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THE AUSTRALIAN INSTITUTE OF INTERNATIONAL
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DEPARTMENT OF FOREIGN AFFAIRS AND TRADE

THE SIR JAMES PLIMSOLL LECTURE 2014

The Hon. Michael Kirby AC CMG

Chair of the United Nations COI on DPRK

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UNITED NATIONS COMMISSION OF INQUIRY ON HUMAN
RIGHTS VIOLATIONS IN NORTH KOREA – REPORT AND
FOLLOW-UP*

The Hon. Michael Kirby AC CMG**

This lecture given in honour of Sir James Plimsoll, doyen of the Australian Foreign Service and onetime Governor of Tasmania, outlines the circumstances that led to the establishment of the Commission of Inquiry on North Korea. It recounts the mandate given to the COI by the United Nations Human Rights Council; the appointments of the members; the severe timeline for reporting and the distinctive methodology adopted – including public hearings. It explains the principal conclusions of the COI report, its release and the strong responses of the United Nations institutions. It then addresses doubts and criticisms that have been raised concerning the approach taken by the COI. It seeks to answer contentions that the COI should have been more conciliatory; more focused on the nuclear priority; more concerned about reunification; more aware of the dangers of futility and the peril of geopolitical inaction. The lecturer seeks to respond to, and answer, these contentions.

SIR JAMES PLIMSOLL REMEMBERED

I had the privilege of knowing Sir James Plimsoll, when he was already a very senior Australian diplomat and public figure.

*Parts of this lecture are derived from earlier presentations by the author on the United Nations report.

** Chair of the UN Commission of Inquiry on Human Rights in the DPRK (2013-14); Justice of the High Court of Australia (1996-2009); Honorary Professor, University of Tasmania (2010 -) President of the International Commission of Jurists (1995-8); Special Representative of the Secretary-General for Human Rights in Cambodia (1993-6). Personal views.

He was born 2 years to the day after the ANZAC landing commenced at Gallipoli, in Turkey. He was educated at public schools, including Sydney Boys' High School and at the University of Sydney. He rose to be Secretary of the Department of External Affairs in Canberra (1965-70). He held most of the most senior diplomatic posts, representing Australia. These included Australian Permanent Representative to the United Nations in New York (1959-63); Australian High Commissioner to India (1963-5); Ambassador to the United States of America (1970-74); Ambassador to the Soviet Union (1974-77); Ambassador to Belgium, Luxemburg and the European Communities (1977-80); and Australian High Commissioner to the United Kingdom (1980-84).

It was when he was serving in Brussels that I first made his acquaintance. I was the inaugural chairman of the Australian Law Reform Commission. I travelled to Brussels in the course of the work of that commission on privacy protection. Hearing of my intended visit, Sir James (he had been knighted in 1962) arranged a working luncheon with European personalities and Commission officials. This was to prove beneficial to my work. He was like that. Ever on the lookout for ways to maximise the visibility of Australian visitors whom he hoped would not disappoint.

Later, he was appointed Governor of Tasmania. He held that post until 1987. On one occasion, he invited me to stay at Government House and he extended the invitation also to my mother. He treated her most royally and personally showed her around the beautiful Botanical Gardens that surround the vice-regal residence in Hobart. The office was a most suitable way to conclude his exemplary public service.

In his early years, he had worked on the Far Eastern Commission which oversaw the work of the Allied Council for Japan, during the post war occupation of that country. In 1950 he became Australian representative to the UN Commission for Unification and Rehabilitation of Korea. It was in that last-mentioned position that he came to witness and understand the devastating impact of the short but bitter war upon the people of the Korean Peninsula. He had first-hand acquaintance with the problems offered by the Stalinist state which took root in North Korea. I am sure that he would have followed all his days the terrible suffering of the people of the North and the frustrations that they confronted in achieving rehabilitation and fundamental human rights.

By chance, Korea has lately occupied my attention. In this lecture, I will speak of a subject that Sir James Plimsoll would have applauded and welcomed: a United Nations investigation into human rights abuses in the Democratic People's Republic of Korea (DPRK). If he were only here, I am sure that Sir James Plimsoll would have original insights and wise counsel to offer those who still work in the daunting environment of Korea affairs.

ORIGINS OF THE COMMISSION

The Commission of Inquiry (COI) on Human Rights in the Democratic People's Republic of Korea (DPRK) (North Korea) arose out of frustrations experienced by the United Nations Human Rights machinery in dealing with that country. It had been admitted to the United Nations in September 1991 on the same day that the Republic of Korea (ROK) (South Korea) was admitted. It thereby accepted the principles of the

Charter of the United Nations of 1945.¹ In the second paragraph of the Preamble to the *Charter*, the Peoples of the United Nations expressed the commitment of member states:

“To reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”

Initially it had been intended to include in the *Charter* an international Bill of Rights. However, time ran out and it was necessary for the *Universal Declaration of Human Rights* (UDHR) to be negotiated and adopted separately. On 10 December 1948, by resolution of the General Assembly, the UDHR was adopted, with no dissenting votes.² By it, the General Assembly proclaimed the UDHR as a common standard for all peoples and all nations. By it, it is declared, that “all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”³ Moreover it further declared:⁴

“Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the

¹ *Charter of the United Nations*, 26 June 1945; TS 993, 3 Bevens 1153, entered into force 24 October 1945. See F.F. Martin et al, *International Human Rights Law and Practice: Cases, Treaties and Materials. Documentary Supplement* (Kluwer, The Hague, 1997, 1 (“UN Charter”)),

² GA Res 217A (III), UN doc A/810 at 71 (1948) (UDHR) in Martin et al, n 1, 32.

³ UDHR Art. 1.

⁴ UDHR Art. 2.

country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”

Under the *Charter* many important treaties providing for universal human rights have been adopted and opened for signature and accession. One of these, the *International Covenant on Civil and Political Rights* (ICCPR)⁵ was adopted to fulfil “the obligation of States under the Charter... to promote universal respect for, and observance of, human rights and freedoms.”⁶

DPRK subscribed to the ICCPR and to other United Nations human rights treaties. However, in many respects its participation has proved to be purely formal and unsatisfactory:

- * It failed to cooperate with the office of the High Commissioner for Human Rights and omitted to invite the High Commissioner to visit the country;⁷
- * It participated only in a formal way in the first examination of its human rights record under the system of Universal Periodic Review (UPR) established by the Human Rights Council (HRC). DPRK is the only nation state that has failed to accept a single one of the many recommendations made under UPR in its case;⁸

⁵ Adopted 16 December 1966; entered into force 23 March 1976. GA Res 2200A (XXI), UN doc A/6316 (1966). Martin et al above n 1, 39 (ICCPR).

⁶ ICCPR, Preamble, para 6.

⁷ United Nations, Human Rights Council, Report of the *Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea* (“COI report”). UN doc A/HRC/25/CRP.1 (7 February 2014), 4 [9].

⁸ COI report, 6 [10]. Whilst stating generic commitment to its human rights obligations, DPRK failed initially to accept any of the 167 recommendations made by the UPR Working Group in 2009. See UN doc A/HRC/13/13, noted COI report, 4 [11]. Subsequently, following a second UPR procedure in 2014 after the COI report, DPRK revised its response to the first set of suggestions for improvement of its human rights record. It said that it had “evolved” to a position of accepting 81 of the initial recommendations. As to the second UPR, it accepted 113 out of 268 recommendations fully and 4 partially. It noted 58 and rejected 93. None of the recommendations accepted concerned critical proposals touching the political powers of the state, party and military.

