

HUMAN RIGHTS,
PEACE AND
NORTH KOREA

The Hon
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The Hon Michael Kirby was Chair of the Human Rights Council's Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea ('DPRK') ('North Korea') (2013–14). Former Justice of the High Court of Australia (1996–2009).

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N.B. All footnotes hereafter have been inserted by the *Court of Conscience* Editorial Team as suggestions for further research.

- 1 Crimes against humanity include murder, enslavement, torture and 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' 'when committed as part of a widespread or systemic attack directed against any civilian population, with knowledge of the attack.': *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 7(1).
- 2 Human Rights Council, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, UN Doc A/HRC/25/CRP.1 (7 February 2014) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/108/71/PDF/G1410871.pdf?OpenElement>>; See generally, Michael Kirby, 'UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea: Ten Lessons' (2014) 15(2) *Melbourne Journal of International Law* 290.

The Democratic People's Republic of Korea ('DPRK' or 'North Korea') is worthy of the attention of all of us because it is a country that has undoubtedly reached a very dangerous moment in its short and violent history. From the point of view of the future of humanity and of its own people, it is therefore appropriate that the international community should examine the preconditions for international peace and security. These include the observance of universal human rights and accountability for crimes against humanity.¹

I am not, and never have been, an expert in military matters or geopolitical analysis. My expertise, relevant to North Korea, is the expertise that led to my appointment by the President of the United Nations Human Rights Council ('UNHRC') to be the Chair of the Commission of Inquiry ('COI') on Human Rights in the DPRK. It is an expertise in international human rights law and an experience in United Nations human rights activities and policy.

The COI was given the task to report on a mandate that had nine headings relating to particular issues which were thought to require examination from a human rights point of view. We were not at large. We were not authorised to examine the geopolitical or security concerns of North Korea for the world. Our focus was narrow and particular. It was a human rights focus.

We met as a COI for the first time in July 2013. Effectively, we had to deliver our report by January 2014. The report was completed in just over six months. It was delivered within budget and on time. It was unanimous. It was also readable and that was its strength. It recounted the COI's findings on the human rights situation in the DPRK.² It identified human rights violations that amounted to crimes against humanity. These included: violations of freedom of thought, opinion and religion; the violation of the right to food and widespread starvation whilst developing new dangerous and sophisticated weapons; the imposition of a classification of social classes that impedes and restricts human equality;

restrictions on freedom of movement; the arbitrary detention, torture and executions of alleged enemies of the people and their families; and the enforced disappearance and abduction of Koreans and foreign nationals – including many Japanese nationals – a piratical wrong that was actually admitted by the DPRK in 2002.

The report created something of a sensation in the UNHRC. It then attracted very strong supportive votes in the UN institutions. The Human Rights Council is often deeply divided about human rights issues and there are frequent geopolitical alignments of countries concerning how they should respond. But the votes on the report of the COI on the DPRK were extremely strong and consensual. They supported the report. They sent it off to the General Assembly ('GA') with a proposal that the GA should pick up the COI's suggestion and send the matter to the Security Council. This is a very rare thing to do in the case of human rights concerns because they are inevitably political and divisive. However, the GA voted very strongly to support the recommendations of the COI. There were relatively few (20) negative votes when it came to the proposal for follow up action on the report.

It was at that stage that the DPRK at last began to be extremely concerned about the report. We had recommended, in the report, that the case of North Korea should be referred to a prosecutor at the International Criminal Court ('ICC'). So far, there has been no resolution placed before the Security Council to achieve that end. Inferentially that is because China, and possibly the Russian Federation, have suggested that they would not agree. Therefore, that form of accountability has been effectively vetoed, at least until now.

The failure to secure accountability in this way led to a new recommendation of the OHCHR to the UNHRC for a new committee of experts to look again at how this could be done. This was agreed. The report by a new committee of experts was delivered to the UNHRC in February 2017.³ The new committee recommended that there should be further exploration of the possibility of a special tribunal and of educative means, including amongst the North Korean community in South Korea, to review and report what has been happening in the DPRK. This was accepted by the UNHRC which had also earlier agreed that a UNHRC field office in South Korea should continue the collection of testimony from people who have suffered in North Korea and should do so in a form that could ultimately become the basis of a brief for a prosecutor, in whatever court or tribunal the matter may ultimately end up, whether the ICC or some different body.

On the presentation the report of the COI to the UNHRC in March 2014, the COI's mandate formally finished. However, many occasions have arisen for me to continue my involvement. The DPRK is a great puzzle that is of deep concern to people in many countries of the world. A puzzle of what can be done in the face of such intransigence on the part of the country concerned. And what can be done that will not give rise to the risks of even greater security dangers and the possible use of weapons that would be extremely dangerous for the DPRK itself, and for the Republic of Korea ('ROK'), China, Japan and nearby countries as well as the global environment.

In March 2017, I was invited to attend a meeting at the National Assembly of the Republic of Korea in Seoul. What was especially interesting at the session at the National Assembly was the response of those participants who had links with then Opposition parties in ROK, concerning the question of what should now be done. This was very important because,

3 Sonja Biserko and Sara Hossain, *Report of the Group of Independent Experts on Accountability*, 34th sess, Agenda Item 4, UN Doc A/HRC/34/66/Add.1 (24 February 2017).



as expected, the Opposition parties went on to win the ROK presidential election on 9 May 2017. Those elections replaced former President Park Geun-hye. She had been removed from office following a process of constitutional impeachment. President Moon Jae-in has now assumed office. He has promised a fresh and different approach, including an attempt to secure greater engagement with the DPRK.⁴

A view expressed in March 2017, by one of the Opposition supporters at the National Assembly meeting, was that the role of South Korea was not to harass North Korea over its human rights record. It was to improve the outlook of human rights in North Korea and to assist North Korea to come to a realisation about improved human rights for itself. It was suggested that it would be quite wrong for South Korea to do more than that.

