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CHALLENGE FOR ASIA'S LAWYERS

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ABSTRACT

In this paper, the author, who was the Chair of the United Nations Commission of Inquiry on Human Rights in North Korea (COI), outlines the historical context of the division of the Korean Peninsula and the unresolved conflict of the Korean War (1950-53). He explains the background to the creation of the COI and the methodology he adopted providing its report to the UN. He describes the reactions to the report and the responses of North Korea. Initially a strategy of denial and non-engagement, this changed to a measure of engagement and production of a 'rosy' report in response to that of the COI. That report is described and criticised. Eventually, the COI report was considered by the General Assembly. The article concludes with proposals for an action plan on the part of LawAsia, and lawyers and their associations in the Asia region.

KOREA – THE DIVIDED PENINSULA

The Democratic People's Republic of Korea (DPRK) (North Korea) was created by a decision of the Allies, as the Second World War was moving to its close. Meeting in Cairo, representatives of the United

*Chair of the United Nations Human Rights Council's Commission of Inquiry (COI) on Human Rights Violations in the Democratic People's Republic of Korea (2013-14); Past Justice of the High Court of Australia (1996-2009); Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia (1993-6).

States of America, the United Kingdom and the Soviet Union agreed that, as with other lands of the defeated Axis powers (Germany and Austria) the Korean peninsula would be divided, upon the eventual defeat of the Empire of Japan, into respectively United States and Soviet spheres of influence.¹

The defeat of Japan was followed the explosion by the United States of America of atomic weapons over Hiroshima and Nagasaki in August 1945. On 2 September 1945, Japan accepted the terms of unconditional surrender. It thereby lost dominion over its empire beyond the Japanese mainland (as well as over some islands of the previous Japanese heartland). The Allies then effectuated the division of the Korean Peninsula which, until then (both during Korean rule of at least 12 centuries and during Japanese rule between 1911-45) had been governed as a single national unit. Suddenly, the two parts of Korea were divided, although the language, culture and traditions of each part of the peninsula were substantially the same.

In the northern part of the Korean Peninsula, a separate republic (DPRK) was created which was to lie within the sphere of influence of the Union of Soviet Socialist Republics. In the south, the new state that eventually emerged, the Republic of Korea (ROK) (South Korea), was to fall within the sphere of influence of the United States of America. Virtually from the beginning, reflecting the Cold War that divided the international community between 1945 - 1990, the two new Korean states were at loggerheads.

¹ The historical data recounted here is drawn from the COI report: United Nations, Human Rights Council, Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, A/HRC/25/63 and A/HRC/25/CRP.1 (7 February 2014), Chapter III, esp.[20]-[34] ("UN COI report").

In both Korean states, authoritarian regimes emerged. Eventually, in the north, a former military officer introduced by the Soviet Union, Kim Il-sung, replaced local personalities who had earlier led the resistance to Japanese imperial rule. Kim Il-sung established a political and economic regime partly copied from the Soviet model developed by Joseph Stalin. That regime was oppressive; built on a cult of personality around a supreme leader; and organised along centralised economic planning which was to prove in Korea, as elsewhere, less efficient and more autocratic than the market economy of the south, with all its defects.

In ROK, the regime was led at first by the long-time president, Syngman Rhee.² He was autocratic but observed certain democratic forms. The economic success of ROK was to come later. However, from the start, it was organised along the lines of a free market not a command economy. Before the line was drawn on the map of Korea in 1945, most heavy industry and mineral extraction had occurred in the North. In effect, South Korea had been the breadbasket for Korea.

A brutal localised conflict, the Korean War, broke out on 20 June 1950.³ Although DPRK has always alleged that this was triggered by an attack on its territory by forces of ROK, supported by the United States, this version of events was always hotly contested by ROK and the United States. Recent contemporaneous documentary evidence has confirmed the ROK version of events. Records of discussions between Stalin and Kim Il-sung, secured from the recently accessible Soviet State Archives, reveal that Stalin, for the Soviet Union and Mao Zedong for China, eventually gave way to repeated demands by Kim Il-sung for

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concurrence in DPRK's attack on South Korea. However, Stalin made it clear that Soviet troops would not participate and they did not. Thus began the cruel and bloody conflict known as the Korean War. It had devastating human, economic, political and military consequences for both Korean states. It remains an unhealed wound to this day.

After initial success, the forces of DPRK were driven back into North Korea by a United Nations force under the command of General Douglas MacArthur.⁴ This force was authorised by a resolution of the United Nations Security Council. That resolution was adopted during the temporary absence from Security Council meetings of the Soviet representative, in protest at the refusal of the Organisation to recognise the credentials for the China seat of the newly installed communist regime of the People's Republic of China. So successful were the United Nations forces that they reached the Chinese border at the Yalu River. At this point "volunteers" from the People's Republic of China (PRC) surged into North Korea. They beat back the United Nations forces, virtually to the centre of the peninsula, near where the original dividing line had existed. In this way a bond was forced between DPRK and PRC. The bond endures to this day, at least to some extent. It is sentimental, historical, economic and strategic.

An armistice was declared and an instrument signed by the chief combatants in 1953. No peace settlement or treaty has ever been signed between the parties to the hostilities in the Korean War. The border between the two Korean states is probably the most heavily mined, and closely defended, land border in the world. Behind this

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fortified division of the peninsula, the two Korean states proceeded to develop their own distinctive political regimes, economies and societies.

