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ADMINISTRATION: HUMAN RIGHTS, PEACE
AND SECURITY

The Honourable Michael Kirby

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Commencement of the Biden Administration

On January 20, 2021, Joseph B Biden was elected as President of the United States of America, succeeding Donald J. Trump. As Vice President of the United States under President Obama, he had been closely involved in the response of the United States to the many challenges presented by North Korea to the international community. Even before serving as Vice President, Mr Biden had been a long-time member of the US Senate Foreign Relations Committee, eventually becoming its Chairman. He also chaired

* This article draws on an earlier text, “Human Rights, Peace and Security: The North Korean Challenge” prepared as a document for the meeting of the UN Human Rights Council in March 2021.

** Chair of the UN Commission of Inquiry (COI) on Human Rights Violations in the Democratic People’s Republic of Korea (DPRK) (North Korea) (2013-14); Justice of the High Court of Australia (1996-2009); and Co-Chair of the Human Rights Institute of the International Bar Association (2018-21). The author and Marzuki Darusman (former Attorney-General of Indonesia) and Sonja Biserko (Human Rights expert Serbia) were the appointed members of the COI on North Korea.

the Senate Judiciary Committee from 1987 to 1995, when it addressed many contemporaneous challenges for universal human rights. Because the years of his service as Vice President and in the Senate coincided with significant challenges to the world order by North Korea, President Biden brings to the office of President substantial experience in the interplay respectively of the security and human rights challenges posed by North Korea.

President Biden's election as President followed the distinctive term of the Trump Administration. During that term, three brief meetings between President Trump and the Supreme Leader of North Korea (Kim Jong-Un) saw focus on what were perceived as the security dangers (principally from nuclear weapons and missiles) presented to the United States and its allies by North Korea. Attention to, and even mention of, the human rights situation in North Korea was missing from the public record of the dialogue between the two national leaders during any of their three brief meetings.

Whilst ambitious and in some respects bold, the initiatives of President Trump on North Korea can only be judged a failure. No substantial progress was made towards denuclearisation on the part of North Korea or the destruction or surrender of its nuclear arsenal. At the same time, whilst modest success was achieved on the recovery from North Korea of some military remains from the Korean War, no progress was made to improve the conditions of human rights of the people of North Korea. Nor were those conditions acknowledged as a problem, or even mentioned, in the record of the three meetings that took place in 2018-2019.

The newly nominated Secretary of State of the United States, the Honorable Antony Blinken, came to office after extensive experience in the US State Department. Speaking at his confirmation hearing before the US Senate Foreign Relations Committee in January 2021, Secretary Blinken acknowledged that North Korea, with its dual challenges of security and human rights, had been a “hard problem that has plagued administration after administration”. He declared that had “not gotten better”.¹ He undertook to consider unspecified options designed to increase pressure on North Korea to come to the negotiating table. However, he cautioned against embracing “overly ambitious goals such as completely denuclearising North Korea” within the term of the Biden Administration.

The emphasis by President Biden and his Administration on the strengthening of engagement with multilateral institutions and the restoration of human rights and democracy as the global objectives of US foreign relations appear to signal a return to many of the strategies adopted during the Obama Administration and earlier.² This return to a more orthodox and systematic approaches to diplomacy and negotiation were also emphasised by the new US representative at the United Nations, Ambassador Linda Thomas-Greenfield. She affirmed that the United States believed that North Korea “constitutes a serious threat to our peace and security and to the globe”. Speaking for the first time as chair of the UN Security Council, she

¹ Jeongmin Kim, “Biden’s secretary of state nominee vows to ‘increase pressure’ on North Korea, *NKNews*, January 20, 2021; <https://www.nknews.org/2021/01/bidens-secretary-of-state-nominee-vows-to-increase-pressure-on-north-korea/>

² Nick Bisley, “Biden will place Asia at the Centre of foreign policy – but will his old-school diplomacy still work?”, *The Conversation*, 11 November 2020; <https://theconversation.com/biden-will-place-asia-back-at-the-centre-of-foreign-policy-but-will-his-old-school-diplomacy-still-work-148095>

foreshadowed a return to “principled diplomacy” that would collaborate with key allies.

