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THE LAW

SPECIAL SECTION ON DPRK

INTRODUCTION

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### INTRODUCTION

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For decades, the international community has turned its back on North Korea and the suffering of its people. In words quoted by Dino Kritsiotis, “the self-styled Democratic People’s Republic of Korea (DPRK) has become the world’s most isolated country”.<sup>1</sup> It causes revulsion or horror to its critics; exasperation to its traditional allies; and puzzlement to most of the rest of humanity.

It is was in this context that, in December 2012, the then United Nations High Commissioner for Human Rights, Navi Pillay, as explained by Danielle Chubb,<sup>2</sup> in her chapter called on the Member States of the United Nations to pay more attention to human rights in North Korea. She said that this was needed “because of the enduring gravity of the situation... one of the worst – the least understood and reported –

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\* Chair of the United Nations Human Rights Council’s Commission of Inquiry on Human Rights Violations in DPRK (2013-14); Justice of the High Court of Australia (1996-2009). Honorary Professor, University of Hong Kong. Personal views.

<sup>1</sup> Dino Kritsiotis, ‘North Korea, Starvation and an Ongoing Crime Against Humanity’ *Asia-Pacific Journal on Human Rights and the Law* (January 2015).

<sup>2</sup> Danielle Chubb, “North Korea Human Rights and the International Community: Responding to the UN Commission of Inquiry” *ibid* (January 2015).

human rights situations the world.” “An inquiry” she declared, “was overdue”.<sup>3</sup>

Soon afterwards the United Nations Human Rights Council (HRC) established a Commission of Inquiry (COI) on Human Rights Violations in DPRK. When the proposal to create a COI came before the HRC, it was adopted without a call for a vote.<sup>4</sup> In such usually charged and hotly contested decisions, a vote is always called for. It was a measure of the impatience and sense of obligation on the part of the international community that the COI was created without dissent in early 2013. This was the first of many unusual features of the United Nations’ North Korea project.

The appointment of the Commissioners was also unusual. Not unusual that they should come from different geographical regions (Sonja Biserko – Serbia; Marzuki Darusman – Indonesia; Michael Kirby – Australia). However, normally, COI members are current or past professors. And usually they are selected from countries in the majority (civil law) tradition. However, two of the members of the COI on DPRK were from a background in advocacy and the judiciary (Darusman and Kirby). Unlike most organisations, the United Nations pays such mandate-holders no fee for discharging their duties: only travel allowances and transport. This may be one reason why professors with tenure have tended to predominate. Not so in the case of the COI on DPRK. Where intricate questions of international law are raised and the evaluation of evidence concerning possible charges of genocide and

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<sup>3</sup> Office of the High Commissioner for Human Rights, “Pillay urges more attention to human rights abuses in North Korea, calls for international inquiry.”

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12923&LangID=E>

<sup>4</sup> Resolution United Nations Human Rights Council 22/13 (21 March 2013).

crimes against humanity arise, the advantage of selecting practising lawyers is obvious.

After a first class secretariat, independent of the Office of the High Commissioner for Human Rights (OHCHR), was created by its ‘flying squad’, the Commissioners met promptly. They decided on a distinctive methodology. This involved the conduct of public hearings, with filmed recordings and verbatim transcripts uploaded on the internet for all to see. In part, these innovations were adopted because of the refusal of DPRK to cooperate with the COI in any way, notwithstanding the HRC resolution urged them to do so.

This third unusual feature of the COI on DPRK (public hearings) had the consequence of attracting, and encouraging, coverage by media of the often chilling and heartrending testimony of the witnesses who came forward to describe the human rights situation in DPRK as they had experienced it. Moreover, the coverage in the international media attracted the attention of the diplomatic community. Often these actors were spurred on by human rights NGOs, politicians and scholars in many countries and on every continent, who came to be aware of the human rights situation in DPRK. That country might be able to deny its own citizens access to the internet or to independent and international news coverage about the situation of human rights in the country. But it could not stifle the growing attention of international media to the COI public hearings that eventually galvanised strong reactions in the United Nations itself.

