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ROUTLEDGE
LONDON & NEW YORK

HUMAN RIGHTS & NORTH KOREA –
THE ROLE OF CHINA, SOUTH KOREA &
UNITED STATES

The Hon. Michael Kirby AC CMG

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STATES?*

THE HON. MICHAEL KIRBY AC CMG**

THE UNITED NATIONS & ITS ROLE IN HUMAN RIGHTS

The ultimate origins of the Commission of Inquiry (COI) of the UN Human Rights Council (HRC) on North Korea can be traced to the global response to the Second World War and the particular fear over the destructive potential of the atomic weapons that helped to bring that war to a close.

The outcome of the war was the establishment of the United Nations Organisation, by the adoption of the UN *Charter*.¹ In its opening paragraphs, that document identified saving future generations from “the scourge of war”; and reaffirmation of “faith in fundamental human rights,

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¹ *Charter* of the United Nations, adopted 26 June 1945; 3 *Bevans*, 1153. Entered into force 24 October 1945.

in the dignity and worth of the human person, [and] in the equal rights of men and women in nations large and small” as key commitments of the United Nations. It sought to establish conditions “under which... international law might be maintained; so that social progress and better standards of life in larger freedom” might be attained.² It offered a grand vision of humanity uniting for peace and universal human rights.

In order to attain these ends; to practise tolerance and living together in peace; to unite “to maintain international peace and security”; and to ensure that “armed force shall not be used, save in the common interest”, the *Charter*, in the name of the Peoples of the world, created the United Nations. It defined its purposes and principles.³ It provided for its membership.⁴ It also identified its principal organs.⁵

One of those organs was to be a “Security Council”.⁶ The Council was to consist of permanent and non-permanent members. The permanent members were named (in terms that have since been updated) as China, France, the Russian Federation, the United Kingdom and the United States of America (the “P5”). Primacy in attaining the stated objectives of the new organisation was given to the P5, acting within the United Nations, to protect human rights and the dignity of the human person. Those objectives were mentioned even before the objective of uniting to maintain peace and security.

² *Ibid.*, Opening Preamble.

³ *Id.*, Ch I.

⁴ *Id.*, Ch II.

⁵ *Id.*, Ch III.

⁶ *Id.*, Art. 7.1.

No explicit machinery was adopted by the *Charter* to define and enforce the “fundament human rights” referred to. The task of giving greater clarity to that expression was assigned to a committee chaired by Eleanor Roosevelt, widow of the wartime leader of the United States. That body recommended the adoption of the *Universal Declaration of Human Rights* (UDHR). The draft was duly accepted, with no dissenting votes, by the General Assembly of the United Nations, meeting in Paris, on 10 December 1948.⁷ No court or similar mechanism was created to help enforce the UDHR. However, in the years after 1945 important UN treaties, binding the states parties that ratified them, were adopted. Agencies were created inter alia to monitor observance of the UDHR and subsequent treaty law. “Special procedures” were later established to respond to complaints of infractions. These “special procedures” eventually included the appointment of “special rapporteurs” and “commissions of inquiry”. The latter procedure involved a serious step towards the detailed investigation and report of alleged abuses of human rights.

Before the creation of the United Nations, “commissions of inquiry” (COI) had a notable history in international law.⁸ Initially, UN COIs on human rights concerns were established by and under the then Human Rights Commission on the initiative of the UN High Commissioner for Human Rights, after that office was established in 1993. When, later, the Human Rights Commission was replaced by a Human Rights Council, the establishment of COIs was, in practice, reserved to the most serious cases of human rights abuses. Less serious investigations were generally

⁷ Adopted by resolution of the UN General Assembly, 10 December 1948 (217A(III)).

⁸ Under the *Hague Convention* of 1899. See F. Pollock, *The League of Nations*, Stevens & Sons, London, 1920, 51-52. Cf M.D. Kirby, “The United Nations Report on North Korea and the Security Council: Interface of Security and Human Rights” (2015) 89 *Australian Law Journal*, 714 at 715-717.

conducted by designated officials, such as special rapporteurs of the HRC or special representatives of the UN Secretary General.⁹ The creation of a COI by the HRC invariably contemplated a more solemn, better resourced, multi-member investigation. Ordinarily, it addressed more serious and sensitive issues of fact-finding, judgment and recommendations. Commonly it was viewed as a more significant political step. Invariably, a proposal to create a COI of the HRC led to a vote in which, typically, the HRC was divided. Opponents or abstainers were either countries that were opposed, in principle, to the creation of HRCs because of a risk they commonly presented of political division. Other opponents or sceptics typically included allies or regional associates of the country concerned. Still others included states that were inferentially mindful of the risk that they might themselves run of being subjected to similar detailed investigation, leading to condemnation. Yet, in the establishment of the COI on DPRK, uniquely, there was no call for a vote. Like the UDHR it was adopted without any contrary votes. The case of DPRK was, from the start, different.

THE UN COI ON DPRK

Korea comprises a peninsula that lies between Japan to the East and China to the West. That land mass contains a population with an ancient history, common language, culture and traditions. It has been subjected, over the centuries, to conflicts often originating from its two major neighbours or, more rarely, from Russia to the North. In pre-modern times, Korea was governed as a unified polity. The South was

⁹ The author was Special Representative for the UNSG on Human Rights in Cambodia, appointed by UNSG Boutros Boutros-Ghali. See “Cambodia: The Struggle for Human Rights”, in M.D. Kirby, *Through the World’s Eye* (Federation, Sydney, 2000), 24; Cf. Janusz Symonides (Ed.) *Human Rights, International Protection, Monitoring and Enforcement*, UNESCO, Paris 2003.

substantially agricultural. The North was mountainous, with valuable mineral resources and most of the industry that had been created prior to the Second World War. In 1910, the peninsula was annexed by the Empire of Japan. The resulting Japanese colonial occupation lasted until the defeat of that nation in August 1945, on terms requiring its unconditional surrender and removal from Korea.¹⁰

At a meeting of Allied leaders in Cairo in 1944, it was proposed that, at the end of the War, Korea would be divided into two zones of influence: that of the United States in the South; and that of the Soviet Union in the North. This decision, reportedly surprised and pleased Josef Stalin and the Soviet Union. There were similar plans for the imposition of spheres of influence in Germany and Austria, to follow their defeat. As a former colonial people, the Koreans were theoretically entitled to enjoy a right to self-determination. Certainly that was so under international law as it later developed.¹¹ However, the Korean people were never consulted about their post-colonial governance. The division of Korea was simply imposed upon them. It has never been affirmed by plebiscite or other act of self-determination. It was imposed by three of the P5 members in the United Nations and accepted by the rest.

Pursuant to the imposed division, two distinct nations emerged as successors to the Japanese colony and the earlier Korean Empire. These were later established and named the Democratic People's Republic of Korea (DPRK) in the North and the Republic of Korea (ROK) in the South.

¹⁰ The history is set out in United Nations, Human Rights Council, *Detailed Findings of the Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea*, HRC, 25th Session, UNDOC A/hrc/25/crp.1 (17 February 2014) (COI Report), 20 [90]-[94].

¹¹ The principle was recognised in the *International Covenant on Civil and Political Rights* (ICCPR), Art. 1; *International Covenant on Economic, Social and Cultural Rights*, (ICESCR), Art. 1.

The dividing line, arbitrarily drawn within the US State Department on a map marked at the 38th Parallel, established the two zones of control. Occupying US and Soviet armies supervised the creation of the two client states. Each exhibited strong elements of autocracy in their government: that of DPRK being substantially organised after the Stalinist model of communism; that of ROK being substantially military, with a façade of electoral democracy.

On 25 June 1950, the leader of DPRK, Kim Il-sung, after finally securing concurrence from Stalin and Mao Zedong,¹² initiated the Korean War. This was done by the invasion of ROK from the North. The United Nations Security Council met and resolved in favour of the creation of a UN military force to repel the invasion. That resolution had only been possible because of the temporary absence from the Security Council of the delegation of the Soviet Union, in protest over the refusal of the UN to accept a change in the credentials of China in favour of the People's Republic of China, created by the newly victorious Mao and the People's Liberation Army. Ultimately, DPRK forces were driven back towards China, only to be rescued by the invasion of "volunteers" from China numbering hundreds of thousands of troops.¹³ A stalemate ensued ultimately coming to rest at a point not far from the original border which then became the Korean demarcation zone. The Korean War concluded in an armistice signed on 27 July 1953. The Demilitarized Zone (DMZ) that now divides the Korean Peninsula is the most heavily militarized international border in the world. The legacy of the Korean War remains unresolved. Its wounds are still deeply felt in both Korean states. There has never been a peace treaty or a formal end to the Korean War.

