

A chronic protection problem: the DPRK and the Responsibility to Protect

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Until recently, the human rights situation in the Democratic People's Republic of Korea (DPRK) had elicited relatively little attention from institutions, activists and analysts concerned with the implementation of the Responsibility to Protect (R2P) and protection of populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹ However, on 18 November 2014, the Third Committee of the United Nations General Assembly passed a resolution that referred to R2P and called on the UN Security Council to refer the situation in the DPRK to the International Criminal Court (ICC) and adopt targeted sanctions. Although it remains to be seen whether the Security Council will take up this challenge, ten of the Council's 15 members indicated privately their support for the initiative.

The new impetus for international engagement on human rights in the DPRK stemmed directly from the UN Human Rights Council's Commission of Inquiry (CoI) on Human Rights in the DPRK, which in February 2014 reported that 'systematic, widespread and gross human rights violations have been and are being committed by the DPRK'. In many instances, it found, these violations constituted crimes against humanity. What is more, they resulted not from the isolated excesses of state officials but were 'essential components of a political system which has moved far from the ideals on which it claims to be founded'. According to the CoI, the situation in the DPRK constituted a uniquely systematic affront to the shared values embodied in international human rights and humanitarian law. As the commission explained, 'the gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world'.² The CoI specifically called on the international community to accept its responsibility to protect the population in the DPRK since the government there had 'manifestly failed' to do so.³ Although the commission's findings were rejected outright by the DPRK and some specific elements (relating to refugees) were rejected by neighbouring China,

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¹ With the notable exceptions of Vaclav Havel, Kjell Magne Bondevik and Elie Wiesel, *Failure to protect: a call for the Security Council to act in North Korea* (New York and Oslo: DLA Piper, the Committee for Human Rights in North Korea and the Oslo Centre, 2006) and Roberta Cohen, of the Brookings Institution.

² *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, A/HRC/25/63* (Geneva: UN, 7 Feb. 2014).

³ *Report of the Commission of Inquiry*, p. 86.

the CoI succeeded in presenting credible evidence of the systematic commission of crimes against humanity in the DPRK, encouraging the international community to view the situation in the country through the lens of R2P (generating greater interest in this issue), pushing the UN's human rights machinery to augment its engagement with this issue, and persuading the UN Security Council to at least consider the question of human rights in the DPRK. In other words, the CoI has already made a valuable contribution to efforts to fulfil the R2P in the DPRK and has created the impetus for a new, heightened, phase of engagement.

This article examines the background to the General Assembly's decision to recommend that the Security Council take action in the name of protecting populations from crimes against humanity in the DPRK. It does so in three parts. First, I briefly explore how R2P relates to the situation in the DPRK. Second, turning to the situation in the DPRK, I consider the emerging body of evidence about the violations perpetrated in the DPRK and the question of whether these constitute crimes against humanity (or possibly, in some cases, genocide). This section also provides background on the international community's evolving engagement with human rights in the DPRK. In the wake of the General Assembly's resolution, the third section examines options for future international engagement on this issue.

The Responsibility to Protect and the DPRK

R2P was unanimously endorsed by the 2005 World Summit, the largest ever gathering of heads of state and government. The summit's outcome document was later adopted as a General Assembly resolution. The concept has been unanimously endorsed by the UN Security Council (Resolutions 1674, 1894 and 2150) and has featured in 26 Security Council resolutions, including those on Syria, Libya, South Sudan, Mali, Côte d'Ivoire, Central African Republic, Somalia and Yemen.

As agreed by UN member states in 2005, R2P rests on three non-sequential pillars of equal importance.⁴ The first pillar relates to the primary responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.⁵ The UN Secretary General described this pillar as the 'bedrock' of R2P, which derives from sovereign responsibility itself and the international legal obligations that states already have under international humanitarian and human rights law.⁶ The second pillar relates to the international community's responsibility to assist and encourage states to fulfil their Responsibility to Protect, particularly by helping them to address the underlying causes of genocide and mass atrocities, to build the capacity to prevent these crimes, and to address problems before they escalate.⁷ These measures are undertaken only with the consent of the relevant state.⁸ The third pillar relates to the

⁴ *Implementing the responsibility to protect*, report of the UN Secretary General (New York: UN, 2009), para. 12.

⁵ *World Summit outcome* (New York: UN General Assembly, A/60/L.1, 2005), para. 138.

⁶ *Implementing the responsibility to protect*, para. 11(a).

⁷ *World Summit outcome*, paras 138–9.

⁸ *Implementing the responsibility to protect*, para. 28.

international community's responsibility to take timely and decisive action to protect populations from the four crimes specified in the first pillar through diplomatic, humanitarian and other peaceful means (principally in accordance with Chapters VI and VIII of the UN Charter) and, on a case-by-case basis, should peaceful means 'prove inadequate' and national authorities be manifestly failing to protect their populations, by other more forceful means through Chapter VII of the UN Charter.⁹ When thinking about how R2P relates to specific protection crises, it is important to be clear on what governments agreed in 2005. Five key points are particularly worth emphasizing in terms of how they relate to thinking about the situation in the DPRK.

First, R2P is narrow in scope, but universal and enduring in its coverage. The concept applies everywhere, all the time. In other words, all states have a permanent responsibility to protect their populations from the four specified crimes. As the UN Secretary General pointed out in 2012, the question is never one of whether or not R2P 'applies'—because this wrongly implies that there are situations in which states do not have a responsibility to protect their populations; the question is how best to realize its goals in any given situation. The concept is narrow, though, in that it relates only to the four acts identified in the 2005 *World Summit outcome* document: genocide, war crimes, ethnic cleansing and crimes against humanity, and to their prevention. The concept does not relate to threats to human life stemming from natural disasters, diseases, armed conflict in general or non-democratic forms of government.¹⁰

The narrow scope of R2P makes the principle agnostic on some of the wider political issues associated with the situation in the DPRK. For R2P, questions about the role of the Korean Workers' Party (KWP) in the internal governance of the DPRK, the government's 'Military First' strategy, the resolution of outstanding issues from the Korean War, the proliferation of nuclear weapons and the reunification of Korea are secondary to the question of protecting populations. From R2P's perspective, reform in these other areas is necessary and useful only to the extent that it contributes to the goal of protecting populations from genocide and crimes against humanity. That said, the universal and enduring quality of R2P means that it cannot simply be set aside as an inconvenience. Although states might disagree on what is the most appropriate combination of policies and strategies, R2P demands of them a shared commitment to protecting populations in the DPRK, ideally through the exercise of the government's own responsibility to protect but—failing that—through encouragement and the provision of international assistance and, if judged necessary, timely and decisive action under Chapters VI, VII and VIII of the UN Charter. As I will demonstrate below, the balance of evidence makes it difficult to argue with the CoI's judgement that the government of the DPRK has 'manifestly failed' to protect its own population and that international action is required.

⁹ *World Summit outcome*, paras 138–9.

