

UN COMMISSION OF INQUIRY ON HUMAN RIGHTS VIOLATIONS IN THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA: TEN LESSONS

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In this article, the author, who was Chair of the United Nations Commission of Inquiry on Human Rights Violations in the Democratic People’s Republic of Korea (North Korea), derives ten lessons from the Inquiry. These are: (1) the importance of appointing a strong and experienced commission and secretariat; (2) the necessity to adopt a transparent methodology; (3) the desirability of drawing on the power and vitality of oral testimony given in public hearings; (4) the importance of engagement with local and international non-governmental organisations; (5) the utility of assistance from appropriate international scholars; (6) the value of continuous engagement with national and international media; (7) the need for effective follow-up to the report once delivered; (8) the inevitable frustrations in the UN system; (9) the utility of recognising the connection between universal human rights and international peace and security; and (10) the appreciation of the significance of the inquiry as an instance of international human rights in action. A number of further conclusions about the inquiry are also suggested.

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I ESTABLISHMENT OF THE COMMISSION AND SECRETARIAT

On 21 March 2013, the Human Rights Council (‘HRC’) of the United Nations, by resolution, established a commission of inquiry (‘COI’) on human rights in the Democratic People’s Republic of Korea (‘DPRK’ or ‘North Korea’).¹ The resolution was adopted without dissent or a call for a vote. It reflected the growing exasperation of the international community over the refusal of the Government of DPRK to permit the entry of, or to engage with, officials of the UN human rights system, including the Special Rapporteur

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¹ Human Rights Council, *Situation of Human Rights in the Democratic People’s Republic of Korea*, HRC Res 22/13, 22nd sess, 48th mtg, Agenda Item 4, UN Doc A/HRC/RES/22/13 (21 March 2013) (‘Resolution 22/13’).

designated by the HRC to investigate and report on human rights in the country.² Although DPRK had ratified four major UN human rights treaties, it had unsuccessfully sought to withdraw from the *International Covenant on Civil and Political Rights* ('ICCPR').³ It had also refused to accept a single recommendation for improvement in its human rights situation made by the HRC after DPRK's first Universal Periodic Review. No other member state of the UN has had such a lamentable record of non-cooperation.

The COI members comprised the current Special Rapporteur (Mr Marzuki Darusman, Indonesia), Ms Sonja Biserko (a Serbian human rights expert) and myself. The latter two members were appointed by the President of the HRC in May 2013. The Special Rapporteur served ex-officio. The initial source of the additional nominations is unclear, but it is believed to have derived from proposals from national governments and suggestions from international human rights office-holders and organisations accredited to the HRC. As with a number of human rights mandate holders, I had earlier served as a member, and on the executive, of the International Commission of Jurists, being President of that body in 1995–98. My past service as Special Representative of the Secretary-General on the situation of human rights in Cambodia (1993–96) occurred under the former UN Human Rights Commission, to which the HRC is the successor.

In this article, I explain ten of the lessons that I learned from my service as Chair of the COI on DPRK. Participation in a multi-member COI is different from service as a Special Rapporteur/Representative. The former role involves gathering, analysing and presenting factual findings, stating conclusions and offering recommendations. The participation of other members, typically from different legal, linguistic and cultural traditions, requires a capacity to act by consensus and to compromise on any non-essential differences so as to avoid the potentially damaging impact of non-unanimous activities and conclusions. In the case of the COI on DPRK, there were no serious disagreements between the Commissioners, and the report was expressed unanimously.

A COI of the HRC is independent of the Office of the High Commissioner for Human Rights ('OHCHR'). Indeed, it must be independent not only of the High Commissioner but of the HRC and of all extraneous influences. Upon appointment, the Commissioners paid a courtesy call on the High Commissioner, Navanethem (Navi) Pillay, at her office in the Palais Wilson in Geneva. They suggested as a principle that they, and all such mandate holders, should make a formal declaration promising to act with independence and integrity in the service of the UN. This proposal (which had been under consideration for some time) was accepted. Later, the President of the HRC transmitted to the Commissioners a form of declaration which they severally signed before entering upon the discharge of their mandates.

² There have been two Special Rapporteurs on North Korea: Professor Vitit Muntarbhorn (Thailand) and Mr Marzuki Darusman (Indonesia). The latter was also a member of the Commission of Inquiry ('COI') in accordance with the mandate of the Human Rights Council ('HRC').

³ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR'). North Korea was informed, on the basis of the advice of the UN General Counsel, that there was no authority to withdraw. It accepted that advice and continued engagement.

The Commissioners of the COI were not acting as UN judges or prosecutors. Their duty was to the mandate given to the COI by the HRC. Essentially, they were engaged as expert fact finders, with a duty to report to the HRC in accordance with its resolution. That resolution, in the case of the DPRK, identified nine separate subject matters of human rights upon which a report was required.⁴ It also instructed the COI to document human rights violations, victim and perpetrator accounts and to ensure accountability for such wrongs. The COI was obliged to report to the HRC by March 2014, as it did.⁵ The time period under report was not limited. However, by the reference to the DPRK as such, it potentially extended back to the foundation of that state, as a result of an artificial border imposed upon the Korean peninsula at the conclusion of the Second World War. That border terminated more than a thousand years of united government, including 34 years (1911–45) under Japanese Imperial rule.

Taking advantage of my presence in Europe for other purposes in June 2013, I arranged to call on the OHCHR. Sonia Bakar, an officer of OHCHR with field experience, was designated to assist in the rapid creation of a secretariat for the COI on DPRK, which like the COI itself, would be independent of OHCHR. We discussed the qualities and experience that would be desirable for the head of secretariat (Director) and other staff members of the secretariat. From around the world, people with relevant experience or interest in North Korea contacted me to offer their services and seek engagement. Some had been senior national office holders. However, it was made clear to me, and subsequently to them, that all recruitment would follow OHCHR protocols designed to avoid favouritism, nepotism and inappropriate selection. I had no effective involvement in the selection of the secretariat. This was undertaken in accordance with the internal processes of the OHCHR.

In my view, this lack of engagement with the COI is an institutional weakness in the selection of the secretariat, where the views of appointed Commissioners, at least on relevant qualities and background, should be sought. Nevertheless, the efficiency and quality of the appointees to the secretariat quickly produced a team of high talent. Mr Giuseppe Calandruccio, a national of Italy, was appointed head of the secretariat. He had earlier served as deputy head of a COI on the Occupied Territories, chaired by Judge Richard Goldstone (South Africa).⁶ The head of that COI secretariat had been Ms Francesca Marotta (Italy), with whom I had worked closely in Cambodia. Mr Calandruccio was to prove a talented and effective director of the operations of the secretariat of the COI on DPRK.

Eventually, nine officers were recruited to serve the COI: three men and six women. Ms Siobhan Hobbs, from Australia, was deployed to the COI by the UN

⁴ *Resolution 22/13, A/HRC/RES/22/13, para 5.*

⁵ Human Rights Council, *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/63 (7 February 2014) 3–4 [3]–[6] (*'Report of the COI'*).

⁶ See Human Rights Council, *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 12th sess, Agenda Item 7, UN Doc A/HRC/12/48 (25 September 2009). See also Mona Rishmawi, 'The Role of Human Rights Fact Finding in the Prevention of Genocide' (Paper presented at the International Conference on Prevention of Genocide, Brussels, 31 March 2014) 2.

agency, UN Women. She took a leading part in one of the substantive investigations of the COI and doubled with special responsibilities for gender issues and advice on that topic for all aspects of the mandate. The secretariat also had the services of two interns who worked on updating relevant regional media and other material. One officer with much experience in OHCHR performed administrative, travel and other duties, which required knowledge of the sometimes slow-moving arrangements of OHCHR. The secretariat was a harmonious team. It worked well together, without apparent or reported friction.

The Commissioners' decision to gather testimony by public hearings imposed novel burdens both on the Commissioners and the secretariat. However, the COI, with the aid of the secretariat, brought its report to completion on time. Although the first substantive meeting of the COI was only held early in July 2013, the report was written and finalised by the end of January 2014. It was published online on 17 February 2014. It was formally presented to the HRC in Geneva on 17 March 2014 and to members of the UN Security Council ('UNSC') in New York on 17 April 2014. It was produced within the budget initially designed by Ms Bakar. Much credit must go to Mr Calandruccio and the secretariat for the efficient discharge of their duties. Whenever one hears of complaints about the inefficiencies of the UN (and there are some) it is necessary to remember the talented and efficient officer-holders who work under great pressure to discharge duties of high emotion, urgency and importance, and some danger, to uphold the UN principles of universal human rights.

