in several relevant areas of international law. Each of the commissioners themselves had earlier experience in international law and awareness of developments of relevance to the DPRK inquiry. Notwithstanding this, it was desirable to supplement that experience with access to recognised scholars in international law and practitioners with relevant expertise or actual experience before national and international criminal courts and tribunals.

A number of interesting and important issues of international law arose in the course of the COI upon which it was useful to secure both practical and scholarly supplementation of knowledge available within the COI itself. For example, in Washington D.C., a number of witnesses described their relevant expertise. In Seoul and in Washington, in particular, experts with special knowledge gave oral testimony on aspects of the mandate. In Washington, these included testimony concerning political prison camps (David Hawk); testimony concerning food security and famine (Andrew Natsios, Marcus Noland); military intelligence (Joseph Bermudez); and gender discrimination (Roberta Cohen); as well as issues of UN institutional consistency over DPRK (Jared Genser). Also in Washington D.C., the COI met informally with a number of international scholars with special expertise in relation to DPRK. An enormous literature has developed, especially in recent years, concerning DPRK. There are notable, well respected scholars whose writings assisted the COI, including Professor Andrei Lankov[15] (ROK and Australia), Professor Leonid Petrov (Australia) and Professor Victor Cha (US)[16]. New books continue to be published concerning aspects of human rights violations in DPRK[17]. An important part of the work of the Commissioners and secretariat involved absorbing this large body of information and opinion, whilst continuing to move forward with the preparation of the report in what was effectively little more than half a year of real time.

Particular mention should be made of the private meetings that were held in London when Commissioners met Professor William Schabas (University of Leiden), a noted

[15] See eg Andrei Lankov, *The Real North Korea: Life and Politics in the Failed Stalinist Utopia*, Oxford Uni Press, Oxford, 2013. The Detailed Findings 179[592]-[593].
[16] Victor Cha, *The Impossible State: North Korea – Past and Future*, 2012, Harper Collins.
[17] See eg Danielle Chubb, *Contentious Activism & Inter-Korean Relations,* Columbia Uni Press, New York, 2014.

expert on crimes against humanity and genocide, and Sir Geoffrey Nice QC, a leading London barrister who participated as counsel in the *Milosevic* trial before the International Criminal Tribunal for the former Yugoslavia. Discussions with them assisted in understanding developments in international criminal law and practice, as relevant to the conclusions of the COI.

One matter upon which dialogue with the jurists was specially helpful concerned the ambit of the international crime of "genocide". This matter was explained by the COI[18]. In some international quarters there has been a tendency to view "genocide" as the gold standard international crime; and to discount accordingly other offences such is "crimes against humanity". However, a point made by Professor Schabas is that this is not a correct attitude and that each such international crime is one of the greatest gravity[19]. Accordingly, there should be no undue feeling that genocide needs to be expanded.

As pointed out by the COI, 'genocide' in international law has been defined, to date, as including various grave and violent acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such"[20]. The COI received submissions urging a finding of genocide against DPRK. Certainly, because of strong testimony that indicated violent acts in political prison camps and conduct that resulted, deliberately or recklessly, in many deaths from starvation, affecting at least hundreds of thousands of DPRK citizens, a conclusion that a type of genocide had occurred appeared open. The difficulty was the emphasis which the crime of genocide had hitherto taken from "national, ethnical, racial or religious" motivations of violators and the doubts that existed that such specific motivations existed in the case of DPRK.

The extension of the crime of genocide to include extermination on religious grounds, was doubtless originally affected by the classification of the extermination of Jews in Europe in the 1930s-40s as 'genocide'. In the case of these victims the motives were commonly both ethnic and religious. However, religion is not an inbuilt

[18] Detailed Findings, part H. See 350-351 [115].
[19] William Schabas, *Unspeakable Atrocities*, 106, cited Detailed Findings, 350[1157], fn 1639.
[20] Detailed Findings, 350 [1155] citing *Convention on the Prevention and Punishment of the Crime of Genocide*, Part 2; *Rome Statute* establishing the International Criminal Court, art. 6.

personal characteristic of human beings as racial and like characteristics are. It is a set of convictions, spiritual beliefs and philosophical/moral commitments that are acquired after birth – mostly in childhood or sometimes later in life. In this respect, the *religious* ground for the crime of genocide appears analogous in some ways to a suggested *political* ground, which would certainly have been applicable in the case of possible exterminations by DPRK. Although there was some evidence before the COI of possible extermination of civilians on religious grounds, said for example to be evidenced by the huge drop in the number of Christian adherents in North Korea identified on the DPRK's own statistics, the evidence of this respect was ambiguous. It was an insufficient foundation for a finding of genocide[21]. It was possible that the large decline in the Christian community in DPRK was a result of official discouragement and propaganda against what Marx called the "opiate of the people", rather than extermination. The COI could not be sure. So we held back on a finding.

