

“THE REPORT CREATED A SENSATION IN THE HRC”

Michael Kirby

- *Interview with retired Australian high court judge Michael Kirby •
on his role as chairman of the UN Committee of Inquiry
on human rights in the Democratic People’s Republic of Korea*

In this exclusive interview with Sur Journal, Michael Kirby discusses the Committee of Inquiry on human rights in the Democratic People’s Republic of Korea (the “COI on DPRK” or the “COI on North Korea”) of which he was chairman. He describes how the report created a sensation when it was tabled in the Human Rights Council (HRC) on the 17 March 2014¹. The unique methodology – discussed in detail below - used by Michael Kirby and his colleagues, Marzuki Darusman and Sonja Biserko, enabled the COI to gather material and document the serious human rights abuses that are taking place in Democratic People’s Republic of Korea (DPRK or North Korea), including crimes against humanity.

The Korean peninsula was governed as a united land for at least a thousand years until 1945 when it was divided by the successful allies in the Second World War after the defeat of Japan, which had been occupying Korea since 1911. The allies drew an artificial line across roughly the centre of the peninsula. The northern section was assigned to the Soviet sphere of influence; the southern section to the sphere of influence of the United States of America. The immediate post-war regimes that were established were both highly autocratic, leading to great tensions in the peninsula. These tensions culminated in 1950 when the northern forces attacked the south. The result was a devastating war, which caused tremendous individual and economic devastation in both parts of Korea. The communist regime in the North survived and the first supreme ruler of North Korea, Kim Il-sung, established a highly autocratic regime which failed to protect, and often deliberately violated, the human rights of its citizens. This trend continues to this day under the current supreme leader, and third member of the Kim dynasty, Kim Jong-un.

In 2013, after many years of international concern about reports of the human rights situation in North Korea, the HRC resolved to establish the COI, an HRC mechanism used to focus international attention in a particular country or area.

Kirby notes how the COI on North Korea is a very interesting case study with many lessons for the way the United Nations (U.N.) can more effectively address human rights problems. According to him, the COI's insistence on due process and fairness - even in the face of a regime such as North Korea - is the only way human rights issues should be handled. Ultimately, he says, this will result in more buy in with follow-up action more likely.

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Conectas Human Rights • The Office for the High Commissioner of Human Rights (OHCHR) has supported or deployed 50 international commissions of inquiry and fact-finding missions since 1992.² How does the COI on human rights in the DPRK stand out from the others, especially in terms of the methodology and the way in which the report was presented?

Michael Kirby • We did not expect the DPRK to cooperate with the COI, and it did not. Therefore, we faced the unique problem of not being able to visit the country and check the situation for ourselves. Accordingly, we had to gather testimony outside the country. We did not have any problem in getting witnesses. We advertised for them and received a very large number of people wishing to speak. There is a community of about 28,000 North Korean refugees in South Korea, from where most of the witnesses originated.

Witnesses were permitted to give their testimony without leading questions and with minimum intervention from the COI. One of the strengths of the report of the COI on DPRK is that on almost every page there are passages quoted from the transcript which tell the experience of the individuals. This adds to the power and vigour of the report, which I believe is a page-turner.

As a judge from a common law country, I felt comfortable with conducting the COI on DPRK using common law elements that were familiar to me – in particular transparency. This was particularly relevant to an inquiry into such a secretive place. An antidote to secrecy is transparency. My colleagues, Marzuki Darusman (Indonesia) and Sonja Biserko (Serbia), despite being from civil law backgrounds, agreed with this strategy and the inquiry was held in the most transparent way possible. This included filming public hearings, which - with the due protection of the identity of witnesses where that was necessary - were put online, together with transcripts both in the original language of either Korean or Japanese, and in English.

The U.N. was not at first particularly happy about the transparent procedure that we adopted. They said that unidentified people would try to disrupt our meetings, that there would be security risks and that this was not the way that COIs were normally conducted.

However, we persisted because not only does transparency help to convince the relevant community as to the integrity and fairness of the procedure, it also raises expectations that something will come out of it.

One of the problems with U.N. reports is that they can be difficult to read. In part, that may arise from the fact that officials are writing them with the psychology of officials and sometimes in languages other than their native tongue. Although the report of the COI on North Korea was drafted by our secretariat, I reviewed every word of the report. As the only native English speaker on the COI, I took the responsibility to make sure that the language was comfortable, that it was simple and that it communicated directly to a non-expert what problems we were addressing.

