

ARTICLE

NORTH KOREA ON THE BRINK OF THE BIDEN ADMINISTRATION: HUMAN RIGHTS, PEACE, AND SECURITY

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COMMENCEMENT OF THE BIDEN ADMINISTRATION

On January 20, 2021, Joseph B. Biden was elected as President of the United States of America, succeeding Donald J. Trump. From 2009 to 2016, President Biden was closely involved in the United States' response to the many challenges presented by North Korea to the international community as 47th Vice President of the United States under President Obama. Then, before serving as Vice President, President Biden served on the U.S. Senate for thirty-six years. He had been a long-time member of the U.S. Senate Foreign Relations Committee for twelve years, eventually becoming its Chairman. He also chaired the Senate Judiciary Committee from 1987 to 1995, when it addressed many contemporary challenges for universal human rights. Because the years of his service as Vice President and in the Senate coincided with significant challenges to the world order by North Korea, President Biden brings to the office of President substantial experience in the interplay respectively of the security and human rights challenges posed by North Korea.¹

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

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1. For more information on U.S. President Biden, see, e.g., *Joe Biden: The President*, WHITE HOUSE, <https://www.whitehouse.gov/administration/president-biden/> [<https://perma.cc/P4K8-LQLZ>]; *Joe Biden*, HISTORY (Dec. 16, 2009), <https://www.history.com/topics/us-presidents/joe-biden> (last updated Jan. 20, 2021) [<https://perma.cc/A7WS-ZR38>].

during any of their three brief meetings. While ambitious and in some respects bold, the initiatives of President Trump on North Korea can only be judged a failure. No substantial progress was made towards denuclearization by North Korea or the destruction or surrender of its nuclear arsenal. At the same time, while modest success was achieved on the recovery from North Korea of some military remains from the Korean War, no progress was made to improve the conditions of human rights of the people of North Korea. Nor were those conditions acknowledged as a problem or even mentioned in the record of the three meetings that took place in 2018-2019.²

The newly confirmed Secretary of State of the United States, the Honorable Antony Blinken, came to office after extensive experience in the U.S. State Department. Speaking at his confirmation hearing before the U.S. Senate Foreign Relations Committee in January 2021, Secretary Blinken acknowledged that North Korea, with its dual challenges of security and human rights, had been a “hard problem that has plagued administration after administration.”³ He declared that it had “not gotten better.”⁴ He undertook to consider unspecified options designed to increase pressure on North Korea to come to the negotiating table. However, he cautioned against embracing “overly ambitious goals such as completely denuclearizing North Korea” within the term of the Biden Administration.⁵

The emphasis by President Biden and his Administration on the strengthening of engagement with multilateral institutions and the restoration of human rights and democracy as the global objectives of U.S. foreign relations appear to signal a return to many of the strategies adopted during the Obama Administration and earlier.⁶ For example, in his first teleconference with President Xi Jinping of China, President Biden referred to human rights concerns, giving a measure of encouragement to those looking for the restoration of attention to human rights in North Korea in the international agenda.⁷ Furthermore, this return to a more

2. For more on the meetings between President Donald Trump and Kim Jong-un, see, e.g., RAMON PACHECO PARDO, *NORTH KOREA—US RELATIONS: FROM KIM JONG IL TO KIM JONG UN* (2d ed. 2020); Leif-Eric Easley, *Trump and Kim Jong Un: Climbing the Diplomatic Ladder*, 16 N. KOR. REV. 103 (2020); Mark E. Manyin, et al., *Diplomacy with North Korea: A Status Report*, CONG. RES. SERV. (Jan. 12, 2021); Mark E. Manyin et al., *Diplomacy with North Korea: A Status Report*, CONG. RES. SERV. (June 19, 2020); Mark E. Manyin et al., *Diplomacy with North Korea: A Status Report*, CONG. RES. SERV. (Jan. 22, 2020).

3. Jeongmin Kim, *Biden's Secretary of State Nominee Vows to 'Increase Pressure' on North Korea*, NK NEWS (Jan. 20, 2021), <https://www.nknews.org/2021/01/bidens-secretary-of-state-nominee-vows-to-increase-pressure-on-north-korea/> [<https://perma.cc/8BKE-N4QA>].

4. *Id.*

5. *Id.*

6. Nick Bisley, *Biden will place Asia at the Centre of foreign policy – but will his old-school diplomacy still work?*, THE CONVERSATION (Nov. 11, 2020, 2:03 PM EST), <https://theconversation.com/biden-will-place-asia-back-at-the-centre-of-foreign-policy-but-will-his-old-school-diplomacy-still-work-148095> [<https://perma.cc/KY4U-R87P>].

7. Natasha Bertrand, *Biden Confronts China's Xi in First Call*, POLITICO (Feb. 10, 2021,

orthodox and systematic approach to diplomacy and negotiation was also emphasized by the new U.S. representative at the United Nations, Ambassador Linda Thomas-Greenfield. She affirmed that the United States believed that North Korea “constitutes a serious threat to our peace and security and to the globe.” Speaking for the first time as chair of the U.N. Security Council, Ambassador Thomas-Greenfield foreshadowed a return to “principled diplomacy” that would collaborate with key allies. While many such allies welcomed the return of attention to human rights, believing that ignoring that objective would only delay achievements on security matters, Ambassador Thomas-Greenfield’s remarks drew predictable fire from the U.N. representatives of North Korea. They warned against “politicization and internalization” at what they described as actions targeted at “armed invasion and regime change.”⁸

The early signs from the leaders of the Biden Administration suggest that the strategy of observing in complete silence on human rights issues in North Korea has come to an abrupt conclusion. Where that change will lead is contested. Still, on the brink of the Biden Administration, it is appropriate to review how the U.N. Human Rights Council became involved in scrutinizing the abuses of human rights issues in North Korea. Additionally, how that topic might be restored to the global agenda, given that, in the immediate past, even cautious reference to it has substantially closed down the dialogue with North Korea, including on security issues.