- * Despite repeated requests, DPRK declined to cooperate with the investigations of the successive Special Rapporteurs established by the HRC to investigate and report on the situation of human rights in DPRK;⁹
- * The last mandate-holder on human rights to be permitted entry into DPRK (the Special Rapporteur on Violence against Women) visited in 1995. Since then, not a single mandate-holder of the HRC has been invited, or permitted, to visit the country;
- * Since 2003, the DPRK government has provided no substantive input into reports of the United Nations on human rights and has rejected all offers of technical assistance on that subject; and
- * At one stage, DPRK even explored denunciation of its participation in the ICCPR. It was informed that there was no provision for withdrawal and it accepted that advice. But its engagements have continued to be reluctant, suspicious, hostile or purely nominal.

Meantime, the international community was confronted with many reports, scholarly, reliable and informal, of grave human rights violations against the people of DPRK.¹⁰ International civil society organisations (including Human Rights Watch, Amnesty International and the International Commission of Jurists) began lobbying for heightened attention to DPRK. January 2013, the High Commissioner for Human Rights (Navanethem Pillay) called for a fully-fledged international inquiry into serious crimes said to have been taking place in DPRK for decades. She stressed that the natural concern of the international community about the implications for peace and security of the reported possession by DPRK of nuclear weapons should not overshadow the deplorable

⁹ Ibid 6 [11]-[12].

¹⁰ Ibid, 6 [8].

human rights situation in the country.¹¹ The statement was made against the background of resolutions adopted by the General Assembly and HRC in 2012, without a vote, expressing deep concern about the persisting deterioration of the human rights situation in DPRK.¹² So frustrated with the non-cooperation of DPRK with United Nations machinery was the second mandate-holder as Special Rapporteur (Marzuki Darusman, Indonesia) that he too called for an independent impartial inquiry mechanism to document more fully the grave systematic and widespread violations of human rights alleged in DPRK.¹³

So it was that in 2013 the HRC, for the first time without a call for a vote, established a COI to carry out an extensive mandate concerned with issues of human rights in DPRK. Before the matter was declared resolved, the President of the HRC (Remigiusz Achilles Henczel, Poland) repeatedly paused to allow time for a vote to be called for. But no such call arose. This fact, and the subsequent response of the HRC to the report of the COI, indicates the level of exasperation that the recalcitrant conduct of DPRK had occasioned. The COI was established. The mandate given to it by the HRC was of the widest possible dimension.¹⁴

MANDATE OF THE COI

Nine areas were specified in the COI's terms of reference. They overlapped and concern interconnected aspects of freedom and human rights. The list of nine items was not exhaustive. The terms of the

¹¹ United Nations, HRC Resolution 19/13; GA Res 67/151.

¹² United Nations, HRC Report of the Special Rapporteur on the situation of human rights in the DPRK to the 22nd Session of the HRC. See COI report, *cit op*, 5 [7].

¹³ COI report, 6-7 [13].

¹⁴ COI report, 7 [13].

mandate identified the nine subject headings as being those which “in particular” the COI should investigate. As appropriate, the COI scrutinised its findings against the body of universal, international human rights law.¹⁵

The nine subject headings that shaped the structure of the COI’s Report were:

- * Violations associated with prison camps;
- * Violations of thought, expression and religion;
- * Arbitrary arrest and detention;
- * Violations of the right to food;
- * Discrimination and, in particular, systemic denial and violation of basic human rights and fundamental freedoms;
- * Violations to the right to life;
- * Violations of the freedom of individual movement;
- * Enforced disappearances, including abductions of foreign nationals.

APPOINTMENTS AND FIRST MEETING

As President of the HRC, Ambassador Henczel was faced with the obligation to constitute the COI so established. By the resolution of the HRC, the present Special Rapporteur on North Korea, Mr Darusman, was to be a member *ex officio*. The COI was to comprise three commissioners. Accordingly, two additional commissioners were appointed to constitute the three member panel:

¹⁵ COI report 6 [12].

- * Mr Marzuki Darusman was a former Attorney-General of Indonesia and trained lawyer;
- * Ms Sonja Biserko was a human rights expert from Serbia, with experience and awareness of issues of genocide and crimes against humanity that had concerned her country; and
- * I had served as a judge in Australia, including on the highest national court. I had previously held a number of international positions, including as Special Representative of Secretary General Boutros Boutros Ghali for human rights in Cambodia. I was designated chair of the COI.

The incoming COI was assigned assistance by the OHCHR to establish its independent secretariat. A number of the appointees to this body, chosen on merit, came from positions in the OHCHR. One was placed with the secretariat on assignment by United Nations Women. Once appointed to the COI secretariat, the officers were independent of the OHCHR or their past affiliations. They worked under the direction of the independent COI itself. Mr Giuseppe Calandruccio (Italy) was designated Director and head of the secretariat. He had experience working in the previous COI on Gaza and Southern Israel (chair, Richard Goldstone). The secretariat were a highly dedicated and energetic team. They worked harmoniously with the commissioners and with each other. They numbered eleven officers, men and women. They were assembled in Geneva by the start-up date of the COI, 1 July 2013.

An office with appropriate security to protect the sometimes highly confidential documents and information of the COI was dedicated to the project in the *Salle des Dames* in the Palais Wilson in Geneva, now the

seat of the OHCHR. The office was large but crowded. One of the appointees, (Christine Chung) was designated political adviser. Another (Jan Hassbruegge) was designated legal adviser. The officer seconded by UN Women (Siobhan Hobbs) was accepted as an adviser on gender issues. The secretariat worked under the day to day supervision of its Director. It served the COI in the discharge of its mandate.

TIMELINES AND METHODOLOGY

The first meeting of the three commissioners with each other (and thus of the COI) occurred in week 1-5 July 2014. The Commissioners met with a timetable that they approved, designed to chart the way ahead for the efficient conduct of the inquiry and the writing of the report.

Much time in the first meeting was devoted to the methodology to be adopted by the COI. An immediate problem confronted the COI, namely the severe time limitation imposed by the HRC for the production of its report. By its mandate, the COI was obliged to produce its report by March 2014, to the meeting of the HRC in that month. Because the COI report had to be translated and available in the six working languages of the United Nations, effectively the report had to be finalised by the first week of January 2014. Thus, in reality, commencing on its start-up date, the COI had less than six months within which to produce its report, allowing for public holidays. This presented a most severe discipline on the COI. This was understood and accepted.

Much of the first meeting in July 2013 was devoted to the attempt to foresee the way in which the investigation would be carried out and the number of meetings that would be necessary, both in Geneva and elsewhere. This timetable, in turn, depended upon the procedure to be adopted to gather information, including testimony; to analyse it in accordance with the mandate and relevant norms of international law; and to reflect upon the conclusions and recommendations that should be made to the HRC and other organs of the United Nations and to the countries most concerned.

An immediate challenge was presented to the COI by the non-cooperation with the HRC and human rights mandate-holders of DPRK. The resolution establishing the COI urged the Government of DPRK to cooperate fully with the Commission's investigation; to permit the members of the COI unrestricted access to visit the country; and to provide them with all information necessary to enable them to fulfil their mandate.¹⁶ However, on the adoption of the resolution establishing the COI, DPRK stated publically that it would "totally reject and disregard" the resolution. It claimed that this was "a product of political confrontation and conspiracy".¹⁷ A letter to this effect was addressed by the Ambassador for the DPRK to the United Nations in Geneva. This indicated that DPRK "totally and categorically rejects the Commission of Inquiry". Whilst the early exchanges between the secretariat of the COI and the DPRK Mission in Geneva were courteous and professional, the refusal of cooperation was maintained without variation.¹⁸

¹⁶ Resolution 22/13. See COI report, 8 [21]. The non-cooperation of DPRK is noted in COI report 8-10 [21]-[27].

¹⁷ According to DPRK state operated Korean Central Newsagency: COI report, 9 [fn9].

¹⁸ COI Report 9 [21].

The immediate consequence of this *impasse* was to present the COI with a challenge of methodology. The issue of methodology sounds unsubstantial. But it is extremely important in the work of a body such as a United Nations COI. If one can get the methodology right, the resulting testimony, information and materials will be of a high standard. The consequential conclusions and recommendations will be strengthened.

