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THE UNITED NATIONS HUMAN RIGHTS INQUIRY ON NORTH
KOREA: BACKGROUND, REACTION AND PROSPECTS*

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ABSTRACT

The author was the Chair of the United Nations Commission of Inquiry on Human Rights in North Korea (COI). He describes the steps that led to human rights in North Korea being placed exceptionally on the agenda of the UN Security Council, in December 2015. He 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 distinctive methodology that it adopted in providing its report to the UN. He details the report and the reactions to the report, including the responses of North Korea itself. 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 and referred to the Security Council. At this stage North Korea reverted to non-engagement and attack. The article concludes with proposals for an action plan for lawyers and their associations in the Asia/Pacific region. Condemnation is not enough. Engagement is essential. But will North Korea respond?

THE UN SECURITY COUNCIL INTERVENES

Issues concerning human rights in the Democratic People's Republic of Korea (DPRK) (North Korea) have been of concern to the international community for a

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** 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 (2013-2014); 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 (1993-1996).

long time, especially during the past decade. This is the period of the operation of the United Nations Human Rights Council (HRC). That body was created to give greater effectiveness to the special procedures of the United Nations concerning human rights. Those procedures are intended to fulfil the commitment of the Organisation to the protection of universal human rights. That commitment appears in the second paragraph of the *Charter* of the United Nations of 1945.¹ That paragraph (after stating a commitment to protecting “succeeding generations from the scourge of war”), committed the new body to:

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

Initially it had been intended to include a Bill of Rights for all humanity in the *Charter*. However, time ran out for preparation of that text. Accordingly, the provision of a statement of universal rights was postponed until December 1948. At that time, the General Assembly adopted the *Universal Declaration of Human Rights*.² That non-binding Declaration eventually gave birth to a series of important international treaties, in which the global community sought to express, in binding language, the universal human rights which it pledged to uphold. Amongst the most important of these treaties was the *International Covenant on Civil and Political Rights* (ICCPR)³ and the *International Covenant on Economic Social and Cultural Rights* (ICESC).⁴ After its admission to the United Nations in 1991, DPRK became a party to each of these treaties, and to several other treaties providing for human rights protective of all people, including its own.

Initially, the machinery of the United Nations for the protection of universal human rights included a Commission on Human Rights, to which various officeholders, including Special Representatives of the Secretary-General and Special Rapporteurs, reported. Between 1993-6, I served as Special Representative of the Secretary-General for human rights in Cambodia. In that capacity, I regularly

¹ 26 June 1945; TS 993; 3 Bevan 1153 (entered into force 24 October 1945). See FF Martin and Ors (eds) *International Human Rights Law and Practice: Cases, Treaties and Materials: Documentary Supplement* (Kluwer, The Hague, 1997, 1).

² United Nations, UDHR, adopted and proclaimed by the General Assembly, Resolution 217A (III) of 10 December 1948.

³ 999 UNTS 171 (1976).

⁴ 1993 UNTS 14531 (1976).

reported to the Commission on Human Rights and to the Third Committee of the General Assembly. However, the Commission was strongly criticised as ineffective and unduly affected by geopolitical considerations. In an attempt to cure these defects, the Human Rights Council was created and substituted. The hope was that this would bring a more objective and principled approach to defending human rights within the United Nations system.

Under the HRC, in respect of DPRK, a Special Rapporteur was appointed to report on alleged human rights violations in DPRK. The first such officeholder (Professor Vitit Muntarbhorn, Thailand) was unable to persuade DPRK to permit him to enter the country so as to conduct the consultations and inspections essential to the efficient discharge of his office. In due course, Professor Muntarbhorn resigned. He was replaced by Mr Marzuki Darusman, a former Prosecutor General and Attorney General of Indonesia. He was likewise refused admission to DPRK. Successive motions of the HRC and of the General Assembly were adopted each year criticising this non-cooperation and calling for DPRK to participate in the human rights machinery of the United Nations. These calls and resolutions fell on deaf ears.