This Article, in Part II, will describe how the U.N. Human Rights Council came to establish its Commission of Inquiry on North Korea (the “COI”); how its investigations were conducted; the findings that it made at the conclusion of its inquiry; and what might be regarded as the achievements and failures of the COI after its report was delivered. Next, Part III will briefly outline the initiatives in South Korea, or the Republic of Korea (“ROK”), and the effect of its decision to take a step back from the situation in North Korea. Finally, in Part IV, I will suggest some components of the road map for the future, identifying options that are open to the United Nations, as to the Biden Administration, to make the most of this opportunity to tilt the United Nations back in the direction of substantive progress on security without ignoring the urgent need for improvements on human rights issues.

9:36 PM), <https://www.politico.com/news/2021/02/10/biden-xi-jinping-phone-call-468544> [<https://perma.cc/WUU6-MGE4>] (“Biden confronted Xi about China’s ‘coercive and unfair economic practices, crackdown in Hong Kong, human rights abuses in Xinjiang and increasingly assertive actions in the region, including toward Taiwan.’”).

8. Jeongmin Kim, *North Korea is a ‘Serious Threat’ to Peace and Security: US Ambassador to the UN*, NK NEWS, (Mar. 2, 2021), <https://www.nknews.org/2021/03/north-korea-is-a-serious-threat-to-peace-and-security-us-ambassador-to-the-un/> [<https://perma.cc/BS6X-9LJZ>].

THE COMMISSION OF INQUIRY

I. Creation of the Commission of Inquiry

The United Nations Human Rights Council (the “HRC”) established human rights violations in the Democratic People’s Republic of Korea (North Korea) (the “DPRK”) on March 21, 2014.⁹ Unusually, the resolution was adopted without a demand for a vote. The international community was already deeply concerned about the widespread reports of human rights abuses in North Korea. It was disturbed by the repeated refusal of North Korea to cooperate with a Special Rapporteur who had been appointed earlier to investigate human rights violations in DPRK. It was also concerned about the failure of North Korea to accept any of the 167 recommendations made by the working group when it first underwent the procedure of Universal Periodic Review (the “UPR”) in 2009. This suggested exceptional arrogance on the part of North Korea and indifference to its obligations as a Member State of the United Nations. Establishing a commission of inquiry constituted an enhancement of the institutional reaction of the HRC. It reminded the reclusive Member State that universal human rights, justice, and respect for peace and security were among the core functions of the United Nations, laid down in its Charter.

I was appointed to chair the COI. The Special Rapporteur, Mr. Marzuki Darusman of Indonesia, and Ms. Sonja Biserko, a human rights expert from Serbia, were appointed as the other two members. As participants from different countries, backgrounds, and experiences, the appointees brought different approaches to our task. We immediately agreed that it was imperative that the COI should work transparently; that it should conduct public hearings; and that it should be open to the media, to scholars, and to civil society. North Korea needed to face the uncomfortable reminder of worldwide scrutiny into its practices to the extent established by the available evidence.

The result was the conduct of public hearings and the recording of testimony at sessions held in Seoul, Tokyo, London, and Washington, D.C. Although North Korea ignored the COI’s requests for admission to their country, we had no difficulty securing evidence. In South Korea alone, more than thirty thousand refugees had fled from the conditions in the North. Many were willing to testify openly about their experiences. For the most part, their evidence was placed online.¹⁰ Thus, it was immediately made available to the world community. Unfortunately, it was not accessible to the people of North Korea because access to the internet and global news media was restricted to the privileged elites who supported the regime.

9. U.N. HRC, 22d Sess., U.N. Doc. A/HRC/22/2 (Nov. 24, 2017). See Human Rights Council Res. 22/13 (Apr. 9, 2013). Note, this Article will use “DPRK” and “North Korea” interchangeably.

10. Commission of Inquiry on Human Rights, *Public Hearings (Programs, Videos, Transcripts)*, U.N. HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/PublicHearings.aspx> (last visited Apr. 28, 2021).

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

As the COI was preparing its final report, the news came in from North Korea that the second most powerful man in the country, Jang Song-thaek (an uncle by marriage of the Supreme Leader, Kim Jong-un), had been dragged out of a meeting of the Politbureau, summarily tried and executed.¹¹ A similar fate was later to befall the half-brother of the Supreme Leader, Kim Jong-nam. He was disposed of by the application of deadly nerve agents to his person at the Kuala Lumpur International Airport.¹²

II. Findings of the COI

The COI delivered its report on time, within budget, and unanimously. It addressed the nine points contained in its mandate.¹³ The COI had been provided with an excellent secretariat.

The HRC had expressly asked the COI to carry out its inquiry “with a view to ensuring full accountability, in particular for crimes against humanity.”¹⁴ The COI’s conclusions were stark:

Systematic, widespread, and gross human rights violations have been and are being committed by [North Korea], its institutions and officials. In many instances, the violations of human rights . . . constitute crimes against humanity. They are not mere excesses by the State: they are essential components of a political system that has moved far from the ideals on which it claims to be founded. The gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world.¹⁵

Amongst the horrors reported in the striking language of witnesses and victims from North Korea were:

- (1) Forced abortions of female escapees returned from China to North

11. Commission of Inquiry on Human Rights, Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea, ¶ 180, U.N. Doc. A/HRC/25/CRP.1 (Feb. 7, 2014) [hereinafter COI Report].

12. See *Kim Jong-nam was Assassinated, Say U.S. and South Korean Officials*, GUARDIAN (Feb. 15, 2017, 2:31 AM EST), <https://www.theguardian.com/world/2017/feb/15/kim-jong-nam-assassinated-south-korea-us-officials> [<https://perma.cc/JF2M-RPB7>].

13. See *id.* ¶ 13.

14. *Id.* ¶¶ 11ff, 15(c). See also U.N. HRC, 25th Sess. at ¶ 74, U.N. Doc. A/HRC/25/63 (Feb. 7, 2014).

15. *Id.* ¶ 1211.