In the South, the ROK, following years of effective military rule, eventually emerged as a vigorous multi-party democracy with regular changes of administration that followed credible elections. In the North, a Soviet-style system of government has endured which ceded real power to the Korean Workers' Party; the Korean People's Army and a small elite gathering around the successive members of the family of the founder, Kim Il-sung (1948–1994). The succeeding leaders were, in turn, Kim Jong-il (1994 – 2011) and Kim Jong-un (2011-). Predictions that the conditions in DPRK would be ameliorated and would change, as had happened in other Soviet bloc states, with the passage of time and of supreme leadership, have not been fulfilled. Kim Jong-un inherited autocratic power. The full extent of this power and the ruthless manner of its exercise was demonstrated in December 2013 when he caused one of the most powerful men in the North Korean regime, his uncle by marriage (Jang Song-thaek), to be arrested, summarily tried and executed by firing squad.

In the south, the ROK made attempts to procure peaceful reunification and demilitarisation. Under ROK President Kim Dae-jung, a so-called “sunshine policy” was instituted. It placed the highest priority upon improvement of intra Korean relations. However, far from resulting in reunification, this period was substantially utilised by DPRK to denounce, and withdraw from the United Nations Nuclear Non-Proliferation Treaty which DPRK had ratified. An active nuclear weapons program was pursued by DPRK. This has produced the development of a reported 20 nuclear warheads. As well, a

sophisticated missile delivery system has been developed and tested. This potentially puts at risk lives and property in DPRK itself, in ROK, Japan, China and even farther beyond. It also enlarges the risks of nuclear weapons proliferation.

In the mid-1990s, DPRK suffered grave economic hardship because of a serious famine and the gross inefficiency of its domestic economy. Reports of large detention camps, where thousands of suspects and their families were imprisoned, as perceived enemies of the state, began to seep out to the surrounding world. Finding accurately the facts about human rights in DPRK was not easy. For decades, DPRK has been a closed society. Some tourism is permitted but it is closely policed and individually monitored. Unrestricted travel and easy access to all parts of the country, even for the local population, is forbidden. Free access to independent media and to the internet is unavailable to the local population. Severe restrictions are placed upon the sources of information other than those allowed by the regime. Even possessing videos or other recordings of soap operas from ROK, in the Korean language, is a serious offence. In the background of these films are the sights and sounds of the prosperous, modern and dynamic society of ROK today. This contradicts the propaganda about ROK spread by DPRK.

Apart from the reported wrongs done in and by DPRK to its own population, a state policy of abductions of foreign nationals was gradually revealed. Many of those abducted were Japanese nationals, including young people and school children transported to DPRK for seemingly trivial purposes. This conduct caused shock and deep

resentment in Japan. Many nationals of ROK were also seized causing the grief and pain of long-term family separations and uncertainty.

CREATION AND REPORT OF THE COI

The foregoing was the background to the creation, in May 2013, of a Commission of Inquiry of the Human Rights Council of the United Nations (COI). The COI on human rights violations of DPRK was created without even a call for a formal vote: such was the near unanimous concern over the reports of serious human rights violations in and by DPRK. The three members of the COI were appointed by the President of the HRC in May 2014. They were Mr Marzuki Darusman (Indonesia), the UN Special Rapporteur on DPRK *ex officio*, Ms Sonja Biserko (Serbia), a human rights expert, and myself (Australia) as chair.⁵ The work of the COI commenced in July 2013. It proceeded in a way novel for UN inquiries. Public hearings were conducted in Seoul, Tokyo, London and Washington D.C. Large numbers of witnesses came forward to give their testimony in public. The testimony was filmed and the filmed record and transcripts were quickly placed online. However, they are not available to the population in North Korea because of their lack of access to the internet and other media outlets.

The COI found many human rights violations on the part of DPRK. Some of them rose to the level of crimes against humanity. The COI concluded that it should not find that 'genocide' had been established. This was not because the deaths of many citizens were not proved but only because the legal definition of 'genocide' in the *Genocide Convention* is confined to crimes of homicide and violence directed at a

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population, or group of a population, for reasons of race, nationality, ethnicity or religion. In DPRK, the motivation for state sponsored killing of individuals and groups is usually political and social.

The COI report was publicly released on 17 February 2014. It was formally presented to the HRC on 17 March 2014. It recommended immediate improvement in person-to-person contacts between the two Koreas.⁶ It urged changes in policies on both sides of the Korean Demilitarised Zone. But it also proposed reference of the case of North Korea (specifically the crimes against humanity) to be examined by the Prosecutor of the International Criminal Court (ICC) at The Hague. Because DPRK is not a party to the *Rome Statute* creating that court, such a referral could only happen lawfully by a vote of the Security Council. Such a vote would have to conform to the requirements of the *Charter* of the United Nations. So numerous, serious, prolonged and shocking were the crimes against humanity detailed in the COI report that, if the case of DPRK were not one suitable for referral to the ICC, it would be difficult to imagine a case that would be.⁷

REACTIONS TO THE COI REPORT

In accordance with normal procedures, the HRC in Geneva debated the COI report over the ensuing weeks of March 2014. The HRC had before it not only the damning conclusions and recommendations of the COI report. It also had further evidence of a state that was refusing to conform to the normal behaviour of a member state of the United Nations:

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- * The refusal of DPRK to extend an invitation to the UN High Commissioner for Human Rights (then Ms Navanethem Pillay now Prince Zeid Ra'ad Zeid Al-Husseini) to visit the country to discuss the human rights situation and to consider technical and other assistance that might be offered to help bring DPRK into a situation conforming to United Nations standards;
- * The refusal of DPRK, in its first cycle of the new system of Universal Periodical Review (UPR), undertaken by the HRC, to acknowledge a single one of the 167 recommendations for improvement in human rights protection in the country as proposed by those conducting the UPR;
- * Additionally, DPRK had refused, from the outset, to permit the Special Rapporteur, appointed by the HRC to examine and report on human rights in DPRK, to visit the country. It has allowed no access to, or co-operation with, that officeholder. Two distinguished lawyers from Asia have held that office (Professor Vitit Muntarbhorn from Thailand and former Attorney-General Marzuki Darusman from Indonesia, the current mandate-holder). Co-operation has been nil;⁸ and
- * DPRK gave no cooperation to the COI. It refused to meet its members; declined to permit a visit to their country; and denounced the report once it was published. It repeatedly described the witnesses from North Korea who gave testimony before the COI at its public hearings “human scum”.

In the HRC, in March 2014, there were extended debates over the findings, conclusions and recommendations of the COI. Eventually, a

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motion proposed by the European Union, Japan and like-minded countries was overwhelmingly adopted. Thirty of the 47 countries voted in favour of the motion. From the Asian region the affirmative votes included those of:

- * Japan;
- * Kazakhstan;
- * Maldives;
- * Philippines; and
- * Republic of Korea.

Six countries only voted against the motion (and thus the COI report). These were Cuba and Venezuela together with four countries of the Asia region:

- * China;
- * Pakistan;
- * Russian Federation; and
- * Vietnam.

A most disappointing feature of the vote of the HRC was the vote to abstain cast by leading democracies of the Asian region, whose own struggle for independence, fundamental human rights and the rule of law has been so important to their resulting societies. I refer to:

- * India; and
- * Indonesia.

The abstention of South Africa in the HRC, whose struggle against apartheid was so notable and supported by so many freedom-loving nations of the United Nations - was specially disappointing because of the racist *Songbun* policy of DPRK revealed in the COI report. This is a policy that classifies the population rigidly into categories according to perceived (often inherited) political inclinations. There was also evidence of prejudice and discrimination against women who had become pregnant to foreigners (mainly Chinese citizens) because of the “impurity” that their conduct introduced into the Korean race. In the face of such evidence, it is difficult to know what kind of case or which arguments would attract the engagement and endorsement of the countries that abstained. What more could the United Nations human rights machinery do in order to elicit a shared concern and a sense of solidarity to help achieve reform and change to the human rights situation in DPRK.

Specially notable was the support voiced for the COI report at the HRC and elsewhere by countries that had formerly been members of the Soviet bloc. Of those countries, which were current members of the HRC at the time of the vote in March 2014, the following voted in favour of the resolution:

- * Czech Republic;
- * Estonia;
- * Kazakhstan;
- * Former Yug. Rep. Macedonia;
- * Romania.

Following the resolution of the HRC, three Security Council (SC) members (France, United States and Australia) called for an “Arria” briefing. This is a procedure which, without convening a formal meeting of the Security Council, allows an informal meeting of member countries so that they might receive an informal briefing on a matter of perceived relevance to the functions of the Council. This took place in New York on 17 April 2014. Two of the Permanent Five member countries of the Security Council (China and the Russian Federation) absented themselves from the briefing. However, the remaining 13 participants attended. Most spoke strongly in favour of the COI report. Of the 13 participants, 11 spoke and 9 expressly declared themselves in favour, to some degree, of the proposal to refer the case of DPRK to the ICC.

No state that spoke at the HRC or the ‘Arria’ briefing of the SC criticised, or sought to correct, any particular factual or legal findings of the COI. The typical objection of the 6 nations which, in the HRC, voted against the resolution was addressed to the ‘country specific mandate’ of the COI. This was presented as an objection of principle. However, once the majority of members of the HRC (without a vote) had created a COI in the case of DPRK, the refusal to consider the resulting report, by reason of a procedural objection to its creation in the first place, is highly formalistic. Where the highest organs of the United Nations have received detailed and believable evidence about grave human rights abuses, a refusal to consider them, or even to consider what should follow from them, is tantamount to condoning shocking international crimes in the face of the evidence showing that such crimes have probably occurred.

All of the talk in the organs of the United Nations about the Responsibility to Protect (R2P) for international crimes;⁹ accountability for international crimes; and a UN strategy of 'rights up front' will appear hypocritical if, in the face of damning evidence assembled by a COI, a substantially formal objection to the happening of the investigation is cited as a reason for ignoring credible testimony and the conclusions that it has presented.

RESPONSES OF DPRK FOLLOWING THE COI REPORT

The COI report and the resolution of the HRC were transmitted to the United Nations General Assembly (GA). In November 2014 the Third Committee of the GA considered the report. A number of events occurred in New York prior to the resolution. On 23 September 2014, an event, organised by civil society organisations concerned about DPRK, took place in New York. The United States Secretary of State, John Kerry, attended this event to outline the United States' stance. A further event occurred on 22 October 2014 in the United Nations building. I participated in that event. There will be many formal and informal engagements in the weeks ahead.

