

EUROPEAN ALLIANCE FOR HUMAN RIGHTS IN NORTH
KOREA

LONDON, 11 MARCH 2016

THE COMMISSION OF INQUIRY: WHAT NEXT?

The Hon. Michael Kirby AC CMG

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I. COI ON DPRK

In March 2013, the UN Human Rights Council (HRC) established a Commission of Inquiry (COI) on human rights in DPRK.¹ Unusually, the COI was established without a call for a vote. The HRC resolution mandated the COI to investigate the systematic, widespread and grave violations of human rights in DPRK, with a view to ensuring full accountability, in particular for violations that might amount to crimes against humanity.²

In May 2013, the President of the HRC appointed Sonja Biserko of Serbia and me to the COI, joining Marzuki Darusman, a member *ex-officio*. He already held office as Special Rapporteur on human rights in DPRK. I was designated to chair the COI on DPRK. The resulting report was released in February 2014.³ It addressed the nine point mandate received by the COI. The report was delivered on time, within budget and unanimously. In doing so, the COI embraced many

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¹ A/HRS/Res/22/13 (21 March 2013).

² HRC, Res 19/13 and GA Res 67/151.

³ A/HRC/25/CRP.1 ("COI report").

innovations in its methodology: most especially the use of public hearings, with testimony, transcript and other materials placed online and shared with the international community and media.⁴

To understand the divided Korean Peninsula today, the COI considered it was essential to provide an historical background.⁵ For more than a thousand years, history records organised human societies in Korea. Because of its geographic position, the peninsula was frequently the subject of interventions: sweeping its exposed territory from the respective directions of China and Japan. These provided a source both for the cultural roots of the Korean land and people; but also the origin for local attitudes, hostility, fears and perceived security risks. The invasions from China brought cultural changes, but also a deep wellspring of Confucian social values and attitudes. The invasions from Japan, brought deep industrialisation, cultural memories and some autocratic habits, including in the forms of torture of suspected enemies and the worship of the leader.

In 1876 the resurgent Meiji Empire of Japan imposed, by force, an unequal treaty on the Korean Empire. In 1910, fresh from its defeat of Russia, Japan invaded Korea and imposed a harsh colonial regime. Independence movements were ruthlessly suppressed. In the centre of

⁴ The report of the COI is available at <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx>. A discussion of the methodology adopted by the COI may be found in M.D. Kirby, “The UN Report on North Korea: How the United Nations Met the Common Law”, *Judicial Officers’ Bulletin*, September 2015 (NSW), vol. 27, number 8 at pp 72-24. See also P. Alston and S. Knuckey (Eds.) *The Transformation of Human Rights Fact-Finding*, OUP Oxford, 2016.

⁵ This was Pt III of the COI report (at pp 19ff, para[85] ff), see <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/CommissionInquiryonHRinDPRK.aspx>. Historical materials appear in Victor Cha, *The Impossible State: North Korea, Past and Future*, ECC, Harper Collins, 2011; Andrei Lankor, *The Real North Korea – Life and Politics in the Failed Stalinist Utopia*, Oxford, OUP, 2013.

Seoul is a former Japanese prison for Korean dissidents. Displayed there are the continuing means of contemporary torture that were explained in evidence given by several witnesses from DPRK.⁶

In 1943, as the tide of the Second World War turned in favour of the Allies, their leaders met in Cairo to consider the likely post-war situation. The United States toyed with the idea of mandate-like arrangements for Korea, once released from Japanese rule. This was subsequently changed to specification of 'spheres of influence'. The Soviet Union, which did not enter the war against Japan until just before its conclusion, was assigned the northern section of the peninsula. The southern section was assigned to the United States, below an artificial line drawn close to the median point. In every way, the division was artificial. There was no self-determination by the Korean people of their post-colonial political future. The division severed the unity of the governance of the Korean people. The actual division was drawn on a map by a middle ranking US official, Dean Rusk, later to be Secretary of State. He had no actual familiarity with Korea, its geography or people.

Each of the successor states, DPRK in the north and the Republic of Korea (ROK) (South Korea) in the south, began with autocratic regimes that reflected the animosities of the Cold War. Militaristic autocracy was to be a feature of the peninsula for most of the supervening years. By 1949, Kim Il-sung had emerged as the uncontested Supreme Leader in the north. He yearned for a fight to 'liberate' the south. On 25 June 1950, the Korean War was initiated by DPRK. However, seizing advantage of the temporary absence of the Soviet Union from the

⁶ COI report, pp 21-22 [95].