¹² COI Report, above n.10, 23-24 [102]-[103].

¹³ Id, 25 [104].

After the armistice, each of the Korean states continued to exhibit features of even more autocratic governance. However, by the 1990s, ROK emerged as a viable democracy. It changed its government at regular popular elections. It generally observed the rule of law. It established powerful courts which even removed defaulting presidents. It created a strong and inventive economy, growing to be the eighth strongest in the world. DPRK, on the other hand, suffered long term economic misery; recurring famines; and increasingly disturbing reports of human rights violations. Nonetheless, each of the Korea states was admitted to membership of the United Nations on the same day, 17 September 1991. In the Security Council since 1958, Japan has served on 12 occasions as a non-Permanent member. Since 1991 ROK has been elected on two occasions (in 1996 and 2013). DPRK has never been so elected. After joining the United Nations, DPRK, like ROK, ratified a number of human rights treaties sponsored by the United Nations, including the ICCPR. When it later asked how it could terminate the irksome obligations under the ICCPR, it was told that there was no facility of withdrawal, a position DPRK apparently accepted.

In 2004, the Human Rights Commission established a mandate of Special Rapporteur (SR) on Human Rights in DPRK to respond to the growing reports of serious abuses of human rights occurring in that country. The original SR (Professor Vitit Muntarbhorn of Thailand) attempted to fulfil his mandate. However, despite the resolutions of the HRC urging cooperation on the part of DPRK, this was not forthcoming. Professor Muntarbhorn was succeeded as SR in 2013 by Mr Marzuki Darusman of Indonesia. His efforts suffered the same fate. There was no cooperation by DPRK. Admission to the country was repeatedly denied. DPRK

condemned the mandate for the SR. It denounced the successive appointments as hostile acts. Faced with increasing numbers of refugees (“defectors”) passing from DPRK through China to ROK and persisting complaints of serious wrongs in DPRK, Mr Darusman urged the HRC to establish a COI.¹⁴ His report as SR argued for the need for “an international, independent and impartial inquiry mechanism with adequate resources to investigate, and more fully to document, the grave, systematic and widespread violations of human rights in the DPRK.”¹⁵

The result of the last-mentioned recommendation was consideration by the UN High Commissioner for Human Rights (Ms Navi Pillay) in January 2013. She referred to the extended record of complaints over decades and the added seriousness of the fact that DPRK was by that stage apparently possessed of nuclear weapons as demonstrated by reports based on the records of seismic tests. The High Commissioner’s proposal was conveyed to the HRC and brought before it by its President (Ambassador Hertzog, Poland). For the first time in the history of the HRC, a COI was established without a call for, or the conduct of, a vote. Such was the widespread concern about the human rights situation reportedly emerging from information on DPRK and the refusal of DPRK to cooperate in any way with the United Nations special procedures.

The uncooperative attitude on the part of DPRK had been confirmed in 2009 when DPRK underwent its first cycle of Universal Periodic Review (UPR). It participated in the process. However, it did not agree to a single recommendation that was addressed to it for the improvement of human rights in the country. This attitude was unique and shocked members of

¹⁴ Id, 5 [7].

¹⁵ Loc cit.

the HRC. At last, the United Nations had run out of patience. It established the COI. Mr Darusman, as SR, and Ms Sonja Biserko (Serbia) were named as members. The writer was designated Chair of the COI.¹⁶ Although DPRK continued to undergo the UPR process and agreed to a small number of the many suggestions for improvement in its human rights record, the record has remained poor. Especially when measured against the findings of the COI when these became available.

The mandate of the COI on DPRK included a requirement to investigate and report, with relevant recommendations, on 9 substantive areas of concern. These included reported violations of the right to food; violations involving prison camps; torture and inhuman treatment; violations involving arbitrary arrest and detention; discrimination, and the systemic denial and violation of basic human rights and fundamental freedoms; violations of freedom of expression; violations in the right to life; violations of the freedom of individual movement; and enforced disappearances, including abductions of nationals of other states, notably Japan. Although most of the topics in the mandate of the COI concerned civil and political rights, the COI report addresses several subjects concerned with economics, social and political rights. These included a specially powerful section on the right to food (Chs IVD and VF) a lengthy treatment of freedoms of thought, expression and religion (Ch IVA) and of gender and disability, (Ch IVB).

The COI promptly went to work, holding its first meeting in Geneva on 1 July 2013. At that meeting, a methodology was agreed upon by the members: including public hearings; engagement with the international

¹⁶ Id, 5 [3].

media; and outreach to DPRK and the other countries most affected. Invitations for engagement were addressed to relevant diplomatic missions in Geneva, including those of DPRK, ROK, Japan, China, the Russian Federation, the European Union , the French Republic, the United Kingdom and the United States of America. Full cooperation was afforded by ROK, Japan, the EU, France, the UK and US. However, DPRK ignored the COI's approach completely.

The Russian Federation and China agreed to receive visits from the members of the COI. So, eventually did the Lao DPR, Thailand and other neighbouring states. From the start there was a distinction between the respective responses of the Russian Federation and of China. The Russian Government received the COI and its secretariat with courtesy and at the level of its Ambassador and Permanent Representative to the United Nations in Geneva. China agreed to a meeting but assigned a medium level official in the Geneva Mission to signify its disapproval of the mandate; its unwillingness to cooperate; its refusal to permit the COI to visit border territories adjoining DPRK; or to meet Chinese officials or experts in Beijing. The Russian Ambassador approached his several interactions with the COI in a candid and realistic way. He indicated that Russia had been a major financial supporter of DPRK until the collapse of the USSR after 1989. It viewed some reports of human rights abuses in DPRK as a probable left-over from a form of government which Russia itself had by now discarded, but understood from its shared history. The Russian Ambassador encouraged the COI, where any reports of improvements in the human rights situation in DPRK came to notice, to acknowledge these and to express praise and encouragement. The COI

accepted this advice. Later in New York, when an Arria briefing¹⁷ was conducted with invited members of the Security Council, the Russian Ambassador to the Security Council in New York sent the Deputy Head of Mission to apologise for his ‘unavoidable’ absence. She insisted that no disrespect towards the COI was intended.

No such courtesy was exhibited by the People’s Republic of China or its representatives at any level either in Geneva or New York. From the start, China’s attitude was hostile, antagonistic and basically disrespectful. The members of the COI were, after all, simply performing functions conferred on them by a mandate lawfully adopted by the United Nations Human Rights Council. The members of the COI understood the position adopted by China, given that it was repeated emphatically many times. The Russian diplomats were more professional. The Chinese diplomats, by way of contrast, appeared petulant and unprofessional. Perhaps this was because they were generally junior in rank, itself an apparently deliberate snub towards the COI. Nevertheless, the strident and repeated insistence by China of its disapproval of country-specific reports on human rights probably gave encouragement to the other countries in the HRC to express similar views, thereby relieving them from having to connect with the highly specific criticism in the COI report addressed to DPRK’s particular defaults.

The methodology adopted by the COI on DPRK proved powerful and effective. A large body of oral testimony was received in public hearings. These were conducted in accordance with the model of the Anglo-American tradition for the conduct of public inquiries. The testimony

¹⁷ Kirby, above n10, (2015) 89 ALJ 714 at 724.

addressed the nine subjects in the COI's mandate. It was recorded on film; uploaded to the internet; and supplemented by transcripts produced from the original oral testimony and provided in the English, Korean and Japanese languages. The testimony was therefore available to the United Nations and the international community, in particular in ROK and Japan. It was not made available in DPRK. That country has established an Intranet. However, it allows access to the Internet only to elite supporters or beneficiaries of the regime. To contentions that the testimony was unreliable, the COI responded repeatedly by offering to correct any established errors, requesting access for that purpose to DPRK. The COI even invited DPRK to arrange for representatives to present their evidence and arguments at the public hearings if it so desired. These responses were all ignored by DPRK.