Still, was there a possibly available classification of "genocide" based on extermination on *political* grounds? Professor Schabas has pointed out that, in the drafting of the *Rome Statute,* to create the International Criminal Court, the delegate of Cuba had proposed an expansion to the definition of "genocide" to include political and social groups (the same words used in in the concept of "refugees" under the *International Refugees Convention* and Protocol). However, this proposal found insufficient support from other delegations. It was not included in the *Rome Statute*.

The COI members expressed themselves sympathetic to a reconfiguration of the controlling definition of "genocide" in international customary law, so that it would include *political* grounds by analogy with *religious* grounds. However, the COI did not feel obliged, or justified, to make conclusive findings on that basis, being convinced that there was ample proof of many "crimes against humanity". Resolution of the issue of law involved in the disputable definition of "genocide" was therefore unnecessary to reach a conclusion for the COI's report[22]. And to demand international action in response.

[21] Detailed Findings, 351 [1159].
[22] Detailed Findings, 351 [1158].

As the COI emphasised, crimes against humanity, in themselves, are so grave as to initiate the responsibility of the state concerned (and in default the international community) to protect the actual and potential victims and to hold the perpetrators accountable under international law. However, what is distinctive about "genocide" is that the *Genocide Convention*, recognised as a source of customary international law, imposes an obligation on all states to *prevent* the relevant acts and defaults. It thus goes beyond the obligation to *protect.* Arguably, it involves even more clearly the duty of collective action for which the Security Council derives special responsibilities under Ch. VII of the United Nations *Charter*. The exact ambit of "genocide" in international law is a matter that will doubtless continue to evolve. In taking the position that it did on the definition of "genocide", the COI on DPRK demonstrated a preference for prudence and restraint. This was in harmony with its methodology of understatement and of permitting the victims to speak for themselves to the readers of the COI's report[23].

In the follow up to the COI report, the international law institutes, academies and centres of learning will have a particular responsibility to ensure that the findings and controversies identified in the report of the COI on DPRK remain before the scholarly and civil communities. The murder of large groups of the Khmer population by the Khmer Rouge in Cambodia in the 1970s and 1980s was, as in DPRK, usually based on perceived political hostility to the regime rather than for reasons of national, ethnical, racial or religious grounds. Yet those crimes, happening in so recently, are commonly described as an instance of "genocide". It seems unlikely that the COI in its report on DPRK will have pronounced the last word on this question.

[23] See Herman von Hebel and Darryl Robinson, "Crimes Within the Jurisdiction of the Court" in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999). The COI's approach is prudent because of the division of the international community on the issue, demonstrated in the negotiations of the *Genocide Convention* and the addition of the category of "Ethnical Group" as a means to 'extend protection to doubtful cases'. See United Nations, Sixth Committee Hearing (UNDOC A/C, 6/SR.75; 15 October 1948) where the committee divided on that issue18 in favour, 17 against, 11 abstentions. "Political groups" were included in the text of the draft convention until very late in its gestation but eventually withdrawn by consensus. Abtahia Webb, *The Genocide Convention: The Travaux Préparatories*, 1412. In the creation of new crimes (including new international crimes) an approach of restraint is justifiable for such developments have a consequence analogous to the imposition of retrospective criminal liability, which international human rights law resists.

6. ENGAGEMENT WITH NATIONAL & INTERNATIONAL MEDIA

During my service as UN Special Representative (SR) for Human Rights in Cambodia, it was my invariable practice to engage with the media and to participate in a media conference, held at the conclusion of each mission to the country. The practice was observed of drawing to notice the favourable developments since the previous mission and those developments that caused concern, from the viewpoint of international human rights law. A media conference in Phnom Penh was addressed mainly to the English and French language media of the country and beyond. There was only sporadic attention by the indigenous Khmer media. These were the days immediately following the United Nations Transitional Authority for Cambodia (UNTAC) period when there were high hopes of progress in the observance of human rights in Cambodia (1991-1993). However, antagonism by the government to media engagement (especially from the then second Prime Minister of Cambodia, Hun Sen) repeatedly caused a severance of communications with the UN Office of Human Rights and the SR. This is a phenomenon that has continued to the present time. Autocratic governments rarely favour free speech and free expression. This is certainly true of DPRK, as is disclosed in detail in the COI's report[24].