The danger for the COI was that, denied access to the country concerned, it would face consequential challenges to the acceptability of its conclusions founded on evidence that lacked the immediacy of first hand inspection and the contemporaneity of complete up-to-datedness. How should this problem be overcome? That this was a potential problem was made clear at the end of the COI's work. The COI was then attacked by DPRK for the unreliability of its witnesses, whom (it said) were self-selecting, hostile and derived from "human scum". Likewise, the Ambassador of China, after delivery of the COI report, said, in effect, that because the COI had been unable to persuade 'the country concerned' to permit the COI access to its territory, its report was thereby flawed and unacceptable.

We knew, at the outset, that these criticisms would be voiced. However, they were criticisms that had no foundation in the *Charter* and organisational structure of the United Nations. It is true that the *Charter* grants certain designated nation states (the 'permanent members of the Security Council') an effective 'veto' over resolutions within the Security Council in particular cases.¹⁹ However, such a 'veto' is not granted to

¹⁹ By UN *Charter*, Art. 27.3.

non-permanent members (such as DPRK). Nor does it extend to resolutions of organs of the United Nations other than the Security Council. Specifically, it does not extend to resolutions of the HRC, establishing a COI enjoining the country concerned to cooperate with it. To extend the notion of 'veto' to such a case would be incompatible with the language, structure and design of the *Charter* and of the United Nations Organisation that it creates.

Nonetheless, as a forensic matter, the inability to enter DPRK was an undoubted disadvantage. For example, DPRK has denied the existence of detention camps, existing outside the present prison system, in which political prisoners (and their families) are confined under the most harsh conditions. The obvious way of checking the existence of such camps would be to send members of the COI, its secretariat or some other designated, impartial person or body accepted by the country concerned to the exact place where witnesses deposed to the existence of the camps. As this was impossible, in the events that occurred, some alternative means were required to affirm (to the additional extent necessary) the truth of the oral testimony of witnesses and the untruth of the official denials.

In this particular case, the COI had access to satellite images which were available to it. Those images, addressed to the vicinity of the towns described by the witnesses, strongly confirmed the existence of large facilities, whose layout and appearance conformed to the descriptions given by witnesses before the COI. However, how was the COI to corroborate (to the extent necessary) testimony that lacked this degree of objective confirmation?

It was to meet this problem that the COI considered a proposal upon which the commissioners agreed, that it should proceed by gathering much of its testimony by way of public hearings. Such a procedure had been undertaken to a limited extent on one previous occasion of a UN COI, the COI on Gaza and Southern Israel chaired by Justice Goldstone. However, in that case, gathering the testimony in this way was limited in effectiveness because only one side (the Palestinian Authority) cooperated in the conduct of public hearings. The other side (Israel) declined to do so. Here also, one side (North Korea) refused access. However, other elements presented no difficulty in the conduct of public hearings in places where significant numbers of relevant witnesses lived and could come forward to give their testimony. This was so in the case of DPRK because approximately 26,000 refugees from DPRK now live in South Korea (ROK) and numbers live in other countries.

The COI therefore elected to proceed by way of a general methodology of public hearings. Such hearings constitute the way in which, in common law countries, evidence in courts, tribunals and inquiries is usually gathered. The objective of public hearings is to subject the decision-maker to public scrutiny; to provide access to the public and the media so as to inform the relevant community; and to raise expectations that an effective outcome will follow the reports that enliven the public interest.

Rightly, the secretariat of the COI warned of certain dangers in proceeding in the way envisaged by the COI. These included a mandate imperative of the COI to do no harm to witnesses. If they were to give testimony in public would this lead to retaliation against them or

their families, if still living in DPRK? As well, the security resources of the United Nations are strictly limited. Conduct of public hearings concerning a state in which acts of violence are repeatedly reported, presented risks of harm to the COI members, secretariat members and possibly witnesses. As well, concern was expressed about the possible abuse by media and witnesses of the opportunity to attend. Specifically, anxiety was expressed about grandstanding or misbehaviour on the part of witnesses, journalists, members of the public and others.

Having considered all these potential risks, the COI, notwithstanding, decided to proceed to public hearings. It took very seriously the obligation to protect the confidentiality of witnesses at risk. Secretariat members discussed with all witnesses the issue of risk and of appearing at public hearings. Even some who were willing to do so were told by the COI that their evidence should only be received in private. The majority of witnesses were interviewed in private. However, more than 80 witnesses were assigned to public hearings. Those hearings took place in accessible public facilities in Seoul, ROK, Tokyo, Japan, London, UK (where there is a substantial community of DPRK refugees with military backgrounds) and Washington D.C. (where there are Korean nationals and as well many academic and governmental experts).

Restrictions and limitations initially imposed for physical security were gradually relaxed as the public hearings proceeded. Restrictions on access by local and international media were also relaxed. The conduct of the public hearings was extremely successful. It marks a significantly new procedure for United Nations COIs. I believe that it may be the

most lasting consequence of the COI on DPRK for COI methodology. It is correct in principle. It is also beneficial to the process. No reports were received by the COI of threats or dangers occasioned by the receipt of witness testimony in public.

The testimony received in public was filmed and subsequently placed on the internet, with the assistance of translation facilities, the costs of which were supplemented by the governments of ROK and Japan. Typed transcripts of testimony were also placed online. Anyone with access to the internet can secure access to the testimony received by the COI on DPRK. This means most people in all countries and places in the world have access. However this is not possible from DPRK where only members of the elite have access to the internet.

The witnesses were given the opportunity to present their testimony along lines that had emerged from previous discussions with members of the COI secretariat. Most of the testimony was elicited from questions asked by the Chair. The questions were framed in a non-leading manner, so as to maximise the shaping of answers by the witnesses themselves. The result was to produce a powerful body of evidence given by persons who, for the most part, neither dissembled nor exaggerated. Like documentary interviews of European holocaust survivors, now commonly available in museums following the World War II genocides, witness testimony given to the COI on DPRK was presented in a low key, matter of fact, generally logical, unemotional and chronological manner. It was as if the witnesses, believing themselves fortunate to have survived their ordeal, felt an obligation to state what they had experienced so as to do honour to those amongst family and

friends who had perished and to bring about accountability for, and non-repetition of, such wrongs in the future.

To the assertion that the evidence was unconvincing or that it was given by “human scum”, the COI has been able to invite any who are sceptical to take time themselves to view the testimony on line and to reach their own conclusions. It is believed that a fair minded approach to the testimony will result in conclusions similar to those reached by the COI. Some of the testimony was confirmed by objective evidence (satellite images and statistical material published by DPRK itself). Some was confirmed by the similarity of the testimony of witnesses who were strangers to each other. As for the rest, it was the COI’s belief that the testimony was overwhelmingly truthful, compelling and relevant to the mandate received by the COI from the HRC.

The standard of proof accepted by the COI accorded with the standard observed by other United Nations fact-finding bodies.²⁰ This was whether “reasonable grounds” had been demonstrated in making factual determinations on individual cases, incidents and patterns of conduct. This imposes a significant threshold for the establishment of the proof of relevant facts. Of course, the COI did not have a contradictor before it. Nor did it have a lawyer assisting it to point to flaws and weaknesses in the testimony. All such responsibilities had to be exercised by the Commissioners themselves. Nonetheless, where there was doubt, witnesses were closely questioned to explore any doubts that their testimony evinced. Moreover, the COI was not a judicial body. Nor was it, as such, a prosecutor. Its task was to conduct an inquiry: finding facts

²⁰ COI report, 16 [67].

in the matters addressed to it by its mandate. Great care was adopted to list the findings made by the Commission. And it was not the duty of the commission to initiate a prosecution, still less to make a finding of guilt. Its duty was ultimately confined to determining whether there were reasonable grounds to refer particular matters to a prosecutor with relevant jurisdiction authority and to consider bringing a legal (criminal) process against identifiable persons or bodies.