The question also arose as to whether we should provide an advanced copy of its report to authorities in the DPRK. This procedure would have been followed in the case of a common law inquiry, particularly where the subject of the inquiry had not attended the inquiry. We therefore sent a copy of our report to the supreme leader via the DPRK's mission in Geneva. In the covering letter, I warned the supreme leader that he himself might be liable for the human rights abuses revealed in the report. This offered him the opportunity and the stimulus to respond to us. He did not respond. Some officials of the U.N. said that had never been done before. However, to us it appeared to be a basic requirement of due process.

These are some of the features that were distinctive of the COI on DPRK. I was very interested in the methodology. It is important. If you get your methodology right, it is more likely that you will produce a convincing report that will actually help to change things. My hope is that it will be possible to get the report published by a private publisher because the DPRK and its problems have not disappeared from the international scene. I believe that the COI report is still relevant and it should be available as widely as possible.

Conectas • Is there anything you would have done differently?

M. K. • I am sure there are many things that we could have done differently. We offered North Korea the opportunity to have a representative before the COI. That was negotiated with the government of South Korea and it was itself an unusual step in the relationship between North and South Korea. Ultimately the DPRK declined the offer. Therefore, if we had our time over, we might have pursued a procedure to ensure that there was an advocate for the DPRK – even if that meant appointing one ourselves.

Conectas • The COI report was unwavering in its condemnation of the DPRK regime, describing how “systematic, widespread and gross human rights violations” have been and are being committed by the DPRK, its institutions and its officials – including crimes against humanity – and recommended that the State be referred to the International Criminal Court (ICC).³ Despite Pyongyang's total rejection of the COI and its findings, after the report's

publication North Korea engaged for the first time with the Universal Periodic Review (UPR) and also embarked on various diplomatic initiatives at the U.N. and European Union.⁴ However, after the U.N. General Assembly referred the Commission's findings to the Security Council in December 2014, Pyongyang renounced any further cooperation with U.N. human rights mechanisms.⁵ How much of these diplomatic manoeuvres do you attribute to pressure created from the report and how do you address the criticism that - by now refusing any further cooperation with U.N. human rights mechanisms - the report may have had the impact of further isolating North Korea?

M. K. • It is clear that the report created a sensation in the HRC and that put pressure on the DPRK to respond. Therefore, the time sequence suggests that the response was the product of the report. The consequence was that North Korea embarked on a so-called charm offensive in order to try to dissuade the organs of the U.N. from pursuing the report and, in particular, pursuing it in any way that would be critical of the supreme leader or referring it to the Security Council. In all its endeavours, the DPRK failed because the international community was properly outraged and alarmed by the content of the report. The steps that were taken by the DPRK, nevertheless, were to be welcomed. It had been the only country in the world that had been submitted to UPR and that asserted that there were no human rights issues that needed resolving. None at all.

Once our report was published, the DPRK took a more active role in the second tranche of the UPR. It agreed that there were a significant number of points - for example, the public execution of enemies of the regime - which should be considered against human rights standards. All this was a good development and certainly to be welcomed. But when it became clear that the matter was going to be referred to the Security Council and when the Security Council by procedural vote placed the matter on its agenda - twice - the DPRK ceased to cooperate.

The COI was not a political body; it was an independent commission to make an inquiry. Our obligation was not that of diplomats trading and negotiating favours in exchange for geopolitical objectives. Our obligation was to make an accurate, fair and principled investigation and report. That is what we did. One does not make progress in the subject of human rights by ignoring or going softly on crimes against humanity. Therefore, it is just inconsistent with such serious crimes against the international legal order to suggest that the crimes, although appearing in the testimony, should have been suppressed or kept to ourselves in case we isolated the DPRK. The country was already isolated - it isolates itself. But it does not isolate itself from the U.N., of which it is a member, nor from the human rights treaties and the Universal Declaration of Human Rights by which it is bound. Those are protections for the people of the DPRK who look to the U.N. We did our duty in revealing the situation. In due course, when the human rights situation in the DPRK is improved, it will only be because of the shocking way in which the people of the DPRK have been treated and which was brought to world attention by the COI.

Conectas • One of the most shocking findings of the COI report is the treatment of North Korean refugees. Can you explain to our readers the specific challenges that this group of people face?

M. K. • One of the most powerful chapters of the report is the chapter dealing with food and the consequences of the great famine – the so called “Arduous March” – in the mid-1990s. Large numbers of the population starved to death. The exact numbers are a matter of controversy, but it was no fewer than 300,000 and may have been more than a million, from a population of 23 million. Therefore, there was widespread suffering. A consequence of that was that large numbers of people tried to flee to China. At the time, the north-eastern border of China was not strongly protected in the winter. Many people, particularly women, from the DPRK crossed the iced rivers and got into China. They suffered great abuses in China - in some cases, human trafficking, but in many cases, very difficult working and living conditions. Many of them only went to make enough money and to secure means to support their families before going back to the DPRK.