¹⁰ Contrary to claims made by some academics: see e.g. Robert Pape, 'When duty calls: a pragmatic standard of humanitarian intervention', *International Security* 37: 1, 2012, pp. 41–80.

Second, states have a responsibility to protect all populations under their care, not just citizens. The 2005 World Summit was careful to identify ‘populations’ and not just ‘citizens’ as the appropriate focus of responsibility. This was deliberately intended to avoid potential temptations to conceive the state’s primary Responsibility to Protect either too narrowly as relating only to ‘citizens’ (and therefore not to stateless groups, refugees and other non-citizens) or too broadly as relating to ‘peoples’ (which might extend beyond national boundaries). This means not only that the DPRK cannot deny protection responsibilities on the basis of denying citizenship, but also that neighbouring China shoulders a responsibility to protect those who flee the DPRK. In addition to its legal obligations under the 1951 Refugee Convention (to which China acceded in 1982), China has a responsibility to protect Koreans on its territory from crimes against humanity. Its response thus far has been to deny that individuals returned to the DPRK are subjected to these crimes, citing the fact that some people who cross into China are returned multiple times.¹¹ However, this is an increasingly implausible line of argument, given the weight of evidence of violations against returnees presented by the CoI and others.

Third, R2P is not itself a legal principle but is based on well-established principles of international law. The crimes to which it relates are enumerated in international law. Under customary international law, states already have obligations to prevent and punish genocide, war crimes and crimes against humanity; to assist states to fulfil their obligations under international humanitarian law; and to promote compliance with the law. In addition, the *World Summit outcome* document clearly states that R2P is to be implemented through the UN Charter. It is important to note that the DPRK is a signatory to most of the treaties that create legal obligations related to R2P. These include the Genocide Convention, the International Covenant on Civil and Political Rights, the Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of the Child. Thus, while R2P urges a foregrounding of protection issues, it does not call for new international norms or legal principles. R2P demands only that states implement what they have already committed themselves to and calls for the use of existing mechanisms to achieve these outcomes.

Fourth, the *World Summit outcome* document calls explicitly for the *prevention* of the four crimes and their incitement. Prevention is at the core of R2P, with other measures contemplated only when prevention fails or (in line with article 42 of the UN Charter) is thought likely to fail by the UN Security Council. While dealing with past and ongoing atrocities is important, R2P also demands action to prevent future crimes. Thus, states cannot argue against utilizing R2P on the grounds that the state concerned is not currently committing crimes against humanity. With respect to the DPRK, not only would this assertion be problematic empirically, it

¹¹ See letters from the Permanent Mission of China to the UN in Geneva to the Chair of the CoI, reproduced in the appendix of the *Report of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*.

also misses the point that the acts need not be actually committed in order for R2P to be deemed relevant: the threat of future crimes against humanity is a sufficient basis for a call to action. Additionally, the preventive element of R2P calls for deep thought about how the international community should manage any future transitions in the DPRK. Studies agree that the risk of mass violence is greatest during political transitions, and with analysts describing the DPRK as a 'failed state' there are real risks of future mass violence.¹² R2P calls for careful attention to be paid to this issue.

Fifth, force and other instruments of coercion (such as targeted economic sanctions) may be used only when authorized by the UN Security Council and when other, peaceful, measures adopted under Chapters VI and VIII of the UN Charter are thought unlikely to succeed. R2P is not a doctrine of humanitarian intervention, but a principle calling for comprehensive engagement aimed at protecting populations. It provides no support for those activists who harbour fantasies about armed intervention to overthrow the regime in the DPRK. Leaving aside the political reality that it is highly unlikely that the Security Council would ever mandate such action, given the DPRK's capabilities for immense destruction it is impossible to see how the use of force could ever be used to improve the life chances of populations north of the border.

Finally, it is worth noting that while there are limited avenues for engagement with the DPRK on these issues, they are not closed entirely. Not only has the DPRK acceded to the main international legal instruments relating to crimes against humanity and genocide, it has also participated in the UN Human Rights Council's periodic review process and has also in recent years (2011 and 2013) permitted the Council's special rapporteur on human rights in the DPRK to fulfil some elements of his mandate.¹³ The DPRK has also demonstrated a willingness to engage in global dialogue on R2P. Thus far, the DPRK has contributed to three of the General Assembly's informal and interactive dialogues on R2P and has stopped short of following states such as Venezuela and Cuba in dismissing the concept out of hand. In 2009, the DPRK insisted that the concept should be implemented in strict conformity with the UN Charter and should not give rise to armed intervention or coercive interference.¹⁴ In 2011, it used its statement to criticize NATO-led action in Libya.¹⁵ The DPRK offered its most positive statement in 2014 on the theme of international assistance and R2P's second pillar. Here it stressed that assistance must always be provided with the consent of the receiving state and reaffirmed its views on the inadmissibility of intervention in

¹² The description of the DPRK as a 'failed state' comes from Paul French, *North Korea: state of paranoia* (London: Zed, 2014).

¹³ Rose Freedman, *Failing to protect: the UN and the politicisation of human rights* (London: Hurst, 2014), p. 102. Visits by the special rapporteur on human rights in the DPRK were permitted in November 2011 and April and November 2013.

¹⁴ Statement by Pak Tok Hun, Deputy Permanent Representative of the DPRK to the United Nations at the Informal and Interactive Dialogue of the UN General Assembly on the Responsibility to Protect, New York, 28 July 2009, <http://www.globalr2p.org/media/files/north-korea-2009-r2p-debate.pdf>, accessed 5 Feb. 2014.

¹⁵ Statement by Ri Tong Il, Deputy Permanent Representative of the DPRK to the United Nations at the Informal and Interactive Dialogue of the UN General Assembly on the Responsibility to Protect, New York, 12 July 2011, <http://www.globalr2p.org/media/files/statement-dprk.pdf>, accessed 5 Feb. 2014.

the name of R2P. Interestingly, though, recognizing the multiplicity of views on R2P, the DPRK welcomed the General Assembly's ongoing consideration of the concept and the UN Secretary General's contribution through his annual report on the subject.¹⁶

While it is not entirely clear *why* the DPRK has accepted, in limited form, the UN's human rights machinery and has engaged reasonably constructively in dialogue on R2P, analysts suggest that the state's dependence on foreign aid—especially food aid—might be a critical determinant.¹⁷ While this suggests an instrumentalist attitude on the part of the government, it also supports the view that limited avenues for engagement might be available should the international community's approach to the situation be coordinated and developed in a comprehensive fashion. More recently, in light of the CoI's findings and emerging pressure in the UN for more decisive action on the situation in the DPRK, the government appears to be prepared to consider opening lines of communication, supporting the view that opportunities may exist for the international community.

Human rights and international engagement with the DPRK

This section examines the international community's attempts to respond to the human rights situation in the DPRK. It shows in particular how widely the gravity of the human rights situation is now recognized, as exemplified by the General Assembly's decision to recommend steps by the Security Council, and charts an emerging international consensus that the systematic violation of human rights in the DPRK includes crimes against humanity and a corresponding view that the international community ought to do more to fulfil its responsibility to protect the population in the DPRK. The CoI, I will show, played a significant role in these developments and in clarifying some specific recommendations for action through the UN's Security Council, General Assembly and Human Rights Council, which are now being actively pursued.