Security Council,⁷ the United Nations resolved to authorise a defence of ROK. The UN Force repelled the invading force from DPRK. But this attracted a huge intrusion of Chinese ‘volunteers’. They ultimately drove the UN Forces back, effectively to the original demarcation line.

The sufferings on both sides of the Korean War were enormous.⁸ Most Korean families had experience of the death of, or severe injury to, family members. The memories of the suffering have proved indelible on both sides. There has never been a peace settlement; merely an armistice. Technically, the two Korean states are still at war. The hostility between them, and the animosity of attitudes and propaganda, have been poisonous on both sides.

An attempt to begin afresh the relationships between the two Korean states followed the election of a great liberal leader as President of ROK: Kim Dae-Jung. He espoused a ‘Sunshine’ policy. He sought to tap the deep desires of ordinary people on both sides of the demilitarised zone, for restored relationships and eventual reunification of the Korean Peninsula. He visited Pyongyang in 2000. In 2005, Six Party Talks were initiated on the basis of a pledge that DPRK would abandon all nuclear weapons and existing nuclear programs. It agreed to do this in return for support in establishing stable energy supplies for the north. There are differences of view about what next happened. However, the objective fact is that DPRK reneged on its non-nuclear pledge; recommenced a nuclear energy program incidental to developing atomic

⁷ It was absent as a protest against the continued occupancy of the China seat in the United Nations by the Republic of China and the failure to recognise the credentials of the People’s Republic of China. After the UN vote, the Soviet Union hastily returned to the Security Council; but the vote had been adopted. Questions persist as to the legality of the vote in the absence of the “concurring votes of the permanent members” in accordance with the United Nations *Charter*, Art 27.3.

⁸ The total Korean casualties were approximately 2 million; Chinese, 600,000; United States, 36,000; and United Kingdom and others (including Australia) 1,000.

weapons; and created a dangerous and destabilising military potential that triggered deep anxiety and military responses on the part of ROK and its military ally, the United States.

There followed three (underground) atomic weapons tests: in 2006, 2009 and 2013. By the time of the third test, in December 2013, the second dynastic ruler of DPRK, Kim Jong-Il had died. His son, Kim Jong-un, aged about 30, succeeded to the military, party and effective state leadership of DPRK. However, his rule introduced features of greater danger. Not only did he retain the huge army, constituting the fifth largest standing military force in the world. He immediately authorised the third atomic test in 2013. And he introduced a series of executions of high level leaders of DPRK, including, in December 2013, Jang Song-thaek, his uncle by marriage. Until his sudden humiliation, removal, military trial and execution, Jang had been described as the 'control tower', accepted to guide Kim Jong-un.⁹ This and other violent acts indicated potential elements of instability in DPRK. These were the more concerning because of the youth and inexperience of the new leader; his rejection of the prudent voices that had gathered around his father; and his willingness to explore still newer weapons. These included the testing of missile systems, potentially to carry nuclear devices, the conduct of a fourth underground test, allegedly of a hydrogen bomb; and the reported testing of a submarine launch of a missile that could enlarge still further the risks presented by the enhanced weaponry of DPRK.

As these dangerous developments unfolded, the COI played out its role in the Korean drama: but with its focus fixed always on the principles of

⁹ COI report, p. 43 [157].

universal human rights as required by its mandate. The commissioners met for the first time in July 2013. In accordance with the distinctive methodology that they had agreed, they conducted public hearings in Seoul, Tokyo, London and Washington in September and October 2013. They had no difficulty in gathering substantial testimony of grave human rights abuses. Available for both public and private hearings was a huge number of refugees who had fled DPRK: particularly during the grave famine (“arduous march”) of the mid-1990s. These witnesses gave evidence of enormous suffering, cruel brutality, shocking discrimination against women and suspected political or religious opponents; severe restrictions on basic civil rights; and the beginnings of reactions to these horrors on the part of the people of DPRK. Those reactions included the establishment of rudimentary markets in some towns; the protest against an attempted currency ‘reform’; and the exodus of thousands of DPRK citizens to China, searching for a better life, greater stability and predictability.

Although access to the internet was prohibited to ordinary citizens in DPRK, availability of an intranet gradually opened up potential access to global media, including television dramas from ROK that confirmed the widespread rumours that life in South Korea was prosperous and infinitely freer than in the North. These were the circumstances in DPRK by the time United Nations’ COI delivered its report on 17 February 2014.