Whilst many such allies welcomed the return of attention to human rights, believing that ignoring that objective would only delay achievements on matters of security, Ambassador Thomas-Greenfield’s remarks drew predictable fire from the UN representatives of North Korea. They warned against “politicisation and internalisation” at what they described as actions targeted at “armed invasion and regime change”.³ The willingness of President Biden, in his first teleconference with President Xi Jinping of China, to refer to human rights concerns gave a measure of encouragement to those looking for the restoration of attention to human rights in North Korea in the international agenda with that country.

The early signs from the leaders of the Biden Administration accordingly suggested that the strategy of observing complete silence on human rights issues in North Korea may have come to an abrupt conclusion. Where that change will lead is contested. However, on the brink of the Biden Administration, it is appropriate to review how the UN Human Rights Council became involved in the scrutiny of the abuse of human rights issues in North Korea; and how that topic might be restored to the global agenda, given that, in the immediate past, even cautious reference to it has substantially closed down the dialogue with North Korea, including on security issues.

³ Jeongmin Kim, “North Korea is a ‘serious threat’ to peace and security: US Ambassador to the UN” *NKNews* March 2, 2021; <https://www.nknews.org/2021/03/north-korea-is-a-serious-threat-to-peace-and-security-us-ambassador-to-the-un/>

I propose to describe how the UN Human Rights Council came to establish its COI on North Korea; how its investigations were conducted; the findings that it made at the conclusion of its inquiry; and what might be regarded as the achievements and failures of the COI after its report was delivered. I will then suggest some components of the road map for the future, identifying options that are open to the United Nations, as to the Biden Administration, so as to make the most of this opportunity to tilt the UN back in the direction of substantive progress on security, but without ignoring the urgent need for improvements on human rights issues.

Creation of the Commission of Inquiry

The United Nations Human Rights Council (HRC) established on human rights violations in the Democratic People's Republic of Korea (North Korea) on 21 March 2014.⁴ Unusually, the resolution was adopted without a demand 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 a Special Rapporteur who had been appointed earlier to investigate human rights violations in DPRK. It was also 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 suggested exceptional arrogance on the part of North Korea and

⁴ At the 22nd Session of the UNHRC. See resolution A/HRC/Res/22/13.

indifference to its obligations as a member state of the United Nations. Establishing a commission of inquiry constituted an enhancement of the institutional reaction of the HRC. It reminded the reclusive member state that universal human rights, justice and respect for peace and security were among the core functions of the United Nations, laid down in its *Charter*. I was appointed to chair the COI. The Special Rapporteur (Mr Marzuki Darusman of Indonesia) and a third member (Ms Sonja Biserko, a human rights expert from Serbia) were appointed the other members.

As participants from different countries, backgrounds and experiences, the appointees brought different approaches to the task. However, 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. North Korea needed to face the uncomfortable reminder of worldwide scrutiny into its practices, to the extent established by the available evidence.

The result was the conduct of public hearings and the recording of testimony at sessions held in Seoul, Tokyo, London and Washington DC. Although North Korea ignored the COI's 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 experiences. For the most part, their evidence was placed online. It was immediately made available to the world community. However, it was not accessible to the people of North Korea, because access to the internet and global news media was restricted to the privileged elites who supported the regime. Occasionally, the COI considered that a witness

might have exaggerated the horrors they described. But overwhelmingly the COI regarded them as witnesses of truth. When North Korea later criticised the witnesses as “traitors”, the COI offered to come to North Korea and listen to any contrary testimony. It promised to correct anything that was found to be false or exaggerated. All such requests were ignored.

As the COI was preparing its final report, the news came in from North Korea that the second most powerful man in the country, Jang Song-thaek (an uncle by marriage of the Supreme Leader, Kim Jong-un) had been dragged out of a meeting of the Politbureau, summarily tried and executed.⁵ A similar fate was later to befall the half-brother of the Supreme Leader, Kim Jong-nam. He was disposed of by the application of deadly 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.⁶ The COI had been provided with an excellent secretariat. Its 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

⁵ COI report A/HRC/25/CRP.1, 49 [180].

