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HUMAN RIGHTS, PEACE AND SECURITY:
THE NORTH KOREAN CHALLENGE

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Background

On 21 March 2013,¹ the United Nations Human Rights Council (HRC) established a Commission of Inquiry (COI) on human rights violations in the Democratic People's Republic of Korea (North Korea). Unusually, the resolution was adopted without a call for a vote.

The international community was already deeply concerned about the widespread reports of human rights abuses in North Korea. It was disturbed by the repeated refusal of North Korea to cooperate with the Special Rapporteur appointed earlier to investigate human rights violations in DPRK. It was concerned about the failure of North Korea to accept any of the 167 recommendations made by the working group, when it first underwent the procedure of Universal Periodic Review (UPR) in 2009. This was a state of exceptional arrogance and indifference to its obligations as a member state of the United Nations. Establishing a commission of inquiry was an enlargement of the institutional reaction of the HRC. It reminded the reclusive member state that universal human rights, justice and respect for

* The authors were the members of the UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea (2013-14).

¹ At the 22nd Session of the UNHRC. By HRC resolution 22/13.

peace and security were among the core functions of the United Nations, laid down in its *Charter*. We were appointed the members of the COI. We undertook to fulfil our obligations with fidelity and independence.

As participants from different countries, backgrounds and experiences,² we brought different approaches to the task. But we immediately agreed that it was imperative that the COI should work transparently; that it should conduct public hearings; and that it should be open to the media, to scholars and to civil society. The so-called “hermit kingdom” needed to face the uncomfortable reality check of worldwide scrutiny into its cruel practices, to the extent established by evidence.

The result was the conduct of public hearings and the taking of evidence addressed to our mandate at sessions held in Seoul, Tokyo, London and Washington DC. Although North Korea ignored our requests for admission to their country, we had no difficulty securing evidence. In South Korea alone, more than 30,000 refugees had fled from the conditions in the North. Many were willing to testify openly about their horrifying experiences. Their evidence was placed online. It is available to the world community. But it was not accessible to the people of North Korea, where access to the internet and global news media is restricted to the privileged elite who support the regime. As for the rest, they are subjected to a tyrannous regime. It was described in vivid detail by the many witnesses who came to the COI of the United Nations to speak truth to power. Occasionally, we thought a witness might have exaggerated the horrors they described. But overwhelmingly we

² Michael Kirby (Australian judge); Marzuki Darusman (Indonesian Attorney-General); and Sonja Biserko (Serbian scholar and human rights activist).

regarded them as witnesses of truth. When North Korea criticised them as “traitors”, we offered to come there and listen to any contrary testimony. We promised to correct anything that was false or exaggerated. Our requests were ignored.

As we were preparing our final report, the news came in from North Korea that the second most powerful man in the land, Jang Song-thaek (an uncle by marriage of the Supreme Leader, Kim Jong-un) had been dragged out of the Politbureau, summarily tried and executed.³ A similar fate befell the half-brother of the Supreme Leader, Kim Jong-nam. He was disposed of by the application of nerve agents to his person at the Kuala Lumpur International Airport.

Findings

The COI delivered its report on time, within budget and unanimously. It addressed the nine points contained in its mandate.⁴ We had an excellent secretariat; but we wrote our own report. The conclusions were stark. “Systematic, widespread and gross human rights violations have been and are being committed by [North Korea], its institutions and officials. In many instances, the violations of human rights... constitute crimes against humanity. They are not mere excesses by 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.”

³ COI report. The mandate appears on 6-7 [13].

⁴ COI report A/HRC/25/CRP.1 (7 February 2014) 49 [80].

Amongst the horrors reported in the striking language of witnesses and victims from North Korea were:

- * Forced abortions of female escapees returned from China to North Korea and the forced drowning of infants on the insistence of authorities;
- * Starvation rations in the many detention camps that housed generations of suspected enemies of the state, resulting in the daily removal of the emaciated bodies of these victims to be used for fertiliser; and
- * Public executions of suspected 'hostile classes', to which school children and citizens were brought to watch in order to derive the desired message about the cost of disloyalty to the regime.

The COI described many violations in the prison camps; torture and inhuman treatment; arbitrary arrest and detention; discrimination and denial of basic human rights; violations of freedom of expression; controls on individual movement; enforced disappearances including abductions of foreign nationals from their homelands (including Japan); and almost total denial, outside the capital, of freedom of religious worship.

Because of the definition of 'genocide' in the *Genocide Convention* of 1948, the COI did not find that crime to have been proved. But countless other human rights abuses were recorded. Some of them were found to justify classification as "crimes against humanity". This is a crime so horrifying that it 'shocks the conscious of mankind'. The HRC had expressly asked the COI to carry out its inquiry "with a view to ensuring full accountability, in particular

for crimes against humanity”.⁵ The COI identified individual agencies probably liable for personal and institutional accountability. These included liability under the “command principle” of the State Security Department; the Ministry of People’s Security; the Office of the Prosecutor; the Korean People’s Army; and the Workers’ Party of Korea. The possibility was identified that the Supreme Leader (more recently designated the general secretary of the Party) could be liable as a person who, having the power to prevent or avoid crimes against humanity, allowed them to happen unrestrained on his watch. When the draft COI report was sent to the North Korean Mission in Geneva, an express warning was included about this form of possible personal liability. Expressly, the COI recommended that its report be placed before the Security Council so that it could ‘refer the situation in [North Korea] to the International Criminal Court for action in accordance with that Court’s jurisdiction”.⁶ The COI also recommended that the Security Council should adopt “targeted sanctions against those who appear to be most responsible for crimes against humanity”.⁷