I have elsewhere described in greater detail the attempts of the COI on DPRK to reach out to national and international media; to facilitate their understanding of the mandate and work of the COI; and to engage them in raising expectations of follow up action[25]. It suffices to point out that, stimulated by the procedure of public hearings that it adopted, the COI took special pains to act transparently and to engage with the media. It invited television cameras, media and other means of communication to attend and record the proceedings (subject to any requirements in particular cases to protect witnesses). The COI Commissioners participated in many television, radio and other interviews. They described and explained their methodology and outcomes. They repeatedly insisted that their views were evolving. They took part in civil society meetings. They contributed to online blogs written by

[24] Report, 26 [7]; see also Detailed Findings, 45-64 [163]-[266].
[25] M.D. Kirby, "The Commission of Inquiry on DPRK: Public Hearings and Media Engagement", unpublished paper, 2014.

others. They participated in podcasts[26]. They authorised the issue of media releases with quotes attributed to them. They participated in media conferences in each of the venues of the public hearings. They also undertook media conferences following oral updates in 2013 before the Third Committee of the United Nations General Assembly in New York and the HRC in Geneva. They were involved in a media "stake-out" following the "Arria Procedure" when members of the Security Council were briefed in New York on the COI's report on 17 April 2014.

For the engagement with the media in ROK and Japan, the COI had the advantage of the short time secondment of an experienced media adviser who had previously worked in OHCHR (Mr Ronald Redmond). When this arrangement expired and could not be renewed for want of funds, the COI turned to the principal media officers of the OHCHR, (Rupert Colville, Rolando Gomez and Elizabeth Throsell). Their expertise and skill were invaluable. Because the effective pursuit of human rights usually involves the raising of awareness and stimulating pressure for action and change, that such awareness today calls forth in the international community, this aspect of the COI's communications strategy should not be overlooked. Indeed, the strategy adopted needs to be expanded into the use of social networks and of the many informal publications that now bring directly to huge audiences knowledge about important developments in human rights. The COI on DPRK was itself still substantially engaged with the traditional outlets of international media. Nevertheless, the coverage of the successive events surrounding the work and report of the COI in other outlets was very useful in raising awareness and supporting the expectations of effective follow up. As the COI said to the HRC at the time of presentation of the COI report concerning the risk of inaction by way of follow up:

> "Now, we cannot say we do not know about DPRK. Now we all know and there is no excuse."

A chief merit of the report of the COI on DPRK was that it digested a huge amount of information from multiple and diverse sources, traceable to reliable and unbiased

[26] See eg the Podcast broadcast globally by the International Bar Association on 21 March 2014 in which the author participated.

reporters, in a document of fewer than 400 pages in total. In March 2014 in answer to the demand by the DPRK ambassador in Geneva that the international community should "mind its own business", the COI told the SC members in New York:[27]

> "[These] crimes are indeed the world's 'business' and the world is watching. Respectfully, if this is not a case for action by the Security Council, it is hard to image one that ever would be."

7. FOLLOW UP TO THE COI REPORT

The COI on DPRK paid much attention to the content and expression of its report. These were the responsibility of the Commissioners. In my time as SR in Cambodia, I actually drafted every report, virtually in its entirety, although I was informed that this was not normal practice, which was to leave the primary drafting to the secretariat. In the case of the COI on DPRK, the first drafts were prepared by the secretariat but subjected to close and detailed amendments, both on matters of content and of expression in the English language (primary) text. A danger for United Nations bodies is a tendency to feel that the production of a report is the objective and conclusion of the exercise. This was never the approach of the COI on DPRK. Commissioner Darusman, in particular, repeatedly insisted upon practical outcomes. He demanded the closure of political camps and the release of all political prisoners as a sign of good faith by DPRK. No such sign was ever forthcoming.

The Commissioners participated in many "side events" connected with the provision of the report to the HRC, the GA and the SC. That action included, on the same day as the report to the HRC, an extremely well attended function organised by civil society, sponsored by HRW, which was addressed by the Deputy High Commissioner for Human Rights, the Commissioners and Korean and Japanese victims of human rights abuses. This event was concluded by a piano performance in the Palais des Nations by a highly talented former North Korea pianist who was

[27] Address by the Chair of the COI on DPRK to the members of the Security Council, unpublished, 17 April 2014, New York.

punished (and eventually fled) for playing “decadent” American jazz themes as well as classical music. As he did before the assembled participants at the United Nations.

In addition to the digital presentation of the COI’s public hearings online, subsequently utilised in many television documentaries, online and news programs, a special brief documentary film was prepared by the COI, with the help of international funding, to capture some of the key moments in the testimony of witnesses in the public hearings, speaking of their ordeal. These included the testimony of Shin Dong-hyuk, the only person known to have escaped political prison camp number 14 into which he was born as the child of adult prisoners confined there. Other potent testimony was given by a witness who saw a baby of a refugee, required to be drowned in a bucket, because of objections to the Chinese ethnicity of its father. This was regarded as contaminating “pure” Korean blood. Another was given by a witness from a family of persons abducted under the DPRK’s state policy of abduction of ROK, Japanese and other nationals deemed useful to the DPRK regime.

