

COMMITTEE FOR HUMAN RIGHTS IN NORTH KOREA (HRNK)

NATIONAL HUMAN RIGHTS COMMISSION OF KOREA (NHRCK)

THE NATIONAL PRESS CLUB, FIRST AMENDMENT LOUNGE

WASHINGTON DC

UNITED STATES OF AMERICA

DECEMBER 16, 2016

MAKING PROGRESS ON NORTH KOREA

The Hon. Michael Kirby AC CMG

COMMITTEE FOR HUMAN RIGHTS IN NORTH KOREA (HRNK)

NATIONAL HUMAN RIGHTS COMMISSION OF KOREA (NHRCK)

THE NATIONAL PRESS CLUB, FIRST AMENDMENT LOUNGE

WASHINGTON DC

UNITED STATES OF AMERICA

DECEMBER 16, 2016

MAKING PROGRESS ON NORTH KOREA

The Hon. Michael Kirby AC CMG*

ON NEVER GIVING UP

I have travelled great distances for a relatively short meeting, and shorter address. I have done so because of the incontestable importance of the topics that bring us together. And because of the uncertain and unpredictable times through which we are passing.

The incontestable importance of human rights violations in Democratic People's Republic of Korea (DPRK) (North Korea) arises because of the dual features of the challenges that North Korea presents to the world. Those challenges are inter-related. They involve the grave violations of human rights (many of them 'crimes against humanity') which the UN Human Rights Council's Commission of Inquiry (COI) found, on reasonable grounds, had been committed, and were being committed, in

* Former Chair UNHRC COI on DPRK (2013-14). Former Special Representative of the Secretary-General for Human Rights in Cambodia (1993-6). Past Justice of the High Court of Australia (1996-2009)

North Korea. And the extremely dangerous threats to peace and security on the Korean peninsula, in its region and increasingly wider afield caused by North Korea's development of a nuclear arsenal; missile delivery systems; and submarine launching techniques. Potentially these could endanger the peace and security of countries distant from North Korea, including the United States of America and Australia. They are of concern to the region and the whole world.

The UN *Charter*, agreed in 1945 and settled in its final form at Dumbarton Oaks, not far from this meeting place, agreed on three fundamental goals of the new Organisation. These are the protection of peace and security; the defence of universal human rights; and the achievement of justice and economic and political equity that would spell the end to the old colonial empires. Thus, from 1945 it was recognised that, specifically, peace and security and universal human rights were interconnected and interdependent. So it has proved in connection with North Korea.

The change of administration in the United States has presented uncertainties because of the need to factor in new likely approaches to international relations, including with many of the leading actors relevant to North Korea. In addition to this uncertainty, the impeachment of the President of the Republic of Korea (ROK) (South Korea) (President Park Geun-hye) introduces an element of instability and uncertainty in that country, which shares borders, history, language, culture and risks with its northern neighbour. Many other uncertainties have emerged on the international scene, including in the policies of China and the Russian Federation, both of which also share borders with North Korea.

This meeting is therefore timely. Change can be healthy, if it opens up new opportunities for peace and justice. The purpose of diplomacy is to turn opportunities into advantage and to approach old problems with new answers.

Three preliminary observations must be stated for these remarks:

- * Although I chaired the COI on North Korea (2013-14), on the delivery of the COI's report to the Human Rights Council on 17 March 2014 my mandate was formally concluded. Although I have been engaged in a number of meetings, and even some activities at the United Nations since March 2014, I am not a UN officeholder in respect of DPRK. I have no authority to speak for the United Nations or to propose action on its behalf. The mandate of the Human Rights Council has passed from Marzuki Darusman (the second SR on DPRK) to Tomás Ojea Quintana (the third SR). He has the current mandate. Nothing I say or do should undermine his important work, including his desire to take new and different steps of outreach in the hope of making more progress on human rights in North Korea than has proved possible in the past;
- * Although human rights and peace and security are intertwined, I have no professional or other expertise on security concerns. I have no military or strategic training. I am not a professional diplomat. My training has been in the law and has included human rights. I must not pretend to have knowledge or expertise in military matters. But one does not have to be a military genius to know the enormous dangers of the proliferation of nuclear weapons and the even greater existential dangers in their use.

Human experience demonstrates the risks of mistakes, accidents, miscalculations, pride and error. In an age of enhanced weaponry, partly controlled by machines not human decision-makers, the risks are enlarged. Those risks include risks to human life and to the environment in which human beings live. This is another reason for the inter-connection between security and human rights; and

- * There are instances in life when doing nothing is a preferable option. Sometimes problems go away. However, doing nothing is not a viable option in respect of the demonstrated abuses of human rights (including crimes against humanity) in North Korea. Crimes against humanity are defined by reference to acts of violence that shake the conscience of humanity and therefore demand a response and accountability from the perpetrators. The international community has accepted this. Where a nation state fails to address such crimes, the duty devolves on the international community to step in for the protection of nationals of that state. As well, the large and growing risks inherent in the proliferation of nuclear weapons, and the means of delivering them, in and from North Korea, virtually oblige the international community, for its own urgent protection, to respond effectively. In part, the Security Council appears to have acknowledged this by resolutions adopted in 2016, stepping up the sanctions that are imposed on North Korea in response to its nuclear tests and associated weapons developments.