Obviously concerned by the very strong vote that had been taken in the HRC in March 2013, the equally strong support for the COI report voiced in the 'Arria' briefing before members of the SC in April 2014, the deep concern expressed in 'side events' of the General Assembly in the ensuing months and widespread publicity attaching to the report in the local and international media, DPRK entered upon a new strategy. This

⁹ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington D.C., 2008).

was seemingly designed to head off the strong wave of sentiment, and sense of outrage, demanding that action should be taken on the COI report, including referral to the Security Council and the International Criminal Court (ICC):

- * Within the HRC, after the March 2014 vote on the COI report, DPRK revised its approach to the UPR process conducted by the HRC. In its second cycle review of the conclusions and criticisms voiced in the response to its human rights report, DPRK announced that it had “evolved” to a position of accepting 81 of the initial first cycle’s 167 recommendations. Following the second cycle of UPR, it accepted 113 out of the HRC’s 268 recommendations fully and 4 partially. It noted 58 further recommendations. It rejected 93. None of the recommendations accepted concerned proposals touching the political powers of the state, party and military in DPRK;
- * In response to the strong and sustained criticism by Japan of the state policy of abductions of Japanese and other nationals, DPRK in secret talks, agreed to a meeting in Mongolia between members of the family of one Japanese abductee and her parents living in Japan. The abductee (Megumi Yokota) had disappeared on 15 November 1977, allegedly seized on her way home from school.¹⁰ She was alleged to have died in DPRK in 1993. Her ‘remains’, later returned to Japan, did not produce a positive DNA test. However, the meeting of her parents with their granddaughter was hosted by Mongolia. It constituted an apparent breakthrough of sorts;

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- * On 13 September 2014, a civil society organisation in DPRK, obviously speaking with the authority of the regime, published a report on the state of human rights in DPRK. A spokesman for DPRK had earlier predicted that this report would be produced and would prove 'rosy', so far as the state of human rights in DPRK was concerned. The report contained few surprises.¹¹ There were frequent denunciations of the United States of America, Japan, ROK and their 'lackeys'. There was an exposition of the formal state structure and legal system of DPRK, asserting that this was human rights compliant. DPRK insisted on its right to sovereignty and its immunity from pressure from the international "human rights racket". It declared that its own human rights record was excellent because of the privileges enjoyed by its citizens because of its 'unique system of socialist production'. It asserted that it enjoyed a legitimate entitlement to defend its political system against the 'hostile forces [ranged] against the DPRK and its socialist system';
- * In September 2014, DPRK decided to send a large team of competitors to participate in the Asian Games in Incheon in ROK. Moreover, it arranged for a high level delegation from DPRK to attend the closing ceremony and to have discussions with ROK. An initial agreement (later cancelled) to re-open inter-Korean talks on reunification was announced.
- * In October 2014, briefings of member countries in the United Nations by DPRK officials began to be more candid about the existence of the detention camps described in the COI report, revealed in satellite images but always denied by North Korea. The DPRK spokesman, Choe Myong Nam, conceded that

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unidentified labour camps “lack facilities for people to rest and bathe”, allegedly because of “external economic pressures.”¹² The long denied camps, which the COI estimated to contain 100,000 to 120,000 detainees held for political crimes, were described in chilling terms by the COI witnesses. It emerged that they do exist after all. However, the blame for their privations was blamed on the UN sanctions not the cruelty of the regime and its control of political dissidents. News stories began to trickle out of steps being taken to empty some of the camps of detainees so that, if eventually opened up to UN inspection (so far denied) the conditions described in the testimony will have been improved or at least ameliorated;

- * Also in October 2014, a spokesman for DPRK indicated, for the first time publicly, that it would be opening up a dialogue with the European Union that would include the issue of human rights;

The procedures adopted by DPRK in preparing its self-exculpating “rosy” report may be contrasted with the transparent procedures adopted by the United Nations COI in producing its report of the HRC:

- * There were no reported public hearings in DPRK and, no reported opportunities for free input by individuals or civil society. The DPRK’s report bears the hallmark of bureaucratic prose. It is full of praise for the government and institutions of DPRK and devoid of acceptance of specific needs for any improvement in its basic regime or its record on human rights;

¹² Democratic People’s Republic of Korea, Association for Human Rights Studies, *Report*, posted 13 September 2014

- * No access has been given to citizens of DPRK to read and consider the COI report. Although this is available internationally online, access to the internet is not available in DPRK, except for a small elite. The secretive procedures of DPRK, the lack of transparency and the difficulties of readability of the report may be compared to the transparency observed by the UN COI; the widespread availability of film and transcripts from the public hearings online; and the free access to media and openness to criticism evidenced by the COI and its members. Particular findings and conclusions of the COI are not tackled, contested or contradicted by reliable or objective evidence. The DPRK report merely resorts to insults and attacks of a general character on the COI and its members. These carry little conviction;
- * The DPRK report repeatedly defends the indefensible, including the reported near or even actual 100% turnout at elections and voting for the candidates of the ruling party in DPRK. The particular adulation reserved to references to the members of the Kim family contrasts with the neutrality and general understatement of the style of the COI report and the testimony of its witnesses; and
- * Whereas the COI report is readable and made the more vivid by the testimony of the refugee witnesses who recount their own experiences, the DPRK report is turgid; enlivened only occasionally by vitriolic adjectives which are mainly deployed to denounce nations and individuals regarded as hostile to DPRK.