When the report of the COI was delivered to the HRC on 17 March 2014, it was denounced by North Korea. However, it did not invite the COI or the High Commissioner for Human Rights or only trusted nominee to enter and verify its critique. Attempts were made to delay or stall action on the report; but overwhelmingly these failed. With strong supporting votes, the report was received by the HRC and the General Assembly. Moreover, unusually for a human rights report, it stimulated action by the Security Council under

⁵ COI report, 362 [11] ff [15(c)]. See also A/HRC/25/63 [74].

⁶ COI report, 370 [1225 (a)].

⁷ Ibid, loc cit [1225 (a)].

a procedural motion, not subject to the veto of permanent members.⁸ The situation in North Korea thus appeared on the agenda of the Security Council in 2014, 2015, 2016 and 2017. It was not taken up in 2018. In 2019, the United States deprived the procedural annual resolution of the necessary majority by failing to vote for it. Inferentially, it was thought to cut across President Trump's forlorn strategy to remain silent about human rights in North Korea, in the hope that this would secure progress on a 'deal' for dismantling North Korea's rapidly growing stockpile of nuclear weapons and intercontinental ballistic missiles.

The futility of this strategy of appeasement was made clear by the sudden termination of the second meeting between Kim and Trump at Hanoi on 27-28 February 2019. Yet throughout his dealings of flattery and bromance, President Trump never acknowledged, or appeared to recognise, the inescapable links between securing peace and security in Korea and observance of fundamental human rights in North Korea. We hope that President Biden will do better.⁹

Achievements of the COI

Amidst the disappointments that followed the delivery of the COI's report on North Korea, there were several achievements.

⁸ 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. See also "The situation in the Democratic People's Republic of Korea", UNSCOR, 7353rd mtg, UNdoc S/PV. 7353 (22 December 2014).

⁹ Cf Timothy Garton-Ash, "The Future of Liberalism"

<https://mail.google.com/mail/u/0/#inbox/FMfcgxwKkbnwBCKJjhJnCnhwTVsBVfld>.

(a) *Hearing complaints:* The COI's methodology of transparency, publicity and openness in fact gathering and active media engagement gave former citizens of North Korea, who had fled abroad, the right for the first time to speak in a world forum, to complain about, and denounce, the deprivations of their basic rights. Their voices were silenced in North Korea. But they were heard and publicised by the COI, in the global media and on the internet.

(b) *Field office:* As recommended by the COI, a UN 'field office' was established in Seoul, South Korea, to continue the task begun by the COI of receiving and recording the complaints of human rights abuses. These continued to be recorded in a way potentially suitable for use in preparing prosecutions. They also formed part of the historical archives of this dark chapter in the history of the Korean people.

(c) *SR's ongoing work:* The Special Rapporteur on North Korea (SR) continues to be appointed by the HRC. He faithfully delivers his annual reports to hold North Korea accountable for its actions, where these can be proved. In this sense, the SR and the HRC fulfil, in part, the commitment of the international community where the country concerned is in default. The global community steps in to provide accountability where the alleged offender fails. As the COI pointed out in its report, accountability is not limited to prosecutions before the ICC or elsewhere. It involves submitting wrongdoers to public assessments by UN bodies and by the international community through the global media.

(d) *People with disabilities*: There has been some improvement since 2014 in the North Korean treatment of the particular category of people with disabilities. In May 2017, North Korea, after years of criticism, consented to the first visit by a UN expert on human rights, namely the SR on People with Disabilities. The COI had earlier criticised the proved disadvantages of citizens in North Korea on the basis of status and arbitrary classification, including disabilities.¹⁰

(e) *Encouraging cooperation*: Certain later improvements in law and practice can be noted. The head of the mission of the Russian Federation in Geneva urged the COI to acknowledge any improvements discussed in human rights. This has been done; but in truth they have been few and generally minor. Likewise, the belated and limited engagement of North Korea with UPR cannot be allowed to overshadow the fact that such cooperation was its obligation. Sometimes the international community appears so anxious to secure cooperation that it acknowledges trivial advances that leave untouched the basic attitude of non-cooperation that remains firmly in place.

(f) *Military remains*: Following the initial meeting of President Trump and the Kim Jong-un in Singapore on 12 June 2018, there were cooperative gestures between military forces on both sides of the De-Militarised Zone (DMZ) for the return of human remains of deceased members of the military forces killed during the Korean War 1950-3.

¹⁰ COI report, 91 [321]-[332].

Cooperation between military personnel was reportedly professional and smooth, if relatively limited and specialised.

(g) *International media*: Following the COI report and recommendations, the BBC restored a limited Korean language service to Korea. Voice of America and other international broadcasters attempted access to the Korean language audience on the Peninsula but continued to face serious technical impediments for broadcasts to the North.

