

2758

NORTH KOREA HUMAN RIGHTS ADVANCEMENT
ASSOCIATION IN AUSTRALIA

CONFERENCE, KOREAN CONSULATE-GENERAL
SYDNEY

12 FEBRUARY 2015

THINKING BEYOND THE UN REPORT ON NORTH
KOREA

The Hon. Michael Kirby AC CMG

NORTH KOREA HUMAN RIGHTS ADVANCEMENT
ASSOCIATION IN AUSTRALIA

CONFERENCE, KOREAN CONSULATE-GENERAL
SYDNEY

12 FEBRUARY 2015

THINKING BEYOND THE UN REPORT ON NORTH
KOREA

The Hon Michael Kirby*

In these remarks I wish to move beyond the report of the United Nations Commission of Inquiry (COI) on human rights violations in the Democratic People's Republic of Korea (DPRK). That report was delivered to the UN Human Rights Council (HRC) on 17 February 2015. It subsequently received strong endorsement by the UN Human Rights Council, the UN General Assembly and the UN Security Council.

I want to draw attention to some little noticed recommendations in the COI report. These recommendations addressed the vexed question of how we could secure real action that improves the conditions of human rights for the people living in DPRK. So what are some of the dilemmas that face us in addressing follow-up to the COI report and real action, which many Korean hearts yearn for?

* Retired Justice of the High Court of Australia (1996-2009); Special Representative of the UN Secretary-General on Human Rights in Cambodia (1993-96); and Chair of the UN Human Rights Council's Commission of Inquiry on Human Rights Violations in DPRK (2013-14). All views expressed are personal to the author. They do not purport to have United Nations authority.

1. *Human rights and geopolitics*: In the context of UN COI reports generally (and the work of UN special procedures on human rights more generally¹), how does the Organisation move from findings of probable violations (including ‘crimes against humanity’), when action in the matter is not ultimately dependent on sound factual conclusions and clear legal principles, as it would ordinarily be in a municipal legal system, but upon political decision-making. Votes in the HRC, GA and the UN SC are dependent upon voting by political representatives of nation states. They are often affected, influenced, or governed, by geopolitical, economic, historical, cultural or other considerations that may not be determined by a desire to redress and terminate the human rights violations in question. Does this illustrate a fatal flaw, lying at the very heart of the United Nations system of human rights? That flaw is most clearly indicated in the ‘veto’ enjoyed by the Permanent Five members of the SC. Is this a reason, in the context of reform of the *Charter*, to reconsider the operation of the ‘veto’ in the context of votes on grave human rights concerns? Or is the ‘veto’ both the definition and guardian of the current realities of enforcement of international human rights law in the world as it is?
2. *Victims and perpetrators*: In the present circumstances of the United Nations, how can a serious human rights report, contribute in a practical way to the improvement of the human rights of the

¹ Ted Piccone, *Catalysts for Change: How the UN’s Independent Experts Promote Human Rights*, Brookings Institute, Washington D.C., 2012, 20 ff.

victims concerned, when it is inevitable that the report will often criticize or condemn those with power who are shown to be probably guilty of serious human rights violations? How can the UN expect follow-up to recommendations proposing that nation states, and their leaders, be held accountable before international prosecutors and judicial tribunals, when the perpetrators have a vote (possibly a 'veto') and an international platform at their disposal and the victims have no vote, little power and sometimes no voice? Does the very demand for accountability sometimes impede attainment of human rights whilst alleged perpetrators remain in effective power of the nation state concerned? Can it be seriously expected that those accused and criticized will cooperate in submitting themselves to effective accountability? Or is the risk that they will not do this an inbuilt reason why inaction in securing practical improvements in human rights the subject of UN COI report is often inevitable?

3. *Accountability, isolation and risk:* Does demand for accountability on the part of leaders and officials in what will often be an already isolated country, increase the risk of still further isolation, hostility and non-engagement? Does that risk, in itself, enhance the possibility that the country concerned may make serious misjudgements, adopt unrealistic postures or even initiate hostile action in consequence of the very isolation that demands for accountability, and their rejection, produce?
4. *Reunification, rights and realism:* In some political circles that yearn for reunification of the two Korean states, there is a belief that, if only reunification could be attained, the human rights

violations reported by the COI would be solved. But is there any realistic possibility of effective reunification of the Korean states without the “profound political and institutional reforms” recommended by the COI, including the adoption of constitutional checks and balances upon the powers of the DPRK’s Supreme Leader and the Korean Workers’ Party and other changes (COI, 1220(a))? What evidence exists of the slightest inclination on the part of DPRK to undertake such reforms when they have been repeatedly rejected, by words and action, before, during and after the UN COI Inquiry? In the absence of realistic steps to achieve Korean reunification, how can the possibility of that happening be more than a pipe dream, without any practical expectation of its attainment? Are there any analogies from which the UN might explore the possibility of realistic, relatively small moves towards reunification in Korea? In its report, the COI strongly recommended the introduction of various forms of people-to-people contacts between individuals, families, students, professionals, institutions, sporting teams and civil society bodies (COI, 1220(n), (o), 1223 and 1224). These recommendations have been ignored. They have not attracted much attention in ROK, where there are some legal and practical impediments to any such contacts. They have been ignored by international news media and in UN deliberations. But might they provide a potential pathway by which to build a ‘people-led process’ involving some peaceful avenues of reconciliation step by step? What machinery is needed to translate these modest aspirations into action? The people-to-people contacts that presently exist in Korea are paltry and inadequate. Their absence is an

impediment to initiating trust-building contacts between relevant people.