CONTENTS OF THE DPRK REPORT

A sample of the attitudes expressed in the DPRK report towards the COI may be found in the following passages:¹³

“The US and Western countries misuse universality of human rights standards established in the international human rights instruments and they are going to endless lengths in their manoeuvres to force their “human rights standards” upon other countries as they did before. These countries make the rumour afloat that their “human rights standards” are the “fair standards” and “the best standards” which can be decided... [However, they are] reactionary ones applied in the imperialist way of thinking, with the view of value and way of life which look down, oppress and dominate others... It was proved vividly that “COI” attempted to bring down the DPRK by collecting the prejudiced “data” without any scientific accuracy and objectivity in the content and raising the publication of “report” of intervention which is extreme in the selectivity and double-dealing standards.”

Later, the DPRK report warms to this theme:¹⁴

“The south Korean authorities go mad to defame the dignity and system of the DPRK, taking part in the US smear campaign against the DPRK’s human rights. The Intelligence Service and all other plot-breeding organisations guide the people to south Korea and bribe them to talk evil about the DPRK in international arena. They also play the role of

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“witness” in the slanderous propaganda completely forgetting that they are people who committed crimes in the DPRK and fled to other countries, leaving their family. The south Korean authorities used the dirty and worthless human scums as the “witness” in fabricating the anti-DPRK human rights report and instigated them to slander the socialist system of the DPRK in parliaments and debates held in US, UK, Switzerland and etc. Furthermore, they made films and published books, full of testimonies given by these scums. They are devoted to [brainwashing] the human scums and train them as the brigade in the malicious propaganda against the DPRK. Under the protection of the south Korean authorities hundreds of thousands of leaflets, defaming the system and dignity of the DPRK, were spread around the areas of the demarcation line... Meanwhile the authorities flocked together with the outside forces to intensify the smear campaign against the DPRK on the human rights in UN and co-sponsored with them in the UN Human Rights Council to prepare falsified document on the DPRK’s human rights, claiming that “evidence is needed for the international community to take military action concerning with the human rights of the north.” What’s more, south Korean authorities volunteered for the instalment of “field-base structure of north Korean human rights” and tried desperately for instalment in south Korea. Whatever the US and its followers slander the human rights situation in the DPRK, they can’t fabricate the actual situation in the DPRK and what’s more they can’t dismantle the socialist system that ensures the protection and promotion of the genuine human rights of the Korean people.”

Although the quoted passage about taking “military action” appears as an apparent quotation, its source is not identified (unlike all such sources in the COI report). No statement of “military action” was ever

propounded by the COI nor by the nations which in March 2014 voted in the HRC for action on the COI report. Nor did the COI report or the HRC resolution ever propose regime change as a solution to the human rights abuses found in DPRK. The sole demand of the COI report was that, as a member country of the United Nations, DPRK should comply with the requirements of the *Charter* of the United Nations and the UN treaties, many of which DPRK has itself ratified.

The major thrust of the argument in the DPRK report is addressed to the insistence that, as a “sovereign” country, DPRK is not answerable to the demands and pressures of the international human rights system or international law. This repeated insistence throughout the DPRK report upon an absolute view of the ambit of national “sovereignty” is inconsistent with the international legal system established by the United Nations *Charter*. Under that system, both to protect the “Peoples of the United Nations” (in whose name the United Nations is founded) and to defend the universal human rights of people everywhere, the nations that created the new Organisation agreed that henceforth state “sovereignty” – as previously understood – would be given content subject to the obligations freely assumed by the nations subscribing to the UN *Charter*, and by ratifying the treaty law made under the *Charter* or otherwise applicable to its members.

To rely on national “sovereignty” as if all of the events that occurred before and since 1945 were of no effect, is simply a mistaken appreciation of national sovereignty in the law of the post *Charter* world. The developments that have occurred since 1945 have happened, in part, because of a recognition of the fact that war crimes, genocide and crimes against humanity, happening within national borders, can

sometimes occasion grave risks to international peace and security. As the *UNESCO* Constitution stated, soon after the birth of the United Nations, “since wars begin in the minds of men, it is in the minds of men that the defences for peace must be built”.

DPRK has ratified many of the core UN treaties on human rights. In the DPRK’s own human rights report, it concedes that:¹⁵

“International human rights instruments are ... “junior international law” for their immense scope and context and are divided into several categories... International human rights instruments are distinguished from other international laws as they cover all issues concerning human rights and lay down principles for its promotion. International human rights instruments sent forth as their basic principles respect the dignity and value of person, prohibition of all forms of discrimination, ensurance of freedom and equality. They play an important role for promoting human rights both at the national and international level”.

Despite this apparent concession to the realities of the international community today, DPRK insists that:¹⁶

“Each nation applies an international human rights convention based on its approval and ratification of the convention however, provisions set forth in the convention should not be applied without any consideration. As the situation, condition and standard of human rights vary according to each country, it is necessary to consider the will and requirement of the

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country concerned in interpreting and applying the international human rights instruments”.

