

NORTH KOREA: GENOCIDE OR NOT?¹

The Honourable Michael Kirby AC CMG

On March 21, 2013, the UN Human Rights Council established the Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea (“North Korea”). I was asked to chair the Commission, which was required “to investigate the systematic, widespread and grave violations of human rights in North Korea, with a view to ensuring full accountability, in particular for violations that may amount to crimes against humanity.”² One of the thornier issues those of us on the Commission had to wrestle with was whether the human rights violations in question, which indeed claimed many lives, constituted genocide. We found ourselves in highly contested territory: how was genocide to be defined? Did the available evidence of the North Korean authorities’ human rights abuses fall within the accepted definition?

My colleagues and I thus had to confront the complexities of the concept of genocide and its legal status before we could make a finding, one way or another, about its attribution to the transgressions we were examining. In what follows I sketch the historical background to this conundrum, and the actions of the North Korean government as revealed in the evidence before us. On that basis I go on to explain why we came to the conclusion we did.

The (very) late arrival of the genocide concept

The world had not heard of “genocide” before 1944. Yet the world has known the phenomenon of genocide all too well since time immemorial—as Steven Pinker graphically reminds us in his historical overview of human violence.³ We can read many accounts of what we now call genocides in the Old Testament, Thucydides’ history of the Peloponnesian War, Polybius’ account of the sacking of Carthage in the Third Punic War, and in countless other an-

1 This paper’s origins are a presentation to the Department of Statistics and Mathematics at Queen’s University of Ontario, Canada, June 8, 2015.

2 “Commission of Inquiry on Human Rights in the Democratic People’s Republic of Korea,” UN Human Rights: Office of the High Commission, accessed October 28, 2016, <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/AboutCoI.aspx>.

3 Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (London: Allen Lane, 2011).

cient sources, as well as in the work of today's forensic anthropologists and archaeologists. That is before we come to the more premeditated medieval genocides such as the Crusades, and the modern ones associated with slave trade, colonialism, ethnic nation building and regime maintenance, right up to the Holocaust itself and beyond.

At its most basic, genocide refers to the deliberate destruction of a recognisable group of people, eliminated because of who they are rather than what they have done or might do. "Killing-by-category," Pinker calls it.⁴ Why did it take humanity until 1944 to find a word for such a horrific and ubiquitous phenomenon? Perhaps because it was such a banal accompaniment of the almost ceaseless warfare in human affairs. A war occurs between tribes A and B; A wins a decisive victory, massacres all the B men to preclude a counterattack, opportunistically enslaves the B women and children, and seizes B's territory. Tribe B is then effectively obliterated. Until the twentieth century, the A leaders had no need to account for their actions because there were no authoritative witnesses, and certainly none with cameras, or telegraphic or wireless links to a foreign press. Above all, there was no rule of law as such to bring leaders to account.

This situation changed with the genocide orchestrated from April 1915 by Turkish authorities against Armenians and other Christian minorities in Asia Minor. Now the witnesses included foreign diplomats and consular staff, and correspondents equipped with cameras, telegraph and shortwave radio. Reports of the atrocities found their way into Western newspapers and sparked mass mobilisation of groups supporting Armenian survivors, including in far-off Australia.⁵ The governments of Britain, France and Russia issued a declaration condemning the outrage. Yet the outrage itself still lacked a name, let alone any legal sanction against it.

Raphael Lemkin, a Polish-Jewish jurist, became obsessed about this problem in the interwar period, all the while focusing on the Armenian killings. What was this crime, and what should we call it? In 1944 he came up with an answer in a very long, forbidding book published in the USA,⁶ by which time his own people (including family members) had fallen victim to the self-same crime at the hands of the German occupiers of his country.⁷ The missing

4 Ibid., 386.

5 Peter Stanley and Vicken Babkenian, *Armenia, Australia and the Great War* (Sydney: NewSouth, 2016).

6 Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington, DC: Carnegie Endowment for International Peace, 1944).

7 The fascinating story of Lemkin's mission, in apparent opposition to his compatriot and colleague Hersch Lauterpacht's project to found post-war human rights development on a more individualistic basis, has re-

name was “genocide” and he laboured for many years to see it stand for a justiciable crime.