(h) *The SR's flexibility*: The ongoing work of the HRC on UPR, of the SR on Human Rights in North Korea and some other UN agencies have continued since the delivery of the COI report. However, North Korea's cooperation with the Office of the High Commissioner of Human Rights has been minimal. Engagement is usually reluctant and hostile. We pay a tribute to the efforts of the SR on North Korea (Mr Tomàs Ojea Quintana) for his efforts to explore new and different ways to open dialogue between North Korea and the HRC and its special procedures. His attempt to propose areas of human rights for exploration that might be more amenable for cooperation (notably economic, social and cultural rights) have been admirable. However, the truth is that they have rarely been rewarded with a positive response by North Korea, let alone positive action.

Failures of the COI

As against the meagre instances of success in the North Korean responses to the UN efforts to improve the human rights situation disclosed by the COI report, there have been many failures. Some of these have been:

(a) *Nuclear weapons and human rights*: North Korea ratified the *Non-Proliferation Treaty* (NPT) in 1985. However, this did not include a safeguards agreement until 1992. This measure of non-compliance was reported to the UN Security Council. That step put in train North Korea's withdrawal from the NPT. There followed underground nuclear tests; on and off assurances of closing down facilities; and promises of cooperation. Nonetheless, nuclear tests were conducted in 2006, 2009 and 2013. These became more worrying with proof of the development of missile delivery systems, expanding to ICBMs in 2017. Despite intermittent assurances of non-abuse by North Korea, the Security Council voted for a succession of increasing sanctions against North Korea: itself a reassuring sign of international common ground. However, there have been breaches, especially reportedly by China which has tended to be increasingly protective of North Korea as an ally. The military situation has become more grave. If such developments can occur in the case of North Korea, the NPT is shown as seriously defective. Whilst this is a critical issue for global peace and security, especially in the region of the Korean Peninsula, it is at the same time a development of importance for universal human rights unelaborated in the COI report. The right to life, of access to food, and to environmental health and safety are being placed at serious and

increasing risk. The substantially unaccountable and totalitarian political regime described in the COI report makes the weapon and missile developments critical for security. They deserve the most urgent attention of the UN and its Security Council and other UN organs. However, such developments also emphasise the expanding human rights concerns presented by the rapid enlargement of North Korea's nuclear and missile arsenal. This cannot be treated as simply an issue of security. It is also a complex and interrelated issue of security and human rights. This is why, in the otherwise welcome direct contacts between President Trump and the Supreme Leader Kim Jong-un in 2018 and 2019, the failure to include any mention of North Korea's non-compliance with universal human rights represented an unacceptable omission. There can be no realistic prospect of achieving compliance with the prerequisites of international peace and security whilst the human rights position in that country is as described in the COI report. No evidence exists of a measurable improvement in North Korea's human rights compliance since the COI report was presented in March 2014. On the contrary, to speak frankly, the situation of human rights in North Korea has persisted and even deteriorated in several significant ways in the period 2014-2021.

(b) *Objection to 'country specific'*: Although there have been minor improvements since 2014 in North Korea's engagement with the UN system, these have been trivial when measured against the grave findings recorded by the COI. Although it is a member country of the UN and, as such, under an obligation to cooperate with the UN's institutions and officers, North Korea has continued to be seriously

non-compliant. It has been hostile and defiant in its engagement with the cornerstone UN objective of universal human rights, as stated in the *Charter*. It has not extended invitations to the High Commissioner for Human Rights, or to the Special Rapporteur on North Korea or to other UN human right mandate holders (except for disabilities) to visit or engage with its officials. Effectively, it has not seriously responded to the report of the COI. Instead, it has elected to insult the COI's members and to denounce their findings, without offering access to the country or verifiable evidence or trustworthy opinion to contradict the shocking record of the COI report. Every attempt of the SR on North Korea to open dialogue by pursuing topics of human rights that might appear less controversial, has been rebuffed. Whilst most members of the HRC and GA have shared the COI's concerns, and said as much, a small nucleus of states in the UN has repeatedly defended the right of North Korea to remain unanswerable to the UN system. Instead of grappling with the findings of crimes against humanity, described in the COI report, as was promised by the unanimous adoption of the "R2P resolution" by the General Assembly in 2005,¹¹ the nucleus of North Korea's allies (some of whom are themselves serious abusers of fundamental human rights) merely insisted that "country specific" human rights mandates and criticisms were ineffective because too "political". This self-fulfilling prophecy of ineffectiveness is no more convincing today than it would have been in the 1930s had there had then been an institution for addressing the

¹¹ UN General Assembly, "2005 World Summit Outcome", A/res/60/1, October 24, 2005 (<http://UNPAN1.un.org/intradoc/groups/public/documents/un/UNPAN021752.pdf>) . See G.J. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Brookings Institution Press, Washington DC, 2008, 11.

crimes against humanity happening in the death camps of Nazi Germany and the gulags of the Soviet Union. Every country has human rights abuses. They cannot all warrant detailed attention at the highest level of the UN system. Yet genocide, crimes against humanity and war crimes are in a different category. In part, this is because they are so 'shocking to humanity'. In part, it is because, of their nature, they may give rise to serious breaches of security. In part, it is a priority that is taught by the lessons of history.

