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EVENT HOSTED BY THE GOVERNMENT OF JAPAN

HUMAN RIGHTS VIOLATIONS AND NORTH KOREA'S:
ABDUCTIONS – TIME FOR ACTION

Michael Kirby

(Australia)

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ABDUCTEES' VOICES

Abductions by persons acting for a foreign state against the nationals of another state can amount to crimes against humanity under international law.

Such crimes involve the perpetration of violent and inhumane acts against others with criminal intent, where they form part of a widespread or systematic attack against a civilian population that shocks to conscience of humanity. The acts concerned may include deportation or forcible transfer; severe deprivation of physical liberty in violation of the fundamental rules of international law; enforced disappearance of persons; and inhumane acts causing great suffering or injury to body or mind.¹ Negligent performance of the act is not sufficient. It is necessary

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¹ Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (COI report): A/HRC/25/CRP.1 321 [128]; (see also A/HRC/25/63),.

that the perpetrator actually intend to do the wrong or is aware of the grave consequence that will follow from the conduct.

Crimes against humanity were first defined in the Charter of the International Military Tribunal at Nuremburg in 1945. They have been shaped by subsequent developments of international law.² If there is jurisdiction, they engage the International Criminal Court (ICC).

The report of the COI on the Democratic People's Republic of Korea (DPRK) (North Korea) concluded, to the standard of proof required for such a grave determination, that North Korea had:

“abducted and forcibly disappeared a large number of persons from other countries [including Japan] in a systematic and widespread manner in order to gain labour and skills to enhance the DPRK and strengthen it in the struggle for supremacy on the Korean Peninsula.”³

Abductions did not constitute the most widespread crimes against humanity found by the COI. These related to the enormous and prolonged violations of the right to food⁴ and the very many instances of arbitrary detention, torture, execution and disappearance into political prison camps.⁵ These crimes affected hundreds of thousands of DPRK citizens, more than a million of whom perished needlessly from starvation in the 1990s whilst resources were lavished on the means of war.

² COI report, 320 [1026].

³ Ibid, 320 [1024] (third conclusion).

⁴ COI report, ibid, 145 [493] ff.

⁵ COI report, ibid, 208 [693] ff.

Nevertheless, some of the most harrowing instances of crimes against humanity recounted by the COI's report related to the cases of forced abduction. Those cases concerned both citizens of the Republic of Korea (ROK) (South Korea);⁶ Japan⁷ and other countries, including China.⁸ Together, these instances revealed a state, the DPRK, that has acted as a kind of international brigand. It has performed acts, including on the high seas, not dissimilar to the old international crime of piracy. Piracy was one of the first international crimes that arose because the world was horrified by its violence and fearful cruelty.⁹ Piracy bears some similarity also to the modern revulsion to slavery.¹⁰ The conduct of North Korea in relation to the abductions of ROK, Japanese and other foreign nationals portrays elements of piracy and slavery targeted at innocent and unwilling victims in the civilian populations of foreign countries. But it extends also to their families and those who are left behind to cope with their loss.

Of all the testimony, horrifying in its detail, that shocked me during the public hearings of the COI on DPRK, amongst the most shocking was that of the families of the victims of DPRK's state policy of abduction:

- * The testimony of Mrs Kim Hang-tae, aged 85, who gave evidence in Seoul of the seizure of her husband from their home near the border in 1953 and told of the anguish she has suffered every day since;¹¹

⁶ Ibid, 271 [848] ff.

⁷ Ibid 298 [933] ff.

⁸ Ibid 307 [976] ff.

⁹ J.G. Starke, *An Introduction to International Law* (4th ed, 1958) (Butterworth & Co, London) 214. Piracy is *jure gentium*. A pirate is "*hostis humani generis*", ie an enemy to all mankind. See [1934] AC 586.

¹⁰ *Slavery Convention*, signed at Geneva 25 September 1926. Entered into force 1953. See also Protocol approved by the UN General Assembly 23 October 1953, GA Res (VIII); entered into force 7 December 1953.

