

**NORTH KOREA HUMAN RIGHTS: THE
ROAD AHEAD
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DILEMMAS AND PARADOXES**

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THE COI REPORT

On 21 March 2013, the UN Human Rights Council (HRC) established a Commission of Inquiry (COI) on human rights violations in the Democratic People's Republic of Korea (DPRK). In May 2013, the then President of the HRC appointed Sonja Biserko (Serbia) and myself (Australia) as members of the COI. By the HRC's resolution, Marzuki Darusman (Indonesia) was ex-officio a member, by reason of his earlier appointment as UN Special Rapporteur (SR) on human rights in DPRK. I was appointed to chair the COI.

Having been denied access to, or any cooperation by DPRK, the COI adopted a novel and distinctive methodology: conducting public hearings; engaging the media; involving victims and civil society; carefully providing due process to DPRK, including prior notification of its conclusions and recommendations for comment.

The COI produced its report on time, within budget and unanimously. The report was publicly released on 17 February 2014 in Geneva.¹ On 17 March 2014, it was presented to the HRC in

* Retired Justice of the High Court of Australia (1996-2009); Special Representative of the Secretary-General on Human Rights in Cambodia (1993-96); and Chair of the UN Human Rights Council's Commission of Inquiry on Human Rights Violations in DPRK (2013-14). All views expressed are personal to the author and do not have United Nations authority.

Geneva. It there attracted a strong vote from the HRC members (30:6:9). On 17 April 2014, in response to a request, an Arria Briefing was afforded to interested members of the Security Council (SC). All members of the SC save China and the Russian Federation attended. So did many other member states and civil society organisations, as observers. The COI report was transmitted by the HRC to the UN General Assembly (GA). A resolution, sponsored by the EU and Japan, called for action on the report and GA referral to the Security Council. A procedural resolution by Cuba to delete references to any such action, in the light of suggested new levels of cooperation from DPRK, was defeated (40:77:50). Subsequently, the Third Committee of the GA endorsed the EU—Japan resolution (111:19:55).² The plenary GA adopted the resolution (116:20:55).

In early December 2014, on the request of 3 members of the SC (Australia, France and the United States of America), the SC President convened a meeting of the SC in response to the COI report. Prior notice of a procedural motion placing issues of human rights in DPRK on the agenda of the SC was given by 10 SC members. This indicated the existence already of a two thirds majority, required by art. 27.2 of the UN *Charter* for decision of the SC on a procedural matter. On 22 December 2014, the UN SC decided to place the issues of human rights in North Korea on its agenda for ongoing attention. This decision was adopted by a strong vote (11:2:2).³ On a show of hands, the only votes against the procedural resolution were those of China and the Russian Federation.

BEYOND REPORTS AND RESOLUTIONS

Working within the UN system, it is easy for professionals (mandate holders, diplomats, UN employees and academics) to fall into the trap of believing that the provision of a well-received, easy to read, apparently fair and accurate report and consequential supporting votes of the

¹ *Report of the detailed findings of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, UN Human Rights Council, 25th sess, Agenda Item 4, UN Doc A/HRC/25/CRP.1, (17 February 2014). References to the COI report below are to paragraphs in the published report.

² *Situation of human rights in the Democratic People's Republic of Korea*, UN GAOR, 3rd Comm, 69th sess, 46th mtg, Agenda Item 68 (c), A/C.3/69/L.28/Rev.1, (18 November 2014).

³ *The situation in the Democratic People's Republic of Korea*, UN SCOR, 7353rd mtg, UN Doc S/PV.7353, (22 December 2014).

member states (adopted by large majorities) in important bodies of the United Nations constitute, in themselves, a successful outcome for the inquiry. This is not so. The COI on DPRK, at all times, insisted that success of its mandate would only be assured if the human rights of the people of North Korea actually improved in consequence of the COI report.