At the conclusion of its hearings and deliberations, the COI provided an advance electronic copy of the manuscript of its draft report to DPRK by way of its representatives in Geneva. Again, this was ignored. However, the draft report included, as an annexure to the text, a copy of the letter earlier sent by the COI Chair on its behalf to Kim Jong-un, Supreme Leader of DPRK.¹⁸ Some UN officials questioned the sending of such a letter saying that it was not ordinary UN practice. However, as the report, as completed, contained allegations that had not been answered, the requirements of due process obliged the COI to provide the text of such allegations to those immediately affected, including the Supreme Leader of DPRK himself. Specifically, the letter to Kim Jong-un contained a warning of the findings of violations of human rights made by the COI, including the findings of crimes against humanity. It included an express

¹⁸ The letter to the Supreme Leader is dated 30 January 2014. See COI Report, above n10, Summary, 25.

warning about the “command” principle in international law. By that principle, a person in command of the actions of subordinates who knew, or should have known, that such grave crimes were being committed yet failed to take all necessary and reasonable measures to prevent or redress their commission, could be rendered personally liable for the breach [... including possibly yourself].¹⁹ A warning was also given of the recommendation in the COI report for drawing the situation in DPRK to the attention of the International Criminal Court (ICC). To this letter and the draft report attached, the COI also received no direct reply. Later it received calumny and criticism, both published and stated orally before the HRC and the General Assembly, both in Geneva and New York, when the report was tabled or referred to. However, the opportunity to engage directly with the COI was rejected.

In response to particular inquiries addressed to the Mission of China in Geneva, the COI received a letter concerning the treatment of persons claiming, or entitled, to refugee status in China. China is a party to the *Refugees Convention and Protocol* of the United Nations. The letter from China, in response to the COI’s inquiries, came from the Chargé d’Affaires a.i. and Ambassador in the Permanent Mission of China to the United Nations in Geneva (Wu Haitao).²⁰ Its expressed position was that DPRK citizens who had entered China illegally “do it for economic reasons. Therefore they are not refugees.”²¹ The letter also stated:

“... I wish to reiterate that China does not support the establishment of the Commission of Inquiry on Human Rights in the Democratic

¹⁹ Loc cit.

²⁰ Letter to Chinese Ambassador, Geneva, 16 December 2013, annexed to COI report, loc cit.

²¹ Letter from Ambassador Wu Haitao, 30 December 2013, COI report, above n.10, Summary, 33-36.

People's Republic of Korea by the Human Rights Council. China's position remains unchanged... China hopes that the Commission of Inquiry on Human Rights in the DPRK can function in an objective and impartial manner, and not be misled by unproved information. China requests this letter to be included in the Commission's report to the Human Rights Council."

It is worth noting at this point that the COI report rejected a number of the complaints made to it concerning human rights violations on the part of DPRK. These included allegations that the testimony established proof of the international crime of genocide. The COI's conclusion in this respect was based on the lack of proof that the killing of a population or group of population was deliberately inflicted "with intent to destroy in whole or part a national, ethnical, racial or religious group, as such."²² Specifically, the COI concluded that the evidence did not prove that the established radical reduction of the Christian population of North Korea was a result of killing.²³ The Commission also rejected, as unproved, evidence of the presence and use in DPRK of chemical weapons. It also accepted that there had been improvements in DPRK's treatment of persons with disabilities. However, otherwise, the COI accepted much of the testimony received by it concerning human rights violations, many of them rising to the level of "crimes against humanity". It said that these violations had been established to the requisite standard of proof. The COI concluded:²⁴

Systematic, widespread and gross human rights violations have been, and are being, committed by the [DPRK], its institutions and

²² COI Report, 350 [1155].

²³ Id, 351 [1159].

²⁴ Ib, 365 [1211].

officials. In many instances, the violations of human rights found by the Commission constitute crimes against humanity. These are not mere excesses of the state. They are essential components of a political system that has moved far from the ideals on which it claims to be founded. The gravity, scale and nature of these violations reveal a state that does not have any parallel in the contemporary world. Political scientists of the 20th century characterised this type of political organisation as a totalitarian state: A state that does not content itself with ensuring the authoritarian rule of a small group of people, but seeks to dominate every aspect of its citizens' lives and terrorises them from within.”

Crimes against international human rights law were found in respect of each of the nine specific substantive areas included in the mandate given to the COI by the HRC. The conclusions of the COI contained specific findings, where possible, about the persons or institutions responsible, in international or local law, for the offences found to have been proved.²⁵

The conclusions in the COI report also contained a number of findings and recommendations that were specifically addressed to DPRK calling for immediate improvements in the human rights situation at home and outreach to the United Nations, its neighbours and in particular, ROK, abroad. Particular recommendations were also addressed to China, urging it to “respect the principle of non-refoulment”; and to abstain from repatriating persons to DPRK unless that action is verified by international human rights monitors.²⁶ China was urged to provide the Office of the High Commissioner for Refugees with full and unimpeded access to

²⁵ COI report, Id, 18-19 [89] esp (m), (n), (o), (p), (q), (r), (s).

²⁶ COI report, Summary, 15 [90](d).

DPRK and to persons seeking contact with it. China was also encouraged to request technical assistance from the UN to help it meet its obligations under international refugees law. Specific proposals were made for the regularisation of the status of women and men from DPRK who marry or have a child with a Chinese citizen who are denied civic equality; and to prevent agents of DPRK from abducting their alleged nationals from Chinese territory.²⁷

So far as the international community was concerned the COI recommended that the Security Council should refer the situation of DPRK to International Criminal Court and adopt targeted sanctions concerning those who appear to be most responsible for the crimes against humanity.²⁸ The High Commissioner for Human Rights, with the support of the HRC and GA, were urged to establish a regional structure to ensure continuing accountability for human rights violations on the part of DPRK, following the end of the COI's mandate. Such a field structure was subsequently established in Seoul, ROK. It continues to operate.²⁹ In a sense, it continues the fact-finding work of the COI and SR.

Many recommendations were addressed to the leadership, government and institutions of DPRK arising out of the COI's findings. Some were addressed to states which historically enjoyed friendly ties with DPRK. Donors and others were urged to form human rights contact groups to raise concerns and provide support for initiatives to improve the human rights situation in DPRK.³⁰ The need for humanitarian aid and for its

²⁷ Ibid, Summary 18 [90 (e) and (f)].

²⁸ COI report, [90 (e) and (f)].

²⁹ Id, [94(a)].

³⁰ Id, [94 (b) and (c)].

provision was called to notice.³¹ A call was also made for convening a conference to consider, and if agreed to ratify, a “final peaceful settlement of the [Korean] war [consistent with] the principles of the *Charter* of the United Nations, including respect for human rights and fundamental freedoms”.³²

The report of the COI was delivered in accordance with its mandate. It was on time, unanimous and within budget. It was first published by the COI on 17 February 2014.³³ A month later, the report was presented by the COI to a plenary meeting of the HRC in Geneva. At the end of March 2014 the report was endorsed by a strong vote of the HRC, on a resolution proposed by the European Union and Japan.³⁴

In accordance with the recommendation of the COI, the HRC sent the COI’s report to the General Assembly of the United Nations in New York. It was there assigned, in the normal way, to the GA’s Third Committee. A strong resolution was prepared for the consideration of the Third Committee by the same co-sponsors. It included referral of the matter of DPRK to the ICC. This would involve the invocation of an exceptional source of jurisdiction in the ICC arising from referral of a matter to it by the Security Council in the case a state party that has not ratified the Rome Treaty establishing the ICC. DPRK is not a party to that treaty. However, it is a member of the United Nations.³⁵ It is therefore subject to this exceptional non-consensual jurisdiction.

³¹ Id, 21 [94 (a)].

³² Ibid, 21 [94(i)].

³³ Fn 62 A/HR/25 714 at 721.

³⁴ The HRC vote was adopted on a resolution presented in draft on 17 February 2014 30 pro, 6 contra, 9 abstentions .