It is widely understood that the DPRK is a serial and systematic violator of basic human rights and humanitarian law.¹⁸ Freedom House categorizes the DPRK as one of the world's least free countries.¹⁹ In addition to the UN's own reporting, international NGOs such as Amnesty International, the International Crisis Group and Human Rights Watch have reported extensively on the human

¹⁶ Statement by the DPRK at the Informal and Interactive Dialogue of the UN General Assembly on the Responsibility to Protect, New York, 8 Sept. 2014, accessed 5 Feb. 2014. For a helpful discussion see Boris Kondoch, 'The responsibility to protect and Northeast Asia: the case of North Korea', *Korean Journal of Defense Studies* 24: 4, 2012, p. 437.

¹⁷ Freedman, *Failing to protect*, p. 102.

¹⁸ Accompanying the CoI's summary report was a substantial and detailed account of the evidence of systematic human rights abuse. See *Report of the detailed findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea*, A/HRC/25/CRP.1, 17 Feb. 2014. On human rights more generally, see French, *North Korea*. There are also a number of excellent accounts based on witness testimony, notably Barbara Demick, *Nothing to envy: ordinary lives in North Korea* (New York: Spiegel & Grau, 2010), and first-hand accounts by defectors, including Chol-hwan Kang and Pierre Rigoulot, *The aquariums of Pyongyang: ten years inside the North Korean gulag* (New York: Basic Books, 2005).

¹⁹ Freedom House, *Freedom in the world 2012: the Arab uprisings and their global repercussions* (New York, 2012).

rights situation in the DPRK, as does the Korea Institute for National Unification, whose *White paper on human rights* provides careful and detailed documentation of alleged abuses of human rights.²⁰ Current estimates suggest that there are between 80,000 and 120,000 prisoners in the country's *gulag* system of political prisons. Deliberate malnutrition, systematic torture and arbitrary killing characterize prison life. It is estimated that between 5,000 and 10,000 people die each year in these prisons. Although the number of prisoners has declined from around 200,000 at the turn of the century, analysts are divided on whether this is a sign of a subtle relaxation policy or the result of a campaign of mass executions.²¹ The political prisons are only one part of an extensive prison system, which includes prisons for ordinary criminals (often no less brutal than the political prisons) and so-called 're-education camps'.²²

The government is run exclusively by the KWP and was controlled initially by Kim Il-sung, who was invited to assume the leadership by the Soviet Union when the Korean peninsula was divided into Soviet- and US-controlled halves at the end of the Second World War. Soon afterwards, with the blessing of the Soviet Union and China, Kim Il-sung led the North into a disastrous war with the South that consumed some 3 million lives and left the boundary precisely where it had been before the war. After the war, Kim oversaw rapid economic rebuilding and development but demanded absolute submission to the central government, initiated repeated waves of Stalinist-style purges, and punished disloyalty—very broadly defined and arbitrarily interpreted—by death or incarceration in the country's brutal *gulag* system. Individuals and whole groups were denied basic rights, including the right to life. Like Mao and Stalin, Kim created a rigid social hierarchy on which was based access to education, jobs, housing, consumer goods and—significantly—food. According to the regime's *songbun* system, society was divided into three groups: the 'core', judged unflinchingly loyal to the regime; the masses, who were known as 'waverers'; and the 'hostile' class, judged implacably opposed to the regime. Within these were some 53 sub-categories.

The Sino-Soviet split in the 1970s saw the DPRK retreat into ever deeper international isolation and domestic ossification, propped up only by Soviet aid. When that was withdrawn, after the collapse of the Soviet Union, the economy failed. Kim Il-sung died in 1994 and shortly thereafter the country was gripped by famine. Not only was the government of Kim Jong-il, Kim Il-sung's son, unable to cope with the famine; its own policies exacerbated the food crisis. Food was deliberately withheld from 'hostile' classes and foreign aid manipulated by the regime.²³ It is not known precisely how many people died as a result, but estimates

²⁰ Soo-am Kim, Kook-shin Kim, Soon-hee Lim, Hyun-joon Lim, Hyun-joon Chon, Kyu-chang Lee and Jung-hyun Cho, *White paper on human rights in North Korea 2012* (Seoul: Korea Institute for National Unification, 2012).

²¹ Andrei Lankov, 'The surprising news from North Korea's prisons', *Bloomberg View*, 13 Oct. 2014.

²² US Department of State, *Country reports for human rights practices 2011: Korea, Democratic People's Republic of* (Washington DC, 2012). See also *Report of the Commission of Inquiry*.

²³ Arguably the best analysis of the famine can be found in Stephen Haggard and Marcus Noland, *Famine in North Korea: markets, aid and reform* (New York: Columbia University Press, 2009). Some aid agencies, including Médecins sans Frontières, withdrew owing to the obvious manipulation of aid to support the regime. See Fiona Terry, *Condemned to repeat? The paradox of humanitarian action* (Ithaca, NY: Cornell University Press, 2002).

range from 600,000 to 3 million. The regime—and population—survived that crisis thanks largely to foreign assistance.

Amid the tumult there were periods of optimism, especially as a result of the ‘agreed framework’ concluded with the US in 1994 and the ‘sunshine policy’ pursued by the Republic of Korea’s (ROK) left-leaning government under Kim Dae-jung, and its successor. However, critics complained that these initiatives made no tangible difference to human rights inside the DPRK and helped only to prop up the regime through the shipment of food and oil, much—if not all—of which went to the state elite and military rather than to the people who most needed it. *Rapprochement* with the United States came to a definitive end in 2002, when President Bush listed the DPRK as part of the ‘axis of evil’, and the badly stalled ‘sunshine policy’ was terminated after a change of government in the ROK in 2007. In the North, Kim Jong-il died unexpectedly in 2011 and was replaced in December that year by his youngest son, Kim Jong-un.

It is too early to tell whether the new government of the DPRK will prove more open to dialogue and reform in relation to human rights. On the one hand, there are signs of a more relaxed attitude on some fronts (see below), especially in relation to the opening up of trade with China and other countries, the proliferation of mobile phones, and the marked decrease in the size of the *gulag* population.²⁴ On the other hand, there is evidence that the new leadership has moved to purge potential opponents, including through the use of forced disappearances and executions.²⁵ Meanwhile, cross-border tensions have increased, particularly as a result of the DPRK’s attacks on the South and its rocket test and nuclear programmes.