The ethos of the DPRK is one of racial exclusivity. Therefore, there was great prejudice towards anyone who came back to the DPRK, particularly if the returnee had had children by Chinese fathers. In one instance, a witness told us that she had been forced to drown her child in a bucket because the father of the child was Chinese. The people who came back from China were subjected to cruel punishments and often imprisoned in detention camps. The Chinese authorities took steps to cooperate with the DPRK in returning the refugees. The COI cautioned China that doing so was inconsistent with China’s obligations under both the Refugee Convention and its Protocol. China responded that these were not refugees, but economic migrants. However, the COI insisted that once people had fled to China, even though they might have originally done so for economic reasons, given the knowledge of the conditions in North Korea, they were technically refugees and were therefore entitled to protection as refugees. China did not agree with that position.

Conectas • The report says how “the international community must accept its responsibility to protect the people of the DPRK”.⁶ How and to what extent do you envisage this responsibility being manifested in the short and longer term? Is there any evidence that this responsibility has already been recognised?

M. K. • The report contained many recommendations for the U.N. One of them has been implemented, namely the establishment of a field office in Seoul, South Korea. It collects testimonies and in that way, it is continuing the work that the COI started. The report also recommended that the matter should be referred to the Security Council in order that it could invoke its jurisdiction under the Rome Statute and refer the case of the DPRK to the ICC. The first step in that process has been achieved by the reference of the matter by the General Assembly to the Security Council - a step that was unusual and, in human right terms, had

only been taken once before in the case of Myanmar (Burma). This decision was reaffirmed in December 2015 by a similar vote to bring the matter before the Council. Consequently, in February 2016, the Security Council unanimously adopted resolutions imposing much stronger sanctions on the DPRK following the fourth nuclear and missile tests.

The question is whether any of this is a vindication of the contents of the COI report. I can not answer what was in the minds of the Member States of the Security Council at any of these steps along the way, but my own belief is that the report of the COI opened a space which would not have been there if the international community had not known of the peculiarity of the situation in the DPRK and the fact that crimes against humanity had occurred and were screaming out for a response.

The Security Council has not yet referred the case, as we recommended, to the ICC. However, that may well still occur in the future, particularly if the DPRK continues to act in its belligerent, hostile and warlike manner. At the end of the Second World War the international community, in establishing the U.N., resolved that never again would the world turn away from crimes against humanity. Crimes against humanity are not just ordinary human rights violations, of which there are millions in our world. These are the gravest form of international crimes, which together with genocide and certain war crimes, call out for the conscience of humanity to respond. And these are the crimes that are recorded in the report of the COI. I believe that the international community will continue to put pressure on the DPRK and will ultimately hold to account those who are responsible for the crimes against humanity that are proved to have occurred.

Conectas • What role should China play in efforts to improve human rights in the DPRK and how concerning is the recent evidence of a cooling of bilateral relations between the DPRK and China in achieving this?

M. K. • China is the clue to progress on the DPRK. China is the major trading partner of the DPRK whereas the Russian Federation now has relatively small economic interests. That makes me hopeful that China will continue to search for ways to deal with the problem on its doorstep. Obviously, China must be deeply concerned both about the dangers to its own environment and its own political arrangements in the northeast of its country. But also about the terrible weapons that the DPRK has and the somewhat unstable governmental system that they have which makes the possible accidental or mistaken use of those weapons a distinct reality that China has to cope with.

All of this means that it is likely that there will to be an evolution of China's position. However, various indications exist that North Korea has damaged the relationships it enjoyed with China. The murder of Jang Song-Thaek, the uncle of the supreme leader, in December 2013 was an example of this. Following the death of Kim-Jong II, he had reportedly urged that the DPRK should move towards a China-style improvement of its economy and its internal politics.

Quiet diplomacy with China, including secret discussions that are not under the blaze of international scrutiny, will be a way forward to leveraging pressure on DPRK to improve the human rights situation.

Conectas • Looking more broadly at the foreign policy of other Global South countries who retain representation in Pyongyang (including, amongst others, Brazil, Indonesia, India and Nigeria) – what should the role of these countries be and how can their diplomatic representatives in the country better assist in improving the human rights situation?