This, then, is the ultimate assertion of DPRK’s position on universal human rights law – including as that law is envisaged by the United Nations *Charter* and expressed in United Nations human rights treaties. International human rights law is fine, so it seems, for DPRK. But only so far as it reflects the “will and requirement” of the country concerned, specifically of DPRK itself. This asserts the entitlement of DPRK effectively to ignore the language of each human rights instrument; its clear intent; the institutions that have been created to give effect to the instrument; the organs of the United Nations designed to implement, elaborate and uphold the instrument; and the body of international expert and juridical opinion concerning its legal requirements.

If this view of “sovereignty” and international legal obligations were to prevail, DPRK would plunge the world back into the lawless jungle of the world, a world before the United Nations. That was of uncontrolled national “sovereignty”. If such an entitlement were demanded by a law-abiding, democratic and peaceful nation, with a recognised record of human rights compliance, it would be serious enough. Instead, it is the assertion by a nation possessed of extremely dangerous nuclear weapons; developed in secrecy and by duplicity; expanded in the face of treaty obligations now denounced; and enlarged so as to provide a threat to peace and security in the region of DPRK and in the world. If our planet were to become a collection of nations with the nuclear, military, missile and human rights disrespecting attitudes as expressed by DPRK in its ‘rosy’ report, the long-term survival of the human species

would be in doubt. The danger to humanity and to international peace and security would be grave.

Every now and again in the DPRK's report, glimpses are allowed into the *Realpolitik* that lies behind the assertion that the power holders in the DPRK must always have the last say as to the meaning and application of the international legal instruments to which that country has subscribed. Take the following extracts from the DPRK report as examples (with emphasis added):

- * "Human rights could be only guaranteed by principled standards which respect the principle of international law and demand of people in *each country* not by the *arbitrary "standards" geared towards the narrow, selfish and vulgar purposes*";¹⁷
- * "Election laws on the reflection of the intention of the popular mass for the first time in the history of the DPRK regulated the content to make people elect representatives directly. Thus 99.6% of the whole electors participated in the election. Approval rate was 97% in election of provincial areas, 95.4% in the level of the city and 96.9% in the level of the country... The fact that the candidates from all walks of life were elected and broad masses of people participated in the election and cast the favourable vote, showed that election laws established in Korea were democratic one which reflected exactly the demand of the people who exercised the political rights though election";¹⁸
- * "The fall of the Berlin Wall, the symbol of Cold War between the East and West, in November 1989, led to the collapse of socialism

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in several countries of East Europe and eventually the dissolution of the Soviet Union... For this reason, the DPRK conducted the work of further strengthening the functions of people's *democratic dictatorship* and increasing the nation's defence capabilities in every way. The important thing here is that the state structure has been turned in to the one of attaching importance to national defence";¹⁹

- * "The work of protecting and promoting human rights is closely related to the stand and attitude of the law enforcers and social workers who are directly responsible... [They must] possess sound view and attitude towards people and high level of legal knowledge. That is why the *DPRK Government performs the rank of law enforcers and social workers including government officials, judges, lawyers, prosecutors, people's security officers with true faithful servants of people* and regularly organises events for them such as short-term, in service training...";²⁰
- * "According to the regulation on facilitating assemblies and demonstrations, a notification is made to the People's Committee and People's Security Organ of the corresponding area three days prior to the holding of the assembly or the demonstration. A written notification should mention the purpose, date and time, location, organiser and size of the demonstration. The notified organ (People's Committee and People's Security Organ) provides assistance to ensure necessary conditions, safety and order for the assembly and demonstration... *Prohibition of anti-government associations is a matter of vital importance related to the destiny of the Republic and the prospect of the protection and promotion of*

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*people's human rights under the situation where the US and western countries are attempting to undermine the socialist system of the DPRK by creating and instigating such associations" ...;*²¹

- * *"Freedom of religion is allowed and provided by the State law within the limit necessary for securing social order, health, social security, morality and other human rights. Especially, the government prevents the religion from being used to draw in foreign forces or harm the state and social order";*²²
- * *In recent years the US is kicking up a row about "arbitrary imprisonment", "extra judicial execution", "torture" and "abduction" by using riff raff of all kinds. As far as those riff raffs that the US is using as "witnesses" are concerned, they are fugitives that committed extremely serious crimes against the country and people. They are terrorists that oppose the social system of the DPRK where people enjoy the genuine life and happiness and they are the objects of punishment by the criminal law of the DPRK... The subjects of death penalty are the criminals that committed extremely serious crimes of plotting to overthrow the government, terrorist acts, treason, sabotage and subversion, international murder, drug trafficking and smuggling";*²³
- * *Right to adequate standards of living is important to the socio-economic rights of the people... At present people in capitalist countries are in deep agony over the heavy burdens of living expenses. People in the DPRK, thanks to its people-oriented policy, are living with no worries of paying for food and house fee from the moment of their birth. This fact alone proves that the socialist system of the DPRK is the land of bliss for the people.*

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Efforts are made in the DPRK to ensure the rights of the people to adequate standard of living by increasing agricultural production, developing light industry and effecting a turning point in construction"... The state takes steps to make sure educational bodies have the right contents of education in accordance with educational purpose and characteristics of subjects...".²⁴