(c) *Absence of prosecutions*: The COI report identified possibilities for bringing those responsible for at least the crimes against humanity before an international body to ensure accountability. That was what was done at Nuremburg in 1945, and elsewhere many times since. Although North Korea is not a party to the *Rome Statute*, establishing the ICC, there is another way to enliven the jurisdiction of that court. This involves referral of the matter to the ICC by the Security Council. That has been done in two instances (Libya and Darfur). The ICC cannot assume jurisdiction unless the SC acts. The SC cannot act unless the matter is placed on its agenda and a resolution is proposed by a member state that persuades the requisite majority of the SC to endorse a relevant resolution. Such a resolution may not be procedural. It could thus be subject to a veto. Yet, even if it might be defeated in the SC, the gravity of the cases identified by the COI suggests that, at least, they deserve serious consideration. Only then might the international community respond as its institutions envisage.

The moral opprobrium for inaction is then shifted from those who seek action but cannot secure it to those who prevent it from happening. Institutions generally abhor ineffectiveness. However, effectiveness sometimes takes a period to manifest itself. Those who would defend tyranny from the requirements of answerability should ultimately be made to wear the shame of maintaining the obstacles.

(d) *China and refugees*: In the preparation of the COI report, the mission of China to the United Nations restricted itself to minimal engagement. Repeatedly, China made it clear that it did not approve of the establishment of a COI for any “country specific” resolution of the HRC, (inferentially however egregious). It declined to allow the COI to visit Beijing to consult with relevant academies, government officials or the local office of the UN High Commissioner for Human Rights. Many of the complainants and most of the witnesses before the COI were escapees (‘defectors’) who escaped into China from North Korea during winter, crossing frozen rivers. Many were seeking food and employment. Some escapees recounted deeply disturbing stories of enforced sexual engagement. Unregistered children were denied schooling and healthcare. Reportedly, pursuant to an MOA with North Korea, China facilitates return of escapees to North Korea, where they and their children were commonly treated harshly. The COI called attention to the obligations of non-refoulment, imposed on China by international law.

By a letter to the COI, which it demanded should be published with its report, China’s ambassador to the UN denied that the escapees were

'refugees'.¹² It alleged that they were "economic" entrants who were violating Chinese laws. Both in correspondence and in subsequent oral statements before the HRC, China attacked the contrary suggestion. China declined to engage with the substance of the reports of grave human rights violations and crimes against humanity affecting North Korean escapees. This uncompromising approach was maintained in the GA and also later before the SC. Although, prior to 1989, the Soviet Union had been the major financial and military supporter of the regime in power in North Korea, that position has now shifted to China. On the other hand, China must itself be concerned about the security risks, nuclear weapons and missile systems of potential danger to its territory and the risks of large-scale population movements into China. At no stage did the Chinese mission suggest any practical alternative initiatives that could be adopted by the COI or the HRC to redress the grave human rights offences disclosed by the testimonies given to the COI.¹³

(e) *Plight of abductees*: A specially objectionable category of North Korea's crimes against humanity was the forced abduction of significant numbers of persons who were not nationals of North Korea, primarily nationals of South Korea (ROK) and of Japan. Despite repeated requests from the COI, Japan and other countries, North Korea's response to the plight of such refugees was negative and generally indifferent. When, following a visit to North Korea in September 2002 by Japanese Prime Minister Koizumi, a small number of the abducted Japanese citizens were returned to Japan, hopes were lifted. However, subsequent discussions

¹² COI report 366-367 [1218].

¹³ The correspondence between COI and China is annexed to the COI report, annexure I, pp 27-34 of the annexure.

were profoundly disappointing. Neither the COI nor HRC were able to negotiate any meaningful response on the part of North Korea to the abduction of foreign nationals, or of Korean nationals and prisoners of war. This remains a major source of grievances that are still continuing.¹⁴

(f) *Family reunions*: Large numbers of Korean nationals have been denied travel to South Korea or easy access to North Korea to visit relatives.¹⁵ Limitation of such access to a trickle of tiny numbers is contrary to human rights law and uncivilized. Especially is this so given the advanced ages of most of those who are affected. Their subjection to selection by lottery is needlessly cruel – playing with raw emotions. In an age of instantaneous communications this denial of ready access (if necessary, by virtual means) is specially shocking and unnecessary. Its existence demonstrates the basic inhumanity of the North Korean Government and its officials. If there were a will, this is a human rights violation that could be readily repaired. Yet it has not been.

(g) *Economic breakdown*: Partly in consequence of the endemic inefficiencies of the economy in North Korea; the impact of SC sanctions; the diversion of disproportionate expenditure to the military, to nuclear weapons and missiles; the apparent results of unacknowledged COVID-19 and isolation, North Korea continues to suffer serious recurring economic burdens. A renewal of a famine similar to that suffered in the 1990s has again demonstrated the fundamental inefficiency of North Korea's economy and its vulnerability

¹⁴ COI report 295-304 [924]-[963].

¹⁵ COI report 276 [861].

to dislocation, corruption and distortion. Even in his address to the Eighth Party Congress in Pyongyang, Kim Jong-un in January 2021 Kim Jong-un acknowledged these serious, endemic features. They are continuing as a great burden on human rights.