Korea and the forced drowning of infants on the insistence of authorities;¹⁶

- (2) Starvation rations in the many detention camps that housed generations of suspected enemies of the state, resulting in the daily removal of the emaciated bodies of these victims to be used for fertilizer; and¹⁷
- (3) Public executions of suspected 'hostile classes,' to which school children and other citizens were brought to watch, inferentially derived the desired message about the price extracted for disloyalty to the regime.¹⁸

Furthermore, the COI described many violations in the prison camps; torture and inhuman treatment; arbitrary arrest and detention; discrimination and denial of basic human rights; violations of freedom of expression; controls on individual movement; enforced disappearances, including abductions of foreign nationals from their homelands (including Japan); and almost total denial, outside the capital, of freedom of religious worship. Nevertheless, the COI did not find that the crime of genocide was proven due to the narrow definition of 'genocide' in the *Genocide Convention* of 1948.¹⁹ However, countless other serious human rights abuses were recorded. Some of them were found to justify classification as "crimes against humanity:"²⁰ a crime of violence so horrifying that it "shocks the conscience of mankind."

The COI identified individual agencies liable for personal and institutional accountability. These included under the "command principle," the liability of the State Security Department, the Ministry of People's Security, the Office of the Prosecutor, the Korean People's Army, and the Workers' Party of Korea. In addition, the possibility was identified that the Supreme Leader—more recently designated the general secretary of the Party—could be liable as a person who, having the power to prevent or avoid crimes against humanity, allowed them to happen unrestrained on his watch. When the draft COI report was sent to the North Korean Mission in Geneva, an express warning was included about this form of possible personal liability of Kim Jong-un. Specifically, the COI expressly recommended that its report be placed before the Security Council so that it could "refer the situation in [North Korea] to the International Criminal Court [the "ICC"] for action in accordance with [its] jurisdiction."²¹ The COI also recommended that the U.N. Security Council should adopt "targeted sanctions against those who appear to be most responsible for crimes against humanity."²²

When the COI report was delivered to the HRC on March 17, 2014, it was

16. *Id.* ¶ 807ff, ¶ 1054ff, ¶ 1105ff.

17. *Id.* ¶¶ 1044-45.

18. *Id.* ¶ 827ff.

19. *Id.* ¶¶ 1155-59.

20. *Id.* ¶¶ 1179-83.

21. COI Report, *supra* note 10, ¶ 1225(a).

22. *Id.*

denounced by North Korea. Still, North Korea did not invite the COI or the High Commissioner for Human Rights or some trusted nominee to enter and verify or contradict its critique; rather, attempts were made to delay or stall action on the report. Overwhelmingly, these attempts failed. Nevertheless, with strong supporting votes, the report was received successively by the HRC and the U.N. General Assembly. Moreover, unusually for a human rights report, the COI report helped to stimulate action by the Security Council under a procedural motion concerned with security. A procedural motion was not subject to the veto of the five permanent members, i.e., China, France, Russia, the United Kingdom, and the United States.²³ The situation in North Korea thus repeatedly appeared on the Security Council's agenda from 2014 to 2017; however, it was not taken up in 2018. In 2019, the United States deprived the annual procedural resolution of the necessary majority by failing to vote for the Security Council's agenda item on North Korea. Inferentially, this was because it was considered to cut across President Trump's forlorn strategy to remain silent about human rights in North Korea, in the hope that this approach would secure progress on a "deal" for dismantling North Korea's rapidly growing stockpile of nuclear weapons and intercontinental ballistic missiles.

The futility of this strategy of appeasement was made clear by the sudden termination of the second summit meeting between Kim and Trump at Hanoi on February 27-28, 2019. Throughout his flattery and declarations of bromance, President Trump never acknowledged or appeared to recognize the inseparable links between securing peace and security in Korea and observing fundamental human rights in North Korea. It is to be hoped that President Biden will not make this mistake.²⁴ The early announcement by Secretary of State Anthony Blinken that he is considering the re-appointment of a United States ambassador for human rights in North Korea suggests the welcome return to a critical strategy observed by the United States until the election of Donald Trump.

III. Accomplishments of the COI

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

A. Hearing Complaints

The COI allowed complaints to be heard. The COI's methodology of transparency, publicity, and openness in evidence gathering and media engagement gave many former citizens of North Korea, who had fled abroad, the

23. Michael Donald Kirby, *The United Nations report on North Korea and the Security Council: Interface of Security and Human Rights*, 89 AUSTL. L.J., 714, 724-725 (2015). *See also* U.N. SCOR, 7353d mtg., U.N. Doc S/P.7353 (Dec. 22, 2014).

24. *Cf.* Timothy Garton-Ash, *The Future of Liberalism*, PROSPECT MAGAZINE (Dec. 9, 2020), <https://www.prospectmagazine.co.uk/magazine/the-future-of-liberalism-brex-it-trump-philosophy> [<https://perma.cc/R8AA-MQXG>].

right for the first time to speak in a public and official forum, to complain about, and denounce, the deprivations of their basic rights. Their voices were silenced in North Korea. Nevertheless, they were heard and publicized by the COI in the global media and on the internet.²⁵

B. Regional Office

As recommended by the COI, a U.N. “field office” was established in Seoul, South Korea. This field office will continue the task begun by the COI of receiving and recording the complaints of human rights abuses by knowledgeable witnesses. These continued to be recorded in a way potentially suitable for ultimate use in preparing prosecutions. They also formed part of the historical archives of this dark chapter in the history of the Korean people.²⁶

C. SR’s Ongoing Work

The Special Rapporteur on North Korea (the “SR”) continues to be appointed by the HRC. He delivers his regular reports, aiming to hold North Korea and the other U.N. Member States accountable for their actions, where human rights concerns can be proved.²⁷ In this sense, the SR and the HRC fulfill, in part, the duty of the international community where the country in question is itself in default. In that event, the global community steps in to provide accountability where the alleged offender has failed. As the COI pointed out in its report, accountability is not limited to the bringing of prosecutions before the ICC or elsewhere. It involves submitting wrongdoers to public assessments by U.N. bodies and the international community through the global media.