It was in this context that, without a call for a vote, the HRC established the Commission of Inquiry on Human Rights Violations in DPRK (COI) by decision of March 2013. Mr Darusman, *ex officio*, was included as a member of the COI. The additional members were Ms Sonja Biserko (Serbia), a human rights expert and myself (Australia), a former judge, as chair. The COI commenced work in July 2013. That work 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 general lack of access to the internet and other media.

The COI found many human rights violations on the part of the 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 unproved but only because the legal definition of 'genocide' in the

Genocide Convention is confined to crimes of homicide and violence directed at a population or group of a population for reasons of race, nationality, ethnicity or religion. In the DPRK, the motivation for state sponsored killing of individuals and groups is usually political and social.

The COI report⁵ 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. 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 the DPRK is not a party to the *Rome Statute* creating that court, such a referral could only happen validly by a vote of the Security Council conforming to the requirements of the UN Charter. So numerous, serious, prolonged and shocking were the crimes against humanity detailed in the COI report that, if this case were not considered suitable for referral to the ICC, the COI suggested that it would be difficult to imagine a case that would be.

Ultimately, in ways that will be described below, the HRC substantially adopted the report of the COI and called strongly for action on the part of DPRK and of the United Nations system.

The HRC resolution was transmitted to the UN General Assembly. In November 2014, the Third Committee of the General Assembly voted (111 for; 19 against; 55 abstentions) to refer the report of the COI to the Security Council. It specially asked the Security Council to consider the recommendation of the COI that the case of North Korea be referred to the ICC.⁶

Subsequently, the plenary session of the General Assembly voted to affirm that resolution (116 for; 20 against; 55 abstentions).⁷ It sent the COI report to the Security

⁵ *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, UN Human Rights Council, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1, (17 February 2014).

⁶ *Situation of human rights in the Democratic People's Republic of Korea*, UN GAOR, 3rd Comm, 69th sess, 46th mtg, Agenda Item 68 (c), A/C.3/69/L.28/Rev.1, (18 November 2014).

⁷ *Situation of human rights in the Democratic People's Republic of Korea*, UN GAOR, 69th sess, Agenda Item 68(c), UN Doc A/RES/69/188, (18 December 2014).

Council. Later, on 22 December 2014, the Security Council debated a procedural motion to place human rights in North Korea on the ongoing agenda of the Council. The DPRK boycotted the Security Council, although invited to attend as an observer affected by the proposed resolution. Eleven members of the Council voted in favour of the proposed resolution. Two abstained (Chad, the then president and Nigeria). Two voted against (China and the Russian Federation). The veto in the UN Charter did not apply as the resolution was admitted as 'procedural'. The initiative was advanced by Australia, a non-permanent member whose term on the Council expired days later. The Council did not consider the COI recommendation for referral of the DPRK situation to a prosecutor of the ICC. That question remains for the future.⁸

In this article, I will outline something of the history of Korea which must be understood if the division of the Korean Peninsula and people after the Second World War is to be fully understood. I will then describe some of the reactions that followed the publication of the COI report on DPRK in March 2014. There will follow extracts from an unusual initiative adopted by DPRK, whereby in September 2014, it published a report of its own on the state of human rights in that country. That publication was one of a number of initiatives taken by DPRK at the time in the apparent hope of sufficiently engaging with the international community on human rights as to avoid referral of that condition to the Security Council of the United Nations. The extracts from the DPRK report allow a perspective (language, values and attitudes) of the authorities in DPRK to be appreciated from their own words. Finally, I will offer a few comments by way of prognosis and assessment concerning the prospects of action to follow up the conclusions and recommendations expressed in the COI report. These reflections will include a number of suggestions on the way in which lawyers, in particular in the Asia/Pacific region, neighbours to DPRK, might respond to the COI response by endeavouring to engage more closely with the DPRK, its rulers and people.

⁸ *The situation in the Democratic People's Republic of Korea*, UN SCOR, 7353rd mtg, UN Doc S/PV.7353, (22 December 2014).