One further consideration must be mentioned in concluding this discussion of methodology. Before the process of public hearings was initiated, the COI, through its secretariat, drew the attention of DPRK to the course it was intending to follow. It invited DPRK, if it so wished to appoint an agent or an appropriate person(s) who could attend the public hearings of the COI, initially in Seoul, ROK. The COI indicated that, if this course were adopted, it would intervene, as necessary, to seek to secure diplomatic immunity for any such representative(s) who travelled from DPRK for this purpose. It had reason to believe that such immunity might be granted by ROK in such circumstances. The COI also indicated a willingness to receive written and oral submissions during and at the close of its evidence and, by leave of the COI, to permit witnesses to be questioned and other witnesses called by DPRK who might answer, rebut or qualify the evidence given by witnesses who had approached the COI in answer to a general advertisement.

DPRK ignored all of these invitations. Because the public hearings were open to unidentified members of the public, in each of the venues, the COI has no way of knowing for certain whether DPRK took the opportunity of this facility to arrange for the presence of agents or observers. In any case, officials of DPRK would now have access to the

recordings of the hearings available on the internet. At no stage has DPRK take the opportunity to dispute particular testimony; to identify flaws or inconsistencies; or to seek to answer, contradict or rebut such testimony. Its criticism of the testimony has simply been generic and not particular.

In most legal systems, there is a principle of law or legal procedure governing the acceptability of testimony which is under consideration by a decision-maker and which is not contradicted or answered, although an opportunity has been provided for that to be done.²¹ In countries that observe the accusatorial system of criminal justice, this principle is sometimes modified by reason of the entitlement of the persons accused of a wrongdoing to remain silent and to leave it to the prosecution to establish guilt entirely from within its own case. Because the COI was not conducting a trial or prosecution, but gathering information and making findings, it was possible in this case for it more comfortably to reach its findings and conclusions because of the facilities that had been offered to DPRK but not utilised.

Quite apart from the impact of the testimony on members of the COI and its secretariat, the widespread coverage of the hearings both by local and international media, presented a devastating picture of great wrongs happening in DPRK, affecting large sections of its population over a very long period of time. To the extent that these convincing assertions remain unanswered, and are placed before the international community

²¹ For example, *King v Burdett* (1820) 4B and Ald 95 at 161-2 per Abbott CJ. See also *Jones v Dunkel* (1959) 101 CLR 298 (Aust); Lindley and Eggleston, "The Problem of Missing Evidence" (1983) 99 *Law Quarterly Review* 86.

by the COI, they reasonably demand an appropriate response from the organs of the United Nations.

THE REPORT

The COI was obliged by its mandate to give an oral update on the progress it had made in the first months of its work both before the HRC in Geneva and before the Third Committee of the General Assembly in New York. These oral updates were duly provided consecutively in September 2013. They afforded the first chance to explain to the UN bodies the methodology the COI was adopting; the progress that had been made in collecting testimony (not then concluded); and the broad outlines of the testimony and the intended course to be followed in concluding the task presented by the mandate.

In the last weeks of 2013 and early in 2014, the COI had a number of lengthy meetings at its headquarters in the Palais Wilson, Geneva. The meetings were highly interactive. All engagement with the secretariat was strictly secured. The COI was greatly impressed by the standard of the work of the secretariat; its efficiency and focus on the plan of action prepared by the COI; its adherence to the established timetable; the quality of the writing of the drafts; and the overall acceptance of the modifications suggested or incorporated by the Commissioners.

Every word of the draft presented by the secretariat, under the several mandate heads from the HRC, was weighed by the Commissioners. Because I was the sole native Anglophone on the COI, I assumed the responsibility to assess every sentence of the report to ensure that it was expressed in natural English language text. Some United Nations

reports are, frankly, impenetrable. In part, this may be because of problems of writing in a language other than the native language of the expert. All of the drafts presented to the Commissioners were excellent both in content and expression. Large numbers of textual amendments were proposed to secure more exact and comfortable language. Both for content and expression, the members of the secretariat loyally accepted all amendments made by the Commissioners. In this respect, they were led with great professionalism by the Director, Mr Calandrucchio. All amendments insisted upon by the Commissioners were incorporated. Truly, the text is superior and readable because of the great care taken by all concerned to ensure the attainment of the objective of readability.

One further feature contributed to the strength of the report was the discursive style of reporting common to Anglophone public inquiries. Virtually every page of the report on DPRK contained quoted passages from the testimony of the witnesses who came before the COI's public hearings. In this way, the evidence is not simply mediated by neutral officials. The COI has allowed the witnesses the dignity of their own voices. It has incorporated those voices with its own so that they can speak directly to the leadership of the United Nations; to the member states; and to the international community. Those voices are powerful, vivid and often very sharply expressed. Whilst the evidence may have been recounted in a low key manner, its content was powerful and arresting. Moreover, it allows international media, human rights organisations and individual citizens to understand and identify with the testimony. It permits the report to come to life in a way that a mediated text written in the usual United Nations style might not do.

The COI on DPRK scrupulously followed the mandate it had received from the HRC. It reorganised some of the mandate headings so as to combine them and present them in what seemed to the COI to be a more logical order. However, the outcome of the inquiry conducted by the COI was both a number of general conclusions and the identification of specific findings relevant to the mandate.

By way of general conclusions, the COI expressed its general opinion in these terms:²²

“Systematic, widespread and gross human rights violations have been and are being committed by the [DPRK] its institutions and officials. In many instances, the violations of human rights found by the commission constitute crimes against humanity. These are not mere excesses of the State; they are essential components of a political system that has moved far from the ideals on which it claims to have been founded. The gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world. Political scientists of the 20th century characterise this type of political organisation as a totalitarian State: a State that does not content itself with ensuring the authoritarian rule of a small group of people, but seeks to dominate every aspect of its citizens’ lives and terrorises them from within.

The COI went on to find the ways in which the citizens of DPRK were terrorised and dissent suppressed. These included surveillance, coercion, public executions, the disappearance to detention in political prison camps and repeated acts of violence and oppression.

²² COI report 365 [1211].

In accordance with its mandate, the COI was obliged to consider specifically whether crimes against humanity in international law had been established to the requisite standard, against the high threshold of proof required for such a conclusion in respect of such grave crimes.

In some instances, the COI held back from finding such crimes, although it could have been possible to reach the opposite conclusion:

- * The COI did not, for example, conclude that the use of chemical weapons had been proved to the necessary standard and left this question for later and further investigation;²³
- * The COI likewise held back from concluding that the international crime of genocide had been established. It took this course, despite submissions to the contrary, because the *Genocide Convention* 1948 requires proof that the acts of violence against a population or population group, as a matter of state policy, should be found to have occurred by reason of race, nationality, ethnicity or religion. In the case of DPRK, overwhelmingly, the reason for such violence has been actual or perceived disloyalty to the political and social order;²⁴
- * Although there was undoubted evidence that the religiously observant population in DPRK had fallen from about 23% at partition of the peninsula in 1945 to less than 1% in recent times, the COI was not convinced that it had been proved that this was by

²³ 269 [836]-[827].

