

Private Roundtable: A Conversation with Justice Michael Kirby and Sonja Biserko on
UN Commissions of Inquiry
Friday, February 20, 2015
Brookings Institution

The proliferation of UN commissions of inquiry (COI) as a new mechanism for focused investigations of human rights crises raises a host of questions for policymakers and the international human rights community. To discuss these issues, the Foreign Policy Program's Project on International Order and Strategy organized a private roundtable on UN commissions of inquiry featuring **Justice Michael Kirby**, Chairman of the United Nations Commission of Inquiry on Human Rights in North Korea. He was joined by **Sonja Biserko**, founder and president of the Helsinki Committee for Human Rights in Serbia and a fellow commissioner on the COI on North Korea. They led a discussion with a group of experts on the strengths and weaknesses of commissions of inquiry as a mechanism for monitoring, reporting on, promotion and protecting human rights globally.

Before his appointment as Chairman of the COI on North Korea, Justice Kirby served as a Justice of the High Court of Australia from 1996 to 2009. He has also served as President of the International Commission of Jurists (1995-1998), Special Representative of the UN Secretary-General for Cambodia (1994-1996), and as a member of the World Health Organization's Global Commission on AIDS (1988-1991). Ms. Biserko has written extensively on the wars in the former Yugoslavia and war crimes and is a senior fellow at the United States Institute of Peace. In 2005 she was one of one thousand women in the group 1,000 Women for Peace nominated for the Nobel Peace Prize.

The meeting was chaired by Ted Piccone, Senior Fellow at Brookings, who opened the meeting by noting the growing number of commissions of inquiry mandated by the UN Human Rights Council (13 since 2006), the broadening geographic scope (beyond Israel/OPT to include Libya, Cote d'Ivoire, Syria, Eritrea and DPRK) and the work undertaken by experts to devise international guidelines for such fact-finding bodies. One recent example of the latter is the *Siracusa Guidelines for International, Regional and National Fact-Finding Bodies* promulgated in 2013 and shepherded by Cherif Bassiouni, who has served in a wide variety of international positions including on commissions of inquiry on Libya, Bahrain and the former Yugoslavia.

This meeting was conducted under Chatham House rule, which dictates that "when a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed."

Lessons Learned from the COI on North Korea (DPRK)

The experience of the Commission of Inquiry (COI) on North Korea offers many lessons about how best to conduct COIs and other fact-finding missions. Ten such lessons were identified off the bat. Prior to the execution of the COI, it is important to bring together a **strong, professional and competent panel**, including practitioners as well as professors to draw on a variety of experience and expertise. During the fact-finding activities, **transparency** is paramount. The COI on DPRK conducted public hearings for 80 of its more than 200 witnesses who were willing to appear publicly

and for whom it was safe to do so. Their testimony was recorded and posted to the internet, and transcribed and translated so their stories are freely available in both the original language (usually Korean or Japanese) and in English. This played an important role in educating the public about the human rights abuses the COI was investigating and **offered the witnesses dignity through the opportunity to speak** about their experiences. Public hearings also imposed a form of discipline and accountability on the commissioners themselves. When one high-profile witness recanted part of his story, the Commission was able to document how the central facts of the report were not called into question given the scope and depth of corroborating information from other witnesses.

Three important groups played key roles in supporting the COI: civil society, international scholars and the media. **Civil society** organizations like Human Rights Watch, Amnesty International and the International Commission of Jurists promoted the establishment of the COI on DPRK. Amnesty International's provision of satellite imagery showing the existence of huge prison camps which the regime had previously denied was especially valuable to the work of the commission. **International scholars** served as witnesses but also consulted privately with the commission about the definition of genocide under international law, which helped the commission clarify its findings on crimes against humanity. (The commission, for example, determined that it did not have sufficient evidence to find genocide under the current definition understood by international legal scholars. It did find that crimes against humanity had been committed.) Finally, the COI utilized national and international **media** to further educate the public about its findings and recommendations.

Follow-up after the fact-finding process has been completed is vital to the success of a COI. The COI on DPRK strove to make its report *readable* and *reliable* to an extensive audience, writing it in the active rather than the passive voice. The commissioners also visited the UN Human Rights Council, General Assembly and Security Council to share their findings; the report was well-received in all three bodies and was added to the Security Council's agenda where it will stay for three years. The commissioners continue, even a year after the official mandate of the COI has ended, traveling and speaking by invitation about their findings, recommendations, and lessons learned. One of the commissioners on the COI for DPRK is the UN Special Rapporteur for Human Rights in DPRK and through his mandate he continues the arduous task of monitoring, promoting and protecting human rights in that country. Though the **UN bureaucracy can be frustrating** at times, the commission received significant support from the Office of the High Commissioner for Human Rights (OHCHR) and was staffed by a dedicated and professional secretariat.

Two final extrapolations that can be drawn from the COI for DPRK experience pertain to the **interrelationship between security and human rights** and the **importance of viewing domestic law within the context of international law**. The UN Security Council is notoriously reticent to involve itself in human rights issues, feeling they are inherently political, but peace and security matters are just as political and security and human rights are interrelated matters. The Security Council should add human rights concerns to its agenda when appropriate to give them the attention necessary. Likewise judges considering matters of domestic law do themselves a disservice when they do not couch their considerations within the ever-evolving domain of international law.