KOREA – THE DIVIDED PENINSULA

North Korea was created by a decision of the Allies, as the Second World War was moving to its close. Representatives of the United 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.⁹

The defeat of Japan was achieved following the explosion of the atomic weapons over Hiroshima and Nagasaki in August 1945. Japan accepted the terms of unconditional surrender on 2 September 1945. It thereby lost dominion over its empire beyond the Japanese mainland (as well as over some islands of the previous Japanese heartland). The Allies agreed to a division of the Korean Peninsula which, until then (both during Korean rule of many centuries and during Japanese rule from 1911-1945) had been governed as a single national unit. Suddenly, the two parts of Korea were separated, although the language, culture and traditions of each part were substantially the same. In the northern part of the Korean Peninsula, a new 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 after 1945, the two new Korean states were at loggerheads.

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 regime partly copied from the Soviet model developed by Josef 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 oppressive than the market economy of the south, with all its defects. In the ROK, the regime was led by a long- serving

⁹ The historical data recounted here is drawn from the COI report: United Nations, Human Rights A/HRC/25/63 and A/HRC/25/CRP.1 (7 February 2014), Chapter III (“UN COI report 369 [para 1220(s)]”).

president, Syngman Rhee. He was autocratic but observed certain democratic forms. The economic success of the ROK was to come later; but 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 was the breadbasket for the preceding unified Korean polity.

A brutal localised conflict, the Korean War, broke out on 20 June 1950. Although the DPRK has always alleged that this was triggered by an attack on its territory by forces of the ROK, supported by the United States, this version of events was always hotly contested by the 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 from Kim Il-sung for concurrence in the 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. Essentially, it remains an unhealed wound to this day.

After initial successes, the forces of the DPRK were driven back into North Korea by a United Nations force under the command of General Douglas MacArthur. This force was authorised by a resolution of the United Nations Security Council. That resolution was adopted during the temporary absence from the 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 regime of the People's Republic of China (PRC). So successful were the United Nations forces that they reached the Chinese border at the Yalu River. At this point, "volunteers" from the 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 been. In this way a bond was forced between the DPRK and the PRC. It endures to this day, at least to some extent.

An armistice was declared in 1953 and an instrument signed by the chief combatants. 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 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 involving military rule, eventually emerged as a vigorous multi-party democracy with regular changes of administration secured by credible elections. In the North, a Soviet-style system of government has endured which ceded substantial real power to the Korean Workers' Party; the Army and a small elite gathering around the successive members of the family of the founder, Kim Il-sung (1948–1994). These leaders were, in turn, Kim Jong-il (1994 – 2011) and Kim Jong-un (2011-present). Predictions that the conditions in the 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 various attempts to procure peaceful reunification and demilitarisation. Under 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 the DPRK to withdraw from, and denounce, the United Nations Nuclear Non-Proliferation Treaty which the DPRK had earlier ratified. An active nuclear weapons program was pursued. This has produced 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 the DPRK itself, in the ROK, Japan, the PRC and even farther beyond. It also enlarges the global risks of nuclear weapons proliferation.

In the mid-1990s, the DPRK suffered grave economic hardship because of a serious famine and the gross inefficiency of its domestic market. 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 the DPRK was not easy. For decades, the DPRK has been a closed society. Some tourism is permitted but it is closely policed and individually monitored. Unrestricted travel and easy access, even for the local population, is forbidden. Free access to independent media and to the internet is impossible for 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 the ROK, in the Korean language, is a serious offence. In the background of these films are the sights and sounds of a prosperous, modern and dynamic society of the ROK today. This contradicts the propaganda about the ROK distributed by the DPRK. Apart from the reported wrongs done in and by the 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 procured and transported to the DPRK for seemingly trivial purposes. This conduct caused deep resentment in Japan. Many nationals of the ROK were also seized, causing the grief and pain of long-term family separations.