Within this context, the DPRK has proved itself generally uncooperative on human rights. In addition to the government’s general isolationism in respect of world affairs, there are, analysts suggest, at least two sets of reasons why the regime is so unwilling to engage in dialogue on human rights, cooperate with international institutions or contemplate even modest reforms. First, the leadership’s commitment to the uncompromising ‘Juche’ philosophy (based on a personality cult of the leader, an ideology of self-reliance and ‘military firstism’) makes even modest economic reform, that could pave the way for an opening on human rights such as that seen in China, exceptionally difficult.²⁶ As Paul French points out, modest reform cannot be contemplated without jettisoning the Juche philosophy, which draws its legitimacy from the oft-proclaimed infallibility of the DPRK’s leaders. Thus, reform is very difficult to achieve without undermining the leadership’s legitimacy and its ‘Mandate from Heaven’.²⁷ Unlike communist China, whose Maoist and post-Maoist ideology permitted self-criticism and self-correction on the part of the leadership (evident in corrections to end the destruction of the Great Leap Forward and Cultural Revolution, and in the judgement that Mao did 70 per cent

²⁴ There are now some 2 million mobile phones in the DPRK. See John Sweeney, *North Korea undercover: inside the world’s most secret state* (London: Corgi, 2013).

²⁵ See e.g. Sam Kim, ‘Kim Jong Un extends family habit of North Korean purges’, *Bloomberg View*, 30 Oct. 2014.

²⁶ On this point see Rosemary Foot, *Rights beyond borders: the global community and the struggle over human rights in China* (Oxford: Oxford University Press, 2001).

²⁷ French, *North Korea*, p. 7.

good and 30 per cent bad), the DPRK's guiding philosophy allows no room for self-correction, essentially locking the regime into failed models of economics and governance from which it cannot easily escape with its legitimacy intact.

This problem is compounded by a second issue, which is that the DPRK finds itself in the unique position of having a highly successful neighbouring kin state ready and willing to incorporate and unify with it should the regime collapse or confront a serious challenge to its legitimacy. In many respects, it is the very success of the ROK that poses the biggest challenge to the legitimacy of the DPRK. For the leadership in the North, the presence of the ROK makes it unlikely that internal reform could be managed in a way that preserved the elite's status and privileges. Indeed, not only would the DPRK elite see its privileges wiped out by integration with the ROK, its members would also be likely to face the prospect of legal accountability for their past and ongoing crimes. Combined, these factors have contributed to an entrenched culture of non-cooperation and non-engagement on the issue of human rights, which presents the international community with limited room for manoeuvre.

Although the CoI gave new prominence to the issue of serious violations of human rights in the DPRK, it was by no means the first body to raise the issue. In 2003, the UN Commission on Human Rights (predecessor to the Human Rights Council, established in 2006) issued its first resolution on human rights in the DPRK. It expressed its 'deep concern about reports of systematic, widespread, and grave violations of human rights', called for the government to permit humanitarian access, and requested that the UN's High Commissioner for Human Rights engage in a dialogue with the DPRK.²⁸ The High Commissioner duly requested a dialogue with the DPRK but received no response, prompting the commission to note its disappointment and adopt additional measures. In 2004, the commission mandated the appointment of a special rapporteur on the human rights situation in the DPRK.²⁹ From 2004 until 2010, that position was held by Thailand's Vitit Muntarbhorn. The special rapporteur's first report noted a variety of human rights 'transgressions', including 'several of an egregious nature'.³⁰ Unsurprisingly, the DPRK rejected the 2004 resolution establishing the mandate for the special rapporteur, arguing that it was biased and politically motivated, and refused to cooperate with the commission even on technical questions.³¹ In 2006, the DPRK extended this argument by noting that because it did not recognize the mandate of the special rapporteur it would not meet or communicate with him on human rights issues.³²

In his final report as special rapporteur, Muntarbhorn lamented that the government of the DPRK had for the most part 'rebutted' his communications

²⁸ UN Commission on Human Rights, Resolution 2003/10, 16 April 2003.

²⁹ UN Commission on Human Rights, Resolution 2004/13, 15 April 2004.

³⁰ *Report of the special rapporteur on the situation of human rights in the Democratic People's Republic of Korea*, E/CN.4/2005/34, 10 Jan. 2005, para. 67.

³¹ 'Letter dated 28 Feb. 2005 from the Permanent Mission of the Democratic People's Republic of Korea to the United Nations Office in Geneva addressed to the High Commissioner for Human Rights', E/CN.4/2005/G13, 2 March 2005.

³² *Report of the special rapporteur on the situation of human rights in the Democratic People's Republic of Korea*, E/CN.4/2006/35, 23 Jan. 2006, para. 38.

'dismissively' and, in particular, had refused to cooperate by permitting him to visit the country.³³ He concluded that 'the human rights situation in the Democratic People's Republic of Korea can be described as *sui generis* (in its own category), given the multiple particularities and anomalies that abound. Simply put, there are many instances of human rights violations which are both harrowing and horrific.'³⁴ The special rapporteur was the first official figure to raise the possibility of promoting accountability by referring the situation in the DPRK to the ICC, advising that the reported crimes could be associated with crimes against humanity.³⁵ He also urged the international community to advocate strongly that the government of the DPRK uphold its responsibility to protect its population by adopting a 'people first' ideology to replace 'military firstism'.³⁶ He called for the development of an integrated UN approach focused on increasing the space for dialogue and engagement while also addressing questions of accountability, impunity and state responsibility, including through the UN Security Council and ICC.

Muntarhorn's work encouraged the Human Rights Commission and its successor, the Human Rights Council, to adopt an annual resolution on the human rights situation in the DPRK. The commission expressed its 'deep concern' at the 'systematic, widespread and grave' violations of human rights in the DPRK and its 'regret' that the government had not done more to fulfil its obligation to engage with the international community.³⁷ In 2005, the commission urged other UN bodies, especially (but not exclusively) the General Assembly, to take up the issue of human rights in the DPRK.³⁸

The General Assembly itself became engaged with human rights in the DPRK in 2003, at around the same time that the Human Rights Commission began its work. Since that time, the Assembly has issued an annual resolution on the matter, expressing 'very serious concern' about the human rights situation and 'strongly urging' the DPRK to fulfil its obligations. Significantly, since 2005 the General Assembly has requested that the Secretary General issue a report on the human rights situation.³⁹ In 2008, the Secretary General expressed his serious concern at the lack of tangible progress on improving human rights and addressing the many issues raised by the special rapporteur.⁴⁰ In his 2013 report, issued shortly after the establishment of the CoI, the Secretary General reiterated these concerns and also called upon neighbouring states to comply with their legal obligations under the Refugee Convention by practising the non-refoulement of refugees. The Secretary General also took the opportunity to reiterate his offer of good

³³ *Report of the special rapporteur on the situation of human rights in the Democratic People's Republic of Korea*, A/HRC/13/47, 17 Feb. 2010, paras 3–4.

³⁴ *Report of the special rapporteur*, 2010, para. 86.

³⁵ *Report of the special rapporteur*, 2010, para. 60.

³⁶ *Report of the special rapporteur*, 2010, para. 89(b).

³⁷ UN Commission on Human Rights, Resolution 2003/10.

³⁸ UN Commission on Human Rights, Resolution 2005/11, 14 April 2005.

³⁹ See e.g. the 2012 iteration of this annual resolution, 'Resolution on the situation of human rights in the Democratic People's Republic of Korea', 66/174, 29 March 2012.