Thanks largely to Lemkin, the still newly created United Nations Organisation adopted in 1948 the Convention on the Prevention and Punishment of the Crime of Genocide (“the Genocide Convention”). Until then, genocide had rated just one official mention—in the indictment of October 1945 served on the defendants in the first Nuremberg trial of major Nazi officials. In consequence of the new convention, “genocide” found its way into indictments before ad hoc international tribunals dealing with atrocities in Cambodia, Rwanda and the former Yugoslavia. Today it constitutes part of the jurisdiction that the 1998 Rome Statute confers on the International Criminal Court (ICC).

Unfortunately, Lemkin’s achievement was incomplete. Countries whose authorities had committed historic wrongs connived to attenuate the definition of genocide in the convention, lest they be accused of the crime themselves. I will return to the problems of definition below.⁸ Suffice to say that the definition in the Genocide Convention, with all its shortcomings, became the one and only authoritative definition for both analytical and legal purposes, and is reproduced in the crimes schedule of the Rome Statute that constitutes the ICC.⁹ Above all, the definition insists on the “intent to destroy [a group] in whole or in part,” and political or class groups are not mentioned as recognisable victims of genocide, which has proved problematic in a number of cases, including Cambodia and, indeed, North Korea.

Of course, most thoughtful people today probably consider that they know, with a fair degree of accuracy, what genocide means. The same could be said for lexicographers. The *Macquarie Dictionary* defines it as “extermination of a national or racial group as a planned move.” The *Shorter Oxford English Dictionary* gives an even briefer definition: “annihilation of a race.” The *Chambers English Dictionary* uses the same definition but adds the adjective “deliberate”: “the deliberate extermination of a race or other group.” This may be an unnecessary elaboration as it is difficult to imagine that a whole race (or part thereof) could be exterminated except by deliberate conduct, even if it remains true to the Genocide Convention’s insistence on intent. Of itself, the

cently been told by international lawyer Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (London: Weidenfeld & Nicolson, 2016).

8 For a more detailed critique of the definition, see Colin Tatz and Winton Higgins, *The Magnitude of Genocide* (Santa Barbara: Praeger, 2016), 17–32.

9 See UN General Assembly Resolution 260, “United Nations Genocide Convention,” Article II, December 9, 1948, <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>; and the crimes schedule of the “Rome Statute of the International Criminal Court,” Article 6 and 25(e), July 1, 2002, https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf.

connotation of “race” is too large to permit chance, accidental or unthinking extermination of so many human beings.

On the basis of their general knowledge or reading, most people would probably sense that the Khmer Rouge regime’s systematic destruction of between 1.5 and 1.7 million people in Cambodia constituted genocide.¹⁰ When it comes to international law, though, such matters are not decided by intuition, feelings or common assumptions. Nor can they fall into the widespread (often rhetorical) tendency to equate any large-scale heinous crime with genocide. The specificity of this crime needs to be respected.

To decide whether conduct of indisputably oppressive regimes that disregard fundamental human rights amounts to genocide requires the decision-maker to be more precise. He or she must look exactly at what constitutes genocide in international law. This obligation takes the decision-maker to an examination of the origins of the notion of genocide in international law.

Considering genocide in North Korea

My role in the UN Commission of Inquiry into Human Rights Abuses in North Korea obliged me to embark upon that journey. The purpose of this essay is to explain where the journey took me, where it ended up, and the controversies surrounding the destination I reached together with my colleagues.¹¹ The Inquiry found convincing evidence of many human rights violations and crimes against humanity. Was there proof of genocide though? On the evidence before us, we answered that question in the negative. Some readers of the report and some scholars have found that conclusion surprising.

Our inquiry followed many years of disturbing reports about North Korea. Although a member of the United Nations since 1993, its authorities had not cooperated with the UN human rights machinery. They had not permitted successive special rapporteurs—appointed by the Human Rights Commission (and then Council, abbreviated to HRC)—to visit their territory, nor had they invited the High Commissioner for Human Rights. North Korea had essentially closed its borders, allowing only a trickle of tourists who were kept under close watch and restricted in their movements and contacts. For these reasons, North Korea came to be known as a “hermit kingdom.”

