

Tuesday, 5 May 2015

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INTERVIEW ON THE REPORT OF THE COI ON  
DPRK

SYDNEY, 5 MAY 2015

The Hon. Michael Kirby

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***Jawoon: Just to let you know where my thesis is going, I'm looking at the normative framework of the Responsibility to Protect (R2P), particularly with regards to North Korea. And of course it's been kicked off by the report that came out; the one that you headed. So, my first question would be:***

***Why did you choose the 'Responsibility to Protect' framework for the report and why was it relevant that you used that particular wording and the concept in the context of North Korea?***

Mr Kirby: We didn't really choose the 'Responsibility to Protect' framework; the 'Responsibility to Protect' framework chose us. We were a Commission of Inquiry of the United Nations. The principle of Responsibility to Protect was adopted by the United Nations in the General Assembly by a unanimous vote including many heads of government and many heads of state. It is an important new insight of international law. It is a principle of United Nations and it is important that principles adopted by the United Nations for the international community should not just be statements that are adopted with a fanfare and then forgotten. The institutions of the United Nations should hold the countries of the world to those principles. And that's what we did.

***Jawoon: People usually associate the Responsibility to Protect with a conflict situation and as you know, North Korea is not an open conflict situation. So, just looking at the Security Council's use of the Responsibility to Protect, it's been mainly focused on an open conflict. Did that affect the way you thought about using the Responsibility to Protect in the report at all?***

Mr Kirby: Conceptually the idea of the Responsibility to Protect is not confined to a conflict situation. It relates to the obligation of the international community, arising out of the brotherhood and sisterhood of the human species to help each other. When a nation-state does not provide universal human rights to its own people, or cannot provide universal human rights to its own people because of an armed conflict, then that obligation rests on the entire international community. This is simply a reflection of the principles of the UN Charter of 1945 which established the United Nations.

Nowadays, we are not all individual planets floating on our own. We have to relate to each other and, where people are denied of universal human rights it's the responsibility of the international community to afford them, or to try to afford them. That's why we have established bodies such as the Human Rights Council, the Office of the High Commissioner for Human Rights and the special mandate holders, including bodies such as the Commission of Inquiry on North Korea.

***Jawoon: Why did you suggest the referral of the DPRK to the International Criminal Court over other measures that you could have suggested? What was the significance of that?***

Mr Kirby: The reasons for taking that course are set out in our report. I don't want, in a brief interview of this kind, to substitute my re-encapsulation of the reasons set out in the report for what I'm saying now. The reasons are complex and are set out at some length in the report. However, the fundamental reason is that we went through the other options to secure accountability. Accountability for horrible crimes is a principle that has been embraced by the international community, at least since the end of the Second World War and the establishment of the International Military Tribunals of Nuremberg and Tokyo. There was a great symbolism in having the tyrannical leaders of the Nazi regime and of the Tokyo regime in the dock to answer to the people and the families of the people who had been dealt with in a way that involved genocide, crime against humanity and other great international crimes. Now, since Nuremberg and Tokyo, we don't accept that people who do horrible crimes can walk away scot free. We accept the principle that those who can be proved to be guilty of such crimes should be made accountable: accountable to the victims; accountable to their own peoples and; accountable to the international community.

We went through the alternatives: the establishment of a special tribunal, the creation of a national section of the judiciary, the referral of the matter to the national judiciary of the DPRK, or the establishment of a special prosecutor without nominating a tribunal. We explain why we did not think that they represented the most appropriate course. The International Criminal Tribunal can secure jurisdiction if jurisdiction is conferred by the Security Council. It has an operating staff. It has already appointed judges. It has its own charter. It has its procedures. It has expertise available to it. So if the Security Council referred the case of North Korea to it, that would ensure that independent judges would hear the matter, deal with the matter with due process and with fairness and in accordance with international law. Therefore, it was the most obvious solution to the problem because the ICC is in existence and it can get jurisdiction if the Security Council take that step. Of course, the Security Council would have to secure the votes of the permanent five members.

