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AUSTRALIAN INSTITUTE FOR HOLOCAUST AND GENOCIDE STUDIES

VOLUME V: GENOCIDE PERSPECTIVE SERIES

AUSTRALIAN ESSAYS IN HOLOCAUST AND GENOCIDE

NORTH KOREA: GENOCIDE OR NOT?

The Hon. Michael Kirby AC CMG

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The Hon. Michael Kirby AC CMG[**]

THE UNIVERSALITY OF GENOCIDE

I honour the work of Professor Colin Tatz on the study of the Holocaust and of genocide. He has been devoted to this field for as long as I have known him – and that is decades. I have kept informed on his scholarly and practical research. I had the honour of launching Volume IV of the *Genocide Perspective Series*. It was published by the University of Technology, Sydney as a UTS eBook. These were companion hard copies. It contained outstanding contributions examining both the theoretical and practical issues of genocide: past, present and potential.

The definition of genocide in international law is important. This is because definitions afford criteria for the exploration of alleged wrongdoing and the moves necessary to render accountable those who are responsible for this gravest of international crimes.

[*] This paper draws upon a paper first presented to a seminar at Queen's University of Ontario, Kingston, Ontario, Canada, Department of Statistics and Mathematics, 8 June 2015.

[**] Justice of the High Court of Australia (1996-2009); Chair of the United Nations Human Rights Council's Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea (DPRK) (North Korea) (2013-14).

Most thoughtful people in today's world would probably consider that they know, with a fair accuracy, what 'genocide' means. According the *Macquarie Dictionary,*[1] the word was first used by Dr Raphael Lemkin in 1944. The meaning of the noun is given as "extermination of a national or racial group as a planned move". The *Oxford Dictionary* gives an even briefer definition, traced to the Greek word for "race" as "annihilation of a race".[2] The *Chambers English Dictionary*[3] uses the same definition but adds the adjective 'deliberate': "the deliberate extermination of a race or other group". This may be an unnecessary elaboration as it is difficult to imagine that a whole race (or even part of it) could be exterminated, except by deliberate conduct. Of itself, the connotation of 'race' is too large to permit chance, accidental or unthinking extermination of so many human beings.

On the basis of their general knowledge or reading, most people would probably imagine that the destruction of so many people of the Khmer race by the organised conduct of the Khmer Rouge, which seized control of the kingdom and imposed an anarchistic regime resulting in large numbers of murders, constituted "genocide". However, when it comes to international law, such matters are not decided by intuition, feelings or common assumptions. Nor are they determined by general dictionaries or popular opinion. To decide whether conduct of concededly oppressive regimes, disregarding fundamental human rights, amounts to "genocide" requires the decision-maker to be more precise. He or she must look more exactly at what constitutes genocide in international law. This takes the decision-maker to an examination of the origins of the notion of genocide in international law.

[1] The Macquarie *Encyclopaedic Dictionary* (The National Dictionary), Macquarie Library, 1990, 386.
[2] *The Shorter Oxford English Dictionary*, (Third Ed, Oxford, Clarendon Press) 1932, Vol 1, 785.
[3] Cambridge University Press, 7th ed, 1988, 592.

Recently, I had the obligation to embark upon that journey. The purpose of this article is to explain where the journey took me; where it ended up; and the controversies that surrounded the destination I reached. The journey took place in discharging a mandate received by me in 2013 from the Human Rights Council of the United Nations. That mandate resulted in the establishment of a Commission of Inquiry (COI) on alleged human rights abuses and crimes against humanity on the part of the authorities in North Korea.[4] The COI found convincing evidence of many human rights violations and crimes against humanity. But was there evidence of genocide? This was the additional question we posed for ourselves. On the evidence before us, we answered that question, in the negative. Some readers of the report and some scholars have found that inclusion surprising.