REACTIONS TO THE COI REPORT

In accordance with normal procedures, the HRC in Geneva debated the COI report, provided to it in February and March 2014 over the ensuing weeks in 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:

- The refusal of the DPRK to extend an invitation to the UN High Commissioner for Human Rights (Ms Navanethem Pillay) to visit the country to discuss the human rights situation and to consider technical and other assistance that might be offered to help bring the DPRK into a situation conforming to UN standards;

- The refusal of the 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, the DPRK had refused, from the outset, to permit the Special Rapporteur, appointed by the HRC to examine and report on human rights in the DPRK, to visit the country; and
- The 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.

In the HRC, in March 2014, there were extended debates over the findings, conclusions and recommendations of the COI. Eventually, a 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, these affirmative nations included Japan, Kazakhstan, the Maldives, the Philippines and the ROK. Six countries only voted against the motion (and thus the COI report). These were Cuba and Venezuela plus four countries of the Asia region: the PRC, Pakistan, the Russian Federation and Vietnam. A most disappointing feature of the vote of the HRC was the abstention of 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, whose struggle against apartheid was so notable – and supported by so many freedom-loving nations and peoples of the United Nations - was specially disappointing because of the racist *Songbun* policy revealed in the COI report. This is a policy that classifies the population rigidly 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” this 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 endorsement of the countries that abstained. What more could the UN human rights machinery do to elicit a shared concern and sense

of solidarity to help achieve reform and change to the human rights situation in the DPRK?

Especially 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: the Czech Republic, Estonia, Kazakhstan, the Former Yugoslav Republic of Macedonia and Romania.

Following the resolution of the HRC, three Security Council 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 a 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 members (the PRC and the Russian Federation) absented themselves from the briefing. However, the remaining 13 participants attended and 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 the DPRK to the ICC. No state that spoke at the HRC or at the ‘Arria’ briefing for the Security Council criticised, or sought to correct, any particular 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 the 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, believable evidence about grave human rights abuses, a refusal even 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;¹⁰ accountability for international crimes; and a UN strategy of 'rights up front' appear hypocritical if, in the face of damning evidence assembled by a COI, a substantially formal objection to the happening of the investigation at all is cited as a reason for ignoring credible testimony and the conclusions that it has presented.

RESPONSES OF THE DPRK FOLLOWING THE COI REPORT

The COI report and the resolution of the HRC were transmitted to the United Nations General Assembly (GA). On 23 September 2014 an event, organised by civil society organisations concerned about the DPRK, took place in New York. The United States Secretary of State, Hon. John Kerry, attended to outline the United States' stance. A further event will occur on 22 October 2014 organised by Japan. There were other 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 Security Council in April 2014, and widespread publicity attaching to the report in the local and international media, the DPRK entered upon a new strategy. This 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:

- Within the HRC, after the March 2014 vote on the COI report, the 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, the DPRK announced that it had "evolved" to a position of accepting 81 of the initial first cycle of 167 recommendations. Following the second cycle of UPR, it accepted 113 out of 268 recommendations fully and 4 partially. It noted 58 further recommendations and rejected 93. None of the recommendations thus accepted concerned proposals touching the political powers of the state, party and military;
- In response to the strong and sustained criticism by Japan of the DPRK state policy of abductions of Japanese and other nationals, the DPRK, in secret

¹⁰ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, Washington D.C., 2008).

talks, agreed to a meeting in Mongolia between members of the family of one Japanese abductee and her parents living in Japan.¹¹ The abductee (Megumi Yokota) had disappeared on 15 November 1977. She was alleged to have died in the DPRK in 1993. Her ‘remains’, returned to Japan, did not produce a positive DNA test. However, the meeting with her daughter and granddaughter was hosted by Mongolia and was an apparent breakthrough of sorts;