A month later, on 17 March 2014, the report was formally presented to the Human Rights Council in Geneva. Because virtually every page of the report contained extracts from the testimony of witnesses, speaking directly to the international community, it caused a sensation. It

attracted very high votes in favour of the report and its recommendations both in the HRC and in the General Assembly, to which the report was duly referred. On 17 April 2014, on the initiative of France, an 'Arria briefing' was given on the content of the report to those members of the Security Council who chose to attend. Only China and the Russian Federation absented themselves from this briefing. The latter called on the COI, in advance of the Arria briefing, to explain that its absence was not a reflection on the actual findings of the COI but because of the objection of Russia to country specific mandates from the HRC.

Informed by the Arria Briefing, steps were then taken to assemble a procedural motion in the Security Council. Exceptionally, this brought the situation of human rights in DPRK before a meeting of the Security Council held on 22 December 2014. Under the *Charter* of the United Nations, procedural votes are not subject to the veto of permanent members. But they still require the support of at least 10 members of the Council.¹⁰ The opposition of China and the Russian Federation caused the Security Council to delay its consideration of a central recommendation of the COI that the human rights situation in DPRK should be referred to the International Criminal Court (ICC). A year after the first procedural resolution was adopted, on 10 December 2015 (Human Rights Day), despite the election of new non-permanent members in the interim, the Security Council once again agreed to place the human right situation in DPRK on its agenda. It thereby accepted and endorsed the interconnection of human rights and international peace and security in the context of North Korea.

¹⁰ *Charter of the United Nations*, Art 27.2, requiring 10 affirmative votes. In fact, in December 2014 there were 11 affirmative votes, 2 abstentions and 2 against.

Speaking in her capacity as the representative of the United States, the President of the Council in December 2015, Ambassador Samantha Power, said:¹¹

“The situation in the DPRK is now an item on the Security Council’s seizure list. Given that the DPRK continues to carry out these widespread and systematic human rights violations, inflicting immeasurable suffering on the North Korea people, and given the ongoing threat posed by DPRK to international peace and security, the reasons for the Council meeting on the situation in the DPRK persist. For as long as this situation in the DPRK remains unchanged, this Council should continue to hear briefings about, and engage in debates on, the human rights situation in the DPRK in this chamber.

The adoption by the Security Council of the procedural resolutions reaffirms the ongoing superintendence of the human rights situation in DPRK by the Council. However, the UN Under-Secretary-General, Mr Jeffrey Feltman, in his remarks in 2015, stressed the need for “efforts to engage the Government of the DPRK to improve the human rights situation in the country [which] must go hand in hand with efforts to hold perpetrators of crimes accountable.” He also acknowledged:¹²

“The international community is yet to find and agree on an effective way to address the serious rights concerns raised by the report of the Commission of Inquiry, and how to bring about positive and lasting

¹¹ Remarks on the adoption of the provisional agenda of the UN Security Council on the situation in the Democratic People’s Republic of Korea, UN Security Council, New York, December 10, 2015.

¹² Remarks to the Security Council Briefing on the situation in the Democratic People’s Republic of Korea by Under-Secretary-General Jeffrey Feltman, December 10, 2015.

change for the North Korean people. Particular challenges have been posed on how to balance calls for accountability and focus on security matters and the need for engagement and dialogue.”

Far from DPRK responding to the concerns and admonishment of the international community, by engagement with its institutions and compliance with previous Security Council resolutions on sanctions, DPRK proceeded to an escalation of the grave dangers involved in the maintenance of its huge standing army; the conduct of a fourth underground nuclear weapon test (allegedly a hydrogen bomb); the conduct of a submarine to air missile test; and the undertaking of a long range missile test of military potential. Obviously, these were deliberate and provocative actions, pursued intentionally and in violation of earlier Security Council resolutions.

What can the international community do to assert its will, to protect itself and the people of North Korea, whose government fails to do so? How can the global community uphold international peace and security in such a dangerous environment? How can it do so whilst at the same time moving to end, and redress, the human right abuses revealed in the COI report?

II. TEN PARADOXICAL STRATEGIES

These are times for principled thinking but also fresh thinking, on how to handle the dual challenges to peace and security and human rights presented to the world by DPRK. My skills are in the fields of law and international human rights: not to field of security risks and military strategy. Skills in human rights law can sometimes be an impediment to

major breakthroughs for peace and security; but that does not make them illegitimate.