Occasionally, younger, enthusiastic staff members of the COI needed to be reminded that the responsibility for the content and language of the report belonged to the Commissioners and that it was the Commissioners' duty to discharge that responsibility and to be satisfied with every word to which they attached their name. I insisted upon this principle. I believe that it ensured that the resulting report was readable, comfortable in its English language expression, comprehensive and convincing.

The first drafts of the several chapters of the *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea* ('*Report of the COI*') were prepared by members of the secretariat according to an outline and timetable set out by the Commissioners at their regular meetings. There was comparatively little drift in the adherence to the timetable. The Commissioners turned the drafts around quickly and efficiently. For example, I made countless, and sometimes significant, textual and verbal changes to the drafts. Whilst there was some give and take, I insisted that the text should genuinely reflect the active participation of the Commissioners and that they should have the last word on any points of difference. This is the correct delineation of functions between a COI and its secretariat. Understanding that division of responsibilities is integral to the success of a COI. To his credit, Mr Calandruccio understood this principle well. He ensured that it was carried into effect. The first requirement of a competent COI is the appointment of talented Commissioners, prepared to work extremely hard and under time, funding and other constraints. The second requirement is the recruitment of an outstanding and dedicated secretariat, with a strong sense of its own independence and integrity. These vital features were present in the COI on DPRK.

II A TRANSPARENT METHODOLOGY

At the first face-to-face meeting of the Commissioners in Geneva in early July 2013, a full day was devoted to the determination of the methodology that would be followed by the COI. The methods of work are explained in the report.⁷ Even by the time the Commissioners first met, it was plain that DPRK would not cooperate with the COI. Its permanent mission in Geneva had rebuffed the demand, stated in the HRC's resolution, that DPRK should cooperate fully with the Commission's investigation and permit the COI members to have unrestricted access to visit the country and provide them with all necessary information.⁸ To the contrary, DPRK informed the HRC President that it would 'totally reject and disregard' the COI, which it viewed as politically hostile and a creation of its enemies, notably Japan, the Republic of Korea ('South Korea' or 'ROK') and the United States.

Faced with this attitude, the COI on DPRK immediately embarked upon a novel, transparent and innovative methodology. My own experience of 34 years as a judge in the common law tradition followed in Australia, attracted me to the methodology of public hearings to gather evidence. This has not been the normal methodology followed by previous UN COIs. Most have followed the more informal techniques of information gathering observed in countries of the civil law tradition. One exception to this approach had been the COI on the Occupied Territories, chaired by a former judge of common law background (Judge Goldstone, South Africa). As Mr Calandruccio had served on the secretariat of that COI, he was aware of the technique. It had not been wholly successful in the case of Judge Goldstone's investigation. In part, this was because of non-cooperation by one relevant state, namely Israel. Secretariat members in the COI on DPRK (most of whom came from civil law backgrounds) expressed some reasonable hesitations and concerns about the proposed methodology. There was anxiety about the effective protection of the identity and safety of witnesses; about maintaining security for the COI itself and its personnel; about preventing possible disruption of hearings and meetings; about procuring, assembling and delivering witnesses according to the comprehensive hearing timetable; about obtaining suitable facilities outside national government premises (which were considered unacceptable); and about the cost implications thought likely to arise.

The Commissioners considered all of these possible obstacles to the conduct of public hearings. However, from the start, they determined that the process must be transparent in order to counteract the inevitable attacks and criticisms that would follow concerning the truthfulness and representativity of the witnesses giving testimony to the COI. From the outset, the Commissioners therefore resolved that the collection of testimony at public hearings would be the centrepiece of their inquiry. They considered that this would play a function in raising public consciousness of the suffering of the victims; establish the duration, nature, variety and intensity of their burdens; and that it would help engage the national and international media during the conduct of the inquiry. All of these intuitive judgments by the COI proved to be correct.

⁷ *Report of the COI*, UN Doc A/HRC/25/63, 4-5 [12]-[20].

⁸ *Ibid* 4 [9].

At the onset, the COI distributed public calls for evidence. In the available time, its secretariat interviewed more than 240 witnesses. Because of the mandate instruction to ensure that no harm came to witnesses, and because most refugees who had fled DPRK still had family living there, the majority were not permitted (even if willing) to give public testimony. Their evidence was then received in private, confidentially. However, other witnesses (some 84) gave evidence in public. In a few cases physical disguises were adopted. In others, great care was taken to avoid, by public questioning, inessential identification of places and people that might be harmed. The DPRK news bureau described the witnesses as ‘human scum’. Although one or two may have occasionally added a gloss to their testimony, overwhelmingly they were judged by the COI to be truthful and convincing witnesses. When they were attacked by DPRK, the COI was able to invite everyone with access to the internet (which excluded most citizens in DPRK where this is prohibited) to view the testimony online and to reach their own conclusions.

The COI also had constant contact with the DPRK missions in Geneva and New York. Repeatedly, the COI invited participation in the hearings; commentary and correction of the draft report when completed; and an opportunity, when the report was produced, to travel to DPRK to brief officials and citizens on its content and to answer questions. Eventually, the final report was supplied to the Supreme Leader of DPRK, Kim Jong-un, repeating the foregoing offers and concluding with a warning about his own possible future personal responsibility under international criminal law.⁹ Such letters were ignored or, where answered, replied to with a reminder of the DPRK’s determination of non-engagement.

Specifically, the COI invited DPRK to send a representative to the public hearings. It offered to permit that representative to make submissions and to call testimony on its behalf. It indicated that such a representative could, with leave, question witnesses. Arrangements were made with ROK to accord diplomatic immunity to any such representative(s) that were nominated by DPRK. No such representation was arranged by DPRK. It is unknown whether, amongst the public attending the hearings of the COI, DPRK arranged for anonymous observers or representation. Because the elite in DPRK have access to the internet, it must be assumed that they, and government agents, would have had full access to the entirety of the public hearings held by the COI.

Public hearings of the COI took place in Seoul, ROK (August 2013); Tokyo, Japan (August 2013); London, United Kingdom (October 2013); and Washington DC, US (October 2013). A grouping of public hearings was arranged partly to save costs. Officers of the secretariat visited the venues in advance of the COI Commissioners so as to interview and organise witnesses for the hearings. All testimony, whether for public or confidential consideration, was made available to the Commissioners. The responsibility of eliciting the evidence in public fell on the

⁹ Letter from Michael Kirby, Chair of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea to Kim Jong-un, 20 January 2014, in *Report of the COI*, UN Doc A/HRC/25/63, annex I (‘Correspondence with the Supreme Leader of the Democratic People’s Republic of Korea and First Secretary of the Workers’ Party of Korea, Kim Jong-un’).

Commissioners, primarily by questions from the Chair. Witnesses were taken through statements that they had provided to the secretariat, and non-leading questions permitted them to give their evidence in their own way. Subsequently, most pages of the report contained references to testimony and small extracts of actual evidence from the transcript. These extracts are generally expressed in much more direct and vivid language than chroniclers usually produce. They gave voice to the actual lived experience of victims. I believe that this technique brings the report of the COI on DPRK to life.

The report also demonstrates two features as a result of this procedure of uploading digital images of witnesses and transcripts (in the English, Korean and Japanese languages respectively) on the COI website. First, as illustrated by Holocaust studies gathered after 1945, victims often feel guilty about surviving when so many friends and family have perished. Whilst they are naturally upset and angry, once they begin recounting their stories, they normally follow their own chronological course. Normally, they are remarkable for their clarity and understatement.

Secondly, the horrors recounted do not require exaggeration in order to have an impact. The low-key way in which the testimony was ordinarily given by the witnesses before the COI was generally a feature that made it more impressive. Anyone in doubt should watch the online hearings and judge both the testimony and the methodology for themselves. That methodology proves that, in today's world, no country can entirely exclude itself from investigation by the human rights organs of the world community. If the door is slammed, investigation can take place outside the territory in question, drawing upon refugees who are pre-vetted to ensure that they appear genuine, reliable and not unduly biased as a result of any ordeal they may have undergone. Most of the selection of witnesses was undertaken by the COI's secretariat. The secretariat's written notes were careful and thorough. They drew attention to lines of inquiry that, they suggested, should not be pursued, lest it identify people and places causing danger or harm to the witnesses or their families or acquaintances.