The COI had no UN blue helmets at its disposal to enforce its findings and recommendations. Any thought of measures of force to achieve that end was outside the COI's mandate and never discussed or considered. The risks to human life, property and to the societies and economies of affected countries, arising out of such a response, would be enormous and unthinkable. The decisions at every level in the UN's consideration of the COI report had been impeccable. Every formal step that could have been taken, in accordance with the *Charter* of the United Nations, was taken. Whatever may have happened in other and different mandates, (including those of COIs), the consideration and follow-up of the COI on DPRK report was outstanding. But how are the findings and recommendations in the COI report now to be translated into practical consequences for DPRK citizens? How, if the COI, the SR and the UNHCHR are not permitted access to DPRK, can it be said with any confidence that the COI report has had beneficial consequences for improving human rights in that country in the light of the dire conditions described in the COI report?

The fact that the COI report has cast a sharp light on human rights in DPRK, previously isolated from global scrutiny, may, of itself, have produced some beneficial outcomes. The threat of the possibility of prosecution of DPRK leaders and officials, at some future unspecified time, may instil a measure of caution, improvement and responsiveness on their part. Following the COI's public hearings, publicity and subsequent report, DPRK, for the first time, engaged to some degree with the UN human rights system. It participated in the Universal Periodic Review (UPR) of its human rights record; it produced its own albeit unpersuasive and propagandistic human rights report;⁴ and it promised dialogue with the EU, the SR and others on human rights matters

⁴ *Report of the DPRK Centre for Human Rights Studies*, 13 September 2014, originally published on the Korean Central News Agency website (www.kcna.kp) though no permanent url exists for the report on that site, Available at: http://www.ncnk.org/Report_of_the_DPRK_Association_for_Human_Rights_Studies.pdf.

(subsequently withdrawn).⁵ So is it possible that the process has led, or will lead in the future to some limited improvements?

One very practical and immediate suggestion which the COI on DPRK advanced as a recommendation (COI 1225(a)) was that the UN SC should refer the situation in DPRK to the International Criminal Court (ICC), for action in accordance with the *Rome Statute* establishing that court. So far, that has not been done. Yet the SC's adoption of its procedural resolution on 22 December 2014 makes it easier, procedurally, at any time in the next 3 years (or so long as the resolution is continued) for any member of the SC to raise human rights concerns about DPRK and to move in that direction. Of course, such a substantive matter would have to run the gauntlet of the 'veto', provided for in art 27.3 of the *Charter*. A separate proposal of the COI was that the UNHCHR should establish a structure to build on the collection of evidence by the COI, to "ensure accountability for human rights violations in the DPRK" (para 1225(c)). A "field office" is to be established in Seoul, in the Republic of Korea (ROK), with the concurrence of ROK. Documentation of human rights violations by the field office, and others, stands as a clear warning to any who henceforth perpetrate, permit, or do not prevent, grave breaches of human rights in DPRK, particularly crimes against humanity.

Widespread publicity given to the COI report throughout the world means that the country remains under the international spotlight. This will remain so for the foreseeable future. However, the attention and commitment of the international community can sometimes be transient. They may be replaced by other urgent priorities. DPRK could again recede into the background. Initiating consideration of DPRK's actions, including at the level of the SC, is now, procedurally, much simpler than it was before December 2014. But it still requires the commitment of a marathon runner, not a sprinter.

Despite progress, the belligerent response of DPRK to the COI report and the foregoing resolutions; its continuing refusal to make the report available to the citizens of DPRK; the

⁵ 'North Korea says it has invited European Union human rights official to visit', *South China Morning Post*, Last updated: 31 October 2014, Available at: <http://www.scmp.com/news/asia/article/1628934/north-korea-says-it-has-invited-european-union-human-rights-official-visit>.

prohibition on access for the report through the internet or intranet into DPRK; the refusal of requests to invite COI members to DPRK to justify and explain their proposals, all constitute a continuing high level of national non-cooperation, non-accessibility and secrecy. These attitudes undermine and frustrate all legitimate attempts of the UN to ‘take human rights seriously’; to ‘put rights up front’; to ‘secure accountability for grave international crimes against humanity’; and to follow-up on the UN’s commitment to protect the human rights of nationals of countries such as DPRK which do not themselves provide such protection, pursuant to the Responsibility to Protect doctrine.⁶