The context in which we meet is therefore a reminder of Winston Churchill's motto: "Never give up." Because doing 'nothing' amounts to giving up, the question is what 'something' demands.

TEN INITIATIVES

1. Promoting Awareness of the COI Report

The starting point for the international community is knowledge about the situation that demands action. Countless books have been written on the situation in DPRK. Vast amounts of data from the internet and elsewhere describe the unjust and dangerous situation in that country. However, concern about partisanship and lack of balance is legitimate in this post-Cold War theatre of conflict. That is why the initiative of the UN Human Rights Council in creating the COI (and doing so exceptionally without a demand for a vote) is so important. It is why the COI itself proceeded with new highly techniques, including greater transparency, public hearings, internet uploads, media engagement, provision of transcripts and presentation of a readable report. The international community will not in the foreseeable future have another opportunity to gather together such findings on a large number of human rights abuses in North Korea. The UN has been reasonably successful in securing this report. It has been less successful in publishing and distributing it. It is the authentic record of existential problems that the world faces. Steps should be taken to publish widely and in attractive format. To translate it into more languages. To annotate and update it, where that is called for. And to promote and encourage familiarity with what it reports. It is that familiarity that will demand action and dispel lethargy and indifference.

2. Supporting the New SR

The new Special Rapporteur (SR) on North Korea, Mr Quintana of Argentina has credentials as a former SR on Burma/Myanmar. Progress has recently been made in that country. But whether the progress has lessons for the different environment of North Korea, remains to be seen. Members of the former COI have had discussions with the current SR. I hope that further meetings will take place in Geneva in March 2017, at the time of the presentation of his next report. He must be respected and encouraged as he attempts new strategies. The truth is that the strategies of engagement with the UN Human Rights machinery and even with the Security Council, to date have not been very fruitful.

3. Supporting the Field Office in Seoul

One recommendation of the COI was for the establishment of a field office in the region of the Korean Peninsula to continue the work of the COI, including in the collection and recording of reports of victims of, and complainants about, human rights abuses. See COI report para 1225(c). The Office of the High Commissioner for Human Rights (OHCHR) has established an office in Seoul, with the consent of the Government of South Korea. This is a step forward. The gathering of data and the preparation of witness statements in terms that could in future sustain proceedings for accountability are positive moves. The field office needs to be better supported financially. It needs further assistance with funds and personnel to ensure the credibility of witness statements and that they are well targeted for their purpose.

4. Supporting the Committee of Experts

The COI considered carefully the options that were available to provide accountability for the wrongs that it concluded had been established on

the evidence. It reviewed various options to achieve accountability, a purpose specifically included in its COI's mandate [COI report 1]. Whilst favouring reference to the International Criminal Court (ICC) [COI report 1201(1)] other forms of accountability were mentioned [COI report 1201(2), 1202]. On the recommendation of SR Darusman, the Human Rights Council has created a new body, a committee of experts, to give further consideration to new mechanisms for accountability.

The committee of experts should be reporting to the Human Rights Council in March 2017. Various options are reportedly under consideration, including national Korean court accountability and use of a truth and reconciliation commission. Difficulties are obvious. But one obligation stands out. Where there are crimes against humanity, it is not acceptable to bargain such suspected crimes away, sacrificing the victims and their families to the goal of securing change in the status quo. In many instances where attempts have been made to resolve complex human rights questions of this kind (South Sudan, Colombia and FARC and the Gambia) demands for excessive impunity in relation to crimes against humanity have generally been refused. They are incompatible with international law, however painful and impeding this may sometimes be to compromise and negotiation.

5. Considering Creating A Contact Group

The COI report recommended creation of a 'contact group' amongst states that have historically friendly ties with North Korea, major donors and potential donors [COI report 1225(h)]. North Korea has countries that have traditionally supported it in the Human Rights Council and elsewhere, at least on the basis of opposing country specific mandates. Venezuela, Cuba, Lao PDR are amongst these and there are others

apart from China and the Russian Federation. The organisation of a contact group should be considered further. At one stage it was suggested that Switzerland might agree to be a convenor.

6. Engaging with International Abstainers

One of the surprising (and sometimes disappointing) features of votes on resolutions in the Human Rights Council on DPRK has been the abstention of important democratic countries. These have included India, Indonesia and South Africa. The COI reached out to these countries to brief them on its work but without effect. More effort may need to be expended to understand their viewpoint if it goes beyond a traditional 'non-aligned' attitude; and to respond to it.

7. Upholding New Security Council Sanctions

Following the fifth nuclear test by North Korea, the Security Council imposed new and stiffer sanctions on DPRK by unanimous vote. None of the P5 members of the Security Council cast its veto. Nor did any abstain. This fact provides a foothold for appreciating the exasperation and concern that North Korea has injected into the international community. The environmental, population and security risks affecting neighbouring states (including China, the Russian Federation, Japan and South Korea) and the sudden alarming increase in weaponry and mechanisms of delivery, demand effective action. The new administration in the United States of America will have to consider quite early the response that it takes to the escalating dangers presented by the situation in North Korea. Shortly before leaving office, President Obama warned the new administration (on November 23, 2016) that North Korea should be the top national security priority for the incoming

government. The failure of past strategies and the urgency of the present situation needs priority attention.

