'RECALCITRANT' STATES AND INTERNATIONAL LAW: THE ROLE OF THE UN COMMISSION OF INQUIRY ON HUMAN RIGHTS VIOLATIONS IN THE DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA

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1. INTRODUCTION

> "…there was this pregnant woman who was about 9 months pregnant. She worked all day. The babies who were born were usually born dead, but in this case the baby was born alive. The baby was crying as it was born; we were so curious, this was the first time we saw a baby being born. So we were watching this baby and we were so happy. But suddenly we heard the footsteps. The security agent came in and this agent of the Bowibu said that . . . usually when a baby is born we would wash it in a bowl of water, but this agent told us to put the baby in the water upside down. So the mother was begging, 'I was told that I would not be able to have the baby, but I actually got lucky and got pregnant so let me keep the baby, please forgive me,' but this agent kept beating this woman, the mother who just gave birth. And the baby, because it was just born, it was just crying. And the mother, with her shaking hands she picked up the baby and she put the baby face down in the water. The baby stopped crying. We saw this water bubble coming out of the mouth of the baby. And there was an old lady who helped with the labor, she picked up the baby from the bowl of water and left the room quietly. So those kind of things repeatedly happened. That was in the detention center in the city of Chongjin of Hamgyeong Province."[1]

> "And you see babies with bloated stomachs. And we also cooked the snakes and the mouse to feed these babies and if there was a day that we were able to have mouse, there was a special diet for us. And so we had to eat everything alive, every type of meat that we could find, anything that flew, that crawled on the ground. Any grass that grew in the field, we had to eat. That's the reality of the prison camp."[2]

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[1] U.N. Human Rights Council, Comm. of Inquiry on Human Rights in the DPRK, Report of the Detailed Findings of the Comm. of Inquiry on Human Rights in the DPRK, para. 432, A.HRC/25/CRP.1 (Feb. 7, 2014) [hereinafter Detailed Findings]; U.N. Comm. of Inquiry on Human Rights in the DPRK - Seoul Public Hearing Day 1 (PM) (Aug. 20, 2013) (02:42:00), http://webtv.un.org/search/commission-of-inquiry-on-human-rights-in-the-dprk-seoul-public-hearing-day-1-pm-20-august/2668611257001?term=%EA%B3%B5%EC%B2%AD%ED%9A%8C.

[2] UN Comm. of Inquiry on Human Rights in the DPRK- Seoul Public Hearing Day 2 (AM) (Aug. 21, 2013) (00:31:50), http://webtv.un.org/search/

North Korea presents unique challenges for the international legal system. Following the unhappy legacy of its long history and the Korean War's aftermath, the country has been under the spell of one of the most unusual regimes in the world.[3] Although the regime claims socialist ideals, it is accurate to characterise its ideology as being limited to "Kimjongism." For long, it has been reported that the regime has been engaging in human rights violations of the worst sort:

> extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, persecution on political, religious, racial and gender grounds, the forcible transfer of populations, the enforced disappearance of persons and the inhumane act of knowingly causing prolonged starvation.[4]

Somewhere between 80,000 and 120,000 political prisoners are currently being detained in prison camps and subjected to starvation and other forms of torture. Gender inequality is pervasive and women are vulnerable to trafficking and sexual exploitation. Aside from indoctrination from an early age, children face starvation and other privations.[5] Citizens and foreigners

commission-of-inquiry-on-human-rights-in-the-dprk-seoul-public-hearing-day-2-am-21-august/2668611256001?term=%EA%B3%B5%EC%B2%AD%ED%9A%8C.

[3] *See* Detailed Findings, *supra* note 1, para. 85 (stating that "[t]he imposed division of the Korean peninsula, the massive destruction that occurred during the Korean War and the impact of the Cold War have engendered an isolationist mind-set and a deep aversion to outside powers.").

[4] Press Release, Comm. of Inquiry on Human Rights in the DPRK, North Korea: UN Commission documents wide-ranging and ongoing crimes against humanity, urges referral to ICC (Feb. 17, 2014), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14255&LangID=E#sthash.3UmQISxM.dpuf [hereinafter U.N. Commission Press Release].

[5] *See* Detailed Findings, *supra* note 1, para. 542 (stating that "apart from killing many children, hunger and starvation have also had negative impacts on the long-term development of infants and children."). Hunger and malnutrition continue to be widespread in DPRK because of the incompetence and inefficiency of the food delivery system and of the local markets. According to the evidence, approximately twenty-seven percent of babies and young children in DPRK are stunted because of severe malnourishment on the part of their mothers during gestation. These conclusions are demonstrated in the reports of impartial United Nations agencies (World Health Organization, Food and Agricultural Organization and World Food Program) operating in the country. *Id.* para. 545. The major burden of food scarcity falls on those citizens deemed "hostile" to the regime under the *Songbun* system of classification. Doubtless this is the reason why DPRK refused access for normal monitoring of food aid, designed to assure donors of the impartiality of donated

continue to face abductions and disappearances at the hands of the state apparatus. In the face of this persistent and horrific disregard for international law norms and institutions, and the continued commission of crimes against humanity, the international community has been largely rendered a spectator helplessly regarding the Democratic People's Republic of Korea (DPRK) as a conundrum for a legal system bereft of direct enforcement capability.

For long, international responses have taken the form of a slew of UN resolutions[6] and persistent name-calling: the DPRK has been called a "rogue state" and a member of the "axis of evil".[7] Clearly, the resolutions have been ineffectual and there is not even agreement about what the pejorative terms designed to

food distribution. Evidence is recorded in the COI's report concerning luxury goods and extravagance by which the ruling elite live well whilst other citizens, less favoured, starve to death. *Id*. para. 570.

[6] *See, e.g.*, S.C. Res. 825, U.N. Doc. S/RES/825 (May 11, 1993) (calling upon North Korea to honour its obligations under the Non-Proliferation of Nuclear Weapons treaty); S.C. Res. 1695, U.N. Doc. S/RES/1695 (July 15, 2006) (strongly urging North Korea to abandon nuclear programs and return to non-proliferation talks); S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006) (demanding that North Korea abandon its nuclear programs, stating efforts to enforce that demand, and forming a committee of the Security Council to monitor those efforts); S.C. Res. 1874, U.N. Doc. S/RES/1874 (June 12, 2009) (recalling previous relevant provisions and reiterating provisions in singular resolution); S.C. Res. 1928, U.N. Doc. S/RES/1928 (June 7, 2010) (requesting that the Panel of Experts provide reports to the Council); S.C. Res. 1985, U.N. Doc. S/RES/1985 (June 10, 2011) (extending the Council's request that the Panel of Experts provide reports to the Council); S.C. Res. 2050, U.N. Doc. S/RES/2050 (June 12, 2012) (extending the Council's request that the Panel of Experts provide reports to the Council); S.C. Res. 2087, U.N. Doc. S/RES/2087 (Jan. 22, 2013) (condemning North Korea's nuclear launch and calling on Member States to enforce previous provisions); S.C. Res. 2094, U.N. Doc. S/RES/2094 (Mar. 7, 2013) (condemning North Korea's nuclear launch and calling on Member States to enforce actions to prevent nuclear proliferation); and S.C. Res. 2141, U.N. Doc. S/RES/2141 (Mar. 5, 2014) (extending the Council's request that the Panel of Experts provide reports to the Council). For instance, the UN General Assembly resolution, dated December 18, 2014, which was adopted with 116 votes for, 20 against, and 53 abstentions, acknowledged that "crimes against humanity have been committed in the Democratic People's Republic of Korea, pursuant to policies established at the highest level of the State for decades" and called on the Security Council to take "appropriate action to ensure accountability, including through consideration of referral of the situation in the Democratic People's Republic of Korea to the International Criminal Court." G.A. Res. 69/188, U.N. Doc. A/RES/69/188 (Dec. 18, 2014).

[7] "The fact that the Democratic People's Republic of Korea has for decades pursued policies involving crimes that shock the conscience of humanity raises questions about the inadequacy of the response of the international community." U.N. Commission Press Release, *supra* note 4.

communicate deviant status actually mean or how to define a state as a pariah. Coevally, a number of other terms such as renegade,[8] outcast,[9] deviant,[10] and recalcitrant are employed to refer to these states at different periods in time by political actors and scholars. Despite the serious challenges posed by such a state to international law, the phenomenon of the recalcitrant state has not received adequate study by scholars of international law. Much less, the potency and relevance of international law in relation to such states remains under-theorized. In this light, the establishment of the UN Commission of Inquiry on Human Rights,[11] and the publication of its widely endorsed report,[12] offers an avenue for developing our understanding as to what to do about recalcitrant states such as the DPRK.

There is a substantial and growing literature about the role of international human rights organizations such as Amnesty International (AI) and Human Rights Watch (HRW) in improving human rights conditions in countries. These organizations adopt naming and shaming strategies to highlight rights violations, raise

[8] MIROSLAV NINCIC, RENEGADE REGIMES (2007).

[9] EFRAIM INBAR, OUTCAST COUNTRIES IN THE WORLD COMMUNITY (1985).

[10] DEON GELDENHUYS, DEVIANT CONDUCT IN WORLD POLITICS (2004).

[11] The UN Human Rights Council (HRC) established the Commission of Inquiry (COI) by a resolution adopted on April 9, 2013. *See* Situation of human rights in the Democratic People's Republic of Korea, G.A. Res. 22/13, paras. 3, 5, U.N. Doc. A/HRC/RES/22/13 (Apr. 9, 2013) (establishing that the HRC

> *decides to* establish, for a period of one year, a commission of inquiry comprising three members, one of whom should be the Special Rapporteur, with the other two members appointed by the President of the Human Rights Council . . . *Further decides* that the commission of inquiry will investigate the systematic, widespread and grave violations of human rights in the Democratic People's Republic of Korea as outlined in paragraph thirty-one of the report of the Special Rapporteur, including the violation of the right to food, the violations associated with prison camps, torture and inhuman treatment, arbitrary detention, discrimination, violations of freedom of expression, violations of the right to life, violations of freedom of movement, and enforced disappearances, including in the form of abductions of nationals of other States, with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity . . .).

[12] Contrary to the overwhelming consensus on the high quality report, A North Korean official termed the evidence "the fabricated testimonies of a handful of defectors who committed crimes and abandoned the country." Rick Gladstone, *United Nations Urges North Korea Prosecutions*, N.Y. TIMES, Nov. 18, 2014, http://www.nytimes.com/2014/11/19/world/asia/north-korea-united-nations-icc-human-rights-abuses.html?_r=0.

media and public awareness, and precipitate international action.[13] While they are not always successful,[14] some evidence indicates that states targeted by these campaigns do improve their practices.[15] For scholars who believe in the ability of human rights organizations to achieve positive change, the key is the utilization of shame[16] to persuade the recalcitrant state that its actions might undermine its domestic and international legitimacy, or its aspirational self-image and identity.[17] Alternatively, shaming might be effective by generating sufficient pressure on other members of the international community so that they are forced to take action against the

[13] *See* Alison Brysk, *From Above and Below: Social Movements, the International System, and Human Rights in Argentina*, 26 COMP. POL. STUD. 259, 259–85 (Oct. 1993) (discussing the impact of the international system on social movements and change in Argentina).

[14] Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT'L ORG. 689, 689–716 (2008) (documenting situations in which naming and shaming has proven successful).

[15] Amanda M. Murdie & David R. Davis, *Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs*, 56 INT'L STUD. Q. 1, 1 (2012) ("Improvements in human rights practices result from the interaction of shaming by HROs with: 1. Large number of HROs present within the state. This domestic presence of HROs helps local social movements pressure their regime for improved human rights 'from below' (Brysk 1993). 2. Shaming of the regime by third-party states, individuals, and organizations. When third parties, citing the work of HROs, join advocacy efforts, the impact of HROs increases due to pressure 'from above.'") (*internal citations omitted*); *see also* James C. Franklin, *Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America*, 52 INT'L STUD. Q. 187, 187 (2008) (studying the response of Latin American governments who have been shamed for human rights violations).

[16] *See* June Tangney et al., *Are Shame, Guilt, and Embarrassment Distinct Emotions?*, 70 J. OF PERSONALITY & SOC. PSYCHOL. 1256, 1256 (1996) (studying the differences between shame, guilt, and embarrassment and finding that shame was no more likely than guilt to be experienced in public situations). In subsequent work, Tangney et al. note that

> shame involves a negative evaluation of the global self; guilt involves a negative evaluation of a specific behavior. Although this distinction may, at first glance, appear rather subtle, empirical research supports that this differential emphasis on self ("I did that horrible thing") versus behavior ("I did that horrible thing") sets the stage for very different emotional experiences and very different patterns of motivations and subsequent behavior.

June Tangney et al., *Moral Emotions and Moral Behavior*, 58 ANN. REV. PSYCHOL. 345, 349 (2007).

[17] *See* Thomas Risse & Kathyn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: An Introduction*, *in* THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE, 1, 1-38 (1999) (exploring the impact of international human rights norms on several countries in different regions).

offender.[18] The first pathway for affecting state behavior is not available when the offender is a state such as North Korea, and the second pathway is of unknown utility because self-image and identity can be highly subjective. Moreover, shaming might have perverse consequences by bolstering domestic legitimacy and identity by casting the ruler as a victim of hostile external propaganda. Therefore, the international community's toolkit is limited to the third pathway – pressuring law-abiding states to enforce international law norms against the offender – and we expand on the role of labelling and shaming to generate pressure under international law that may be applicable to such states, identifying its target and scope. Thereafter, we consider some objections to shaming and posit that the Commission of Inquiry (COI) mechanism addresses many of the theoretical objections. First, the COI possesses both authority and legitimacy because it is established pursuant to a formal legal process and its work is subject to legal standards. Although it is not a judicial tribunal, the COI provides robust procedural safeguards: a transparent methodology, acceptable standards of proof, due process rights to the accused, and a legal framework to assess violations committed by the offender. Second, the COI is a neutral and independent entity capable of making assessments about facts and determinations about violations of international law obligations without being tainted by partisanship. Third, because the COI is not a judicial tribunal or a prosecutor, and the setting is not adversarial, there are incentives for the accused regime to participate in its work and contribute to the establishment of accurate facts. Thereafter, it has the ability to take corrective action if blame is assessed, without the taint of legal liability, thereby achieving rehabilitation goals. Fourth, because of the location of the COI within the UN architecture, shaming is addressed both to the offending regime and the other member states. This is key to its *authority*—to assert legal authority delegated by member states pursuant to the organization's constitutional documents and legal rules, to reiterate the binding nature of international law norms to participants and observers and thereby deter other potential offenders, and to ensure that law-abiding states take action against violators. Having subscribed to an

[18] *See* James Lebovic & Erik Voeten, *The Politics of Shame, The Condemnation of Country Human Rights Practices in the UNCHR*, 50 INT'L STUD. Q. 861, 861 (Dec. 2006) (analyzing the United Nations Commission on Human Rights' targeting and punishment of countries who violated human rights norms).

organization's charter and consented to binding legal obligations, states do not have the luxury of claiming that they are unaware of violations or that the facts have not been independently assessed. Therefore, states cannot resort to responsibility-shifting and free-riding after a well-publicized report issued by a UN agency if they expect the international legal order to hold. As the COI said to the Human Rights Council (HRC) at the time of presentation of the COI report concerning the risk of inaction by way of follow up: "[n]ow, we cannot say we do not know about DPRK. Now we all know and there is no excuse." In March 2014, in answer to the demand by the DPRK ambassador in Geneva that the international community should "mind its own business," the COI told members of the UN Security Council in New York: "[these] crimes are indeed the world's 'business' and the world is watching. Respectfully, if this is not a case for action by the Security Council, it is hard to image one that ever would be."[19]

The paper is organized as follows. Part II details the work of the Commission of Inquiry, its methodology, and key findings. Part III outlines a theoretical model for shaming and labelling in international law, considers several objections, and makes a novel normative argument for a greater utilization of the COI procedure in international law. Part IV concludes.

2. THE COMMISSION OF INQUIRY

The COI on human rights in the DPRK was established by a resolution of the HRC of the United Nations on 21 March 2013.[20] The resolution was adopted without dissent or call for a vote. It reflected the growing exasperation of the international community over the refusal of the government of DPRK to permit the entry of, or to engage with, officials of the UN human rights system, including the Special Rapporteur designated by the HRC to investigate and report on human rights in the country.[21] Although DPRK had ratified four

[19] Address by the Chair of the COI on DPRK to the members of the Security Council, unpublished, 17 April 2014, New York.

[20] G.A. Res. 22/13, *supra* note 11.

[21] There have been two Special Rapporteurs on North Korea: Professor Vitit Muntarbhorn (Thailand) and Mr Marzuki Darusman (Indonesia). The latter, still in office, was also a member of the COI in accordance with the mandate of the HRC. As the COI notes

major UN human rights treaties, it had unsuccessfully sought to withdraw from the International Covenant on Civil and Political Rights (ICCPR).[22] In 2013, it had refused to accept a single recommendation for improvement in its human rights situation, made during its first participation in the Universal Periodic Review (UPR) in 2009–10.[23] No other member state of the United Nations has had such a lamentable record of non-cooperation.

> The Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea has not had access to the country since the inception of the mandate in 2004. . . . not a single mandate holder of the Human Rights Council has been invited, or permitted, to visit the DPRK . . . the Secretary-General and the High Commissioner for Human Rights have also issued periodic reports detailing human rights violations and related impunity in the DPRK. The DPRK has not provided substantive input to these reports since it has rejected the underlying resolutions of the General Assembly and Human Rights Council.

Detailed Findings, *supra* note 1, para. 11-12.

[22] It was informed, on the basis of the advice of the UN General Counsel, that there was no authority to withdraw. It accepted that advice and continued engagement.