At the moment, that does not appear to be likely because China and the Russian Federation voted against even putting this matter, by a procedural motion, on the agenda of the Security Council. However, in matters of this kind, one cannot be sure how things will develop. At the very least, we now have the issues of human rights in North Korea on the agenda of the Security Council for the next three years. During that time, it may be that all of the permanent five members of the Security Council and the majority of the other members will agree to refer the matter of North Korea to the Security Council. That is what should happen. Objectively, if you stand back from this matter and you look at the very great number and great duration of the crimes against humanity that are recorded in the Report of the Commission of Inquiry, I think one would say that there should be a solution. There is an available solution. It should be instituted and invoked. The countries that have the power to do so should take that step. That was the view that the Commission of Inquiry took. Nothing that has happened since the report was delivered has persuaded me that it wasn't the correct view.

***Jawoon: I had the privilege of reading your paper you presented in Washington, "The DRPK after the COI Report – the Dilemmas and Paradoxes". In that paper you did mention that you didn't consider any "measures of force" because they were simply out of the***

***mandate of the Commission. Would you be able to expand on what you mean by these “measures of force”?***

Mr Kirby: I don't want to get into that because first of all, it wasn't within the mandate of the Commission of Inquiry and. By getting into it, I could cause concern and anxiety that I have overstepped the mark and that I am plotting or threatening violence and force against North Korea. Force is not the solution to this issue. Therefore, it wasn't placed in the mandate of the Commission of Inquiry. Therefore, we in the Commission of Inquiry, didn't consider it. The reasons for that are obvious. The possession by North Korea of Weapons of Mass Destruction (including nuclear weapons with an increasingly sophisticated missile delivery system and with new research on submarine delivery systems and with the fourth or fifth largest standing army in the world) makes the idea of resolving the human rights of human beings on the peninsula, by means of force, unthinkable. You would be left only with ashes and cockroaches if resort were made to Weapons of Mass Destruction and armed force.

The suffering of the Korean people on both sides of the border on the Korean peninsula has already been so great that the idea of repeating or expanding the suffering of the Korean people is unthinkable. However, solutions have to be found. Things cannot continue as they are. The position of crimes against humanity against people in North Korea is intolerable. It is intolerable to the international community. The very high votes that took place in the Human Rights Council, in the General Assembly of the United Nations, in the Third Committee of the General Assembly of the United Nations and in the Security Council indicate that the international community as a whole has concluded that this situation is intolerable. Something has to be done. That's why the Commission of Inquiry made the recommendations that it did. I hope that the Security Council will, in due course, take the steps that we recommended.

***Jawoon: You briefly mentioned before that China and Russia were absolutely against having the matter put on the agenda at the Security Council. Other than China and Russia which have been fairly obviously, in your opinion who have been the main resisters of the***

***report or having the findings of the report implemented, and where does the pushback come from?***

Mr Kirby: There isn't much pushback. If you look at the voting patterns of the three organs that I mentioned: the Human Rights Council, the General Assembly, and the Security Council, the numbers of countries and identities of the countries are known. There are not very many that supported DPRK. They are countries, most of them, with a record and history of Communist governments or fellow travellers who are friendly to North Korea. They have been put under pressure by North Korea to deliver on that friendship. There are, of course, nuances and complexities in the case of China. It is not simply a 'fraternal party' connection. There are also geopolitical concerns. The border between China and North Korea is an extensive one. China has trading and other economic relations. China also may have some concerns about the establishment of a border with the Republic of Korea, which is in friendly relations with the United States of America. The Russian Federation has substantially wound back the strong support that it gave DPRK in the past. It cut off its substantial economic aid after the end of the Soviet Union. However, it still has traditional relations and it has some economic relations in the supply of timber across the border and of workers who travel from North Korea to the Russian Federation. I think both of those countries, the P5 members, China and Russia are exasperated by North Korea and find having to deal with it tiresome. But, at the moment they have taken a protective stance.