The Arria arrangement in the Security Council on 17 April 2014 was initiated by France and joined in by the United States of America and Australia (as co-sponsors). It provided the facility of a briefing to members of the Security Council (and a concurrent briefing on the preceding day to members of the General Assembly). This procedure indicates both the increasing concern of the international community about gross violations of human rights in North Korea and the need for a response to the high media coverage of the COI report. Each of the Commissioners assumed substantial post-report obligations to follow up, and communicate, the findings in the report.

Mr Marzuki Darusman remains the Special Rapporteur on DPRK. He has continuing duties to endeavour to secure implementation of the COI recommendations in which he participated fully. In June 2014, he provided a further report to the HRC on the situation in DPRK. Commissioner Biserko and I have numerous conferences in our own countries and abroad, to attend at which the COI report is explained and elaborated. In my own case, these include visits to ROK the United States of

America, Japan and Hong Kong to explain the COI's findings and proposals. In Japan, the International Bar Association, which holds its annual conference there in October 2014, added DPRK and the COI's report to its plenary program. LAWASIA did likewise in its annual conference in Bangkok, Thailand in October 2014.

No member of the COI, whether Commissioner or secretariat, could leave their duties untouched by the testimony of great suffering that came to their notice. That suffering is not over. It continues. In the great famine of DPRK in the mid-1990s, the COI estimated that at least one million DPRK citizens perished by starvation. This was needless because it occurred at a time when DPRK was spending inferentially very large sums on acquiring MIG fighter planes and materials for nuclear weapons as well as participating in missile developments for the delivery of such weapons, potentially to neighbouring countries[28].

Hunger and malnutrition continue to be widespread in DPRK because of the incompetence and inefficiency of the food delivery system and of the local markets. According to the evidence, approximately 27% of babies and young children in DPRK are stunted because of severe malnourishment on the part of their mothers during gestation[29]. These conclusions are demonstrated in the reports of impartial United Nations agencies (WHO, FAO and WFP) operating in the country. The major burden of food scarcity falls on those citizens deemed "hostile" to the regime under the *Songbun* system of classification. Doubtless this is the reason why DPRK refused access for normal monitoring of food aid, designed to assure donors of the impartiality of donated food distribution. Evidence is recorded in the COI's report concerning luxury goods and extravagance by which the ruling elite live well whilst other citizens, less favoured, starve to death.

[28] Report, 10 [46]-[55]; Detailed Findings, 207-208 [682]-[692].
[29] Detailed Findings, 163 [571] ff.

8. ACKNOWLEDGING AND OVERCOMING FRUSTRATIONS

As in any task performed to severe deadlines, with limited resources, there were frustrations in the work of the COI on DPRK. Some of these were acknowledged by the then High Commissioner for Human Rights herself in meetings with the COI.

In particular there is an element of rigidity in securing airline tickets to suit the competing obligations of the Commissioners. None of the Commissioners was paid for performing their duties as a COI member. They acted as independent experts for the United Nations. This arrangement involves an element of injustice because other relevant UN "experts" are recruited and paid, for example those who serve with the agency that monitors the implementation of the Security Council sanctions and who prepare reports on these sanctions and how they are being implemented or evaded[30].

For some, working for the United Nations without fee on human rights is a sufficient badge of honour. For others, with competing obligations, it is can be a burden. It necessarily limits, to some extent, the types of persons who are available to accept appointment as COI commissioners. Substantially, most of them come from academic posts where their salaries continue during their service. In my own case, the opportunity costs of surrendering professional work were not insubstantial. As the High Commissioner has repeatedly said, for volunteers, there should not be imposed unreasonable demands to use the cheapest airfare, involving unacceptably long layovers. In some UN agencies, it is possible to authorise a mandate holder, exceptionally, to purchase a convenient air ticket with reimbursement to an agreed airfare later, upon proof of payment and travel documents. In the OHCHR, there is a rule requiring more than 2 weeks notice to alter a travel booking. This is incompatible with the source of the occasional need to change a travel itinerary because of supervening and competing obligations. These frustrations were expressly drawn to the notice of OHCHR during the COI's work.

[30] United Nations, Security Council, note by the President of the Security Council [UNDOCS/2014/147] (6 March 2014). Report to the Council of the Panel of Expert established pursuant to Resolution 1874 (2009).

Upon the completion of the mandate of the COI on DPRK on 31 March 2014, no funds were available in the OHCHR to permit travel by COI members. From an auditing viewpoint, travel could not be allowed because the COI no longer legally existed. When in mid-April, it became necessary for COI members to attend and provide a briefing to members of the Security Council, at the request of three member States, only the SR, Marzuki Darusman, could be provided with an air ticket by the United Nations. Ms Biserko and I had to scrounge elsewhere. In my own case, by chance, I was invited to attend a conference in Jamaica for another UN agency and the remainder of my air ticket could be provided from another source. The OHCHR continues to operate within the most severe budgetary limitations. These sometimes spill over into frustrations affecting secretariat members and COI commissioners alike.