[23] *See generally* G.A. Res. 67/L.50, U.N. Doc. A/C.3/67/L.50 (Nov. 9, 2012) (expressing concern of North Korea's violation of and strongly urging North Korea to respect human rights). The UNHRC Resolution of 2013 in its preamble expressed

> its serious concern at the refusal of the government of the Democratic People's Republic of Korea to articulate, by the time of the adoption by the Human Rights Council of the outcome report of its universal periodic review in March 2010, which recommendations enjoyed its support, and regretting the lack of action taken by the Democratic People's Republic of Korea to date to implement the recommendations of that report.

G.A. Res. 22/13, *supra* note 11. *See also* Press Release, Pillay urges more attention to human rights abuses in North Korea, calls for international inquiry (Jan. 14, 2013), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12923&LangID=E (calling for international inquiry into the human rights abuses occurring in North Korea). The Universal Periodic Review of North Korea conducted in 2009–10 resulted in over one hundred recommendations to improve human rights, but North Korea refused to identify one recommendation it would implement. *See* Press Release, Human Rights Council adopts outcomes of Universal Periodic Review on Bhutan, Dominica and Democratic People's Republic of Korea (Mar. 18, 2010), available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9921&LangID=E (noting that the Council urged North Korea to implement the recommendations). In November 2012, a North Korean delegate to the UN called "the report of the special rapporteur . . . a product of the hostile policies of the United States and European Union against the DPRK (North Korea) and is a typical example of politicization, double standards and selectivity on the issue of human rights." Jo Yong-Hak, *North Korea Says Proud of its Human Rights Record*, REUTERS, Nov. 3, 2012, http://ca.reuters.com/article/topNews/idCABRE8A11F120121103.

The COI members included the current Special Rapporteur (Mr. Marzuki Darusman, Indonesia), together with Ms. Sonja Biserko (a Serbian human rights expert), and one of the authors of this article (Justice Kirby). The latter two members were appointed by the President of the HRC in May 2013. The Special Rapporteur served *ex-officio*.

It is important to note that a COI of the HRC is independent of the Office of the High Commissioner for Human Rights (OHCHR). It is required to be independent not only of the High Commissioner but of the HRC and of all extraneous influences. The commissioners of the COI were not acting as United Nations judges or prosecutors. Their duty was to the mandate given to the COI by the HRC and their role was as expert factfinders, with a duty to report to the HRC in accordance with its resolution. In the case of the DPRK, that resolution identified nine separate subject matters of human rights upon which a report was required.[24] It also instructed the COI to document human rights violations, victim and perpetrator accounts, and to ensure accountability for such wrongs.[25] The COI was obliged to report to the HRC by March 2014.[26] Although the time under report was not specified, it potentially extended back to the foundation of the DPRK, as a result of an artificial border imposed by the victorious Allies upon the Korean peninsula at the conclusion of the Second World War.[27] That border terminated more than a

[24] The nine matters identified were: violations associated with prison camps; violations of thought, expression and religion; arbitrary arrest and detention; violations of the right to food; discrimination and, in particular, systemic denial and violation of basic human rights and fundamental freedoms; violations to the right to life; violations of the freedom of individual movement; and enforced disappearances, including abductions of foreign nationals. Detailed Findings, *supra* note 1, at 6-7.

[25] The COI report notes the following objectives: "(a) Further investigating and documenting human rights violations; (b) Collecting and documenting victim and perpetrator accounts; (c) Ensuring accountability." Detailed Findings, *supra* note 1, para. 15.

[26] UN Human Rights Council resolution A/HRC/RES/22/13, 9 April 2013, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/128/65/PDF/G1312865.pdf?OpenElement ("Requests the commission of inquiry to present an oral update to the Human Rights Council at its twenty-fourth session and to the General Assembly at its sixty-eighth session, and a written report to the Council at its twenty-fifth session.")

[27] The mandate did not specify a geographic boundary either: "Commission has interpreted its mandate to include alleged violations perpetrated by the DPRK against its nationals both within and outside the DPRK as well as those violations that involve extraterritorial action originating from the DPRK, such as the abductions of non-DPRK nationals." Detailed Findings, *supra* note 1, para. 19.

thousand years of united government, including 34 years (1911–1945) under Japanese imperial rule.

The commissioners' made a decision to gather testimony by public hearings thereby imposing novel burdens both on the commissioners and the secretariat. However, the COI, with the support of the secretariat, brought its report to completion on time. Effectively, although the first substantive meeting of the COI was held at the beginning of July 2013, the report was written and finalised by the end of January 2014. It was published online on 17 February 2014.[28] It was formally presented to the HRC in Geneva on 17 March 2014[29] and to members of the Security Council (SC) in New York on 17 April 2014.[30]

The COI's pathbreaking work included the testimony of Shin Dong-hyuk, the only person known to have escaped political prison camp number 14 into which he was born as the child of adult prisoners confined there. Other potent testimony was given by a witness who saw a baby of a refugee required to be drowned in a bucket because of objections to the Chinese ethnicity of its father. This was regarded as contaminating "pure" Korean blood. A witness from a family of persons abducted under the DPRK's state policy of abducting Republic of Korea (ROK), Japanese, and other nationals deemed useful to the DPRK regime also provided testimony. The COI's report attracted unprecedented international media attention and focused states' attention on horrific international crimes against humanity.

2.1. The COI's Methodology

At the first in-person meeting of the Commissioners in Geneva in early July 2013, a full day was devoted to adopting a methodology

[28] Detailed Findings, *supra* note 2.

[29] For the full chronology of events see Sec. Council, DPRK (North Korea) Chronology of Events (Sept. 1, 2014), http://www.securitycouncilreport.org/chronology/dprk-north-korea.php.

[30] The Report was transmitted by the Permanent Representatives of Australia, France, and the United States by way of a letter addressed to the President of the Security Council. U.N. S.C., transmitted by letter dated Apr. 14, 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, U.N. Doc. S/2014/276 (Apr. 14, 2014), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/S_2014_276.pdf.

for the working of the COI.[31] This was especially important because the DPRK communicated to the President of the Human Rights Council that it "totally and categorically rejects the Commission of Inquiry"[32] and repeatedly refused to cooperate with the COI.[33] In order to respond to this attitude, the COI had to adopt a novel, transparent, and innovative methodology: public hearings.[34] This methodology is not common to UN inquiries, the one exception being the COI on the Occupied Territories, chaired by a former judge of common law background (Justice Richard Goldstone of South Africa).

The Commissioners determined that the COI's process must be transparent in order to counteract the inevitable attacks and criticisms that would follow concerning the truthfulness and representativity of the witnesses giving testimony to the COI. They resolved that the collection of testimony at public hearings would be the centrepiece of their inquiry. There were collateral advantages to public hearings: they would raise public consciousness of the suffering of the victims; establish the duration, nature, variety and intensity of their burdens; and it would help engage the national and international media during the conduct of the inquiry. All of these intuitive judgements of the COI proved to be correct.

At the onset, the COI distributed public calls for evidence. In the available time, its secretariat interviewed more than 240 witnesses. In recognition of the fact that most of the witnesses were refugees

[31] *See* Detailed Findings, *supra* note 1, paras. 12–20 (detailing the development of the methodology for the COI and how it was implemented).

[32] Detailed Findings, *supra* note 1, para. 21.

[33] The HRC resolution establishing the COI urged the Government of DPRK to cooperate fully with the Commission's investigation; to permit the members of the COI unrestricted access to visit the country; and to provide them with all information necessary to enable them to fulfil their mandate. At the very beginning, the DPRK stated publicly that it would "totally reject and disregard" the resolution. It claimed that this was "a product of political confrontation and conspiracy". Michael Kirby, *Moment of truth for North Korea over human rights*, CNN (Nov. 18, 2014), http://edition.cnn.com/2014/11/18/opinion/north-korea-un-resolution-kirby/.

[34] Secretariat members in the DPRK COI (most of whom came from civilian legal backgrounds) expressed some reasonable hesitations and concerns about the proposed methodology. There was anxiety about the effective protection of the identity and safety of witnesses; about maintaining security for the COI itself and its personnel, as well as for witnesses and deponents; about preventing possible disruption of hearings and meetings; about procuring, assembling and delivering witnesses according to the comprehensive hearing timetable; about obtaining suitable facilities outside national government premises (which were considered inappropriate); and about the cost implications thought likely to arise.

who had fled DPRK but had family living in that country, a majority were not permitted to offer public testimony in order to ensure compliance with the mandate instruction that no harm came to witnesses. Their evidence was then received in a private and confidential setting. However, other witnesses (some 84) gave evidence in public. In a few cases physical disguises were adopted. In others, great care was taken to avoid, by public questioning, inessential identification of places and of people who might be harmed. The DPRK news bureau described the witnesses as "human scum".[35] Although one or two witnesses may have occasionally added a gloss to their testimony, overwhelmingly they were judged by the COI to be truthful and convincing witnesses. When they were attacked by DPRK, the COI was able to invite everyone with access to the internet (which excluded most citizens in DPRK where such access is prohibited) to view the testimony online and to reach their own conclusions.[36]

The COI also had constant contact with the DPRK missions in Geneva and New York. Repeatedly, the COI invited participation in the hearings; commentary and correction of the draft report when completed; an opportunity, when the report was produced, to travel to DPRK to brief officials and citizens on its content; and to answer questions.[37] Eventually, the final report was supplied to the Supreme Leader of DPRK (Kim Jong-un), repeating the foregoing offers and concluding with a warning about his own possible future personal responsibility under international criminal law.[38] Such

[35] Comm. of Inquiry on Human Rights in the Democratic People's Republic of Korea, Questions and Answers on the Report of the United Nations Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, 5 (Feb. 17, 2014), *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIDPRK/Report/coi-dprk-q-and-a.pdf (noting that news reports called the public hearings "slander" and the participants "human scum").

[36] To view the testimony online see Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Korea, see Public Hearings, http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/PublicHearings.aspx (listing the documents containing testimony from the public hearings).

[37] Press Release, OHCHR, UN Inquiry on Human Rights in North Korea Set to Begin Hearings in Japan (Aug. 23, 2013), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13653&LangID=E#sthash.PJmEOF9l.dpuf (noting the schedule and structure of the public hearings in Japan).

[38] *See* U.N. Human Rights Council, Comm. of Inquiry on Human Rights in the DPRK, Report of the Detailed Findings of the Comm. of Inquiry on Human Rights in the DPRK, Annex I, A.HRC/25/63 (Feb. 7, 2014) (including a letter submitted to His Excellency detailing the findings of the Commission and the potential ramifications under international law) [hereinafter Detailed Findings II].

letters were ignored or, where answered, replied to with a reminder of the DPRK's determination of non-engagement.

Specifically, the COI invited DPRK to send a representative to the public hearings. It offered to permit that representative to make submissions and to call testimony on its behalf. It indicated that such a representative could, with leave, question witnesses. Arrangements were made with ROK to accord any such representative(s), nominated by DPRK, diplomatic immunity. No such representation was arranged by DPRK. It is unknown whether, amongst the members of the public attending the hearings of the COI, DPRK arranged for participation or representation anonymously. Because the elite in DPRK has access to the internet, it must be assumed that they, and government agents in and outside North Korea, would have had full access to the entirety of the public hearings held by the COI.

The public hearings of the COI took place in Seoul, ROK (August 2013); Tokyo, Japan (August 2013); London, UK (October 2013) and Washington, DC (October 2013).[39] The grouping of public hearings was arranged partly to save costs. Officers of the secretariat visited the venues in advance of the COI Commissioners so as to interview and arrange witnesses for the hearings. All testimony (for public and confidential consideration) was made available to the Commissioners. The responsibility of eliciting the evidence in public fell on the Commissioners, primarily by questions addressed from the chair. Witnesses were taken through statements provided by the secretariat, using non-leading questions so as to permit the witnesses to give their evidence in their own words. Subsequently, the report of the COI contained on most pages references to testimony and small extracts from the transcript of actual evidence. These extracts are generally expressed in much more direct and

[39] The COI methodology proves that, in today's world, no country can entirely exclude itself from investigation by the human rights organs of the world community. If the door is slammed shut by violators, investigation can take place outside the territory in question, drawing upon refugees who are pre-vetted to ensure that they are genuine, reliable and not unduly biased as a result of any ordeal they may have suffered. Notably, the COI also sought to visit China but the request was rebuffed: "On 20 November 2013, the Permanent Mission informed the Secretariat that, given China's position on country-specific mandates, especially on the Korean peninsula, it would not be possible to extend an invitation to the Commission." Detailed Findings, *supra* note 1, para. 45.

vivid language than expert chroniclers usually produce. They gave voice to the actual lived experiences of victims.[40]

The report also demonstrates two features as a result of this procedure of uploading digital images of witnesses and transcripts (in the English, Korean and Japanese languages) on the COI website. First, as demonstrated by Holocaust studies, gathered after 1945, victims often feel guilty about surviving when so many friends and family have perished. Whilst they are naturally upset and angry, once they begin recounting their stories, they normally follow their own chronological course. Normally, they are remarkable for their clarity and understatement. Second, the horrors recounted do not require exaggeration in order to have an impact. The low-key way in which the testimony was ordinarily given by the witnesses before the COI made it all the more impressive.

2.2. The Conduct of Public Hearings

The COI's decision to conduct public hearings raised both process and substantive questions in relation to witnesses. For instance, there were questions about the reliability of witnesses given that a majority (experts apart) were refugees who had already made a decision to leave DPRK. One of the concerns was that the testimony of the witnesses was out of date and therefore unhelpful.[41] Furthermore, there was no shortage of witnesses: in ROK there are over 26,000 refugees from DPRK and significant numbers are also present in other countries. Many of these refugees were willing to come forward and offer testimony, raising questions about how to select witnesses and complete the work within time. In the end, the COI had to terminate the flow of witnesses so as to concentrate on selecting, and analysing, a representative sample who could speak to the nine-point mandate given by the HRC.

In assessing reliability of witness testimony, the COI adopted a two-part test: first, a judgement based on impressions of credibility and non-exaggeration; and second, corroboration by other witnesses unknown to the person giving testimony, including effective corroboration by satellite images and documentation

[40] This technique brings the report of the COI on DPRK to life. It makes it a much more readable document than most UN reports.

[41] This is because enhanced barriers at the borders between DPRK and China have reduced the flow of asylum seekers into China since 2012.

available, both from DPRK itself and from UN and other agencies operating in DPRK (such as World Food Program (WFP)).[42] Crucially, facts about the persecution of religious minorities are, to some extent, confirmed by published official data on religious adherents, deriving from DPRK records.[43] Similarly, statements about the pernicious *Songbun* system of social caste are confirmed by speeches by DPRK officials, including successive Supreme Leaders. Remarkably, those leaders appear to be proud, and not ashamed, of labelling people at their birth with a social caste (classified as 'core', 'wavering,' and 'hostile' classes), upon the basis of which opportunities for education, housing, employment, political advancement, and food accessibility are decided.

The legal framework for the COI's work was provided by the international law instruments voluntarily entered into by the DPRK. Specifically, obligations under the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) provided legal content in order to assess the DPRK's responsibility.[44] In relation to crimes against humanity, the Rome

[42] The following considerations were taken into account in assessing credibility:

> (a) the witness's political and personal interests, potential biases and past record of reliability (if known); (b) the witness's apparent capacity to correctly recall events, considering his or her age, trauma, how far back the events occurred, etc.; (c) the position of the witness in relation to the subject of the information; (d) where and how the witness obtained the information; and (e) the reasons for which the witness provided the information.

Detailed Findings, *supra* note 1, para. 73.

[43] The COI made a distinction between information and testimony: "any piece of information had to be assessed for its validity by considering, amongst other factors, the information's relevance to the inquiry, its internal consistency and coherence, its logicality and its consistency with and corroboration by other information." *Id.* para. 74.

[44] Article 18 of the ICCPR providing for the right to freedom of thought, conscience and religion and article 20 were relevant for allegations about the indoctrination of citizens; articles 19 and 22 were relevant for assessing violations of the right to freedom of speech, expression, and association. *See* International Covenant on Civil and Political Rights, arts. 18, 19, 20, and 22, 999 U.N.T.S. 171 (Mar. 23, 1976) (including the rights to freedom of thought, conscience, religion, speech, expression and association). Articles 12, 13, 14, 15 and 17 of the Convention on the Rights of the Child (CRC) were also relevant in the context of children. *See* Convention on the Rights of the Child, 1577 U.N.T.S. 3 (Feb. 16, 2005) (recognizing the same rights for children).

Statute of the International Criminal Court (ICC) and customary international law provided content.

The COI accepted for itself a rigorous standard of proof, common to United Nations COIs of reported human rights violations.[45] It accepted the "reasonable grounds for belief" standard. It judged available testimony against the legal obligations binding on the DPRK as a State Party to the United Nations Charter and to international human rights treaties and as a State subject to customary international law.[46] The COI made a conclusion that a fact was established when "it was satisfied that it had obtained a reliable body of information, consistent with other material, based on which a reasonable and ordinarily prudent person would have reason to believe that such an incident or pattern of conduct had occurred."[47]

Where there was any doubt or uncertainty as to any finding or conclusion (as in the suggested deployment in and by DPRK of chemical weapons), the COI refrained from expressing a final conclusion, leaving several matters of that kind for the future. Similarly, where international law was in a possible state of evolution (as in the possible availability of the international crime of genocide in cases of annihilation of a section of the population on grounds of political belief[48]) the COI held back from expressing a conclusion on the possible infringement of such a law.[49]

Notably, due to the fierce propaganda contest that exists in and near the Korean peninsula, care had to be taken in the use of media reports and in accepting the official positions of affected

[45] Detailed Findings, *supra* note 1, paras. 63–78 (detailing the legal framework and standard of proof for the Commission).

[46] *Id.* paras. 63–64 (recognizing the legal obligations DPRK assumed as a State Party to treaties, as well as binding customary international law).