III THE POWER AND VITALITY OF WITNESSES IN PUBLIC HEARINGS

In earlier engagements with the UN, I learned an important lesson from a great international civil servant employed in the system, Dr Jonathan Mann (World Health Organization, Global Programme on AIDS). At the outset of the AIDS epidemic, he insisted that it was essential to listen to the voices of people living with HIV and others who were vulnerable to infection. They should always be given a platform and be engaged. They should not be spoken at or of; but with. This approach informed the approach of the COI to its witnesses. In some cases the COI relied on written statements. In other cases, involving confidential testimony, witnesses were seen and heard in private sessions. A proportion of witnesses were seen and heard in public hearings. Their testimony was recorded digitally; is available online; and is supported by written transcripts which are also published online. Documents and records referred to in testimony were admitted and numbered as exhibits.

Many journalists, and some national representatives in the HRC, questioned whether the COI's witnesses could be reliable given that a majority (experts apart) were refugees who had taken a decision to leave DPRK. They questioned

whether, because enhanced barriers at the borders between DPRK and China have reduced the flow of asylum seekers into China since 2012, the testimony of the witnesses was out of date and unhelpful. However, the COI had no difficulty in securing apparently reliable and helpful witnesses. In ROK there are already more than 26,000 refugees from DPRK. Significant numbers are also present in other countries. Many came forward and offered assistance. In the end, the COI had to terminate the flow of witnesses so as to concentrate on selecting and analysing a representative sample who could speak to the nine-point mandate given to the COI by the HRC.

An assessment of reliability involves a judgment based on impressions of credibility and non-exaggeration, and also on corroboration by other witnesses unknown to the person giving testimony as well as corroboration (where relevant) by satellite images and documentation available, both from DPRK itself and from UN and other agencies operating in DPRK (such as the World Food Programme). Statements about the persecution of religious minorities are, to some extent, confirmed by published data on religious adherents, deriving from DPRK records. Statements about the pervasive *Songbun* system of social caste are confirmed by speeches by DPRK officials, including successive Supreme Leaders. Remarkably, those leaders appear to be proud, not ashamed, of fixing people at their birth with a social caste (classified as ‘core’, ‘wavering’ and ‘hostile’ classes), upon the basis of which opportunities to access education, housing, employment, political advancement and food are decided.

The COI accepted for itself a rigorous standard of proof, common to UN COIs, of reported human rights violations.¹⁰ It accepted the ‘reasonable grounds for belief’ standard. It judged available testimony against the legal obligations binding on the DPRK as a state party to international human rights treaties and as a state subject to customary international law.¹¹

Where there was any doubt or uncertainty as to any finding or conclusion (as in the suggested deployment in DPRK of chemical weapons) the COI refrained from expressing a final conclusion, leaving several matters for the future. Similarly, where international law was in a possible state of evolution (as in the availability of the international crime of genocide in cases of annihilation of a section of the population on grounds of political belief)¹² the COI held back from expressing a conclusion on the possible infringement of such a law. However, it did indicate its inclination in that respect. There was already so much material (and findings on so many human rights violations and crimes against humanity) that this approach of prudent restraint appeared to be appropriate. The tone of the writing of the *Report of the COI* is restrained. Substantially, it is left to the voices of the victims to express, in vivid language, the ordeals and violations they have experienced.

In accordance with its mandate, the COI was extremely careful to attend to its duties to undertake proper record keeping; the protection of the confidentiality

¹⁰ Human Rights Council, *Report of Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1 (7 February 2014) 15–17 [63]–[78] (‘Detailed Findings’).

¹¹ *Ibid* 15 [63]–[64].

¹² See generally *ibid* 350–1 [1155]–[1159].

and identity of victims; and the safe archiving of its material.¹³ On the recommendations of the COI, the High Commissioner for Human Rights was urged to continue the collection of evidence and to establish a secure archive for the safekeeping of all information gathered by, or for, the COI.¹⁴

The relatively small secretariat of the COI on DPRK ensured that the members were aware of the cross-cutting issues and the interrelationship of particular themes (such as gender discrimination) involved in the study of particular mandate items.

In the end, there were no significant breaches of confidentiality or security affecting witnesses, either in the public hearings of the COI or otherwise. Special assistance was provided by UN Security for the conduct of the public hearings and in the COI's movement between venues. Only on two occasions during the public hearings was anything said, or revealed, that was of potential embarrassment. A firm instruction from the Chair had the effect of curtailing media reportage of that item and the transcript and record were redacted to delete the identifiers. There was no disruption of public hearings or any evidence of undue danger or concern on the part of witnesses.

One witness who later saw the *Report of the COI*, suggested that the editing of the report of that person's testimony had potentially given an incorrect impression of what was said. Although it was not possible later to edit or amend the published report to meet this concern, a letter was given to the witness by the COI affirming the full detail of what had been said, as appearing in the official transcript. The existence of the transcript, and its broad availability, provided proper protection for the witness.

No doubt future public hearings in other COIs and contexts will present new and different challenges. However, by conducting public hearings, the COI on DPRK afforded victims an opportunity to recount experiences important to them; to tell of their suffering; to be given a respectful hearing and an opportunity to be taken seriously and treated with dignity; and to have their testimony (or such of it as was safe to disclose) presented in public and utilised in the discharge of a UN report. Hopefully, some of the testimony will be available at some time in the future to ensure accountability on the part of persons accused and utilised appropriately in their prosecution.

IV CIVIL SOCIETY ENGAGEMENT

Because of its small secretariat and limited budget, the COI on DPRK had to secure a measure of assistance and support from outsiders, including the governments of interested countries. Although DPRK itself refused repeated requests to engage with it, the COI called on (and reported progress to) the Governments of Australia, China, France, Indonesia, Japan, the Republic of Korea, Lao People's Democratic Republic, the Russian Federation, Thailand, the UK and the US.

The missions of the foregoing countries were uniformly courteous and many made helpful suggestions, several of which were followed. For example, one country urged the COI, where justified, to give credit to DPRK for any advances

¹³ *Report of the COI*, UN Doc A/HRC/25/63, 6 [23].

¹⁴ *Ibid* 30 [94]; *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 370–1 [1225].

that were found in its protection of human rights. This was done, for example, in relation to the suggestion that DPRK had discriminated against citizens on the basis of disability. Information was secured that indicated that DPRK had signed (but not yet ratified) the *Convention on the Rights of Persons with Disabilities*,¹⁵ and had possibly changed its previous practice of removing disabled people from Pyongyang because of the poor impression they were felt to occasion. The advent and availability of mobile phones and the widening of inter-citizen contacts as a result was also acknowledged. But, in truth, the instances of improvement were few, or none at all, in relation to the mandate headings of torture and inhuman treatment; arbitrary arrest and detention; discrimination; freedom of expression; freedom of movement; and enforced disappearances and abductions. Whilst the number of abductions of foreign nationals by DPRK has diminished in recent years, instances of abductions of DPRK nationals from China are still reported.

Because of the fierce propaganda contest that exists in and near the Korean peninsula, care has to be taken by the COI in the use of media reports and in accepting the stated official positions of affected governments. For instance, widespread reports that, following his execution in December 2013, the remains of the uncle of the Supreme Leader, Jang Sung-thaek, had been fed to wild dogs were eventually traced to a Chinese social media source. It was a fictitious rumour. So was a report that the former girlfriend of the Supreme Leader Kim Jong-un had been executed by firing squad in connection with indecent behaviour. In May 2014 she appeared in a television program praising the Supreme Leader. The COI kept an appropriate distance from the governments of concerned countries, and it was ordinarily sceptical of Korean and other news reports.

International human rights bodies proved invaluable in providing testimony; affording contact with victims; making submissions to the COI; supporting side events at the HRC, UN General Assembly ('UNGA') and UNSC; and participating in, and stimulating, the drafting of UN resolutions and procuring follow up. Human Rights Watch ('HRW') played an important role in ceaselessly advocating the creation of the COI. Its proposal ultimately attracted the support of Mr Darusman, as Special Rapporteur. HRW has long been engaged in DPRK issues. Similarly, Amnesty International facilitated contact with expert and other witnesses, particularly in London and Washington DC. It provided the COI with satellite imagery that was important to contradict the assertion of DPRK that there were no political detention camps in North Korea. Amnesty International, which had conducted visits to DPRK, was extremely helpful in supporting the COI. So were the International Commission of Jurists and the International Service for Human Rights, regular non-government players in the activities of the HRC in Geneva.