Of course, UN staff and office-holders know that, particularly in a big organisation, strong budgetary controls and effective auditing and avoidance of waste are vital. The COI had its own budget and it operated within its limitations. It is highly desirable that COI members should not only be drawn from academic ranks. People with backgrounds in the practising legal profession, the judiciary, business, government and civil society have qualities that will sometime be particularly useful. They may have experience in the highly practical business of rendering serious criminals accountable for their wrongdoing in home jurisdiction. They know the necessity of clarity and precision in thinking and expression. A most important, and beneficial, feature of the report on COI in DPRK is the inclusion throughout of specific findings, as made by the commission. The reader is not left to guess what the findings are. They are set out in exact detail at the conclusion of the treatment of each mandate item. This allows the reader, and any who have later obligations or interests for follow up and action, to know exactly what the COI concluded and how its recommendations are to be judged and implemented, based on those findings and conclusions.

9. *CONNECTION OF HUMAN RIGHTS, PEACE AND SECURITY*

The experience serving on the COI on DPRK also demonstrated clearly the close interrelationship between the achievement of international peace and security and of universal human rights and justice. The interrelationship was effectively acknowledged by the invitation, soon after the presentation of the COI on DPRK report to the HRC, to provide a briefing to members of the Security Council. Under the United Nations *Charter*, the Security Council, with its five permanent members and rotating non-permanent members, has the "primary responsibility for the maintenance of international peace and security"[31]. This is so in order "to ensure prompt and effective action by the United Nations"[32].

However, disputes and situations engaging the functions of the Security Council[33] do not occur in a vacuum. They occur in the real world. Unresolved affronts to universal human rights may occasion serious "threats to the peace [and] breaches of the peace",[34] which it is amongst the primary purposes of the United Nations to adjust and settle. This is recognised by the acknowledgement, when the first preambular statements of the UN *Charter*[35] were adopted, of the obligation to avoid the "scourge of war" and to "reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and nations large and small". And in the need to "establish conditions under which justice and respect for the obligations arising under treaties and other sources of international law can be maintained", so as to "promote social progress and better standards of life in larger freedom"[36].

Thus, from the very first words of the UN *Charter*, there is recognised the interrelationship between peace and security and the defence of fundamental human rights. The institutional arrangements that establish a General Assembly and also a Security Council, the latter with special responsibility for maintenance of international

[31] UN *Charter*, Art. 24.1.
[32] Ibid.
[33] UN *Charter*, Art. 12.1.
[34] UN *Charter*, Art 1.1.
[35] UN *Charter*, Preamble, paras 1 and 2.
[36] UN *Charter* Preamble, paras 4 and 5.

peace and security, have tended to force these interrelated objectives of the new world legal order into separate treatment. However, the case of DPRK constitutes a classic instance of the way in which these objectives, stated at the creation of the United Nations, come together and need to be viewed in relation to each another.

The General Assembly (GA) of the United Nations (like the HRC which answers to it) has maintained a continuing interest and concern over the state of human rights in DPRK. Annual resolutions of the GA have confirmed that interest. The creation of the COI grew out of the annual expressions of concern. The COI's report to the HRC, in turn, must be submitted to the GA for eventual transmission by it to the SC. However, in advance of that communication later in 2014, the "Arria Formula" and its invocation by three members of the Security Council, indicated the growing awareness of the dangers to international peace and security deriving from the instability resulting from grave, prolonged and widespread human rights violations in DPRK.

Previously, the attention of the SC in relation to DPRK has been addressed to concerns about the access that DPRK has secured to nuclear weapons and the development it has demonstrated of missile delivery systems. In a highly populated region of the world, that is already facing many new and difficult dangers, the existence of a state with the fourth largest standing army in the world and weapons of mass destruction, is serious danger enough. When to these ingredients is added the instability and risks inherent in recurring mass starvation, serious discrimination, violations of freedom of movement and residence, imposition of arbitrary detention, torture, public executions, prison camps and abductions from foreign countries, the result is potentially explosive.

A demonstration of this fact may be seen in the sudden removal from power and arrest in December 2013 of the Supreme Leader's uncle by marriage, Jang Sung-thaek; his rapid trial before a military tribunal of judges reported as denouncing him during his trial; and the swift execution by firing squad that followed (with reported deaths of many others). These reports signal not only gross breaches of fundamental human rights. They also suggest a serious instability in the way in which political and economic differences are resolved at the highest level in DPRK.

It is in this way that human rights violations seep into dangers to peace and security. They occasion grave dangers to the maintenance of international peace and security.