[47] As the COI's Detailed Findings note, "[t]his standard of proof is lower than the standard required in criminal proceedings to sustain an indictment, but is sufficiently high to call for further investigations into the incident or pattern of conduct and, where available, initiation of the consideration of a possible prosecution." *Id.* para. 68.

[48] *Id.* paras. 1155–59 (describing how the human rights abuses in North Korea are similar to the accepted definition of genocide).

[49] However, it did indicate its inclination in that respect. There was already so much material (and findings on so many human rights violations and crimes against humanity) that this principle of prudent restraint appeared to be appropriate. *Id.* para. 1158 ("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").

governments. For instance, widespread reports that following his execution in December 2013, the uncle of the Supreme Leader, Jang Sung-thaek had been fed to wild dogs, were eventually traced to a Chinese social media source. It was a fictitious rumour. So was a report that the former girlfriend of the Supreme Leader Kim Jong-un had been executed by firing squad in connection with indecent behaviour. In May 2014 she appeared in a television program praising the Supreme Leader. The COI kept an appropriate distance from the governments of concerned countries and was appropriately sceptical of Korean and other news reports.

In accordance with its mandate, the COI was also extremely careful to attend to its duties to undertake proper recordkeeping, protection of the confidentiality and identity of victims, and the safe archiving of its materials.[50] On the recommendations of the COI, the High Commissioner for Human Rights was urged to continue the collection of evidence and to establish a secure archive for the safe-keeping of all information gathered by, or for, the COI.[51]

[50] There were no significant breaches of confidentiality and security affecting witnesses, either in the public hearings of the COI or otherwise. Special assistance was provided by United Nations Security for the conduct of the public hearings and in the COI's movements between venues. Only on two occasions during the public hearings was anything said, or revealed, which was of potential embarrassment. A firm instruction from the chair had the effect of curtailing media reportage of that item and the transcript and record were redacted to delete the identifiers. There was no disruption of public hearings or any instance of undue danger nor concern on the part of witnesses. One witness who later saw the report of the COI, suggested that the editing of the report of that person's testimony had potentially given an incorrect impression of what was said. Although it was not possible later to edit or amend the published report of the COI to meet this concern, a letter was given to the witness by the COI affirming the full detail of what had been said, as appearing in the official transcript. The existence of the transcript, and its broad availability, provided a proper protection for the witness. *Id.* para. 13 (describing the mandate of the Commission).

[51] Detailed Findings, *supra* note 1, para. 94(d); *see also* U.N. H.R.C. Res. 25/CRP.1, *supra* note 2, para. 1225(d) ("The High Commissioner for Human Rights should continue the OHCHR's engagement with the Democratic People's Republic of Korea"). After the report of the COI was delivered, an agreement was announced in May 2014, between OHCHR and the Government of ROK, for the establishment in ROK, as recommended by the COI, of a field office, *inter alia* to continue the collection and recording of testimony by victims of human rights abuse in DPRK.

2.3. Participation of Non-State Actors

Because of its small secretariat and limited budget, the COI on DPRK had to secure a measure of assistance and support from outsiders. These included government agencies, and there were numerous meetings throughout the COI process with representatives of the governments of interested countries.[52]

International human rights agencies proved invaluable in providing testimony; affording contact with victims; making submissions to the COI; supporting side events at the HRC, GA and SC; and participating in, and stimulating, the drafting of United Nations resolutions and procuring follow up to the COI report.[53] HRW played an important role in ceaselessly advocating the creation of the COI.[54] Similarly, AI facilitated contact with expert and other witnesses, particularly in London and Washington, DC. It provided the COI with satellite imagery that was important to contradict DPRK's assertion that there were no political prison camps in North Korea.

The COI also made contact during its investigations, including following delivery of its report, with international think tanks, such as the Robert Kennedy Foundation in Washington, DC.[55]

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[52] Although DPRK itself refused repeated requests to engage with it, the COI called on (and reported progress to) the governments of Australia, China, France, Indonesia, Japan, the Republic of Korea, Lao DPR, the Russian Federation, Thailand, the United Kingdom and the United States of America. In ROK, Japan, the UK and US, the Commission made contact with national bodies concerned with particular aspects of the mandate and representatives of victims and their families. These bodies played a useful role in stimulating attention to the condition of human rights in DPRK when (as is often the case), the record tends to lapse for want of up-to-date information.

[53] In addition to HRW and AI, the International Commission of Jurists and the International Service for Human Rights provided valuable assistance. Detailed Findings, paras. 49-50.

[54] William Cornforth, *North Korea: Launch a UN Commission of Inquiry, UN Investigation Needed to Document "Systematic and Egregious" Rights Abuses*, HUMAN RIGHTS WATCH (Jan. 21, 2013), http://www.hrw.org/news/2013/01/21/north-korea-launch-un-commission-inquiry.

[55] After the report was delivered, the COI made contact with The Graduate Institute Geneva, the Geneva Academy of International and Humanitarian Law, the Asser Institute in the Netherlands and The Hague Academy for Global Justice, as well as the Gresham College in London. Engagement was likewise made with the Holocaust Museum and Brookings Institution (Washington DC) and with the Council on Foreign Relations (New York), coinciding with the COI briefing to members of the Security Council. Following the delivery of the COI report, contact has been established with international bodies of lawyers, such as LAWASIA and

2.4. The Contribution of International Scholars

An enormous literature has developed, especially in recent years,[56] concerning DPRK. There are notable well-respected scholars whose writings assisted the COI, including Professor Andrei Lankov (ROK and Australia),[57] Professor Leonid Petrov (Australia) and Professor Victor Cha (US).[58] An important part of the work of the Commissioners and secretariat involved absorbing this large body of information and opinion, whilst continuing to move forward with the preparation of the report in what was effectively little more than half a year of real time.

One matter upon which dialogue with the jurists was especially helpful concerned the ambit of the international crime of "genocide."[59] In international law, genocide has been defined as including various grave and violent acts committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such."[60] The COI received submissions urging a finding of genocide against DPRK. Certainly, because of strong testimony that indicated violent acts in political prison camps and conduct that resulted, deliberately or recklessly, in many deaths from starvation, affecting at least hundreds of thousands of DPRK citizens, a conclusion that a type of genocide had occurred appeared open. The difficulty was the emphasis which the crime of genocide had hitherto taken from "national, ethnical, racial or religious"

the International Bar Association (IBA), universities and concerned NGOs in ROK and the Asia Society and United Nations Association in the United States of America.

[56] *See generally* DANIELLE CHUBB, CONTENTIOUS ACTIVISM & INTER-KOREAN RELATIONS (2014) (analyzing recent North Korea-South Korea relations).

[57] *See generally* ANDREI LANKOV, THE REAL NORTH KOREA: LIFE AND POLITICS IN THE FAILED STALINIST UTOPIA (2013) (providing an overview of the politics, government and foreign relations of DPRK); Detailed Findings, *supra* note 1 at para. 592–593.

[58] *See generally* VICTOR CHA, THE IMPOSSIBLE STATE: NORTH KOREA, PAST AND FUTURE (2012) (describing the country, its secrecy, and the factors that have allowed the regime to persist for so long).

[59] Detailed Findings, *supra* note 1, para. 1155 (raising the question of whether a genocide has occurred in DPRK).

[60] *Id.* para. 1156 (citing the *Convention on the Prevention and Punishment of the Crime of Genocide* and including international law's definition of genocide); *see also* Rome Statute of the International Criminal Court, art. 6, U.N. Doc. A/CONF. 183/9, 2187 U.N.T.S. 90 (establishing the International Criminal Court).

motivations of violators and the doubts that existed that such specific motivations existed in the case of DPRK.

To be sure, the extension of the crime of genocide to include extermination on religious grounds was originally affected by the classification of the extermination of Jews in Europe in the 1930s-40s as 'genocide'. In the case of these victims, the motives were commonly both ethnic and religious. However, religion is not an inbuilt personal characteristic of human beings as racial and like characteristics are. It is a set of convictions, spiritual beliefs and philosophical/moral commitments that are acquired after birth – mostly in childhood or sometimes later in life. In this respect, the *religious* ground for the crime of genocide appears analogous in some ways to a suggested *political* ground, which would certainly have been applicable in the case of possible exterminations by DPRK. Although there was some evidence before the COI of possible extermination of civilians on religious grounds, said for example to be evidenced by the huge drop in the number of Christian adherents in North Korea identified on the DPRK's own statistics, the evidence of this respect was ambiguous. It was an insufficient foundation for a finding of genocide.[61]

The COI members expressed themselves as sympathetic to a reconfiguration of the controlling definition of "genocide" in international customary law, so that it would include *political* grounds by analogy with *religious* grounds.[62] However, the COI did

[61] *See* Detailed Findings, *supra* note 1 at para. 1159 ("[T]he Commission was not in a position to gather enough information to make a determination."). While there was undoubted evidence that the religiously-observant population in DPRK had fallen from about twenty-three percent at partition of the peninsula in 1945 to less than one percent in recent times, the COI was not convinced that it had been proved that this was by reason of extermination of that population. It was possible that the large decline in the Christian community in DPRK was a result of official discouragement and propaganda rather than extermination. The COI could not be sure and held back on a finding.

[62] *See* Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS (Roy S. Lee ed., 1999) (arguing that the COI's approach is prudent because of the division of the international community on the issue, demonstrated in the negotiations of the *Genocide Convention* and the addition of the category of "Ethnical Group" as a means to 'extend protection to doubtful cases'); *see also* U.N. Sixth Comm., Oct. 15, 1948, UNDOC A/C, 6/SR.75 (outlining how the committee divided on that issue 18 in favour, 17 against, 11 abstentions. "Political groups" were included in the text of the draft convention until very late in its gestation but eventually withdrawn by consensus); HIRAD ABTAHI & PHILIPPA WEBB, THE GENOCIDE CONVENTION: THE TRAVAUX PRÉPARATOIRES 1412 (2008) (finding that in the creation of new crimes—including new international crimes—an approach of restraint is justifiable, for such developments have a

not feel obliged, or justified, to make conclusive findings on that basis, being convinced that there was ample proof of many "crimes against humanity." Resolution of the issue of law involved in the disputable definition of "genocide" was therefore unnecessary to reach a conclusion for the COI's report.[63]

As the COI emphasised, crimes against humanity, in themselves, are so grave as to initiate the responsibility of the state concerned (and in default the international community) to protect the actual and potential victims and to hold the perpetrators accountable under international law.[64]

One of the specific recommendations of the COI on DPRK was that the situation in the country should be referred by the Security Council to the International Criminal Court (ICC). Such a reference would be necessary under the Rome Statute[65] because DPRK is (perhaps not unexpectedly) not a party to the Rome Statute and hence is not otherwise amenable to its jurisdiction. In its report, the COI examined various other possible ways of ensuring accountability for the crimes against humanity that it had found and, in respect of which, DPRK afforded no protection or redress to its own people. Such failure would appear to enliven the responsibility of the international community, in the case of DPRK, to protect (Responsibility to Protect (R2P)) the people of DPRK from

consequence analogous to the imposition of retrospective criminal liability, which international human rights law resists).

[63] Detailed Findings, *supra* note 1, para. 1158 (emphasizing that all of the crimes against humanity found in the DPRK are grave crimes that trigger an international response).

[64] However, what is distinctive about "genocide" is that the *Genocide Convention*, recognised as a source of customary international law, imposes an obligation on all states to *prevent* the relevant acts and defaults. It thus goes beyond the obligation to *protect.* Arguably, it involves even more clearly the duty of collective action for which the Security Council derives special responsibilities under Chapter VII of the United Nations Charter. *Compare* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, *available at* https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=1507EE9200C58C5EC12563F6005FB3E5&action=openDocument (detailing methods to prevent genocide) *with* Charter of the U.N. Charter ch. VII (explaining measures to be taken by the Security Council to prevent threats to peace).

[65] *See* Rome Statute, *supra* note 58, art. 13(b) (finding that the ICC would have jurisdiction if a "situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council."). *Cf.* Detailed Findings, *supra* note 1, para. 1201(1) ("The Security Council could refer the situation in the Democratic People's Republic of Korea to the International Criminal Court based on article 13 (b) of the Rome Statute and Chapter VII of the Charter of the United Nations.").

such crimes. All of the other options considered by the COI were, for the reasons given in the COI report, less suitable or desirable.[66]

2.5. Findings

The COI produced its report on time, within budget, and unanimously. The report was publicly released on 17 February 2014 in Geneva.[67] On 17 March 2014, it was presented to the HRC in Geneva. It there attracted a strong vote from the HRC members (30:6:9). The COI found:

> Systematic, widespread and gross human rights violations have been and are being committed by the [DPRK], its institutions and officials. In many instances, the violations of human rights found by the commission constitute crimes against humanity. These are not mere excesses of the State; they are essential components of a political system that has moved far from the ideals on which it claims to have been founded. The gravity, scale and nature of these violations reveal a State that does not have any parallel in the contemporary world. Political scientists of the 20th century characterized this type of political organization as a totalitarian State: a State that does not content itself with ensuring the authoritarian rule of a small group of people, but seeks to dominate every aspect of its citizens' lives and terrorizes them from within.[68]

The COI made the following specific findings:

- "there is an almost complete denial of the right to freedom of thought, conscience, and religion, as well as of the rights to freedom of opinion, expression, information, and association."[69]

[66] Detailed Findings, *supra* note 1, paras. 1201–1202 (detailing the options). The other options included (1) a peace and reconciliation process; (2) an ad hoc international tribunal; (3) a joint national and international ad hoc tribunal; and (4) appointment of a special prosecutor, without a designated court, to continue to gather and evaluate evidence.

[67] *Id.* para. 5.

[68] Detailed Findings, *supra* note 1, para. 1211.

[69] *Id.* para. 259.

- The DPRK "operates an all-encompassing indoctrination machine" commencing at an early age "to propagate an official personality cult" and to ensure "absolute obedience to the Supreme Leader," effectively extinguishing independent thought;[70]
- There is strict control of all social activities. Pervasive surveillance geared at ensuring that "virtually no expression critical of the political system or of its leadership goes undetected. Citizens are punished for any "anti-State" activities . . ."[71]
- Information is absolutely restricted to state sources and the "monopoly [is protected] by carrying out regular crackdowns and enforcing harsh punishments";[72]
- Religious persecution against Christians is pervasive. "Christians are prohibited from practising their religion and . . . [those] caught practising . . . are subject to severe punishments in violation of the right to freedom of religion and the prohibition of religious discrimination."[73]
- Discrimination that is sponsored by the state "is pervasive . . . [and] rooted in the *songbun* system, which classifies people on the basis of State-assigned social class and birth,[74] and also includes consideration of political opinions and religion. *Songbun* intersects with gender-based discrimination, which is equally pervasive. Discrimination is also practised on the basis of disability";
- Gender discrimination is egregious and takes many forms including targeting for bribery: "[there are] blatantly discriminatory restrictions on women in an attempt to maintain the gender stereotype of the pure and innocent

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70 *Id.* para. 260.

71 Detailed Findings II, *supra* note 38, para. 28.

72 Detailed Findings, *supra* note 1, para. 263.

73 Detailed Findings II, *supra* note 38, para. 31.

74 The COI noted that

> the *songbun* system used to be the most important factor in determining where individuals were allowed to live; what sort of accommodation they had; what occupations they were assigned to; whether they were effectively able to attend school, in particular university; how much food they received; and even whom they might marry.

Id. para. 33.

Korean woman. Sexual and gender-based violence against women is prevalent throughout all areas of society."[75]

- There is drastic violation of "all aspects of the right to freedom of movement [and] the State imposes on citizens where they must live and work, violating their freedom of choice."[76]
- Citizens are banned from leaving the country and having contact with foreigners.[77] Those "found to have been in contact with officials or nationals from the Republic of Korea or with Christian churches may be forcibly "disappeared" into political prison camps, imprisoned in ordinary prisons or even summarily executed."[78]
- China is in violation of "its obligation to respect the principle of *non-refoulement* under international refugee and human rights law." by repatriating those crossing the border back to DPRK.[79]

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[75] The COI recorded that "[d]iscrimination against women also intersects with a number of other human rights violations, placing women in positions of vulnerability. Violations of the rights to food and freedom of movement have resulted in women and girls becoming vulnerable to trafficking and increased engagement in transactional sex and prostitution." In addition, "[w]omen abducted from Europe, the Middle East and Asia were subjected to forced marriages with men from other countries to prevent liaisons on their part with ethnic Korean women that could result in interracial children. Some of the abducted women have also been subject to sexual exploitation." *Id.* paras. 36, 67.

[76] *Id.* paras. 38–39.

[77] Detailed Findings, *supra* note 1 para. 1104

> (Border guards remain authorized to shoot to kill persons who cross the DPRK border without permission. Such killings amount to murder. They cannot be justified as legitimate border control measures, because they serve to uphold a de facto total travel ban on ordinary citizens that violates international law. Furthermore, the intentional taking of life for purposes of preventing the unauthorized crossing of a border is grossly disproportionate.)

[78] Detailed Findings, *supra* note 1 para. 489. The COI also finds that "severe impediments put in place by the Democratic People's Republic of Korea to prevent contact and communication with family members in the Republic of Korea are a breach of the State's obligations under international human rights law. The restrictions are arbitrary, cruel and inhuman."

[79] Detailed Findings II, *supra* note 38, para. 43. This practice adopted by China under the plea that these people are economic migrants has horrific effects on women and children. As the COI points out,

> Many women are trafficked by force or deception from the Democratic People's Republic of Korea into or within China for the purposes of exploitation in forced marriage or concubinage, or prostitution under coercive circumstances. An estimated 20,000 children born to women from the Democratic People's Republic of Korea are currently in China. These children are deprived of their rights to birth registration, nationality,

- The DPRK "has used food as a means of control over the population . . . it [confiscates] food from those in need . . . [and provides it] to other groups. The State has practised discrimination with regard to access to and distribution of food based on the *songbun* system."[80]
- There is "evidence of systematic, widespread and grave violations of the right to food[81] . . . decisions, actions and omissions by the State and its leadership caused the death of at least hundreds of thousands of people and inflicted permanent physical and psychological injuries on those who survived."[82] The consequences were particularly grave for children.[83] Crucially, the state was responsible for breaching

education and health care because their birth cannot be registered without exposing the mother to the risk of refoulement by China.