It might have been hoped briefly that the summit meetings with President Trump could open a possibility of tourism and the injection of financial benefits. However, any such hopes were smashed by the sudden termination of the second summit meeting in Hanoi on 28 February 2019. The consequences of famines, partly natural but mostly man-made, are especially harsh burdens on political prisoners in North Korea's prisons and detention camps. The COI had hoped that at least some progress might have been made on this problem following its report, backed up by irrefutable satellite images. Although some rationalisation of the aggregate number of detention camps appears to have occurred since the COI report, there is no evidence of any significant overall decrease the overall in numbers of prisoners and detainees. These are the equivalent of the former Soviet political gulags. Despite denials, their existence can be established beyond question and they demand a convincing response and access to UN officials no longer delayed.

(h) *ROK initiatives*: Throughout its inquiry, the COI was repeatedly informed by witnesses and officials in South Korea of the passionate desire of their citizens for reunification of the Korean Peninsula. The division of Korea into two states was not made by the free decision of

its people, exercised on the termination of Japanese colonial rule in August 1945. Instead, it was imposed by political decision of the Allied leaders, meeting in Cairo in 1943.¹⁶ This division is unnatural and arbitrary given the commonalities of history, language, culture and population of Korea. Even small steps proposed by the COI to reduce the divisions have been ignored by North Korea.¹⁷

The meeting of the President of the United States, the Supreme Leader of North Korea and the President of South Korea (Moon Jae-In) at Panmunjom on 30 June 2019 was to be welcomed. So were the earlier meetings of President Moon with Kim Jong-un and his officials. However, the hope that these and other encounters might give rise to progress and the taking of small steps to improve relationships, appear to have been dashed by the destruction by detonation on 16 June 2020 of the liaison office built by ROK in Kaesong, near the former joint economic zone and close to the border between North and South Korea. The fact that this wanton act occurred immediately after the sister to the Supreme Leader, Kim Yo-jong threatened direct action against South Korea is a shocking example of the petulance and intemperance of the North Korean leadership. It demonstrates once again that moderation and attempted appeasement pay few dividends in dealings with North Korea.

Diplomats must be polite and swallow the truth in describing the foregoing realities. However, human rights experts need to point

¹⁶ COI report 22 [95].

¹⁷ See eg COI report, 370 [1222]-[1224].

bluntly and truthfully to the lack of the normal controls of a modern state that exists in the extreme political circumstances of North Korea. Without proper accountability, destructiveness and violence can enjoy full rein without effective controls. This reinforces the lesson repeatedly expressed by the COI, in its report and in comments by members since. The quest for security in relations with North Korea, however understandable, is futile without harnessing that quest to a concurrent attempt to uphold universal human rights for all people in North Korea. Although recent amending legislation in South Korea, designed to prohibit the distribution of leaflets concerning human rights in North Korea has been justified by ROK with reference to the alleged danger to residents occasioned by the risk of Northern retaliation,¹⁸ this may itself constitute an attempt to burden disproportionately the reasonable demands of citizens in ROK to respond to and confront the extreme isolation imposed on the North Korean people by their rulers. The possibility that a strategy of prohibiting the distribution of information will pay dividends in DPRK seems illusory. Sadly, a similar conclusion was ultimately reached earlier when the “Sunshine” policy of Kim Dae-Jung attracted similar responses from the North.

This comment applies to the withdrawal by South Korea (ROK) from participation in the annual resolution before the HRC on North Korean human rights, for the first time in 15 years. However well meaning, this self-exclusion from participation in stating the obvious about human rights in North Korea is illogical and undesirable, as the SR on North

¹⁸ Republic of Korea, Ministry of Unification, on the amended provisions of “the development of inter-Korean Relations Act for scattering leaflets (December 2020).

Korea has pointed out. History, including the history of North Korea's reactions to peaceful gestures by the Government of South Korea, does not encourage any confidence that appeasement of a violent, totalitarian government will persuade its leaders to change their ways out of a sense of brotherly admiration for the kindness and good manners of their counterparts.

Directions and Roadmap

(a) *Parts of the jigsaw:* Since 1945, the institutions of the international community, including the United Nations Organization, have not been capable of fulfilling all of the hopes and dreams of those who created the body in San Francisco as the Second World War was coming to its close after the detonation of the nuclear weapons over Hiroshima and Nagasaki, Japan in August 1945. The opening preamble of the *Charter* affirms of commitment to the UN to the three great objectives that all need to be achieved if the goals of the United Nations are to be reached: avoidance of the 'scourge of war'; reaffirmation of faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small; and the establishment of conditions for justice, international law, social progress and better standards of life "in larger freedom".

Achieving all these goals at the same time is not easy. However, it is essential for the survival of the planet, the biosphere and the human and other living species. A symbol of hope has been afforded to humanity by the contemporary images of our blue planet, taken from

outer space. It demonstrates Earth's speciality, beauty and unity that transcends the many differences between its human inhabitants. Speaking plainly, the things that bind us together far exceed our differences, when compared with the alien environment beyond the Earth.

The recent COVID-19 pandemic, still spreading globally, also demonstrates the vital necessity of multilateral cooperation if we are to preserve our planet and the lives of human beings and other life forms within it. Global cooperation in relation to the pandemic is a sign that common ground can be discovered and the return to isolationism and undiluted nationalism avoided.

