

2794

SALZBURG GLOBAL SEMINAR #556 INTERNATIONAL
RESPONSES TO CRIMES AGAINST HUMANITY: THE
CHALLENGE OF NORTH KOREA

DPRK: SUMMING UP

The Hon. Michael Kirby AC CMG

SALZBURG GLOBAL SEMINAR #556 INTERNATIONAL
RESPONSES TO CRIMES AGAINST HUMANITY: THE
CHALLENGE OF NORTH KOREA

GLIMPSES AT DPRK: SUMMING UP

The Hon. Michael Kirby AC CMG*

We have reached the conclusion of this seminar. It was given focus by the report of the Commission of Inquiry (COI) on Human Rights Violations in the Democratic People's Republic of Korea (DPRK) (North Korea). The time has come for us to depart this idyllic environment of the Schloss Leopoldskron in Salzburg, Austria.

For us, the hills have not been alive with the sound of music. Our thoughts have been with the suffering of fellow human beings who live far from here. They do not know about our meeting. Yet we have met because of the commitment of the peoples of the United Nations, when it was established 70 years ago, to three great principles:

- * International peace and security;
- * Universal human rights; and
- * Justice, self-determination and independence for all nations and peoples, under conditions of respect for the foregoing principles.

* Chair of the Commission of Inquiry (COI) on the Democratic People's Republic of Korea (DPRK) (2013-14); Past Justice of the High Court of Australia (1996-2009).

DAY ONE

On the first day, Clare Shine, Vice-President and Chief Program Officer at Salzburg, made us welcome. She reminded us of Margaret Mead's prophetic statement, in the early days of this series. No one should ever doubt the ability of a small group of people to change the world.

Sometimes this may appear impossible. Yet history shows that it can be done. It was done when the objectives of the United Nations themselves were drafted in the darkest days of a global war. Earlier, it had been done when a small group of citizens attracted increasing numbers to their cause, to persuade the British Government to put an end to the transatlantic slave trade. Today, it is being done by citizens, with an eye on the future of our species, demanding action on climate change by nation states and resistant to transnational economic giants. We met in the sure conviction that it could be done in the case of North Korea. And Clare Shine encouraged us in that belief.

Edward Mortimer drew, in part, on his long experience working in academic and civil society organisations and with the United Nations itself. He also drew on his earlier leadership of the Salzburg Global Holocaust Education and Genocide Prevention Initiative in 2009. It was in that connection that he first approached me to explore the ambit of the international notion of 'genocide'. And whether that grave international crime had been committed in DPRK.

At the outset, he raised the issue of the publicity that should be given to our deliberations. He pointed to the fact that normally, free people meet and freely discuss issues of concern. But DPRK is not normal. Some of our participants will need the protection of anonymity. That is why a

principle was adopted that the names of participants will only be referred to with their consent. At their request or when in doubt, they will be described in neutral terms, for there are people and institutions that may wish to silence those who speak up on DPRK and its wrongs.

After these preliminary talks, I took the floor to speak of the paradoxes and dilemmas presented by the situation in DPRK. In doing so, I drew upon the report of the COI, presented to the Human Rights Council of the United Nations on 17 March 2014.¹ Although the mandate of the COI formally concluded, with the presentation of that report, one of our members, Marzuki Darusman (present in Salzburg) retains his mandate as Special Rapporteur on the human rights situation in DPRK. The other members (Sonja Biserko and myself) retain a close interest and concern. However, we did not speak for the United Nations and do not pretend to do so.

My comments examined the fundamental dilemma that is presented at the outset. To pursue human rights law is to present the possibility of a legal process being initiated at some future stage against the leaders of DPRK for any crimes against humanity that can be established by credible evidence. Yet, if progress is to be made, a question is posed: is it prudent and strategic to insist on that law?