- * *"Members of the "COI" are despicable human rights abusers bribed by the US and its allies to distort the facts and deliberately tarnish the image of a sovereign state. The HRC makes a fuss about fictitious "human rights situation" based on false documents, fabricated by those criminals and attempts to put political pressure. This arouses doubt on whether the HRC is an international body serving for the purposes of human rights"; and*²⁵
- * "Since 2003, adoption of "resolution" on human rights against the DPRK every year, followed by the set-up of the "Commission of Inquiry" and *fabrication of its "report"* has nothing to do with international co-operation for promotion of human rights but is a product of political confrontation and plot by the US and its satellite forces."²⁶

PROGNOSIS AND ASSESSMENT

Some of the infelicities of expression in the DPRK report may be the result of imperfect translation. Some may be occasioned by a lack of familiarity with contemporaneous use of the English language. Setting such considerations aside, the net impact of the DPRK report on its own human rights record is still sobering. It presents a country, sheltering

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behind its dangerous military, nuclear and missile capabilities, belligerently indifferent to the attitude to it of the civilised world and insistent on its “sovereign” right, in effect, to join the United Nations but still to ‘go it alone’. If the issues in DPRK are studied, not from the stand point of geopolitics but from the perspective of the people living in that country, it appears clear that those people could not safely, or at all, look to their government to uphold their human rights. Certainly, DPRK holds itself entitled to ignore their human rights as expressed in the international instruments of the United Nations; as expounded by the treaty bodies; as investigated by the special procedures and COIs; and as upheld by the high organs of the United Nations (HRC, GA and SC).

It may prove impossible in the short run to secure the efficient and essential implementation of the findings and recommendations of the COI, as the COI has proposed. Most especially, it may prove impossible to have the crimes against humanity, found by the COI on reasonable grounds, investigated by the Prosecutor of the ICC and, if prosecuted, resolved by the decision of the independent international court with appropriate jurisdiction, the ICC. The COI examined other possibilities of authoritative resolution (a specialist tribunal; a joint trial chamber; or eventually national tribunals still to be established after a significant change of heart on the part of DPRK). But the COI concluded that the cheapest, most efficient and speedy response, appropriate to the finding of widespread, prolonged and substantial crimes against humanity, was referral of DPRK to the specialist court already in place to receive such jurisdiction by decision of the international community expressed by the Security Council.

If this and the other possible remedial measures are frustrated by a loss of will on the part of the international community; or by the exercise of a 'veto' by permanent member(s) of the Security Council; or because other hurdles and priorities get in the way, all is not lost. One of the specific recommendations of the COI was the establishment, in the region, of an appropriate "field office" of the United Nations.²⁷ This, it was hoped, could continue to collect testimony on complaints of human rights abuses by DPRK and thereby to bear further witness to the complaints of suffering recounted by the many witnesses willing to do this both in the ROK and elsewhere.

Even at some risk to themselves and their families, witnesses came forward. Their suffering and that of their families, loved ones, neighbours and work comrades impelled them to testify to the COI. They are not "human scum" as DPRK says in its 'rosy' report. They are proof of the unquenchable courage that exists in the human spirit. Providing them with a platform and giving them a voice to the highest levels of the United Nations and to the internet audience throughout the world (but not DPRK) was itself an important achievement of the COI on DPRK. The authorities in DPRK know this. It helps to explain the exceptional steps of purported 'engagement' DPRK assumed after September 2014 in an attempt to head off the long overdue response of the international community to its many wrongs and crimes. The government of ROK has agreed to the request of the UN High Commissioner for Human Rights to establish a field office, as recommended, in its territory. When set up in early 2015 the UN field office will continue the task of collecting testimonies and recording them

²⁷ DPRK Report.

as part of the history of the Korean people during this discouraging and painful era.

Eventually, the burdens described in the COI report on DPRK will be lifted from the people of North Korea. Change will happen. How it will happen and when exactly it will occur are as yet uncertain. But contemporary history tends in the direction of universal human rights. This may be because of an element, deep in the human DNA, that thirsts for rationality, justice, kindness and love for one another. Whatever the ultimate source of the impulse and whatever time it takes to resolve the crisis of human rights violations in DPRK, change will occur. The COI report will contribute to change. So will the political actions already taken and to be taken by the United Nations.

THE DUTY OF LAWYERS TO RESPOND

There are some sections of the DPRK report on its own human rights that are specially interesting to lawyers and legal professional associations. These include descriptions of particular legislation (on elections, on labour law, on gender equality and ‘socialist human rights’). And sections on constitutional law and on the law as it relates to the judiciary, tribunals, lawyers and notaries public. There is even a section on laws protecting intellectual property rights and on organisations relevant to human rights. The named lawyers’ organisations include:²⁸

- * The DPRK Association for Human Rights Studies;
- * The Korean Lawyers’ Society; and
- * The Democratic Lawyers’ Association of Korea.

²⁸ DPRK report. The Juche policy instituted by Kim Il-sung is described in the COI Report, 33 [126].

The Korean Lawyers' Society is said to have been founded in November 1945. Its task is said to be to explain the laws to the country and people and to provide legal aid to assist the courts. It is said also to work "to develop the co-operation and exchange with lawyers' organisations of other countries". The Democratic Lawyers' Association of Korea was founded in 1954 "with the mission of defending and implementing the DPRK government's ideology and policy on law and strengthening and defending the law system of the Republic including the human rights law system". This body is said to enjoy co-operation with "international and national organisations of lawyers of progressive nature including the International Democratic Lawyers' Association".