At all stages, the COI insisted upon its independence from governments and also from non-governmental organisations. However, this did not prevent adequate access to Korean and other national institutions and civil society organisations and the receipt of expert and other useful testimony, reports, literature and information. In Japan, ROK, the UK and US, the Commission

¹⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

made contact with national bodies concerned with particular aspects of the mandate and representatives of victims and their families. These bodies played a useful role in stimulating attention to the condition of human rights in DPRK when (as was often the case), the record was interrupted for want of up-to-date information. The COI also made contact during its investigations, and after delivery of its report, with international think tanks and generalist interest groups, such as the Robert Kennedy Foundation in Washington DC. After the report was delivered, the COI made contact with the Graduate Institute Geneva, the Geneva Academy of International and Humanitarian Law, the Asser Institute in the Netherlands and The Hague Academy for Global Justice, as well as the Gresham College in London and several universities. Engagement was likewise made with the Holocaust Museum and Brookings Institution (Washington DC) and with the Council on Foreign Relations (New York), coinciding with the COI briefings to members of the UNSC. Whilst always remembering the principle of independence, and that a COI of the UN is not a lobbyist or civil society body, there is no doubt that these organisations play a useful supportive role in the discharge of the functions of a COI. So it proved in the case of the COI on DPRK.

V ACCESS TO INTERNATIONAL SCHOLARS

Members of the secretariat of the COI were, to a greater or lesser extent, experienced in international law and practice. One member of the secretariat was designated the legal adviser to the COI. He had post-graduate training and experience in Europe and the US in several relevant areas of international law. Each of the Commissioners themselves had earlier experience in international law and awareness of developments of relevance to the DPRK inquiry. Notwithstanding this, it was desirable to supplement that experience with access to recognised scholars in international law, and practitioners with experience before national and international criminal courts and tribunals.

A number of interesting and important issues of international law arose in the course of the COI upon which it was useful to secure both practical and scholarly supplementation of the knowledge available within the COI itself. For example, in Washington, a number of witnesses described their relevant expertise. In Seoul and in Washington, in particular, experts with specialist knowledge gave oral testimony on aspects of the mandate. In Washington, these included testimony concerning political prison camps (David Hawk); testimony concerning food security and famine (Andrew Natsios, Marcus Noland); military intelligence (Joseph Bermudez); gender discrimination (Roberta Cohen); and issues of UN institutional consistency (Jared Genser). Also in Washington, the COI met informally with a number of international scholars with special expertise in relation to DPRK. An enormous literature has developed, especially in recent years, concerning DPRK. There are notable scholars whose writings assisted the COI, including Professor Andrei Lankov¹⁶ (Australia and ROK), Professor Leonid Petrov (Australia) and Professor Victor Cha (US).¹⁷ New

¹⁶ See, eg, Andrei Lankov, *The Real North Korea: Life and Politics in the Failed Stalinist Utopia* (Oxford University Press, 2013); *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 179 [592]–[593].

¹⁷ Victor Cha, *The Impossible State: North Korea Past and Future* (HarperCollins, 2012).

books continue to be published concerning aspects of human rights violations in DPRK.¹⁸ An important part of the work of the Commissioners and secretariat involved absorbing this large body of information and opinion, whilst continuing to move forward with the preparation of the report in what was effectively little more than half a year of real time.

Particular mention should be made of the private meetings that were held in London when the Commissioners met Professor William Schabas (University of Leiden), a noted expert on crimes against humanity and genocide, and Sir Geoffrey Nice QC, a leading London barrister who participated as counsel in the Milošević trial before the International Criminal Tribunal for the former Yugoslavia. Discussions with them assisted in understanding the developing international criminal law as relevant to the conclusions of the COI.

One matter upon which dialogue with the jurists was helpful concerned the ambit of the international crime of ‘genocide’. This matter was explained by the COI.¹⁹ In some international quarters there has been a tendency to view ‘genocide’ as the gold standard international crime, and to discount accordingly other offences such as crimes against humanity. However, a point made by Professor Schabas is that this is not a correct attitude because each such international crime is one of the greatest gravity.²⁰ Accordingly, there should be no undue feeling that the definition of genocide needs to be expanded.

As pointed out by the COI, ‘genocide’ in international law has been defined, to date, as including various grave and violent acts committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such’.²¹ The COI received submissions urging a finding of genocide against DPRK. Certainly, because of strong testimony that indicated violent acts in political prison camps and conduct that resulted, deliberately or recklessly, in many deaths from starvation, affecting at least hundreds of thousands of DPRK citizens, a conclusion that a type of genocide had occurred appeared open. The difficulty was the emphasis which the crime of genocide had hitherto taken from ‘national, ethnical, racial or religious’ motivations and the doubts that existed as to whether such motivations existed in the case of DPRK.

The definition of the crime of genocide to include extermination on religious grounds was doubtless originally affected by the classification of the extermination of Jews in Europe in the 1930–40s as ‘genocide’. In the case of these victims the motives were partly ethnic and partly religious. However, unlike racial characteristics, religion is not an inbuilt personal characteristic of human beings. It is a set of convictions, spiritual beliefs and philosophical/moral commitments that are acquired after birth — mostly in childhood or sometimes later life. In this respect, the religious ground for the crime of genocide appears

¹⁸ See, eg, Danielle L. Chubb, *Contentious Activism and Inter-Korean Relations* (Columbia University Press, 2014).

¹⁹ *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 350–1 [1155]–[1159].

²⁰ William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, 2012) 106, cited in *ibid* 350 [1157] n 1639.

²¹ *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 350 [1155]–[1156], citing *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2 and *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 6 (‘*Rome Statute*’).

analogous in some ways to a political ground, which would certainly have been applicable in the case of possible exterminations by DPRK. Although there was some evidence before the COI of extermination of civilians on religious grounds, said to be evidenced by the huge drop in the number of Christian adherents in North Korea identified on the DPRK's own statistics, the evidence in this respect was ambiguous. It was an insufficient foundation for a genocide finding.²² It was possible that the large decline in the Christian community in DPRK was a result of official discouragement and propaganda against what Marx called the 'opiate of the people', rather than extermination. The COI could not be sure, and so we held back on that finding.

Still, was there a possibly available classification of 'genocide' based on extermination on political grounds? Professor Schabas has pointed out²³ that, in the drafting of the *Rome Statute of the International Criminal Court* ('*Rome Statute*'), the delegate of Cuba had proposed an expansion to the definition of 'genocide' to include political and social groups (the same words used in the concept of 'refugees' under the *Convention relating to the Status of Refugees*²⁴ and *Protocol*²⁵). However, this proposal attracted insufficient support from other delegations and was not included in the *Rome Statute*.

The COI members expressed themselves sympathetic to a reconfiguration of the controlling definition of 'genocide' in international customary law, so that it would include political grounds, by analogy with religious grounds. However, the COI did not feel obliged, or justified, to make conclusive findings on that basis, being convinced that there was ample proof of many crimes against humanity. It was therefore unnecessary for the COI to reach a resolution on the issue of law relating to the definition of 'genocide' for its report.²⁶

As the COI emphasised, crimes against humanity, in themselves, are so grave as to initiate the responsibility of the state concerned (and in default the international community) to protect the actual and potential victims and to hold the perpetrators accountable under international law.²⁷ However, what is distinctive about 'genocide' is that the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*'), recognised as a source of customary international law, imposes an obligation on all states to prevent the relevant acts and defaults. It thus goes beyond the obligation to protect. Arguably, it involves even more clearly the duty of collective action for which the UNSC derives special responsibilities under ch VII of the *Charter of the United Nations* ('*UN Charter*'). The exact ambit of 'genocide' in international law is a matter that will doubtless continue to evolve. In taking the position that it did on the definition of 'genocide', the COI on DPRK demonstrated a preference for prudence and restraint. This was in harmony with

²² *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 351 [1159].

²³ William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 4th ed, 2011) 100–1.

²⁴ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954).

²⁵ *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

²⁶ *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 351 [1158].

²⁷ *Ibid.*

its methodology of understatement and of permitting the victims to speak for themselves to the readers of the *Report of the COI*.²⁸

In the follow up to the *Report of the COI*, international law institutes, academies and centres of learning will have a particular responsibility to ensure that the findings and controversies identified in the *Report of the COI* remain before the scholarly and civil community. The murder of large groups of the Khmer population by the Khmer Rouge in Cambodia in the 1970s was, as in DPRK, usually based on perceived political hostility to the regime rather than for reasons of national, ethnical, racial or religious grounds. Yet those crimes, happening in Cambodia in the 1970s, are commonly described in popular speech as an instance of 'genocide'. It seems unlikely that the COI in its report on DPRK will have pronounced the last word on this question.