Thus arose the fourth unusual development, which was a political one. International NGOs began to find it comparatively easy to catch the ear

of diplomats at the United Nations, both in Geneva and New York. The COI members, in accordance with their mandate, gave oral updates to the Human Rights Council in Geneva (16 September 2013); to the Third Committee of the General Assembly in New York (29 October 2013); to an international media briefing on the release of the report online (17 February 2014 in Geneva);<sup>5</sup> to the meeting in Geneva of the HRC at which the report was formally presented (17 March 2014); to an ‘Arria’ briefing of the members of the Security Council in New York (17 April 2014); to a high level side event in Geneva hosted by Japan (10 September 2014); and to a side event for members of the General Assembly and Security Council in New York (22 October 2014).

Such was the growing sense of shock on the part of the members of the United Nations over what the COI had disclosed – frequently reinforced by the participation in these events of impressive refugees from North Korea who could tell their own stories – that DPRK began to realise that the earth was shifting under them. The strategy of non-engagement with the international community, that had been brilliantly successful for more than 30 years, was not working any more. Representatives of nation states were becoming increasingly insistent that something had to be done.

It was at this time that DPRK stepped up its initiatives by a ‘charm offensive’ in an attempt to avoid the growing determination of member states of the United Nations to do what they could to secure change in the situation of human rights in DPRK.

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<sup>5</sup> Report of the Commission of Inquiry on Human Rights in the Democratic Peoples’ Republic of Korea (A/HRC/25/63 (7 February 2014).

For years, a critical but somewhat anodyne resolution on the human rights situation in the DPRK had been adopted by the consensus of the member states at the General Assembly in New York. Now, the mood had changed. Watering down the resolution, so as to avoid the necessity of a vote, became an increasingly unacceptable option. It was clear that the mood of the global community had changed to one insistent upon strong action.

The political forces in the General Assembly therefore began to muster their numbers to support a resolution first circulated by the representatives of the European Union and Japan. The COI in its report had offered a graduated range of policy options for action by the organs of the United Nations, the international agencies and the nations most closely concerned over what was shown to be happening in DPRK.

To the Supreme Leader, the Workers' Party of Korea, the Korean People's Army and other agencies of the DPRK state, the COI called for "profound political and institutional reforms without delay to introduce genuine checks and balances upon [government power]."<sup>6</sup> It called for acknowledgement by DPRK of the existence of human rights violations, including in political prison camps the existence of which was long denied by DPRK.<sup>7</sup> It called for a moratorium on the imposition and execution of the death penalty;<sup>8</sup> the establishment of independent media;<sup>9</sup> the introduction of education about human rights;<sup>10</sup> and respect for religious freedom.<sup>11</sup>

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<sup>6</sup> COI report, 367 [1220(a)].

<sup>7</sup> Ibid, 367 COI report [1220(b)].

<sup>8</sup> Ibid 367, [1220(d)]

<sup>9</sup> Ibid 367 [1220 (e)]

<sup>10</sup> Ibid 367-368 [1220 (f)]

<sup>11</sup> Ibid 367-368 [1220 (g)].

An entire chapter of the COI report had been devoted to the shocking evidence of violations of the human right to food and the related aspects to the right to life.<sup>12</sup> Assuring the supply of food to a population is one of the most basic and fundamental of the obligations of government and leaders everywhere. However, during a severe famine in DPRK in the 1990s, which originated from natural causes and poor economic management, huge numbers of the population of DPRK (conservatively estimated at a million persons) died of starvation. The loss of so many people in a country with a population of 23 million; supporting the fourth largest standing army in the world, was completely unnecessary. It could have been avoided by the reduction of the huge expenditures of DPRK on military hardware; the elimination of the development of nuclear weapons and missile systems; and the abandonment of the maintenance of such a vast army, unnecessary for purely domestic defence. It could have been avoided if DPRK had accepted international humanitarian food aid, on reasonable conditions. It could have been avoided if DPRK had permitted standard conditions to be observed for monitoring of food aid, so as to ensure that it went to those most needy; not just to the elite. It could have been avoided if DPRK had only addressed the serious problem of stunting in its newborn population (estimated at 27% of all births).<sup>13</sup>

Out of either arrogance or fear, DPRK failed to adopt policies essential to save the lives of hundreds of thousands of people in North Korea. The level of infant stunting diminished a little; but it is still unacceptably high. It is a direct result of malnourishment of expectant mothers and

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<sup>12</sup> COI report, Part IVD (493-692).

<sup>13</sup> COI report, 164 [544].

newborn infants. It will produce lifelong health problems in those affected.