The other countries can be identified by the voting patterns. They include Cuba, Venezuela, Vietnam and some curious additions such as Pakistan. Pakistan cannot, I am afraid, hold its head up high in relation to North Korea. It is generally suspected that it was Pakistan that made available the nuclear technology which has been utilised in North Korea. Giving such a violent state access to nuclear weapons was a very antihuman act. If Pakistan was responsible for that step, then they deserve to be reproached. These are simply the countries that have come to the support of North Korea.

North Korea engaged in a so-called "charm offensive" when it pulled out all the stops and gave some apparent indications of mollification of its stance in the past on human rights. It did this in order to try to avoid referral of the report of the COI to the Security Council. However, the 'charm offensive' didn't work. People looked beyond the honeyed words. They looked to the actions of North Korea. Those actions are violent actions. The manner in

which one of the leaders of North Korea, possibly the second or third, Jang Song-Taek, was murdered after the most perfunctory legal process, is an indication of the violence of that state. Further, it is a confirmation of the evidence of the many witnesses who gave testimony before the COI in the public hearings of the fear in which people live in North Korea. So, there we have it. A country with nuclear weapons, with huge army, great violence, no effective machinery for the rule of law or fundamental human rights and strong evidence of crimes against humanity. The international community cannot tolerate that pattern continuing. It is a danger to the international community. It's also a danger to the people of North Korea and to the people of South Korea and to the region. So that's why the COI was set up. It was set up without a call for a vote, showing the very strong feelings in the international community. It gave an honest report quickly, a readable report. Action on that report is essential.

***Jawoon: Having read both the short and long versions of the report, I definitely found that it was easy to read and to understand. And it gave a really good historical context to the situation. So I really appreciated that as a reader. So, I'll just move onto the final question since we don't have enough time.***

***Other than getting the matter adopted as an agenda by the Security Council and setting up the regional office in Seoul, what other efforts to implement the findings of the report have been made? And a particular question to that would be, have you presented this before any regional organisations or a non-Western conference maybe?***

Mr Kirby: There have been a number of steps that have been taken. The most important is to keep this matter before the attention of the international community. That is now substantially the responsibility of the special rapporteur, Marzuki Darusman. He was a member of the Commission of Inquiry. Therefore, he is aware of exactly what we found and what we recommended. He always insisted that writing a readable report and burying it in the basement of the Office of the High Commissioner for Human Rights in Geneva was not enough. It was necessary to secure action. There has been a little action on the part of North Korea. It did engage with Universal Periodic Review. Whether that will survive the failed 'charm offensive' remains to be seen.

There were COI recommendations for person-to-person contacts. I have recommended to two legal non-governmental organisations (the International Bar Association and LawAsia) that they should reach out to North Korea, seek to re-establish membership by North Korea of those associations and try to bring North Korea into dialogue upon human rights and the rule of law with countries and lawyers of the Asian-pacific region. I understand that some steps are being taken in that direction. Person-to-person contacts ought to be established. The link that was created during the Incheon Asian Games in 2014 was a good development. There is no reason why associations of dentists, doctors, horticulturalists and other experts could not be established across the border in the Koreas.

However, such initiatives need a positive response from North Korea. The signs are not always hopeful. Last week in New York, at the United Nations, an event took place where refugees and escapees were giving testimony and the distinguished ambassadors for the DPRK began screaming and shouting at them. As one of the escapees said, 'Even animals know to wait their turn'. The behaviour of the diplomats was very peculiar. It illustrates the lack of toleration of different points of view in North Korea and that lack of toleration is the symptom of the problem of a country living in isolation from its neighbours and the world. It is in the interest of North Korea to embrace the world and, to embrace the principles of the universal human rights. I hope that the report of the Commission of Inquiry will prove a step in the direction of that outcome.

One can be sure that outcome will in due course be attained. When it is, I hope the international community will see that at least on this occasion, the United Nations, of the world, of the people of the world, did everything it could, within the limitations of the tools that were available to it, to uphold the principles of the Charter of the United Nations and of the Universal Declaration of Human Rights.