An earlier approach to paradoxical thinking was the initiative of ROK, thirty years ago, to move from autocratic rule and to embrace in the south the broad features of parliamentary democracy; the rule of law; and economic liberalism. This challenge helped to build a society in South Korea which is far more attractive to knowledgeable Korean citizens than the threadbare absolute monarchy of DPRK, with its grinding poverty, recurring famines, obsessive secrecy, totalitarian rule and pervasive detention camps. Another effort at fresh thinking was that offered by Kim Dae-Jung's 'Sunshine Policy'. In the result, it did not succeed, as most observers hoped it would. But at least the attempt was made. As several participants have insisted, there are no 'quick fixes' to the challenge of DPRK. That challenge is no longer a 'fringe issue'. It lies at the heart of contemporary global security concerns. 'Business as usual' is no longer a viable option so far as DPRK is concerned. The risks of mistakes, accidents and unpredictable chance events are too great. The dangers to nations, peoples and the entire biosphere are real. They cannot be ignored.

Three recent images bring the current realities starkly to our minds:

- * In DPRK, in January 2016, the signs of rejoicing on the streets are vividly recalled, as the emotional television presenter announces the fourth bomb test and later the subsequent missile launch;
- * In the United States, the sombre faces of the legislators who came together, across party lines, to adopt the *North Korea Sanctions and Policy Enhancement Act* of 2016 (US) reflected the

unanimous (or near unanimous) support in both Houses of the Congress. With one voice the senators and representatives set out to tighten the web of sanctions, designed to achieve “an overall policy to denuclearize North Korea and promote human rights within the country”.¹³ At a time of very deep political divisions in the United States, President Barack Obama endorsed this signal of unified resolve by himself signing the measure into law. It is now operating to impose new and stronger sanctions and strategies in respect of DPRK, its leaders and people; and

- * In ROK, the government abruptly cancelled cooperation with DPRK in the Kaesong Industrial Zone. It declared that the income from the zone had been used by DPRK to finance its nuclear and missile programs. A day later, DPRK froze all of the Kaesong assets, expelled all nationals of ROK from the zone and declared the zone a military security area. Inevitably, this action dismantled the effective Trojan horse that the efficient, clean and prosperous factories in Kaesong had presented to the 50,000 Kaesong workers, to be spread as an idea throughout DPRK.¹⁴ Whatever the competing arguments, ROK had clearly concluded that its exposure to increased risks from DPRK required resolute action. Inaction or turning the other cheek, was not a sufficient response. A signal had to be sent, including a signal to DPRK’s principal protector, China.

Given that China is the only country with major trading and economic relations with DPRK, and potential influence over its actions, it remains a

¹³ Announcement of the US Senators Bob Corker (R-Tenn), Ben Cardin (D-Md) and Cory Cardner (R-Colorado) and Robert Menendez (D-NJ) announcing that the US Senate Foreign Relations Committee had passed the *North Korea Sanctions and Policy Enhancement Act*, January 28, 2016.

¹⁴ R. Frank, “The Kaesong Closure, Punishment or Shot in the Foot”, published 38 *North.org*.

key to achieving progress on the human rights and the security issues. But given the recent history of China, and its own current regional strategies, is there hope for change? What can the international community do to promote new initiatives? What strategies or combination of strategies presents any possibility of promoting change? Given the unacceptability and dangers of military intervention, what can be done specifically to improve the human rights of the people of DPRK at this present juncture? Is hope of change unrealistic? Or, paradoxically, is the present time specifically propitious for change in DPRK?

1. *UN Initiatives*

The mandate of the COI has been discharged. The COI has no continuing existence. The members of the COI rejected suggestions that they should continue in office. They wanted to make the point that, the report being provided to the United Nations, it was up to the nation states to respond, as their legal duty demanded.¹⁵

The term of the second Special Rapporteur, Marzuki Darusman, will shortly expire. It will be important to fill the vacancy caused by his retirement without delay. I pay tribute to the outgoing SR for the excellence, persistence and creative imagination of his reports. He and his predecessor (Professor Vitit Muntarbhorn of Thailand) have demonstrated the qualities of mind and courage that are essential to this frustrating task. Despite so many discouragements, the HRC must