⁶ COI report. The mandate of the COI report (7 February 2014) appears on 6-7 [13].

reveal a State that does not have any parallel in the contemporary world.”⁷ 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;⁸
- * 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; and⁹
- * Public executions of suspected ‘hostile classes’, to which school children and other citizens were brought to watch, inferentially in order to derive the desired message about the price extracted for disloyalty to the regime.¹⁰

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.

⁷ COI report, 365 [1211].

⁸ COI report, 255 [807]ff; 327 [1054]ff; 336 [1105]ff.

⁹ COI report 325 [1044]-[1045].

¹⁰ COI report 262 [827]ff.

Because of the narrow definition of ‘genocide’ in the *Genocide Convention* of 1948, the COI did not find that crime to have been proved.¹¹ However, countless other serious human rights abuses were recorded. Some of them were found to justify classification as “crimes against humanity”.¹² This is a crime of violence, 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”.¹³

The COI identified individual agencies probably liable for personal and institutional accountability. These included under the “command principle”, liability 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 of Kim Jong-Un. 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’.¹⁴ The COI also recommended that the Security Council should

¹¹ COI report, 350-351 [1155]-[1159].

¹² COI report, 355-356 [1179]-[1183].

¹³ COI report, 362 [11] ff [15(c)]. See also A/HRC/25/63 [74].

¹⁴ COI report, 370 [1225 (a)].

adopt “targeted sanctions against those who appear to be most responsible for crimes against humanity”.¹⁵

When the report of the COI was delivered to the HRC on 17 March 2014, it was denounced by North Korea. However, North Korea did not invite the COI or the High Commissioner for Human Rights or some trusted nominee to enter and verify or contradict its critique. Attempts were made to delay or stall action on the report. Overwhelmingly, these attempts failed. With strong supporting votes, the report was received successively by the HRC and the UN General Assembly. Moreover, unusually for a human rights report, the COI report helped to stimulate action by the Security Council under a procedural motion concerned with security. A procedural motion was, not subject to the veto of the permanent members.¹⁶ The situation in North Korea thus appeared on the agenda of the Security Council in 2014, 2015, 2016 and 2017. However, it was not taken up in 2018. In 2019, the United States deprived the annual procedural resolution of the necessary majority by failing to vote for it. Inferentially, this was because it was considered to cut across President Trump’s forlorn strategy to remain silent about human rights in North Korea, in the hope that this approach 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 summit meeting between Kim and Trump at Hanoi

¹⁵ Ibid, loc cit [1225 (a)].

¹⁶ 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 724-725. See also “The situation in the Democratic People’s Republic of Korea”, UNSCOR, 7353rd mtg, UNdoc S/PV. 7353 (22 December 2014).

on 27-28 February 2019. Throughout his flattery and declarations of bromance, President Trump never acknowledged, or appeared to recognise, the inseparable links between securing peace and security in Korea and observance of fundamental human rights in North Korea. It is to be hoped that President Biden will not make this mistake.¹⁷ The early announcement by Secretary of State, Anthony Blixen that he is considering favourably the re-appointment of a United States ambassador for human rights in North Korea, appears to suggest the welcome return to a key strategy that was observed by the United States until the election of Donald Trump.

Accomplishments of the COI

Several achievements by the COI on North Korea may be listed before turning to the areas where the COI was less successful.

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

(b) *Regional office:* As recommended by the COI, a UN 'field office' was established in Seoul, South Korea, to continue the task begun by the

¹⁷ Cf Timothy Garton-Ash, "The Future of Liberalism"
<https://mail.google.com/mail/u/0/#inbox/FMfcgxwKkbnwBCKJjhJnCnhwTVsBVfld>.