Id. para. 44.

[80] Detailed Findings, supra note 1 para. 683. The COI made a finding that during periods of "mass starvation, the [DPRK] impeded the delivery of food aid by imposing conditions that were not based on humanitarian considerations. International humanitarian agencies were subject to restrictions contravening humanitarian principles." *Id.* para. 687. In addition, "deliberate starvation [is used] as a means of control and punishment in detention facilities. This has resulted in the deaths of many political and ordinary prisoners." *Id.* para. 689.

[81] Washington Public Hearing, 30 October 2013 (00:45:19); Detailed Findings, *supra* note 1 para. 516,

> When my younger brother was born . . . my grandmother actually wanted to kill [him] because my mom was very undernourished and she was not able to lactate. [My mother] begged my grandmother saying, 'Please do not kill the baby.' . . . I had to take care of this baby brother. So I was piggybacking him around the town and sometimes my grandmother had to carry him around to make him stop crying. But as I mentioned, because there was no food, he was not able to stop crying. . . [My] baby brother died in my arms because he was not able to eat. And because I was holding him so much, he thought I was his mom. So when I was feeding him water, he was sometimes looking at me smiling at me.

[82] *Id.*

> Commission finds that there was awareness about the famine situation all the way up to the Supreme Leader. Former officials stated that the provinces submitted detailed reports about the situation to the capital. Kim Jong-il also visited numerous locations in the country as part of his "military first" and "on-the-spot guidance" visits. On these occasions, he could not have missed what was happening in the country.

[83] Detailed Findings, *supra* note 1, para. 545.

> Between 2003 and 2008, 45 per cent of children under five in the DPRK were stunted. For the same age group, nine per cent were suffering from wasting and seven per cent were severely underweight. The most recent UNICEF-financed nutritional survey concluded that 27.9 per cent of the

international legal obligations in relation to the right to food.[84] The COI found that "deliberately providing misleading information to international humanitarian actors or preventing international food aid from reaching starving populations can constitute extermination, if mass deaths occur" and because the authorities knew that their decisions aggravated mass deaths, their "level of criminal intent is sufficient for the crime of extermination."[85]

- The regime is kept alive by "police and security forces . . . systematically employ[ing] violence and punishments that amount to gross human rights violations";[86]
- Specifically, political prisoners are arbitrary arrested and detained indefinitely by the State Security Department, the

country's two year olds are afflicted by stunting and 8.4 per cent of all children in that age group are severely stunted.

The COI also noted the dire impacts on women: "women in the DPRK, particularly mothers in the family, have experienced severe deterioration in their health, largely because they either skipped or reduced portions of their meals for the benefit of other family members." *Id.* para 560.

[84] One of the obligations identified by the COI was Article 2 (1) of the ICESCR, which states that

> each State Party to the present Covenant undertakes to *take steps, individually and through international assistance and cooperation*, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively the full realization* of the rights recognized in the present Covenant *by all appropriate means*, including particularly the adoption of legislative measures. (emphasis supplied by the COI).

Detailed Findings, *supra* note 1, para. 637. The COI found that "the allocation of resources by the DPRK has grossly failed to prioritize the objective of freeing people from hunger and chronic malnutrition, in particular in times of mass starvation." *Id.* para 639. Other obligations include a right to "Freedom from hunger" which "lies at the conjunction of the right to adequate food (article 11 (2) of the ICESCR) and the right to life (article 6 of the ICCPR)." *Id.* para 665. The COI found that "decisions, actions and omissions by the DPRK and its leadership have generated and aggravated this situation. They have caused at least hundreds of thousands of human beings to perish." *Id.* para 674; That "the DPRK has been responsible for the deliberate starvation of people detained for interrogation purposes as well as those imprisoned in political prison camps and the ordinary prison system." *Id.* para 681; and that "decisions, actions and omissions by the state and its leadership have caused the death of at the very least hundreds of thousands of human beings and inflicted permanent physical and psychological injury including intergenerational harm, on those who survived." *Id.* para. 690.

[85] *Id.* paras. 1121-22.

[86] *Id.* para. 838.

Ministry of People's Security and the Korean People's Army Military Security Command;[87]

- Torture is regularly employed in interrogations and "[s]tarvation and other inhumane conditions of detention are deliberately imposed on suspects to increase the pressure on them to confess and to incriminate other persons";[88]
- Those convicted of committing major political offenses are "disappeared" without trial or judicial order, to political prison camps (*kwanliso*).[89]
- The forced disappearances are not confined to DPRK citizens: "over 200,000 persons, including children, who were brought from other countries to the Democratic People's Republic of Korea may have become victims of enforced disappearance, as defined in the Declaration on the Protection of All Persons from Enforced Disappearance."[90]
- The COI estimated that "hundreds of thousands of political prisoners have perished in these camps over the past five

[87] The COI applied the legal framework provided by "article 6 (the right to life), article 7 (freedom from torture and cruel, inhuman or degrading treatment), article 9 (right to liberty and security of the person), article 10 (humane treatment of detainees), and article 14 (right to a fair trial) of the International Covenant on Civil and Political Rights (ICCPR)." The COI found that "Courts appear not to ever be involved in the decision to send a person to a political prison camp. This exclusion violates not only international law, but also article 127 of the DPRK Code of Criminal Procedure Code." Id. At para 721. Further, "non-judicial prison "sentences" violate the suspect's right to a fair and public hearing by a competent, independent and impartial tribunal established by law, which is established by article 14 of the ICCPR." *Id.* para 727.

[88] The COI report details Mr Jeong's 'pigeon torture'.

> [Y]our hands are handcuffed behind your back. And then they hang you so you would not be able to stand or sit . . . There are no people watching you. There is nobody. And you can't stand, you can't sleep. If you are hung like that for three days, four days, you urinate, you defecate, you are totally dehydrated. . . . [the pigeon torture] was the most painful of all tortures . . . [it] was so painful that I felt it was better to die.

Seoul Public Hearing, 21 August 2013, morning (02:09:00); Detailed Findings, *supra* note 1, para. 715.

[89] Detailed Findings, para. 793.

> In the kwanliso, the inmates are no longer registered citizens, so you do not need a law to decide the sentences. The bowibu [SSD] agent is the person who decides whether you are saved or you are executed. There are no other criteria other than his words. [The inmates] are already eliminated from society.

Seoul Public Hearing, 21 August 2013, afternoon (00:58:40).

[90] Detailed Findings, para. 1011.

decades. The unspeakable atrocities that are being committed against inmates of the *kwanliso* political prison camps resemble the horrors of camps that totalitarian States established during the twentieth century."[91]

- The denials about the camps by the DPRK are contradicted by satellite imagery and it is "estimated that between 80,000 and 120,000 political prisoners are currently detained in four large political prison camps";[92]
- Prisoners are executed "with or without trial;, publicly or secretly, in response to political and other crimes that are often not among the most serious crimes." The regime apparently employs public executions as a means to "instil fear in the general population,"[93] and various state institutions were responsible.[94]

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[91] *Id.* para. 842. The COI found that the atrocities were not limited to those convicted of major crimes:

> Prisoners in the ordinary prison system are systematically subjected to deliberate starvation and illegal forced labour. Torture, rape and other arbitrary cruelties at the hands of guards and fellow prisoners are widespread and committed with impunity . . . Once you are in there, not a lot of people make it out. Once you are in the solitary cell, you are beaten up and they give you 30 grams per meal and you get cold, so that leads to an immediate weakness. Somebody who weighs 50 kilograms [when they go in], their weight is reduced to 20 kilograms [when they exit solitary confinement].

Seoul Public Hearing, 21 August 2013, morning (01:48:10).

[92] *Id.* para. 1062.

[93] *Id.* para. 845. The COI found that

> a large number of executions are carried out in places of detention in the DPRK. In some cases, the execution is based on a judicial sentence. In other cases, summary execution is imposed without any known trial or judicial order, apparently to uphold discipline and institutional rules. . . . Inmates of political and ordinary prison camps are particularly vulnerable to secret executions. . . . The killing of prisoners can also be easily concealed because the bodies of prison camp inmates are never returned to their family. The Commission received credible first-hand information about instances of secret summary executions carried out in prison camps and interrogation detention facilities.

Id. paras 834-35.

[94] Detailed Findings, supra note 1 at para 839.

> "Gross human rights violations . . . in respect of detention, execution and disappearances are characterized by a high degree of centralized coordination between different parts of the extensive security apparatus. The State Security Department, Ministry of People's Security and the Korean People's Army Military Security Command regularly subject persons accused of political crimes to arbitrary arrest. This falls short of

- Crucially, "operations [involving disappearances] were approved at the level of the Supreme Leader."[95] The disappearances appear to be motivated by the desire to "gain labour and other skills for the State." In some instances, there were to "further espionage and terrorist activities."[96]
- The COI found that "from 1950 until the present, the DPRK has engaged in the systematic abduction, denial of repatriation and subsequent enforced disappearance of persons from other countries on a large scale and as a matter of State policy. Well over 200,000 persons who were taken from other countries to the DPRK may have potentially become victims of enforced disappearance, as defined in the Declaration for the Protection of All Persons from Enforced Disappearance."[97] International abductions continue to present date and "[since] the 1990s, its agents have abducted a number of persons from Chinese territory, including

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> the legal requirements set out by international law and even under the [DPRK's] own laws."

With regard to legal responsibility, the COI found that

> various decisions and policies of the DPRK leadership . . . entail crimes of murder as defined in international criminal law, because the responsible officials aggravated starvation in full awareness that this would cause more deaths in the ordinary course of events. . . . most of the public executions carried out in response to economic crimes for survival during the famine amounted to murder, as defined by international criminal law.

Id. paras 1128-29.

[95] Detailed Findings, supra note 1, at para 835: "secret executions could be linked to a directive that was allegedly issued by Kim Jong-il in 1997 and instructed the security apparatus to eliminate all elements who are "diseased in mind". Further, the COI

> has received information directly indicating that the camp system is controlled from the highest level of the state. In some cases, the Commission was able to trace orders to cause the disappearance of individuals to the camps to the level of the Supreme Leader. Moreover, the State Security Department, which decides whether to send individuals to the camp, is subject to the directions and close oversight of the Supreme Leader.

Id. para 1065.

[96] *Id.* para. 853. The COI noted that "family members abroad and foreign States wishing to exercise their right to provide diplomatic protection have been consistently denied information necessary to establish the fate and whereabouts of the victims. Family members of the disappeared have been subjected to torture and other cruel, inhuman or degrading treatment." *Id.* para. 1019.

[97] *Id.* para 1011.

nationals of China, the Republic of Korea and, in at least one case, a former Japanese national."[98]

- Of special import, the COI found that "the body of testimony and other information it received establishes that crimes against humanity have been committed in the Democratic People's Republic of Korea, pursuant to policies established at the highest level of the State."[99]
- The COI also established that these crimes including "extermination, murder, enslavement, torture, imprisonment, rape, forced abortions and other sexual violence, persecution on political, religious, racial and gender grounds," the forcible transfer of populations, the enforced disappearance of persons, and the inhumane act of knowingly causing prolonged starvation" are ongoing.[100]

Specifically, the COI determined that "crimes against humanity have been committed against starving populations, particularly during the 1990s . . . from decisions and policies violating the right to food, which were applied for the purposes of sustaining the present political system, in full awareness that such decisions would exacerbate starvation and related deaths" of much of the population.[101]

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[98] *Id.* para. 1020. The COI observed that "human rights violations continue against them and their families. The shock and pain caused by such actions is indescribable." *Id.* para. 1021.

[99] *Id.* para. 1160. The COI found that "that DPRK authorities have committed and are committing crimes against humanity in the political prison camps, including extermination, murder, enslavement, torture, imprisonment, rape and other grave sexual violence and persecution on political, religious and gender grounds." *Id.* para 1033.

Further,

> inmates of political prison camps are victims of the crime of imprisonment. Inmates are imprisoned, usually for life, in camps without ever having been brought before a judge in accordance with article 9 (3) and (4) of the ICCPR. . . . inmates of the DPRK's political prison camps are victims of the crime of enforced disappearance. . . . living conditions in the political prison camps are calculated to bring about mass deaths. . . . intentional killings of individual inmates in the DPRK's political prison camps, through summary executions, beatings, infanticide, deliberate starvation and other illegal means, all amount to the crime of murder. . . . inmates in the DPRK's political prison camps are generally victims of the crime of persecution.

Id. paras. 1039, 1043, 1047, 1058.

[100] *Id.* paras. 1028-76.

[101] *Id.* para. 1162.

Having made these chilling findings, the COI issued a set of recommendations. Perhaps the most significant in terms of actual executability is a call for the UN to ensure "that those most responsible for the crimes against humanity committed . . . are held accountable."[102] The COI suggested that the UNSC could refer the situation to the International Criminal Court or the UN set up an ad hoc tribunal.[103] The COI made a number of other recommendations that might be termed aspirational in terms of the prospect of actualisation in the near term.[104] These included a demand to provide access to political prisoners and their immediate release, institute "political and institutional reforms . . . to introduce genuine checks and balances upon the powers of the Supreme Leader and the Workers' Party of Korea," creation of an independent and impartial judiciary, a "multiparty political system and elected people's assemblies at the local and central levels that emerge from genuinely free and fair elections," establishment of an "independent constitutional and institutional reform commission," and "acknowledge[ment of] the existence of human rights violations, including the political prison camps."[105] Legal reforms such as abolishment of "vaguely worded 'anti-State' and 'anti-People'

[102] Detailed Findings, *supra* note 1, para. 1218. (The COI also made the following sobering call for responsibility:

> The international community must accept its responsibility to protect the people of the Democratic People's Republic of Korea from crimes against humanity, because the Government of the Democratic People's Republic of Korea has manifestly failed to do so. In particular, this responsibility must be accepted in the light of the role played by the international community (and by the great powers in particular) in the division of the Korean peninsula and because of the unresolved legacy of the Korean War.)

[103] Detailed Findings, *supra* note 1, para. 1219 (The COI also recommended that this be combined with a "reinforced human rights dialogue, the promotion of incremental change through more people-to-people contact and an inter-Korean agenda for reconciliation.")

[104] Detailed Findings, *supra* note 1, para. 1211-25. (In this category was a recommendation to

> Prosecute and bring to justice those persons most responsible for alleged crimes against humanity; appoint a special prosecutor to supervise this process; ensure that victims and their families are provided with adequate, prompt and effective reparation and remedies, including by knowing the truth about the violations that have been suffered; launch a people-driven process to establish the truth about the violations; provide adults and children with comprehensive education on national and international law and practice on human rights and democratic governance.)

[105] Detailed Findings, *supra* note 1, para. 1220.

crimes" in the criminal code, the creation of a guarantee of the "right to a fair trial and due process . . . articulated in the International Covenant on Civil and Political Rights," enforcement of the prohibitions and criminalization of "torture and other inhuman means of interrogation that are illegal under international law," and the guarantee of "humane conditions of detention for all inmates deprived of liberty" within the prison system were also recommended.[106] On the social front, the COI recommended that the DPRK adopt a "moratorium on the imposition and execution of the death penalty, followed without undue delay by the abolition of the death penalty," create the conditions for the operation of a free press, access to "the Internet, social media, international communications, foreign broadcasts and publications, including the popular culture of other countries," commence "education to ensure respect for human rights and fundamental freedoms," terminate "propaganda or educational activities that espouse national, racial or political hatred," and "[e]nd discrimination against citizens on the basis of their perceived political loyalty or the sociopolitical background of their families."[107] It also called on the state to "[a]llow Christians and other religious believers to exercise their religion independently and publicly, without fear of punishment, reprisal or surveillance."[108] In response to the egregious violations of gender equality, the COI recommended that the DPRK undertake a series of practical measures.[109] The COI also addressed recommendations to China. Specifically, it asked that China "[r]espect the principle of non-refoulement and . . . abstain from forcibly repatriating any persons to [DPRK] . . . extend asylum and other means of durable protection to persons fleeing the [DPRK] who need international protection."[110] Crucially, the COI asked China to "[t]ake immediate measures to prevent agents of [DPRK] from carrying out further abductions from Chinese territory; prosecute and adequately punish apprehended perpetrators of abduction and demand the

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.* (explaining that these recommendations included "providing equal access for women in public life and employment; eradicate discriminatory laws, regulations and practices affecting women; take measures to address all forms of violence against women, including domestic violence, sexual and gender-based violence by State agents and/or within State institutions.")

110 Detailed Findings, *supra* note 1, para. 1220.

extradition of those giving such orders so that they may be tried in accordance with law."[111]

The COI called on the UN, specifically the SC, to "refer the situation in [DPRK] to the International Criminal Court for action in accordance with that court's jurisdiction."[112] It asked the SC to "adopt targeted sanctions against those who appear to be most responsible for crimes against humanity."[113]

2.6. Aftermath of the COI Report

The COI report was transmitted by the HRC to the UN General Assembly ("GA"). A resolution, sponsored by the EU and Japan, called for action on the report and GA referral to the Security Council. A procedural resolution by Cuba to delete references to any such action, in the light of suggested new levels of cooperation from DPRK, was defeated (40:77:50). Subsequently, the Third Committee of the GA endorsed the EU-Japan resolution (111:19:55).[114] The plenary GA adopted the resolution (116:20:55).