In addition to calling for changes in DPRK, the COI recommended action on the part of China and other states. It proposed initiatives by the international community and United Nations itself. Amongst the key recommendations addressed to the United Nations was that:<sup>14</sup>

“The Security Council should refer the situation in the Democratic People’s Republic of Korea to the International Criminal Court for action in accordance with that Court’s jurisdiction. The Security Council should also adopt targeted sanctions against those who appear to be most responsible for crimes against humanity. In the light of the dire social and economic situation of the general population, the Commission does not support sanctions imposed by the Security Council or introduced bilaterally that are targeted against the population or the economy as a whole.”

Because of the terms of this recommendation, and because of the conclusion that, based on reasonable grounds and on the evidence, the authorities in DPRK “engage in gross human rights violations” and “longstanding and ongoing patterns of systematic and widespread violations meet the high threshold required for proof of crimes against humanity in international law”, strong action was manifestly required. By international law, those leaders of DPRK who failed to use their powers to end such conduct; to ensure against its repetition; and to bring accountability its perpetrators, could themselves be potentially liable and accountable for such crimes.

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<sup>14</sup> COI report 370 [1225(a)].

Ordinary principles of due process therefore required that, when the report of the COI was supplied, in advance of release to, amongst others, to the Supreme Leader of DPRK (Kim Jong Un), the letter of transmittal should frankly give notice of the risk that the Supreme Leader might *himself*, in certain circumstances, be rendered personally accountable for failing to use his powers (if that could be proved) to terminate, redress and prevent crimes against humanity. In the letter by me to Kim Jong Un I included this statement:<sup>15</sup>

“The Commission has found that systematic, widespread and gross human rights violations have been, and are being, committed by the Democratic People’s Republic of Korea, its institutions and officials. In many instances, the violations of human rights found by the Commission entailed crimes against humanity. ... Any official of the Democratic People’s Republic of Korea who commits, orders, solicits or aids and abets crimes against humanity incurs criminal responsibility by international law and must be held accountable under that law. ... The Commission wishes to draw to your attention that it will therefore recommend that the United Nations refer the situation in the Democratic Peoples’ Republic of Korea to the International Criminal Court to render accountable all those, *including possibly yourself*, who may be responsible for the crimes against humanity referred to in this letter and in the Commission’s report.”

Some commentators have suggested that such a warning should not have been given to a person who is an effective head of state. I do not

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<sup>15</sup> COI report at 24 where the letter to the Supreme Leader is set out in facsimile (emphasis added).

agree. Due process applies to everyone. If, in certain contingencies, there was a possibility that the report of the COI might lead to personal responsibility on the part of the recipient of the letter, a failure to have mentioned that possibility would have amounted to duplicity. It would have involved a failure candidly to bring the risk of personal liability to notice, so as to afford the recipient the opportunity to act as the law might be held to require.

Due process is not always observed in DPRK. In the hasty, violent arrest, trial before a military court and death by execution in December 2013 of Jang Song-thaek (uncle by marriage of the Supreme Leader), due process appears to have received little attention. However, officers of the United Nations must itself always act in accordance with the fundamental principles of human rights. This the COI did and hence its warning.

The notice to the present Supreme Leader of DPRK<sup>16</sup> appears, at least, to have helped the launch a ‘charm offensive’:

- \* The Kaesong Industrial Complex was reopened after a peremptory closure;
- \* The Family Reunion lottery was recommenced after earlier sudden cancellation;
- \* For the first time, DPRK took an active part in the Universal Periodic Review procedure instituted by the HRC. It identified a number of recommendations from the HRC that it accepted;

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<sup>16</sup> A/HRC/25/63, 23-25 (Letter to Supreme Leader dated 16 December 2013);

- \* DPRK in September 2014, published its own report on its human rights. As predicted by it, this was ‘rosy’, uncritical of the regime and hagiographic of the leadership. But nothing like it had been done before;
- \* DPRK’s Foreign Minister offered to engage in discussion of human rights issues with representatives of the European Union and on abduction issues with Japan;
- \* A high level political officer of the Korean Peoples’ Army flew unexpectedly to Incheon, in the Republic of Korea, attended the closing events of the Asian Games and committed DPRK to reopening the inter-Korean dialogue after many years of suspension; and
- \* DPRK, in the weeks before the vote in the General Assembly, released 3 United States nationals who had been arrested whilst travelling in DPRK as tourists.