The entering into force on 22 January 2021 of the *Treaty on the Prohibition of Nuclear Weapons*, although imperfect like all human achievements, is a fresh response of the global community. It signals an understandable concern about nuclear weapons; a determination to achieve their elimination; and an encouragement for all states to work towards these goals.¹⁹ The treaty reflects a fresh appreciation of the particular risks of nuclear weapons. Unless they are brought under the effective control of international law, leading to their elimination, ill-considered actions, mistakes and accidents will almost certainly result in catastrophic consequences. The fact that this has not happened in the past 75 years is no guarantee of continuance.

¹⁹ *Treaty on the Prohibition of Nuclear Weapons*, adopted UNGA 7 July 2017; opened for signature 20 September 2017; entered into force, 22 January 2021.

This is the context in which the security challenges presented by the Korean Peninsula fall to be resolved by humanity and its institutions. No one should underestimate the danger of the situation that North Korea's weapons and missiles present to the Earth, to the United Nations and the global community. That danger is not specific only to Korea, which is immediately affected. It is emblematic of how the human species will tackle similar, and possibly larger, challenges in the future. All organs of the United Nations and all officials with relevant authority must discharge their functions keeping this dimension of contemporary dangers to peace and security in mind. They are vital to the safety of all the people of Korea and its neighbours. Resolving those challenges has lately become even more difficult. It is therefore essential that the United Nations should quickly find the means to resolve the differences over Korea before their destructive potential is released with irreversible consequences. This demands a heightened sense of urgency, proportional to the death and destruction that neglect, indifference or mistake might occasion.

(b) *Revival of multilateralism:* Whilst the changes of recent times are significant, the indications of possible global reengagement with multilateralism may afford a fresh opportunity to re-set the agenda of the international community. Working together to address the urgent response to a dangerous pandemic presents opportunities to re-learn a vital lesson. Some problems cannot be addressed successfully by any single nation, however powerful it may appear in economic, military or other terms. This is why no step should be left unturned in seeking to find solutions to the security challenge caused by North

Korea's development of nuclear weapons and missile systems. Those who know most about such weapons are usually foremost in insisting on a heightened sense of urgency. Nevertheless, this must be explored and accompanied in the wider context of international law, justice and universal human rights. So far a minority of UN member states and especially North Korea have presented an obstacle to taking steps in the right direction.

(c) *UN membership*: The *UN Charter* contemplates a case where a member state, already admitted to membership of the United Nations, may be suspended or even expelled from the Organization. The essential features of membership are declared in Article 4 of the *Charter*. They involve being a "peace-loving state which accept[s] the obligations contained in the present *Charter* and which, in the judgment of the Organization, [is] able and willing to carry out those obligations". North Korea was inferentially taken to have passed that hurdle when it was admitted to membership of the UN on 17 September 1991, concurrently with South Korea. Suspension of UN membership refers to the interruption of the "exercise of the rights and privileges of membership". It is limited to a case of a member of the United Nations "against which preventative or enforcement action has been taken by the Security Council". That precondition does not apply at this time to North Korea. In any case, suspension of membership can only happen "upon the recommendation of the Security Council". This will not happen to North Korea in the present circumstances. Furthermore, it might not be useful in dealing with the problem that North Korea presents.

The provision in Article 6 for “expulsion” is limited to a Member “which has consistently violated the Principles contained in the present *Charter*.” A fair-minded reading of the report of the COI would establish, together with the response of North Korea to the report once published, that the country has repeatedly and seriously violated the Principles of the UN. The “Purposes and Principles” of the UN are stated in Article 1 of the *Charter*. In Article 1.3, they include “promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. Again, because of the precondition of a recommendation of the Security Council to initiate the steps towards expulsion, no such action against North Korea can currently be contemplated.

Consideration of the expulsion of South Africa from the UN in October 1974 because of its apartheid policy, is the closest that an analogous situation has arisen when compared to that of North Korea today. South Africa was also, at the time, a member state reportedly possessed of a nuclear weapons arsenal. However, as in that case, the proposed expulsion was not approved by the SC because France, the United Kingdom and the United States vetoed the proposal.

North Korea enjoys benefits and advantages as a result of its membership of the UN, whilst significantly failing to fulfil the obligations attached to membership. At a minimum, those obligations appear to contemplate active cooperation with a serious investigation for the

HRC concerning the state of human rights and fundamental freedoms in North Korea; conformity with, and cooperation as resolved by, the HRC itself in establishing the COI; and compliance with requests made by officers and mandate holders of the HRC and OHCHR. Whilst suggestions have occasionally been made that North Korea's defiance of the minimal obligations of cooperation with the COI warrants suspension of membership, or scrutiny of the credentials of its government to represent the people of North Korea, arguably its continued presence in the United Nations as a member affords the global community the opportunity, which it has exercised, of repeatedly demonstrating the unacceptability of that member's conduct and non-cooperation. North Korea was not obliged to join the United Nations. However as it did so, it needs to be reminded of the obligations that arises because of that membership.