¹¹ COI report, 314 [197]. Seoul public hearing, 23 August 2013 (afternoon) (02:41:51).

“If at least I could find the body of my husband, I would like to lay over his body... I cannot admit what happened to me. My husband was a good man, a decent man. Half of her is gone when a wife was lost her husband. It’s like having lost an arm. I am waiting until this day. I am holding hands with my daughter waiting the return of my husband.”

- * The testimony of Mr and Mr Yokota, who gave evidence in Tokyo, told of the unbearable pain they suffered from the abduction of their 13 year old daughter Megumi. On 15 November 1977 she was taken by force on her journey home from badminton practice at school and taken to North Korea. Apparently this was done for no better purpose than to teach idiomatic Japanese language expression:¹²

[When] I saw the photos for the first time [of Megumi] as a grown up... we wept... for the first time I saw her in the photo, and we were really so sad. We looked for her everywhere last 20 years, and now she is in Pyongyang, and we felt so bad. I finally discovered her, and still we cannot save her, and we said sorry for her... I wept so much that I still cannot help her.”¹³

Most COIs of the United Nations content themselves with an antiseptic description of horrible events. But that was not enough for our inquiry. We insisted on the dignity of the victims. We gave them the public opportunity to speak. We allowed them to tell their humble and poignant

¹² Ibid 298 (934).

¹³ Tokyo public hearing, 29 August 2013 (morning) (01:25:00).

stories before the world. We afforded them the dignity of conveying their suffering.

If the test for crimes against humanity, in international law, is whether the act “shocks the conscious of mankind”, we let the voices of the victims speak. They spoke to the learned and distinguished delegates at the UN Human Rights Council. They will speak from our pages to the delegates at the General Assembly in New York in the weeks to come. They will speak to the representatives of the members, including the great powers, in the Security Council if, as we hope, our report is received by them. They will speak to the Secretary-General. Through international media, they will speak to ordinary citizens everywhere.

Through our public hearings recorded online, they will speak further to the whole world. They demand from the United Nations the exercise of the responsibility to protect (R2P) because, clearly, North Korea will not protect the families of those lost to abduction. They demand accountability. They demand ‘rights up front’. They demand referral of their cases of abduction to the International Criminal Court (ICC) in The Hague. Their voices can be heard everywhere. They are heard at this event. They are piercing and deafening voices that tell of prolonged grief. Who in humanity cannot be moved to action by these voices?

The ordinary citizens of DPRK cannot hear their voices. Their government blocks access to the internet and to media that would bring their voices from the public hearings of the COI to good people in North Korea. They are kept in the dark. Just as their country is a grim, dark place when viewed from a satellite looking back at Earth. Its surroundings are awash with light, prosperity and progress. But DPRK

is bleak and dark. In dark North Korea the voices of the abductees and their families are muffled. Just as the cries of those who were seized were muffled when they were taken to that most unfriendly place.

BUT WILL THE VOICES BE HEARD?

In the coming weeks, the international community will have to face the hard question of whether all its talk about 'rights up front' is just hot air. Is all the talk about accountability for international crimes just decoration? Is all the talk about responsibility to protect – unanimously adopted by the General Assembly in 2005¹⁴ - just wishful thinking?

In coming weeks the report of the COI on DPRK will, we hope, be referred by the General Assembly to the Security Council. And then, we proposed, the case of North Korea will be referred to the ICC. No other solution is so proper, swift, economical and appropriate:

- * North Korea is not a party to the *Rome Statute* creating the ICC. However, exceptionally, the Security Council is entrusted by international law with the power of conferring jurisdiction on the ICC by its reference of a case to that court;
- * If the shocking revelations in the report of the COI on DPRK – page after page - do not justify referral to the ICC, it is very hard to imagine a case that would do so;
- * Although the ICC does not enjoy jurisdiction under its *Statute* for events that happened – as most abductions did - prior to the ICC's