³⁵ A referral may be made by vote of the Security Council. The *Rome Statute* was adopted on 17 July 1998 (218) UNTS 90. There had earlier been two such referrals by the Security Council in the cases of Dafur and Libya.

Within the General Assembly, a large majority was assembled to support the recommendations of the COI. However, Cuba moved an amendment in the light of what it said was the “new spirit of cooperation” evident, so it claimed, by the participation of DPRK in UPR. Cuba therefore urged the General Assembly (GA) to delay a substantive resolution on the part of the Assembly. Eventually, this amendment was defeated in the Third Committee. In the final vote in the plenary session of the General Assembly, the vote was 116 pro; 20 con; 55 abstentions.³⁶ Given the strong findings and recommendations of the COI report and the seductive arguments for postponement and delay offered by the Cuban proposal, the outcome was a powerful endorsement of the COI report on DPRK. It was a rebuff to the DPRK and its dwindling, but familiar, band of supporters led by China and the Russian Federation.

A change in the composition of the Security Council was approaching at the time of the foregoing votes in the GA, including the departure of Australia as a non-permanent member. It was at this stage that the Arria Briefing of interested members of the Security Council was convened on the initiative of the French Republic, the United States of America (P5 members) and Australia (a non permanent member). They proposed that the UNSC should place the matter of DPRK on its agenda, to remain there until removed by vote.

In the result, 11 members of the Security Council supported this resolution. Two members (China and the Russian Federation) opposed it. Two members (Chad [the President]; and Nigeria) abstained. The

³⁶ UNGAOR, 69th Session, Agenda Item 68(c); UNDOC A/res/69/188.

result was that the requisite majority was found for a “procedural motion” of the Security Council, namely more than 10 of the 15 Council members present and voting.³⁷ China and Russia did not press to a vote their contention that the step asked of the Security Council was not correctly classified as ‘procedural’.³⁸ In consequence, the matter of DPRK (and thus the issues presented by the COI report) was added to the UNSC’s agenda for consideration. Effectively, this was to result in a recurrent opportunity for a debate in each succeeding December.

So it was that, in subsequent Decembers, the UN Security Council returned to consider DPRK, including its human rights record. However, in December 2019, for the first time, on the initiative of the Trump Administration, the United States of America abstained on taking up the procedural resolution once again. The consequence was that the necessary votes in the Council fell one short of the members required for such a procedure. Apparently in pursuit of his approach to negotiations with DPRK President Trump rescued that country from a further public airing in the highest organ of the United Nations of the issues of peace and security and relating thereto of human rights in DPRK.³⁹ Other relevant changes in the response to the COI report, as introduced by the Trump Administration, must now be described for they constitute an important shift in the approach to the situation in DPRK generally and to the findings and conclusions in the COI report, in particular.

³⁷ Kirby, above n.8 (2015) 89 *Australian Law Journal* 714 at 725-6.

³⁸ The three Non-Permanent Members of the UNSC lobbied the delegations not to support the procedural vote. In the event Chad (from Africa) ultimately joined in voting for the motion. China then lobbied energetically against the resolution on the merits. It argued first in camera and then in open session. However, on 22 December 2014 the UNSC voted to add the matter of DPRK to the Security Council’s agenda. There were 11 votes pro; 2 con (China and Russia) and two abstentions (Chad and Nigeria).

³⁹ D. Trump at “Way Back Machine”, *Business Insider*, 8 August 2017.

CHANGE AND THE TRUMP ADMINISTRATION

The election of Donald Trump as President of the United States of America was unexpected. He brought to the office many changes in US domestic and foreign policy. Generally speaking, he favoured nationalist, nativist and populist policies, with reductions in many international engagements and resistance to demands for larger contributions in the form of US military aid engagement and protection. Specifically, significant policy changes have been introduced concerning the Korean Peninsula.

At the outset, the arrival of the election of the Trump Administration coincided with an escalation in the development and [non atmospheric] testing by DPRK of nuclear weapons and long-range missiles as if intended to send a warning to the new American President. On 8 August 2017, in response to DPRK's nuclear posture, President Trump stated that such initiatives would be met with "fire, fury and frankly power, the likes of which the world has never seen before".⁴⁰ These words signalled the initial change in President Trump's style of leadership in foreign affairs. In his first address to the General Assembly of the United Nations, he said:

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"The United States has great strength and patience, but if it is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea. Rocket Man is on a suicide mission for himself and his regime."

⁴⁰ Michael Wolff, "Fire and Fury – Inside the Trump White House", *New York Times*, 19 September 2017, 1.

⁴¹ Speech by President Donald Trump to the General Assembly of the United Nations, New York, on 19 September 2017.

Without mentioning it by name, he also chastised China for continuing to support DPRK, calling it “an outrage that some nations would trade arm [sic], and support North Korea”.⁴²

These bellicose statements notwithstanding, the United States moved secretly to arrange meetings between President Trump and the DPRK Supreme Leader, Kim Jong-un. Prior to these meetings taking place, a precondition for any such encounter with the US President had been the prior commitment on the part of DPRK to eliminate its stockpile of nuclear weapons in compliance with three formal requirements. There were that the elimination should be complete, verifiable and irreversible.⁴³ No such preconditions were required of, or fulfilled by, the DPRK regime, to secure the three meetings that followed with President Trump:

- * On 12 June 2018 in Singapore, President Trump and Chairman Kim conducted their first summit. Its stated object was the building of a “lasting and robust peace regime on the Korean Peninsula”. During the course of that meeting, President Trump committed to providing DPRK with security guarantees. Chairman Kim reaffirmed the “unwavering commitment” of DPRK to complete the denuclearisation of the Korean Peninsula.” Their joint statement, issued at the conclusion of the summit, said:⁴⁴

⁴² *Loc cit.*

⁴³ Verification stages have been a recurring problem in the negotiation of nuclear non-proliferation and dismantlement: see J.A. Camilleri et al (Eds) *The 2017 Nuclear Ban Treaty: A Path to Nuclear Disarmament*, Rutledge, London, 2019, 6-7.

⁴⁴ Joint Statement of President Donald Trump and Chairman Kim Jong-un, *Singapore Summit*, The White House, archived from the original, on June 11, 2018.

1. “The United States and the DPRK commit to establish new US – DPRK relations in accordance with the desire of the people of the two countries for peace and prosperity.
2. The United States and DPRK will join their efforts to build a lasting and stable peace regime in the Korean Peninsula.
3. Reaffirming the April 27, 2018 Pan Mun Jom Declaration,⁴⁵ the DPRK commits to work towards the complete denuclearization of the Korean Peninsula.
4. The United States and the DPRK commit to recovering POW/MIA remains including the immediate repatriation of those already identified.

* On 27-28 February 2019 a second summit meeting took place between the two leaders. It convened in Hanoi, Vietnam. After a meeting and dinner on the first day, the summit broke up early on the second morning, without agreement or the issuance of a closing statement. Informal remarks after the meeting dispersed suggested that discussions would follow in the form of contacts between senior officials on both sides.

* A third meeting between the two leaders took place briefly on 30 June 2019 at the DMZ, Pan Mun Jom. For the first time in the case of a US President in office, Mr Trump entered DPRK territory. Others recorded as participating on the occasion were President Trump’s daughter, Ivana Trump, and her husband Jared Kushner. They and a US diplomat were the only US personnel noted as being

⁴⁵ *Pan Mun Jom Declaration* had been earlier signed on 27 April 2018 by President Moon Jae-in (ROK) and Chairman Kim Jong-un (DPRK).

present at the summit. However, once again no prepared statement was released but it was agreed that US and DPRK officials would follow up the summit at the level of officials meeting in Stockholm, Sweden. This they did on 5 October 2019. During intervals between these meetings, Chairman Kim had three encounters with President Xi of China and also a meeting with President Putin of the Russian Federation, held in Vladivostok.