²⁴ COI report, 350 [1155]-[1159] (“A Case of Political Genocide?”) Cf W. Schabas, *Unimaginable Atrocities: Justice Politics and Rights at the War Crimes Tribunals* (Oxford Uni Press, Oxford, 2012) 4, 99 ff (“The Genocide Mystique”); W. Schabas, *The Three Charters: Making International Law in the Post-War Crucible* (Universiteit Leiden, 2013) 3.

reason of extermination of that population as distinct from being the result of hostile and discouraging propaganda.²⁵

These approaches indicate the prudence and caution adopted by the COI in discharging its mandate. There was ample evidence of crimes against humanity. Those crimes are themselves extremely grave crimes involving intentional inhumane acts forming part of a widespread or systematic approach to victim groups as part of an organised action in pursuance of a preconceived state plan or policy such as to shock the conscience of humanity.²⁶ Based upon the testimony and information received, the COI found that DPRK authorities had committed, and were continuing to commit, crimes against humanity in the political prison camps; in the ordinary prison system; by targeting religious believers; by imposing starvation on large sections of the population; and by targeting persons, including persons from other countries, through the course of state sponsored abductions and disappearances.

An interesting section of the report of the COI postulated the possibility of an expansion of the notion of “genocide” to include instances of political genocide.²⁷ The members of the COI were “sympathetic to the possibility of expansion of the current understanding of genocide.” However, they did “not find it necessary to explore these theoretical possibilities.” The crimes against humanity found by the COI were of such gravity, and so numerous, that it was sufficient to confine the conclusions to such crimes and to leave the possible future expansion of the boundaries of the international crime of genocide to be elaborated in scholarly, inter-governmental and political fora.

²⁵ COI report 333-334 [1087]-[1089]; 351 [1159].

²⁶ COI Report, 321-2 [1022]-[1052] 26.

²⁷ COI Report, 350-1 [1155]-[1159] 27.

PRESENTATION OF REPORT

The COI report was released, effectively, in three stages:

- * On 17 February 2014, the English language version of the report was uploaded on the internet and hard copies were released in Geneva to DPRK, interested delegations, to the HRC (not then in session); the international media; and international human rights organisations. A media conference was undertaken in the Palais des Nations, Geneva. This attracted a great deal of international media attention and coverage. In acting in this way, the COI followed established procedures;
- * On 17 March 2014, the three Commissioners appeared before the HRC in Geneva to present the COI report to the members of the HRC. In advance of the presentation of the report, the COI had delivered the report to the High Commissioner for Human Rights and to the newly elected President of the Human Rights Council (Mr Baudelaire Ndong Ella, of Gabon). A request had been made to allow digital technology to be used to permit selected victims to speak directly to the HRC by video film and sound recording. This request was declined by the Presidency, in case it established a precedent. Nevertheless, the oral presentation of the report permitted instances to be given of the suffering of victims and the conclusions of the COI; and
- * On 17 April 2014 in New York, the COI was requested to provide an “Arria” briefing to members of the Security Council. This was

done in a large meeting room of the United Nations adjacent to the Security Council chamber. Although not formally a meeting of the Security Council itself, the fact that it was brought on so quickly was an indication of the high level of interest and concern enlivened by the COI Report. I will return to this procedure.

The presentation of the COI report to the United Nations created a sensation. No report of a COI of the HRC had been so effective, I believe, in drawing attention to victims and to such a broad range of wrongs perpetrated against the civilian population of a member state of the United Nations to such a shocking degree over such a long period of time. As was stated in each of the above three presentations of the report, no one in any position of responsibility in the United Nations or in its members states could now say that he or she was unaware of the conditions prevailing in DPRK. Unlike earlier totalitarian states and oppressive conduct, the world cannot now lament, 'if only we had known...' Now, the world does know. And the question is whether the world will respond effectively and take the necessary action.

In March 2014, at the conclusion of the deliberations on the COI report in the HRC, a resolution sponsored by likeminded countries was adopted. It expressed substantial endorsement of the conclusions of the COI. It called for reference of the matter in the General Assembly and action along the lines recommended by the COI. Of the 47 members states of the HRC, 31 (an usually high level of concurrence) joined in supporting the consensus resolution. Only 6 states voted against the motion. Those states were China, Cuba, Pakistan, the Russian Federation, Venezuela and Vietnam. Other nations abstained.

The Arria procedure is adopted, in advance of any formal consideration of a matter by the Security Council, to permit those members of the Security Council who wish it, to receive a briefing on a particular matter thought to be relevant to international peace and security: the prime responsibility of the Security Council.

The initial moves for such an initiative were taken by France. It was joined by United States of America (also a permanent member of the Security Council) and Australia (a non-permanent member). These three states co-hosted the Arria procedure before a very large meeting comprising also a large number of the member states of the United Nations General Assembly. They observed the proceedings. With the permission of the chair (Ambassador Gary Quinlan, permanent representative of Australia), some spoke to the issues

The COI had been informed that lobbying had occurred in the week before 17 April 2014 to try to convince non-permanent member states of the Security Council to boycott the Arria briefing. In the result, each of the chairs of the members of the Security Council was filled, save for those of China and the Russian Federation (both permanent members). The lobbying for non-attendance had not succeeded.

Of the 13 Security Council member states present at the Arria briefing, 11 intervened to address the issues. None of them spoke adversely to the report or its conclusions or recommendations. Of the 11 that spoke, 9 expressed themselves in favour of a key recommendation included in the COI report and addressed specifically to the Security Council. This was the recommendation that the Security Council should “refer the situation in the [DPRK] to the International Criminal Court [ICC] for

action in accordance with that Court's jurisdiction".²⁸ Under the *Rome Statute* establishing the ICC, jurisdiction in that court extends to matters concerning a state party to the *Rome Statute* (which DPRK is not) or where the Security Council has made a reference to the ICC. Such references have been made to the ICC by the Security Council in two earlier instances, namely the case of Darfur (2005) and the case of Libya (2011). This means that, in those instances, the vote was taken in the Security Council and adopted with the participation (as required by the *Charter*), or at least the abstention of each of the 5 permanent members.

Following the conclusion of the Arria briefing and the many strong statements calling for action, both on the part of members of the Security Council and on the part of other members of the United Nations present as observers, a document dated 11 July 2014 was addressed by the permanent representatives of Australia, France and the United States of America to the President of the Security Council.²⁹ This letter reported on the co-hosting of the meeting of Security Council members under the Arria formula on 17 April 2014 "to discuss the [COI] report". The ambassadors for the three host countries observed:³⁰

"We believe that the Security Council should formally discuss the commission's findings of widespread and systematic human rights violations in the Democratic People's Republic of Korea and its recommendations to the Council, and consider appropriate action. In particular, the Council should consider how those responsible for such violations should be held accountable."

²⁸ COI Report 370, [1225(a)].

²⁹ Document dated 11 July 2014: S/2014/501 (17 July 2014).

³⁰ *Ibid*, 1.

The document is described as a “non-paper”.³¹ It is expressed as recording the co-convenors’ summary of the comments made by participants during the Arria meetings. It insists that it “does not prejudice endorsement of their content by Australia, France, the United States or any other Member State”; but that it is provided “for further consideration”.

Among the key findings of the COI that are listed in the “non-paper” are references to:

- * The estimated 80,000 to 120,000 people imprisoned without trial in four large prison camps in the DPRK and others languishing in other prisons and interrogation centres where torture is a standard practice;
- * The forced repatriation of women who have tried to flee DPRK and their subjection to sexual humiliation and violence, as found by the COI;
- * The attempt of authorities in DPRK to control the minds of the population by indoctrination and violent suppressions of freedom of thought or opinion;
- * The instances of cases of abduction and forced disappearance of well over 200,000 persons from China, Japan, ROK and other counties.

The document indicates that the commission of such crimes against a country’s own people presented a “perpetual source of instability and security for their neighbours”. It notes the COI’s insistence that the

³¹ Id, 2.

perpetrators of such crimes “must be held accountable under international criminal law”. It records the testimony of two witnesses who came before the Arria proceedings and who spoke powerfully and convincingly of their own personal experiences in DPRK before they escaped as refugees.