- On 13 September 2014, a civil society organisation in the DPRK, obviously speaking with the authority of the regime, published a report on the state of human rights in the DPRK.¹² A spokesman for the DPRK had earlier predicted that this report would prove ‘rosy’, so far as the state of human rights in the DPRK was concerned. The report contains few surprises. There are frequent denunciations of the United States of America, Japan, the ROK and their ‘lackeys’. There is an exposition of the formal state structure and legal system, asserting that this is human rights compliant. The DPRK insists on its right to sovereignty and its immunity from pressure from the international ‘human rights racket’. It declares that its own human rights record is excellent because of the privileges enjoyed by citizens in the ‘unique system of socialist production’. It asserts that it enjoys a legitimate entitlement to defend this system against the ‘hostile forces [ranged] against the DPRK and its socialist system’;
- In October 2014, the briefings of the United Nations by the DPRK officials began to be more candid about the existence of the detention camps described in the COI reports, revealed in satellite images but always denied by North Korea. The DPRK spokesman, Choe Myong Nam, conceded that unidentified labour camps “lack facilities for people to rest and bathe” because of “external economic pressures.”¹³ So the long denied camps, which the COI estimated as containing 100,000 to 120,000 detainees for political crimes,

¹¹ See, Martin Fackler, ‘Years After Abduction by North Korea, a Reunion’, *New York Times*, Last updated: 16 March 2014, available at: <http://www.nytimes.com/2014/03/17/world/asia/parents-of-japanese-woman-kidnapped-by-north-korea-meet-their-granddaughter.html>.

¹² *Report of the DPRK Centre for Human Rights Studies*, 13 September 2014 (‘rosy report’), originally published on the Korean Central News Agency website www.kcna.kp though no permanent url exists for the report on that site, available at: http://www.ncnk.org/Report_of_the_DPRK_Association_for_Human_Rights_Studies.pdf.

¹³ Associated Press, ‘North Korea Admits to Labor Camps’, *New York Times*, Last updated: 7 October 2014, available at: <http://www.nytimes.com/2014/10/08/world/asia/north-korea-admits-to-labor-camps.html>.

described in chilling terms by the COI witnesses, do exist after all. But the UN sanctions against DRRK are now said to be the cause;

- Also in October 2014, the spokesman for the DPRK indicated, for the first time publicly, that it would be opening up a human rights dialogue with the European Union¹⁴ – long critical of its human rights record. Is this all evidence of reform or repentance? Or is it a late strategy to head off approaching demands in the United Nations General Assembly and Security Council for protection of human rights in the DPRK which is not being afforded by its own government?; and
- The DPRK launched a number of apparently ameliorative actions of its own, including a decision to send a large team of competitors to participate in the Asian Games in September 2014, at Incheon in ROK. And to arrange for a high level delegation from DPRK to attend the closing ceremony and to have discussions with ROK.¹⁵

The procedures adopted by the DPRK in preparing its own self-exculpating report may be contrasted with the procedures adopted by the United Nations COI:

- There were no reported public hearings in DPRK and, no reported opportunities for free input from civil society. The report bears the hallmark of bureaucratic prose, full of praise for the government and institutions of DPRK and devoid of acceptance of specific needs of improvement in its basic regime;
- No access has apparently been given to citizens of DPRK to consider the United Nations COI report. Although this is available internationally online, general access to the internet is not possible in DPRK, except for a small elite. The secretive procedures, lack of transparency and difficulties of readability of the DPRK report can be compared to the transparency followed by the UN COI; the widespread availability of images and transcripts online;

¹⁴ ‘North Korea says it has invited European Union human rights official to visit’, *South China Morning Post*, Last updated: 31 October 2014, available at: <http://www.scmp.com/news/asia/article/1628934/north-korea-says-it-has-invited-european-union-human-rights-official-visit>.

¹⁵ Agence 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>, for details of the relationship between the Incheon delegation visit and future engagement.

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 near or even actual 100% turnout in elections and voting for the candidates of the ruling party in the 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 quoted testimony of 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 persons viewed as hostile to the DPRK.

CONTENT OF THE DPRK REPORT

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

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... [but 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:

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

The major thrust of the argument in the DPRK report is addressed to the insistence that, as a "sovereign" country, the 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 in favour of an extreme view of the ambit of national “sovereignty” is inconsistent with the world order established by the UN *Charter*. By 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 joined 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 established by the Organisation or otherwise applicable to its members. In these circumstances, to talk about national “sovereignty” as if all of the events that have occurred before and since 1945 were of no effect, is simply a mistaken appreciation of national sovereignty in the post-*Charter* world. The developments that have occurred since 1945 have happened, in part, out of a recognition of the fact that war crimes, genocide and crimes against humanity, happening behind 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 constructed”.¹⁶

The DPRK has ratified many of the core UN treaties on human rights. In the DPRK human rights report it even concedes that:

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.