The United Nations itself can do nothing else. But not all of us at Salzburg are officers of the United Nations or even lawyers. Some of us could appreciate the arguments for giving the highest priority to peace and security and to a fresh outreach to the regime in Pyongyang.

¹ <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>

Ambassador Jung-hoon Lee (Human Rights Ambassador of ROK) appealed to us to remember the suffering of the escapees who had fled the DPRK regime, described in the COI report. We should be careful, he said, not to prop up the institutions and people who had committed such grave crimes. We should support a humanitarian approach. But at the same time, we should understand the deep feelings of people on both sides of the Korean DMZ, questing for reunification. Yet how could that goal be attained if one party to the equation (DPRK) grossly abuses the human rights of its people as the COI has found.

DAY TWO

On the second day, Marzuki Darusman, in a brilliant analysis, explained the approach that he is adopting, as Special Rapporteur, in following up the COI report. He suggested a number of areas which, for lack of a longer time for inquiry, the COI could not examine as closely as it might have wished:

- * The ideological underpinnings of the leadership and government officials in DPRK;
- * The financial underpinnings of the society, particularly after the collapse of the foreign aid that had marked the Soviet times;
- * The need for closer examination of aspects of the suggested genocide, particularly conduct targeting parts of the population because of their religious beliefs; and
- * The identification of the names of particular offenders and the gathering of evidence in testamentary form, so as to expose the

way in which a prosecution might eventually be brought to establish accountability.

An official² explained the value of quiet and respectful diplomacy. For example, there is no doubt of a recent fall in the number of escapees from DPRK getting through to ROK. But is this because of refoulement by neighbouring countries? Or is it simply a result of strengthened international borders put in place by Kim Jong-un's DPRK?

Mention had been made concerning radio services in the Korean language to DPRK. The practicalities need to be considered. Most of those in DPRK who might listen to an illegal radio program from abroad will probably want to do so late at night. Provision of a 24 hour news cycle may sound a good idea. But is it value for money and would it engage with a relevant audience? Another official spoke prudently of his years in DPRK. He strongly supported the value of dialogue. He expressed the view that DPRK was very sensitive to international criticism, particularly criticism of its leadership.

Professor Jae Chun-won of ROK urged the preparation of a new translation of the COI report into more colloquial Korean, using pictures and images to supplement the written word. He also felt that religious freedom needed deeper treatment. He raised the issue of the application of the international legal principle of 'universal jurisdiction'. It was this consideration that made it specially important to determine finally whether the undoubted disappearance of a very large cohort of

² Some of the names of participants in this report have been deleted from the written record in order to protect their identity.

religious people in DPRK was the result of genocide or simply a reaction to official hostility.

Later on the second day, Jennifer Walsh explained the principle of R2P – the responsibility of the international community to protect the human rights of citizens of a country where it was clear that their own government was failing to do so. She stressed the importance of contingency planning for the time, which will come in due course, when actual charges can be brought against those who may be guilty and deserve to be brought before a court or tribunal with relevant jurisdiction and powers.

Greg Scarlatoiu presented grim evidence suggesting the stepping up of violence in DPRK since the advent of the new leadership. Material available to him appeared to indicate that at least 70 officials had been executed since 2010.

Juliet de Riviero built on these propositions. She said it was the duty of civil society organisations to gather evidence and files that could eventually be used to secure accountability.

Ambassador Alexander Vorontsov suggested that it was important that those who gathered evidence, and made allegations, should be sure about its reliability. He also suggested that the time had come to move beyond naming and shaming DPRK. Yet others asked: if DPRK resists the jurisdiction of the International Criminal Court and other potential tribunals, what other immediately effective remedies are available?

Also later on day two, Anselmo Lee appealed for an improvement in understanding of, and knowledge about, DPRK in ROK. In response to this, an official explained the history of the *North Korean Human Rights Act* of ROK. He explained the streams that existed in the government and in the opposition parties in ROK affecting the estimates of how any value could be anticipated from outreach to DPRK.