D. People with Disabilities

There has been an acknowledgment of improvement since 2014 in the North Korean treatment of the human right of the particular category of people living with disabilities. In May 2017, after years of criticism and non-cooperation, North Korea consented to the first visit by a U.N. expert on human rights, appointed by the HRC, namely the SR on People with Disabilities. The COI had earlier criticized the disadvantages of citizens in North Korea established by the evidence based on the status and arbitrary classification, including disabilities.²⁸

25. See *Public Hearings*, *supra* note 10.

26. See *New UN Office Opens in Seoul to Monitor Human Rights Issues in DPR Korea*, U.N. NEWS (June 23, 2015), <https://news.un.org/en/story/2015/06/502362-new-un-office-opens-seoul-monitor-human-rights-issues-dpr-korea> [<https://perma.cc/U9DP-GNKB>].

27. The most recent report of the SR was delivered to the HRC on March 1, 2021. See Thomàs Ojea Quintana (Special Rapporteur), *Report of the Special Rapporteur on the Situation of Human Rights in the DPRK*, U.N. Doc. A/HRC/46/51 (Mar. 1 2021).

28. COI Report, *supra* note 10, ¶¶ 321-32.

E. Encouraging Cooperation

Further improvements in law and practice on the part of the DPRK may be noted that encourage its cooperation with the United Nations. During its inquiry, the head of the mission of the Russian Federation in Geneva urged the COI to acknowledge any improvements disclosed in the handling of particular human rights.²⁹ This has been done. However, in truth, these improvements have been few and generally minor. The belated and limited engagement of North Korea with UPR cannot be allowed to overshadow the fact that such cooperation was the obligation of North Korea as a U.N. Member State. The international community cannot settle and be relieved to secure any degree of cooperation that it acknowledges trivial advances and leaves untouched the basic attitude of denial of rights and international non-cooperation that remains firmly in place. There are millions of human lives at stake.

F. Military Remains

Following the initial meeting of President Trump and Kim Jong-un in Singapore on June 12, 2018, there were some cooperative gestures between military forces on both sides of the De-Militarised Zone (the “DMZ”) for the return of human remains of deceased members of the military forces killed during the Korean War 1950-3. Cooperation between military personnel was reported to be professional and smooth, if relatively limited and specialized. Substantially, Cooperation affecting living persons is much more limited than in respect of the remains of dead military personnel.

G. International Media

Following the COI report and recommendations, the BBC restored its limited Korean language service to Korea.³⁰ Additionally, Voice of America and other international broadcasters have attempted to afford access to the Korean language audience on the Peninsula.³¹ Despite this, they continue to face serious technical

29. Ambassador Zbigniew Czech (Permanent Representative of Poland to the United Nations in Geneva), *U.N. HRC, 46th Sess., Joint Statement on the Deteriorating Situation of Human Rights in Russia*, U.S. MISSION INT’L ORGS. IN GENEVA (Mar. 12, 2021), <https://geneva.usmission.gov/2021/03/12/joint-statement-on-the-deteriorating-situation-of-human-rights-in-russia/> [<https://perma.cc/P8K7-K6FS>].

30. *BBC Launches Korean News Service*, BBC (Sept. 25, 2017), <https://www.bbc.com/news/world-asia-41389030> [<https://perma.cc/2WYL-CHEM>]. See also Leo Byrne, *BBC Launches Korean Language Service Covering North Korea*, NK NEWS (Sept. 25, 2017), <https://www.nknews.org/2017/09/bbc-launches-korean-language-service-covering-n-korea/> [<https://perma.cc/54M3-9ASC>].

31. See U.S. Agency for Glob. Media, *Audience and Impact: Overview for 2019*, at 1-6, 14, https://www.usagm.gov/wp-content/uploads/2019/11/2019-USAGM_audience-005.pdf [<https://perma.cc/3F7S-L2HU>].

impediments for broadcasts to the people of the North.³²

H. The SR's Flexibility

The ongoing work of the HRC on UPR, of the SR on Human Rights in North Korea, and some other U.N. agencies have stayed flexible and continued their efforts since the delivery of the COI report in 2014. Even though North Korea's cooperation with the Office of the High Commissioner of Human Rights has been minimal, and engagement is usually reluctant and hostile.

IV. Shortcomings of the COI

As against the instances of success in the North Korean responses to the United Nations' efforts above, to improve the human rights situation disclosed by the COI report, there have been many shortcomings.

A. Nuclear Weapons and Human Rights

North Korea ratified the U.N. *Non-Proliferation Treaty* in 1985, but this did not include negotiating a safeguard agreement until 1992.³³ That measure of non-compliance was reported to the U.N. Security Council, which put in motion North Korea's withdrawal from the NPT. There followed underground nuclear tests, on and off assurances of closing down the relevant facilities, and promises of cooperation. Nonetheless, nuclear weapons tests by North Korea were conducted underground in 2006, 2009, and 2013.³⁴ These became more concerning with the proof of the faster than expected development of missile delivery systems, expanding them to ICBMs in 2017.³⁵ Despite intermittent assurances of non-abuse by North Korea, the Security Council voted for a succession of increasing sanctions against North Korea—itsself a reassuring sign of international common ground. However, there have been breaches of this U.N. sanctions regime, especially reportedly by China, which has tended to be increasingly protective of North Korea as an ally.³⁶ The substantially unaccountable and totalitarian

32. *See id.* at 16, 20.

33. Treaty on the Non-Proliferation of Nuclear Weapons, Mar. 5, 1970, 729 U.N.T.S. 161 [hereinafter NPT]. Non-parties are India, Israel, North Korea, Pakistan and South Sudan. *Id.*

34. *See* Chico Harlan, *In North Korea, Seismic Activity Detected Near Nuclear Test Site*, WASH. POST (Feb. 12, 2013), https://www.washingtonpost.com/world/asia_pacific/in-north-korea-seismic-activity-detected-near-nuclear-test-site/2013/02/11/1fcf0e4a-74c9-11e2-95e4-6148e45d7adb_story.html [<https://perma.cc/K3PA-XNUN>].