HUMAN RIGHTS ABUSES AND FACT FINDING

The United Nations Human Rights Council (HRC) established its Commission of Inquiry (COI) to investigate, and report on, human rights abuses in the Democratic People's Republic of Korea (DPRK) (North Korea).[5] The inquiry followed many years of disturbing reports about North Korea. Although a Member State of the United Nations since 1993, DPRK had not cooperated with the United Nations human rights machinery. It had not permitted successive special rapporteurs, appointed by the HRC, to visit its territory. It had not invited the High Commissioner for Human Rights (HCHR) to visit. Effectively, it had closed its borders, only allowing a trickle of tourists who were kept under

[4] See United Nations, Report of the Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea (A/HRC/25/CRP.1) 7 February 2014 (COI report).
[5] United Nations, Human Rights Council Resolution 19/13 (2014). The report is UN document A/HRC/25/63.

close watch and restricted in their movements. For these reasons, It was commonly referred to as a "hermit kingdom".

Getting up to date, accurate and representative evidence to respond to the nine point mandate for the COI inquiry, was bound to be extremely difficult.[6] As expected, the government of DPRK, through its mission in Geneva, effectively ignored requests from the COI to permit its members and staff to visit the country. It maintained that stance throughout the inquiry. When, in the end, copy of the draft report was transmitted electronically through the Geneva embassy of North Korea to the Supreme Leader of DPRK (Kim Jong-un), with a warning that he might himself be personally accountable for crimes against humanity found in the report,[7] this too was ignored. However, DPRK was aware of the inquiry. It regularly denounced it and its members. When it criticised the inquiry and its procedures, the members and the United Nations, offered to come to Pyongyang to explain their mandate and report and to answer questions. This offer was also ignored.[8]

Faced with such intransigence, the COI was brought to the realisation of the importance of the compulsory procedure of *subpoena* (lit. "under the power"), developed in national legal systems to ensure that parties, witness and records relevant to a proceeding are bought before those with the responsibility of decision. Whilst the HRC strongly and repeatedly urged DPRK to cooperate with the COI, its injunctions fell on deaf ears. Yet, obviously, this want of cooperation could not frustrate the COI in attempting to discharge its mandate any more than a national court or inquiry would simply surrender in the face of non-cooperation.

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[6] COI report, 6-7 [13].
[7] See COI report, Annex 1 to the report (23-25) at 25 (page 3 of the letter).
[8] *Ibid, loc cit.*

The three members of the COI came from differing cultural and legal traditions. Two (Marzuki Darusman, Indonesia and Sonja Biserko, Serbia) came from countries that follow the civil law traditions, ultimately traced back to France and Germany. My own experience had been in the common law tradition derived from England as applied in Australia. Most UN inquiries are carried out by professors and public officials from civilian countries. The COI on DPRK gave a great deal of attention, at the threshold, to the methodology that it should adopt in order to overcome (so far as possible) the hostility and non-cooperation of the subject country.[9]

The COI was not itself a court or tribunal. It was not authorised to prosecute, still less to arraign and to determine the guilt of, the DPRK or any named officials. The object of UN COIs in the area of human rights is to be "effective tools to draw out facts necessary for wider accountability efforts."[10] Self-evidently, all such inquiries must themselves conform with United Nations human rights law. This means that they must accord natural justice (due process) to those who are the subject of inquiry and protection to those who give or produce testimony and may for that reason be at risk. The COI on DPRK took these obligations seriously.

The methodology adopted included:[11]

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[9] COI report, 10-15, [30]-[62]; cf P. Alston and S. Knuckey, *The Transformation of Human Rights Fact-Finding*, OUP, Oxford, 2016, esp 25, 69, 89.

[10] UNSC *Report of the Secretary-General on the Rule of Law in International Justice in Conflict and Post Conflict Societies* (2011) UN Doc S/2011/634 [24]; UNHRC, *Report of the Secretary-General on Impunity* (2006) E/CN.4/2006/89. See also G. Palmer, "Reform of UN Inquiries", ch 36 in Festschrift for Roger Clark, Victoria University of Wellington, New Zealand, 2015 (Brill, Leiden, 2015), 595.