Eun Kyoung-kwon described reports of how the ROK national security law had an impact on non-governmental organisations considering engagement with DPRK. She also described the importance of engaging with the younger generation in South Korea about DPRK.

DAY THREE

The third day began with a brilliant address by Surin Pipsuwan (Thailand). Drawing on his high service in ASEAN, he described what he called 'the ASEAN way'. Often this would seek to avoid confrontation and accusation. Sometimes that approach would gain more and better outcomes than demands for accountability in courts or tribunals of law. That possibility had to be weighed.

Professor Junya Nishino described the history of what he called the serious attempts of Japan to engage with DPRK (1998-2000). When the Supreme Leader Kim Jong-Il acknowledged the abductions of Japanese nationals as an act of state by DPRK, he appeared to believe that this acknowledgement would settle the issue. Instead, the shock and indignation felt in Japan, as well as the horror for the sufferings caused by abductions, greatly unsettled relations between the two countries.

Richard Morris reminded the participants of the 800th anniversary of the signature of the Magna Carta in 1215 at Runnymede in England by King John. Although it dealt with very different concerns, it constituted an assertion by the people of England of their right to subject the power of their rulers to basic principles which would be expressed and respected. Essentially, this was what was now being attempted in relation to the leadership of DPRK.

Angela Majdu-Kuti drew on experience in South Africa in the invocation of the universal jurisdiction of courts to respond to crimes against humanity. Much thought was given to whether, and if so where, such a principle could be invoked successfully in the case of DPRK. Professor Vorontsov stressed his view that the security situation in DPRK was the number one issue of legitimate concern to the international community. He said that some countries were hoping for changes within DPRK, so as to reduce the risks and tensions in the region. However, some of the strategies proposed in the COI report might simply make the situation worse.

Also on day three, Joanna Hosaniak, who was present at the creation of the COI, described the history by which the COI came about. And the important interaction between the OHCHR and international civil society in that process.

Camila Asano spoke from the view point of her own country, Brazil, and suggested that concern about human rights in DPRK was not currently on the agenda of the BRICS nations. This could be seen by the abstaining or negative votes of members of that group. It was as if DPRK was of little or no relevance to them.

James Burt described the little known fact that 1200 refugees from DPRK have been given sanctuary within the countries of the European Union. They are naturally a focus of concern and their predicament is often acute.

Param Preet Singh explained her view about the importance of securing champions in the international community, who would stand up for the human rights of DPRK's citizens. She expressed praise for the leadership role that had been played by Australia, then a non-permanent member of the Security Council (SC), in achieving the adoption in December 2014 of the procedural resolution by UNSC. This had placed the issues of human rights in DPRK on the agenda of the SC, which was itself a novel step, rarely taken. At the least, it would mean that the SC could open discussions about DPRK immediately, if the occasion looked promising.

On the evening of the third day, Jihyun Park, herself an escapee from DPRK, engaged with the participants in a heartfelt explanation of her life as a refugee. She recounted the sufferings and sacrifices she had gone through. This was a sobering encounter. It put a human face on the issues of evidence and principle about which the seminar was engaged.

DAY FOUR

On the fourth day, Mark Tokola expressed concern at the risk that DPRK would be able to effectively blackmail other nations, simply because of fears about the nuclear arsenal that was building up. Respect for human rights and R2P made it important to adhere to principle. But all too

often, DPRK wielded an upper hand by the brute power and terror of the arms available to it.

Keum-Soon Lee described the work of non-governmental bodies in ROK. She pointed to the generosity of citizens in ROK in directly, or through their government, providing major sources of donations to relieve the humanitarian stress in DPRK.

Gordon Flake pointed to another paradox that could be added to those collected in my paper and presentation. This was that, in a sense, the extremely distressing picture painted by the COI report made it harder to take steps that continued to provide aid and succour to DPRK or propped it up despite the gross injustices and inefficiencies of its own internal institutions and laws.