At the close of 2019, reference was made to a termination by DPRK of its previous commitment not to engage in launching intercontinental missiles or testing nuclear weapons systems during negotiations. Reference was also made by DPRK news media to DPRK sending a “Christmas present” to the United States. This promise led to speculation that “a new strategic weapon”, possibly a new intercontinental ballistic missile with multiple warheads, would be fired to signify DPRK’s disappointment over lack of progress in removing, or reducing, the United Nations sanctions, imposed by resolutions of the Security Council. In remarks by President Trump immediately before a New Year’s Eve celebration, he affirmed his “very good relationship” with Kim Jong-un:⁴⁶

“I know he’s sending out certain messages about Christmas presents, and I hope his Christmas present is a beautiful vase. That’s what I’d like, a vase... [H]e likes me; I like him. We get along.... But he did sign a contract... talking about denuclearization. ... Number one sentence: denuclearization. That was done in

⁴⁶ United States, White House, 1 January 2020 (Mar-a-Lago, “US Takes Unusual Step of Releasing Photo Drills with S. Korea”, *Yonhap Newsagency*, 23 December 2019

Singapore. And I think he is a man of his word. So we're going to find out, but I think he is a man of his word."

Also at the close of 2019, the United States renewed the conduct of reconnaissance flights over the Korean Peninsula. The Supreme Leader of DPRK cancelled his usual New Year's Day address and reshuffled his cabinet. The United States Special Operations Forces' spokesman took the unusual step of releasing photos of combined drills of US and ROK Special Forces in South Korea. The President of ROK met top military commanders to discuss that country's combat posture.⁴⁷

In Japan, the NHK public broadcaster withdrew an earlier incorrectly reported story on the North Korean so-called "Christmas gift", which had stated that a missile had fallen into the waters east of Japan. NHK issued an apology.⁴⁸ The Chinese and Russian Governments unveiled a proposal of their own at the UN Security Council. It was stated to be on the basis of "humanitarian grounds",⁴⁹ to provide DPRK with wide ranging relief from the sanctions imposed by the UNSC since 2006. Media stories received from North Korea reported that, for its part, the "North Korean party plenum: [was] bracing for long-term confrontation [with United States]".⁵⁰ The United States, however, rejected the Chinese and Russian move to relax North Korean sanctions, calling it "premature". The United States declared that the "UN Security Council cannot support a resolution that subsidises DPRK's ongoing development of weapons of

⁴⁷ "Ensure he will get combat posture", Moon Meets Top Military Commanders, Yonhap, 27 December 2019.

⁴⁸ Japan's NHK delivers enormous North Korean "Christmas gift" Reuters (26 December 2019)

⁴⁹ "China and Russia to hold more UN talks on lifting Sanctions; Pitch for N. Korea - proposal would see DPRK receive relief from sanction measures related to the livelihood of the civilian population", NK News, 5 January 2020.

⁵⁰ CBS News, 14 December 2019.

mass destruction by sanctions relief.”⁵¹ Reports from Seoul suggested that some observers in ROK were losing faith in President Trump’s approach on North Korea. They noted that China’s demand for easing sanctions was designed to “maintain stability on the Peninsula”.⁵²

Other news media recorded friendly exchanges of fraternal greetings for the New Year 2020 between DPRK and countries that had supported it throughout the UN response to the COI report: China, Cambodia, Congo, Cuba, Egypt, Iran, Lao PDR, Nigeria, Palestine, Russia and Syria.⁵³ Although there were many news items at this time relevant to nuclear weapons, missiles, humanitarian aid and economic concerns, a rare news item dealt with human rights. It noted the adoption by the UN General Assembly of a draft declaration on the situation of human rights in the DPRK. This declaration was adopted by the General Assembly by consensus, without a call for a vote.⁵⁴ The DPRK ambassador to the United Nations (Kim Song), in a speech to the UNGA stated that his delegation “totally rejects” the resolution; declares it “a product of hostile forces that obsess with inveterate hatred against us”. It asserts that the resolution had nothing to do with the “genuine promotion” of human rights; and adds that the human rights issues mentioned in the UNGA resolution “have never existed and cannot be allowed to exist in my country, where dignity and independent rights of human beings are most valued”.⁵⁵

In the substance of the North Korea Human Rights 2019 resolution, adopted for the 15th year in succession, there was, however, one

⁵¹ KCNA News 18 November 2019.

⁵² KCNA News 13 November 2019.

⁵³ News item, KCNA Watch (DPRK MFA), December 2019.

⁵⁴ UNGA A/C.3/74/L.26 (31 October 2019).

⁵⁵ DK News, 5 January 2020, “North Korean Ambassador condemns usual UN resolution on Human Rights”, Ambassador News.

significant change. ROK was missing from the liberal democratic nations, including the United States, that had normally sponsored it. This led to a statement issued by the new SR on DPRK (Tomas Quintana). He stated that the absence of ROK from the resolution “sends a message that implies that human rights, the importance of respecting and protecting the human rights of the people in North Korea, is something that comes second in [ROK’s] effort to build a relationship with [DPRK].”⁵⁶ Although 60 countries co-sponsored the UNGA resolution, ROK for the first time since 2008 declined to do so. As a result, a joint letter was addressed by 22 countries, as well as 76 non-governmental bodies, urging President Moon Jae-in to stand up for human rights in DPRK.⁵⁷ However, this representation, addressed to ROK, did not draw an affirmative response.

The letter from human rights bodies to President Moon Jae-in in December 2019 was only the first of many local and international representations made to him. Thus, in August 2020 a detailed letter was addressed to him on the North Korea Freedom Coalition, a body that in earlier years had been a strong supporter of ROK’s stand on human rights in DPRK. This letter requested the Moon administration to abandon legal proceedings it had brought against journalists and authors for criticising government officials objecting to their new policies; for disrupting religious meetings on supposed grounds of COVID-19 but actually in a suppression of religious freedoms; for revoking the licences of North Korean human rights organisations and closing a youth organisation for North Korean human rights, allegedly connected with the launching of balloons with

⁵⁶ *New Delhi Times*, 20 December 2019 online “UN Human Rights Expert: Seoul Sent Wrong Message to Pyongyang”

⁵⁷ Human Rights Watch, Letter to President Moon Jae-in, South Korea on human rights in North Korea, 16 December 2019. President Moon also declined to receive a visit from the parents of Otto Warmbier who died soon after his return to the United States from DPRK where he was imprisoned and suffered serious medical complications following conviction for a minor offence.

human rights messages for DPRK; for the repatriation of two North Korean men who had sought to defect on the unproved claim of DPRK that they were wanted there for crimes; and for failing to be a voice for freedom and human rights for all Koreans and instead retreating into a silence, as demanded by Kim Jong-un, a posture unbecoming to a constitutional democracy.⁵⁸

In September 2018, to mark the improvement in relations between DPRK and ROK, a joint liaison office building was erected in the Kaesong Industrial Region in DPRK. It was aimed at providing a venue for direct communications between the two Korean nations. The cost of the building, paid by the ROK Government, was estimated at \$USD 8 million. However, at the outbreak of COVID-19, after January 2020, the ROK delegation left the Kaesong building empty . By June 2020 in retaliation for the sending of anti-regime propaganda leaflets by balloons from NGOs in ROK, DPRK threatened to “completely shut down all contact means... and get rid of unnecessary things.” The sister of the Supreme Leader, Kim Yo-jong, complained that the North Korean “defectors”, considered responsible, were “human scum” and “mongrel dogs”. She threatened that the “useless North-South joint liaison office” would “before long... collapse”. On 16 June 2020, the office in Kaesong was blown up by the DPRK. Its Foreign Minister declared that hopes for peace had “faded away into a dark nightmare”.⁵⁹ To outsiders, this petulant, deliberate, gesture appeared an immature act by those in DPRK unused to the irksome reality of democratic challenges, lacking rational response and infuriated by trivial annoyances. It demonstrated vividly the difficulty of

⁵⁸ Letter to President Moon by North Korea Human Rights Coalition, 4 August 2020 (“Supervision of Fundamental Freedoms and Oppression of Human Rights Activists and North Korean Defectors”).

⁵⁹ “North Korea Blows Up Liaison Office Shared with South Korea”, *New York Times*, June 16, 2020.

reconciling the political traditions of DPRK and ROK. The ROK response was remarkably restrained.