[11] M.D. Kirby, "The UN Report on North Korea: how the United Nations met the Common Law" (2015) 27 Judicial Officers' bulletin (NSW) #8, 69 at 72-73.

(1) Advertisement to invite witnesses to identify complaints and offer testimony;
(2) Conduct of public hearings to receive such testimony as could be safely procured in public (with other evidence being received in private);
(3) Film recording of such public testimony and placing it online, accompanied by written transcripts in relevant languages;
(4) Inviting national and international media to attend and cover the testimony and draw it to global attention;
(5) Production of a report written in simple, accessible language;
(6) Indicating clearly in the report of the findings made by the COI and the evidence upon which such findings was based;
(7) Provision of a draft of the report to the nations and individuals most closely concerned, with an invitation to offer suggested corrections or comment on factual or legal conclusions;
(8) Publication with the report of any such comments (comments were received and published from China);[12] and
(9) Engaging with media in all forms to promote knowledge of -and to secure support for the conclusions and recommendations.

The COI on DPRK was aware that false testimony by witnesses could potentially damage the credibility of its findings. Therefore, it took care to limit the witnesses to those who, on preliminary interview by the COI's secretariat, appeared to be honest and trustworthy. It also secured agreement with the government of the Republic of Korea (ROK) (South Korea), exceptionally, to permit DPRK to send representatives, advocates, or to engage lawyers, who could make submissions and,

[12] COI report, Annex II, pp 27-36.

with permission of the COI, ask questions of witnesses. This offer was communicated to DPRK but ignored. In giving testimony, the witnesses before the COI were examined in the manner of "examination in chief" i.e. by non-leading questions. This course permitted them to give their testimony, in a generally chronological way, in their own language, and in a fashion that was comfortable to them. The COI did not cross examine witnesses unless it considered this step essential to clarify apparent inconsistencies or to address doubts about the witness raised in the minds of COI members by the evidence. The "non-leading" mode of examination allowed witnesses to speak for themselves.

The mass of testimony procured by the COI was substantially organised under the headings of the nine point mandate received by the COI from the HRC. In each case, analysis of the issues and the overall effect of the testimony was supplemented by short extracts from the transcripts. These passages add light and colour to the report which third person chronicles will commonly lack. Part of the power of the report of the COI on DPRK derives from the care devoted by the members and the secretariat to provide of a readable text. The object was to ensure that the findings, conclusions and recommendations grew naturally out of the preceding passages of testimony, evidentiary extracts, recommendations and analysis.

To the criticism expressed by DPRK of the report and the alleged 'self-selecting' character of the witnesses, the COI repeatedly responded with appeals to permit COI members to visit the country to conduct a transparent investigation on the spot among a wider pool of witnesses. This offer was also ignored. Moreover, the testimony of more than 80 witnesses (taken and recorded in Seoul, Tokyo, London and Washington

D.C.) was placed online and is still available there. This means that people everywhere throughout the world (except in the DPRK) can view the witnesses and their testimony for themselves and reach their own conclusions as to its truthfulness, balance and representativity.

The objections and alternating "charm offensive" and bullying tactics adopted by DPRK, following publication of the COI report, are all recorded online. Sharp (but respectful) exchanges by me with the DPRK Ambassadors at the United Nations in Geneva and New York are also captured online (and available on the internet). These allow both the political actors and the general international public to evaluate the COI report. Certainly in the first instance, the political actors in the organs of the United Nations indicated their strong conclusions by overwhelming votes endorsing the report, recorded successively in the HRC, in the General Assembly and the Security Council of the United Nations. In the Council, by a procedural vote not subject to the veto[13] the human rights situation in DPRK was added to the agenda of the Security Council by a two third majority (11 for; two abstentions; two against).