35. *See id.*

36. *See, e.g.,* Lara Jakes & Choe Sang-Hun, *North Korea Threat Forces Biden into Balancing Act with China*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/world/asia/biden-north-korea-china.html> (last updated Mar. 24, 2021) [<https://perma.cc/772R-GA7D>]; Eleanor Albert & Lindsay Maizland, Backgrounder, *The China–North Korea Relationship*, COUNCIL FOREIGN REL. (June 25, 2019, 8:00 AM EST), <https://www.cfr.org/backgrounder/china-north-korea-relationship> [<https://perma.cc/XB24-V3FE>]; USIP China-N. Kor. Snr. Study Grp.,

political regime in North Korea, described in the COI report, makes the weapon and missile developments critical for security. In the otherwise welcome direct contacts between President Trump and the Supreme Leader Kim Jong-un in 2018 and 2019, the failure to include any mention of North Korea's non-compliance with universal human rights represented a deeply troubling omission. There can be no realistic prospect of achieving compliance with the prerequisites of international peace and security while the human rights position in that country remains as described in the COI report.

B. Objection to “Country Specific”

Although there have been minor improvements since 2014 in North Korea's engagement with the U.N. system, these have been trivial when measured against the grave findings recorded by the COI. Although it is a member country of the United Nations and, as such, under an obligation to cooperate with the U.N.'s institutions and officers, North Korea has continued to be seriously non-compliant.³⁷ It has been hostile and defiant in its engagement with the cornerstone U.N. objective of universal human rights, as stated in the U.N. Charter. While most members of the HRC and GA have shared the COI's concerns and said as much in remarks at the United Nations, a small nucleus of States in the United Nations has repeatedly defended the right of North Korea to remain unanswerable to the U.N. system. Instead of grappling with the findings of crimes against humanity, as was promised by the unanimous adoption of the “R2P resolution” by the General Assembly in 2005,³⁸ a small number of countries, including North Korea's allies—some of whom themselves are serious abusers of fundamental human rights—insisted that “country-specific” human rights mandates and criticisms were ineffective because they were too “political.” However, genocide, crimes against humanity, and war crimes are in a different category. In part, this is because they are “shocking to humanity.” In part, it is because, of their nature, they could give rise to severe breaches of security. In part, it is a priority that is taught by the lessons of history.

C. Absence of Prosecutions

The COI report identified several possibilities for bringing those responsible for at least the crimes against humanity before an international body to ensure accountability. Although North Korea is not a party to the *Rome Statute*, which

China's Role in North Korea Nuclear and Peace Negotiations, U.S. INST. PEACE (May 6, 2019), <https://www.usip.org/publications/2019/05/chinas-role-north-korea-nuclear-and-peace-negotiations> [<https://perma.cc/FB2F-DP8T>].

37. See *Fact Sheet on DPRK Nuclear Safeguards*, INT'L ATOMIC ENERGY AGENCY, <https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards> [<https://perma.cc/2HQ3-Y6XQ>].

38. G.A. Res. 60/1, 2005 World Summit Outcome (Oct. 24, 2005). See G.J. EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 11 (2008).

established the International Criminal Court, there is another way to bring the issue under its jurisdiction. This involves the referral of the matter to the International Criminal Court by the Security Council.³⁹ This has been done previously in two earlier instances—Libya and Darfur.⁴⁰ The ICC cannot assume jurisdiction unless the Security Council acts. The Security Council may not act unless the matter is placed on its agenda, and a resolution is proposed by a Member State that persuades the requisite majority of the Security Council to endorse a relevant resolution. Such an affirmative resolution may not be procedural. It could, thus, be subject to a veto by one or more of the permanent members of the Security Council.⁴¹

Yet, even if it might be defeated in the Security Council, the gravity of the cases identified by the COI suggests that, at least, they deserve serious consideration, where necessary brought to a vote. Only then might the international community respond as its institutions envisage. Where a vote is taken, the moral opprobrium for inaction is then shifted from those who seek action but cannot secure it to those who prevent it from happening despite having the relevant power. Institutions generally abhor ineffectiveness. However, effectiveness sometimes takes various forms and occasionally time to manifest itself. Those who would defend tyranny from the requirements of answerability should ultimately be made to clearly answer the opprobrium of maintaining the obstacles.

D. China and Refugees

In preparing the COI report, China's mission to the United Nations, both in New York and Geneva, restricted itself to minimal engagement with the COI. Repeatedly, China made it clear that it did not approve of the establishment of a COI for any "country-specific" resolution of the HRC (inferentially however egregious). It declined to allow the COI to visit Beijing, as requested, to consult with relevant academics, government officials, and the local office of the U.N. High Commissioner for Human Rights. Many of the complainants and most of the witnesses before the COI were escapees, also known as "defectors," who escaped into China from North Korea during the Winter by crossing over frozen rivers. Many of these escapees crossed the frozen rivers in search of food and employment. Sadly, their crossings did not bring them safety. Some escapees

39. COI Report, *supra* note 10, ¶ 1201(1), ¶ 1218, ¶ 1225(a).

40. See S.C. Res 1970 (Feb. 26, 2011); see also Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005).

41. U.N. Charter art. 27. For further description on Security Council procedures, see, *The UN Security Council Handbook: A User's Guide to Practice and Procedure*, SECURITY COUNCIL REP. (2019), <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/the-un-security-council-handbook-by-scr-1.pdf> [<https://perma.cc/2BT9-W64R>]; *Model United Nations Security Council Guide*, UNITED NATIONS, <https://www.un.org/en/model-united-nations/security-council> [<https://perma.cc/T4MA-MRH2>].

recounted deeply disturbing stories of forced sexual engagement. Children of the escapees were denied schooling and healthcare in China because they were unregistered. Moreover, there are reports that, pursuant to a memorandum of understanding with North Korea, China facilitates the return of escapees to North Korea. This is so although the returnees and their children are then reportedly commonly treated with great harshness.