The document concludes with a statement that the Security Council members had congratulated the COI for the “compelling report of exceptional quality”; as well as commending the courage of the two witnesses. Council members “expressed grave concern at the horrific human rights violations and crimes against humanity outlined in the report”. Most members of the Council “urged DPRK to comply with the Commission’s recommendations and to engage with the UN human rights system, including at its forthcoming UPR”. As recorded in the “non-paper”, it was noted that “several non-Council members also voiced support for the aforementioned accountability efforts”.

Neither in the Arria briefing of the Security Council members nor earlier in the HRC was there any criticism of particular findings or conclusions of the COI. No factual finding was contested, other than by the generic denunciation of the COI by the representative of DPRK after the COI report was presented to the Council. The DPRK was absent (along with China and the Russian Federation) from the Arria briefing.

The sole clue to the objections to the adoption of the resolution of the HRC appears in the common theme that emerged from what the opposing states said when they intervened in the HRC. Most specifically, China asserted, in effect, that the COI investigation was doomed to fail because it “could not persuade the state concerned” to

permit access to its territory. However, China itself had refused to permit the COI access to Beijing (to meet state officials) or to the border areas with DPRK (to interview refugees and associated organisations and institutions) despite the COI's requests. Essentially, China, along with Cuba and other dissenting voices, simply expressed opposition to "country-specific mandates". It was said that such mandates were inimical to the achievement of real progress in human rights in the United Nations and through its human rights mechanisms. Venezuela, in particular, stated that such country-specific mandates had been the cause of the politicisation and abandonment of the previous Human Rights Commission, now replaced by the HRC. The system of UPR was the correct way, so it was said, to make progress in human rights: by dialogue and engagement not by hostile investigation and condemnation.

This point might have been more effective were it not for the fact that, in its original UPR procedure, DPRK had rejected each and every one of the 167 recommendations placed before the HRC working party by it for improvement of its human rights record. In this sense, DPRK confronted the United Nations human rights system with an *impasse*. It would not cooperate with UPR. It would not cooperate with OHCHR. It would not cooperate with the present Special Rapporteur or his predecessor. It would not cooperate with the COI. It wished to be left alone. But this was not acceptable because of the substantial and believable testimony and other information demonstrating grave crimes against humanity and other human rights violations on the part of DPRK, a member country of the United Nations.

In recent years, the United Nations has adopted several resolutions and administrative approaches designed to render its human rights mechanisms more effective and proactive:

- * It has insisted on an Organisation-wide approach described as “rights up front”. Thus, policies and initiatives throughout the United Nations system are being joined to adopt an emphasis that gives high priority to the attainment of human rights as one of the core objectives of the Organisation as stated in the *Charter*,
- * The United Nations has also repeatedly insisted upon the need for effective accountability for human rights violations. No longer is it sufficient to collect information, present reports and then leave these to gather dust in the basement of the Palais Wilson; and
- * Most importantly, since the unanimous resolution of the General Assembly at its special summit in 2005, the United Nations has accepted the principle of the responsibility to protect (R2P).³² This is a responsibility that is accepted by the entire organisation and its member states. It applies to the case of DPRK because it is plain that the government of that country cannot, or will not, protect its own citizens.

DOUBTS AND FOLLOW-UP

At the time of this report, the ultimate resolution of the recommendations of the COI on DPRK and the immediately following determination

³² G.J. Evans, *Responsibility to Protect* (Brookings, Washington, 2007). See COI report, 363-365 [1204]-[1210] citing United Nations, World Summit Outcome, A/Res/60/1, para [139] and cf International Law Commission’s “Draft Articles on Responsibility on States for Internationally Wrongful Acts”, considered: General Assembly Res 56/83 (12 December 2001).

adopted by the HRC, is not known. In due course, the world will know whether the COI report acted as a catalyst for securing practical initiatives designed to respond to the report: whether in the ways recommended by the COI or in other ways.

At this time, it is appropriate to note a number of criticisms of, or doubts about the report and its approach voiced during recent presentations about, its contents. I will suggest the responses that can be made to such criticisms and doubts:

Adversarial/Conciliatory. A few observers have suggested that the report was insufficiently 'diplomatic'. For example, writing a letter to the Supreme Leader of DPRK and attaching it to the COI Report,³³ in terms that complained about non-cooperation, referred to findings of grave crimes requiring action and warned him that he might himself be personally responsible for crimes against humanity (and therefore accountable) was said to be unique in the history of United Nations COIs. It was suggested that this course of conduct was undiplomatic and likely to entrench hostility. It was likely to close the door to negotiation of some face-saving device that would permit the Supreme Leader and his circle to set in train reformatory measures.

However, the letter to the Supreme Leader was the vehicle for transmitting the report of the COI. It was entirely proper to provide the report prior to its public release. It was also a simple matter of due process and procedural fairness to afford the Supreme Leader notice that he might be personally accountable under international law for the crimes against humanity found in the report. It would have been

³³ Letter from Chair of the COI to Supreme Leader, Kim Jung-un, 20 January 2014. COI report, 23-25.

deceitful, and a possible ground for later criticism, if the COI had remained silent, whilst writing to him, about his own possible personal liabilities. A change in conduct so grave as to amount to crimes against humanity, and so long lasting, is not likely to come about without due warning and a realisation of the potential consequences of failing to act in accordance with international law. In any case, the COI was not a judicial or trial tribunal. Nor was it prosecutor. Nor was it prejudging the matters of personal or institutional liability. Prosecution and judgment, if any, were the responsibilities of others. So too was it the responsibility of others, including “representatives of the nation states in the United Nations” to determine what responses would follow from the COI report. The sole responsibility of the COI was to inquire, to make findings, to express certain conclusions and recommendations and then to leave it to the political organs of the United Nations to consider any action that should be taken. It would have been quite wrong for the COI to pull its punches, to provide inadequate findings and to modify clear conclusions because it felt obliged to act ‘diplomatically’. Diplomacy is a skilled profession. A COI is not, as such, part of the diplomatic profession. It should not pretend to be so.

Nuclear priority: The greatest danger to human rights in the case of DPRK, it was frequently said, was its possession of a reported 20 nuclear armed warheads and its current development of an arsenal of missile delivery systems that could threaten its neighbours and eventually its region, even the United States of America and the global community. In these circumstances, the injection (including into the Security Council) of ‘contestable questions’ of human rights, would simply divert attention from the highest priority that the world faced. This was to secure an agreed peace settlement. DPRK would rejoin the Six

Party talks;³⁴ abandon its nuclear arsenal, return to the Nuclear Non-Proliferation Treaty (NPT) system and feel safe enough to address international human rights concerns.

There is no doubt that the nuclear danger presented by DPRK (especially in a state given to such high level political violence as evidenced in December 2013 in the case of Jang Song-taek, uncle of the Supreme Leader) itself constitutes a grave danger to human rights. The people of DPRK, of the neighbouring ROK and of Japan and China, in particular, are endangered by the restart of an outdated (and reportedly faulty) plutonium power station for the development of further nuclear weapons. However, these were initiatives that DPRK took, notwithstanding “the Sunshine Policy” of ROK President of Kim Dae-Jung.³⁵ Attempts at reconciliation on the part of ROK and other nations were rewarded with the highly hostile acts of denouncing the NPT and developing nuclear weapons of great danger. The strategy of non-criticism, attempted friendliness and deference was singularly unsuccessful in securing either the goal of peace, national re-unification or human rights compliance. In the UN *Charter*, the interrelationship of universal human rights and international peace and security is clearly recognised by the language, structure and purpose of the instrument. Countries that are violent, armed beyond the needs of self-defence and given to hostile bellicosity are a grave danger to themselves and to others.

³⁴ Victor Cha, *The Impossible State* (Ecco-Harper Collins, New York, 2012), 170, 264-6, 294-8; Andrei Lankov, *The Real North Korea* (OUP, Oxford, 2013), 155-157, 255-6.

³⁵ Danielle Chubb, *Contentious Activism & Inter-Korean Relations* (Columbia Uni Press, New York, 2014), 156ff, 191-201.