Two Permanent Members of the Security Council, China and the Russian Federation, on a show of hands, voted against the procedural resolution adding the COI report to the Council's agenda. One substantive matter where the concurring decision of the Permanent Members would be essential concerns the COI's recommendation that the case of North Korea should be referred to the International Criminal Court[14] so that prosecutorial decisions might be considered, and if so

[13] United Nations, *Charter*, Art. 27.2.
[14] COI report, 361 [1201.1]; 370 [1225(a)].

decided, trials conducted to render those arguably guilty of grave crimes accountable before the people of Korea and the international community. That substantive resolution has not, so far, been proposed, still less voted on.

In December 2015, the report of the COI returned to the Security Council. By a further procedural motion, it affirmed that the topic was within the agenda of the Security Council. Again, China and the Russian Federation disagreed. However, their negative votes again did not count as a veto, because the resolution was procedural. No so called "double veto" was invoked to challenge the assertion that the resolution was "procedural". The Chinese Ambassador declared that DPRK was no danger to the peace and security of its neighbours. Notwithstanding this argument, the Security Council adopted the resolution. The serious error of the Chinese Ambassador's characterisation of DPRK was demonstrated within weeks by the conduct in North Korea, in early 2016, of a fourth nuclear weapons test and by the launch, a month later, of an intercontinental missile. Ostensibly this was undertaken to place a satellite in space. But no observer was misled into thinking that the objectives were purely peaceful.

A principal recommendation of the COI, based upon the findings it made of human rights violations and crimes against humanity, was that the case of DPRK should be referred by the Security Council to the International Criminal Court (ICC).[15] Under the *Rome Statute*, establishing the ICC, the Security Council, exceptionally, has the power to confer jurisdiction on that court, notwithstanding the fact that the country concerned is not itself a party to the *Rome Statute*. Although the

[15] *Rome Statute of the International Court* (17 July 1998; 2187 UNTS 90) article 13(b).

Security Council has not so far invoked that exceptional jurisdiction in the case of DPRK, following the fourth nuclear test conducted by DPRK on 6 January 2016 (said to have been a hydrogen bomb) and a follow-up rocket launch, the Security Council adopted a strong resolution imposing new and severe sanctions on DPRK.[16] Reports, after this resolution, suggest that China (which is a key to ensuring progress in the case of DPRK) has been implementing the sanctions regime.

The findings by the COI of crimes against humanity referred to the definition of such crimes under international law.[17] The Commission found ample evidence in the testimony before it of such crimes in the conduct of political prison camps;[18] in the control of the ordinary prison system;[19] in the way the DPRK regime targeted religious believers and others considered subversive influences;[20] in the victimisation of persons who attempt to flee the country;[21] and in the targeting of persons from other countries as victims, in particular through a deliberate campaign of abduction of foreigners.[22]

As well, the failure to address the state's obligations to feed its population on top of natural disasters (floods and droughts) was found to have resulted in a major famine in the mid-1990s.[23] It caused many cases of starvation; and severe stunting of infants, deprived of essential nourishment. But was there evidence of "genocide"? This was the question that the COI addressed in a special section of its report.

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[16] http://www.onn.com/2016/03/02/world/un-north-korea-sanction-vote-index/html
[17] COI report, pp 319 ff [1022-1165].
[18] *Ibid* p323 [1033]-[1067].
[19] *Ibid* p330 [1068]-[1086].
[20] *Ibid* p333 [1028]-[1097].
[21] *Ibid* p335 [1098]-[1114].
[22] *Ibid* p345 [1183]-[1154].
[23] *Ibid* report Ch IVD p144 [493]-[692].

THE DEFINITION OF GENOCIDE

Although the COI's mandate from the Human Rights Council did not expressly raise the issue of genocide (as distinct from human rights violations and crimes against humanity), some of the submissions received by the COI urged that a case of genocide had been established.

This was particularly said to be so in relation to the evidence of the starvation of the general population (especially the prison and detention camp population)[24] and the evidence of the drastic reduction in the population of Christian and other religious believers in DPRK.[25] Christian Solidarity Worldwide, a civil society organisation representing Christians, appeared before the COI in London. It sought to make out this case. It offered a well prepared and persuasive submission that the evidence of genocide against religious groups (especially Christians) was sufficiently established before the COI. Allegedly, this related particularly to the period of the 1950s and 1960s. It was at that time that, even according to the national census in DPRK and other materials issued by DPRK itself, the Christian population in the country declined rapidly and substantially.