The COI called attention to the obligations of non-refoulement imposed on China by international law.⁴² China's ambassador to the United Nations wrote a letter to the COI that denied that the escapees were "refugees" and demanded that it be published with COI's report.⁴³ It alleged that they were "economic" entrants who were violating Chinese natural laws. Both in correspondence and subsequent oral statements before the HRC, China attacked the contrary suggestion. China declined to engage with the substance of the reports of grave human rights violations and crimes against humanity affecting North Korean escapees. By inference, China must itself be concerned about the security risks, nuclear weapons accumulation, and missile systems that are a potential danger to China's territory and the danger of large-scale Korean population movements into China. Still, at no stage did the Chinese mission suggest any practical alternative initiatives that the COI or the HRC could adopt to redress the grave human rights wrongs disclosed by the factual testimonies recorded by the COI.⁴⁴

E. Plight of Abductees

An especially objectionable category of North Korea's crimes against humanity was the forced abduction of significant numbers of persons who were not nationals of North Korea.⁴⁵ Primarily, these were nationals of South Korea and Japan. Despite repeated requests from the COI, Japan, and other countries, North Korea's response to the plight of such refugees was negative and generally indifferent. Neither the COI, the HRC, or Japan—a nation seriously affected—was able to negotiate any meaningful response from North Korea to the abduction of foreign nationals, nor the Korean nationals and prisoners of war. This remains a major source of grievances against North Korea that are still

42. *Id.* ¶¶ 1221(e)-(f).

43. *Id.* ¶ 1218.

44. For the correspondence between the COI and China, see Commission of Inquiry on Human Rights, Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea, annex 1, at 27-34, U.N. Doc. A/HRC/25/63 (Feb. 7, 2014).

45. See, e.g., North Korean Human Rights Act of 2004, 22 U.S.C. §§ 7801-7846; Anthony DiFilippo, *Still at Odds: The Japanese Abduction Issue and North Korea's Circumvention*, 32 UNSCI DISCUSSION PAPERS 137, May 2013, <https://www.redalyc.org/pdf/767/76727454007.pdf> [<https://perma.cc/FXS9-WLWU>]; Adam Edelman, *Japanese Citizens Simply Vanished: North Korea had Abducted Them. But Why?*, NBC NEWS (June 11, 3:52 PM EDT), <https://www.nbcnews.com/politics/white-house/japanese-citizens-simply-vanished-north-korea-had-abducted-them-why-n881546> [<https://perma.cc/9S8L-PKGD>].

continuing.⁴⁶

F. Family Reunions

Large numbers of Korean nationals have been denied travel to South Korea or easy access to North Korea to visit relatives.⁴⁷ The limitation of such access to a trickle of tiny numbers is contrary to international human rights law. It is uncivilized. Especially is this so given the advanced ages of many people affected because unless these family reunions occur soon, it will be too late for many of these families. In an age of instantaneous communications, this denial of ready access (if necessary, on occasion by virtual means) making the denial of these reunions especially shocking and reprehensible. Its existence illustrates the basic inhumanity of the North Korean Government and its officials.

G. Economic Breakdown

Partly in consequence of the endemic inefficiencies of the economy in North Korea; the impact of Security Council sanctions; the diversion of disproportionate expenditure to the military, to nuclear weapons and missiles; and the apparent results of unacknowledged COVID-19 and isolation, North Korea continues to suffer serious, recurring economic burdens.⁴⁸ As a result, there has been a renewal of famine similar to that suffered in the mid-1990s. This suffering demonstrates North Korea's economy's serious inefficiency and its vulnerability to dislocation, corruption, and distortion. In his address to the Eighth Party Congress in Pyongyang in January 2021, Kim Jong-un acknowledged these serious, endemic features. Unfortunately, they are continuing as a great burden on human rights.

Additionally, any hope that a proposal by the United States to facilitate economic revival in North Korea by tourism and a "new Marshall Plan" has been

46. COI report, *supra* note 10, ¶¶ 924-63.

47. *Id.* ¶ 861. See *North Korea: Connection Denied*, AMNESTY INT'L, <https://www.amnesty.org/en/latest/campaigns/2016/03/north-korea-connection-denied/> [<https://perma.cc/JYR5-KZCZ>]; see also *North Korea's Human Rights: What's Not Being Talked About*, BBC (Feb. 18, 2019), <https://www.bbc.com/news/world-asia-44234505> [<https://perma.cc/4SUE-HEV9>].

48. See Evans J.R. Revere, *North Korea's Economic Crisis: Last Chance for Denuclearization?*, BROOKINGS (Feb. 26, 2021), <https://www.brookings.edu/research/north-koreas-economic-crisis-last-chance-for-denuclearization/> [<https://perma.cc/TQ9Z-3XC2>]; Simon Denyer, *North Korea's Economy is Ravaged by Sanctions and Pandemic Isolation: Kim is Lashing Out*, WASH. POST (Feb. 21, 5:00 AM EST), https://www.washingtonpost.com/world/asia_pacific/north-korea-kim-economy-crisis/2021/02/19/16d108d8-706b-11eb-8651-6d3091eac63f_story.html [<https://perma.cc/GMU8-CG7B>]; *Kim Jong-un Calls Meeting as North Korea Faces Worst Economic Crisis Since 1990s Famine*, S. CHINA MORNING POST (Dec. 28, 2020), <https://www.scmp.com/news/asia/east-asia/article/3115541/kim-calls-meeting-north-korea-faces-worst-economic-crisis-1990s> [<https://perma.cc/T7KQ-Q45L>]; John Sifton, *Unprecedented Glimpse of Crisis in North Korea*, HUMAN RIGHTS WATCH (Aug. 21, 2020, 1:39 PM EDT), <https://www.hrw.org/news/2020/08/21/unprecedented-glimpse-crisis-north-korea> [<https://perma.cc/CDX8-SM67>].

dashed because no plan has been put forth for what the United States might exchange with DPRK as an incentive to abandon the nuclear stockpile.