¹⁵ The reference is to the “R2P” principle. The origins and implications of this principle in international law are described in Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* Brookings Institution Pressing, Washington DC, 2008, according to this exposition “the primary responsibility for protecting its own people from mass atrocity crimes lies with the state itself. State sovereignty implies responsibility, not a license to kill. But when a state is unwilling or unable to halt or avert such crimes, the wider international community then has a collective responsibility to take whatever action is necessary”.

persist with an SR. In his last report, SR Darusman proposed that a “committee of experts” should be established to explore, beyond the efforts of the COI, the present state of international law and the prevailing state practices on accountability.¹⁶ He recommended that “creative and practical mechanisms of accountability, that are most effective in securing truth and justice for the victims of crimes against humanity in the [DPRK], should constitute the mandate of the new expert committee”. Some concern has been expressed that the COI has already fully explored the remedies available.¹⁷ However, it did so under a tight deadline. A new expert committee might produce fresh options. It would maintain the commitment of the United Nations, to mobilise the international community to protect the human rights of DPRK nationals. It would signal an unwavering determination to that end. Given appropriate timing, it need not cut across the mandate and responsibilities of the new SR, when appointed.

2. Publicity COI Report

Preparing a report is not the end of the mission of a UN COI. It is only the beginning. Much international news media on DPRK seems content to emphasise the peculiar or humorous features seen in DPRK and its society. However, as the COI report discloses, DPRK is no joke for the people subject to its rule. An antidote to the isolation, and to the denial of access to modern communications in DPRK, would be the widespread distribution of the DPRK report, especially in the Korean language. Top priority should be given to this objective. Likewise, distribution of the full report, in hardback and in an attractive format, should be a priority UN initiative. The UN is successful in organising

¹⁶ United Nations, Report of the Special Rapporteur on the situation of human rights in the Democratic People’s Republic of Korea. A/HRC/31/70 (19 January 2016), b10 [39(a)].

¹⁷ COI report, pp 361-365 [1201]-[1208].

COIs. It is less successful in promoting awareness of their findings. The present impediments placed in the way of translations of the report into the Korean and Chinese languages, should be immediately removed by OHCHR. As much attention should be addressed to publicity to the COI report as to the enforcement of policies on archiving immaterial documents which the OHCHR certainly enforces. The new attitude to transparency, demonstrated by the COI on DPRK during its operations, should spill over into the approach of OHCHR to promoting worldwide awareness of the COI findings and recommendations. Awareness of these assists in maintaining and increasing the direct perception of DPRK as a “rogue state”.¹⁸ This enhances strong votes, at all levels of the United Nations, in support of the passage of resolutions on human rights in DPRK. It sends the clearest signals to DPRK that it must change its ways if it is to engage with the world community. It was not obliged to join the United Nations. Having done so (and having ratified several human rights treaties), it is obliged to conform to the requirements of the treaties and answer to the organs of the United Nations for compliance.

3. *Engagement with China*

In the discharge of its mandate, the COI took great pains to engage with China. The COI’s actions and correspondence with representatives of the PRC are described in the COI report.¹⁹ China itself must necessarily have concerns about the nuclear weapons and missile developments of DPRK, with which it shares geographic contiguity, ecological connection and shared dangers. National responses, in the organs of the United

¹⁸ M.D. Kirby and Sandeep Gopalan, ‘Recalcitrant’ States and International Law: The Role of The UN Commission of Inquiry on Human Rights Violations in the Democratic People’s Republic of Korea”, 37 *University of Pennsylvania Journal of International Law*, 229 at 279-294.

¹⁹ COI report, Appendix II. See also COI report Summary, 27 – 36 and recommendations in report, p369 [1221].

Nations, suggest the potential for finding common ground in the shared concerns over DPRK's weapons developments. China is a great nation. Its recent economic and other progress has been astonishing. It is also a permanent member of the Security Council, with the special responsibilities that go with that position, and with its privileges. During the debate on December 10, 2015 in the Security Council, the Chinese Ambassador stated that DPRK was no danger to peace and security. Subsequent events constitute an insult by DPRK to China, by making the latter's assertions and judgment appear naive and foolish. China shares with other countries common responsibilities to apply pressure on DPRK, both to change its armaments policies and to reduce its human rights defiance.²⁰ The existence of the shared interests of humanity and concern over the dangers inherent in the present situation may, paradoxically, bring about a degree of consensus which includes China. Propinquity, including in the chamber of the Security Council, is sometimes an encouragement to exploring and finding common ground.