How did this situation come about? Is it an indication of a new far less insistent approach on the part of ROK towards DPRK? Does the ROK withdrawal from the statement of global concern about human rights in DPRK in the United Nations General Assembly and at home, together with the US withdrawal of support for a debate on DPRK in the Security Council, indicate an acceptance by ROK and the United States of DPRK's off repeated assertion that references to human rights concerns are "political" and bound to be "counter-productive" and unhelpful to the cause of denuclearisation. And that new and different strategies are needed there if there is to be real progress on human rights compliance in countries that are amongst the worst offenders?⁶⁰ Is this the explanation for the ROK's apparent passivity in the face of the wanton destruction of the Kaesong joint liaison office?

ROK's AMBIVALENT STAND ON HUMAN RIGHTS

Most political democracies have political parties whose policies coalesce around competing attitudes and programs on a "progressive"/"conservative" spectrum. Historical factors, national traditions and individual personalities can sometimes affect the significance of party allegiances and policies. In part as a result of the Cold War and the Korean War, DPRK over an extended period became a leading "ideological foe and rival" of ROK in the assertion of the

⁶⁰ David Hundt, "The ROK's Duelling Perspectives on Human Rights in the DPRK; What role for China?" December 2019, p.2.

entitlement of each of the Korean states to be the sole legitimate political authority in post-colonial Korea.⁶¹

The political situation in ROK had itself to undergo a transformation from authoritarian and military rule that substantially lasted until the 1980s. The fast expanding flow of refugees from DPRK at that time, combined with recurring natural disasters in the North, led to distinctive networks in the South with differing understandings of what “human rights” truly required when applied to the two Korean states. The “progressive” networks in the North emphasised that human rights basically concerned economic, social and cultural rights (ESCR). The “conservative” networks in the South emphasised that they were basically concerned with civil and political rights (CPR).

The divisions along these lines were not unusual in the world of the Cold War. They reflected many of the same divisions that arose in the 1940s-1970s during the drafting of the UDHR (1946-8) and the several UN treaties that followed it. Divisions of opinion within ROK influenced the developing views in that country concerning the reported human rights situation inside DPRK, especially in the 1990s and early 2000s.⁶² As happened in other countries in relation to human rights controversies (e.g. over women’s rights and LGBT rights) differing priorities were assigned in ROK by “progressive” and “conservative” leaders and in the networks that respectively supported them.

⁶¹ Bae Jung-yun and Moon Chung-in, “South Korea’s engagement policy – Resisting a Human Rights Policy” (2014) 46 *Critical Asian Studies*, 15 at 17 cited in Hundt, above n. 60, 4.

⁶² Bae and Moon, above n. 61, 19.

At a certain level there was agreement in ROK about the universal character of fundamental human rights. However approaches differed, “when it [came] to the urgency and plausibility of actions to address these issues”.⁶³ “Conservatives” were adamant about, and insistent upon, CPR. “Progressives”, on the other hand, insisted that DPRK had to be recognised for the “uniqueness of its context”. Doing this would oblige an approach that would be more “cooperative [and] non-adversarial” in character. It would avoid the exertion of pressure for immediate change.⁶⁴ For “progressives”, any other approach was doomed to failure. If proponents were serious about securing real human rights improvements in DPRK, as distinct from posturing over condemnation and vilification, they would be forced to engaged in another strategy in dealing with DPRK.

The administration of Kim Dae-jung as President of ROK (1998-2003) introduced a “Sunshine Policy”. This introduced a measure of détente in the relations between ROK with DPRK. President Kim was lauded by progressives as a genuine human rights activist and hero. He had made his name during the authoritarian era of ROK lasting up to the 1990s immediately prior to his election. He was succeed by President Roh Moo-hyun, who served 2003-2008. Both President Kim and President Roh reached out to DPRK. Kim travelled to Pyongyang in 2000 and he sought active engagement with the leadership in DPRK. Both Presidents Kim and Roh laid great emphasis on the priority of achieving the unification of the Korean Peninsula. Each shared a belief that DPRK would ultimately embrace at least minimal changes so far as human rights were

⁶³ Suh Bo-hyuk, “Beyond Silence and Blaming: Revising South Korea’s Role in North Korean Human Rights” (2013) 37 *Asian Perspective*, 79.

⁶⁴ Alon Levkowitz, “The Disparity Between South Korea’s Engagement and Security Policies Towards North Korea: The Realist – Liberal Pendulum” in F. Rüdiger, J.E. Hoare, P. Köllner and S. Pares (eds) *Korea Yearbook 2008*, Leiden, Brill, 125 at 133.

concerned. In fact, some “progressive” supporters of Presidents Kim and Roh considered that each of them had remained too close to the security and military interests in the ROK that had predominated during the preceding [mostly military-supported] regimes. However, both Presidents Kim and Roh were disinclined to raise CPR human rights issues for fear that doing this would derail further inter-Korean relations and engagement without achieving any significant gains for security, human rights or reunification.⁶⁵

The response of DPRK to the ROK’s “Sunshine Policy” was, however, disappointing, including for its advocates and defenders in ROK. The “conservative” opposition to Presidents Kim and Roh relied on the ongoing abuse of human rights in DPRK in order to maintain the necessity of upholding a distance between the two states until DPRK evidenced improvement. In the result, in late 2007, President Lee Myung-bak was elected President of ROK in succession to President Roh. He brought back to office the “conservative” approach and policies (2007-2013). He was accused of dismantling the “Sunshine” policy of hostility to public demonstrations and civil rights. President Lee was followed by President Park Geun-hye (2013-2017). Each of these administrations drew a sharp distinction from the preceding “progressive” decade. Their resumed emphasis on CPR in DPRK as a litmus test for change became a dominating force in ROK national politics. It made it difficult to pursue effectively the achievement of significant progress on inter-Korean relations. It possibly weakened the aspiration that China might agree to act as a partner or intermediary in eliciting change in DPRK and facilitating improvement in the plight of refugees leaving DPRK via China. China had

⁶⁵ Hundt, above n.50, 5.

its own internal reasons for resisting emphasis on CPR in the case of DPRK. Any such emphasis would have had obvious implications for international attention to the state of CPR in China.

Shortly before Kim Dae-jung was elected President of ROK in 1998, and long before my appointment as chair of the COI on DPRK, Kim, as a leading opposition figure, made an invited official visit to Australia. By that time, I had been appointed (1996-2009) a Justice of the High Court of Australia, the nation's highest judicial and constitutional court. I had also been elected (1995-8) president of the International Commission of Jurists, a global body of judges and lawyers dedicated to human rights and the rule of law. The fame of Kim Dae-jung as a notable human rights activist occasioned an invitation to him by me to participate in a luncheon at my court, together with selected Australian human rights colleagues. Kim was an admirable and sincere supporter of universal human rights. He had taken risks for these causes during his political career. In opposition, he had suffered greatly. His visit to Australia was a success. It confirmed the admiration for him on the part of many Australians including those who attended the luncheon.

Following my appointment to chair the COI in 2014, after the presidency and subsequent death of Kim Dae-jung, I visited his Peace Center established in Seoul to celebrate his life and service. I took the opportunity to meet and pay respects to his widow Lee Phee-ho, who had served as First Lady of ROK from 1998-2003. She was herself to die in June 2019. She was a champion of women's rights and civic empowerment. During the conduct of the COI, I repeatedly indicated my desire to enlarge contacts with the then opposition parties in ROK. They were largely absent from the many South Korean bodies engaging with the COI. Such

contact unfortunately, did not happen in large numbers. However, it was not for lack of repeated requests by the COI and suggestions on my own part.

By way of contrast, during her service as President of ROK, which coincided with the conduct of the COI, President Park Geun-hye was repeatedly engaged with us. We met her twice at the Blue House and she insisted that the ambition closest to her heart was the achievement of the reunification of North and South Korea. However, she advocated the objective of reunification on a basis of freedom, human rights and prosperity.⁶⁶ She also sought to strengthen ties between ROK and China and with the Russian Federation. She took advantage of a state visit to Germany, soon after winning the presidency by a narrow margin, to urge practical steps and joint projects for the benefit of both sides of the Korean divide.