Accessing up-to-date, accurate and representative evidence to respond to

¹⁰ Tatz and Higgins, *The Magnitude*, 106.

¹¹ UN Human Rights Council, “Report of the Commission of Inquiry on Human Rights Violations in the Democratic People’s Republic of Korea,” February 7, 2014, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/108/66/PDF/G141866.pdf?OpenElement>.

the nine-point mandate for our inquiry was bound to be extremely difficult.¹² As expected, the North Korean government, through its mission in Geneva, effectively ignored our requests to permit Commission members and staff to visit the country. It maintained this stance throughout the inquiry. In the end, a copy of our draft report was emailed through North Korea's Geneva embassy to the country's Supreme Leader (Kim Jong-un), with a warning that he might himself be personally accountable for the crimes against humanity found in the report under the "command principle."¹³ This too was ignored. The North Korean authorities, however, were aware of the inquiry. They regularly denounced it and its members. When they criticised the inquiry and its procedures, the Commission's members and other UN representatives offered to come to Pyongyang to explain their mandate, to report and answer questions. This offer was also ignored.¹⁴

Faced with such intransigence, the Commission was reminded of the importance of the compulsory procedure of *subpoena* (literally "under the power"), developed in national legal systems to ensure that parties, witnesses and records relevant to a proceeding are brought before judicial officers charged with making findings about transgressive conduct. While the HRC strongly and repeatedly urged the North Korean government to cooperate with the inquiry, its pleas were also ignored. Yet obviously, this want of cooperation could not be allowed to obstruct the Inquiry in the discharge of its mandate, any more than a national court or inquiry would simply surrender in the face of non-cooperation.

The three members of our Commission of Inquiry came from differing cultural and legal traditions. Two (Marzuki Darusman from Indonesia, and Sonja Biserko from Serbia) came from countries that follow civil law traditions, ultimately traced back to France and Germany. My own experience had been in the common law tradition derived from England as applied in Australia. Most UN inquiries are carried out by professors and public officials from civilian countries. Ours gave a great deal of attention at the outset to the methodology we should adopt to overcome, as far as possible, the hostility and non-cooperation of the subject country.¹⁵

The Commission was not itself a court or tribunal. It was not authorised to prosecute, still less to arraign and to determine North Korea's guilt, or that

12 "Report of the Commission," 6–7.

13 *Ibid.*, 25.

14 *Ibid.*, 23–25.

15 *Ibid.*, 10–15; Philip Alston and Sarah Knuckey, *The Transformation of Human Rights Fact-Finding* (Oxford: Oxford University Press 2016), 25, 69, 89.

of any named officials. The object of UN commissions in the area of human rights is to be “effective tools to draw out facts necessary for wider accountability efforts.”¹⁶ Self-evidently, all such inquiries must themselves conform with UN human rights law. This means that they must accord natural justice (due process) to those who are the subject of inquiry, and protection to those who give or produce testimony, and may for that reason be at risk. Our Commission took these obligations seriously. The methodology adopted included:

1. Advertisement to invite witnesses to identify complaints and offer testimony;
2. Conduct of public hearings to receive such testimony as could be safely procured in public (with other evidence being received in private);
3. Film recording of such public testimony and placing it online, accompanied by written transcripts in relevant languages;
4. Inviting national and international media to attend and cover the testimony and draw it to global attention;
5. Production of a report written in simple, accessible language;
6. Indicating clearly in the report of the findings made by the Commission and the evidence upon which such findings are based;
7. Provision of a draft of the report to the nations and individuals most closely concerned, with an invitation to offer suggested corrections or comment on factual or legal conclusions;
8. Publication with the report of any such comments (that were received and published from China);¹⁷ and
9. Engaging with media in all forms to promote knowledge of—and to secure support for—the conclusions and recommendations.¹⁸

The Commission was aware that false testimony from witnesses could potentially damage the credibility of its findings. It therefore took care to limit the witnesses to those who, on preliminary interview by the Commission’s Secretariat, appeared to be honest and trustworthy. It also secured an unusual