4. *Outreach to Koreans: ROK:*

The OHCHR should explore outreach to the individuals and community groups concerned about the ongoing state of human rights in DPRK. The establishment of the UN field office in Seoul, ROK, provides an opportunity to open and extend that conversation. To the extent that sedition or other laws in ROK impede frank dialogue within the ROK community, consideration should be given to the reform and amendment of such laws and their enforcement. The legislature in ROK should consider draft legislation designed to promote accountability in DPRK for

²⁰ After the lecture on which this article was based was delivered, it was announced that the United States and China had agreed on a resolution addressed to North Korea's nuclear "provocations" and that the new resolution would go to a Security Council vote shortly. *New York Times*, February 25, 2016 p.1. *The Australian*, February 26, 2016, 9. See below.

its most serious human rights crimes. A Bill intended to protect and improve the human rights of the people of North Korea was first proposed to the legislature in ROK in 2005. Calls were made for the passage of legislation of this kind.²¹ The United Nations must explain how pursuit of humanitarian aid to DPRK can proceed, where justified, in conjunction with providing redress for grave human rights crimes, including crimes against humanity. Human rights conferences, held in ROK should no longer occur in the virtually total absence of Opposition parliamentarians. In addressing an existential question, such as the future of the Korean Peninsula, all democratic elements in ROK should actively engage in the issues raised by the report of the COI. That report should not be ignored.

5. Outreach to Korean People: DPRK

It is essential to step up communication to people of DPRK, so that they are informed (as their Government attempts to deny to them) on the findings and recommendations of the United Nations COI on their country. COI members have repeatedly offered to visit Pyongyang to explain their report and answer questions and criticisms. The COI members are still prepared to do this. In default of such invitations, ROK should support and encourage new and enlarged efforts to broadcast news on the findings of the COI and later and other investigations of human rights in DPRK. Although there are more than 28,000 refugees from DPRK in ROK, their voices are strangely silent within ROK. Whether this is for cultural reasons or for fear of legal breaches, is unclear. It is remarkable that no large scale and general representation of refugees in ROK has yet been formed. Providing for the voices of DPRK refugees to speak directly to the people of DPRK and ROK

²¹ Human Rights Watch Asia, (February 2, 2016) “South Korea’s Act to Promote Rights in North Korea”.

should be encouraged by every technological means. These include the provision of URL and other technologies to bring the advantages of freedom, prosperity and diversity in ROK to the notice of the citizens of DPRK.

6. *Person to Person Contacts*

The COI placed emphasis on the pursuit of person to person contacts between organisations civil society bodies and other groups on both sides of the demilitarised border.²² Although approaches of this kind may at first be rebuffed, they should be persisted in. The delays in providing adequate communication between divided families in DPRK and ROK are a humanitarian disgrace. Private consultations should be had, if necessary supported by new international funding, to explore what is required to facilitate such contacts. At the present rate of annual meetings, it will take 300 years to process all of the available applicants. This is barbarous. Once such meetings are agreed, the modalities constitute no more than technical impediments. It is also shocking that the precise fate of Japanese abductees in DPRK has not yet been satisfactorily determined. This unfinished business remains to be addressed. Contacts between professional bodies should also be explored, including by initiatives from outside DPRK. With my encouragement and the knowledge of the Korean Bar Association in ROK, contacts have been established between LawAsia, a regional legal profession organisation, and lawyers' bodies in DPRK. Initiatives for sharing specialised knowledge should be explored. DPRK is proud of its technological teaching institutions. ROK should permit professional contacts to begin the process of building up dialogue at the individual and grassroots level.

²² COI report, p. 370 [1222].

7. *OHCHR Initiatives*

One consequence of the COI report on DPRK was the initiation, for the first time, of at least some meaningful dialogue in Universal Periodic Review (UPR) on DPRK before the HRC in Geneva. The acknowledgement by DPRK of areas where improvement in its human rights record could be secured, gives rise to the possibility of technical assistance. This should be explored. Likewise, the possibility of a visit to DPRK by the soon to be appointed new SR should be proposed. The possibility of a first visit to DPRK by the High Commissioner for Human Rights should also be investigated, so as to establish appropriate circumstances for such a visit. None of these initiatives is inconsistent with the closure by ROK of the Kaesong complex. None of them presents risks of hard currency accumulation, which was the ultimate reason for the termination by ROK of the Kaesong zone. DPRK is a member of the United Nations. The disclosure and acknowledgment of serious defects in DPRK's human rights record, imposes on members of the United Nations obligations to provide help and support.