However, in December 2016 President Park Geun-hye was impeached by the National Assembly of ROK for allegedly having been engaged in influence-peddling. Her impeachment was unanimously upheld and enforced by order of the Constitutional Court of ROK on 10 March 2017. In consequence, she was removed from office and is now serving a term of imprisonment. A new presidential election was then held that resulted in the return of the “progressive” candidate, Moon Jae-in. He assumed office as President of ROK in May 2017. President Moon immediately reverted to many of the former policies of Presidents Kim and Roh. Specifically, he arranged inter-Korean summit meetings with the DPRK Supreme Leader in April, May and September 2018. He also participated

⁶⁶ South Korea’s President, Park Geun-hye, *North Korean Strategy*, *The Heritage Foundation*, retrieved 16 October 2015.

in the brief but symbolic first meeting of President Trump with Kim Jong-un at the DMZ on 30 June 2019.

Although often described as a former “human rights lawyer” this does not tell the full story about President Moon, a trade union or labour lawyer and accomplished court advocate. His attitude to human rights in his dealings with DPRK has substantially reverted to that of President Roh Moo-hyun. This was not surprising. In the 1980s Moon Jae-in had argued many cases involving labour rights and the human rights of workers.⁶⁷ He became President Roh’s campaign manager for his election and eventually his chief presidential secretary. When President Roh was impeached by the National Assembly in 2004, for allegedly engaging in illegal electioneering, Moon Jae-in, was his leading counsel, contesting the impeachment before the Constitutional Court. He won the case. President Roh was reinstated by the Court in May 2004. Like Presidents Kim and Roh, both of whom he admired, President Moon Jae-in, following his election, took immediate steps to attempt an improvement in relations of ROK with DPRK. He became the first ROK President to walk across the DMZ to meet DPRK’s Supreme Leader.

In July 2017, President Moon Jae-in also chose Berlin, as the venue at which to proclaim his commitment to the reunification of the Koreas as an active. His policies have not emphasised (or for the most part mentioned) the human rights of the people of North Korea, certainly in terms of CPR. His primary emphasis has been on reducing the dangers of armed conflict. President Moon Jae-in rightly sees the significance of dealing with DPRK’s nuclear and missile developments as a source of great danger to

⁶⁷ Sang-hiun, Choe, “After Park Who? A Guide to those who would head S. Korea”, *The New York Times*, 9 December 2016.

human life of course, they also represent human rights challenge. Still, it appears to be one not to be openly described as such. The close physical proximity of Seoul to the DMZ makes the assurance of peace between the two Korean states a major practical challenge both from a safety and a human rights standpoint.

There could not be a clearer indication of the urgencies to which President Moon attaches importance than his decision to withdraw ROK from the co-sponsors of the annual UN resolution on human rights in DPRK, as adopted in 2019 by the HRC. By inference, President Moon has concluded that even the mention of human rights is regarded by DPRK as a “hostile act”; that it is therefore counterproductive in securing actual change on the part of DPRK; that the adherence of DPRK to the *Juche* philosophy of self-reliance makes it specially difficult to expect the surrender by DPRK of its weapons and missiles achieved by self-reliance; and that only time, exceptional patience and perhaps economic investment and humanitarian aid will improve the human rights scene in ROK’s Northern neighbour. If President Moon has referred to the COI report on DPRK since assuming his office, I am unaware of it. No doubt this too would be regarded in DPRK as a hostile act. It seems unlikely to occur at this time.

It would be a mistake to suggest that the Moon Administration in ROK involves nothing else than a simple reversion to the “progressive” politics earlier adopted by the administrations of the Kim Dae-jung and Roh Moo-hyun. The election of the Trump Administration in the United States injected a completely new element of uncertainty and potential vulnerability for ROK which no president of ROK could ignore. President Moon’s continued emphasis on military engagement with the United

States stands alongside his insistence on a “stable peace regime on the Korean Peninsula”. Whilst China has maintained fraternal political and party links with DPRK, notwithstanding the advent of the administrations of Presidents Lee and Park Geun-hye China could not ignore the huge economic potential of ROK as a potentially close trading partner of China.

It has to be admitted that the hard line policies on human rights, especially on CPR, evident during the decade that preceded the election of President Moon’s administration, did not achieve any substantial progress in DPRK, either on the issue of respect for human rights or advancement of denuclearisation and security. The one new element that does appear to have had an impact on DPRK has been the costs imposed and strengthening of the United Nations sanctions that remain solidly in place under successive UNSC resolutions. The advent of a much stronger relationship between DPRK and China, during the previous two administrations in ROK, despite their border frictions, and the interest that China clearly has in denuclearisation and the avoidance of a break-down in DPRK, presented President Moon with new and differing strategic options than had been available to his two ideologically differentiated predecessors.

However, President Moon Jae-in would certainly not be unaware of the dangers of openly encouraging DPRK down a political and economic path similar to that which the fraternal party leadership in DPRK had followed earlier. A chief reason for the sudden trial and execution of his uncle by marriage, Jiang Song-thaek, soon after the arrival of Kim Jong-un as Supreme Leader, was reportedly attributed to the latter’s concern that

Jiang had aspirations to lead DPRK down a reformist Chinese path.⁶⁸ His murder and later that of the present Supreme Leader's half-brother, Kim Jong-nam at Kuala Lumpur Airport in February 2017, demonstrated vividly the destructive features of the political governance of DPRK described in detail in the COI report. The murder charges brought in Malaysia against two women accused of applying nerve gas to the person of Kim Jong-nam were eventually dropped. No one was punished for the killing of an important foreign national at an international airport by using an agent unavailable to common murderers. So far as DPRK is concerned, lawlessness, like human rights violations, is tolerable because, it is effective and ordered by the Kim leadership. This happens because such conduct in DPRK is legally unaccountable. It is effectively beyond legal restraints at home. Seemingly, it is also immune from effective responses outside DPRK's own borders.

The only response of the international community that DPRK acknowledges is the series of sanctions imposed by the UNSC. Unused to any of the normal constraints of the rule of law and human rights, DPRK constantly and vehemently demands the repeal of the UN sanctions. Admittedly, some humanitarian burdens flow from these sanctions. But with no apparent progress at home in terms of the human rights of the people of DPRK and increasing risks and dangers in terms of its expanding nuclear arsenal and missile capacity, can the sanctions against DPRK be safely released at this time?

⁶⁸ The execution of Jang Song-thaek in December 2013 is noted in COI report, above n.10, 49[140]. Subsequently Malaysia suspended diplomatic relations with DPRK. However, these were quietly restored and the Malaysian embassy in DPRK was reopened in January 2020; *Malay Mail*, 26 December 2019.

WHERE PRINCIPLE AND REALISM MEET

The report of the COI on DPRK of 2014 was an evidence-based and closely reasoned examination of testimony, publicly received and recorded, that was overwhelming and convincing. That testimony was considered by experienced decision-makers who published their report and presented it to the international community at the highest levels. At the outset of undertaking their inquiry the members of the COI affirmed their commitment to act with independence and integrity, based solely on testimony placed before them which they examined closely, recorded carefully, and substantially accepted. They provided their report to the United Nations at the end of a hearing process that, to the greatest degree possible, observed principles of transparency, openness and accessibility to the affected individuals, communities and nations.

The COI report was written in a style that was readable, fact-based and persuasive. It rested upon an abundance of evidence addressed to the nine subject-areas contained in the mandate for investigation assigned to the COI by the UNHRC. The standard and burden of proof applicable to all such United Nations enquiries, was faithfully applied by the COI.⁶⁹ The report contained a large number of particular findings, relevant to the mandate. Those findings led to identified conclusions and recommendations that were explained as arising directly out of the testimony, the findings and the conclusions.

The COI was not a criminal trial. Nor was it authorised to exercise the prosecutorial discretion that normally stands at the gateway before the

⁶⁹ COI report, above n.10, 15-16 [63]-[70].

commencement of a formal criminal process. However, the conclusions reached, and the recommendations made, remain before the international community. In effect, they demand action. They will not tolerate indifference or rejection because of inconvenience or other priorities.