The only foundation for achieving progress away from this danger is a truthful understanding of the prevailing situation. The United Nations Security Council has already addressed the nuclear danger presented by DPRK. It has established sanctions and a committee to monitor compliance with those sanctions and any non-observance by DPRK and other states. Allowing DPRK's bullying to silence the COI in its revelation of grave human rights violations and crimes against humanity would not have been a contribution to peace and security in the region; still less to human rights. Transparency, evidence, truth and vigilance, together with domestic tranquility, are the best guarantees of peace, security and human rights in our world.

Reunification priority: In ROK, naturally, deep concern is felt about the strategies for dealing with DPRK that will produce reunification of the two states on the Korean peninsula. After all, for more than 1,400 years, the Korean peninsula was governed as a unified geographical and national unit. Even during the Japanese colonial period (1911- 45), the peninsula was treated as a single governmental unit. Some concerns were expressed that concentration on human rights would impede reunification. That, if only reunification could be secured, the economic progress that would be attained would quickly ensure the improvement of human rights in North Korea.

This may be so. However, the modes of securing reunification are basically the responsibility of political governments. They are priorities for the nation states, including as they operate within the General Assembly and Security Council of the United Nations. The COI's function for the United Nations was a more limited one. It was to investigate and make findings of the alleged abuses of human rights that

have occurred, and are still occurring, in DPRK. It is then for the nation states to act upon that report as they see fit. Although DPRK sometimes refers positively to reunification, its maintenance of the fourth largest standing army in the world; the world's most heavily armed border with ROK; and its development of nuclear weapons do not suggest a willingness to embrace early reunification. The refusal to permit all but token contacts between people in North and South Korea; the absence of even old fashioned telephone and mail contacts; the refusal to allow direct airline services; the hostility to civil society contacts are all significant impediments to reunification. This is why many of the suggestions in the COI Report were addressed to improving person to person contacts.³⁶ Until DPRK and ROK, enter upon the negotiation of a peace treaty to terminate the ongoing state of war, it is unlikely that reunification will be attained under current conditions of hostility.

Taking small steps: Instead of considering steps designed to address the issues of human rights that bedevil the relations of states, some commentators have suggested that the COI should have concentrated on small, even tiny, steps of reconciliation. Such a non-confrontational, patient approach might do more for human rights in DPRK in the long run than examination and criticism of its current human rights record.

The COI itself placed emphasis upon practical improvements, whenever noted. It expressed the hope that at least the detention camp system

³⁶ The 'Person-Person Recommendations are included in the Conclusions and Recommendations of the COI: COI Report: 366-371, [1220] (m) Abolish prohibition on foreign travel and restrictions on domestic travel; (n) provide whereabouts of disappeared; (o) Allow family reunifications and emigration; [1223] Contact in culture, science, sports, good governance and economic development; [1224] Contacts in business enterprises, broadcasting and development; [1225] (d) Cooperation on abductions. [1222] professional and other links [1223] Cultural, scientific, sports and other links; [1224] business and development links.

might be dismantled or reduced and that the large numbers of detainees might be released to enjoy freedom. Improvements in the food supply and access to the internet would also be an important, but limited, step to improve relationships. None of these improvements have come about.

The sole steps in improvement of contacts have been the revival of the family reunion visits in 2014 and the meeting, in Mongolia, of the daughter of Megumi Yokota with her grandparents for the first time since Megumi's abduction from Japan. This became possible following quiet diplomacy and contact between Japan and representatives of DPRK. However, whilst these steps are welcome on a human level, they are small crumbs in the record of the shocking deprivations of human rights described in the COI Report. The international community should not be satisfied with such tiny concessions. At stake are the universal human rights of 23 million people living in DPRK. If the United Nations is serious about the Responsibility to Protect; the duty of securing accountability; and the strategy of rights up front, it will take steps to ensure that the COI report is followed up and its recommendations acted upon. Against the present glacial pace of tiny concessions to fundamental human rights, millions of citizens in DPRK live and die under conditions of almost unimaginable suffering.

Regime change/compliance: One of the most frequent reactions of DPRK to the report of the COI, as to earlier United Nations initiatives addressed to its human rights record, is that the United Nations is seeking to achieve regime change. The suggestion here is that the

human rights situation in DPRK is fine,³⁷ and acceptable to the population, but out of step with the perceptions of foreigners who illicitly seek to impose change and to destroy the special social and political organisation of DPRK.³⁸

However, it was never the purpose of the COI to propose regime change as a solution to the serious abuses of human rights that the COI found on the part of DPRK, its government and institutions. Subject to the *UN Charter* and applicable norms of international law, the political system in DPRK is a matter for the people of DPRK. The self-determination of peoples is guaranteed in the common first articles to each of the principal human rights treaties of the United Nations: the ICCPR and ICESCR.³⁹ The report of the COI, the transcripts and oral record of its investigations that are online and the interviews with Commissioners and staff lend no support to the proposition that the COI adopted an objective (or even contemplated a necessary consequence) of regime change.

As the COI repeatedly insisted any such change is entirely a matter for the people of DPRK. It does not belong to the United Nations, still less to an institution, such as the COI, created under the *Charter*. Nevertheless, so long as DPRK remains a state party to the *Charter* (and, as well, to the ICCPR and other human rights treaties) it is required to conform with the universal principles of human rights as expressed in international law. It must therefore bring itself into conformity with human rights principles and obligations. The advice and

³⁷ DPRK's Association for Human Rights Studies has announced its intension to publish its own 'rosy' human rights report to 'expose the lies and fabrications' in the COI's report. AFP (Telegraph.co.uk), 11 August 2014.

³⁸ KCNA, 22 December 2005: Criticism of the role played by Japan on the passage of the HR resolution against DPRK. See also United Nations, Security Council, resolution (February 2012).

³⁹ ICCPR, Art. 1. See also *International Covenant on Economic Social and Cultural Rights* (ICESCR); 993 UNTS No. 14531 (1976), 3, Art.1.

recommendations of the COI are directed solely to that end. It is true that a number of recommendations,⁴⁰ contained in the COI report, if implemented, would involve very significant changes in the way DPRK is currently organised. They would certainly oblige substantial changes in the rights, privileges and duties of its citizens, including the present leaders. However, this is no more than is required of all other United Nations member states. Mere lip service and formal adherence to the human rights component of United Nations membership is not enough. DPRK could be assisted to understand this differentiation and to bring itself into compliance with what international law demands.

Futility/utility. Some critics of the COI report suggested that it was basically futile to address such wide-ranging, fundamental and significant recommendations to DPRK. This was so, it was argued, because of the non-cooperation of DPRK with the United Nations human rights machinery; the attempt of DPRK to put itself beyond any obligation of compliance (including by military means involving a nuclear arsenal); and the total refusal to discuss improvements in its record or the technical assistance that might be available to hasten improvement. Additionally, the negative response of China, both to requests of the COI to visit China and towards criticism of China itself and of DPRK suggests to some observers that it is futile to expect the United Nations system to deliver progress on human rights in DPRK. According to this view, any moves along the lines recommended by the COI are likely to be stymied in the Security Council by the use of the veto. A realisation of these

⁴⁰COI Report, 367, [1220] Recommending: (a) 'Profound political and institutional reforms without delay to introduce genuine checks and balances upon the powers of the Supreme Leader and Workers' Party of Korea'; (b) Acknowledgement of the existence of human rights violations; (c) Reform of the Criminal Code and Code of Criminal Procedure; (d) Immediate moratorium on the death penalty; (e) Independent newspapers and other media; (f) Introduction of education on human rights; (g) Observance of rights of religious believers; (h) Terminating discrimination; (i) Ensuring gender equality in practice; (j) providing access to food; (k) realignment of expenditure priorities.

realities (reinforced by the non-participation of China and the Russian Federation in the Arria briefing) demanded, so it was said, a completely different approach to DPRK. Critical findings and recommendations are simply seen as adversarial and completely unacceptable. Appeals will be made to State “sovereignty”, without any acknowledgement of the degree to which, in the current age, State sovereignty must be re-imagined in light of the obligations of the UN *Charter*, human rights treaties and customary law. If practical and useful advances were to be made, these would require a “softer” approach, more “conciliatory” language and action on part of the United Nations.