VI ENGAGEMENT WITH NATIONAL AND INTERNATIONAL MEDIA

During my service as UN Special Representative for Human Rights in Cambodia, it was my invariable practice to engage with the media and to participate in a media conference at the conclusion of each mission to the country. The practice was to draw to notice the favourable developments since the previous mission, and those developments that caused concern from the viewpoint of international human rights law. A media conference in Phnom Penh was addressed mainly to the English and French language media of the country and beyond. There was only sporadic attention by the indigenous Khmer media. These were the days immediately following the period under the UN Transitional Authority in Cambodia when there were high hopes of progress in the observance of human rights in Cambodia. However, antagonism by the government to media engagement (especially from the then Second Prime Minister of Cambodia, Hun Sen) repeatedly caused a severance of communications with the UN Office and the Special Representative. This is a phenomenon that has continued to the present time. Autocratic governments rarely favour free speech and free expression. This is certainly true of DPRK, as is disclosed in detail in the COI's report.²⁹

I have elsewhere described in greater detail the attempts of the COI on DPRK to reach out to national and international media; to facilitate their understanding of the mandate and work of the COI; and to engage them in raising expectations

²⁸ See Herman von Hebel and Darryl Robinson, 'Crimes within the Jurisdiction of the Court' in Roy S Lee (ed), *The International Criminal Court: The Making of the Rome Statute — Issues, Negotiations, Results* (Kluwer Law International, 1999) 79. The COI's approach is prudent because of the division of the international community on the issue, demonstrated in the negotiations of the *Genocide Convention* and the addition of the category of 'Ethnical Group', proposed by Sweden as a means to 'extend protection to doubtful cases': UN GAOR, 6th Comm, 3rd sess, 75th mtg, Agenda Item 7, UN Doc A/C.6/SR.75 (15 October 1948) 115. The negotiating committee divided on that issue 18 in favour, 17 against, 11 abstentions: at 116. A reference to 'political groups' was anonymously included in the text of the draft convention until very late in its gestation but was eventually withdrawn by consensus. In the creation of new crimes (including new international crimes) an approach of restraint is justifiable for such developments have a consequence analogous to the imposition of retrospective criminal liability, which international human rights law resists.

²⁹ *Report of the COI*, UN Doc A/HRC/25/63, 7 [26]. See also *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 45–74 [163]–[264].

of follow-up action.³⁰ It suffices to point out that, stimulated by the procedure of public hearings that it adopted, the COI took special pains to ensure transparency and to engage with the media. It invited television cameras and other media to film and record the proceedings (subject to any requirements in particular cases to protect witnesses). The COI Commissioners participated in many television, radio and other interviews. They described and explained their methodology and outcomes. They repeatedly insisted that their views were evolving. They took part in civil society meetings. They contributed to online blogs written by others. They participated in podcasts.³¹ They authorised the issue of media releases with quotes attributed to them. They participated in media conferences in each of the venues of the public hearings. They also undertook media conferences following oral updates in 2013 before the Third Committee of the UNGA in New York and the HRC in Geneva. They were involved in a media ‘stake-out’ following the Arria-formula meeting on 17 April 2014, when members of the UNSC were briefed in New York on the COI’s report.

For the engagement with the media in ROK and Japan, the COI had the advantage of the short-term secondment of an experienced media adviser who had previously worked in the OHCHR (Mr Ronald Redmond). When this arrangement expired and could not be renewed for want of funds, the COI turned to the principal media officers of the OHCHR (Rupert Colville, Rolando Gomez and Elizabeth Throssell). Their expertise and skills were invaluable. Because the effective pursuit of human rights usually involves the raising of awareness and stimulating pressure for action and change, this aspect of the COI’s communications strategy should not be overlooked. Indeed, the strategy should have been expanded to the use of social networks and the many informal publications that bring directly to huge audiences knowledge about important developments in human rights. The COI on DPRK was still substantially engaged with the traditional outlets of international media. Nevertheless, the coverage of the successive events surrounding the work and report of the COI was very useful in raising awareness and supporting the expectations of effective follow up. As the COI said to the HRC at the time of presentation of its report: ‘Now, we cannot say we do not know about DPRK. Now we all know and there is no excuse’.

A chief merit of the *Report of the COI* was that it digested in a document of fewer than 400 pages a huge amount of information from multiple and diverse sources, traceable to apparently reliable and unbiased reporters. In March 2014, in answer to the demand by the DPRK ambassador in Geneva that the international community should ‘mind its own business’, the COI told the UNSC in New York: ‘[These] crimes are indeed the world’s “business” and the world is watching. Respectfully, if this is not a case for action by the Security Council, it is hard to imagine one that ever would be’.³²

³⁰ See Michael Kirby, ‘Human Rights and Media: The Experience of the Commission of Inquiry on North Korea’ (2014) 26 *Denning Law Journal* 1.

³¹ See, eg, Kirsty Lang, Interview with Michael Kirby, Chair of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (Webcast, 21 March 2014) <<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=667b44e9-2bbe-431b-8243-032d56a13b5a>>.

³² Address by the Chair of the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (United Nations Security Council, New York, 17 April 2014).

VII FOLLOW-UP TO THE *REPORT OF THE COI*

The COI on DPRK paid much attention to the content and expression of its report. These were the responsibility of the Commissioners. As Special Representative in Cambodia, I personally drafted each report, virtually in its entirety, although I was informed that normal practice was to leave the primary drafting to the secretariat. In the case of the COI on DPRK, the first drafts were prepared by the secretariat but subjected to close and detailed amendments, both on matters of content and of expression in the primary (English language) text. A danger for UN bodies is a tendency to feel that the production of a report is the objective and conclusion of the exercise. This was never the approach of the COI on DPRK. Commissioner Darusman, in particular, repeatedly insisted upon practical outcomes. He demanded the closure of political camps and the release of all political prisoners as a sign of good faith by DPRK. No such sign was ever forthcoming.

The Commissioners participated in many 'side events' connected with the provision of the report to the HRC, the UNGA and the UNSC. That action included, on the same day as the report to the HRC, an extremely well attended function organised by civil society, sponsored by HRW, which was addressed by the Deputy High Commissioner for Human Rights, the Commissioners and Korean and Japanese victims of DPRK. This event was concluded by a piano performance in the *Palais des Nations* by a highly talented former North Korean pianist who was punished (and eventually fled) for playing 'decadent' American jazz themes and classical Western music, as he did before the assembled participants at the UN.

In addition to the online digital presentation of the COI's public hearings, subsequently utilised in many television documentaries, online and in news programs, the COI prepared a special brief documentary film with the help of international funding in order to capture some of the key moments in the testimony of witnesses speaking of their ordeal in the public hearings. These included Shin Dong-hyuk, who gave testimony of how he had escaped political prison camp number 14, into which he gave evidence of having been born as a child of adult prisoners. Other testimony was given by a witness who described how she saw a baby of a refugee required to be drowned in a bucket because of objections of DPRK officials to the Chinese ethnicity of its father, which was regarded as contaminating the 'pure' Korean blood. Another was given by a witness from a family of persons abducted under the DPRK's state policy of abduction of ROK, Japanese and other nationals deemed useful to DPRK.

The Arria-formula meeting in the UNSC on 17 April 2014 was initiated by France and joined by the US and Australia (as co-sponsors). It provided a briefing to members of the UNSC (with a briefing on the preceding day to members of the UNGA). This procedure indicates both the increasing concern of the international community about the gross violations of human rights in North Korea and the need for a response to the high media coverage of the *Report of the COI*. Each of the Commissioners assumed substantial post-report obligations to follow up on, and communicate, the findings in the report.

Mr Marzuki Darusman remains the Special Rapporteur on DPRK. He has continuing duties to endeavour to secure implementation of the COI recommendations in which he participated fully. Commissioner Biserko and I

have numerous conferences to attend in our own countries and abroad, at which the *Report of the COI* will be explained and elaborated. In my own case, these included visits to Hong Kong, Japan, the Netherlands, Norway, ROK and the US to explain the COI's findings and proposals. In Japan, the International Bar Association, which held its annual conference there in October 2014, added DPRK and the COI's report to its plenary program, as did Lawasia in its meeting in Bangkok, Thailand at the same time.

No member of the COI, whether Commissioner or secretariat, could depart their duties untouched by the testimony of great suffering that came to their notice. That suffering is not over. It continues. In the great famine of DPRK in the mid-1990s, the COI estimates that at least one million DPRK citizens needlessly perished by starvation. This occurred at a time when DPRK was spending very large sums on acquiring MIG fighter planes and materials for nuclear weapons as well as missile developments to deliver such weapons, potentially to neighbouring countries.³³

Hunger and malnutrition continue to be widespread in DPRK because of the incompetence and inefficiency of the food delivery system and of the local markets. According to the evidence, approximately 27% of babies and young children in DPRK are stunted because of severe malnourishment on the part of their mothers during gestation.³⁴ These conclusions are supported by published reports of impartial UN agencies (the World Health Organization, Food and Agriculture Organization and World Food Programme) operating in the country.³⁵ The major burden of food scarcity falls on those citizens deemed 'hostile' to the regime under the *Songbun* classification system. Doubtless this is the reason why DPRK refused access for normal monitoring of food aid, designed to assure donors of the impartiality of donated food distribution. The *Report of the COI* records evidence of the extravagance enjoyed by the ruling elite whilst other citizens, less favoured, starve to death.