16 UNSC, “The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies,” August 23, 2004, <https://www.un.org/ruleoflaw/files/2004%20report.pdf>; UNHRC, “Impunity: Report of the Secretary-General,” February 15, 2006, <http://repository.un.org/handle/11176/258488>. See also Geoffrey Palmer, “Reform of UN Inquiries,” *For the Sake of Future Generations: Essays on International Law, Crime Justice in Honour of Roger S. Clark*, eds. Suzannah Linton, Gerry Simpson and William A. Schabas (Leiden: Brill-Nijhoff, 2015), 597–616.

17 “Report of the Commission,” 27–36.

18 Michael Kirby, “The UN Report on North Korea: How the United Nations Met the Common Law,” *Judicial Officers Bulletin* 27, no. 8 (2015), 72–73.

agreement with the government of South Korea, to allow North Korea to send representatives or advocates, or to engage lawyers, who could make submissions and (with the Commission's leave) ask questions of witnesses. This offer was communicated to the North Korean government, which ignored it. In giving testimony, witnesses before the Commission were examined in a manner appropriate to "examination in chief," that is, with non-leading questions. This course permitted them to give their testimony in a generally chronological order, in their own language, and in a way they felt comfortable. The Commission did not cross-examine witnesses unless it found it essential to clarify apparent inconsistencies, or to address particular doubts that the evidence had raised in the minds of Commission members. The non-leading mode of most of the examination allowed witnesses to speak for themselves.

The Commission substantially organised the mass of testimony it procured under the headings of the nine-point mandate it had received from the HRC. In each case, analysis of the issues and the overall effect of the testimony were supplemented by short extracts from the transcripts. These passages add light and colour to the report, which third person chronicles commonly lack. Part of the power of the Commission's report derives from the care devoted by the members and the Secretariat to providing a readable text. The purpose was to ensure that the findings, conclusions and recommendations grew naturally out of the preceding passages of testimony, evidentiary extracts, recommendations and analysis.

The North Korean government criticised the report on the basis of the alleged "self-selecting" character of the witnesses, among other points. The Commission repeatedly responded with appeals to permit its members to visit the country and to conduct a transparent investigation among a wider pool of witnesses. This offer was also ignored. Moreover, the testimony of more than 80 witnesses (taken and recorded in Seoul, Tokyo, London and Washington DC) was placed online and is still available there. This means that people everywhere throughout the world (except in North Korea) can view the witnesses and their testimony for themselves and reach their own conclusions as to their truthfulness, balance and representativeness.

North Korea's objections, and alternating "charm offensive" and bullying tactics following publication of the report, are recorded online. Sharp (but respectful) exchanges between the country's ambassadors at the UN in Geneva and New York and myself as the Commission's Chair, are also available on the internet. These allow both the political actors and the general international public to evaluate the Commission's report. Certainly, in the first instance, the political actors in the organs of the UN indicated their strong support for the inquiry through overwhelming votes endorsing the report in the HRC, the UN

General Assembly and the Security Council. In the latter, the human rights situation in North Korea was added to the agenda of the Security Council following a procedural vote, not subject to the veto, by a two-thirds majority (11 for, two abstentions, two against).

Two permanent members of the Security Council (China and the Russian Federation) voted against the procedural resolution that added the report to the Council's agenda. One substantive matter on which the concurring decision of the permanent members would be essential concerns the Commission's recommendation that the case of North Korea be referred to the ICC. If that occurred, prosecutorial decisions might be considered and, if so decided, trials would be conducted to render those arguably guilty of grave crimes accountable both before the people of North Korea and the international community.¹⁹ So far, that substantive resolution has not been proposed, still less voted on.