When, at the conclusion of the Second World War, the international community established the United Nations Organisation, it did so at a critical moment in human history. It was conscious that the failures of the League of Nations⁷⁰ had resulted in a second brutal conflict of global proportions within less than 20 years. That conflict eventually occasioned terrible sufferings on the part of civilians, military forces and especially minorities. By its end, it yielded up evidence of genocide and the Holocaust. It gave birth to international treaty law governing genocide and to the new international war crimes and “crimes against humanity”. Such crimes were great wrongs even beyond the terrible cruelties of a modern war, the wrongs of governments and countless human rights abuses. They amounted to acts of violence on the part of states and individuals that “shock the conscience of humanity”.⁷¹

It was in the aftermath of the discovery and response to such crimes that the international community began the journey to provide remedies and redress for those who had suffered and for their families haunted by the memories of the victims. Eventually, tribunals were created, included the International Military Tribunals and later the International Criminal Court and other like tribunals to ensure that such grave crimes would not go unconsidered and unpunished. And that humanity would not turn its back,

⁷⁰ F. Pollock, *League of Nations* (Stevens, London, 1920).

⁷¹ P. Sands, *East West Street – On the Origins of Genocide and Crimes Against Humanity*, (Weidenfeld and Nicholson, 2016).

as it had done in the 1930s and the 1940s. It would respond. It would investigate. And it would act upon credible evidence and proportionate recommendations

In due course, the international community went beyond the creation of laws, national criminal courts and international tribunals. It endorsed the concept of the “responsibility to protect”. This captures a simple and powerful idea.⁷² The primary responsibility for protecting people from mass atrocity crimes lies with the state where the crimes themselves occur. State sovereignty implies responsibility to protect, not a licence to kill, oppress and deny human rights and human dignity. When a state is unwilling or unable to avert, halt or punish such crimes, the wider international community has a collective responsibility to take whatever action is necessary. The “responsibility to protect” was unanimously adopted by the UN General Assembly at the 2005 World Summit. It is not acceptable simply to wring our hands and cry “never again”. Action must be taken, however difficult and even dangerous the path of pursuing such action can sometimes be.

Of course, there are major problems facing the international community, and the two Korean states most immediately involved, in providing the urgent attention and action that is essential to reduce and eliminate the dangers of nuclear weapons and intercontinental missiles that could deliver them. These instruments of mass destruction affect millions of fellow human beings. They risk occasioning mass deaths and catastrophic losses. However, citing the dangers of such weapons as a

⁷² G.J. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Brookings Institution, Washington DC, 2008. See also UNGA “2005 World Summit Outcome” A/Res/60/1 (24 October 2005): <http://unpan1.un.org/intradoc/groups/public/documents/un/UNPAN021752.pdf>.

reason for increasing their number and magnitude whilst at the same time ignoring their peril, is not a rational response on the part of nation states, the United Nations Organisation or the human species. Nor is it a rational response to ignore established evidence of crimes that shock the conscience of humanity simply because the mention of those crimes will upset those who are alleged to have committed them or permitted them to be committed in their name. To turn a blind eye to such wrongs, despite the shock to conscience that they occasion, is neither rational nor just.

To acquiesce meekly in assertions that findings of such crimes are the result of “hostility” and that they do not, and could not, occur (whilst denying access to the world to inspect and evaluate such denials) is also lacking in rationality. To refuse action on the footing that findings of the desperate need for action amount to “political” prejudice and evidence of hatred and hostility, is not a rational response to the demand for action nor redress for such grievous wrongs that have continued for many decades. When the *Charter* of the United Nations was adopted and the UDHR and UN treaty law on human rights was formulated and brought into effect the world moved beyond acquiescence and frozen incapacity. Yet this is the condition in which we now find ourselves. It can be seen in many manifestations relevant to the great wrongs revealed by the COI and in this reminder of its work:

- * The shift in the strategy of the United States of America under the Trump Administration from advocacy and action based on the requirements of universal human rights to silence about that topic, with the excuse that mentioning it will halt action on the supposedly greater imperatives of denuclearisation, global peace and security;

- * The shift in engagement of ROK from concerns for the grave human rights violations suffered by fellow Koreans in DPRK, China and elsewhere and the withdrawal of ROK from active involvement in United Nations' efforts to defend and uphold the universal human rights of Korean people shown by compelling evidence to be endangered. Such fundamental rights are being abused and denied just kilometres away on the same terrestrial landmass and against blood brothers, sisters and children divided by political fiat not by any choice of those affected to submit to such a regime; and
- * The shift amongst some of the most important guardians of the United Nations system, the P5 powers, effectively to step back from the universal human rights envisaged by the *Charter*. That this is done by China is bad enough. That it is done because investigation and action for the United Nations are condemned as “political acts” when, certainly in the case of the COI on DPRK they are independent attempts to secure action and enforcement, is also bad enough. But the fact that the United States of America itself is now seeking to redefine universal human rights so as to narrow their ambit and trace them to a contested divine source instead of to the will of the People of the Earth⁷³ is specially discouraging.⁷⁴

What are the lessons for the international community of the past 70 years of dealing with DPRK? What might tempt its present leadership to take the steps that existential dangers, urgent global necessity and current international law require. Specifically, what would persuade DPRK to

⁷³ The *Charter* of the United Nations 1945 was expressly made in the name of the “Peoples of the United Nations”.

⁷⁴ M. Gessen, “Mike Pompeo’s Faith-Based Attempts to Narrowly Redefine Human Rights”, *The New Yorker*, 15 July 2019; “Mike Pompeo’s new panel on human rights is unnecessary and may be dangerous”, *Los Angeles Times*, Editorial Board, 11 July 2019; E. Wong and Eileen Sullivan, “New Human Rights Panel Raises Fears of a Narrowing US Advocacy”, *The New York Times*, 20 July 2019.

surrender its still growing nuclear arsenal and increasingly powerful missiles? In the face of a quasi ideological 'dictatorship of the proletariat' and pride in a 'philosophy' of *Juche* or self-reliance, what might convince DPRK and its leaders to take steps that could consign it, once again, to being a poor, isolated, fragile neighbour in a region of angry, powerful states? Given the slowly increasing access of the people of DPRK to the internet and outside news, of a very different world, the long-term prospects of its collapse have probably increased. This rational analysis and the lessons of history suggest this as a likely medium term prospect even if, 'regime change' is not on the explicit agenda of any of its neighbours and is robustly denied by most of them.

There is no convincing (or even optimistic) evidence that the alternative strategies advocated by the "progressives" or "conservatives" in ROK, or the wider world, will hasten the coming of change in DPRK. Charm and sunshine have not worked. Isolation and hectoring have failed. Threats seem hollow in the light of the dangers of retaliation. The only strategy that appears to apply real pressure upon DPRK is that of the sanctions, imposed by votes of the UN Security Council in which DPRK's partial allies, China and Russia earlier took part. These sanctions cannot be abolished without overcoming the 'veto' of opponents with the power of veto or without turning a blind eye to those who dream of circumventing and ignoring the sanctions.

Doing nothing and praying for change is not an acceptable strategy. This is so given the urgency occasioned by the ongoing suffering of the people of DPRK and the dangers of a conflict where accidents and mistakes might occur in highly populated areas and emotionally charged circumstances.

Military confrontation of DPRK is far too risky. Reviving the Six Party Talks and mixing economic temptations with blunt and honest communications seem the best way forward at this time. The Marshall Plan that followed the Second World War, rescued many countries from the dangerous cycle of competing extreme ideologies then prevailing. The one truly imaginative image advanced by President Trump in his negotiations with DPRK was probably that of building Trump golf clubs, resort hotels, economic advancement and tourism. If that had happened, DPRK might have begun the journey that Cambodia took after 1991, for all the faults and limitations of the Hun Sen regime. The prospect of foreign universities and English language institutions might tempt the Supreme Leader who grew up in western society (Switzerland) and who knows its endless attractions to young people who are dazzled by its technology, sport, celebrities and digital opportunities.

The continuation of the present blindfolded approach is perilous. Silence about human rights is intolerable. Within ROK there is a large population of refugees from the North. They should be engaged and consulted. They will have much knowledge and experience about what is needed. Dreaming about reunification will not make it happen. Imagination, creative thinking and new strategies are sorely needed. But releasing the pressure of sanctions without assured dividends in the observance of human rights, the dismantling of weaponry and the achievement of security is not the way to go.

A knowledge of history and awareness of human rationality suggest that change will come in DPRK. For the sake of Korea and the world, a greater sense of urgency and realism are required to help change have a chance.

Otherwise, we are sleep walking, once again, towards extremely high dangers.