COI of receiving and recording the complaints of human rights abuses by knowledgeable witnesses. These continued to be recorded in a way potentially suitable for ultimate 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 delivers his regular reports, aiming to hold North Korea and other UN members states accountable for their actions, where human rights concerns can be proved.¹⁸ In this sense, the SR and the HRC fulfil, in part, the duty of the international community where the country in question is itself in default. In that event, the global community steps in to provide accountability where the alleged offender has failed. As the COI pointed out in its report, accountability is not limited to the bringing of 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 an acknowledgement of improvement since 2014 in the North Korean treatment of the human right of the particular category of people living with disabilities. In May 2017, after years of criticism and non-cooperation, North Korea consented to the first visit by a UN expert on human rights, appointed

¹⁸ The most recent report of the SR was delivered to the HRC on March 1, 2021. See Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the DPRK*, A/HRC/46/51 (1 March 2021) (SR Thomàs Ojea Quintana)

by the HRC, namely the SR on People with Disabilities. The COI had earlier criticised the disadvantages of citizens in North Korea established by the evidence on the basis of their status and arbitrary classification, including disabilities.¹⁹

(e) *Encouraging cooperation*: Certain further improvements in law and practice on the part of DPRK may be noted. During its inquiry the head of the mission of the Russian Federation in Geneva urged the COI to acknowledge any improvements disclosed in the handling of particular human rights. This has been done. However, in truth these improvements 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 the obligation of North Korea as a member country of the United Nations. Sometimes the international community appears so relieved to secure any cooperation that it acknowledges trivial advances that leave untouched the basic attitude of denial of rights and international 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 some 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. Cooperation between military personnel was reported to be

¹⁹ COI report, 91 [321]-[332].

professional and smooth, if relatively limited and specialised. Substantially, Cooperation affecting living persons is much more limited than in respect of the remains of dead military personnel.

(g) *International media*: Following the COI report and recommendations, the BBC restored its limited Korean language service to Korea. Voice of America and other international broadcasters have attempted to afford access to the Korean language audience on the Peninsula. However, they continue to face serious technical impediments for broadcasts to the people of 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 has continued since the delivery of the COI report in 2014. However, North Korea's cooperation with the Office of the High Commissioner of Human Rights has been minimal. Engagement is usually reluctant and hostile.

Failures of the COI

As against the instances of success in the North Korean responses to the UN efforts above, 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 UN *Non-Proliferation Treaty* (NPT) in 1985.²⁰ However, this did not include negotiation of a safeguards agreement until 1992. That 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 the relevant facilities; and promises of cooperation. Nonetheless, nuclear weapons tests by North Korea were conducted underground in 2006, 2009 and 2013. These became more worrying, with proof of the faster than expected 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 of this UN sanctions regime, especially reportedly by China which has tended to be increasingly protective of North Korea as an ally. The substantially unaccountable and totalitarian political regime in North Korea described in the COI report, makes the weapon and missile developments critical for security. 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 a deeply troubling omission. There can be no realistic prospect of achieving compliance with the prerequisites of international peace and

²⁰ United Nations, *Treaty on the Non-Proliferation of Nuclear Weapons* ("NPT"), United Nations Office for Disarmament Affairs effective 5 March 1970. Non parties are India, Israel, North Korea, Pakistan and South Sudan.

security whilst the human rights position in that country is as described in the COI report.

(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*. Whilst most members of the HRC and GA have shared the COI’s concerns, and said as much in remarks at the United Nations, 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 2005,²¹ a small number of countries including North Korea’s allies (some of whom themselves serious abusers of fundamental human rights) insisted that “country specific” human rights mandates and criticisms were ineffective because they were too “political”. Yet genocide, crimes against humanity and war crimes are in a different category. In part, this is because they are ‘shocking to humanity’. In part, it is so

²¹ UN General Assembly, “2005 World Summit Outcome”, A/res/60/1, October 24, 2005 (<http://UNPAN1.un.org/intrados/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.

because, of their nature, they could 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 a number of possibilities for bringing those responsible for at least the crimes against humanity before an international body, so as to ensure accountability. 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 International Criminal Court (ICC) by the Security Council.²² That has been done previously in two earlier instances (Libya and Darfur). The ICC cannot assume jurisdiction unless the SC acts. The SC may not 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 an affirmative resolution may not be procedural. It could thus be subject to a veto by one or more of the permanent members of the SC. 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, where necessary brought to a vote. Only then might the international community respond as its institutions envisage.