Following this, France, joined by the United States and Australia co-sponsors, initiated the Arria arrangement in the Security Council on April 17, 2014. It provided the facility of a briefing to members of the Security Council, as well as a concurrent briefing on the preceding day to members of the General Assembly. This procedure

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111 *Id.*

112 *Id.*

113 *Id.* (Stating

> In the light of the dire social and economic situation of the general population, the commission does not support sanctions imposed by the Security Council or introduced bilaterally that are targeted against the population or the economy as a whole."). The COI was acutely conscious of the pernicious side effects of sanctions on innocent people in a country beset by starvation: "States should not use the provision of food and other essential humanitarian assistance to impose economic or political pressure on the Democratic People's Republic of Korea. Humanitarian assistance should be provided in accordance with humanitarian and human rights principles, including the principle of non-discrimination. Aid should only be curbed to the extent that unimpeded international humanitarian access and related monitoring is not adequately guaranteed.

Id. at 21.

114 Situation of Human Rights in the Democratic People's Republic of Korea, Human Rights Council and the General Assembly, G.A. Res. 25/25, UN GAOR, 3rd Comm'n, 69th Sess, 46th Mtg, Agenda Item 68 (c), Supp. No. 53, U.N. Doc. A/69/53, 2 (Mar. 28, 2014) (endorsing the EU-Japan resolution).

indicates both the increasing concern of the international community about gross violations of human rights in North Korea and the need for a response to the high media coverage of the COI report. All members of the Security Council save China and the Russian Federation attended. Of the thirteen Security Council member states present at the Arria briefing, eleven intervened to address the issues. None of them spoke adversely about the report or its conclusions or recommendations. Of the eleven that spoke, nine expressed themselves in favor of a key recommendation included in the COI report and addressed specifically to the Security Council. This was the recommendation that the Security Council should "refer the situation in the [DPRK] to the International Criminal Court for action in accordance with that Court's jurisdiction."

Neither in the Arria briefing of the Security Council members nor earlier in the HRC was there any criticism of particular findings or conclusions of the COI. No factual finding was contested, other than by the generic denunciation of the COI by the representative of DPRK after the COI report was presented to the Council.

Following the conclusion of the Arria briefing and the many strong statements calling for action, both on the part of members of the Security Council and on the part of other members of the United Nations present as observers, a "non-paper" dated July 11, 2014 was addressed by the permanent representatives of Australia, France, and the United States to the President of the Security Council.[115] This letter reported on the co-hosting of the meeting of Security Council members under the Arria formula on April 17, 2014 "to discuss the [COI] report."[116] The document concludes with a statement that the Security Council members had congratulated the COI for the "compelling report of exceptional quality" and had

[115] Letter from the Permanent Reps. of Australia, France and the U.S. to the United Nations to the President of the Security Council (July 11, 2014). Recording the co-convenors' summary of the comments made by participants during the Arria meetings, the document insists that it "does not prejudge endorsement of their content by Australia, France, the United States or any other Member State;" but that it is provided "for further consideration." *Id*. at 2.

[116] *Id.* at 1.

> We believe that the Security Council should formally discuss the commission's findings of widespread and systematic human rights violations in the Democratic People's Republic of Korea and its recommendations to the Council, and consider appropriate action. In particular, the Council should consider how those responsible for such violations should be held accountable.

"commended the courage of the two witnesses."[117] Council members "expressed grave concern at the horrific human rights violations and crimes against humanity outlined in the report".[118] Most members of the Council "urged [DPRK] to comply with the Commission's recommendations and to engage with the [UN] human rights system, including at its forthcoming universal periodic review".[119] As recorded in the "non-paper," it was noted that "[s]everal non-Council members also voiced support for the aforementioned accountability efforts".[120]

In early December 2014, upon the request of three members of the Security Council (Australia, France and the United States of America), the Security Council President convened a meeting of the Security Council in response to the COI report. Prior notice of a procedural motion placing issues of human rights in DPRK on the agenda of the Security Council was given by ten Security Council members. This indicated the existence already of a two-thirds majority, as required by art. 27.2 of the UN Charter for decision of the Security Council on a procedural matter. On 22 December 2014, the Security Council decided to place the issues of human rights in DPRK on its agenda for ongoing attention. This decision was adopted by a strong vote (11:2:2).[121] On a show of hands, the only votes against the procedural resolution were those of China and the Russian Federation.

Following the COI's public hearings, publicity and subsequent report, DPRK, for the first time, engaged to some degree with the UN human rights system. It participated in the UPR of its human rights record; it produced its own—albeit unpersuasive and

[117] *Id*. at 4. (Listing among the key findings of the COI in the non-paper are references to: 1. the estimated 80,000 to 120,000 people imprisoned without trial in four large prison camps in the DPRK and others languishing in other prisons and interrogation centres where torture is a standard practice; 2. the forced repatriation of women who have tried to flee DPRK and their subjection to sexual humiliation and violence, as found by the COI; 3. the attempt of authorities in DPRK to control the minds of the population by indoctrination and violent suppressions of freedom of thought or opinion; and 4. the instances of cases of abduction and forced disappearance of well over 200,000 persons from China, Japan, ROK and other counties.)

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] U.N. S.C. 7353d mtg. U.N. Doc. S/PV.7353, (Dec. 22, 2014) (detailing speeches given by members of the Council on the situation in DPRK).

propagandistic—human rights report;[122] and it promised dialogue with the EU, the Special Rapporteur, and others on human rights matters, which was subsequently withdrawn.[123]

The report of the COI on DPRK "reveals the unique and dangerous conditions prevailing in the DPRK that do not have any parallel in the contemporary world."[124] The question now confronting the global community and the United Nations as its representative body is whether sufficient resolution and principle can be found to take the steps that are necessary to protect universal human rights in DPRK and to render accountable, quickly and effectively, those who have breached, and continue to breach, those rights. The report of the COI on DPRK has been prepared in the hope and conviction that the answer to those questions is in the affirmative.

3. RECALCITRANT STATES AND INTERNATIONAL LAW

3.1. Is The Outlaw/Rogue Label Analytically Useful?

The term "outlaw state" or "rogue state" has gained currency in modern reportage about international relations.[125] This is largely

[122] *Report of the DPRK Centre for Human Rights Studies*, KOREA CENTRAL NEWS AGENCY, Sept. 13, 2014, *available at* http://www.ncnk.org/Report_of_the_DPRK_Association_for_Human_Rights_Studies.pdf (documenting the current state of human rights in DPRK). Note that this source was originally published on the Korean Central News Agency website (www.kcna.kp), although no permanent url exists for the report on that site.

[123] *North Korea says it has invited European Union human rights official to visit*, SOUTH CHINA MORNING POST Oct. 31, 2014, http://www.scmp.com/news/asia/article/1628934/north-korea-says-it-has-invited-european-union-human-rights-official-visit (noting that the DPKR invited the EU's top human rights official to visit and threatening to rescind invitations to visit previously issued to UN officials unless references to the International Criminal Court were dropped from the UN resolution on the country).

[124] Detailed Findings, *supra* note 1, para. 1211.

[125] *See* MIROSLAV NINCIC, RENEGADE REGIMES: CONFRONTING DEVIANT BEHAVIOR IN WORLD POLITICS 18 (2007) (observing that "renegade regimes are deviant members of the international community, norm breaking is their key defining feature . . . "). *See also* IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 563, 566 (2005)

> there are now two categories of outlaw states: 'behavioural outlaws', who violate norms, and 'ontological outlaws', who are outlaws 'more for who

owed to the employment of the terms by the United States in its post-Cold War foreign policy.[126] After recounting its early origins, Litwak elaborates that the modern concept of rogue state developed under Reagan. The focus was on labeling states as outlaws if they supported terrorism aimed at the United States. Following the conclusion of the Cold War, the acquisition of weapons of mass destruction ("WMD") by states inimical to the United States caused those states to be labelled as rogue states.[127] Therefore, for Litwak, the label has everything to do with preservation of American preferences in international relations.[128] On the other hand, John Rawls uses the term in a normative sense in his work *Law of Peoples*. He notes, "[t]he liberal and decent peoples' acceptance of the law of peoples is not sufficient—the society of peoples need to develop new institutions and practices to constrain outlaw states when they appear . . . among these practices should be the promotion of human rights."[129]

It must be recognized that despite the term's currency and popular appeal, a state does not become an outlaw or a rogue following any formal legal procedure that is derived from treaties or other international law commitments. This is in sharp distinction with domestic law outlaws—which is supposedly the basis for the analogical extension of the term into international relations. In the former, an individual is assessed typically through a formal legal proceeding to have violated precise legal obligations and found to be guilty. In the latter, the reality of international relations belies the

> they are than what they have done'. In its recent deployments, democracy has been used to foster the category of 'ontological outlaws', those found deficient for what they are rather than for what they have done.

126 *See* ROBERT S. LITWAK, ROGUE STATES AND U.S. FOREIGN POLICY: CONTAINMENT AFTER THE COLD WAR 56 –57 (2000) (describing the emergence of the term "rogue status" at the end of the Cold War).

127 *Id.* at 52 –54 (describing the acquisition of weapons of mass destruction as "the second key criterion" for labelling a state as "rouge" or "outlaw.").

128 *Id.* at 47-8 (discussing the United States' use of the rogue state policy to promote American interests and giving examples of the political motivation behind the act of labelling of specific states as "rogue").

129 JOHN RAWLS, LAW OF PEOPLES 48 (1999). *See also id.* at 90

> There are two kinds of non-ideal theory. One kind deals with conditions of non-compliance in which certain regimes refuse to comply with a reasonable Law of Peoples; these regimes think that a sufficient reason to engage in war is that it advances the regime's rational (not reasonable) interests. These regimes I call *outlaw states*.

existence of such orderly proceedings that are binding and capable of assessing the guilt of states.

Therefore, the term "rogue" or "outlaw" as it is applied to states in international law is not a coherent concept. It is politicised, idiosyncratic, and not accurately descriptive in a legal sense. However, that is not to deny its utility.

3.2. The Objectives of Labelling

Regardless of whether one chooses to employ the term "rogue," "deviant," or "outlaw" in reference to a problematic state, it is inescapable that the labels all proceed from a precondition—that the state has violated a set of norms shared by states within that norm-community. Due to the enormous variations between nation states along social, religious, political, and economic lines, it is worth asking whether there is a degree of shared normative commitment that justifies the imposition of labels like rogue, deviant, and outlaw. Analysis suggests that despite the above variations, modern states share religious,[130] ethnic, gender,[131] economic, linguistic, and technological bonds that give rise to common commitments embodied in international norms.[132] For instance, most nation states

[130] *See* Jeff Hynes, *Transnational Religious Actors and International Politics*, 22 THIRD WORLD QUARTERLY 143, 143—58 (2001) (examining the tie between transnational religious actors and state sovereignty).

[131] The women's movement transcends national boundaries in its campaigns for issues affecting women around the world. The UN Convention on the Elimination of all Forms of Discrimination Against Women is one manifestation of a legal framework for this community. *See generally* G.A. Res. 34/180, U.N. Doc A/RES/34/180 (Dec. 18, 1979) (establishing an international treaty aimed at eliminating discrimination against women); VALENTINE M. MOGHADAM, GLOBALIZING WOMEN (2005) (examining how the positive and negative aspects of globalization have helped to create transnational networks of feminist activists and organizations with shared agendas); TRANSNATIONAL SOCIAL MOVEMENTS AND GLOBAL POLITICS (Jackie Smith et al. eds., 1997) (examining transnational social movements from the lens of actors traditionally excluded from the study of global politics); GLOBAL FEMINISM: TRANSNATIONAL WOMEN'S ACTIVISM, ORGANIZING, AND HUMAN RIGHTS (Myra M. Ferree & Aili M. Tripp eds., 2006) (exploring the social and political developments that have led the movement for women's recognition as full persons).

[132] Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT'L ORG. 1, 3 (1992) (defining an epistemic community as a "network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area").

have made a legal commitment to the condemnation of torture,[133] slavery,[134] piracy,[135] genocide,[136] prostitution,[137] and narcotic drugs.[138] This is evidenced by their participation in the drafting and ratification of international law instruments on these subjects and both subsequent statements and conduct, which, although not exemplars of perfect compliance, exert substantial constraints on contraventions. In addition to legal texts on these topics, there is a community of shared overarching norms constituted by the adoption of obligations associated with the membership of international organisations such as the United Nations.[139]

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[133] *See generally* U.N. Convention against Torture, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) (placing an absolute prohibition on torture and imposing obligations on parties to prevent it from occurring).

[134] *See generally* Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 60 L.N.T.S. 253 (defining "slavery" and "slave trade"); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7 1956 (advancing the goals of the 1926 Convention); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/Res/217(III) (Dec. 10, 1948) (setting forth the basic human right to liberty).

[135] *See generally* Convention on the High Seas art. 100, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11 (stating "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy . . . ").

[136] *See generally* Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 (noting that "genocide, whether committed in time of peace or in time of war, is a crime . . . ").

[137] *See generally* Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, G.A. Res. 317(IV), U.N. Doc. A/RES/4/317 (Dec. 2, 1949) (requiring punishment for those who promote human trafficking).

[138] *See generally* U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/16, *reprinted in* 28 I.L.M. 493 (1988) (establishing international drug trafficking offenses); Protocol amending the Single Convention on Narcotic Drugs, U.N. Doc. A/RES/3444 (Dec. 9, 1975) (inviting governments and the Secretary-General to support the International Narcotics Control Board); Convention on Psychotropic Substances, Aug. 16, 1976, 1019 U.N.T.S. 175 (establishing an international control system for psychotropic substances); Convention on the Suppression of the Trade in and use of Prepared Opium, Feb. 11, 1925, 51 L.N.T.S. 337 (regulating the trading and international uses of opium); International Opium Convention, Feb. 19, 1925, 81 L.N.T.S 319; Convention on Raw Opium and Other Narcotics, Jan. 23, 1925 (introducing a regulatory system to be controlled by an Opium Board); andHague International Convention on Opium, Jan. 23, 1912, 8 L.N.T.S. 187 (allowing states to use powers to regulate the opium trade).

[139] *See* Bardo Fassbender, *The United Nations Charter as Constitution of the International Community*, 36 COLUM. J. TRANSNAT'L L. at 529 (1998) (arguing that the Charter of the United Nations represents the constitution of the international community).

The international community with shared norms seeks objectives that are analogous to those sought to be achieved by national communities in their reaction to norm violators. In the domestic context this is most powerfully illustrated by the deployment of criminal law to achieve "deterrence, incapacitation, just punishment, and rehabilitation."[140] The first can be divided up into general deterrence and specific deterrence. General deterrence is aimed at establishing a calculus whereby any potential offender has to trade off the benefits from committing a crime against its expected costs, which are established at high levels in order to ensure that the costs outweigh the benefits.[141] General deterrence is aimed at the whole community, not just prospective or actual offenders. Studies about the effectiveness of deterrence in the domestic context show that in the absence of the threat of any punishment for criminal conduct, the social fabric of society would readily dissipate because crime would escalate and overwhelmingly frustrate the capacity of people to lead fulfilled lives. Thus, general deterrence works in the sense that there is a connection between the existence of some form of criminal punishment and criminal conduct. In contrast, specific deterrence aims to discourage crime by punishing individual offenders for their transgressions and, thereby, convincing them that crime does not pay.[142] This is achieved by seeking to deter offenders from reoffending by inflicting imprisonment or other punishment that is costly, with the

[140] U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL, 2 (2013).

[141] *See generally* Dieter Dölling et al., *Is Deterrence Effective? Results of Meta-Analysis of Punishment*, 15 EUR. J. CRIM. POL'Y RES. 201 (2009) (studying the effect of general deterrence on different crimes); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not*, 18 J. ECON. PERSP. 163, 177-78 (2004) (linking reduction in crime to the increased threat of punishment); Richard Berk, *New Claims about Executions and General Deterrence: Déjà Vu All Over Again?* 2 J. EMPIRICAL LEGAL STUD. 303, 328 (2005) (examining the deterrent value of capital punishment); NATIONAL RESEARCH COUNCIL, THE GROWTH OF THE INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES 90 (2014) (examining the literature on the premise that harsher punishments have significant deterrent effects.).

[141] NATIONAL RESEARCH COUNCIL, THE GROWTH OF THE INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES 68 (2014) (discussing the theory of general deterrence).

[142] *See generally* Daniel S Nagin, Francis T. Cullen and Cheryl L. Jonson, *Imprisonment & Re-offending,* 38 CRIME & JUST. 115 (2008) (examining the effects of specific deterrence on prison rates).

goal of persuading them to avoid the unpleasant experience in the future.[143]

Rehabilitation is aimed at reforming the offender. The underlying premise is a recognition that offending behaviour is generated from a complex mix of social, economic, and familial factors and that offenders can be persuaded to reform their ways and become law-abiding citizens. Under this model, harsh punishments and lengthy prison terms are ill-suited to persuasion and reformation. In contrast, incapacitation seeks to remove the offender from society and prevent him from committing other offences during the time of punishment. In addition to the traditional deprivation of liberty through imprisonment, less crude forms of incapacitation include the termination of professional licenses, bans, and other forms of immobilisation of the offender from situations where he is likely to offend. Needless to say, incapacitation is only effective if the offender would have re-offended during the term of the prison sentence. Further, incapacitation is a blunt tool; it does not pay to imprison offenders in order to prevent them from committing minor or trivial offenses when the cost of imprisonment exceeds the damage caused by their crimes. There are no established models for determining with a high degree of accuracy offenders who will re-offend. In addition, research has demonstrated that incarceration might have 'criminogenic' effects.[144] Lower level offenders interact with more serious criminals in prison and tend to commit more serious crimes upon release. To be sure, there are complex reasons for this phenomenon, including socialization into a criminal culture, diminishment of lawful employment opportunities upon conviction, deterioration of relationships, and negative mental well-being.[145]

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[143] *See generally* Mirko Bagaric &Theo Alexander, The Capacity of Criminal Sanctions to Shape the Behaviour of Offenders: Specific Deterrence Doesn't Work, Rehabilitation Might and the Implications for Sentencing, 36 CRIM. L. J. 159 (2012) (studying empirical data on whether specific deterrence achieves sentencing goals).