8. Employing Technology and Media

An urgent priority should be the spread of more information on DPRK to its own nationals. Support for media engagement with nationals of North Korea has been significant. The recent decision of the British Broadcasting Corporation to reopen its Korean language service is to be welcomed. The ongoing broadcasts of VOA help the people of DPRK to see their situation more clearly and to be aware of United Nations initiatives, including the COI. The sending of occasional balloons over the border from South to North Korea is an ineffective strategy.

South Korea is one of the global leaders in communications technology and cyber data. Major initiatives should be undertaken, including by ROK, to spread knowledge about North Korea and the way it is viewed throughout the world, to its own nationals who live behind the propaganda shield in the North. New technology should be invoked to enhance awareness. The awareness should include knowledge of the COI report. North Korea is a member of the United Nations; yet its people have no access to the findings of the commission established on the situation in DPRK by the United Nations. This situation is intolerable. It cannot be overcome with consent and co-operation. It therefore needs to be overcome by technological means. It would also be desirable if means of spreading information about North Korea in China, the Russian Federation and neighbouring states could be undertaken so as to promote a more questioning attitude towards the current responses of those countries.

9. Opening People to People Co-operation

Although embarking on a military operation against North Korea is unthinkable, preparedness and a capacity to respond to eventualities must be accepted as a most painful potential if necessary. The danger of countries and leaders that live in isolation from the world and popular opinion is that they may come to believe their own propaganda. Every effort should be made to open up people to people contact between North and South Korea as proposed in the COI report.

The COI report contained many suggestions for an agenda for reconciliation, inter-Korean dialogue and co-operation [COI report, 1222], also for engagement between civil society and professional organisations across present borders [COI report 1223] and the enhancement of family visits and civil society links [COI report 1224]. These parts of the COI report did not attract much media attention (nor did comments and recommendations on interference with religious freedom) [COI report 1220(g)]. Opening up in the future transport, postal and other links should be negotiated painstakingly.

10. Challenging Credentials?

In the end, the steps that can be taken within the United Nations system are limited. Most of them have already been tried. Many of them have gone as far as they can in the form of affirmative resolutions of the Human Rights Council; of the General Assembly; and even of the Security Council.

An exceptional course that should be considered would be a possible challenge to the credentials of North Korea before the United Nations. No nation state is obliged to join or remain a member of the United

Nations. Yet doing so has many advantages; not least with respect to the dignity and international status of a country and the removal of risks that some other applicant(s) may seek to secure credentials, in the absence of the *de facto* government.

In 1974, the General Assembly passed resolution 3206. This endorsed the recommendation of the Credentials Committee to suspend South Africa's participation in the General Assembly by reason of its continued disregard for Security Council resolutions condemning its laws on apartheid. The General Assembly also called on the Security Council to consider the actual expulsion of South Africa from the Organisation. The latter measure was vetoed by France, the United Kingdom and the United States. South Africa retained its status as a member until 1994, when the country's credentials were restored following its transition to democracy. There have been other challenges to credentials, including the case of Kampuchea (Cambodia) in 1991-2. (Cf. United States, Council on Foreign Relations, *A Sharper Choice on North Korea: Engaging China for a Stable Northeast Asia* (Independent Taskforce Report no. 74, 35).

Expulsion of North Korea, even if ventured, would not occur against the veto of China and the Russian Federation. Even suspension from the General Assembly would face difficulties. However, doing nothing about the COI report and other developments is not an option. Something must be done to address the dual and interrelated challenges of evidence of crimes against humanity and evidence of nuclear proliferation and grave security dangers. These cannot be ignored.

CONCLUSIONS AND ACTION

The report of the COI on North Korea has not become available to the citizens of that country. They live in a cocoon of isolation and propaganda. That cocoon afflicts both ordinary citizens and even many in the leadership and elite. The present situation is intolerable. It is extremely dangerous. Polite persuasion has made no progress. Invocation of UN resolutions has proved powerless against a barrage of slogans and invective. Routine procedures of the UN's human rights machinery and resolutions have been rebuffed and ignored. Meanwhile, the crimes against humanity inferentially continue. Accountability has not been achieved. Other human rights abuses remain in place without sanction.

A small impoverished self-reverential country, where many people are often starving, builds up its sophisticated and expensive armaments. It endangers most especially the Korean peninsula. But it also endangers South Korea, Japan, the Russian Federation and China. It is true that some steps have been taken within the United Nations. On the whole, the organs and agencies of the United Nations have, in this respect, acted in the way that was contemplated by the *Charter*. Seizing the opportunities and uncertainties of the current time is the challenge the United Nations and members states must face. The rational way ahead is spelt out in the COI report. It was not posited on regime change (an option that was not available to a COI of the United Nations). But it was posited on substantial change. And the need for the road map to be followed has become more urgent and pressing since the COI report was delivered early in 2014.