The ‘charm offensive’ may be seen as an attempt to forestall resolute action by the General Assembly and the Security Council along the lines proposed by the COI. Its effectiveness was put the test in the Third Committee of the General Assembly by an amendment proposed by Cuba to the draft resolution circulated by Japan and the European Union in November 2014. The Cuban amendment said:<sup>17</sup>

“[The General Assembly] *Decides* to adopt a new cooperative approach to the consideration of human rights in the [DPRK] that will enable: (a) the establishment of dialogues by representatives of the [DPRK] with States and groups of States interested in the issue; (b) the development of

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<sup>17</sup> Draft resolution A/C.3/69/L.C.3/69/L.63. The vote on the Cuban amendment was 40 for the amendment; 77 against; 28 abstentions. Cuban amendment, 3 November 2014.

technical cooperation between the [OHCHR] and the [DPRK]; and (c) the visit of the Special Rapporteur on the situation of human rights in the [DPRK] to the country.

After a heated debate and a contested vote, the amendment was defeated. Three great democracies, which had earlier struggled for their own freedoms, India, Indonesia and South Africa, abstained. But the Cuban amendment was decisively voted down.

After further acrimonious debate, on 18 November 2014, the substantive resolution proposed to the Third Committee by the European Union and Japan, was put to the vote. The resolution eventually secured 62 co-sponsors. It was carried. Virtually all of the newly independent former members of the Eastern Bloc were co-sponsors or otherwise voted for the resolution (Bosnia and Herzegovina, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Moldova, Romania, Slovakia, Slovenia, Former Yugoslav Republic of Macedonia and Ukraine). This strong concurrence on the part of countries that had formerly experienced denial of human rights in some ways similar to that recounted by the COI in its report, speaks volumes for the changing concerns in the world about human rights in North Korea. No longer simply a geopolitical concern of western democracies, the powerful vote including the former Eastern Bloc countries (to which may be added Afghanistan, Croatia, Georgia and Kazakhstan) shows the strong response of those who knew best what the COI was describing and condemning.

The final vote on the substantive resolution before the Third Committee of the General Assembly was a strong one. It upheld the principles of

universal human rights recognised in the *Charter of the United Nations*,<sup>18</sup> expressed in the *Universal Declaration of Human Rights*;<sup>19</sup> and stated in the treaties that have followed (many of which DPRK has ratified).

The ultimate vote in favour of the resolution was 111 for; 19 against; 55 abstentions. The same three great democracies that had abstained in the Cuban amendment (India, Indonesia and South Africa) abstained on the substantive resolution. The South African delegate said that his country did not believe in “name calling”. Yet much of the effort of the United Nations and the global community in the 1970s and 1980s to win universal rights, equality and freedom in South Africa was derived from strong resolutions, and occasional ‘name calling’ of the Apartheid regime. The negative votes on the resolution were unsurprising. They included 2 Permanent Members of the Security Council (China and the Russian Federation), DPRK itself, various traditional allies (Belarus, Lao PDR, Myanmar, Syria, Uzbekistan, Venezuela and Vietnam; together with new DPRK supporters such as Sri Lanka and Zimbabwe). The resolution, when formally confirmed, will pass from the General Assembly to the Security Council in accordance with its terms.<sup>20</sup>

The resolution adopted by the General Assembly commends the Special Rapporteur on DPRK and the work of the COI whilst expressing regret that they had received no cooperation from DPRK.<sup>21</sup> It acknowledges the COI’s conclusion of crimes against humanity based on policies “established at the highest level of the State for decades”.<sup>22</sup> It endorses the establishment of the field office, which will be set up in Seoul,

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<sup>18</sup> The *Charter of the United Nations* 1945, Preamble.

<sup>19</sup> Adopted by the General Assembly of the United Nations, 10 December 1948.

<sup>20</sup> Resolution proposed to the General Assembly by the European Union and Japan, A/C.3/69/19, para 14.

<sup>21</sup> *Ibid*, paras 5 and 6.

<sup>22</sup> *Ibid*, para 7.