VIII ACKNOWLEDGING AND OVERCOMING FRUSTRATIONS

As in any task performed to severe deadlines and with limited resources, there were occasional frustrations in the work of the COI on DPRK. Some of these were acknowledged by the High Commissioner for Human Rights herself in meetings with the COI.

In particular, there is an element of rigidity in securing airline tickets to suit the competing obligations of the Commissioners. None of the Commissioners was paid for performing duties as a COI member. They act as an expert for the UN. This involves an element of injustice because other relevant 'experts' are recruited and paid, for example those who serve with the agency that monitors

³³ *Report of the COI*, UN Doc A/HRC/25/63, 10–11 [46]–[55]; *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 207–8 [682]–[692].

³⁴ *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 163 [571] ff.

³⁵ See, eg, 'Overview of Needs and Assistance in the Democratic People's Republic of Korea 2012' (Overview Funding Document, United Nations, 2012); 'DPR Korea 2013: Humanitarian Needs and Priorities' (Report, United Nations, 2013).

the implementation of the UNSC sanctions and who prepare reports on these sanctions and how they are being implemented or evaded.³⁶

For some, working for the UN without fee on human rights is a badge of honour. For others with competing obligations, it can be a burden. It necessarily limits the types of persons who are available to accept appointment as COI Commissioners. Most of them come from academic posts where their salaries continue during their service but, in my own case, the opportunity costs of surrendering professional work were not insubstantial. As the High Commissioner has repeatedly said, for volunteers, there should not be imposed unreasonable demands to use the cheapest airfare involving unacceptably long layovers. In some UN agencies, it is possible to authorise an officeholder, exceptionally, to purchase a convenient air ticket with reimbursement to an agreed airfare later, upon proof of payment and travel documents. In the OHCHR, there is a rule requiring more than two weeks' notice to alter a travel booking. This is necessarily incompatible with the occasional reasons that may arise to change a travel itinerary because of supervening competing obligations. These frustrations were expressly drawn to the notice of the OHCHR during the COI's work.

Upon the completion of the mandate of the COI on DPRK on 31 March 2014, no funds were available in the OHCHR to permit travel by COI members. From an auditing viewpoint, this could not be allowed because the COI no longer legally existed. When in mid-April 2014, it became necessary for COI members to attend and provide a briefing to the UNSC, at the request of three UNSC members, only the Special Rapporteur, Marzuki Darusman, could be provided with an air ticket by the UN. Ms Biserko and I had to scrounge elsewhere. In my own case, by chance, I was invited to attend a conference in Jamaica for another UN agency and the remainder of my air ticket could be provided from another source. The OHCHR continues to operate within the most severe budgetary limitations. These sometimes spill over into frustrations affecting COI Commissioners and secretariat members alike.

Of course, UN staff and office-holders know that, particularly in a big organisation, stringent budgetary controls and effective auditing and avoidance of waste are vital. The COI had its own budget and it operated within its limitations. It is highly desirable that COI members should not only be drawn from academic ranks. People with backgrounds in the practising legal profession, the judiciary, business and civil society have qualities that will sometimes be particularly useful. They may have experience in the highly practical business of rendering serious criminals accountable for their wrongdoing in their home jurisdiction. They know the necessity of clarity and precision in thinking and expression. A most important, and beneficial, feature of the *Report of the COI* is the inclusion throughout of specific findings, as made by the Commission. The reader is not left to guess what the findings are. They are set out in exact detail at the conclusion of the treatment of each mandate item. This allows the reader, and any who have later obligations or interests in follow up and action, to know

³⁶ See *Note by the President of the Security Council*, UN SCOR, 69th sess, UN Doc S/2014/147 (6 March 2014) annex ('*Report of the Panel of Experts Established pursuant to Resolution 1874 (2009)*').

exactly what the COI concluded and how its recommendations are to be judged and implemented, based on those findings and conclusions.

IX CONNECTION OF HUMAN RIGHTS, PEACE AND SECURITY

The COI on DPRK also demonstrated clearly the close interrelationship between the achievement of international peace and security and of universal human rights and justice. The interrelationship was effectively acknowledged by the invitation, soon after the presentation of the *Report of the COI* to the HRC, to provide a briefing to members of the UNSC. Under the *UN Charter*, the UNSC, with its five permanent members and rotating non-permanent members, has the 'primary responsibility for the maintenance of international peace and security'.³⁷ This is so in order 'to ensure prompt and effective action by the United Nations'.³⁸

However, disputes and situations engaging the functions of the UNSC³⁹ do not occur in a vacuum. They occur in the real world. Unresolved affronts to universal human rights may occasion serious 'threats to the peace [and] breaches of the peace', which it is amongst the primary purposes of the UN to adjust and settle.⁴⁰ This is recognised by the acknowledgement, when the first preambular clauses of the *UN Charter* were adopted, of the obligation to avoid the 'scourge of war' and to 'reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and nations large and small'.⁴¹ It is also reflected in the need to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained', so as to 'promote social progress and better standards of life in larger freedom'.⁴²

Thus, from the very first words of the *UN Charter*, there is recognised the interrelationship between peace and security and the defence of fundamental human rights. The institutional arrangements that established the UNGA and the UNSC, the latter with special responsibility for maintenance of international peace and security, have tended to force these interrelated objectives of the new world legal order into separate treatment. However, the case of DPRK is a classic instance of the way in which these objectives, stated at the creation of the UN, come together and need to be viewed in relation to each another.

The UNGA (like the HRC which answers to it) has maintained a continuing interest and concern over the state of human rights in DPRK. Annual resolutions of the UNGA have confirmed that interest. The creation of the COI grew out of these annual expressions of concern. The COI's report to the HRC, in turn, was submitted to the UNGA in November 2014 with a proposal for eventual transmission by it to the UNSC. However, in advance of that communication later in 2014, the Arria-formula and its invocation by three members of the UNSC, indicates the growing awareness of the dangers for international peace

³⁷ *Charter of the United Nations* art 24(1) ('*UN Charter*').

³⁸ *Ibid.*

³⁹ *Ibid* art 12(1).

⁴⁰ *Ibid* art 1(1).

⁴¹ *Ibid* Preamble.

⁴² *Ibid* Preamble.

and security deriving from the instability resulting from grave, prolonged and widespread human rights violations in that country.

Previously, UNSC attention to DPRK has been addressed to concerns about DPRK's access to nuclear, and other, weapons and its development of missile delivery systems. In a highly populated region of the world that is already facing many new and difficult dangers, the existence of a state with the fourth largest standing army in the world and weapons of mass destruction is serious danger enough. When to these ingredients are added the instability and risks inherent in recurring mass starvation, serious discrimination, violations of freedom of movement and residence, imposition of arbitrary detention, torture, public executions, prison camps and abductions from foreign countries, the result is potentially explosive.

A demonstration of this fact was made clear by the sudden removal from power and arrest in December 2013 of the Supreme Leader's uncle by marriage, Jang Song-thaek; his rapid trial before a military tribunal of judges reported as denouncing him during his trial; and his swift execution by firing squad (with the reported deaths of many others). These reports signal not only gross breaches of fundamental human rights. They also suggest a serious instability in the way in which political and economic differences are resolved at the highest level in DPRK. It is in this way that human rights violations seep into dangers to peace and security. They occasion grave dangers for the maintenance of international peace and security.

In the *Constitution of the United Nations Educational, Scientific and Cultural Organisation*, it is stated eloquently that 'since wars begin in the minds of [human beings], it is in the minds of [human beings] that the defences for peace must be constructed'.⁴³ This is the justification for bringing the human rights situation in DPRK to the notice of the UNSC. It must be hoped that the UNSC will exercise its jurisdiction and power with this symbiosis of concerns clearly in contemplation.