The COI recognised the legitimate controversy about the diplomatic follow-up to its findings, conclusions and recommendations. Whilst recognising that attempted “softer” policies have not been rewarded with success in terms of human rights improvement in DPRK, the COI appreciated the potential need for a multi-pronged approach to improve the state of human rights in DPRK. However, nothing in the history of international engagement with DPRK since its establishment gives any realistic encouragement that “softer” words and more “conciliatory” actions would produce protection of the human rights of the people of North Korea. Whilst such strategies are sometimes rewarded by minor concessions,⁴¹ objectively such measures can only be assessed as “crumbs” when measured against the violations and crimes reported by the COI.

⁴¹ Examples include the reopening of the Kaesong Economic Zone; revival of family reunions in 2014; and the agreement with Japan followed by a meeting of the parents of Ms Yagumi Yokota with their granddaughter in Mongolia in 2014. Ms Yokota disappeared on 15 November 1977: COI report, 298 [934] She was alleged to have died in 1993 but remains returned to Japan did not produce a positive match to DNA tests.

The meetings in Pyongyang in September 2002 with the Japanese Prime Minister, Mr Junichiro Koizumi⁴² and in September 2000 with President Kim Dae-Jong of ROK⁴³ were not long-term substantive successes. In the case of the Japanese Prime Minister, a tiny number of abductees were returned with an acknowledgement of a state policy of abductions by the DPRK, since abandoned. However, when the bones of some of the Japanese abductees, said to have died in DPRK, were returned to Japan, they were found to have no DNA match to the families of the abductees. In some cases they were probably animal bones – an affront to Japan and to the abductees’ families. Negotiations with ROK coincided with clandestine development of nuclear weapons at the very time of the promotion of the “Sunshine Policy”. It is the futility of “soft” strategies that enlivens most clearly the responsibility of the United Nations to provide protection for the human rights of the people of DPRK or those abducted to DPRK, which the government of that country denies. In any case, the COI’s duty was honestly to report its findings, conclusions and recommendations. It was not to water them down in case the truth upset any recipients unused to hearing it.

Action/ inaction: But let me return to the bottom line. The *Charter* of the United Nations gives the five permanent members of the Security Council a veto that can prevent the passage of resolutions on substantive matters which referred to the ICC undoubtedly is. The Russian Federation has links of tradition and history with DPRK dating to Soviet Union times. China has substantial trade and is now the principal economic supporter of DPRK. How in these circumstances can the COI

⁴² Cha, *op. cit.* 376-378.

⁴³ Cha, *op. cit.*, 94, 202-203; Lankov, *op. cit.*, 164.

seriously expect any real action to be taken by the Security Council? This is a reasonable question.

In the end, a veto may prevent action being taken upon some of the central recommendations of the COI Report. On the other hand, in the case of the downing of Malaysian Airlines flight MH17 in July 2014⁴⁴ it did prove possible to negotiate a resolution through the Security Council designed to facilitate the independent investigation of the loss of that airliner with so many lives on board. Because of the geopolitical situation in and around Ukraine, this issue was extremely sensitive, perhaps especially for the Russian Federation. Yet, by diplomacy, imagination a measure of give and take and negotiation, a satisfactory resolution was ultimately adopted. We must hope for a similar outcome to the recommendations on DPRK. I am far from convinced that this is impossible.

The Russian Federation now has few economic or other contacts with DPRK. It has several more pressing concerns. China must itself be deeply concerned, not only by the development of nuclear weapons on its doorstep but also by the dangers of an exodus of civilian populations seeking refuge in the neighbouring areas of China. The execution of Jang Song-taek, reportedly an advocate of the 'China path' for DPRK, must also be a source of concern. Both the Russian Federation and China have agreed to the adoption of resolutions on the nuclear weapons programme in DPRK and to the close monitoring of the

⁴⁴ On 17 July 2014 Malaysia Airlines flight 17 (MH17) was downed over Ukraine and crashed near Torez in Donetsk Oblast. The Organisation of Security and Cooperation in Europe (OSCE) convened the Trilateral Contact Group. Following an emergency meeting of the United Nations Security Council, the Council adopted Resolution C/2166 on 21 July 2014.

sanctions imposed by the Security Council on DPRK. There is thus a relevant existing resolution on DPRK of the Security Council. What is needed is not a completely new resolution. The requirement is for an enlargement of the current resolutions and the engagement in that task of two great powers with special powers but also special responsibilities and close physical proximity to DPRK.

The veto power was the price paid for the establishment of the United Nations. It is unlikely that either the United States of America or the Soviet Union (perhaps others) would have joined the system if it has not been for that special status. Responsibility in the exercise of great power is a requirement of a just and safe world, under the *Charter*.⁴⁵

The COI cannot, of course, guarantee the adoption of a new Security Council resolution on human rights in DPRK. Still less can it predict one that refers the case of DPRK to the ICC. However, the COI report presents a compelling case to support that objective. It was the hope, and expectation, of the COI in writing its report, that, mutual self-interest and the safety of the peninsula and the region, would ultimately ensure that effective action was taken. That is the assumption of the Responsibility to Protect.

The world has therefore reached a moment of truth over DPRK. The international community and anxious people everywhere will be watching closely the consideration of the COI report. I am hopeful that

⁴⁵ The aggregate use of the veto by the permanent members of the Security Council to 2014 is: China (10); France (18); United Kingdom (32); United States of America (83); USSR/Russian Federation (129) making a total of 269. Of these 59 have been used to block the admission of new members and 43 to block appointment of a candidate for Secretary-General. China (since the Peoples Republic of China secured the seat has been the most reticent in the exercise of the veto. See United Nations *Document Research Guide*.

the outcome will be positive. The human rights of the people of DPRK demand it. The peace and security of Korea and the region require it.

DENOUMENT

There is a final consideration. The conduct of the COI's investigations and of public hearings in which victims gave their testimony had their own value. They permitted the victims to recount their experiences before the international community. Collecting and recording such testimony has a value for the history and the dignity of nations and peoples. The record will be valued in the future when respect for human rights has been restored throughout Korea.

At the HRC and in the General Assembly meetings, representatives of nations in the former Soviet Bloc affirmed to the COI both publically and privately the importance of historical materials in the circumstances of their own recent experiences. Even if no immediately positive outcome is procured for the protection of human rights in DPRK, either from the General Assembly or the Security Council, the investigation by the COI and its report have their own intrinsic value. In a future time, the people of Korea will know that the UN human rights system responded strongly and independently to their suffering. If the response of the organs of the United Nations was not ultimately effective, this may itself ultimately stimulate improvements in the capacity of the organisation ultimately to respond. Already, an important recommendation of the COI has been adopted by agreement between the OHCHR and the Government of ROK for the establishment in Seoul of a field office of the United Nations to continue the task of interviewing witnesses, collecting testimony for

possible future prosecutions and recording this grim period in the history of Korea.⁴⁶

The COI emphasised the importance of the preservation, under conditions of security and confidentiality, of the archives and records gathered by the COI⁴⁷ by the High-Commissioner for Human Rights. In those records lie the chronicles of past and present wrongs against universal human rights. From those records will eventually emerge strong movements for change and demands for reform, accountability and vindication.

⁴⁶ COI report, 370-371 [1225(c)].

⁴⁷ COI report, 370 [1224 (e)] 371 [1225(c)]