Where a vote is taken, the moral opprobrium for inaction is then shifted from those who seek action but cannot secure it to those who prevent it from happening despite having the relevant power. Institutions

²² COI report, 361 [1201(1)]; 369 [1218]; 370 [1225(a)].

generally abhor ineffectiveness. However, effectiveness sometimes takes various forms and occasionally time to manifest itself. Those who would defend tyranny from the requirements of answerability should ultimately be made to wear clearly the opprobrium of maintaining the obstacles.

(d) *China and refugees*: In the preparation of the COI report, the mission of China to the United Nations, both in New York and Geneva restricted itself to minimal engagement with the COI. 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, as requested, to consult with relevant academies, government officials and 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 the Winter, crossing frozen rivers. Many were seeking food and employment. Some escapees recounted deeply disturbing stories of enforced sexual engagement. Unregistered children to the escapees were denied schooling and healthcare in China. Reportedly, pursuant to a memorandum of understanding with North Korea, China facilitates the return of escapees to North Korea. This is so although the returnees and their children are reportedly commonly treated harshly. The COI called attention to the obligations of non-refoulment, imposed on China by international law.²³

²³ COI report 369-370 [1221(e)-(f)].

By a letter to the COI, which it demanded should be published with the COI's report, China's ambassador to the UN denied that the escapees were 'refugees'.²⁴ It alleged that they were "economic" entrants who were violating Chinese natural 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. By inference, China must itself be concerned about the security risks; nuclear weapons accumulation; and missile systems of potential danger to its territory and the danger of large-scale Korean 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 wrongs disclosed by the factual testimonies recorded by the COI.²⁵

(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, these were 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. Neither the COI, nor the HRC nor Japan (a nation seriously affected) was able to negotiate any meaningful response from North

²⁴ COI report 366-367 [1218].

²⁵ The correspondence between COI and China is annexed to the COI report, annexure I, pp 27-34 of the annexure.

Korea to the abduction of foreign nationals, or of Korean nationals and prisoners of war. This remains a major source of grievances against North Korea that are still continuing.²⁶

(f) *Family reunions*: Large numbers of Korean nationals have been denied travel to South Korea or easy access to North Korea an order to visit relatives.²⁷ Limitation of such access to a trickle of tiny numbers is contrary to international human rights law. It is uncivilized. Especially is this so given the advanced ages of many of the people affected. In an age of instantaneous communications this denial of ready access (if necessary, on occasion by virtual means) is specially shocking and reprehensible. Its existence illustrates the basic inhumanity of the North Korean Government and its officials.

(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; and 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 mid-1990s has again demonstrated the serious inefficiency of North Korea's economy and its vulnerability to dislocation, corruption and distortion. In his address to the Eighth Party Congress in Pyongyang in January 2021 Kim Jong-un acknowledged these serious, endemic features. They are continuing

²⁶ COI report 295-304 [924]-[963].

²⁷ COI report 276 [861].

as a great burden on human rights. Any hope that a proposal by the United States to facilitate economic revival in North Korea by tourism and a 'new Marshall Plan' has been dashed.

(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 the reunification of the Korean Peninsula. The division of Korea into two nation 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 on those people by political decision of the Allied leaders, meeting in Cairo in 1943.²⁸ 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 completely ignored by North Korea.²⁹ The only such project that may have seen progress has been the creation of a new Korean language dictionary and some steps towards sporting cooperation.

The meeting of President Trump, 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 their officials. However, the hope that these and other encounters might give rise to larger further progress has not been fulfilled. This was most clearly demonstrated

²⁸ COI report 22 [95].