It was not the responsibility of the COI on DPRK to solve all of the problems arising under the *Charter* and international law affecting DPRK. Its sole responsibility, in accordance with its mandate from the HRC, was to deliver a report containing reasoned factual findings concerning alleged human rights violations in DPRK, including those rising to the level of ‘crimes against humanity’. Action on the COI’s report is fundamentally the responsibility of those to whom the report is delivered: the member states of the United Nations; relevant organs of the UN (HRC, GA and SC); relevant agencies and officials (especially OHCHR); and, if a reference were made to it, the Prosecutor at the ICC and the ICC itself. The COI was neither a prosecutor nor a judicial tribunal. Its sole authority and jurisdiction was to make findings according to the standard of ‘reasonable grounds’ (COI, 68). Having done that, formally, the COI has discharged its functions.

The action in December 2014, of the partial withdrawal of the testimony of one witness before the COI (Shin Dong-hyuk), was immaterial to the conclusions of the COI report, despite a letter of complaint addressed by DPRK to UN members.⁷ Likewise, the criticism of another witness Park Yeon-mi. If DPRK were serious about defending itself against the record revealed by the many witnesses who gave evidence before the COI, it would invite the United Nations, the international media and members of the COI to visit DPRK, to undertake thorough and well-publicised inspections and to produce fully documented findings. DPRK cannot rely on its own

⁶ Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Brookings Institution, Washington D.C., 2008, 175ff.

⁷ Identical letters dated 21 January 2015 from the Permanent Representative of the [DPRK] to the United Nations addressed to the Secretary-General and the President of the Security Council, A/69/739-S/2015/47.

failure to cooperate with the United Nations. Ultimately, the full truth will come out. In the meantime, the world has access to the truth as revealed by many convincing witnesses. The testimony of those witnesses is available online for assessment by the peoples of the United Nations, in whose name the *Charter*, and the UN commitment to universal human rights, is expressed. This was a merit of the transparent methodology adopted by the COI on DPRK. At issue is not just the opinion of the COI. It is the conclusion of the world that has access to the COI's evidence.

PARADOXES AND DILEMMAS

Although the COI has no formal function in exploring and resolving various dilemmas and paradoxes presented in its report, this does not mean that the members of the COI ignored or overlooked those features in their work.

Some of the paradoxes and dilemmas that are raised by the report include the following. They deserve ongoing attention, scrutiny and, where so decided, action by the international community:

1. *Human rights and geopolitics*: In the context of UN COI reports generally (and the work of UN special procedures on human rights more generally⁸), how does the Organisation move from findings of probable human rights violations (including 'crimes against humanity') to action: when such action is not ultimately dependent on sound factual conclusions or clear legal principles, as it would ordinarily be in a municipal legal system, but upon political decision-making. Votes in the HRC, GA and the UN SC are dependent upon voting by political representatives of nation states. They are often affected, influenced, or even governed, by geopolitical, economic, historical, cultural or other considerations that may not be decided by a desire to redress and terminate the human rights violations in question. Does this illustrate a fatal flaw, lying at the very heart of the United Nations system of human rights? That flaw is most

⁸ Ted Piccone, *Catalysts for Change: How the UN's Independent Experts Promote Human Rights*, Brookings Institution, Washington D.C., 2012, 20 ff.

clearly visible in the ‘veto’ enjoyed by the Permanent Five members of the SC. Is this a reason, in the context of reform of the *Charter*, to reconsider the operation of the ‘veto’ in the context of votes on grave human rights concerns? Or is the ‘veto’ both the definition and guardian of the current realities of the enforcement of international human rights law, in the world as it is?