An official described some of the frustrations and joys of dealing with DPRK and its people.

Another official turned the dialogue to the economics of dealing with DPRK. She described the frustrations of engagement with the country, even when foreign donors, who were seeking to provide financial support, were rebuffed and frustrated.

Tom Kellog examined further the dilemma of geopolitics in the United Nations system. He pointed to the enormous importance of China for developments in DPRK. In a sense, China is the key to unlock the door of progress in dealing with DPRK. That was therefore a primary challenge with which the COI report had ultimately to grapple.

Later on day four, Jean Fabrice Pietri described the challenges that had led Medicines Sans Frontiers (MSF) to withdrawn from humanitarian assistance to DPRK. As the COI report had pointed out, to secure humanitarian aid, DPRK had ordinarily to submit to standard requirements, both of civil society organisations (like MSF) and governmental and intergovernmental bodies which had essential auditing responsibilities. Resolving the urgent needs of the country against the normal demands of integrity, non-corruption and accountability was a major challenge facing donor activities.

David Austin explained the importance of putting at the forefront of humanitarian responses the actual saving of lives in DPRK. If that objective had a cost in modifying or overlooking ordinary rules, it was a cost that the international community should be willing to pay in order to save lives.

One entrepreneur described the value of tourism and the merit of stimulating and promoting contact between ordinary people in DPRK and ordinary citizens coming as peaceful visitors and tourists. He urged participants to get out of their silos and to help open up actual contacts and real dialogue.

At the conclusion of the fourth day, my colleague Sonja Biserko explored the various pressure points that might become useful in the future for securing progress and change in DPRK. She did so by reference to her own earlier experience in the Balkans. She stressed that the UNSC had the power to achieve action and progress through a referral to the ICC. So securing the procedural resolution to permit the rapid exploration of the human rights situation in DPRK in the UNSC was a potentially

valuable provision of a useful pressure point for deployment in the future.

Yves Doutriaux explained the role that the European Union had to play in supporting the like-minded resolution (with Japan) that had carried strong votes successively in the HRC, UNGA and UNSC of the United Nations. He suggested that the EU should concentrate on explaining its position better to the countries of Africa and Asia that sometimes seemed uninvolved in such issues. He also pointed out that, even if, on a substantive motion in the UNSC, a veto were cast to prevent adoption of the motion under the *Charter*, this was not necessarily the end of the matter. Proceeding to the point of a vote would usually force those who wished to frustrate the strongly felt views of the consensus of the international community to attempt to explain and justify their position. Hollow explanations were easily seen through. This could sometimes, in due course, contribute to their abandonment or modification.

William Schabas described the historical functions performed by COIs of the HRC. He pointed to the problem of proof that would arise immediately any serious consideration was given to a prosecution of an individual for crimes against humanity. As befitted such a grave international crime, a very high standard of credible evidence would be needed to make good the accusation. Those who gathered evidenced and alleged such crimes always had to remember the preconditions.

In the past, there was some evidence that, occasionally, an accusation of grave crimes acted as a deterrent in certain circumstances against gravely wrongful acts. For example, at the end of the Nazi regime in Europe, there was some evidence that the approaching possibility of war

crimes trials led to an amelioration of conduct on the part of certain leaders. Whether this was so in DPRK was, at this stage unknown. However, accountability for crimes against humanity, and for the risks posed by nuclear weapons, were a contemporary challenge to the international community.

Michael Liu drew upon the experience of the Cambodia Tribunal to explain the methodology and value of rendering those accused of grave crimes accountable before their victims and in the country concerned. He suggested that, in the building up of the rule of law in China (in part in response to the necessities of highly developed and sophisticated economy) hopes could arise that the attitude to the COI report and albeit human rights abuses might change.

MEMORIES

And so we part from each other and from the inspiring and beautiful physical context of our seminar. What are the memories that will come flooding back to us, weeks and years from now, as we think back on our dialogue on DPRK and the COI report now challenging the conscience of the international community?