²⁹ See eg COI report, 370 [1222]-[1224]. Such as sporting links; academic; sister city links; apprenticeship and student engagements; travel and engagement.

by the destruction, by detonation, on 16 June 2020 of the liaison office built by ROK in Kaesong, close to the border between North and South Korea. This wanton act occurred immediately after the sister to the Supreme Leader, Kim Yo-jong threatened direct action against South Korea. It was a shocking example of the petulance of the North Korean leadership. It demonstrated once again that moderation and attempted appeasement pay few dividends in dealings with North Korea.

Diplomats and perhaps politicians must be polite and swallow the truth in describing the foregoing realities. However, human rights experts need to point 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 since by COI members. The quest for security in relations with North Korea, however understandable, is futile without harnessing that quest to a concurrent effort to uphold universal human rights for all people in North Korea. The attempt by ROK to justify the introduction of new legislation to penalise distribution of pamphlets by the South reflects criticism by the SR of this abject response to those who are the real enemies of human rights on the Korean peninsula.³⁰

³⁰ Min Joo Kim and Simon Denyer, “South Korea to criminalize sending leaflets into North Korea, bowing to regime”, December 10, 2020, *The Washington Post*, https://www.washingtonpost.com/world/asia_pacific/north-korea-leaflets-defectors-kim/2020/12/10/9c6d7328-3a92-11eb-aad9-8959227280c4_story.html

This comment also 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 Korea has pointed out.³¹ 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.

- (i) Achieving all the goals of the United Nations 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 photographs of our blue planet, captured from outer space. It demonstrates Earth's beauty, speciality and unity that transcends the differences between its human inhabitants. Speaking plainly, the things that bind humanity together far exceed the differences, when compared with the alien environment beyond the Earth.

The recent COVID-19 pandemic, still spreading globally, especially in developing countries, including in North Korea, also demonstrates the vital necessity of multilateral cooperation if we are to preserve our

³¹ Human Rights Council, *Report of the Special Rapporteur on the situation of human right in the DPRK*, A/HRC/43/58 (25 February 2020) 18 [53].

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.

(j) *Revival of multilateralism:* Whilst the advent of the Biden Administration has raised hopes for the global reengagement of the United States with multilateralism to afford a fresh opportunity to re-set the agenda of the international community. Some problems cannot be addressed successfully by any single nation, however powerful it may be in economic, military or other terms. This is why no step should be withheld in seeking solutions to the security challenge caused by North Korea's development of nuclear weapons and missile systems. Those who know most about the destructive potential of such weapons are usually leaders in insisting on a heightened sense of urgency. New initiatives 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. Every effort needs to be explored by the UN and member states so as to achieve a revival of attention to the dual urgencies of security and human rights in North Korea.

(k) *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.³² It substantially still 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.

Without altering the substance of the COI report, the COI members should hold ourselves ready to cooperate with a project to republish the report. 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 within North Korea to provide knowledge about the report and human rights education concerning the findings of the COI report.

- (l) *Funding the Seoul office:* The United Nations should vote 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

³² <https://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>

humanity. The testimony on such crimes must be professionally recorded whilst it is still available.

- (m) *Security Council meetings:* Security Council meetings should be revived 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”. Those who live in a bubble of unaccountability are prone to fall victim to their own propaganda. Plain speaking is required by all those those who report independently on such serious human rights violations and crimes against humanity.
- (n) *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 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.
- (o) *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.³³ Inaction and surrender to violence and tantrums of North Korea are not an acceptable option.

(p) *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, legal practitioners, prosecutorial bodies, civil society organisations with expertise and UN member states should be encouraged 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, humanity is diminished. None of us is safe.

³³ COI report, 359-363 [1195]-[1203]. See also Independent Experts on Accountability Report, A/HRC/14/66 Add 1 at 15-17 [51]-[63].

Other voices will increasingly 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.

It is time for 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. 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.³⁴

³⁴ Kim Dae Junk; Park Soen Hye; Moon Jae In, “Anti-Leaflet Law May Come in Conflict with Biden Administration”, KBS World Radio, December 19, 2020; https://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=158385