⁴⁰ *Situation of human rights in the Democratic People's Republic of Korea: report of the Secretary General*, A/63/322, 26 Aug. 2008.

offices to promote dialogue on strengthening the promotion and protection of human rights, an option which the DPRK has yet to take up.⁴¹

These efforts were supported by the work of former Czech Republic President Vaclav Havel, former Norwegian Prime Minister Kjell Magne Bondevik and Nobel Laureate Elie Wiesel. In 2006, the three prominent figures reported that ‘North Korea has violated its responsibility to protect its own citizens from crimes against humanity being committed in the country’.⁴² In 2008, they reiterated that ‘it is clear that Kim Jong Il and the North Korean government are actively committing crimes against humanity’, especially by allowing mass starvation in the 1990s, through its *gulag* system which was judged to have killed some 400,000 people over the course of 30 years, and by practices of arbitrary execution and forced disappearances.⁴³ Noting the DPRK’s decision not to cooperate with the UN’s human rights machinery, Havel, Bondevik and Wiesel called for the UN Security Council to place the issue on its agenda by adopting, in the first instance, a Chapter VI (peaceful measures) resolution reaffirming the DPRK’s responsibility to protect its own population, calling on the government to provide unfettered humanitarian access to UN personnel, release all political prisoners and allow the special rapporteur to visit, and requesting that the Secretary General become more engaged on the issue and provide regular reports to the Security Council. The panel argued that should the DPRK elect not to comply with the resolution, the Council should adopt a Chapter VII resolution.⁴⁴

These recommendations were not heeded at the time and the Security Council refrained from considering the human rights situation. However, the DPRK’s continuing non-cooperation with the special rapporteur and non-compliance with the resolutions of the General Assembly and Human Rights Council, combined with the activism of human rights groups such as Amnesty International, Human Rights Watch and the International Coalition to Stop Crimes Against Humanity in North Korea, helped build a constituency of support for additional measures.

On 21 March 2013, the Human Rights Council decided to establish the CoI through a rare consensus of its 47-state membership. This consensus vote was especially telling given the pronounced discomfort felt by many member states with country-specific mandates and the Council’s past tendency to limit commissions of inquiry to situations of armed conflict.⁴⁵ Unsurprisingly, the DPRK rejected the commission’s mandate and refused to cooperate. This forced the commissioners—chair Justice Michael Kirby (Australia), Indonesia’s Marzuki Darusman (Muntabhorn’s successor as special rapporteur) and Serbia’s Sonja Biserko—to gather evidence outside the country through a mixture of open hearings and private interviews with people who were able to provide first-hand testimony. As noted at the beginning of this article, the CoI documented a litany of egregious human rights

⁴¹ *Situation of human rights in the Democratic People’s Republic of Korea: report of the Secretary General, A/68/392*, 19 Sept. 2013.

⁴² Havel et al., *Failure to protect*, p. 1.

⁴³ Havel et al., *Failure to protect*, p. 1.

⁴⁴ Havel et al., *Failure to protect*, p. 100.

⁴⁵ For an excellent overview, see Jung-hyun Cho, ‘A brief study on the report of the UN Commission of Inquiry (COI) on human rights in North Korea’, *IFANS Brief*, 2014–05, 2014.

abuse which, in its judgement, constituted crimes against humanity, and called on the international community to shoulder its responsibility to protect, specifically recommending that the Security Council consider referring the situation to the ICC and imposing targeted sanctions on those responsible for crimes against humanity.⁴⁶ In addition, the CoI recommended that the UN High Commissioner for Human Rights, with the support of the Human Rights Council and General Assembly, extend human rights monitoring and contribute to accountability by establishing a field-based entity to collect and document evidence of human rights violations. It also recommended that the UN secretariat and agencies adopt a 'rights up front' strategy in their engagement with the DPRK, ensuring that human rights concerns and the prevention of recurrence are placed at the centre of the organization's engagement with the DPRK across all sectors, including the provision of humanitarian assistance and (presumably) deliberations on nuclear weapons. With that in mind, however, the CoI cautioned against the temptation to use humanitarian assistance as leverage to apply pressure on Pyongyang and insisted that such assistance be guided exclusively by humanitarian principles—though the commission recognized that freedom of access and the absence of monitoring provisions were legitimate grounds on which to hold back aid.⁴⁷

Finally, the CoI raised particular concerns with respect to China and directed recommendations specifically to that country. As the UN Secretary General had done in 2013, it asked China to respect the principle of non-refoulement as well as to provide the Office of the UN High Commissioner for Refugees (UNHCR) with full and unimpeded access to all people from the DPRK requesting such access and to adopt a victim-centred approach to the problem of people trafficking.⁴⁸

As noted above, the CoI's report had a significant impact on the level of international engagement with the question of human rights in the DPRK. What is more, there are some signs that this heightening international interest is pushing the DPRK towards a modest openness to dialogue and more constructive engagement, though it is clearly too early to judge the longer-term significance of this.

It was soon apparent that some states would push for the international community to follow up on the CoI's recommendations. On 27 March 2014, the Human Rights Council voted to support a resolution drafted by the EU and Japan (30 in favour, six against, including China and Russia, 11 abstentions) which called on the Security Council to seek accountability for those responsible for crimes against humanity, including through the use of international criminal justice mechanisms, and mandated the establishment of an office under the Office of the High Commissioner for Human Rights (OHCHR) to collect information and testimony on human rights violations in the DPRK.⁴⁹ It was subsequently agreed that the office would be established in Seoul.⁵⁰

⁴⁶ *Report of the Commission of Inquiry*, para 94.

⁴⁷ *Report of the Commission of Inquiry*, para. 94.

⁴⁸ *Report of the Commission of Inquiry*, para. 90.

⁴⁹ A/HRC/RES/25/25, 9 April 2014.

⁵⁰ See Stephanie Nebehay and Tom Miles, 'Mind your own business, North Korea says of UN demand for justice', Reuters, 28 March 2014.