However, despite this apparent concession to the realities of the international community today, the DPRK insists that:

¹⁶ *Constitution of the United Nations Educational, Scientific and Cultural Organization* (signed on 16 November 1945, came into force on 4 November 1946), preamble, available at <http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

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

This, then, is the ultimate assertion of the DPRK position on universal human rights law – including as that law is envisaged in the United Nations *Charter* and expressed in United Nations human rights treaties. International human rights law is fine, so it seems, for the DPRK. But only so far as it reflects the “will and requirement” of the country concerned, specifically the DPRK itself. This asserts the entitlement of the DPRK 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, expound 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, the DPRK would plunge the world back into the lawless jungle of the pre-United Nations world; a world of uncontrolled national “sovereignty”. If such an entitlement were demanded by a law-abiding, democratic and peaceful nation with a passable record of human rights compliance, it would be serious enough. But, 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, and enlarged so as to provide a threat to peace and security in the region of the DPRK. If the world were to become a collection of nations with the nuclear, military, missile and human rights disrespecting attitudes as expressed by the DPRK in its ‘rosy’ report, the long-term survival of the human species on this small planet would be in doubt. The danger to humanity and to the peace and security of the world would be extremely 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 representative examples (with emphases 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.*
- 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 through election.
- 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 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.
- 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...
- 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*

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.

- 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.*
- In recent years the US is kicking up a row about “arbitrary imprisonment”, “extra judicial execution”, “torture” and “abduction” *by using ruff 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, murder, drug trafficking and smuggling.*
- 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.* 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...
- *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.*
- 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.

PROGNOSIS AND ASSESSMENT

Accepting that some of the infelicities of expression in the DPRK report may be products of imperfect translation, occasioned in part by a lack of familiarity with contemporaneous use of the English language, and setting such considerations wholly aside, the net impact of the DPRK report is still sobering. It presents a country, sheltering 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 the DPRK are studied, not from the stand point of geopolitics but from the perspective of the people living in that country, it appears entirely clear that those people cannot safely, or at all, look to their government to uphold their human rights. Certainly, the DPRK holds itself entitled to ignore their human rights as expressed in the international instruments of the United Nations, as expounded by treaty bodies, as investigated by the special procedures and COIs, and as upheld by the high organs of the United Nations (HRC, GA and Security Council). In the end, it may prove impossible in the short run to secure the efficient 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 the 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 the 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” for the United Nations. This, it was hoped, could continue to collect the testimony and thereby to bear

further witness to the complaints of suffering recounted by the many witnesses willing to do this in the ROK and elsewhere. Even at some risk to themselves and their families, these witnesses came forward. Their suffering and that of their families, loved ones, neighbours and work comrades impelled them to come forward. They are not “human scum” as the DPRK says in its ‘rosy’ report. They are proof of the unquenchable nobility and courage that exist 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 the DPRK) was itself an important achievement of the COI on the DPRK. The authorities in the DPRK know this. It helps to explain the exceptional steps of purported ‘engagement’ the DPRK is willing to take in an attempt to head off the long overdue response of the international community to the DPRK’s many wrongs and crimes. The government of the ROK has agreed to the request of the UN High Commissioner for Human Rights to establish such a field office in its territory. When set up this can continue the affirming task of collecting testimonies and recording them as part of the history of the Korean people during this discouraging and painful era.

Eventually, the burdens described in the COI report on the DPRK will be lifted from the people of North Korea. Change will happen. How it will happen and when it will occur are yet uncertain. But human 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 source of the impulse and whatever time it takes to resolve the crisis of human rights violations in the DPRK, change will happen. The COI report will contribute to the change. So will the political actions to be taken in the future.