8. *Establish a Contact Group*

The COI report also urged the creation of a "contact group", that would include countries that have historically maintained friendly ties with DPRK.²³ Finding a venue in which DPRK might feel comfortable to explore an improvement of contacts, where improvement is possible, should be a top priority of the United Nations. Similarly, the means of promoting dialogue about a peace treaty and eventual reunification should be explored. The DPRK ambassador to the United Kingdom

²³ COI report, 371 [1225] (h).

recently pointed out that Kim Jong-un had declared that the slogan that should be endorsed by the people of DPRK in 2016 should be: “Let us frustrate the final challenges by the anti-reunification forces within and without, and usher in a new era of independent reunification!”²⁴ The leaders of ROK have asserted their commitment to reunification. Such common aspirations should be unpacked patiently, to find possible ways of achieving real progress, beyond mere slogans.

9. *Accountability Messaging:*

It is necessary to insist that crimes against humanity cannot be waved away as a price that must be paid for international peace and security. The definition of crimes against humanity restricts such crimes to those that shock the conscience of human beings.²⁵ This does not mean that every minor criminal offender must be tried on that account. Or that all officials in DPRK will be at risk of prosecution. That outcome would not be practically possible or sensible. However, justice to victims of the crimes recounted in the COI report cannot be swept under the carpet. As in the case of Anne Frank, hiding in an attic Amsterdam, in 1943 the message should be sent to victims of DPRK to keep diaries. This was the message Anne Frank heard on the BBC. It led her to write her famous book. One hopes that a renewed BBC service to Korea (and other news outlets) will bring the same message to current victims of abuses in DPRK. Such diaries would need to be kept prudently, and with circumspection. However, in due course, their contemporaneity and detail would support reliable evidence, to be used in the prosecution of serious offenses against international law. Meantime, as the current SR

²⁴ Kamila Kingstone, “North Korea’s UK Ambassador: ‘We want peace but we’ve been victimised?’” *The Guardian*, London, January 14, 2016.

²⁵ COI report, p.319 [1022]-[1065].

has insisted in his most recent report,²⁶ the principle of command and superior responsibility may render high personages in DPRK responsible for crimes against humanity. There is some evidence that, towards the end of the Second World War, Nazi perpetrators began to modify their conduct out of fear of being placed on trial, after the war, for their crimes.²⁷ One of the most vivid images of the twentieth century, alongside the mushroom cloud but more hopeful, was of the Nazi and other Axis leaders on trial: collected in a dock full of prisoners who once held the power of life and death over others. Accountability for great international crimes is one of the signal recent achievements of international law. It is a work still in progress. But it does not apply to every wrongdoer.

10. *Responding to the Special Nuclear Danger:*

Allowing fully for the foregoing urgencies in securing responses to the human rights offenses reported in the COI report, the fact remains that the development of a significant nuclear arsenal, missile and submarine facilities and the maintenance of a huge standing army are abiding dangers to the very survival of humanity. Certainly in and near the Korean Peninsula. The dangers extend beyond deliberate actions on the part of DPRK. The perils include accidents, misunderstandings, mistakes or random acts of violence by a person facing acts of violence targeted in themselves. The increasing number of military and other leaders in DPRK who have been reportedly executed in recent years underlines the risks. It is those risks that make it obligatory to continue dialogue with DPRK. That dialogue must extend beyond the dangers of

²⁶ Report of the Special Rapporteur, above, p6 [E2].

²⁷ The reference is to the belated agreements by H. Himmler in late 1943 to permit a delegation of the International Committee of the Red Cross to inspect the Theresienstadt Concentration Camp and the release of a small number of Danish Jewish prisoners. See e.g. Vojtěch Blodig, *Terezín In the "Final Solution of the Jewish Question 1941-1945"*, Oswald, 2003, 34-37.

nuclear weapons and missiles. It must extend to proper responses to the “systematic, widespread and gross human rights violations [that] have been, and are being, committed by [DPRK], its institutions and officials”, as found in the COI report.²⁸

This is where relevant decision-makers need to embrace the paradoxes of the situation in Korea. They need to remember that the Korean people themselves, in the north and the south, are innocent of the division of the country. They inherited the division from others, who then influenced the governmental systems of the two hostile states. The Korean people, in huge numbers, in north and south, suffered grievously in the Korean War. So did the Chinese people, including even Mao Zedong who lost his son. Famine, prolonged hardship and detention camps proved, with pin point accuracy, by satellites peering into the dark space of DPRK, demonstrate the suffering that is continuing. So do the voices of the victims collected in the report of the UN COI.