One of the specific recommendations of the COI on DPRK was that the situation in the country should be referred by the UNSC to the International Criminal Court ('ICC'). Such a reference would be necessary under the *Rome Statute*⁴⁴ because DPRK is (perhaps not unexpectedly) not a party to the *Rome Statute* and hence not otherwise amenable to the ICC's jurisdiction. In its report, the COI examined various other possible ways of ensuring accountability for crimes against humanity and in respect of which DPRK afforded no protection or redress to its own people. Such failure would appear to enliven the responsibility of the international community, in place of DPRK, to protect the people of DPRK from such crimes (pursuant to the 'responsibility to protect' doctrine). All of the other options considered by the COI were, for the reasons given in the *Report of the COI*, less suitable or desirable.⁴⁵

⁴³ *Constitution of the United Nations Educational, Scientific and Cultural Organization*, signed 16 November 1945, 4 UNTS 275 (entered into force 4 November 1946) Preamble.

⁴⁴ *Rome Statute* art 24. Cf *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 361 [1201].

⁴⁵ *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 361–2 [1201]–[1202]. The other options included (1) a peace and reconciliation process; (2) an ad hoc international tribunal; (3) a joint national and international ad hoc tribunal; and (4) appointment of a special prosecutor, without a designated court, to continue to gather and evaluate evidence.

The danger that one or two permanent members of the UNSC (for example China and/or the Russian Federation) might exercise their ‘veto’ to ensure that no such reference to the ICC would occur, presents a quandary. Should the proposal of the COI be pressed to a vote or would this be pointless, given the announced opposition, at least on the part of China?⁴⁶ Upon one view, pressing the issue to the vote is precisely how the *UN Charter* is expected to operate. The broad and strong consensus expressed in the HRC,⁴⁷ and the strong report of the COI with its grave findings, indicate what objectively should happen. If particular countries are not convinced, they should be required to explain their position and vote. That way they can be judged by the international community, by their own people who come to know of it and by history. It cannot be comfortable or safe for China, in particular, to have at its doorstep a country, as presently governed, which is not only potentially extremely dangerous to Chinese citizens but also potentially turbulent because of human rights violations and the ever present risks of starvation and the unrest that this can cause.

X INTERNATIONALISM AT WORK

During my service as a Justice in the High Court of Australia, I often raised my voice to express a perceived need to reconcile the mandates of domestic law and any relevant provisions in international law (whether in treaties or in customary international law).⁴⁸ Sometimes I was a lone supporter of this view; but sometimes not.⁴⁹ In part, my approach arose from the opportunities I had already enjoyed to serve in a number of international positions, watching closely (and contributing to) the growing influence and impact of international law: especially the international law of human rights. My recent engagement with the COI on DPRK has reinforced the views I then held. I do not doubt that, in due course, these views will prevail not only in Australia but everywhere in the world. This is simply the force of destiny, the outcome of the growth of the power and influence of international law that is inevitable and desirable — to save the planet and to save the human species from dangers otherwise arising.

Repeatedly during the inquiry on the DPRK, contact with countries which had once been joined with the DPRK in the former Soviet bloc expressed to the members of the COI its appreciation for their labours. The ambassador for one such country pointed out that DPRK was a kind of historical leftover and anomaly. Eventually, it would have to adjust and change. This would not necessarily mean abandoning its distinct identity or even possibly its political system, as the history of China has shown. But it would mean radical reform of

⁴⁶ The HRC recommended that the *Report of the COI* be submitted to the UN Security Council for that body to consider referring those responsible for human rights violations in DPRK to the International Criminal Court: Human Rights Council, *Situation of Human Rights in the Democratic People’s Republic of Korea*, 25th sess, Agenda Item 4, UN Doc A/HRC/25/L.17 (26 March 2014) para 7. The six countries which voted against the resolution in the HRC were China, Cuba, Pakistan, Russian Federation, Venezuela and Vietnam.

⁴⁷ The voting on the HRC resolution was: 30 nations in favour; 6 against; 11 abstentions.

⁴⁸ See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, 617 [152] ff (*‘Al-Kateb’*). Cf at 589 [62] ff (McHugh J). See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–18 [166].

⁴⁹ In *Al-Kateb*, Chief Justice Gleeson and Justice Gummow dissented, although reaching their minority conclusion substantially by techniques of statutory interpretation of the local statute.

its society, an acknowledgment of the serious wrongs done to its citizens, and a commitment to bring itself wholeheartedly into the era of universal human rights envisaged by the *UN Charter*. Another such ambassador declared that the people of North Korea would, in due course, become aware of the COI and the efforts of the UN. Although most such people were presently unaware of the UN's labours and report (because of censorship in place and totalitarian control), in due course, they would become aware. They would then know that the world had been concerned about their suffering and had created a high level inquiry as an expression of that concern and to stimulate action and reform. Another such ambassador declared that the situation revealed in the *Report of the COI* resonated with her because (although otherwise in less extreme forms) many countries of the former Soviet Bloc had been subject to similar violations of human rights, which were fresh in memory and all too familiar. Important objective sources now available, concerning the history of human rights abuses in DPRK, include the archives of the former Soviet Union and German Democratic Republic. Documents from these archives, quoted in the *Report of the COI*, reveal the duplicity of the DPRK leadership (including about the commencement of the Korean War and the number of prisoners of war detained) and the anxiety of comradely states about the extreme forms of the personality cult built around the founder of DPRK, Kim Il-sung. This struck observers from the Soviet Bloc at the time as astonishing, dangerous and counter-productive to the proletarian cause.

This is why, in the *Report of the COI*, the COI concluded that the DPRK today had moved far away from the original principles on which it had purportedly been founded:

- It is neither egalitarian nor democratic. It is a kind of absolute monarchy in which power has been passed from one generation of the family of Kim Il-sung to another. This is a unique and extreme form of nepotism with no real counterparts in the former communist states.
- It is not dedicated to social justice. In the many ways demonstrated throughout the COI's report,⁵⁰ DPRK is an extremely patriarchal society in which women suffer gross injustices and humiliations, inequalities and serious forms of discrimination.
- It is not a multicultural community, but one based upon notions of the racial 'purity' of the Korean blood, with antipathy to any mixing of that blood with the blood of foreigners, even with the Chinese fathers of the children of Korean refugees, themselves forced back to Korea and obliged to abort or even kill their progeny conceived with non-Koreans.
- It is not, even in ideology, egalitarian. Its *Juche* philosophy, proclaimed by its Founder and the *Songbun* system established by him, stamp people at birth with social classifications as 'core' (or sympathetic), 'wavering' or 'hostile'. This is an aristocratic/feudal caste system of assignment by social class that is extremely difficult

⁵⁰ *Detailed Findings*, UN Doc A/HRC/25/CRP.1, 336–7 [1105]–[1107].

for citizens to escape. It is an enormous burden throughout the lives of those classified as 'hostile', at birth or thereafter.

Of course, these are not necessarily reasons to demand an end to DPRK. That is a decision which was not on the agenda of the COI. Change of government is a privilege that is to be exercised, if at all, by the people of DPRK as enshrined in international human rights law.⁵¹ It does not belong, as such, to the COI; nor does it belong to governments, as such, or to the UN.

But whilst DPRK is a member of the UN and has itself ratified major UN treaties on human rights, it must conform to universal human rights principles. This it is not doing. International law cannot easily enforce change or secure compliance with international human rights law. However, it can express and insist upon the basic principles that are at stake. It can show the direction in which those principles point. It can offer advice, encouragement, technical assistance and, where justified, criticism and condemnation. It can encourage an end to the violations. It can offer an opening of dialogue and actions to enhance people-to-people contact, such as the recommendations set out in the *Report of the COI on DPRK*.⁵² It can set up machinery in the OHCHR that will continue to collect testimonies which the COI has started.⁵³ It can keep the matter under review in the HRC, the UNGA and the UNSC. It can do all these things and more until, in due course of time, the grave wrongs revealed in the *Report of the COI* are terminated and redressed.

The *Report of the COI* will contribute to the process of change. No one now has the excuse of saying that they are not aware of the affronts to human rights in DPRK. Now, we all know. We all must ensure that change happens. If the arc of history bends in the direction of human rights, equality and justice, as Martin Luther King Jr assured us, change will happen. When and how that change will come is as yet uncertain. But it will come, and the UN will have played a proper part.

Consider the peculiarities of the North Korean situation:

- DPRK has many features of a totalitarian society, as that word is understood in historical and political discourse. The governments and officials of many countries in our world are harsh and oppressive; but few are totalitarian in the sense of seeking to control the minds of the people as well as their actions.
- DPRK has a huge army and it defends one of the most strictly guarded, lethally defended and heavily-mined borders on earth.
- DPRK has but one political party and, as recently demonstrated, the legislature is not freely elected by the people. They have, at best, a power of delay which is virtually never exercised.
- DPRK is possessed of a nuclear weapons arsenal (estimated at up to 20 nuclear warheads) and missiles which have the capability of delivering such weapons of mass destruction to neighbouring

⁵¹ ICCPR art 1; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1 (self-determination of peoples).