According to the DPRK report, lawyers and other citizens are expected to be educated in the "theory and law on human rights" as propounded by the *Juche Idea* expounded by the founder of DPRK, Kim Il-sung. The DPRK report states:

"As the graduates who acquired the *Juche oriented human rights ideology, theory and law and the international human rights law* in the regular education networks advanced to various fields of the state and society, the work of protecting and promoting human rights in the DPRK is being carried forward evermore splendidly."²⁹

The DPRK report contains argumentative and critical statements (together with some fair comment) on alleged abuses of human rights in other countries notably the United States of America, Japan, the European Union and 'south Korea'. These criticisms now circulate freely

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in most other countries by way of the internet. Such freedom contrasts with the total absence of open circulation in DPRK of the COI report and of the ensuing international criticism of the closed society of DPRK.

A small number of human rights do appear to have improved in the DPRK in recent years. Improvements are acknowledged in the COI report. These improvements relate, for example, to medical care; food availability; increases in compulsory education; and the protection of people with disabilities. These lights are, however, the more noticeable because of the generally dark landscape in which they appear.

The violations of human rights in DPRK, revealed in the COI report, are a blot on the history of that country. However, they are also a blot on the record of lawyers, especially in the Asia/Pacific region. We have been too complacent. We have been silent when our voices should have been raised. We have turned away from this 'hermit kingdom': with its absolute monarchy, mass games and the strange relics of its Stalinist past. Our countries and our Bar and legal associations have not been adequately insistent on (or contributing to) change.

Of the 6 countries that voted against the COI report in the HRC, 4 were from Asia. Of the great democracies of Asia, heralds of the advance of the rule of law worldwide, two abstained when it came to a vote. How could a nation abstain in the face of the powerful evidence of wrongs of North Korea? What did lawyers and lawyers' associations in our region do to discourage, or protest at, such a response? How can we raise awareness amongst our colleagues, institutions and communities in Asia? Why should we be indifferent to the burdens imposed on the

ordinary people of North Korea, simply because we have recently had very few links with them?

The citizens of DPRK are human beings. They are entitled to the protection of their human rights. They have the same desires as all humans do: for safe, peaceful and happy lives; for enough food for their nourishment; for education for their children and young people; for healthcare in the case of accidents and illness; for freedom to move about and to work; for access to the global explosion of information and diverse knowledge; and for enlargement of the spirit and of arts cultivated in creative freedom.

Lawyers, by their vocation, know about universal human rights. They have been leaders in their formulation, adoption and implementation. They know the imperfections of the law and of the efforts of every nation to meet high global standards. Lawyers are people of practicality. However, lawyers are also people of principle. These are also the features of the international law of human rights is.

Lawyers of Asia should consider the COI report on DPRK. They should watch, online, films of the COI's witnesses. They should read the transcripts of their testimony. They should listen to the pleas for action by the victims. They should be insistent on the legal accountability of those proved responsible for crimes against humanity. Accountability for wrongs against international law. Accountability before an international court or tribunal having jurisdiction and expertise obliged to afford due process, to protect the vulnerable and to uphold universal human rights. The case of DPRK has been a shameful chapter for lawyers in our region. Like so many others, Asia's lawyers have simply turned away.

Bodies such as LawAsia, should adopt a well-informed response to DPRK. LawAsia should embrace a five point plan:

First, to reach out to DPRK. After consultation with the Korean Bar Association in the ROK, LawAsia should address the Korean Lawyers' Society and the Democratic Lawyers' Association of Korea. It should review past links and establish appropriate connections. Isolation breeds hostility and misunderstanding. Person to person contact of such kinds was expressly urged by the UN COI in its report.

Secondly, LawAsia should renew connection with the appropriate professional lawyers' association in China. Quite apart from the inherent importance of such a move, any such re-connection may be an effective precondition to achieving improvements in the state of human rights in DPRK;

Thirdly, LawAsia should take appropriate steps itself to consider the COI report. It should express its views to the leadership of the United Nations and the governments of constituent countries. At stake are the rule of law and universal human rights (as well as peace and security) in the Asian region. Just imagine if a comparable report had been available in the 1930s in relation to the totalitarian regimes operating at that time. Yet international lawyers' organisations have averted their eyes and done nothing. It is time that LawAsia took a stand on this cancer in the midst of the Asian region.

Fourthly, constituent Bar Associations and Law Societies of LawAsia, in nations that abstained in the votes on the COI report, should express their views to their governments and lobby for affirmative action on it.

The report and follow up by the politicians and diplomats of their countries. Crimes against humanity, as reported by the COI, are very grave crimes. There is responsibility to protect the people of DPRK. Lawyers in Asia should be foremost in calling for that protection

Fifthly, LawAsia should begin preparing a comprehensive action plan, including fellowships, scholarships, conferences and other initiatives, to promote real change in DPRK when access is finally granted and improvement becomes feasible.

Let the lawyers of Asia read the 'rosy' report of DPRK lately delivered. Let them also read the COI report of the United Nations. Then, I believe, there will be action. DPRK is part of the Asian region. Its dangers are ours to prevent. Its burdens are ours to share.