For more lessons learned, see ["UN Commission of Inquiry on Human Rights Violations in the DPRK: Ten Lessons,"](#) by Michael Kirby, Melbourne Journal of International Law, 2015.

For a discussion of the dilemmas raised by the commission's work, see [“The DPRK After the UN COI Report – Dilemmas and Paradoxes”](#) written by Michael Kirby for the *North Korea Human Rights: The Road Ahead* conference in Washington, DC, February 17-18, 2015.

The North Korean Context

The realities of the current North Korean society and the impact on North Koreans' shared mindset must be born in mind: it is a nationalistic society based on the notion of a superior race which inherently rails against foreigners. Witnesses exhibited very little analysis of their own society, perhaps because they were just fighting for survival, but in addressing the extensive human rights abuses observed by the COI it is important to deal with the ideology as well as the violations. There is a lack of solidarity, family ties, and strong social fabric in a society where children are raised to denounce their parents which must be addressed.

DPRK's development of nuclear weapons is an instrument to prevent outside interference but the COI report points out the true problems. The government is reacting very aggressively in the face of the truth being revealed to the international community. This is evidence of fear and insecurity on its part – impact can be felt when victims lose their fear of speaking out and the rulers in turn fear scrutiny and accountability. In this regard, it was important that the Commission wrote directly to the DPRK head of state with the findings of the investigation and the potential for being held responsible for crimes against humanity.

A UN field office is being established next month in Seoul to continue collecting testimony. This is vital for reunification of North and South Korea, a division which was artificially imposed by the international community following World War II over 60 years ago. In addition to prompting the creation of a field office, the COI report helps create a framework for the establishment of rule of law, which North Korea lacks.

Next steps

The field office in Seoul, where many of the refugees of DPRK live and where relevant human rights organizations are headquartered, will help South Korea move past its ambivalence to North Korea and move forward with the reconciliation they desire but do not know how to obtain. In soliciting testimonies and presenting witness statements, the commission's report had an eye to their possible use in holding leaders to account later. One of the greatest challenges going forward, however, is that the machinery of fact-gathering for accountability purposes is still being built. Fact-gathering should be independent, professional, serious, and efficient, and not political as it is currently.

We should not assume that China will exercise its veto power when it comes time to vote on a referral to the International Criminal Court. In general they are reluctant to use it and don't want a destabilized North Korea on their border.

Having an impact in North Korea

As follow-up on this particular report continues, expanding the concept to include North Koreans around the world can help to expand the audience and constituency for North Korean human rights. The human rights of all North Koreans should be of concern, not just the rights of those in North Korea or the prison system. Examples include exploited workers in foreign countries like China, the

Czech Republic, Russia and Mongolia and trafficked women, especially in China, Russia and South Korea. North Korea should also be acknowledged for progress it does make, as limited as it may be, including signing onto CEDAW (the Convention Eliminating all forms of Discrimination Against Women) and making progress on disability rights and the rights of children; these can be used as opportunities for technical assistance and education.

There must also be a conversation about how to make activism more effective. South Korea has its own biases when it gathers groups to discuss the North Korea issue and must work harder to obtain greater diversity of political opinions. There have been slippages in democracy across East Asia and this must be admitted while discussing North Korea issues. North Koreans must also be educated on the principles of human rights – the language is not universal.

Other models

There is a UN supported International Commission against Impunity in Guatemala (CICIG) which assists with investigations and criminal prosecutions in a country which, because of government failures or actions, lack rule of law. It offers a valuable contribution and is being evaluated for its utility in other contexts. There is a concern that such a model would isolate a government and cause it to exhibit irrational behavior, which has sometimes been the case with DPRK.

The COI report recommended the Security Council refer North Korea to the International Criminal Court but the International Court of Justice could also hold the state responsible. Generally the ICJ would require consent of jurisdiction but an ICJ Advisory Opinion at the request of the UN General Assembly is also possible. Creative solutions like utilizing the ICJ or appointing a prosecutor without an immediate tribunal must be considered for addressing this difficult case.

Challenges

North Korea is generally examined from within various silos – for example, security, human rights, or trafficking perspectives – without much interaction between the various groups. The regime benefits from this. Raising the human rights abuses in North Korea to the level of atrocity through the COI report is a good step, but the challenge is identifying next steps when this is not a post-conflict situation, or when the conflict happened so long ago that the current context is no longer a post-conflict context.

Final thoughts

Observers believe they are seeing the “beginning of the end” with regards to North Korea. DPRK reactions over the past few months have a different tenor. The regime has begun acting very strangely, denouncing public meetings on the issue of North Korea, including one in Washington, DC this week. This is in part due to the truths raised in the COI report, and the COI report letter of transmission to Kim Jung Un which clearly indicated that because he has not stopped or provided redress for the crimes against humanity the COI found in North Korea, he could be held accountable. It is important to note that this unusual behavior is an example of DPRK engaging after 60 years of non-engagement. The situation in the country is also changing as some contact with the rest of the world is being established – some CDs and DVDs are making it in to the country, penetrating the strict censorship imposed by the state. The North Korean people must be freed of the fear that has been the main instrument for keeping the nation homogenized and downtrodden.