M. K. • One of the disappointing features of the response in the U.N. to the COI report was the non-engagement of African and BRICs countries, which have also themselves felt the pain of human rights deprivations. India, for example, repeatedly abstained in relation to the consideration of the report in the General Assembly. The vote in the General Assembly was 120 to 20 with 55 countries abstaining. These abstentions included many of the leading countries of the developing world which have had direct experience with human rights abuses.

A lot of the countries of the developing world continue to live in the dream world of non-alignment. They have not adjusted their international responses to the world since 1989. This was a revelation to me as I watched the U.N. debates. However, it must never be forgotten that 120 countries - a huge vote on a human rights issue - voted for the report of the COI and against the charm offensive of the DPRK. Likewise, in the Security Council, 11 and later 10 Member States voted for action on a procedural vote. And ultimately in February 2016 the Council unanimously voted for stronger sanctions.

Conectas • Were you able to access any civil society organisations in North Korea during the COI – for example that are operating covertly? If so, how are they organised and what is their role in focusing attention on the regime?

M. K. • A surprising feature of our inquiry was that there was no evidence of an organised civil society in the DPRK. It may exist, but it would have to be extremely cautious and covert because the country is a violent and cruel place for anyone who stands against the regime.

Even in South Korea, a surprising feature is the failure of a civil society organisation to emerge representing the many refugees who have fled there. The ostensible reason given for that is that Korea is constitutionally one country, the refugees have joined the “real Korea” and therefore they do not need a separate civil society. But it is perhaps the residual consequence of living in such an oppressive, totalitarian regime that, even in the high levels of civic freedom in South Korea, the refugees from the DPRK have not formed civil society organisations of any significance.

Despite this, the COI had constant dialogue with civil society in other U.N. countries. Civil society played an important part in the moves that led to the unanimous decision of

the HRC to create the COI in the first place. Civil society plays a very important role in the U.N. human rights machinery. It cajoles, it stimulates and it provokes actions to protect principles when inertia or economic interests will sometimes lead states to do nothing.

Conectas • Going forward, how can our readers mobilise to assist in improving human rights in North Korea?

M. K. • We all have to go back to the principle of the Charter of the U.N. Many in Australia or South America will say “what has the DPRK got to do with us? This is a far away country and there is nothing much we can do to affect it, and therefore, we should mind our own business and do nothing.” That is not the principle of the Charter. The principle of the Charter, stimulated by the tremendous sufferings of the Second World War and by the horrors of the crimes against humanity in the death camps and provoked by the mushroom clouds of the nuclear bombs over Japan, emphasised that we are all one species, living on the one tiny and rather insignificant planet. We have to search for, and uphold, common ground and that common ground includes the fundamental dignity and human rights of all people, including the people in North Korea.

NOTES

1 • Korea can be read at <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx>.

2 • “Commissions of Inquiry And Fact-Finding Missions On International Human Rights And Humanitarian Law - Guidance And Practice,” Office of the United Nations High Commissioner for Human Rights (OHCHR), 2015, accessed May 30, 2016, http://www.ohchr.org/Documents/Publications/Col_Guidance_and_Practice.pdf, p. 114.

3 • United Nations General Assembly, A/HRC/25/63, “Report of the commission of inquiry on human

rights in the Democratic People’s Republic of Korea,” February 7, 2014, para. 24 and 94(a).

4 • See for example: David Hawk, “North Korea Responds to the UN Commission of Inquiry.” 38 North, October 16, 2014, accessed May 30, 2016, <http://38north.org/2014/10/dhawk101614/>.

5 • See for example: Christine Chung, “Moving Forward on North Korean Human Rights.” 38 North, July 27, 2015, accessed May 30, 2016, <http://38north.org/2015/07/cchung072715/>.

6 • United Nations General Assembly, A/HRC/25/63, para. 86.

Interview conducted in May 2016 by Oliver Hudson (Conectas Human Rights).

**MICHAEL KIRBY** – *Australia*

Michael Kirby retired from the High Court of Australia in 2009, at the time being the country's longest serving judge and having held twice the position of Acting Chief Justice of Australia. Aside from being chairman of the United Nations (U.N.) Committee of inquiry on human rights in the Democratic People's Republic of Korea (2013-14), he has held a series of high profile national and international appointments, including president of the International Commission of Jurists (1995-98) and the U.N. Special Representative for Human Rights in Cambodia (1993-6). He is currently a member of the UNAIDS Reference Group on HIV and Human Rights (2004 -) and serves as Editor-in-Chief of The Laws of Australia (2009 -). In December 2015 he was appointed by the U.N. Secretary-General to be a member of the U.N. High Level Panel on Health Technology Innovation and Access.

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