In December 2015, the Commission's report returned to the Security Council. By a further procedural motion, the Council affirmed that the topic was within its agenda. Again, China and the Russian Federation disagreed, but their negative votes again did not count as a veto, since the resolution was procedural. No so-called "double veto" was invoked to challenge the assertion that the resolution was procedural. The Chinese ambassador asserted that North Korea presented no danger to the peace and security of its neighbours. Notwithstanding this argument, the Security Council adopted the resolution. By its own actions, North Korea itself quickly demonstrated the serious error of the Chinese characterisation of its dangers: in January 2016 it conducted a fourth nuclear weapons test and, a month later, tested an intercontinental missile. Ostensibly, it carried out the latter test to place a satellite in space. Yet no observer was misled into thinking that its objectives were purely peaceful. In September 2016 it undertook a fifth and larger nuclear test.

As noted above, the Commission recommended that North Korea's human rights violations should be referred to the ICC.²⁰ Under the Rome Statute that established the court, in exceptional cases the Security Council can confer jurisdiction notwithstanding the fact that the country concerned is not itself a party to the statute. Although the Council has not so far invoked this exceptional jurisdiction in North Korea's case, following the country's fourth nuclear test on January 6, 2016 and a new missile launch, the Council adopted a strong resolution imposing new and severe sanctions on the country.²¹

19 "Report of the Commission," 361, 370.

20 "Rome Statute," Article 13(b).

21 Richard Roth, Holly Yan and Ralph Ellis, "UN Security Council Approves Tough Sanctions on North Korea," *CNN*, March 3, 2016, <http://www.onn.com/2016/03/02/world/un-north-korea-sanction-vote-index/html>.

The Commission's findings of crimes against humanity referred to the definition of such crimes under international law. It found ample evidence in the testimony of such crimes in the conduct of political prison camps; in the ordinary prison system; in the way the regime targeted religious believers and others considered subversive influences; in the victimisation of people who attempt to flee the country; and in the targeting of other countries' citizens as victims, in particular through a deliberate campaign of abduction of foreigners.²²

As well, the failure to address the state's obligations to feed its population on top of natural disasters (floods and droughts) was found to have resulted in a major famine in the mid-1990s.²³ It caused death by starvation of up to 2 million people,²⁴ and severe stunting of infants, deprived of essential nourishment. Famine crimes (including the North Korean case) have been examined in depth by international lawyer, David Marcus,²⁵ who proposes four grades of negligence or recklessness, the top two to be considered criminal: the least deliberate (incompetent government that cannot manage a food crisis); the next level (an indifferent government that does not act even though it has the capacity to); second worst (when governments develop policies that create famine and although they are aware of the consequences, persist in implementing them); and, finally, the first-degree famine crime where governments intentionally use starvation as a tool of annihilation.²⁶ Marcus argues that the first and second-degree cases are distinguished by the intent (or *dolus specialis*). He also argues that famine crimes of this extent, used to eliminate a particular group, may align with the Genocide Convention.

Genocide scholar Adam Jones explains that as a tyrannical regime following in the footsteps of Mao Zedong and Josef Stalin, the North Korean government has added to political persecution a strong element of racism with its philosophy that Koreans constitute the world's purest or cleanest race. After the fall of the Soviet Union and China's withdrawal of foreign aid, 1994 saw a major famine, while international humanitarian aid was diverted from local populations to the leadership who sold it on the black market for profit.

22 "Report on the Commission," 319, 323, 330, 333, 335, 345.

23 *Ibid.*, 144.

24 Adam Jones, *Genocide: A Comprehensive Introduction*, 2nd ed. (Oxon: Routledge, 2011), 68. The Commission found "the death of at the very least hundreds of thousands of human beings." Report, 208. Although it is true that some observers have estimated millions of deaths in the 1995 famine in DPRK, more recent estimates have suggested that the number of deaths was substantially lower, no more than 800,000 and probably less.

25 David Marcus, "Famine Crimes in International Law," *American Journal of International Law* 97 (2003), 245–81.

26 Tatz and Higgins, *The Magnitude*, 30.

Forced requisitions of crops and food for the army exacerbated the situation, and any protesting civilians were labelled political enemies and punished with exile to Gulags for slave labour or execution.²⁷

All of this is true. Yet in the context of the Commission of Inquiry's terms of reference, and with the Genocide Convention providing the international legal definition, was there evidence of genocide? This was the question that the Commission addressed in a special section of its report.