¹⁴ G.J. Evans, *Responsibility to Protect* (Brookings, Washington, 2007). See also COI report, above n 1, 363 [1204-1210].

creation in July 2002,¹⁵ unaddressed cases of abduction and other crimes against humanity are continuing offences. Victims of abduction (if still alive) and their families, if living and still suffering, continue to be the subject of ongoing international crimes. In respect of those continuing crimes, a prosecution could still be considered appropriate;¹⁶

- * The ICC could even decide to isolate and deal separately with the crimes of abduction and leave the other, more politically sensitive, crimes for later. There are family witnesses whose testimony should be taken in front of the ICC whilst they can still give it. I remind you that Mrs Kim and Mr and Mrs Yokota are in their 80s. Time is running out;
- * Creating an ad hoc United Nations tribunal for the trial of those responsible for abductions would be an alternative. But it would be slow, expensive and could run into difficulties which the ICC does not. The ICC is in existence. It already has a prosecution service and independent judges who can be trusted to act according to law;
- * The recent cases involving verdicts against the Khmer Rouge leaders in Cambodia show that, even belatedly, public and international accountability for such crimes against humanity can be secured. Now the victims of DPRK's abductions look to the Security Council. Only a public trial would present the chance for their redemption and the salving of decades of pain and dismissive unaccountability;
- * It is not as if this would be a surprising new precedent. One never before allowed against the vetoes of the great powers. It has been

¹⁵ Ibid, 359 [1201].

¹⁶ Ibid, 349 [1154] (“Continuous nature of the crime against humanity of enforced disappearance”).

done before, with the referral of cases to the ICC of respect of Darfur/Sudan (2005)¹⁷ and Libya (2011);¹⁸

- * It is not as if North Korea has no case to answer. Astonishingly, Kim Jong-Il, although never actually apologising for the abductions, did admit to Prime Minister Koizumi that a number of Japanese nationals had been seized by DPRK state agents and taken to North Korea. This shocking admission of itself demands public and authoritative investigation and judgment by the standards of international law. Judgment for the sake of the victims. Judgment for the sake of the rule of law. Judgment against this form of modern piracy. Judgment for accountability. Judgment to make this state brigandage less likely in the future.

Some say that such a judgment will not come in my lifetime. I do not accept that assessment. The whole world acknowledged in 2005 at the World Summit in the General Assembly that, where a country is manifestly failing its own people, it is the responsibility of us all (R2P) to protect the people who are suffering grave international crimes. It can be done. It should be done. Peace loving people everywhere demand that it be done. They lift their voices to the General Assembly. To the Security Council. And to all of us here in this house of the United Nations.

The hope of international law, the rule of law and true respect for universal human rights is pinned on the decisions that will be made in the weeks ahead. That is why this day in Geneva is so timely. Those

¹⁷ UN Security Council Resolution 1593 (31 March 2005) by a vote 11:0:4 – Algeria, Brazil, China and the United States abstaining. This followed receipt of a report of the International COI on Darfur established by Security Council resolution 1564 (18 September 2004). The prosecutor's investigation was opened on 6 June 2005.

¹⁸ UN Security Council Resolution 1970 (27 June 2011).

who make the coming decisions should not let down the hope and trust of millions. Not just Koreans. Not just Japanese. The hopes of people everywhere to whom the report of the COI on DPRK speaks directly. The hopes of the victims. Those who have suffered violations of their fundamental human rights. Those who have suffered, and are still suffering, from crimes against humanity. Including the abductees and their families.

There is much that we can do. The establishment of the United Nations field office in Seoul, recently agreed, is a positive step.¹⁹ The resolute reports of the Special Rapporteur, Marzuki Darusman, are vital and they shine the light. The COI report was good. It shows the way. But now we have reached the moment of truth. And the world is waiting and watching the actions of the United Nations in New York, with great expectations.

¹⁹ United Nations to set up new Seoul office to investigate human rights abuses in North Korea. *The Guardian*, 29 May 2014.