[144] *See* Lynne M. Vieraitis et al., *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data, 1974–2002*, 6 Criminology & Pub. Pol'y 589, 593 (2007) (defining the "criminogenic" effect as the "direct and positive impact [of prison release] on crime if prisoners commit more crimes than they would have had they not gone to prison.").

[145] See Christy Visher, Jennifer Yahner, and Nancy G. La Vigne, Urban Inst., Life After Prison: Tracking the Experiences of Male Prisoners Returning to Chicago, Cleveland, and Houston, URBAN INSTITUTE (May 27, 2010), available at http://urbn.is/1ySLXk4 (finding many men after prison "struggled with extensive criminal and substance use histories, and significant shares returned to crime (17

Finally, the community seeks to achieve the goal of retribution in meting out punishment for norm violations. In its most primitive form, retribution is based on the idea of the *lex talionis*—an eye for an eye. The goal is to exact vengeance on the offender in proportion to the harm he has caused to the victim.

Applying the above to international law, it is clear that incapacitation is an expensive option, as it requires the use of military force. Specific and general deterrence may also call for military force in order to be effective, except to the extent that similar results could be achieved at lower cost through the employment of other options such as economic sanctions and shaming. In this context, the employment of labels like outlaw, rogue, and deviant might be aimed at achieving the objectives of deterrence by shaming the state alleged to have violated international norms. Similarly, the international community might attempt rehabilitation by educating and persuading the violator to change its behavior after shaming.

Shaming is "the process by which citizens publicly and self-consciously draw attention to the bad dispositions or actions of an offender, as a way of punishing him for having those dispositions or engaging in those actions."[146] In the criminal law context, shaming can take the form of publication of the identities of patrons of prostitutes in the media,[147] to mandating specifically negative license plates for those convicted of driving under the influence of alcohol or drugs.[148] In some instances, courts have used shaming as part of the sentencing process.[149] Critically, deterrence is key to

percent, self-reported), substance use (27 percent), and prison (22 percent, official) within 7 to 12 months of release.").

[146] Dan M. Kahan & Eric A. Posner, *Shaming White-Collar Criminals – A Proposal for Reform to the Federal Sentencing Guidelines*, 42 U. Chi. J.L. & Econ., 365, 368 (1999) (looking at shaming in the context of white-collar criminals).

[147] *See* Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV., 733, 735 (1998) (suggesting how shaming offers an alternative to traditional forms of punishment); *see also* Courtney Guyton Persons, *Sex in the Sunlight: The Effectiveness, Efficiency, Constitutionality, and Advisability of Publishing Names and Pictures of Prostitutes' Patrons* 49 VAND. L. REV. 1525, 1527 (1996) (discussing the non-financial policy implications of shaming prostitute's patrons).

[148] *See* Donna DiGiovanni, *The Bumper Sticker: The Innovation That Failed*, 22 NEW ENG. L. REV., 643, 644 (1988) (referencing the trial court's decision in *Goldschmitt v. State,* 490 So. 2d 123 (Fla. Dist. Ct. App. 1986)).

[149] Shaming has been employed in U.S. courts various times. *See United States v. Gementera*, 379 F.3d 596, 599 (9th Cir. 2004) (requiring a convict to wear a signboard proclaiming his guilt); *United States v. Coenen*, 135 F.3d 938, 939 (5th Cir. 1998) (requiring the defendant to publish notice in the official journal of the parish); *United States v. Schechter*, 13 F.3d 1117, 1118 (7th Cir. 1994) (requiring the defendant to notify all future employers of the defendant's past tax offenses); *People v.*

shaming because the objective is to show other members of the community that offending can be costly.[150] Shaming might also serve retributive goals, as it provides an outlet for the expression of the community's disapproval at the offender's act and allows disparate actors to punish the offender by attacking his reputation.[151] This can have significant negative effects for the offender even when he is able to counteract institutional forms of punishment.

Letterlough, 205 A.D.2d 803, 804, 613 N.Y.S.2d 687 (N.Y. App. Div. 1994) (requiring the defendant to place a "CONVICTED DWI" sign on his license plate); *People v. McDowell*, 59 Cal. App. 3d 807, 812–13, 130 Cal. Rptr. 839 (Cal. App. 1976) (requiring the defendant who was a purse thief who used tennis shoes to approach his victims quietly and flee swiftly to wear tap shoes); *Goldschmitt v. State*, 490 So.2d 123, 124 (Fla. Dist. Ct. App. 1986) (requiring a defendant to place a sticker: "CONVICTED D.U.I.—RESTRICTED LICENSE" on their car); *Ballenger v. Georgia*, 436 S.E.2d 793, 794 (Ga. Ct. App. 1993) (imposing a condition requiring the offender to wear a fluorescent pink plastic bracelet imprinted with the words "D.U.I. CONVICT"). *See contra People v. Hackler*, 16 Cal.Rptr.2d 681, 686 –87 (1993), (requiring a shoplifting offender to wear a t-shirt whenever he left the house reading, "My record plus two six-packs equals four years" on the front and "I am on felony probation for theft" on the back. This was struck down in appeal on the ground that the objective was to "public[ly] ridicule and humiliate[e]" and not "to foster rehabilitation." Id. at 686 –87); *People v. Johnson*, 174 Ill. App.3d 812, 124 Ill. Dec. 252, 528 N.E.2d 1360 (1988), (requiring a DWI offender to publish a newspaper advertisement with apology and mug shot. This was struck down because it "possibly, add[ed] public ridicule as a condition" and was contrary to the goal of rehabilitation. Id. at 1362).

150 *See U.S. v. Gementera*, 379 F.3d 596 (2004), *supra* note 131, at 599 (imposing a sentence that included performing community service while wearing a signboard stating that he stole mail on a defendant convicted of mail theft in order to better comport with the court's aim of deterrence); *see also E.B. v. Verniero*, 119 F.3d 1077, 1120–21 (1997)

> . . . notification results in shaming the offender, thereby effecting some amount of retribution. This suffering 'serves as a threat of negative repercussions [thereby] discourag[ing] people from engaging in certain behavior.' It is, therefore, also a deterrent. There is no disputing this deterrent signal; the notification provisions are triggered by behavior that is already a crime, suggesting that those who consider engaging in such behavior should beware.

151 *See* Chad Flanders, Shame and the Meanings of Punishment, 54 Clev. St. L. Rev. 609, 612 (2006) (noting that "shaming punishments replace a concrete physical harm with a largely symbolic or expressive one . . . "); *see also* Dan Kahan, What's Really Wrong with Shaming Sanctions, 84 Tex. L. Rev. 2075, 2087 (2006) (suggesting that shaming will not be effective because egalitarian citizens will not embrace it as an alternative means of punishment).

3.3. Objections to Shaming

To be sure, shaming might have negative consequences.[152] As in the case of traditional punishments, offenders might form sub-groups where norm-breaking is tolerated (or even celebrated).[153] The goal of these sub-groups might be to offer support—such as financial or legal support—for the offender and provide protection from negative consequences.[154] Gangs and terrorist organizations are examples of such sub-communities.[155] Aside from these issues, shaming risks idiosyncratic enforcement depending upon factors unrelated to the quality of the offence. For instance, India and Pakistan were treated more charitably than North Korea after testing nuclear weapons, although all three states acted in contravention of international law norms.[156] The strategic importance of these states to the United States might have influenced its support for minimal punishment for possessing nuclear weapons, in contrast to states such as North Korea and Iran, which have been dealt with more harshly.[157] However, it must be acknowledged that inequality and disproportionality are problems

[152] Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 748 (1998) (stating that "shame punishments may be disproportionately too weak or . . . too strong"); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 15 (2004) (arguing that a type of shame called "primitive shame" is "a way of hiding from our humanity that is irrational . . . bound up with narcissism"); Toni M. Massaro, *The Meanings of Shame* 3 PSYCHOL. PUB. POL'Y & L. 645, 648 (1997) (explaining that shaming can create a desire for retaliation); Toni M. Massaro, *Shame, Culture, and American Criminal Law* 89 MICH. L. REV. 1880, 1884 (1991) (stating that "the limiting concerns of proportionality, equality, and cruelty . . . point against use of [shaming] penalties.").

[153] JOHN BRAITHWAITE, CRIME SHAME AND REINTEGRATION (1989) (stating that "[offenders] associate with others who are perceived in some limited or total way as also at odds with mainstream standards.").

[154] *See* Kahan, *supra* note 133, at 2095 (concluding that shame creates an "inescapable expressive partisanship.").

[155] David A. Skeel, *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1817-18 (2001); BRAITHWAITE, *supra* note 135.

[156] *See* Uttara Choudhury, *Seven years after going nuclear, India and Pakistan thriving*, AGENCE FRANCE-PRESSE (June 2, 2005), http://www.spacewar.com/2005/050602015347.lmtxze92.html. ("Based on the experiences of India and Pakistan since they tested nuclear weapons in 1998, North Korea could be forgiven for thinking the price of carrying out an atomic test is worth paying.").

[157] Bill Nicholas, *Condemnation Swift, but Options are Limited*, USA TODAY (Oct. 9 2006), http://usatoday30.usatoday.com/educate/college/polisci/articles/20061015.htm (citing Ted Galen Carpenter's explanation that North Korea's rationale for testing nuclear weapons is to gain bargaining power like Pakistan).

that bedevil even traditional sanctions and therefore are not fatal objections to shaming.

Another objection to shaming is that the tactic entails costs just like other types of punishments.[158] It is costly for an individual to build and maintain a reputation, and the wasting of these expenditures may not always outweigh benefits obtained by adversely impacting that reputation.[159] Further, imposing the shaming punishment also entails a cost—the community has to undertake activities that go beyond mere cheap talk in order to effectively shame the offender.[160] For example, a state that wishes to subject another state to shaming might have to end commercial relationships between its business entities and those in the shamed state with the result that its citizens experience an increase in prices for commodities and consumer goods. It would also have to expend resources on policing rogue companies that choose to defy its instructions, etc.[161]

Critics also argue that modern society does not offer conducive conditions for shaming because of the lack of social interdependence;[162] social heterogeneity creates problems of definition pertaining to the kinds of offences that might engender a feeling of shame.[163] However, this objection has little salience because nation states are extremely interdependent. These relationships of interdependence mean that shaming can result in lost developmental aid and grants,[164] termination of foreign direct investment,[165] the efflux of foreign institutional investors from stock markets inflicting losses on investors,[166] the collapse of a state's

158 Kahan & Posner, *supra* note 140, at 372.

159 Skeel, *supra* note 137, at 1818–19.

160 *Id.* at 1819.

161 *Id.*

162 Massaro, *supra* note 141, at 1917 (noting that shaming is ineffective in part due to cities' in the United States lack of interdependence and cohesiveness).

163 *Id*. at 1923. ("Thus, even if a particular community could theoretically impose shame on an offender, a given judge's particular method of accomplishing that goal may still be off the mark.").

164 Rich Nielsen, *Rewarding Human Rights? Selective Aid Sanctions against Repressive States*, 57 INT'L STUD. Q. 791, 791 (2012) (finding that aid donors withdraw aid when repressive acts are publicized in the media).

165 Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression,* 59 INT'L ORG. 593, 595 (2005).

166 *Not Open for Business: Despite Elections, Investor Risk Remains High in Burma,* CONFLICT RISK NETWORK, (Apr. 2012), http://endgenocide.org/images/uploads/downloads/burma-not-open-for-business.pdf.

currency,[167] the embargoing of contracts with companies based in the offending state,[168] restrictions on the repatriation of capital to that state,[169] restrictions on travel to and from that state,[170] and the suspension and expulsion of that state from multilateral organizations.[171]

A powerful critique of shaming is about the lack of *authority* and *legitimacy*. Shaming punishments are typically imposed by a variety of actors which might include NGOs, international organiazations, media agencies, and private actors. As is apparent, NGOs, media agencies, and private actors do not possess authority in any formal legal sense. In other words, the offending state is not subject to these organizations under any legal instrument. Moreover, the primary addressees of international law are sovereign states which are only bound by consent. Therefore, the argument is that these NGOs and private actors do not possess any authority to impose punishment on sovereign states. The second criticism pertains to the lack of legitimacy. This is related to the idea that shaming is imposed without the preconditions of legitimacy antecedent to the imposition of traditional punishments in domestic law. These pertain to the existence of legal rules that result from democratic participation in law-making, identified institutions charged with formal legal authority for enforcement, formal processes for establishment of rule violations and procedural safeguards to

[167] *Iran Arrests 50 Over Currency Decline*, ASSOCIATED PRESS (Oct. 24, 2012), http://news.yahoo.com/iran-arrests-50-over-currency-decline-122538312--finance.html.

[168] *Judge Blocks Fla. Cuba, Syria Business Ties Law*, ASSOCIATED PRESS (June 26, 2012), http://cnsnews.com/print/news/article/judge-blocks-fla-cuba-syria-business-ties-law.

[169] *U.S. Government Eases Sanctions Against Burma*, SIDLEY AUSTIN LLP (July 12, 2012), http://www.sidley.com/en/news/us-government-eases-sanctions-against-burma-07-12-2012; Council Decision 2012/365/CFSP, amending Decision 2010/413/CFSP concerning restrictive measures against Iran, 2012 O.J. (L 282) 58–69.

[170] Press Release, Council of the European Union, Human rights violations: Council tightens sanctions against Iran (Mar. 23, 2012), *available at* http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/129215.pdf.

[171] *The Positive and Punitive Power of CMAG*, COMMONWEALTH QUARTERLY, (2008), *available at* http://www.thecommonwealth.org/EZInformation/176155/060308cmag/. *Organization of Islamic Cooperation Suspends Syria's Membership*, AL ARABIYA NEWS (Aug. 13, 2012), http://english.alarabiya.net/articles/2012/08/13/232088.html.

protect the rights of offenders, and certain fundamental rights that constrain both the power to make rules and enforce them.

The first element of legitimacy—legal rules enacted pursuant to a formal institutional process typically subject to democratic participation—is somewhat easy to overcome in situations involving codified legal rules where a state has ratified a treaty or convention embodying those rules. The assumption is that legitimacy is conferred by the state's participation in lawmaking, secondary participation by its domestic institutional actors, and tertiary involvement by lay citizens. Such legitimacy is presumed even if a particular state does not possess mandatory constitutional requirements for the international rules to be debated in domestic parliaments or for its citizens to participate in any meaningful sense. The very fact of the ratification of the international law instrument adopted pursuant to a formal legal process by an organization with subject-matter authority confers the rule with legitimacy, at least in the formal legal sense. This is analogous to the making of domestic legal rules. However, there are several complications. First, customary international law rules, particularly those derived from colonial times, raise questions about legitimacy because of the absence of participation from erstwhile colonies. Second, modern codified rules are created by institutions with the active participation of states with gross actual violations of the rules being proposed, raising questions about whether the rules are really meant to be binding in any meaningful sense.[172] Third, although most states participate in the drafting and adopting process, the reality is that the rules are a reflection of the interests of dominant powers. Weaker states are often mute spectators in the lawmaking process because their representatives are at a disadvantage due to of deficits in technical capacity, resources, and lobbying capabilities.

The second element—institutions for enforcement—is again satisfied where a treaty regime creates a machinery for monitoring and policing state commitments. It is of course possible that many treaty regimes do not create institutional mechanisms and merely embody obligations. The reasons are obvious—monitoring institutions are costly and many states are unwilling to contribute to mechanisms for policing breaches due to self-interested reasons. In such circumstances, there is an enforcement gap, and NGOs, individual states, and private actors seek to fill the void. States

[172] *E.g.*, consider the legitimacy of laws criminalizing domestic violence created by a parliament comprised largely of domestic abusers.

might seek to enforce either because they were active in the adoption of the treaty or because of a deep commitment to the underlying principles behind the rules, or because enforcement coincides with their strategic interests in relation to the offender state. NGOs might seek to fill the gap because enforcement coincides with their raison d'être, generates support from members or funders, or for other reasons. All these instances of shaming raise legitimacy concerns.

The third element—processes for establishing breaches of the rules and imposing procedural fairness requirements—generates significant problems in the shaming context because many of the instances of state shaming are bereft of such protections.[173] Considering the empirical evidence of partisanship and politicization in the deployment of shaming, critics claim that shaming fails the test of fairness. In situations where NGOs or media outlets engage in shaming campaigns, these agencies are not bound by legal obligations to ensure that the offender is innocent unless proven guilty. Nor do they have legal obligations to afford the offender an opportunity to defend itself adequately, to protect against coercion, to take account of precedent or to ensure that punishment is proportionate to the wrong committed. In such circumstances, shaming fails the test of legitimacy because the fact finding and blame imposing processes are not subject to adequate legal safeguards. The objection is not without merit in relation to private actors. Crucially, these objections about procedural fairness do not survive in relation to institutions such as the instant COI The COI under the aegis of the international legal system is capable of achieving acceptable levels of adjudicative neutrality, giving an opportunity for the accused state to defend itself, protecting against illegal coercion, and taking account of precedent.

The final element of the legitimacy claim—lack of fundamental rights to limit the power of rulers to make law and enforce them—manifested typically in domestic constitutions and bolstered by judicial review is presented in the shaming context, for example, when there is disproportionality in punishment. In the domestic context, one of the limits on the design of punishment is proportionality—that punishment fits the crime. Under this head,

[173] *See* Seth Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 6 (1991) ("The power of public opprobrium, once evoked, is often more pervasive and more penetrating than criminal punishment. As the volume of information controlled by the state increases, so too does the government's ability to sanction dis-favored activities by the simple act of public disclosure.").

punishment is carefully calibrated both in degree and administration with designated officials and institutions charged with both aspects. In contrast, shaming operates without any control over the degree of punishment or how—and by whom—it is to be administered. Therefore, some offenders are over-punished and others are under-punished.[174] This is exacerbated by the high degrees of uncertainty and unpredictability of both the finding of guilt and the administration of punishment.[175]

3.4. Shaming the State

From the above, it is clear that labels such as "rogue" and "pariah" attach at the level of the state. The idea is based on traditional notions of enterprise liability.[176] As is the case with collectively organised forms of business, such as corporations, liability is imposed on the collective body which bears responsibility for the actions of its agents. Enterprise liability externalizes the cost of monitoring when the conduct is at micro-level with attendant asymmetries of knowledge, resources, and information between enforcers and offenders. The prospect of liability creates incentives for the entity to invest in monitoring the conduct of its agents.[177] When agents engage in bad conduct, they are disciplined by their superiors and the chain of responsibility for monitoring stops with the board in the case of large modern companies.