⁵² *Report of the COI*, UN Doc A/HRC/25/63, 16 [89].

⁵³ *Ibid* 20 [94].

countries, with high density populations, including the China, Japan and ROK.

- DPRK has recently been observed restarting a previously decommissioned, old and defective nuclear power station, with attendant dangers, inferentially for the collection of plutonium for use in the manufacture of further nuclear weapons.
- In December 2013, one of the highest ranking officials of DPRK, Chang Song-thaek, uncle by marriage of the Supreme Leader, Kim Jong-un, was arrested, hurriedly tried and executed, reportedly along with others who had fallen out of favour. His widow, Kim Kyong-hui, the only sister of the founder, Kim Il-song, has now reportedly also been airbrushed out of archival photographs and documentary films shown on the DPRK official broadcasting outlets.⁵⁴
- In belated response to the strong international reaction to the *Report of the COI*, DPRK, in September 2014 launched a ‘charm offensive’ to suggest a new engagement both with the UN and concerned states over human rights. However, many states remained unconvinced. DPRK continued to deny its citizens access to the *Report of the COI*. It also contrived to refuse permission to the COI members to visit Pyongyang so that they could explain the report and answer questions and criticisms. On 18 November 2014 in New York, the Third Committee of the United Nations General Assembly voted to endorse the *Report of the COI*'s recommendations. It also resolved to adopt the resolution proposed by Japan and the European Union. This welcomed the recently expressed willingness of DPRK to consider dialogue with other states, to receive technical cooperation and to receive a country visit by the Special Rapporteur.⁵⁵ However, it commended the work of the COI;⁵⁶ acknowledged its findings of crimes against humanity;⁵⁷ it also resolved to submit the report to the UNSC in order for it to take appropriate action, including ‘through consideration of referral of the situation in [DPRK] to the International Criminal Court’.⁵⁸ In response to the vote of the Third Committee, DPRK threatened to renew testing of its nuclear armaments with ‘catastrophic consequences’ for ROK, Japan and other countries. By their own action, DPRK has demonstrated why it should properly be made the subject of UNSC scrutiny and monitoring.

⁵⁴ ‘N Korea Deletes Leader’s Aunt from Documentary Film’, *Yonhap News Agency* (online), 17 April 2014 <<http://english.yonhapnews.co.kr/northkorea/2014/04/17/24/0401000000AEN20140417004800315F.html>>.

⁵⁵ *Situation of Human Rights in the Democratic People’s Republic of Korea*, UN GAOR, 3rd Comm, 69th sess, Agenda Item 68(c), UN Doc A/C.3/69/L.28/Rev.1 (14 November 2014) 8 [14].

⁵⁶ *Ibid* 6 [6].

⁵⁷ *Ibid* 8 [15].

⁵⁸ *Ibid* 6 [8].

The foregoing have relevance for the enjoyment of universal human rights in DPRK. At the same time they present substantial reasons for concern in the global community for peace and security in, and in the region of, the Korean Peninsula.

XI CONCLUSIONS

How can engagement of the powers and functions of the UNSC be justified in the case of DPRK, as the nature of that country and its current conditions are revealed in the *Report of the COI*?

- The COI on DPRK was specifically asked, by its mandate, to identify the means by which those liable for any acts and omissions that might constitute human rights violations, could be rendered accountable for such conduct. The COI had no option to ignore its mandate, for example on the grounds that addressing this question might alienate the leadership or authorities of DPRK or make peaceful dialogue with them more difficult. The mandate had to be answered faithfully and truthfully. As it has been.
- The most appropriate, and available, means of securing accountability (invoking the jurisdiction of the ICC) directly engages the special powers of the UNSC. This is because it is plain that DPRK will not provide protection for its citizens in accordance with the norms of international human rights law, and the DPRK is not itself a state party to the *Rome Statute* attracting the ICC's consensual jurisdiction in such cases.
- In such circumstances, it falls on the international community to provide such protection. Indeed, the international community has a responsibility to protect where the state concerned fails to do so. The most effective way it could do so in the case of DPRK would be through an already established judicial body and properly resourced professionals affording such protection. But jurisdiction can only relevantly be engaged by decision of the UNSC.
- The UN has adopted an overall approach to the conduct of its own agencies and officials described as 'Rights up Front'.⁵⁹ This approach is intended to ensure that all decisions and actions by all of the organs and personnel of the UN are informed and give priority to the protection of universal human rights. If the UNSC, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security where there appears to be a threat to the peace, a breach of the peace, or acts of aggression, the UNGA may, in accordance with the Uniting for Peace Resolution, consider the matter immediately with a view to making appropriate recommendations to Member States for collective measures. In the case of a breach of the peace or an act of aggression, these measures might include the use of armed force, when necessary, to maintain and restore international peace and security.

⁵⁹ See United Nations, '*Human Rights Up Front*' Initiative (2014) <<http://www.un.org/sg/rightsupfront/>>.

Because the unconcluded war on the Korean Peninsula (ended in 1953 by an armistice and not by a peace treaty) involved the UN, as authorised in 1950 by a vote of the UNSC,⁶⁰ the subsequent human rights violations in the DPRK might be viewed, in material respects, as consequences and outcomes of the war. At the least, they attract the special attention and a sense of responsibility for what has since transpired, of the UNSC and its members.

Why is it not a viable option to do nothing in response to in the case of the *Report of the COI* on the DPRK?

- The HRC created the COI and mandated its report which has now been delivered.
- Whatever views might be held on the establishment of country-specific inquiries on the part of the HRC, the existence and content of the *Report of the COI* cannot now be ignored as if it had never existed. Nor can the information provided by the COI be expunged from the collective knowledge of the UN or the wider world. The *Report of the COI* is before the UN in a report, lawfully initiated, duly provided and now publicly distributed and widely known.
- In contrast to previous often vague and unanalysed data on human rights violations in DPRK, the international community now knows in considerable detail of the grave wrongs occurring in DPRK. These wrongs include crimes against humanity that invoke obligations of prompt and effective action which includes the responsibility to protect to people of DPRK whose government manifestly fails to do so.
- In any case, the *UN Charter*, by its preambular statements and the expression of the functions and powers of the UNSC, recognises the integrated characteristics of the objectives of international peace and security, and the commitment to ‘the equal rights of men and women and of nations large and small’.⁶¹ The language of the *UN Charter* and the history of humanity, demonstrate the interrelationship of peace and security and universal human rights. To the extent that human rights are not respected and that conditions exist under which justice and respect for the law are not maintained, causes of further instability are created. Such instability is a cause of conflict, unrest and a demand for change that can put the orderly conduct of international, as well as national, affairs at risk. Particularly is this so in a country with such a large army, with a number of nuclear devices not subject to international inspection or control, and which has demonstrated its missile delivery systems and violence against its own people and threats of violence to its neighbours.

The *Report of the COI* reveals the unique and dangerous conditions prevailing in DPRK that do not have any parallel in the contemporary world. The question

⁶⁰ See *Resolution concerning the Complaint of Aggression upon the Republic of Korea Adopted at the 473rd Meeting of the Security Council on 25 June 1950*, SC Res 82, 5th sess, 473rd mtg, UN Doc S/1501 (25 June 1950).

⁶¹ *UN Charter* Preamble.

now confronting the global community, and the UN to which in dangerous times it has given birth, is whether sufficient resolution and principle can be found to take the steps that are necessary to protect universal human rights in DPRK, and to render accountable, quickly and effectively, those who have breached, and continue to breach, those rights. The *Report of the COI* has been prepared in the hope and conviction that the answer to those questions will be in the affirmative. Only time will tell whether this is a pipedream or justifiable confidence in the capacity of vital institutions of the UN to protect our species and the biosphere from serious and potentially fateful outcomes threatening the whole. The *Report of the COI* on DPRK makes it easier for the UN and the world to arrive at correct outcomes to these challenges.⁶²

⁶² The Human Rights Council referred the *Report of the COI* to the UN General Assembly. It was there considered by the Third Committee. By a vote of 111:19:55, that committee resolved to endorse the substantive recommendations of the COI, including specifically the recommendation that the report be referred to, and considered by, the UN Security Council. By a letter signed by 10 members of the Security Council, the report was placed on the agenda of the Council for consideration in December 2014: see Ankit Panda, 'With North Korea in World Spotlight, What Can China Do?', *The Diplomat* (online), 8 December 2014 <<http://thediplomat.com/2014/12/with-north-korea-in-world-spotlight-what-can-china-do/>>.