In April 2014, the Security Council held its first informal discussion of the human rights situation in the DPRK, under the so-called 'Arria formula' which allows the Council to meet informally with outside partners. At the meeting, proposed by Australia, France and the United States, the CoI's report was transmitted to the Council and members were briefed by its chair, Justice Michael Kirby, and two defectors who had escaped the political prison camps in the DPRK.⁵¹ All three speakers urged the Council to place the human rights situation in the DPRK on its formal agenda. Kirby emphasized the Council's responsibilities associated with its commitment to R2P and called on it to consider referring the situation to the ICC—a move judged unlikely from the outset owing to opposition from China, which enjoys the power of veto on the Security Council.⁵²

Soon afterwards, negotiations began in the General Assembly's Third Committee on the annual resolution on the situation of human rights in the DPRK. The EU and Japan prepared a draft resolution which specifically referred to R2P and encouraged the Security Council to consider the CoI's recommendations, including referring the situation to the ICC and adopting targeted sanctions against those most responsible for crimes against humanity.⁵³

The pressure was maintained by Darusman's 2014 report as special rapporteur, published on 24 October. The special rapporteur reiterated the CoI's findings and called on the DPRK to do more to improve human rights and address specific allegations. He also called on all neighbouring countries to treat those fleeing the DPRK humanely and to apply the principle of non-refoulement.⁵⁴ The special rapporteur used especially bold language, however, in reflections directed to UN member states as a whole, and directly reinforced the CoI's key recommendations. He underscored the CoI's assessment that, 'in light of the manifest failure of the Democratic People's Republic of Korea to protect its population from crimes against humanity, the international community through the United Nations, bears the responsibility to protect the population' of that country.⁵⁵ With that in mind, the special rapporteur called on the General Assembly to pass a resolution submitting the CoI report to the Security Council for its consideration, and called on the Council to refer the situation to the ICC and impose targeted sanctions on those 'who appear most responsible for crimes against humanity'.⁵⁶ He also recommended that the Security Council place the human rights situation in the DPRK on its agenda and invite regular briefings from the special rapporteur, reaffirm the international community's responsibility to protect the population in the DPRK, and ensure that the OCHCR establishes a field mission to collect information. Darusman also called on the UN system to view the situation in the

⁵¹ 'Letter dated 14 April 2014 from the Permanent Representatives of Australia, France and the United States of America to the United Nations addressed to the President of the Security Council', S/2-14/276, 14 April 2014.

⁵² 'UN Security Council discusses N. Korean rights abuses', *Chosunilbo*, 7 Nov. 2014.

⁵³ See Security Council report, 'Monthly forecast: November 2014—North Korea', New York, 30 Oct. 2014; Madison Park, 'Under pressure, North Korea proposes human rights visit', CNN, 29 Oct. 2014.

⁵⁴ *Report of the special rapporteur on the situation of human rights in the Democratic People's Republic of Korea, A/69/Slot33701*, unedited advanced copy, 24 Oct. 2014, para. 54.

⁵⁵ *Report of the special rapporteur, A/69/Slot33701*, para. 16.

⁵⁶ *Report of the special rapporteur, A/69/Slot33701*, para. 53.

DPRK through the prism of its 'rights up front' policy, and called on the Security Council to request that the UN apply 'rights up front' in this case.

Under this increasing pressure, the DPRK pursued a twin-track approach. On the one hand, it rejected the CoI's findings as biased fabrications. In a well-publicized stunt, which attracted much media attention in the West, the DPRK's Association for Human Rights Studies issued its own human rights report which lauded the country's human rights record as heralding 'a new era of human rights' while deriding those who gave testimony to the CoI as 'human scum' and 'terrorist riff-raff'.⁵⁷ At the same time, however, the DPRK showed signs of increased willingness to engage with the international community. Most notably, on 27 October 2014 officials met with the Human Rights Council's special rapporteur and raised the possibility of a visit to Pyongyang, though on the condition that any reference to the ICC be dropped from the draft resolution being considered by the General Assembly's Third Committee. Darusman reportedly welcomed the government's change in attitude and attributed it to the increasing international attention being paid to the issue as a result of the CoI's report.⁵⁸

The DPRK has also adopted an unusually cooperative attitude towards the Human Rights Council more generally. The government first underwent universal period review (UPR) in 2009 and in its 2010 reply rejected all of the 167 recommendations suggested by its peers—the only state to do so during the UPR's first round.⁵⁹ The DPRK signalled a more constructive approach to the UPR shortly before its second-round review in 2014, issuing a more detailed response to the initial 167 recommendations which rejected 50 on the grounds that they 'slandered the country', considered but rejected 15, accepted 81 recommendations and claimed to have implemented them, partially accepted six and took note of 15.⁶⁰ In response to the 2014 UPR, the DPRK accepted some 113 and 'partly' accepted four of the 268 recommendations presented by the Council's working group on 2 July. It 'noted' a further 58 recommendations and rejected 67 recommendations on the grounds that they slandered the country. The final ten were rejected after consideration.⁶¹ The DPRK government also agreed to bilateral talks with Japanese officials about the abduction of Japanese citizens, building on its decision earlier in 2014 to release information in return for an easing of Japanese sanctions. Finally, it offered to participate in a human rights dialogue with the EU.⁶² It also underscored its willingness to participate in human rights dialogue with parties not hostile to it.⁶³

⁵⁷ *Report of the DPRK Association for Human Rights*, Pyongyang, 13 Sept. (Juche 103) 2014.

⁵⁸ Security Council report, 'Monthly forecast: November 2014—North Korea'.

⁵⁹ *Report of the Working Group on the Universal Periodic Review: Democratic People's Republic of Korea—addendum: views on conclusions and/or recommendations, voluntary commitments and replies presented by the state under review*, A/HRC/27/10Add.1, 12 Sept. 2014.

⁶⁰ *Position of the DPRK on the recommendations received during its first cycle UPR*, 1 May 2014. This document does not have an official number because it was received late.

⁶¹ *Report of the Special Rapporteur on the situation of human rights in the DPRK* (Geneva: Human Rights Council, A/HRC/26/43, 13 June 2014), para. 10.

⁶² See Roberta Cohen, 'A human rights dialogue with North Korea: real or illusory?', 38 *North, US–Korea Institute at SAIS*, 16 Oct. 2014, <http://38north.org/2014/10/rcohen101614/>, accessed 5 Feb. 2015.

⁶³ 'UN secretary general receives letter from NK leader', *Korea Herald*, 28 Sept. 2014.

Ultimately, this apparent openness to renewed dialogue on human rights failed to win many supporters. A Cuban effort to amend the EU–Japanese draft resolution to make it less critical, remove references to R2P, the ICC and the Security Council, and focus on enhanced dialogue was defeated by 77 votes to 40, and the unamended text was passed by the General Assembly’s Third Committee by a large majority of 111 votes to 19, with 55 abstentions. The resolution ‘recalled’ the DPRK’s responsibility to protect its own population from crimes against humanity, endorsed the findings of the CoI, and decided to submit its findings to the Security Council and recommend that the Council ‘take appropriate action to ensure accountability’, including through referral to the ICC and the adoption of targeted sanctions against those suspected of responsibility for crimes against humanity.⁶⁴

It seems clear that the CoI has made an important contribution to international engagement with the DPRK on the issue of human rights. Not least, it has helped to clarify the nature of the violations committed as crimes against humanity; has persuasively argued that the situation in the DPRK is one in which the state has ‘manifestly failed’ to fulfil its Responsibility to Protect, and that this responsibility should now be shouldered by the international community in general and the UN Security Council in particular; and has identified a number of concrete steps that should be taken to address this problem, should the DPRK not comply with the recommendations directed at it. As a direct result, the reports of the special rapporteur have acquired greater clarity around the issue of crimes against humanity and R2P, and the Human Rights Council, General Assembly and Security Council have all become actively engaged on the issue. Even in the face of continued intransigence from the DPRK, this progress will make it more difficult in future for these UN bodies to resist further action. With these points in mind, the following section briefly examines some of the available future options.