The definition of genocide

Although the Commission's mandate from the HRC did not expressly raise the issue of genocide (as distinct from human rights violations and crimes against humanity), some of the submissions it received urged that a case of genocide had been established. This was particularly so in relation to the starvation of the general population (but especially the prison and detention camp population),²⁸ and the drastic reduction in the population of Christian and other religious believers in North Korea.²⁹ Here too there is a parallel with the Cambodian case, which can be said to align with the international legal definition of genocide in its targeting of Buddhist monks, Muslim Cham communities, and ethnic Chinese and Vietnamese, but not in relation to its killing of Cambodian citizens who were viewed as political or class enemies.

In the North Korean case, Christian Solidarity Worldwide, a civil society organisation representing Christians, appeared before the Commission in London and offered a well-prepared and persuasive submission that the evidence of genocide against religious groups (especially Christians) was sufficiently established. This related particularly to the 1950s and 1960s when, even according to North Korea's national census and other official materials, the Christian population in the country declined rapidly and substantially.

Unsurprisingly, at the partition of the Korean Peninsula in 1945, the proportion of the Christian population of North Korea approximated that of South Korea. Before the end of the Second World War in August 1945, during the years that Korea was a unified kingdom and empire—even as a colony of Japan (1911–1945)—it had been a unified country, with a common language and culture, including religious culture.³⁰ According to the statistics issued by the North Korean census authorities, the percentage of the population identi-

27 Jones, *Genocide*, 216.

28 "Report on the Commission," 350.

29 *Ibid.*, 351.

30 *Ibid.*, 9–21.

fyng as Christian in 1945 was 24 per cent. This was roughly the same as in the south. It is roughly the same proportion as exists in South Korea today.

In North Korea, however, the percentage identifying in the census as Christians plunged rapidly, so that today it stands at less than one per cent. Christians, Chondoists and Buddhists dropped from 24 per cent in 1950 to 0.016 per cent in 2002.³¹ The Commission was invited to accept the inference that this reduction was the result of the regime's hostile attitudes and actions towards faith communities, and Christians in particular. Such hostility would have been consistent with a large amount of evidence before the Commission proving the regime's suppression of any challenge to the ideology propounded by its successive Supreme Leaders. So was there sufficient evidence to justify a conclusion of genocide in that case? Was the evidence supported by the testimony relating to the suffering of the people (especially children) of North Korea during the famine in the mid-1990s? That period was labelled by the regime (with its attraction to traditional Marxist slogans) as "the arduous march."

Before the Commission reached a conclusion on this subject, it consulted a number of experts on the international law of genocide. These experts included Professor William Schabas and Sir Geoffrey Nice QC. The former had written extensively on the legal aspects of genocide.³² The latter had extensive trial experience before the International Tribunal for the former Yugoslavia, dealing with allegations (and the proof) of the international crime of genocide. Each of these experts cautioned the Commission that it should not feel under any obligation to find the "gold standard" international crime of genocide. As noted earlier in this essay, in law, genocide has unique features. It has specificities that have to be applied in formal decision-making. It is not a general offence arising from any mass death toll due to serious human rights offences.

The components of genocide in international law

In dealing with this issue, the Commission collated the testimony that might arguably fall within the crime of genocide:

According to the Commission's findings, hundreds of thousands of inmates have been exterminated in political prison camps and other places over a span of more than five decades. In conformity with the intent to eliminate class enemies and factionalists over the course of three generations, entire

31 Ibid., 351.

32 William Schabas, *Unspeakable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 106.

groups of people, including families with their children, have perished in the prison camps because of who they were and not for what they had personally done. This raises the question of whether genocide or an international crime akin to it has been committed.³³

Having reflected on those findings, the Commission addressed the definition of genocide in international law, which specifies the groups covered as national, ethnic, racial or religious in character.