2. *Victims and perpetrators:* In the present circumstances of the United Nations, how can a serious human rights report contribute in a practical way to the improvement of the human rights of the victims concerned, when it is inevitable that the report will often criticize or condemn those with power who are shown to be probably guilty of serious human rights violations? How can the UN expect follow-up to recommendations proposing that member states, and their leaders, be held accountable before international prosecutors and judicial tribunals, when the perpetrators have a vote (possibly a ‘veto’) and also an international platform at their disposal whereas the victims have no vote, little power and sometimes no voice? Does the very demand for accountability sometimes impede the attainment of human rights whilst alleged perpetrators remain in effective power of the member state concerned? Can it be seriously expected that those accused, and criticized, will cooperate in submitting themselves to effective scrutiny and accountability? Or is the risk that they will not do this an inbuilt reason why inaction is often inevitable in securing practical improvements in human rights, the subject of the UN COI report?
3. *Accountability, isolation and risk:* Does the demand for accountability on the part of leaders and officials in what will often be an already isolated country (such as DPRK), increase the risk of still further isolation, hostility and non-engagement? Does that risk, in itself, increase the possibility that the country concerned may make serious misjudgements, adopt unrealistic postures or even initiate hostile action in consequence of the very isolation that demands for accountability, and their rejection, produce?
4. *Reunification, rights and realism:* Some political circles yearn for reunification of the two Korean states. They believe that, if only reunification could be attained, the human rights violations reported by the COI would be solved. However, short of dramatic

developments on the Korean peninsula, is there any realistic possibility of reunification of the Korean states without the “profound political and institutional reforms” recommended to DPRK by the COI, including the adoption of constitutional checks and balances upon the powers of the DPRK’s Supreme Leader and the Korean Workers’ Party and other changes (COI, 1220(a))? What evidence exists of any inclination on the part of DPRK to undertake such reforms when they have been repeatedly rejected, by words and action, before, during and after the COI investigation? In the absence of realistic steps to achieve Korean reunification, how can the possibility of that happening be more than a pipe dream, without any practical expectation of attainment? Are there any analogies from which the UN might explore the possibility of realistic, relatively small moves towards reunification in Korea? In its report, the COI strongly recommended the adoption of various forms of people-to-people contacts between individuals, families, students, professionals, institutions, sporting teams and civil society bodies (COI, 1220(n), (o), 1223 and 1224). These recommendations have been ignored by DPRK, despite offers by the ROK government to resume talks, family reunions, or humanitarian assistance to DPRK. Might these recommendations provide a potential pathway by which to build a ‘people-led process’ involving some peaceful avenues of reconciliation, step by step? What machinery is needed to translate these modest aspirations into action? People-to-people contacts would be essential to initiating a trust-building process.

5. *Person-to-person analogies and lessons:* How can people-to-people dialogue and relationships be initiated? Are there any lessons from the steps that led to reunification of the American Union after the US Civil War? What about the reunification of Germany in 1989? Are there less well researched such cases sufficiently analogous to the situation in Korea? Where is the best starting point? The warm reactions of the ROK and DPRK football teams and spectators at the Incheon Asian Games suggest that sport may provide a fruitful place to start.⁹ How can such contact at Incheon be made more than an accidental one-off event?

⁹Agence France Presse, ‘Asian Games: Top North Korean Leaders to Attend Closing Ceremony’, *NDTV Sports*, Last updated: 4 October 2014, Available at: <http://sports.ndtv.com/asian-games-2014/news/230881-asian-games-top-north-korean-leaders-to-attend-closing-ceremony>. See also: Yonhap News Agency, ‘North Korea Newsletter:

6. *Commitment to reunification in Korea:* In the absence of postal, telecommunications, internet, transport, media and other rudimentary contacts between the two Korean States, how can mutual respect and desire for reunification be built now, virtually from scratch? The ROK government has offered to invest in improving DPRK infrastructure, but could such investment be sustainable if DPRK were insistent on retaining its present political, constitutional and legal system, as its leaders insist they must do? Would the costs of reconciliation and reunification be prohibitive, as is sometimes predicted? Given the severe current weaknesses of the DPRK economy and infrastructure, estimates run to trillions of dollars. Reports of disillusionment (and, worse, indifference) amongst young citizens in ROK make the prospects of reunification, without reforms of the kind proposed by the COI (COI, 1220(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m – s)) almost impossible to contemplate and plan for. So long as DPRK commits or condones grave international crimes against its citizens (and severely punishes them for even possessing recordings of popular ROK television serials¹⁰) are not the changes necessary, as a practical precondition for reunification such as to make the possibility of that course wholly unrealistic? Or do they necessarily envisage a time frame that is intolerably prolonged and potentially dangerous?
7. *Creating a support group for dialogue:* How can an initiative to establish a framework for dialogue of DPRK with the outside world, including by the initiatives of UN member states that have historically enjoyed friendly ties with DPRK, be created (COI, 1225(h))? How could the support and assistance of such states (some of them identified in the HRC, GA and SC debates on the COI report) be converted into a genuine and useful follow-up to this COI recommendation? Who could launch such an initiative? Realistically, how could the UN play a catalytic role in that regard?
8. *From armistice to peace treaty:* What initiatives could realistically be taken, upon conditions that are conformable with the UN *Charter* and UN human rights law, to