Ways forward: engagement, isolation or the status quo?

A number of objections have been raised in response to the idea of foregrounding human protection in engagement with the DPRK. First, there are concerns that because the room for engagement and likelihood of progress are so limited, engaging with the DPRK would be a waste of resources and human capital that could be better employed elsewhere in the world where the prospects are better. From a purely pragmatic perspective, there is little to recommend the investment of limited political capital and resources in the improvement of human protection in the DPRK. A strong body of empirical research suggests that investment in the promotion and protection of human rights in those states where violations are most severe is unlikely to deliver positive results. From this perspective, efforts should be prioritized through a form of global triage—focusing effort and resources on those countries judged most open to change.⁶⁵ Others point out that

⁶⁴ UN General Assembly, Third Committee, Resolution A/C/3/69/L.28/Rev.1, 18 Nov. 2014.

⁶⁵ Emilie M. Hafner-Burton, *Making human rights a reality* (Princeton, NJ: Princeton University Press, 2013).

the very attribute that makes the UN's human rights system well placed to facilitate global dialogue and the promotion of human rights, namely a consensual and consultative approach, makes it poorly suited to the *protection* of those rights when they are systematically violated by states.⁶⁶ Although there is some empirical merit to these propositions, and there are undoubtedly situations where a case could be made for less, rather than more, on the grounds that it is doing more harm than good, this argument is not persuasive when it comes to the DPRK for three main reasons: because of the gravity of the violations, which include crimes against humanity; because of the universality of the R2P principle, which demands action to protect populations from the gravest of abuses no matter who or where they may be; and because the proposed measures are relatively inexpensive and are unlikely to draw resources away from other countries where the chances of success might be judged to be greater.

Second, some hard-nosed strategists and diplomats argue that nuclear non-proliferation is a more urgent and critical global security issue that ought to be prioritized above human protection concerns. From this perspective, the situation *within* the DPRK can be addressed only once progress has been made on the nuclear issue. Until then, the foregrounding of protection concerns would only cloud and complicate an already difficult diplomatic engagement on nuclear weapons. According to the Congressional Research Service in the United States, this is precisely how successive US administrations have pursued relations with the DPRK: 'North Korea's nuclear program has been prioritized over North Korea's human rights record.'⁶⁷ However, as the various rounds of nuclear talks have stalled, it should have become apparent that the two issue-sets are closely related. If the analysis above about the regime's inability to reform itself even modestly without discarding the Juche philosophy and thereby weakening its internal legitimacy is correct, it stands to reason that genuine progress on the nuclear issue will not be possible in the absence of progress on other fronts, including human rights. Indeed, some critics have alleged that a decade or more of nuclear diplomacy has delivered only foreign aid, which has helped prop up the government, and a nuclear-armed DPRK.⁶⁸ Whether or not one accepts this critique, it seems fair to suggest that the prioritization of nuclear issues over human rights has largely failed to deliver progress on either. There is, then, little obvious evidence to support the case for a 'nuclear-first' strategy of engagement with the DPRK.

The DPRK situation is clearly complicated by the nuclear issue, but also by a range of other factors including the presence and position of the ROK and its commitment to reunification, the regime's unrelenting ideological dogmatism, and the very real danger that a weakening regime could precipitate a wider emergency should it feel the need to. Given these considerations, what are some of the practical steps that could be taken to advance protection in the DPRK?

⁶⁶ Freedman, *Failing to protect, passim*.

⁶⁷ Emma Chanlett-Avery and Ian E. Rinehart, 'North Korea: US relations, nuclear diplomacy and internal situation', Congressional Research Service report, 15 Jan. 2014, p. 3.

⁶⁸ See, *inter alia*, Daniel A. Pinkston, 'Bargaining failure and the North Korean nuclear program's impact on international nonproliferation regimes', *KNDU Review* 8: 2, 2003, pp. 5–21.

This closing section identifies five initiatives—some of which are drawn from the proposals of the CoI and special rapporteur.

First, without doubt, is the imperative of deeper engagement with China aimed at finding common ground and translating that into common action. For there to be any constructive change in the DPRK, China will have to play multiple roles: as a permanent member of the Security Council, without whose acquiescence no action can be taken through that body; as a neighbouring country, without whose cooperation little can be done to improve the protection of those fleeing the DPRK; and as a regional hegemon, without whose support persuasive pressure will not be brought to bear on Pyongyang.

For these reasons, China needs to be a fundamental part of the conversation about R2P and the future of the DPRK, and it is important that it be engaged in formal and informal, multilateral and bilateral, dialogue. China's overriding priority in this context appears to be to prevent the collapse of the DPRK and this, combined with its traditional foreign policy stance of opposition to external interference, externally imposed regime change and innovations such as country-specific mandates in the UN Human Rights Council, has pushed it to adopt a cautious—if not outright rejectionist—position on human rights in the DPRK.⁶⁹ Not surprisingly, therefore, in early October 2014 China indicated that it would not support referral of the DPRK to the ICC, though it stopped short of threatening to veto a draft resolution to that effect, prompting Justice Kirby to note that a Chinese veto on this issue should not be assumed. China has shown a capacity for flexibility in its practices on the UN Security Council and its leadership appears to understand that the DPRK's long-term viability cannot be assured without reform. What is more, China has become increasingly interested in the role of mediation in resolving major disputes and has dispatched envoys to Syria, South Sudan, Darfur and Myanmar, all of which have made constructive contributions. All this suggests that there is potential scope for dialogue to find common ground on human rights in the DPRK—and this, I would argue, is essential for advancing the issue through multilateral institutions and applying pressure on Pyongyang.

Second, the UN system and the international community more broadly need to put 'rights up front' in their relationship with the DPRK. R2P dictates that the protection of populations from crimes against humanity be placed at the forefront of our consideration rather than being understood as an optional extra. In practical terms, this means that the UN system especially, but also member states and NGOs (with the possible exception of the International Committee of the Red Cross, which has a unique mandate), ought to develop a comprehensive and strategic approach to addressing the human rights situation in the DPRK and improving the protection of the population there from crimes against humanity. This comprehensive approach should coordinate the various strands of human rights engagement with the DPRK (UN system, US, EU, Japan, ROK, etc.) and carefully calibrate demands for engagement, inducement, coercion and accountability. The UN's 'rights up front' framework, raised in the 2014 report of

⁶⁹ Chanlett-Avery and Rinehart, 'North Korea', p. 11.

the special rapporteur, provides useful guidance on how this might be achieved. Three elements of that framework and the Secretary General's commitment to it are especially pertinent: the international community should be provided with candid information about serious violations of human rights or international humanitarian law; the UN and its partners should ensure coherent strategies to address rights violations, and human rights action should be better coordinated; and partners should exercise 'due diligence' to ensure that their engagement with the DPRK does not facilitate rights violations.