At partition of the Korean Peninsula in 1945, the Christian population of DPRK was, unsurprisingly, approximately the same as in the Republic of Korea (South Korea). This was unsurprising because, before the end of the Second World War in August 1945, when Korea was a unified kingdom and empire and even when it was a colony of Japan (1911-

[24] *Ibid* p350 [1155].
[25] *Ibid* p351 [1159].

1945) had been a unified country, speaking the same language and with a common culture, including religious culture.[26] According to the statistics issued by the census authorities in DPRK, the percentage of the population identifying as Christian in 1945 was about 23%. This was roughly the same as in ROK. It is roughly the same proportion as exists in ROK to the present time in that country.

However, in DPRK, the numbers identifying in the census as Christians plunged rapidly so that today it is less than 1%. Christians, Chondoists and Buddhists dropped from 24% in 1950 to 0.016% in 2002.[27] The inference that the COI was invited to accept was that this reduction was the result of hostile attitudes and actions towards faith communities, and Christians in particular. Such hostility would have been consistent with a large amount of evidence before the COI proving the resistance of the regime to any questioning of the ideology propounded by its successive supreme leaders. So was there sufficient evidence to justify a conclusion of "genocide" in that case? Was the evidence supported by the testimony relating to the suffering of the people (especially children) of North Korea during the famine in the mid-1990s? That period was labelled by the regime (with its attraction to traditional Marxist slogans) "the arduous march"?

Before the COI reached a conclusion on this subject, it consulted a number of experts on the international law of genocide. These experts included Professor William Schabas and Sir Geoffrey Nice QC. The former had written extensively on the legal aspects of genocide.[28] The

[26] *Ibid* p19-21 [87]-[95].
[27] COI report, *ibid*, 351 [1159].
[28] W. Schabas, *Unspeakable Atrocities – Justice, Politics and Rights at the War Crimes Tribunal*, OUP, Oxford, 2012, p106.

latter had extensive trial experience before the International Tribunal for the former Yugoslavia, dealing with allegations (and the proof) of the international crime of genocide. Each of these experts cautioned the COI that it should not feel under any obligation to find the "gold standard" international crime of "genocide". In law, "genocide" has unique features. It has specificities that have to be applied in formal decision-making. It was not a general offence arising from nothing more than the widespread death of persons, in consequence of serious human rights offences.

THE COMPONENTS OF GENOCIDE IN INTERNATIONAL LAW

In dealing with this issue, the COI on DPRK set out the ambit of the testimony that might arguably fall within the crime of genocide:[29]

> "According to the Commission's findings, hundreds of thousands of inmates have been exterminated in political prison camps and other places over a span of more than five decades. In conformity with the intent to eliminate class enemies and factionalists over the course of three generations, entire groups of people, including families with their children, have perished in the prison camps because of who they were and not for what they had personally done. This raises the question of whether genocide or an international crime akin to it has been committed."

Having reflected on those findings, the COI addressed the definition of "genocide" in international law:[30]

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[29] *Ibid*, 350 [115].
[30] *Ibid* p350 [1156].

> "International law defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, such as:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> *(e)* Forcibly transferring children of the group to another group."

The conclusion of the COI was that the deliberate conduct of DPRK, destructive of human life, although clearly established, had been "based principally on imputed political opinion and state assigned social class". As the COI pointed out "such grounds are not included in the contemporary definition of genocide under international law.[31]

Because the number and horror the crimes revealed in the COI report appeared to demand still closer analysis, the COI went on to consider how the acts of murder and extermination would be classified. It said:[32]

> "Such crimes might be described as a "politicide". However, in a non-technical sense, some observers would question why the conduct detailed above was not also, by analogy, genocide. The Commission is sympathetic to the possible expansion of the current understanding of genocide. However, in light of finding many instances of crimes against

[31] COI report, p351 [1158].
[32] *Ibid,* COI report, p351 [1158].