- * We will remember the breathtaking setting of our meeting, the majestic mountains and the elegant beauty of the Schloss. These images lifted our thoughts from the mundane. They encouraged us all to explore the present and the future;
- * We will recall the new insights that were provided on top of those earlier recorded by the COI. Those who thought that everything

that could be written had been written were constantly surprised by new ideas raised and new possibilities of progress offered;

- * No one should be over proud in the face of terrible wrongs and injustices in DPRK. On the first day of our seminar I called for criticisms both of the content and methodology of the COI on DPRK. Humanity improves itself by criticism. Although the COI on DPRK has already been called the “the gold standard” of COIs, there are doubtless things we could have done better, particularly if we had enjoyed more time. I will welcome the receipt of further suggestions, after we have parted, on ways in which the COI could have worked better. Such suggestions will be drawn to the notice of the United Nations to help improve its responses to its enormous responsibilities;

- * A common stream of suggestions urged fresh attention to the serious challenge of bringing the content of the COI report to the notice of a broader audience. It is easy to provide a report at an end of the process. But, in truth, it is only the beginning of the solution. Parts of the report (being the substantive section) have never been translated into Chinese or other major languages. The Korean language version should be made simpler. The English language version should be published by a commercial publisher, so as to reach a much broader audience. This is one COI report that is readable, compact, understandable and important and urgent. To the extent that this is necessary, OHCHR should secure the approval of the relevant authorities, on any usual conditions, to permit an expansion of the process of bringing the COI message to the world. We the experts have read the report.

But new audiences must be sought out. For the truth and knowledge will demand action and progress;

We will remember the Barbeque beside the lake and the effort of Gordon Flake, in stentorian voice, to encourage us to “climb every mountain”.

- * We will think of the optimism voiced during our dialogues that separated families may come to meet each other before it is too late. That progress will be made in person to person contacts, as urged by the COI. That an opening economy will provide opportunities, just as earlier occurred in China and other countries.
- * We will certainly remember the photographs that were shown by one of our participants from the time actually spent in DPRK. Those photographs showed school children in DPRK, sitting seriously in their classroom with the images of the supreme rulers looking down on them;
- * Another photograph of children showed them standing together in Winter sunshine. They wore cheap jackets to ward off the extreme cold. No one could feel hostile to these children. They deserve the fulfilment of the good life and respect for their human rights, as promised to them in the Charter of the United Nations.
- * We will also remember the happy band of adults in DPRK shown in a photograph standing on a boat after what appeared to have been a picnic. It is ordinarily impossible to hate people when you know them. This is how, in Australia, we overcame the demons of

the “White Australia Policy”. It is the way that all of us can be reminded of the humanity we share with the people of DPRK.

- * And we will also remember our tears. For tears there were many when we heard the tragic stories of suffering, the struggle to escape the risks, dangers and failures. And relief on the ultimate removal of the shadow. The words of Jihyun Park will continue to haunt us and rightly so.

Those of us who explored the gallery in which Jihyun Park spoke to this seminar will have found, on the rear wall, a photograph of this Schloss, taken after the *Anschluss* by which Austria was absorbed into Germany in 1938. There, in the same room in which we were meeting were images of an earlier time of great wrongs. Fear and terror haunted the Schloss, and Austria at that time. And the world at large. Danger and crimes against humanity were never far away.

Reflecting on that photograph, with its reminder of earlier totalitarianism, will teach us that all wrongs are ultimately overtaken. Sunshine, hope and beauty are restored. This does not happen just by wishing for it. It requires resolute action, intelligence, strategy and truthful reporting.

It is the hope of all members of the COI on DPRK that this seminar, at *Schloss Leopoldskron*, will have contributed – even if only in a small part - to the day when the shadow will be lifted from DPRK and human rights in Korea will be assured to all of its people.