There are a variety of tangible ways in which this might be achieved. The CoI's recommendation, endorsed by the special rapporteur, that interested states establish a contact group on human rights in the DPRK would be an important starting-point. A contact group, composed of states with historical friendly ties to the DPRK, donors and potential future donors, and states involved in the six-party talks on nuclear weapons, would be a focal point for human rights dialogue, would allow interested states to coordinate their positions in the UN's political and human rights bodies and maintain the pressure, and would facilitate useful exchange between states on the measures that they might take individually or collectively to encourage the DPRK to fulfil its responsibilities.⁷⁰ These might include, for instance, targeted sanctions against individuals and taking up the special rapporteur's proposal that states should apply the principle of universal jurisdiction for crimes against humanity. Other ways of pushing the human rights situation in the DPRK to the front and centre of international policy would be to address specific elements. One initiative, for example, could be a regional conference on displacement led by the UNHCR to consider the nature, plight and protection of those who flee the DPRK and ensure that the principle of non-refoulement is, if not always respected, then at least discussed.

Third, although the prospect of dialogue with the OHCHR is rightly at the forefront of concern, more should be done to encourage the use of the good offices of the UN Secretary General. The Secretary General's good offices can provide a useful vehicle for facilitating dialogue on improving the protection of human rights in the DPRK. The Secretary General can also act as a trusted conduit between the DPRK and the UN's political and human rights institutions, especially the UN Security Council. The Secretary General has repeatedly offered his good offices to the DPRK on this matter but to date has been rebuffed. In order to overcome this roadblock, the General Assembly might consider asking the Security Council to specifically recommend the use of good offices. At the same time, the Secretary General could soften the approach to Pyongyang by offering dialogue, in the first instance, on those UPR recommendations that were accepted by the DPRK.⁷¹

Fourth, it is important to underscore the importance of the establishment of a standing office to collect information about the human rights situation in the DPRK. Not only will the standing office become an important repository of

⁷⁰ *Report of the Commission of Inquiry*, para. 94(h).

⁷¹ On this point, see *Report of the Working Group on the Universal Periodic Review: Democratic People's Republic of Korea—addendum*.

information and testimony about the grave violations committed in the DPRK, a potentially important source for any future prosecutions, it will also play a key role in maintaining global interest in the situation once the international attention generated by the CoI subsides.

Fifth, in the light of the General Assembly's recommendation, there are strong grounds for thinking that it is time for the UN Security Council to give the situation of human rights in the DPRK a regular place on its formal agenda, as recommended by both the CoI and the special rapporteur. R2P gives the Council special responsibilities for protecting populations from crimes against humanity when the host state has 'manifestly failed', and the CoI and special rapporteur agree that the DPRK falls into this category. Indeed, no state—other than the DPRK—has yet argued that this is not the case. At the very least, the Security Council has a 'responsibility to try' by placing the issue on its agenda and exploring ways in which it might support the protection of populations in the DPRK.⁷² Besides these responsibilities, the Security Council is endowed with unique international authority, which includes the capacity to pass legally binding resolutions, refer matters to the ICC, and apply enforcement measures such as targeted sanctions should these be necessary.

The DPRK's renewed willingness to engage in human rights dialogue in the wake of the CoI report seems largely driven by concern about the General Assembly asking the Security Council to refer the situation there to the ICC. This being so, it seems clear that it would be very difficult to achieve tangible gains without the Security Council's active engagement in keeping up the pressure on Pyongyang. However, given the political differences evident within the Council (recall that Russia and China voted against the 2014 Human Rights Council resolution on the DPRK, and China has already voiced its opposition to referring the situation to the ICC), it is unlikely that the Council would agree to place the matter on its regular agenda without moe careful diplomacy. There are, however, signs that if sufficient pressure were brought to bear, China and Russia would find it difficult to block a move to place the DPRK on the agenda. Clearly, the DPRK government is concerned about this possibility.

Persuading the Council to give the issue a regular place on its agenda will be far from straightforward, however. Given the aforementioned positions of Russia and China, it would be difficult for the Council to find a consensus on some of the recommendations advanced by the CoI. In particular, at the present time, it would be difficult to build sufficient support in the Council for the headline recommendations of referring the situation to the ICC and imposing targeted sanctions on the individuals most responsible for crimes against humanity. As noted earlier, China has already expressed its opposition to an ICC referral and is also well known for its generally cautious attitude to economic sanctions, including targeted sanctions. Thus the emerging linkage between the Council placing the situation in the DPRK on its regular agenda and the specific proposals arising from the CoI—a referral to

⁷² On this way of viewing the Security Council's responsibilities see Jennifer M. Welsh, 'Implementing the responsibility to protect: catalyzing debate and building capacity', in Alexander Betts and Phil Orchard, eds, *Implementation and world politics: how international norms change practice* (Oxford: Oxford University Press, 2014), p. 126.

the ICC and targeted sanctions—could prove counterproductive. That is, tying the agenda item (human rights in the DPRK) to policy measures not supported by all the permanent members is likely to make it more difficult for advocates to achieve their first goal of persuading the Council to take up the issue. Suspecting that it would give rise to a contentious agenda that would force its hand on the use of the veto, China in particular (but also Russia) would be likely to redouble efforts to restrict the Council's consideration of human rights in the DPRK.

To avoid this potential problem, those advocating the issue's adoption by the Security Council should focus their attention on the relatively modest steps that the Council could take to begin what is likely to be a protracted engagement. With that in mind, the focus should be on building trust between the permanent members and establishing the parameters for the Council's future deliberations. This could be achieved through advocacy for two of the less prominent recommendations suggested by the CoI and the special rapporteur: reaffirmation by the Council of the principle of R2P as it relates to the situation in the DPRK; and a request by the Council for, and a commitment to receiving, regular briefings from the Secretary General on the matter. While the former would help establish principled expectations that could frame the Council's engagement, the latter would set a foundation of common understanding as a basis for future debate and collective action, which may (or may not) include referring the matter to the ICC and imposing targeted sanctions.

Conclusion

The human protection crisis in the DPRK is arguably the world's most chronic and intractable; and yet to date it has been largely overlooked by those engaged with R2P. The inclusion of R2P in the UN General Assembly's 2014 resolution on the human rights situation in the DPRK therefore represents significant progress—progress that was made possible by the CoI that preceded it. By documenting the government's abuses in detail, finding that many of those abuses amount to the commission of systematic crimes against humanity, and calling on the international community to fulfil its responsibility to protect the people of the DPRK in a context where the government had manifestly failed to do so, the CoI has proved to be a powerful catalyst for deeper international engagement on the protection of populations in the DPRK. At the time of writing, three of the UN's key bodies—the Human Rights Council, the General Assembly and the Security Council—are engaging or deepening their engagement on the question, with a range of options under active discussion. This article has identified five steps—each fraught with its own political and practical difficulties—which could slowly increase the pressure for reform in the DPRK, as well as opening pathways to enable and facilitate such reform. Whether or not progress on any of these fronts is achievable in the short term, it seems likely that the human protection dimension will play a more significant role in international deliberations on the DPRK in the years to come than it has in years past.