As stated, North Korea formally withdrew from the NPT in 2003. It attempted to withdraw from the *International Covenant on Civil and Political Rights* (ICCPR) on 25 August 1997. It was informed by the Secretary-General there was no mechanism for withdrawal from that treaty, so that it could only withdraw if all other parties to the NPT agreed. This is something that has not happened. North Korea appears to have accepted that it is still bound by the ICCPR – a position also adopted by the UN Secretary-General. The result is the present apparent impasse. North Korea is a member of the UN. The mechanics of its suspension, expulsion or withdrawal are not presently available. In any case, membership of the UN and of the ICCPR establish the duties of North Korea to fulfil the objectives of the UN. It

must be held to those duties. That means all of the objectives, including those of, and under, the *Charter* for the human rights of its people and its neighbours affected by its actions.

Proposals for Action

(a) *Dissemination of COI report:* The COI report is a powerful and readable document. It needs to be more widely known and available. Its text is accessible on the internet.²⁰ However, the internet is not generally accessible in North Korea. The changes in the condition of human rights that have occurred in North Korea since the report was presented to the HRC in 2014 are minimal. The report still substantially states the human rights situation in that country today. Unless the report is widely available for a general readership and reflection, the power of the findings and impact of the conclusions of the report are undesirably diminished.

The HRC should consider the republication of the report of the COI in accessible hard copy format. The Secretary-General and the High Commissioner for Human Rights might be willing to write a foreword and/or an introduction, including a brief update based on the reports of the SR and other reliable sources. Other events, concurrent with the 2021 session of the HRC, should be considered to remind the international community, in and beyond the UN, of the findings, conclusions and recommendations of the COI.

²⁰ <https://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>

The COI report is readable partly because of the inclusion on most of its pages of extracts from the testimony of witnesses addressing their experiences with the mandate topics. Renewed attempts should be made to secure publication of the report by the private sector; but if not, by the UN itself. Republication should include photographs, images and cartoon drawings made by prisoners of their conditions of punishment in detention, reproduced in the COI report. Under the terms of the Universal Postal Union, pursuant to the *Bern Treaty* 1874, North Korea should be held to its obligations to distribute copies of the COI report widely in North Korea were sent by post – including to institutions of government and educational institutions. Desirably, reliable translations into the Korean language should be prepared and widely distributed. They should be offered free and for sale in South Korea and elsewhere.

Without altering the substance of the COI report, we would hold ourselves ready to cooperate with such a publishing project. North Korea is a member of the Universal Postal Union and should be reminded of its obligations as such. The UNODC office in South Korea should provide opportunities to provide knowledge about the report and human rights education concerning the findings of the COI report.

(b)Funding the Seoul office: The upcoming March 2021 HRC session should recommend the provision of enhanced resources to the OHCHR Seoul office and to the Office of the High Commissioner for Human Rights in Geneva. Only this will ensure that they continue

creating the database/repository of evidence, the latter maintained on a secure and confidential server in Geneva. The Seoul office should also pursue closer cooperation with authorities in ROK and explore OHCHR's ability to build individual case files on cases involving suspected international crimes, including crimes against humanity. We emphasise the importance of South Korea's continuing to host, and cooperate with, the OHCHR Seoul office. In effect, the work of the UN Seoul office is the minimum that must be undertaken by the United Nations and South Korea so that testimony of human rights offences and crimes against humanity is not lost or forgotten. And so that this dark chapter in the history of the Korean people is preserved and archived.

(c) Security Council meetings: We express our support for the revival and continuation of regular, Security Council meetings to review denuclearisation on the part of North Korea and accountability for human rights. North Korea has repeatedly expressed its assertion that the promotion of human rights is an "obstacle to peace". This is a self-fulfilling assertion by a totalitarian state that should not be accepted. There should be no trading away of accountability for human rights abuses as a supposed price to be paid for negotiations with North Korea about its expanding nuclear weapons and missile delivery systems. The interrelationship of international security and universal human rights is recognised in the preambular principles of the UN *Charter* itself. It is really self-evident. Those who live in a bubble of arrogance and unaccountability are prone to fall victim to their own propaganda. This may not be said by those who are bound by the

conventions of diplomacy. However, plain speaking is required by those who report independently on such serious human rights violations and crimes against humanity. It is important that the virus of arrogance should not infect the United Nations or its institutions and member countries. The promise by the UNGA to respond to human rights offences such as are identified in the COI report that rise to the level of 'crimes against humanity' is one that the United Nations must fulfil. It must do so if the integrity of the *Charter* and UN and the obligations of treaty and other law are to be maintained and global safety secured.

(d) Independent expert or panel: The HRC Council should consider asking for the appointment of an independent expert or panel to bring up to date the recommendations made by the COI in its report. Such an expert or panel could work in cooperation with the SR on North Korea, but independently of him. It would be timely for a review of the COI's recommendations to be conducted precisely for the purpose of bringing the findings up to date. The HRC should, by resolution, require the cooperation of North Korea with such an expert or panel. The person(s) chosen should exhibit manifest independence and impartiality. They should monitor progress in North Korea, including in any areas of improvement and in all areas of backtracking and deterioration. The latter should extend to the examination of the impact of Government rules and regulations in North Korea for the control of, and response to, the COVID-19 pandemic in that country.