It is necessary to shame states because they are the primary actors in international law and they have to be held to account for commitments they enter into with each other. Enforcement is necessary if these commitments are to be regarded as legally binding. Therefore, a key test of these commitments is whether there is enforcement in practice. Lebovic and Voeten conducted a study examining the consequences for states that ratified the ICCPR,

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[174] James Whitman, *What is Wrong with Inflicting Shame Sanctions?*, 107 YALE L.J. 1055, 1088 (1988).

[175] *See* Tim Eaton, *Prosecutor Kills Himself in Texas Raid Over Child Sex*, N.Y. TIMES, (Nov. 6, 2006) http://www.nytimes.com/2006/11/07/us/07pedophile.html (noting that the suicide of a prosecutor who allegedly solicited a person he believed to be thirteen years of age following a Dateline NBC sting is a sobering reminder of the dangerous consequences of shaming punishments).

[176] David Skeel, *supra* note 142, at 1829 (examining the effects of shaming a corporation).

[177] *Id.*

noting, "[d]uring the Cold War, states that signed and ratified the ICCPR treaty were about twice as likely to be shamed by public resolution than were states that failed to do so." Clearly, rather than pure partisanship and *ad hoc* imposition, the treaty system seems to be creating a set of contract-type expectations which are then enforceable by the imposition of a shame sanction.[178] The architecture of the treaty defines the legal obligations assumed by the ratifying state and provides criteria for other states to make evaluative judgements about whether subsequent behavior conforms to performance expectations.[179]

Shaming is aimed at targeting a state's self-image because there is ample evidence that states deeply care about their self-image and invest considerable resources in building and projecting it. In many contexts, this self-image and its external manifestations are in the form of a brand and exhibit property-type characteristics. Therefore, shaming a state to negatively affect its self-image and brand for the international law norm violations committed by its officers is akin to imposing a punishment that reduces one's property interests.[180] There might be internal and external aspects to this shame depending upon the depth of a state's sense of identity. Under ideal conditions, for a state with a strong sense of identity and attendant conceptions of national pride, the imposition of a shame sanction triggers internal consequences.[181] These might

[178] The study by Lebovic and Voeten revealed that members that signed and ratified the ICCPR treaty judge target states that also committed to the treaty more harshly than states that did not and conclude that shaming practices in the UNHRC are based, in part, on a desire to hold states accountable for their commitments . . . countries that have signed and ratified the ICCPR treaty do not appear to share characteristics (e.g., human rights records) that could explain why the probability of a vote to punish a target rises precipitously when both the target and voter are parties to the ICCPR treaty. *See generally* James Lebovic and Erik Voeten, *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR*, 50 INT'L STUD. Q. 861 (2006).

[179] *Id.* at 885

> States do not appear to get favorable treatment from the commission merely by paying lip service to important principles. To the contrary, the acts of signing and ratifying treaties or achieving formal membership within IOs seem not to contribute directly toward reputation-building in the international community. If these agreements and memberships matter, it is in raising expectations when members of the community evaluate the conduct of other states. Simply put, states expect others to deliver on their promises.

[180] *E.g.*, a fine.

[181] Thomas Risse & Stephen Ropp, *International Human Rights Norms and Domestic Change: Conclusions*, *in* THE POWER OF HUMAN RIGHTS 234, 254 (1999).

be manifested by exercises in self-reflection,[182] formalized institutional processes aimed at establishing the truth and identifying offenders,[183] structural reforms,[184] corrective legislation, punishment for offenders,[185] reparations for victims,[186] and apologies.[187] In contrast to these situations, states might engage in a refutation of shaming campaigns, and the shaming is therefore confined to extracting external consequences.[188] Under either scenario, shaming the state creates incentives for better monitoring and law abidance. In some cases, such incentives might result in greater investment in promoting better conduct, e.g., by ratifying

[182] E. Dresler-Hawke & J. H.Liu, *Collective Shame and the Positioning of German National Identity*, 32 PSICOLOGÍA POLÍTICA 131–53 (2006); Michael Johns et al., *Ashamed to Be an American? The Role of Identification in Predicting Vicarious Shame for Anti-Arab Prejudice After 9-11*, (2005) 4 SELF AND IDENTITY, 331–348.

[183] *Day of Shame for British Army: Shocking Brutality Uncovered by Inquiry*, LONDON EVENING STANDARD (Sept. 8, 2011), http://www.standard.co.uk/news/day-of-shame-for-british-army-shocking-brutality-uncovered-by-inquiry-6441146.html.

[184] Ryan Goodman, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE LJ 983, 995 (2004).

[185] Following an abuse scandal at Abu Ghraib prison in Iraq, several U.S. military personnel serving at the prison were convicted on multiple charges by court martial and incarcerated, *Graner Gets 10 years for Abu Ghraib Abuse*, NBC NEWS (Jan. 16, 2005), http://www.nbcnews.com/id/6795956/ns/world_news-mideast_n_africa/t/graner-gets-years-abu-ghraib-abuse/; Liz Beavers, *England Back in Mineral County*, CUMBERLAND TIMES (Mar. 25, 2007), http://www.times-news.com/england-back-in-mineral-county/article_5919dee3-e19a-50c4-8ac8-f9c7b408c07d.html .

[186] For example, Maher Arar, a Syrian-Canadian who was deported from the United States to Syria after Canadian officials falsely suspected him of terrorist activities, was awarded $10.5 million in damages from the Canadian government following a public inquiry. Josh Tapper, *Barack Obama Should Apologize to Maher Arar, Rights Groups Say*, TORONTO STAR (May 22, 2012), http://www.thestar.com/news/canada/2012/05/22/barack_obama_should_apologize_to_maher_arar_rights_groups_say.html.

[187] Kevin Rudd, Prime Minister of Australia, Apology to the Stolen Generations (Feb. 13, 2008), *available at*http://www.dfat.gov.au/indigenous/apology-to-stolen-generations/national_apology.html.

[188] Libya's oil industry, for example, was hit hard by UN sanctions imposed after the bombing of two commercial airplanes in the late 1980s. By 2001, the total cost of these sanctions to the Libyan economy was estimated to be $18 billion by the World Bank and $33 billion by Libyan government. *See* Ray Takeyh, *The Rogue Who Came in from the Cold*, FOREIGN AFF.62, 64 (2001). However, sanctions against the Ian Smith regime in Rhodesia succeeded in making the country wholly dependent on trade with apartheid-era South Africa. Once Western countries managed to disrupt that trading relationship, the Rhodesian economy was brought to its knees. Robert O. Matthews, *From Rhodesia to Zimbabwe: Prerequisites of a Settlement(1989-1990)*, 45 INT'L J. 292, 302, 327 et seq. (1990).

international law instruments; bonding or improving the training of police or military personnel; employing more lawyers in the defence hierarchy; preventing or employing anti-corruption staff and human rights commissions; and monitoring, while in other cases it translates into greater resources for punitive enforcement, *e.g.*, more police, courts, and prisons. The net result from the operation of these incentives is that a state acts rationally to minimize the probability of being punished because it cares about the negative consequences of shaming.

The empirical evidence is less clear. Other things being equal, shaming sanctions appear to be imposed less frequently upon richer states than on poorer states.[189] Authors who have studied shaming by the United Nations Human Rights Commission ("UNHCR") write that despite there being eleven attempts at censuring China between 1991 and 2001, none proved to be successful.[190] The study examined other variables that predicted when a state would become a target for shaming at UNHRC. States seen to be more cooperative than others or those that made a greater contribution to common objectives were, unsurprisingly, less likely to be targeted by other states.[191] For example, the authors found that "regardless of their rights records, states that failed to participate in peacekeeping missions in the prior year ran about twice the risk of being targeted by the commission as did participating states. [Similarly,] states that vote in the UN [General Assembly] only half the time are about twice as likely to be targeted than are states that vote all the time."[192] The difficulty of disparities in punishment actions relative to power

[189] During the Cold War, a state with average capabilities was able to escape sanctions or to keep the charges against it confidential 44% of the time; a state with capabilities one standard deviation above the mean (*e.g.*, Austria or Morocco) avoided more than confidential treatment 66% of the time. The effect is only slightly less pronounced in the post-Cold War period; the values are 25% and 42%, respectively. *See* James H. Lebovic & Erik Voeten, *The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR*, 50 INTL' STUD. Q. 861, 878 (2006).

[190] As the ability of Saudi Arabia and China to escape condemnation indicates, there is still good reason to be suspicious of the impartiality of the UNHCR's public shaming process. *Id.* at 884.

[191] In the Cold War period, a state with a perfect attendance record in the UNGA is less than half as likely to have a public resolution adopted against it as is a country that participates only 50%of the time . . . targeted states that faithfully vote in the UNGA escape without punishment or with confidential consideration an estimated 54% of the time, whereas a state that participates only half the time that it is eligible can make the same claim only 13% of the time. *Id.* at 877–78.

[192] *Id*.

and influence is not necessarily a problem as long as punishment is attempted—our claim is that shaming has the potential to affect state behavior in ways that matter for law, not that all states are punished equally all of the time. The ultimate success of prosecution and degree of punishment imposed is a function of a number of factors, not least of which is relative power and resources—no different from traditional law enforcement.

A complicating factor for shaming at the state level is its politicization.[193] This is particularly problematic at the multilateral organization level when there is capture by partisan interests. One study of practice at UNHRC found that during the Cold War, "political alignment with the [U.S.] greatly increased the prospect that countries were subject to severe sanctions. Targeted states that consistently voted with the [U.S.] were virtually assured (a probability of .93) of being sanctioned by a public resolution."[194] This declined following the end of the Cold War, but "states were more likely to favour countries with similar alliances and to oppose countries with dissimilar alliances. This conclusion is further reinforced by the impact of a convergence in domestic ideology."[195]

3.5. Shaming the Regime

Shaming the regime is preferable to shaming the state when the latter is either not congruent with blame for the wrong or when shaming the state is not effective. Several reasons exist for this: first, as illustrated by the North Korean example, the relationship between the offending public officials and the citizens of the state is likely to be quite attenuated. To be sure, shaming the entire North Korean state in such circumstances is both unfair and ineffective. It is unfair because shaming punishes innocent people who are victims of the actions of the regime and ineffective because the citizens are unlikely to experience shame for illegal actions that they did not commit. In other words, the citizen is likely to behave more as a victim than as an offender and shaming is wasted.

193 *Id.* ("foreign policy positions, as measured by votes in the UNGA, has a significant and substantial effect on the decision by a state to withhold punishment of another (hence, the negative coefficients) in both the Cold War and post-Cold War periods.").

194 Lebovic and Voeten, *supra* note 18, at 876.

195 *Id.*

Some of these difficulties in shaming the state as an entity can be resolved by shaming the regime instead. Even so, fairness requires that shame should be restricted to the individual offenders rather than the entire government.

One response might be to limit shaming to the ruler when the decision is made by him or at his behest. This has the virtue of protecting innocent actors from undeserved punishment. States that are ruled by ideational figures, personality cults, and dynastic families are prime targets. A totalitarian regime such as North Korea, where executive power vests in one individual or a dictatorial regime, provides a good example. The work of the COI is an illustration of shaming the regime because of specific findings made against the Supreme Leader.

In an ideal scenario, shaming triggers both an internal and external response in the ruler; internal in the sense that the ruler experiences moral shame and undertakes corrective action to punish wrongdoers, compensate victims and prevent future occurrences because he genuinely believes that the conduct is wrongful.[196] In less ideal conditions, the response might be purely external: faced with the shame sanction, the ruler takes some action to assuage external actors while continuing to covertly condone or ignore the wrong.[197] These externally directed actions might be accompanied by denials of any wrongdoing.[198] North Korea has exhibited these reactions at several points in its history including after the publication of the COI Report.

Notably, shaming the ruler comes with its own set of unintended consequences. A rational ruler might be assumed to weigh the cost from being shamed when acting on the international plane. The ruler must ask if the cost he is likely to incur from successful shaming activity by third parties outweighs the benefits conferred from the act. If the cost exceeds the benefits, a rational ruler will forego the action. Logically, the shaming activity depends on the wrong act being detected. Therefore, rulers might attempt to hide information about wrongs committed by themselves or their lower level functionaries, calculating that if the acts do not attract public

196 *See* Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, MICH. ST. L. REV.,785, 793-94 (2007).

197 *Bahrain's Human-Rights Report: the King's Risky Move*, THE ECONOMIST (Nov. 26, 2011), http://www.economist.com/node/21540304.

198 *Sri Lanka's Empty Promises and Denial of Rights Crisis Exposed at UN*, AMNESTY INT'L., (Nov. 1, 2012), *available at* https://www.amnesty.org/en/latest/news/2012/11/sri-lanka-s-empty-promises-and-denial-rights-crisis-exposed-un/.

scrutiny there is less likelihood of shaming.[199] Thus, one of the unintended consequences of shaming the ruler might be to create incentives for suppressing information about wrongs committed by lower level officials.

It is not clear that all rulers are equally responsive to shaming; and some rulers are more responsive than others. For example, rulers with strong claims to moral or ethical leadership,[200] rulers whose grip on power is infirm,[201] those who need good reputations to join regional associations or trade groups,[202] those who need to attract international investment,[203] those who need loans from

[199] *Access to Information in Mexico: Migration and National Security*, FREEDOMINFO.ORG (June 28 2012), http://www.freedominfo.org/2012/06/access-to-information-in-mexico-migration-and-national-security/.

[200] Religious leaders, in particular, such as the Pope, might be susceptible to shaming. *See* Cathy L. Grossman, *Sex Abuse Scandal Drives Down Pope Benedict's U.S. Approval Ratings*, USA TODAY (Mar. 29, 2010), http://content.usatoday.com/communities/Religion/post/2010/03/pope-benedict-sex-abuse-survey-ratings-fall/1 (noting that opinions of religious leaders are documented and published); *See also* Navi Pillay, UN High Commissioner for Human Rights, Opening Statement to the 29th Session of the Human Rights Council by the High Commissioner for Human Rights (June 15, 2015), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16074&LangID=E. , (naming states involved in possible human rights violations).

[201] *See* FRANK SCHIMMELFENNIG, NATO'S ENLARGEMENT TO THE EAST: AN ANALYSIS OF COLLECTIVE DECISION-MAKING, EAPC-NATO INDIVIDUAL FELLOWSHIP REPORT 1998-2000 64, *available at* http://www.nato.int/acad/fellow/98-00/schimmelfennig.pdf

> . . . the opponents and skeptics of enlargement within the alliance could not openly oppose and block enlargement either without experiencing genuine cognitive dissonance and shame or without risking to reveal a hypocritical, self-serving attitude toward the alliance's norms and mission and to lose their credibility and reputation as members of the community in good standing.

[202] *See* György Szondi, *The Role and Challenges of Country Branding in Transition Countries: The Central and Eastern European Experience,* 3 PLACE BRANDING AND PUB. DIPL. 8, 10 (2007)

> Central European countries' most important foreign policy goals were to join NATO and the European Union, two 'superbrands'. Countries in transition rely on the moral, financial and political support of more developed regions or nations, called 'centre nations', such as the Western European countries. The less developed or transitional countries are often situated on the 'periphery'. In their orientation the transitional countries are moving from the periphery towards the centre position and the function of branding is to support and justify this 'move' and demonstrate that these countries are worthy of the centre nations' support. Branding can also be interpreted as the periphery's call for legitimisation.

[203] Libya, for example, following a decades-long shame campaign spearheaded by the United States and United Kingdom, eventually agreed to

multilateral lending agencies,[204] and those who need support from allies[205] are probably most responsive to shame sanctions. In contrast, rulers who resist external norms,[206] have established reputations for denouncing the dominant international actors,[207] or

extradite two suspects in the PanAm bombing and to pay compensation to the victim's families. This action permitted Libya to normalize its aviation industry and to attract much needed foreign investment to fully exploit its oilfields. John H. Donboli & Farnaz Kashefi, *Doing Business in the Middle East: A Primer for U.S. Companies*, 38(2) CORNELL INT'L. L. J. 413, 451 (2005); Jad Mouawad, *Libya Tempts Executives With Big Oil Reserves*, N.Y. TIMES (Jan. 2, 2005), http://www.nytimes.com/2005/01/02/ business/libya-tempts-executiveswith-big-oil-reserves.html?_r=0.

[204] In 1994, the World Bank obligated Burkina Faso to "[i]ncorporate a pledge in its policy framework paper to curb female genital mutilation." Canan Gunduz, *Human Rights and Development: The World Bank's Need for a Consistent Approach* 18 DESTIN STUD. INST., WORKING PAPER SERIES 3) (2004), *available at* http://www2.lse.ac.uk/internationalDevelopment/pdf/WP/WP49.pdf. Two years later, Burkina Faso criminalized female genital mutilation and formed a national committee charged with combatting the practice. Heidi Jones, Nafissatou Diop, Ian Askew, & Inoussa Kaboré, *Female Genital Cutting Practices in Burkina Faso and Mali and Their Negative Health Outcomes*, 30 STUD. FAMILY PLAN. 219, 220 (1999), *available at* http://www.popcouncil.org/uploads/pdfs/councilarticles/sfp/SFP303Jones.pdf.