In the UNESCO Constitution, it is stated eloquently that, since wars begin in the minds of human beings, it is in their minds that the defences for peace must be built. This is the justification for bringing the human rights situation in DPRK to the notice of the SC. It must be hoped, that the SC will, in due course, exercise its jurisdiction and power, with this symbiosis of concerns clearly in contemplation.

One of the specific recommendations of the COI on DPRK was that the situation in the country should be referred by the Security Council to the International Criminal Court (ICC). Such a reference would be necessary under the *Rome Statute*[37] because DPRK is (perhaps not unexpectedly) not a party to the *Rome Statute* and hence is not otherwise amenable to its jurisdiction. In its report, the COI examined various other possible ways of ensuring accountability for the crimes against humanity that it had found and, in respect of which, DPRK afforded no protection or redress to its own people. Such failure would appear to enliven the responsibility of the international community, in case of DPRK, to protect (R2P) the people of DPRK from such crimes. All of the other options considered by the COI were, for the reasons given in the COI report, less suitable or desirable[38].

The danger that one or two permanent members of the Security Council (China and/or the Russian Federation) might exercise their 'veto' to ensure that no such reference to the ICC would occur, presents a quandary. Should the proposal of the COI be pressed to a vote or would this be pointless, given the announced opposition, at least on the part of China[39]. However, upon one view pressing to the vote is precisely how the *Charter* is expected to operate. The broad and strong consensus expressed in the HRC[40] and the strong report of the COI with its grave findings,

[37] *Rome Statute*, Art. 24. Cf Detailed Findings, 361, [1201] (1).
[38] Detailed Findings, 360-362 [1201]-[1202]. The other option included (1) a peace and reconciliation process; (2) an ad hoc international tribunal; (3) a joint national and international ad hoc tribunal; and (4) appointment of a special prosecutor, without a designated court, to continue to gather and evaluate evidence.
[39] The countries which voted against the Resolution in the Human Rights Council were China, Cuba, Pakistan, Russian Federation, Venezuela, and Vietnam.
[40] The voting on the HRC Resolution was 30 nations in favour; 6 against; 11 abstentions.

indicate what objectively should happen. If particular countries are not convinced, at least arguably, they should be required to explain their position and vote. That way they can themselves be judged by the international community, by their own people who get to know of it and by history. It cannot be comfortable or safe for China, in particular, to have at its doorstep a country, as presently governed, which is not only potentially extremely dangerous to Chinese citizens but also potentially turbulent because of human rights violations and the ever present risks of starvation and the unrest that this can cause.

10. INTERNATIONALISM AT WORK

During my service as a judge in the High Court of Australia, I often raised my voice to express the need to reconcile, in the current age, the mandates of domestic law and any relevant provisions in international law (whether in treaties or in international customary law)[41]. Sometimes I was a lone supporter of this view; but sometimes not[42]. In part, my approach arose from the rare opportunity I had already enjoyed to serve in a number of international positions, watching closely (and contributing to) the growing influence and impact of international law: especially the international law of human rights. My recent engagement with the COI on DPRK has conformed and reinforced the views I then held. I do not doubt that, in due course, these views will prevail not only in Australia but everywhere in the world. This is simply the force of destiny: the outcome of the growth of the power and influence of international law that is inevitable, irreversible and desirable: to save the planet and to save the human species from dangers otherwise arising.

Repeatedly, during the inquiry on the DPRK, contact with countries which had once been joined with the DPRK in the former Soviet bloc expressed to the COI their appreciation of its labours. The ambassador for one such country pointed out that DPRK was a kind of historical left over and an historical anomaly. Eventually, it would have to adjust and change. This would not necessarily mean abandoning its

[41] See eg *Al Kateb v Godwin* [2004] HCA 37; (2007) 219 *Commonwealth Law Reports*, 562 at 617 [152] ff. Contrast at 589 [62] ff, per Justice McHugh. See also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337.
[42] In *Al Kateb*, Chief Justice Gleeson and Justice Gummow dissented, although reaching their minority conclusion substantially by techniques of statutory interpretation.

distinct identity or political system, as the history of China has shown. But it would mean radical reform of its society, an acknowledgment of the serious wrongs done to its citizens, and a commitment to bring itself wholeheartedly into the era of universal human rights envisaged by the *Chapter*. Another such ambassador declared that the people of North Korea would, in due course, become aware of the COI and the efforts of the United Nations. Although most such people were presently unaware of the United Nations labours and report (because of censorship in place and totalitarian control) in due course they would become aware. They would know that the world had been concerned about their plight and had created a high level inquiry to voice that concern and to stimulate action and reform. Another such ambassador declared that the situation revealed in the COI report resonated with her because (although otherwise in less extreme forms) many countries of the former Soviet Bloc had been exposed to similar violations of human rights, which were fresh in memory and all too familiar. Important objective sources now available, concerning the history of human rights abuses in DPRK, include the archives of the former Soviet Union and German Democratic Republic. These archives, quoted in the COI report, reveal the duplicity of the DPRK leadership (including about the commencement of the Korean War and the number of prisoners of war detained) and the anxiety of comradely states about the extreme forms of the personality cult built around the founder, Kim Il-sung. This struck observers from the Soviet Bloc at the time as astonishing, dangerous and counter-productive to the proletarian cause[43].