Republic of Korea, to gather further data.<sup>23</sup> And it contains the critical resolution which DPRK had most strongly sought to avoid:

*[The General Assembly]*

*Decides to submit the report of the Commission of Inquiry to the Security Council and encourages the Council to consider the relevant conclusions and recommendations of the Commission and take appropriate action to ensure accountability, including through consideration of referral of the situation.*

The adoption of the resolution, by the processes of the General Assembly, revealed a major shift in the willingness of its members to ensure that the Security Council should become involved in such a grave case involving prolonged and serious human rights violations. In the past, such steps have been defeated by the geo-political alignments within the United Nations. However, there is now a growing recognition of the truth, asserted by the UN *Charter* itself, that matters of universal human rights are intimately connected with international peace and security. Countries where grave human rights violations take place are all too frequently violent, unstable, threatening to their own people and dangerous to their neighbours. They are countries liable to cause breaches of international peace and security. North Korea is such a place.

Anyone in doubt should consider the actions taken by DPRK following the adoption by the Third Committee of its resolution. The language has been hostile and violent. The primary targets of its threats have been the United States of America, Japan and ROK. As if to underline the

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<sup>23</sup> Ibid, paras 9 and 10.

General Assembly's insistence on the inter-relationship between universal human rights and international peace and security, the state media of DPRK began warning the world of "catastrophic consequences" awaiting supporters of the moves in the United Nations to censure its human rights record.<sup>24</sup>

On 23 November 2014, the National Defence Commission of DPRK (which is chaired by the Supreme Leader) reportedly stated that the foregoing resolution of the General Assembly amounted to a "war declaration" by including the Supreme Leader in those possibly responsible for DPRK's human rights abuses. The spokesman for the DPRK was reported as saying:<sup>25</sup>

"The US and its followers will be wholly accountable for the unimaginable and catastrophic consequences to be entailed by the highest level of the state" [including to President Park Guen-Hye of ROK] "This frantic human rights racket". ... and [DPRK's response] could make Japan 'disappear from the world map for good'.

New military exercises have reportedly been initiated by DPRK. The resumption of the testing of nuclear devices has been threatened. DPRK's language has been ever more belligerent.

Some observers predict that the Security Council will back away from the response sought by the COI and now made possible by the action of the General Assembly. In a previous case concerning Myanmar /Burma, the Security Council failed, in January 2007, to adopt a draft resolution

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<sup>24</sup> "North Korea warns of 'catastrophic consequences' over UN Rights Rules, 23 November 2014, *Sydney Morning Herald* 21.

<sup>25</sup> Ibid, loc cit.

calling on that country to respect human rights; to begin a democratic transition; and to address the injustices to the Rohingya People. The majority of the General Assembly had voted in favour of the resolution in 2006. However, in January 2007, China and the Russian Federation voted against its adoption in the Security Council.<sup>26</sup> Why would those two States not do so again in the case of DPRK in 2014-15?

Of course, vetos by China and the Russian Federation against referral to the ICC are possible. However, there remain other initiatives that could be taken by the Security Council. They might not attract a veto. Unquestionably, there is now a very strong feeling in the United Nations that North Korea must change its stance on the human rights of its citizens. And that the United Nations must do what it can for the protection of the human rights of the people of that country, given the failure of their own government to defend them.

In following up the report of the COI on DPRK, the United Nations has acted in a principled fashion. Ignoring the grave crimes against humanity, recorded in the COI report, is not really an option under the *Charter* of the United Nations. There are difficulties and there are dangers. The danger of food scarcity is an acute challenge. It creates a fragile environment. It presents risks of violence and accidents having devastating consequences.

But this is precisely why it would now be timely for the Security Council to exercise its powers and shoulder its responsibilities. The situation in DPRK will not go away. Like it or not, the Council has large responsibilities for the peace of the Korean Peninsula and the safety of

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<sup>26</sup> United Nations SC doc. 14 (S/2007/14 (12 January 2007).

the world. It also has responsibilities to the people of North Korea, especially now that the United Nations has been put on notice of the protracted and terrible wrongs that they have long been suffering.

A great merit of this special section on North Korea in this *Journal* is that it addresses our attention to a place and a problem that many in our world would prefer to ignore. The dangers of action are obvious. But the perils of indifference are even greater. The ingredients for the resolution for the challenge of DPRK are now in place. They call forth a reminder of the original objectives of the United Nations. All three of its objectives are in play:

- \* The preservation of international peace and security;
- \* The defence of universal human rights; and
- \* The attainment of economic equity for all.

Rarely, since 1945, has a small country presented so many challenges to the United Nations all at once. That is why this *Journal* and the contributions it now contains are so important and timely. The question is presented: is the United Nations willing and able to respond?