The problem, as it seemed to me (and I expressed it at the time), is that North Korea is a country that denies access by its nationals to international media or the internet.⁵ There is also a lack of access to civil society organisations that are not controlled by the government.⁶ It is therefore very difficult to imagine how the people of the DPRK could reach their own views different from the views that are presented to them by the authorities in power.

Other views were expressed at the National Assembly about how the Opposition might approach the issue if elected to government. Still, it is a familiar phenomenon, which we have seen in our own countries, that once political leaders are elected to government they have the responsibilities of government. The leaders and people of ROK can be expected to react accordingly. One hopes that the new officials will trouble to read the report of the UN COI and find out what has happened in North Korea, according to that painstaking and careful report. If they do that, they will come to the conclusion that leaving the dire human rights situation in DPRK to correct itself is not really an available policy. Even from the point of view of peace and security, it is potentially a dangerous policy. Something has to be done to respond to the serious human rights situation in North Korea. The rebuffs by DPRK to the attempts at engagement offered by President Moon Jae-in have been discouraging. Even more worrying has been the actions of DPRK to engage in its sixth nuclear weapons test in September 2017 and to test launch international and other ballistic missiles of great potential danger to the region and beyond.

A difficulty which the COI experienced in achieving dialogue within South Korea, was the apparent mistrust between the Government and the Opposition. This made it difficult, in the past, to persuade members of the Opposition to attend COI events and to engage on human rights issues. However, the COI report collects a mass of detailed material. It respects the people who have suffered. It brings their words, recounting their sufferings, to the attention of their own government and to the attention of the international community. How we respond to those concerns will be a test for international fidelity to the immediate post World War II decision that crimes against humanity, at least, should always be responded to. Where crimes against humanity are established or appear likely, the United Nations should not turn away. It is the obligation of the United Nations to ensure accountability and redress where the country concerned refuses, or fails, to do so. At this stage, that is the case with the DPRK. It rejects and dismisses the report of the COI. And its allies effectively prevent referral of the matter to a prosecutor of the ICC so that proceedings might be considered and brought so as to establish where truth lies authoritatively and conclusively.

4 See, eg, Choe Sang-Hun, 'South Korea's New President, Moon Jae-in, Promises New Approach to North', *The New York Times* (online), 10 May 2017 <<https://www.nytimes.com/2017/05/10/world/asia/moon-jae-in-president-south-korea.html?mcubz=0>>; Matt Stiles, 'On 100th Day in Office, South Korean President Tries to Ease Nation's War Tensions', *Los Angeles Times* (online), 17 August 2017 <<http://www.latimes.com/world/asia/la-fg-south-korea-moon-speech-20170817-story.html>>.

5 See, eg, Amnesty International, 'Connection Denied: Restrictions on Mobile Phones and Outside Information in North Korea' (Research Report No ASA 24/3373/2016; 9 March 2016) <<file:///C:/Users/ellen/Downloads/ASA2433732016ENGLISH.PDF>>.

6 Human Rights Watch, *World Report 2017: North Korea – Country Summary* (January 2017) <https://www.hrw.org/sites/default/files/northkorea_2.pdf>.

- 7 Zeid Ra'ad Al Hussein, 'Statement by UN High Commissioner for Human Rights' (Speech delivered at the Opening Ceremony of the 34th Session of the Human Rights Council, Geneva, 27 February 2017) <[http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx? NewsID=21229&LangID=E](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21229&LangID=E)>.
- 8 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
- 9 See also, Special Rapporteur on the Situation on Human Rights in the Democratic People's Republic of Korea, *Situation of Human Rights in the Democratic People's Republic of Korea*, 71st sess, Agenda Item 68(c), UN Doc A/71/402 (26 September 2016).

The UN High Commissioner for Human Rights, Prince Zeid Ra'ad Al Hussein, in his address at the opening of the session of the UNHRC in February 2017, pointed out that the Preamble to the Charter of the UN contains the three great principles for the work and mission of the United Nations.⁷ The first of these is observance of universal human rights. He pointed out that respect for universal human rights is intimately interconnected with the achievement of peace and security, the second great principle. That is undoubtedly so. Without protection and accountability for human rights, the dream of peace and security and economic equity and justice (the third principle) for the Korean Peninsula will remain an unachievable illusion. The present situation in North Korea is extremely dangerous to the human rights of the people of that country. But it is also dangerous for peace and security. And because of the intrusion of nuclear weapons, missiles and the enormous army facilities that the DPRK can now deploy, the dangers extend beyond the Korean Peninsula to the region and to the planet.

This is why the world, in its understandable desire to achieve a peaceful resolution of the huge dangers of North Korea, must not forget the report of the UN inquiry into human rights in that country. Without human rights accountability, there will be no peace. There will be no stability, except on a basis of fear and terror. The dangers of conflict will not recede. To the dangers of deliberate warlike actions of great peril will be added the dangers of accidents, mistakes and miscalculations. A new approach, as proposed by the new Administration in ROK, may bring new ideas. However, the new ideas must be faithful to the principles stated in the *Charter of the United Nations*, the principles expressed in the *Universal Declaration of Human Rights*⁸ and UN treaty law.

This is the central puzzle and dilemma that the international community faces at this time in dealing with the challenges presented to it by the DPRK.⁹ The security concerns are great indeed. But they cannot be divorced from the dangers, internal and external, caused by the violation of human rights committed by the DPRK. Especially the crimes against humanity found by the COI which calls out for redress and accountability.