This is why, in the COI report, the COI concluded that the DPRK today had moved far away from the original principles on which it purported to be founded:

- It is neither egalitarian nor democratic. It is a kind of absolute monarchy in which power has been passed from one generation of the family of Kim Il-sung to another and then to the next. This is a unique extreme of nepotism with no real counterparts in the former communist states;
- It is not dedicated to social justice. In the many ways, demonstrated throughout the COIs report[44], DPRK is an extremely patriarchal society in

[43] See Detailed Findings, 315-316 [1003]-[1006].
[44] Detailed Findings, 336-337 [1105].

which women suffer gross injustices and humiliations, inequalities and serious adverse discrimination;

- It is not a multicultural community, but one based upon notions of the racial "purity" of the Korean blood, with antipathy to any mixing of that blood with the blood of foreigners, even with the Chinese fathers of the children of Korean refugees, themselves forced back to Korea and obliged to abort or even kill their progeny conceived with non-Koreans; and
- It is not, even in ideology, egalitarian. Its *Juche* philosophy, proclaimed by its Founder and the S*ongbun* system established by him, stamps people at birth into classifications as "core" (or sympathetic), "wavering"; or "hostile". This is an aristocratic/feudal caste system of social assignment, by social class that is extremely hard for citizens to escape. It is an enormous burden throughout the lives of those classified as "hostile", at birth or thereafter.

Of course, these are not necessarily reasons to demand an end to DPRK. That is a decision which was not on the agenda of the COI. Change of government is a privilege that is to be exercised, if at all, by the people of DPRK as enshrined in international human rights law[45]. It did not belong, as such, to the COI; nor does it belong to governments or to the United Nations.

But whilst DPRK is a member of the United Nations and has itself signed major UN treaties on human rights, it must conform to basic universal human rights principles. This it is not doing. International law cannot easily enforce change, to secure compliance with international human rights law. But it can stand up clearly for the basic principles that are at stake. It can show the direction in which those principles point. It can offer advice, encouragement, technical assistance and, where justified, strong criticism and condemnation. It can encourage an end to the violations. It can offer an opening of dialogue and actions to enhance people to people contact, such as are set out in the COI report on DPRK[46]. It can set up machinery in the OHCHR that will continue to collect testimonies which the COI has started[47]. It can keep the matter under review in the HRC, the GA and the SC of the United Nations. It can do

[45] *International Covenant on Civil and Political Rights,* Art.1; *International Covenant on Economic, Social and Cultural Rights,* Art. 1. (Self-determination of peoples)
[46] Report, 16 [89].
[47] Report, 20, [94(c)].

all these many things and more until, in due course of time, the grave wrongs revealed in the COI report are terminated, repaired and redressed.

The COI report will contribute to the process of change. No one now has the excuse of saying that they are not aware of the affronts to human rights in DPRK. Now, we all know. We all must ensure that change happens. If the arc of history bends in the direction of human rights, equality and justice as Martin Luther King Jr assured us, change will happen. When and how that change will come is as yet uncertain. But it will come. And the United Nations will have played a proper part.

Consider the peculiarities of the North Korean situation:

- DPRK has many features of a totalitarian society, as that word is understood in historical and political discourse. The governments and officials of many countries in our world today are harsh and oppressive; but few are totalitarian: seeking to control the minds of the people as well as their actions;
- DPRK has the fourth largest army in the world and it defends one of the most strictly guarded, lethally defended and heavily mined borders on earth;
- DPRK has but one political party and, as recently demonstrated, the legislature is not freely elected by the people. They have, at best, a theoretical power of veto which apparently is never, or virtually never, exercised;
- DPRK is possessed of a nuclear weapons arsenal (estimated at 20 nuclear warheads) and missiles which have the capability of delivering such weapons of mass destruction to neighbouring countries, with high density populations, including the ROK, Japan and China;
- DPRK has recently been observed to restart a previously decommissioned, old and defective nuclear power station, with attendant dangers, inferentially for the collection of plutonium for use in the manufacture of further nuclear weapons; and
- In December 2013, one of the highest ranking officials of DPRK, Jang Sung-thaek, uncle by marriage of the Supreme Leader, Kim Jong-un, was arrested, hurriedly tried before a military tribunal and executed, reportedly along with

others who had fallen fell from favour. His widow, Kim Kyong-hui, the only sister of the founder, Kim Il-Song, has now reportedly been airbrushed out of archival photographs and documentary films shown on the DPRK official broadcasting outlets[48].