The Commission concluded that the North Korean government's clearly deliberate conduct, that had destroyed human life en masse, had been "based principally on imputed political opinion and state assigned social class," and that "such grounds are not included in the contemporary definition of genocide under international law."³⁴

Because the number and horror of the crimes revealed in the Commission's report demanded still closer analysis, it went on to consider how the acts of murder and extermination might be classified:

Such crimes might be described as a "politicide." However, in a non-technical sense, some observers would question why the conduct detailed above was not also, by analogy, genocide. The Commission is sympathetic to the possible expansion of the current understanding of genocide. However, in light of finding many instances of crimes against humanity, the Commission does not find it necessary to explore these theoretical possibilities here. The Commission emphasises that crimes against humanity, in their own right, are crimes of such gravity that they not only trigger the responsibility of the state concerned, but demand a firm response by the international community as a whole to ensure that no further crimes are committed and the perpetrators are held accountable.³⁵

The Commission acknowledged that the category of possible elimination that might come closest to the definition of genocide in the present international law would be that relating to religion:

In its testimony before the Commission, Christian Solidarity Worldwide submitted that there were indications of genocide against religious groups, specifically Christians, in particular in the 1950s and the 1960s. The Com-

33 "Report on the Commission," 350.

34 *Ibid.*, 351.

35 *Ibid.*

mission established, based on the [North Korean government's] own figures that the proportion of religious adherence [had greatly declined]. The Commission also received information about purges targeting religious believers in the 1950s and the 1960s. However, the Commission was not in a position to gather enough information to make a determination as to whether the authorities at that time sought to repress organised religion by extremely violent means or whether they were driven by the intent to physically annihilate the followers of particular religions as a group. This is a subject that would require thorough historical research that is difficult or impossible to undertake without access to the relevant [North Korean] archives.³⁶

In this way the Commission came to its conclusion that genocide, as it is currently defined in international law, was not made out on the testimony. The reasons for extermination were fundamentally political and ideological. That is not currently a ground for the establishment of genocide in international law. Nonetheless, the evidence of many acts amounting to crimes against humanity was overwhelming. Such acts were enough to invoke the duty of the international community to respond. It would have pushed the boundaries of the Commission's report needlessly to have reached a finding of genocide.

Conclusion

Genocide is a special crime of the greatest horror. That is why UN inquiries, scholars, historians and even politicians have to be careful in the use of the word. Throwing around the term "genocide" and drawing analogies to horrible events that do not fit the treaty definition of genocide, is dangerous. It tends to downgrade the unique and particular elements of the crime as presently defined.

One could certainly argue that genocide in international law should extend to crimes of extermination based upon actual or perceived political conviction or belief. So much was proposed during the elaboration of the Genocide Convention by the representative of Cuba. The USA's representative opposed the suggestion. In the end, the "political ground" was not adopted. This was another reason, based on the *travaux préparatoires*, for the Commission to hold back.

Time may establish that, in this respect, the Commission was excessively cautious. Evidence might appear that the extermination of religious believers

36 "Report on the Commission, 351.

that occurred in North Korea was motivated by their religious beliefs. If that were so, it would be enough to constitute genocide, accountable in international law as it stands today. Time might eventually also see the enlargement of the definition of genocide to include extermination on political grounds. Any such elaboration would operate in law prospectively only, even if—analytically speaking—it might apply to North Korea's actions in the 1950s, 1960s, or even up to the present day, based on the continuation of the relevant acts of deadly violence based on racial or religious grounds.

If we are to build international law and tribunals that are respected as a true regime of law, we must do so on a foundation of authentic components. Those components will include establishing the preexistence of the norm invoked. In the immediate instance, that is the norm of the definition of genocide contained in present international law.

On each occasion when alleged victims and civil society organisations urged the Commission to push the envelope of international law and practice into problematic areas, it held back. It observed the principle of due process and natural justice. It took care to warn the North Korean government and its Supreme Leader of their own potential personal liability for international crimes. When it came to considering the international crime of genocide, it accepted the orthodox, current definition. On the basis of that definition it declined to record a finding of genocide.

Whilst this conclusion may strike some as surprising, even needlessly cautious and disrespectful to the victims in North Korea, it was the conclusion that the rule of law appeared to demand on the evidence adduced. One of the essential ingredients for preventing, combatting and responding to genocide is the existence of international law. In that sense, the Commission's approach contributes to a world in which genocide is no longer just a morally repugnant affliction of humanity, but constitutes an international crime for which perpetrators can face prosecution.