When doubts arise as to the utility of promoting dialogue with DPRK, the risks of failing to do so must also be remembered. Pride or even a sense of deserved retaliation, can sometimes get in the way of reducing the intolerable risks inherent in total isolation and non-engagement.

When the possibility of improvement of the situation in DPRK seems at its most unpromising, we must remember that the division of Korea is but a 70 years of history. That is short in comparison to the millennia in which the Korean people lived together, and the centuries in which they were governed as one nation and one people.

²⁸ COI report, p 365 [1211].

III. WE ARE ONE

If contemporary observers are tempted to lose their patience with DPRK, they must be cautioned to stay the course of dialogue and with exploration with firmness: remembering the commonalities that the people of all nations share with one other, with the Korea people, and with all of them. The Korean people themselves know of these commonalities. They enjoy on both sides of the DMZ the same language, literary classics, musical traditions, cuisine and great poets. They also share more humble pursuits.

Things in common sometimes emerge unexpectedly from the deep silence when the Korea people from north and south meet. Slogans of reconciliation may be shouted at each other from both sides across the DMZ. However, the sense of mutuality in a recent football match proved a metaphor for the paradoxical possibilities.

Whilst the work of the COI was concluding and being considered by the international community, the Asian Games were held in Incheon, ROK. To those games, DPRK sent a number of sporting champions, including its football team. That team won through to the final, only to discover that its competitor for the winner's medals was ROK, its closest neighbour.

The football game began before a packed stadium in Incheon. Yet the apparent rivalry was muted by the recognition, on the part of the players and spectators alike, of the historical nature of the contest. Each team

played with sportsman-like attitudes. When a player of the ROK team was accidentally bumped and fell over, he was helped to his feet by DPRK players. When a DPRK player fell, he was helped to his feet by the ROK team. In the end, the ROK team won the medals. But the players exchanged acknowledgements of each other. And all the while the spectators cried out, throughout the game: “We are one!”²⁹

This is a story of the essential paradox of Korea. One day, the riddle will be solved. The paradox will be fully understood. Until that day comes, humanity, and the United Nations on its behalf, must retain minds open to advancing the changes whenever they arise. We must be ready for them to come at once, with peace and security for all and upholding the human rights of the Korean people and all of them on both sides of the DMZ. “We are one!” they cried out to us in that stadium in Incheon. We must remember that cry. To accommodate the paradox that it expresses when placed beside the COI report. And to embrace the paradoxical thinking that it demands.

At the same time, the international and Korean communities must press on with specific actions that show that dangerous new military initiatives come at a price of specific and sharply targeted sanctions and international disapproval. And that, in ROK, a sense of solidarity and engagement will lead to ongoing action to respond to human rights abuses in the North.

²⁹ Agence France-Presse, <http://sport.ndtv.com/asian-games-2014/news/230881-asian-games-top-north-korean-leaders-to-attend-closing-ceremony>.

In the past weeks the power of paradoxical thinking and action has been evident in a number of moves:

- * The United States held secret talks aimed to explore the possibility of fresh dialogue with DPRK. These talks only broke down when DPRK rejected the postulate that it would need to surrender its nuclear armaments that are such a danger to itself and its neighbours,³⁰
- * The ROK legislature has, on March 2, 2016, after great delay, adopted the Human Rights in North Korea law to facilitate the collection and recording of human rights abuses that became known in the south; and
- * The Security Council of the United Nations on 29 February adopted a unanimous resolution³¹ imposing strong new sanctions on DPRK designed to persuade it to abandon its warlike posture including nuclear and ballistic missile related activities.

These developments show the power of paradoxical thinking and action. And it is possible that the foundation that makes this possible is the strong source material that the report of the COI on DPRK has given to international community. It shows the shocking circumstances of human rights in DPRK and the obligation of the international community to respond where the government of DPRK is manifestly failing to do so. The unanimity of the Security Council's recent resolution is an important sign. The world must continue to explore the paradoxes for within them lie the seeds of progress on security but also protection of universal human rights.

³⁰ "U.S. Agreed to North Korea Peace Talks Before Latest Nuclear Test", *Wall Street Journal*, 21 February 2016, <http://www.wsj.com/articles/u-s-agreed-to-north-korea-peace-talks-1456076019>.

³¹ United Nations, Security Council, Resolution 29 February 2016 S/2016/202.