338³, Last updated: 13 November 2014, Available at:

<http://english.yonhapnews.co.kr/search1/2603000000.html?cid=AEN20141112006200325>, for details of the relationship between the Incheon delegation visit and future engagement.

¹⁰ Cf Choe Sang-hun, “Illicit soap operas luring North Koreans”, *International New York Times*, January 26, 2015, 1, 3.

enlarge humanitarian assistance and technical aid to DPRK? (COI, 1225(i)). How could states parties to the Korean War take steps, and under what conditions, to convene a high level political conference to begin the moves to replace the current fragile armistice with an effective and final peace treaty that addresses all of the essential complaints and human rights violations alleged by the opposing parties to such a dialogue?

9. *Conference on abductions and separations:* How could an international conference on justice for all persons (and their families) who have suffered abductions in or after the Korean War be initiated? In the light of the unsatisfactory features of the follow-up to the undertakings given by DPRK's then Supreme Leader to Japan's Prime Minister Koizumi in September 2002 (COI, 924) how could a new initiative be designed that might have a chance of success? Having regard to the still unresolved issues in ROK, Japan and other nations, of forced abductions and prisoner of war retention, how could these longstanding festering wounds be brought to satisfactory and just outcomes, given the years that have passed since such separations occurred and the likely ages and health of any surviving persons?

10. *Nuclear security and human rights:* How could the human rights concerns contained in the COI's report take more fully into account the acute dangers presented to DPRK itself, its neighbouring countries and the populations thereof exposed to the extremely grave risks of accidental, mistaken or deliberate use of nuclear weapons? Or of the new DPRK missile delivery systems? Or of the DPRK's huge standing army? The risks of nuclear accidents or incidents themselves present great dangers to the human rights of all persons potentially affected. They were put to one side in the report of the COI on DPRK. But should they be treated as separate? Given that the dangers arise in partial consequence of the withdrawal of DPRK from the UN *Nuclear Non-Proliferation Treaty* and DPRK's development of an arsenal of nuclear weapons during a time when ROK was extending generous investment and assistance to DPRK, what confidence could ROK and other nations have in genuine negotiations by DPRK on the de-nuclearisation issue?

RIDDLE, MYSTERY, ENIGMA

Describing a serious challenge to building a bridge of understanding between United Kingdom and the USSR, Winston Churchill, in a broadcast in October 1939, described the latter as “a riddle, wrapped in a mystery, inside an enigma”. The same may now be said of DPRK.

In part, these features of DPRK’s remoteness are self-imposed attributes of a nation state that is cut off from most of the world at the very moment in history when information technology, global transportation and international challenges and problems have expanded exponentially to bring the world and its people into closer contact with one other.

The COI on DPRK produced a persuasive and compelling report. However, that is not enough. The international community must ensure action and follow-up. Countries with the interest and power to do so should address the list of recommendations contained in the concluding passages of the COI report (COI, 1211-225). Most of those conclusions and recommendations have been ignored or overlooked in political and media coverage and in international consideration of the COI report. Some of them exhibit a tension with the disclosures of human rights violations, ‘crimes against humanity’ and the consequential demands for immediate and effective accountability. This tension should be admitted and addressed. The COI’s recommendation on referral to the ICC attracted much international attention. In the immediate aftermath of the Security Council resolution on 22 December 2014, the time has come to shift somewhat the focus towards the other recommendations of the COI. Some of them may contain the seeds by which the international community, and the two Koreas, can reduce human rights violations, tensions and concerns in both practical and immediate ways and initiate a people-driven journey to ultimate reconciliation and reunification. But this should also include accountability for the grievous wrongs described in the COI report.