5. *Person-to-person analogies and lessons:* How can people-to-people dialogue and relationships be established? Are there any lessons from the steps that led to reunification of the American Union after the US Civil War? In Austria and Germany, divided in 1945? And in other countries afflicted with the aftermath of civil war – such as the former Yugoslavia? Are any such cases truly analogous to the situation in Korea? Where is the best starting point? The warm reactions between the ROK and DPRK football teams and spectators at the Incheon Asian Games in 2014 suggests that sport may provide a fruitful place to start.² How can such contact be made more than an accidental one-off event?

6. *Commitment to reunification in Korea:* In the absence of postal, telecommunications, internet, transport, media and other rudimentary contacts between the two Korean States, how can mutual respect and a desire for reunification be built now, virtually from scratch? Is there, in any case, such a desire now in ROK if DPRK were insistent on retaining its present political, constitutional and legal system, as its leaders insist they must do? Would the costs of reconciliation and reunification be prohibitive, as is sometimes predicted? Estimates run to trillions of dollars, given the severe current weaknesses of the DPRK economy and

²Agence France Presse, ‘Asian Games: Top North Korean Leaders to Attend Closing Ceremony’, *NDTV Sports*, Last updated: 4 October 2014, Available at: <http://sports.ndtv.com/asian-games-2014/news/230881-asian-games-top-north-korean-leaders-to-attend-closing-ceremony>. See also: Yonhap News Agency, ‘North Korea Newsletter: 338’, Last updated: 13 November 2014, Available at: <http://english.yonhapnews.co.kr/search1/2603000000.html?cid=AEN20141112006200325>, for details of the relationship between the Incheon delegation visit and future engagement.

infrastructure. Reports of disillusionment (and, worse, indifference) amongst young citizens in ROK make the prospects of reunification, without reforms of the kind proposed by the ROK by the COI (COI, 1220(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m – s)) almost impossible to conceive and plan for. So long as DPRK commits or condones grave international crimes against its citizens (and severely punishes them for even possessing DVD recordings of popular ROK television serials) are not the changes necessary as a practical precondition for reunification such as to make the possibility of that course unrealistic? Or requiring a time frame that is intolerably prolonged and dangerous?

7. *Creating a support group for dialogue:* How can initiatives to establish a framework for dialogue of DPRK with the outside world, including by the initiative of states that have historically enjoyed friendly ties with DPRK, be created (COI, 1225(h))? How could the support and assistance of such states (some of them identified in the HRC, GA and SC debates on the COI report) be converted into a genuine and useful follow-up to this COI recommendation? Who can possibly launch such an initiative? Realistically, how could the UN play a catalytic role in that regard?

8. *From armistice to peace treaty:* What initiatives could realistically be taken, upon conditions that are conformable with UN human rights law, to enlarge humanitarian assistance and technical aid to DPRK? (COI, 1225(i)). How could states parties to the Korean War take steps, and under what conditions, to convene a high

level political conference to begin the moves to replace the current fragile armistice with an effective and final peace treaty that addresses all essential complaints and human rights violations alleged by the opposing parties to such a dialogue?

9. *Conference on abductions and separations:* How could an international conference on justice for all persons (and their families) who suffered abductions in or after the Korean War be initiated? In the light of the unsatisfactory features of the follow-up to the undertakings given by DPRK's then Supreme Leader to Japan's Prime Minister Koizumi in September 2002 (COI, 924), how could a new initiative be designed that might have a chance of success? Having regard to the still unresolved issues in ROK and other nations, of forced abductions and prisoner of war retention, how could these longstanding festering wounds be brought to satisfactory and just outcomes, given the years that have passed since such separations occurred and the likely ages and health of any surviving persons concerned?

10. *Nuclear security and human rights:* How could the human rights concerns contained in the COI's report take more fully into account the acute dangers presented to the DPRK itself, its neighbouring countries and the populations thereof exposed to the extremely grave risks of deliberate, accidental or mistaken use of nuclear weapons? Or of the new DPRK missile delivery systems? Or of the DPRK's huge standing army? The risks of nuclear accidents or incidents themselves present great dangers to the human rights of all persons potentially affected. They were

put to one side in the report of the COI on DPRK. But should they be treated as separate? Given that the dangers arise in partial consequence of the withdrawal of DPRK from the UN *Nuclear Non-Proliferation Treaty* and DPRK's development of an arsenal of nuclear weapons during a time of the so-called "Sunshine Policy" of cooperation between ROK and DPRK, what confidence could ROK have in general negotiations with DPRK on the de-nuclearisation issue?

These are some of the dilemmas that the international community – and specifically the divided Korean community – must learn from the COI report. They must act upon the COI report and also more beyond it.