ROK INITIATIVES

Throughout its inquiry, the COI was repeatedly informed by witnesses and officials in South Korea of the passionate desire of their citizens for the reunification of the Korean Peninsula. The division of Korea into two nation-states was not made by the free decision of its people, exercised on the termination of Japanese colonial rule in August 1945. Instead, it was imposed on those people by a political decision of the Allied leaders, meeting in Cairo in 1943.⁴⁹ This division is unnatural and arbitrary given the commonalities of Korea's history, language, culture, and population. Unfortunately, North Korea has completely ignored even small steps proposed by the COI to reduce the divisions.⁵⁰ The only such project that may have seen progress has been the creation of a new Korean language dictionary and some steps towards sporting cooperation.

The meeting of President Trump, the Supreme Leader of North Korea, and the President of South Korea, Moon Jae-In, at Panmunjom on June 30, 2019, was to be welcomed as well as the earlier meetings of President Moon with Kim Jong-un and their officials. But, unfortunately, the hope that these and other encounters might give rise to further progress was not fulfilled. This was most clearly demonstrated by the destruction, by detonation, on June 16, 2020, of the liaison office built by ROK in Kaesong—close to the border between North and South Korea. This wanton act occurred immediately after the Supreme Leader's sister, Kim Yo-jong, threatened direct action against South Korea.

This was a shocking example of the petulance of the North Korean leadership. It demonstrated once again that moderation and attempted appeasement pay few dividends in dealings with North Korea. Diplomats and perhaps politicians must be polite and swallow the truth in describing the foregoing realities. Nonetheless, human rights experts need to point bluntly and truthfully to the lack of the normal controls of a modern state that exists in the extreme political circumstances of North Korea. Without proper accountability, destructiveness and violence can enjoy full rein without adequate controls. This reinforces the lesson repeatedly expressed by the COI in its report and subsequent comments by COI members.⁵¹ The quest for security in relations with North Korea, however understandable, is futile without harnessing that quest to a concurrent effort to uphold universal human rights for all people in North Korea.

49. COI Report, *supra* note 10, ¶ 95.

50. *See, e.g., id.* ¶¶ 1222-24. Such as sporting links, academic, sister city links, apprenticeship and student engagements, and travel and engagement.

51. *See, e.g.,* Hon. Michael Kirby, *Multilateralism, Pushback and Adjustment: From the U.N. Charter to Covid-19*, 35 MARYLAND J. INT'L L. 22, 44 (2020).

The attempt by the ROK to justify the introduction of new legislation to penalize the distribution of pamphlets by the South reflects criticism by the SR of this abject response to those who are the real enemies of human rights on the Korean peninsula.⁵²

This Article also applies to the withdrawal by South Korea from participation in the annual resolution before the HRC on North Korean human rights for the first time in 15 years. As the SR on North Korea has pointed out, however well-meaning, this self-exclusion of ROK from participation in stating the obvious about human rights in North Korea is illogical and undesirable.⁵³ History, including the history of North Korea's reactions to peaceful gestures by the Government of South Korea, does not encourage any confidence that appeasement of a violent, totalitarian government will persuade its leaders to change their ways out of a sense of brotherly admiration for the kindness and good manners of their counterparts.

It is time for South Korea to return to the international consensus that demands a transparent and tangible response to the conclusions and findings of the COI, particularly with respect to crimes against humanity. This is the duty of all democratic countries. Moreover, it is the special responsibility of South Korea. Its present posture betrays the fundamental entitlement of the people of North Korea to enjoy the universal human rights promised by the *Charter* of the United Nations, the *Universal Declaration of Human Rights*, and U.N. treaty law.⁵⁴

RECOMMENDATIONS

Achieving all the goals of the United Nations is not easy. Nonetheless, it is essential for the survival of the planet, the biosphere, and the human and other living species. A symbol of hope has been afforded to humanity by the photographs of our blue planet, captured from outer space. It demonstrates Earth's beauty, specialty, and unity that transcends the differences between its human inhabitants. Speaking plainly, the things that bind humanity together far exceed the differences when compared with the alien environment beyond the Earth. The recent COVID-19 pandemic, still spreading globally, especially in developing countries, including in North Korea, demonstrates the vital necessity of multilateral cooperation if we are to preserve our planet and the lives of human beings and other life forms within it. Global cooperation with the pandemic signifies that common ground can be discovered and the return to isolationism

52. Min Joo Kim & Simon Denyer, *South Korea to Criminalize Sending Leaflets into North Korea, Bowing to Regime*, WASH. POST, (Dec. 10, 2020, 4:06 AM EST) https://www.washingtonpost.com/world/asia_pacific/north-korea-leaflets-defectors-kim/2020/12/10/9c6d7328-3a92-11eb-aad9-8959227280c4_story.html [https://perma.cc/529Z-2Q7P].

53. Tomás Ojea Quintana (Special Rapporteur), *Report of the Special Rapporteur on the Situation of Human Right in the DPRK*, ¶ 53, U.N. Doc. A/HRC/43/58 (Feb. 25, 2020).

54. Kim Dae Junk, Park Soen Hye, & Moon Jae In, *Anti-Leaflet Law May Come in Conflict with Biden Administration*, KBS WORLD RADIO (Dec. 19, 2020, 1:57 PM), https://world.kbs.co.kr/service/news_view.htm?lang=e&Seq_Code=158385 [https://perma.cc/NWS3-XJRT].

and undiluted nationalism avoided.

I. Revival of Multilateralism

While the advent of the Biden Administration has raised hopes for the global re-engagement of the United States with multilateralism to afford a fresh opportunity to re-set the agenda of the international community, some problems cannot be addressed successfully by any single nation, however powerful it may be in economic, military, or other terms. This is why no step should be withheld in seeking solutions to the security challenges caused by North Korea's development of nuclear weapons and missile systems. Those who know most about the destructive potential of such weapons are usually leaders in insisting on a heightened sense of urgency. New initiatives must be explored and accompanied in the broader context of international law, justice, and universal human rights. So far, a minority of U.N. Member States, especially North Korea, have presented an obstacle to taking steps in the right direction. Every effort needs to be explored by the United Nations and the Member States to achieve a revival of attention to the dual urgencies of security and human rights in North Korea.