Immediate Roadmap

In addition to the foregoing broader agenda for follow up the COI report, the following particular points should be included in the immediate agenda of those working on the challenges for human rights in North Korea:

(a) Accountability and its meaning: The High Commissioner for Human Rights may be expected shortly to present her second written report to the HRC on efforts to promote accountability in North Korea. The questions of ‘accountability’ and what the reaction of the international community to the findings of the COI and subsequent follow up should be, once again need to be addressed by the HRC.²¹ The HRC should revive the sense of shock and concern that accompanied the publication of the COI report in 2014. An attitude of hopelessness or incapacity must be overcome. It must be replaced with a practical determination to protect the victims of human rights abuses in North Korea – particularly from the consequences of crimes against humanity.

(b) Reasonable grounds for findings: It may also be expected that, in the High Commissioner’s upcoming report, she will again highlight the analysis of the situation in North Korea conducted by her own office. We hope and expect that she will confirm, as the COI concluded, that reasonable grounds exist for the making of factual determinations on

²¹ General Assembly, Human Rights Council, Report of the Group of Independent Experts on Accountability Pursuant to Council Resolution 31/18. A/HRC/14/66.Add1. (26 February 2017) esp at 15 ff [51]-[63].

individual cases, incidents and patterns of state conduct set out in the COI report. And that these will establish both human rights violations and crimes against humanity²². We have confidence that a proper analysis will renew the COI's findings that crimes against humanity have been committed and are ongoing in North Korea. Such a conclusion would inevitably lead to a renewed demand, as made by the COI, that those responsible for past and ongoing human rights abuses and crimes against humanity should be held accountable. Nothing less would be acceptable given the strength of the recorded testimony and the failure of North Korea, although it has had plenty of opportunity, over nearly 7 years, to demonstrate the contrary or even to raise a reasonable doubt about the COI's detailed findings.

(c) Means for institutional redress: Although the COI report concluded, and illustrated, the gravity, scale and nature of North Korea's violations, without parallel, and called for urgent action by the international community, the truth is that very little action has actually been taken in the intervening 7 years. The international community must find its voice on this issue. It must speak with special clarity if the promise of the *Charter* and of the UDHR are to mean anything for the people of North Korea. They put their faith in the United Nations. Participants from their community, who had escaped, came forward and spoke to the COI, in the hope and belief that the international community would respond. A fair review of their testimony contained in the report and in the public hearings available online, confirms the

²² COI report, 16-17 [67]-[76].

reliability and justice of the COI's conclusions. The High Commissioner and the HRC should heed the voices of those who have spoken to the United Nations through the public hearings of the COI. This was not an inquiry that was carried out in secret, behind closed doors. It was undertaken transparently using the COI's unique methodology. The world is watching to see how the UN responds. It must not betray the people of North Korea.

(d) Institutional accountability: A lasting peace on the Korean Peninsula can be achieved only if the violations found in the COI report are acknowledged, addressed and terminated. The rights of victims to truth, justice, reparations and guarantees of non-recurrence must be fulfilled. To fulfil these aims, the prosecution of alleged international crimes remains a high priority. Primarily such redress should happen through referral of the situation of North Korea to a prosecutor of the ICC. If that cannot be done, a new ad hoc and specialised tribunal of the UN should be established by the General Assembly. Alternatively, another mechanism or other initiatives should be undertaken, as discussed in the COI report.²³ Inaction and surrender to violence and ill-tempered tantrums of North Korea should not be an option.

(e) Accountability beyond international institutions: Absent any present prospect for a referral of the case of North Korea to a prosecutor of the ICC or for consideration of the setting up of an ad hoc UN tribunal or other institutional remedy, we would encourage legal practitioners,

²³ COI report, 359-363 [1195]-[1203]. See also Independent Experts on Accountability Report, A/HRC/14/66 Add 1 at 15-17 [51]-[63].

prosecutorial bodies, civil society organisations with expertise and UN member states to work with OHCHR and with victims and their representatives, including escapees from North Korea, to examine any novel legal approaches that can be enlisted to achieve accountability. These might allow the exercise by victims of their rights of access to national courts, so that the victims' rights to remedy and redress can at last be realised, including by the possible invocation, where allowed by law, of universal jurisdiction. So far, the only substantial redress that the victims of North Korea's crimes have received has been that of giving testimony in public before the COI. It is time that their redress should go beyond words, formal reports and fine declarations. This is what crimes against humanity demand. If it is denied in one case, we are all diminished. None of us is then safe.

Other voices will be heard concerning the response of the global community to the indicated crimes of North Korea. When global institutions fail, necessity demands that universal jurisdiction and other means should be accepted so that the clear steady voice of universal human rights can again be heard and seen to secure a proportionate response.

The HRC, the High Commissioner for Human Rights and the SR should use their good offices to persuade South Korea to recognise that the attempts to secure change in North Korea and the improvement of human rights for its people, did not succeed under the distinguished leadership of President Kim Dae Jung and his Sunshine Policy; Nor has it succeeded recently in the face of the responses by Kim Jung Un. This is despite the well-intentioned and

sincere efforts of South Korea to improve relations. In these circumstances, it is time to urge South Korea to return to the international consensus that demands a transparent and tangible response to the conclusions and findings of the COI, particularly with respect to crimes against humanity. This is the duty of all democratic countries. However, it is the special responsibility of South Korea because its present posture betrays the fundamental entitlement of the people of North Korea to enjoy the universal human rights promised by the *Charter* of the United Nations, the *Universal Declaration of Human Rights* and UN treaty law.