> humanity, the Commission does not find it necessary to explore these theoretical possibilities here. The Commission emphasises that crimes against humanity, in their own right, are crimes of such gravity that they not only trigger the responsibility of the state concerned, but demand a firm response by the international community as a whole to ensure that no further crimes are committed and the perpetrators are held accountable."

The COI acknowledge that the class of possible elimination that might come closest to the definition of genocide in the present international law would be that relating to the cause of religion. It acknowledged:[33]

> "In its testimony before the Commission, Christian Solidarity Worldwide submitted that there were indications of genocide against religious groups, specifically Christians, in particular in the 1950s and the 1960s. The Commission established, based on the [DPRK's] own figures that the proportion of religious adherence [had greatly declined]. The Commission also received information about purges targeting religious believers in the 1950s and the 1960s. However the Commission was not in a position to gather enough information to make a determination as to whether the authorities at that time sought to repress organised religion by extremely violent means or whether they were driven by the intent to physically annihilate the followers of particular religions as a group. This is a subject that would require thorough historical research that is difficult or impossible to undertaken without access to the relevant archives of the DPRK."

It was in this way that the COI on North Korea came to its conclusion that genocide, as it is currently defined in international law, was not

[33] COI report, p351 [1159].

made out on the testimony. The reasons for extermination (where it existed) were fundamentally political and ideological. That is not currently a ground for the establishment of genocide in international law. The evidence of many acts amounting to 'crimes against humanity' was overwhelming. Such acts were enough to invoke the duty of the international community to respond. It would needlessly have pushed the boundaries of the report of the COI to have reached a finding of genocide. It is a special crime of the greatest horror. That is why United Nations inquiries, scholars, historians and even politicians have to be careful in the use of the word. Throwing around the term 'genocide' or for that matter 'the Holocaust', and drawing analogies to horrible events that do not fit the treaty definition of genocide is dangerous. It tends to downgrade the peculiar elements of the crime as presently defined.

It is certainly arguable that 'genocide' in international law should extend to crimes of extermination based upon actual or perceived political conviction or belief. So much was proposed during the elaboration of the *Genocide Convention* by the representative of Cuba. It was opposed at the time by the representative of the United States of America. In the end the 'political ground' was not adopted. This was another reason based on the *travaux parétoires*, why the COI on DPRK held back.

Time may establish that, in this respect, the COI was excessively cautious. Time may eventually prove that the extermination of religious believers existed in DPRK in DPRK by reason of their religious beliefs. If that were so, it would be enough to constitute genocide, accountable in international law. Time might eventually also see the enlargement of the definition of genocide to include extermination on political grounds.

However, any such elaboration would inferentially be prospective in operation. It might apply to acts performed by DPRK in the 1950s, 1960s or even up to the present based on the continuation of the relevant acts of deadly violence based on racial or religious grounds.

If we are to build international law and tribunals that are respected as a true regime of law, it will be essential that it is achieved on a foundation of authentic components. Those components will include the feature of the pre-existing establishment of the norm that is invoked. In the immediate instance, that was the norm of the definition of genocide in present international law.

At every opportunity, where the COI was urged by alleged victims and civil society organisations to push the envelope of international law and practice into problematic areas, it held back. It observed the principle of due process and natural justice. Carefully, it warned DPRK and its Supreme Leader of their own potential personal liability for international crimes. And when it came to considering the international crime of genocide, it accepted the orthodox, current definition. On the basis of that definition it declined to record a finding of genocide.

Whilst this conclusion may seem to some surprising, even needlessly cautious and disrespectful to the victims in the DPRK, it was the conclusion that the rule of law appeared to require on the evidence adduced. One of the essential ingredients for preventing, combatting and responding to genocide is the existence of international law. In that sense, the approach of the COI on North Korea contributes to a world in which genocide is no longer an affliction of humanity not because it is morally repugnant but because it is an international crime.