THE DUTY OF ASIA’S LAWYERS TO RESPOND

Meantime, there are some sections of the DPRK report that are specially relevant to lawyers and legal professional associations in the Asia/Pacific. These include descriptions of special legislation (on elections, on labour law, on gender equality and ‘socialist human rights’) sections on constitutional law and on 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:¹⁷

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

The Korean Lawyers' Society is said to have been founded in November 1945. Its task is stated 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". 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 exculpatory report goes on:

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.

The DPRK report contains argumentative and highly 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 DPRK criticisms now circulate freely in most other countries. Such freedom contrasts with the absence of open circulation in the DPRK of the COI report and of the ensuing international criticism of the closed society of DPRK. Some elements of human rights do appear to have improved in the DPRK in recent years.

¹⁷ See DPRK report. The highly discriminatory *Juche* policy assigned the population to social categories and very difficult to escape, instituted by Kim Il-sung, is described in the COI Report 33.

Improvements are acknowledged in the COI report. Recent reports suggest a measure of recent improvement in the food supply and that, of itself, would be a contribution to the human rights of the people.¹⁸ These improvements relate, for example, to not only to food availability, but also to extensions of compulsory education, and the protection of people with disabilities. Such bright lights are, however, the more noticeable because of the generally dark landscape.

The violations of human rights in the DPRK, revealed in the COI report, are a blot on the history of that country. But 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, choreographed 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 are from Asia (China, Pakistan, Russian Federation and Vietnam). Of the great democracies of Asia, heralds of the advance of the rule of law worldwide, two abstained when it came to a vote (India and Indonesia). These votes were also reflected in the General Assembly – both in the Third Committee and the plenary roll call. How can a nation abstain in the face of the powerful evidence of wrongs of North Korea? What did lawyers and lawyers' associations in the region do to argue against, or protest at, such a response? How can lawyers raise awareness amongst our colleagues, professional institutions and communities? Why should we be indifferent to the burdens imposed on the ordinary people of North Korea, simply because we have generally had 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, enough food for their nourishment, education for their children and young people, healthcare in the case of accidents and illness, freedom to move about and to work, access to the global explosion of information and diverse knowledge, and enlargement of the human spirit and of arts cultivated in creative freedom. Lawyers, by their vocation, know

¹⁸ There are tantalising signs of liberal reforms in North Korea: <http://www.businessinsider.com.au/there-are-tantalizing-signs-of-liberal-reforms-in-north-korea-2015-2>

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; but also of principle. These are also the features of the international law of human rights.

Lawyers of the Asia/Pacific region should consider the COI report on the DPRK. They should watch—online, films of the witnesses and read the transcripts of their testimony. They should listen to the pleas for action by the victims. And 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: committed to afford due process, to protect the vulnerable and to uphold universal human rights. The case of the DPRK has been a sad and shameful chapter for lawyers, especially in Asia where the dangers of explosion and accidents are highest. Like so many others, Asia's lawyers have simply turned away. Bodies of lawyers should formulate an action plan. In the case of LawAsia, it would include at least five elements:

First, to reach out to the DPRK, and specifically, to the Korean Lawyers' Society and the Democratic Lawyers' Association of Korea to review past links and to establish appropriate connections. Isolation breeds hostility and misunderstanding. Person to person contact of such kinds was expressly urged by the UN COI.

Secondly, to 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 a precondition to improvements in connection with lawyers in DPRK.

Thirdly, legal professional bodies should take appropriate steps to study and consider the COI report. They 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 our region. Just imagine if a comparable report had been available in the 1930s in relation to totalitarian regimes of that time, and international and national lawyers' organisations had averted their eyes and done nothing.

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

Fifthly, legal professional bodies, universities and academic bodies in Asia should begin planning a comprehensive action plan, including fellowships, scholarships, conferences and other initiatives, to promote real change in the DPRK when that becomes feasible.

Now is the time for change. Let lawyers of Asia and Pacific read the 'rosy' report of the DPRK. And let them read the COI report of the United Nations. Then, I believe, there will be action. The DPRK is part of the Asia/Pacific region. Its dangers are ours to prevent. Its burdens are ours to share.