The foregoing have relevance for the enjoyment of universal human rights in DPRK. At the same time they present substantial reasons for concern in the global community for peace and security in, and in the region of, the Korean Peninsula.

CONCLUSIONS

How can engagement of the powers and functions of the Security Council be justified in the case of the DPRK, as the nature of that country and its current conditions, are revealed in the COI report?

- The COI on the DPRK was specifically asked, by its mandate from the HRC, to identify the means by which those liable for any acts and omissions that might constitute human rights violations, could be rendered accountable for such conduct. Thus, the COI had no option to ignore its mandate, for example on the grounds that addressing this question might dangerously alienate the leadership or authorities of DPRK or make peaceful dialogue more difficult. The mandate had to be answered faithfully and truthfully. As it was.
- The most appropriate, and available, form of securing accountability (invoking the jurisdiction of the ICC) directly engages the powers of the Security Council, as no other United Nations institution. This is because it is plain that DPRK will not provide protection for its citizens in accordance with the norms of the international law of human rights and the DPRK is not itself a state party to the *Rome Statute* conferring its consensual jurisdiction on the ICC in such cases.

[48] Yonhap News, 17 April 2014: http://english.yonghapnews.co.kr/northkorea/2014/04/17/24/00401000000AEN201404170048003 on 18 April 2014 at 2:36am

* In such circumstances, it falls on the international community to provide such protection. Indeed, the international community has a responsibility to protect where the state concerned fails to do so. The most effective way is through an already established judicial body and properly resourced professional affording such protection, whose jurisdiction can only relevantly be engaged, in the circumstances, by decision of the Security Council; and
* The United Nations has adopted an overall approach to the conduct of its own agencies and officers described as "Rights up Front". This approach is intended to ensure that all decisions and actions by all of the organs and personnel of the United Nations are informed in their actions and give priority to, the protection of universal human rights. [I]f the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security, in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly may, in accordance with the Uniting for Peace Resolution, consider the matter immediately with a view to making appropriate recommendations to Member States for collective measures, including in the case of a breach of the peace or an act of aggression the use of armed force, when necessary, to maintain and restore international peace and security.

Because the unconcluded war on the Korean Peninsula (ended by an armistice and not by a peace treaty) involved the United Nations, as authorised in 1951 by vote of the Security Council, the subsequent human rights violations in the DPRK might be viewed, in material respects, as consequences and indirect outcomes of the War. At the least, they attract the special attention, and a sense of responsibility for what has since transpired, of the Security Council and its members.

Why is doing nothing not a viable option in the case of the COI report on the DPRK?

* The Human Rights Council created the COI and mandated its report which has now been delivered;

- Whatever views might be held on the establishment of country specific inquiries on the part of the HRC, the existence and content of the COI report cannot now be ignored as if it did not exist. Nor can the information provided by the COI be expunged from the collective knowledge of the United Nations or the wider world it serves. The COI report is before the United Nations in a report, lawfully initiated, duly provided and now publicly distributed and widely known;
- In contrast to previous often vague and unanalysed data on human rights violations in the DPRK, the international community now knows in considerable detail of the grave wrongs occurring in DPRK, including crimes against humanity that invoke obligations of prompt and effective action which includes the Responsibility to Protect to people of DPRK whose government manifestly fails to do so; and
- In any case, the *Charter,* by its preambular statements and expression of the functions and powers of the Security Council, recognises the integrated characteristics of the objectives of international peace and security and failure to accord to men and women and nations large and small "fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women person [and] in the equal rights of men and women."[49] The language of the *Charter* and the history of humanity, demonstrate the interrelationship of peace and security and universal human rights. To the extent that human rights are not respected and that conditions exist under which justice and respect for the law are not maintained, causes of instability are created. Such instability is an occasion and cause of conflict, unrest and demand for change that can put at risk the orderly conduct of international as well as national affairs. Particularly so in a country with such a large army; with a number of nuclear devices not subject to international inspection or control; which has demonstrated its missile delivery systems.

The report of the COI on DPRK "reveals the unique and dangerous conditions prevailing in the DPRK that do not have any parallel in the contemporary world"[50]. The question now confronting the global community, and the United Nations to which

[49] *Charter*, Preamble, para 2.
[50] Report p.15 [80].

in dangerous times it has given birth, is whether sufficient resolution and principle can be found to take the steps that are necessary to protect universal human rights in DPRK. And to render accountable, quickly and effectively, those who have breached, and continue to breach, those rights. The report of the COI on the DPRK has been prepared in the hope and conviction that the answer to those questions is in the affirmative. Only time will tell whether this is a pipedream or justifiable confidence in the capacity of vital living institutions to protect our species and the biosphere from serious and potentially fateful outcomes threating the whole.