II. Dissemination of COI Report

The COI report is a powerful and readable document. It substantially still states the human rights situation in that country today. However, it needs to be more widely known and available. Its text is accessible on the internet.⁵⁵ Unless the report is widely available for a general readership and reflection, the power of the findings and impact of the report's conclusions are undesirably diminished. Accordingly, the HRC should consider the republication of the report of the COI in accessible hard copy format. Furthermore, the COI members should hold themselves ready to cooperate with a project to republish the report without altering the substance of the COI report.

Additionally, North Korea is a member of the Universal Postal Union and should be reminded of its obligations as such. The UNODC office in South Korea should provide opportunities within North Korea to provide knowledge about the report and human rights education concerning the findings of the COI report.

III. U.N. Action

The United Nations needs to continue its efforts to address the situation in North Korea. This means the United Nations should vote enhanced resources to the OHCHR Seoul office and the Office of the High Commissioner for Human Rights in Geneva. Only this will ensure that they continue creating the database, or repository of evidence, maintained on a secure and confidential server in

55. COI Report, *supra* note 10, available at <https://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/ReportoftheCommissionofInquiryDPRK.aspx> (last visited Mar. 23, 2021).

Geneva. The Seoul office should also pursue closer cooperation with authorities in ROK and explore OHCHR's ability to build individual case files on cases involving suspected international crimes, including crimes against humanity. The testimony on such crimes must be professionally recorded while it is still available.

Additionally, Security Council meetings should be revived to review denuclearisation on the part of North Korea and accountability for human rights. North Korea has repeatedly expressed its assertion that the promotion of human rights is an "obstacle to peace." Those who live in a bubble of unaccountability are prone to fall victim to their own propaganda. Plain speaking is required by all those who report independently on such serious human rights violations and crimes against humanity.

Also, the HRC Council should consider asking for the appointment of an independent expert or panel to bring up to date the recommendations made by the COI in its report. Such an expert or panel could cooperate with the SR on North Korea, but independently of him. In addition, it would be timely for a review of the COI's recommendations to be conducted precisely to bring the findings up to date. The latter should extend to examining the impact of Government rules and regulations in North Korea for the control of, and response to, the COVID-19 pandemic.

IV. Accountability

A lasting peace on the Korean Peninsula can be achieved only if the violations found in the COI report are acknowledged, addressed, and terminated. The rights of victims to truth, justice, reparations, and guarantees of non-recurrence must be fulfilled. To fulfill these aims, the prosecution of alleged international crimes remains a high priority. Primarily such redress should happen through a referral of the situation of North Korea to a prosecutor of the ICC. If that cannot be done, a new ad hoc and specialized tribunal of the United Nations should be established by the General Assembly. Alternatively, another mechanism or other initiatives should be undertaken, as discussed in the COI report.⁵⁶ Inaction and surrender to the violence and tantrums of North Korea are not acceptable options.

Absent any present prospect for a referral of the case of North Korea to a prosecutor of the ICC or consideration of the setting up of an ad hoc U.N. tribunal or another institutional remedy, legal practitioners, prosecutorial bodies, civil society organizations with expertise, and U.N. Member States should be encouraged to work with OHCHR and with victims and their representatives, including escapees from North Korea, to examine any novel legal approaches that can be enlisted to achieve accountability. These might allow the exercise by victims of their rights of access to national courts so that the victims' rights to remedy and redress can, at last, be realized, including by the possible invocation,

56. *Id.* ¶¶ 1195-1203. *See also Independent Experts on Accountability Report*, Add 1, ¶¶ 51-63, U.N. Doc. A/HRC/14/66.

where allowed by law, of universal jurisdiction.

Other voices will increasingly be heard concerning the global community's response to the indicated crimes of North Korea. When global institutions fail, necessity demands that *universal jurisdiction* and other means should be accepted so that the clear, steady voice of universal human rights can again be heard and seen to secure a proportionate response.

So far, the only substantial redress that the victims of North Korea's crimes have received has been that of giving testimony in public before the COI. It is time that their redress should go beyond words, formal reports, and fine declarations. This is what crimes against humanity demand. If it is denied in one case, humanity is diminished. No one is safe.

CONCLUSION

North Korea remains a mysterious, isolated, closed, and undisclosed state. The usual sources of information, through the voices of visitors, nationals traveling overseas, and even diplomats, are substantially missing. Views about North Korea have been made even less accessible because of the imposition by the administration of lockdown measures, allegedly in response to the COVID-19 crisis. Such measures were surprising because of the regime's assertion that North Korea was basically free of the virus causing the pandemic. Evidence of serious economic decline aggravated by a recurrence of famine and extreme weather and the impact of Security Council sanctions has, in part, been acknowledged, even in public speeches made by Kim Jong-un. However, fundamentally, the world still has little access to hard data by which to measure with fresh eyes the political, economic, and social conditions in North Korea. There is little evidence to suggest significant change since the COI report was produced. There is no evidence known to this writer to indicate improvement or reform.

If the situation in North Korea is going to get better, all of us, i.e., the whole international community, must do better. For one, the international community has to begin to work together as security and human rights in North Korea cannot be adequately addressed without a multilateral effort. Two, there needs to be an increase in awareness of the seriousness of the situation in North Korea—this is not a situation for tomorrow; the situation in North Korea is a security and human rights crisis. Three, the OHCHR Seoul office needs to be funded so that it can continue and intensify the investigation of the crimes against humanity that have occurred and are occurring in North Korea. Four, the situation of North Korea must be included in the Security Council's agenda and addressed. Five, the HRC should appoint an independent panel, or at least an independent expert, separate from the SR to bring the COI's report up to date. Last but not least, North Korea needs to be held accountable; these victims should not be left to suffer, and South Korea needs to return to its role in the fight for accountability—it is the responsibility of every democratic nation to stand up against abuses of universal human rights, especially crimes against humanity.