[205] Ulrike Demmer & Christoph Schult, *Unreliable Partners? Germany's Reputation in NATO Has Hit Rock Bottom,* SPIEGEL, (May 17, 2012) http://www.spiegel. de/international/world/criticism-of-germany-s-military-role-in-the-nato-alliance-a-833503.html.

[206] In 2008, Robert Mugabe was stripped of an honorary British knighthood that had been bestowed in 1994, as a mark of revulsion at the abuse of human rights and abject disregard for the democratic process in Zimbabwe over which President Mugabe has presided. *Mugabe is Stripped of Knighthood as Mark of Revulsion*, THE SCOTSMAN (Jun. 25, 2008), http://www.scotsman.com/news/uk/ mugabe-is-stripped-of-knighthood-as-a-mark-of-revulsion-1-1077561# axzz3o471H8rT. In close temporal proximity, Mugabe was stripped of several honorary degrees he had been awarded by Western universities in the 1980s. Paul Kelbie, *Edinburgh University Revokes Mugabe Degree,* THE GUARDIAN (Jul. 15, 2007), http://www.theguardian.com/uk/2007/jul/15/highereducation.internationaled ucationnews; *Michigan State Revokes Mugabe's Honorary Degree*, ASSOC. PRESS (Sept. 16, 2008), *available at* http://diverseeducation.com/article/11685/.

[207] Hugo Chavez is a good example of such a figure. At a press conference on August 2, 2012, Chavez denounced European nations for funding Syrian rebels and terrorists in the ongoing conflict in that country. *Venezuela's President Hugo Chavez Criticizes West Over Syria,* THE GUARDIAN (Aug. 2, 2012), http://www. guardian.co.uk/world/video/2012/aug/02/venezuela-hugo-chavez-syria-video; *Chavez, Ahmadinejad Denounce West's Imperialist Aggression in Libya, Syria*, JAGRAN POST (Aug. 17, 2011), http://post.jagran.com/chavez-ahmadinejad-denounce-wests-imperialist-aggression-in-libya-syria-1313592746. In 2006, Chavez famously referred to then-US-President George Bush as "the devil" during a speech to the UN General Assembly, taking the opportunity in follow-up interviews to criticize the Second Iraq War and Washington-back capitalist reforms in Latin America. Tim Padgett, *Chavez: Bush Has Called Me Worse Things*, TIME MAGAZINE (Sept. 22, 2006),

are pursuing a different ideology, which provides internal justifications for their actions, are unlikely to be responsive to shaming.[208] Regimes and rulers with economic or political importance generate their own difficulties.[209] Under such circumstances, a ruler is likely to be less responsive to shame sanctions because of the strategic or economic importance of his country.[210] Even so, unless the ruler has egregiously criminal tendencies,[211] he will be responsive to shaming on a scale that varies from weakly responsive to strongly responsive. If the ruler enjoys widespread domestic support and has a weak opposition,[212] or is a

http://www.time.com/time/world/article/0,8599,1538296,00.html#ixzz2G6BzUvhc.

[208] For example, the Taliban destroyed the irreplaceable Bamiyan Buddhas in 2001, despite an international outcry in which several countries, including Iran, offered to purchase the historical statues, due to a "religious obligation to destroy idols." Alex Spillius, *Taliban Ignore All Appeals to Save Buddhas*, THE TELEGRAPH (Mar. 5, 2001), http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1325119/Taliban-ignore-all-appeals-to-save-Buddhas.html.

[209] China and Russia have both been able to use their permanent seats on the Security Council to avoid action on Tibet and Chechnya, respectively. Despite the personal popularity for the Dalai Lama and the Tibetan cause in many Western States, China's rising importance has ensured that the issue has slipped off the international agenda. See, e.g., HUMAN RIGHTS WATCH, WORLD REPORT 2000: CHINA AND TIBET – THE ROLE OF THE INTERNATIONAL COMMUNITY (2000), *available at* http://www.hrw.org/legacy/wr2k1/asia/china3.html (describing China's persistence in curbing basic freedoms despite domestic and foreign pressure).

[210] *See, e.g.*, David Eimer, *China Dismisses US Criticism of its Human Rights Record,* THE TELEGRAPH (Apr. 10, 2011), http://www.telegraph.co.uk/news/worldnews/asia/china/8441374/China-Dismisses-US-Criticism-of-its-human-rights-record.html (noting how China fired back at the United States for criticizing its human rights record); *World Report 2015: China*, HUMAN RIGHTS WATCH (2015), https://www.hrw.org/world-report/2015/country-chapters/china-and-tibet.

[211] Examples of this type of ruler include Idi Amin of Uganda and Pol Pot of Cambodia. Idi Amin's rule has been described as "a synonym for barbarity" and the man himself as "possessed of an animal magnetism" which he wielded with "sadistic skill". Amin attributed God-like powers to himself, and exhibited such irrational behavior that most foreign leaders who had contact with him came to the concluded that he was, in fact, clinically insane. Amin was ruthless in dealing with real and imagined political opponents and his reign caused the deaths of an estimated 300,000 people. Patrick Keatley, *Obituary: Idi Amin*, THE GUARDIAN(Aug. 18, 2003), http://www.theguardian.com/news/2003/aug/18/guardianobituaries. Amin often acted based on erratic reasons, and via sadistic methods, *e.g.*, beating to death with sledge hammers. *Death of a Buffoon and Killer*, NEW SCOTSMAN, (Aug. 17, 2003), http://www.scotsman.com/news/international/death-of-a-despot-buffoon-and-killer-1-1292740.

[212] For example, Robert Mugabe of Zimbabwe. Support for Mugabe's chief opposition, the Movement for Democratic Change, fell from 38% in 2010 to only 20% in mid-2012. Lydia Polgreen, *Less Support for Opposition in Zimbabwe, Study Shows*, N.Y. TIMES (Aug. 22, 2012), http://www.nytimes.com/2012/08/23/

dictator without any resistance, he will be weakly responsive at best. Similarly, if the ruler thrives on challenging the dominant international structure or is leading a revolutionary government fighting against claimed injustices perpetrated by foreign actors, shame has little chance of succeeding.[213] To the contrary, in such cases, shaming by international actors serves to establish that ruler's reputation for fearlessness and in some cases can be effectively utilized to buttress his or her position among his domestic constituency.[214]

3.6. Shaming North Korea

International human rights groups have engaged in shaming campaigns against North Korea for a long time. This is despite the realization that the nature of the regime makes any prospect of engaging with it in order to achieve change rather remote.[215] When

world/africa/support-for-opposition-in-zimbabwe-declines-study-shows.html?_r=0. The MDC has faced many challenges, including attempting to pacify a diverse supporting base of its own and a leadership weakened by accusations of treason and Mugabe's populist policies, such as accelerated land redistribution. Chris Maroleng, *Situation Report: Zimbabwe Movement for Democratic Change*, INST. FOR SECURITY STUD. (May 3, 2004), *available at* http://dspace.cigilibrary.org/jspui/bitstream/123456789/31353/1/ZIMMAY04.pdf?1.

[213] Slobodan Milosevic, for example, always positioned himself as the defender of the Serbian people against foreign aggression. In a 2001 BBC interview, following his extradition to face war crimes charges at The Hague, Milosevic's wife Mira Markovic stated, "I don't feel any shame. On the contrary, I'm proud of my people and I am sure that throughout its history it pursued—as far as wars are concerned—a defence policy." Mrs. Markovic blamed Western powers for the bloodshed in the former Yugoslavia and claimed that Mr. Milosevic was an inspiration to "many poor, small and humiliated nations throughout the world." *Wife Hails Milosevic the 'Freedom Fighter'*, BBC NEWS (Sept. 7, 2001), http://news.bbc.co.uk/2/hi/europe/1529200.stm. Milosevic himself phoned Fox News from his cell phone to give a live interview stating, "I'm proud of everything I did in defending my country and my people." *MilosevicGives TV Interview from Cell*, BBC NEWS(Aug. 24, 2001), http://news.bbc.co.uk/2/hi/europe/1507660.stm.

[214] John F Dickerson, *Why Bush Is Giving Schroeder the Cold Shoulder*, TIME MAGAZINE(Sept. 30, 2002), http://content.time.com/time/nation/article/0,8599,356168,00.html; Dan Collins, *Schroeder Claims Narrow Victory*, CBS NEWS (Sept. 20, 2002), http://www.cbsnews.com/news/schroeder-claims-narrow-victory/; Steven Komarow, *Schroeder Sticks to Opposing War with Iraq*, USA TODAY (Sept. 23, 2002), http://usatoday30.usatoday.com/news/world/2002-09-23-germany_x.htm.

[215] As a Human Rights Watch official noted in 2011, in reference to Kim Jong-Il

the current Supreme Leader assumed power following the death of his father, the International Coalition to Stop Crime against Humanity in North Korea addressed a letter to him utilizing language geared at triggering self-reflection: "we believe [you could] enhance your leadership, improve the standing of your country and benefit your people."[216] The Coalition pointed out that over 200,000 people were being detained in prison or labor camps and that "human rights of the vast majority of the 24.5 million North Korean people are routinely violated, despite the fact that the DPRK government has ratified and is therefore bound to respect the rights contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights."[217] It "appeal[ed to him] to change course at this critical juncture of North Korean history, just a few months before the April 15, 2012, celebration of the 100th year of the birth of . . . Kim Il-Sung."[218] Human Rights Watch repeatedly called for the establishment of a UN commission of inquiry: "North Korea's defiance of the UN Human Rights Council's mandates and mechanisms should not be allowed to stand. It's time for the UN to take the next step, and ratchet up the pressure by [setting up a COI]."[219]

> The conventional wisdom is that he would not have cared, that talking more in public about human rights, or pressing North Korean leaders directly on issues like labor camps, would have done nothing for the country's people, while making diplomacy even more difficult. This sense of futility became another reason to push North Korea's horrors from the forefront of our minds. Kim Jong Il became more often a subject of ridicule from the outside world, with his bouffant haircut, and retro-Soviet propaganda slogans, than of condemnation—his wackiness was a distraction and thus also a source of protection . . .

Tom Malinowski, *Is There Any Way To Help the People of North Korea,* THE NEW REPUBLIC (Dec. 22, 2011), https://www.hrw.org/news/2011/12/22/there-any-way-help-people-north-korea.

[216] *Letter from human rights coalition to Kim Jong-Un*, HUMAN RIGHTS WATCH (Jan. 8, 2012), https://www.hrw.org/news/2012/01/08/joint-letter-supreme-commander-kim-jong-un.

[217] *Id.* The letter also noted that many were starving despite the ability of the government to provide food and that the regime was accused of committing crimes against humanity.

[218] *Id*.

[219] *North Korea: UN Should Investigate Crimes Against Humanity: New Leader Kim Jong-Un Indicates No Change on Human Rights*, HUMAN RIGHTS WATCH (Jan. 23, 2012), https://www.hrw.org/news/2012/01/23/north-korea-un-should-investigate-crimes-against-humanity.

As previously noted, one of the functions of the naming and shaming strategies employed by international human rights organizations is to put pressure on non-offender states and international organizations to take action against the offender state. This is clearly the only avenue in situations such as North Korea because of the slim prospects that the regime will undertake reforms and the non-existence of domestic human rights groups that could leverage international pressure to destabilize the regime. The efforts of international advocacy groups did result in generating pressure on states and International Organizations. For instance, the Human Rights Council adopted a resolution against North Korea in 2012 without a single state's opposition.[220] This is significant when viewed against the inability of that body to adopt consensual positions against states like Libya and Burma, which also had poor records.[221] North Korea's response to such resolutions is unequivocal rejection.[222]

Human Rights Watch campaigned for the European Union to take action,[223] "welcome[ing] the fact that [it] has co-sponsored a number of resolutions at the United Nations General Assembly and Human Rights Council criticizing human rights violations in North Korea."[224] The European Parliament adopted a resolution in 2012

[220] For instance, in 2010, a Human Rights Council resolution saw Indonesia, China, Russia, Cuba, and Egypt being opposed. *Indonesia in Bad Company Defending North Korean Rights Abuses*, HUMAN RIGHTS WATCH (Mar. 31, 2010), https://www.hrw.org/news/2010/03/31/indonesia-bad-company-defending-north-korean-rights-abuses.

[221] A Human Rights Watch official stated "The Human Rights Council's unopposed condemnation of North Korea's horrific human rights record is ground-breaking." *UN Human Rights Council: North Korea Condemnation Goes Unopposed,* HUMAN RIGHTS WATCH (Mar. 21, 2012), https://www.hrw.org/news/2012/03/23/un-human-rights-council-north-korea-condemnation-goes-unopposed.

[222] *See* Louis Charbonneau, *U.N. Members Want North Korea in International Court for Rights Abuses*, REUTERS(Dec. 18, 2014), http://www.reuters.com/article/2014/12/18/us-northkorea-rights-un-idUSKBN0JW24420141218 ("'My delegation totally rejects the resolution,' North Korean delegate An Myong Hun told the assembly. 'It is a product of a political plot and confrontation.'").

[223] The EU director at Human Rights Watch stated, "The European Union needs to step up its action in response to the North Korean regime's outrageous patterns of human rights violations . . . Establishing an independent international commission of inquiry would be a good first step." *EU: Try to Improve Human Rights in North Korea,* HUMAN RIGHTS WATCH (June 14, 2010), https://www.hrw.org/news/2010/06/14/eu-try-improve-human-rights-north-korea.

[224] *Letter from human rights coalition to EU Foreign Ministers*, HUMAN RIGHTS WATCH (June 14, 2010), https://www.hrw.org/news/2010/06/14/letter-eu-foreign-ministers-concerning-european-union-policies-north-korean-human-ri.

"[reiterating] its call for the DPRK to put an immediate end to the ongoing grave, widespread and systematic human rights violations perpetrated against its own people, which are causing North Koreans to flee their country; [and urging DPRK] to act upon the recommendations of the report of the [Periodic Review], and as a first step to allow inspection of all types of detention facility by independent international experts."[225] In November 2014, the UN General Assembly adopted a resolution co-authored by the EU and Japan and co-sponsored by 62 member states. [226] The EU and Japan are also working on another resolution for adoption by the UN Human Rights Council in early 2015 to refer the DPRK for prosecution before the ICC for crimes against humanity.[227]

Other states, most notably the United States, have attempted to respond to information about the abuses in the DPRK. At the UN, Ambassador Power of the US noted the "growing consensus among Council members and UN Member States that the widespread and systematic human rights violations being committed by the North Korean government are not only deplorable in their own right, but also pose a threat to international peace and security."[228]

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[225] European Parliament resolution of 24 May 2012 on the situation of North Korean refugees. Council Directive 2012/2655, O.J. 2012/2655(RSP), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0229+0+DOC+XML+V0//EN. (The resolution recorded that

> . . . as a direct result of the policies of the DPRK . . . it is estimated that over the years up to 400,000 North Koreans have fled the country, many of whom are living in neighbouring China as 'illegal migrants . . . according to eye-witness reports, refugees who are forcibly returned to North Korea are systematically subjected to torture, imprisoned in concentration camps and may even be executed, pregnant women are allegedly forced to abort, and babies of Chinese fathers are at risk of being killed; . . . satellite images and various accounts . . . substantiate allegations that the DPRK operates at least six concentration camps and numerous 're-education' camps, possibly housing up to 200 000 prisoners, most of them political.)

[226] Report of the Third Committee, 69th Sess., Nov. 2014, U.N. Doc. A/C.3/69/L.28/Rev.1 (2014), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/69/L.28/Rev.1.

[227] Hyo-jin Kim, *EU and Japan Submit N. Korea Human Rights Resolution,* NATIONAL(Mar. 19, 2015), *available at* http://www.koreatimes.co.kr/www/news/nation/2015/03/116_175560.html.

[228] The Ambassador stated: "[i]f you have not watched any of the hours of victims' testimony, or read from the hundreds of pages of transcripts from the Commission's public hearings, I urge you to do so. They show North Korea for what it is: a living nightmare." Samantha Powers, *U.S. Permanent Representative to the United Nations,* Remarks by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, at a UN Security Council Session on the

3.7. Shaming is an Effective Punishment

There is reason to believe that even an offender state that has been labelled as a "recalcitrant" or "deviant" is responsive to shaming. All states care about their self-image and external reputation. The first is important to a state to ensure its legitimacy and protect its identity and existence as a physical and legal construct. It is what binds citizens to the state and generates obedience to laws that underpin society. The second is important both for instrumental and non-instrumental reasons. Reputation is central to a state's desirability as a partner in cooperation with other states and business entities. This is manifested by the willingness of states to enter into treaties, provide loans, sponsor entry into clubs, etc. A reputation for law abidance and commitment to international norms is also crucial for attracting foreign businesses, much needed technological investment, and migrant labor. Therefore, it is no surprise that all states closely guard their reputation and react with aggressive measures at efforts to tarnish it. This explains much of why states undertake the costly effort of explaining their actions as being consistent with international law, and producing detailed rebuttals and legal opinions seeking to convince domestic and international audiences when they are accused of breaching international obligations.

States as powerful as the United States and as recalcitrant as North Korea both exhibit evidence of such behaviour. As elaborated by Ambassador Powers, " . . . the DPRK's response [to the COI report] . . . shows that it is sensitive to criticism of its human rights record . . . North Korea has tried . . . to distract attention from the report, to delegitimize its findings, and to avoid scrutiny . . . [The] second argument for exerting additional pressure is that when regimes warn of deadly reprisals against countries that condemn their atrocities . . . we need [to]stand up and not back down. Dictators who see threats are an effective tool for silencing the international community tend to be emboldened and not placated. And that holds true not only for the North Korean regime, but for human rights violators around the world who are watching how the

Human Rights Situation in North Korea, December 22, 2014, *available at* http://iipdigital.usembassy.gov/st/english/texttrans/2014/12/20141223312526.html#ixzz3XKUPrmBx.

Security Council responds . . . "[229] Further, DPRK officials have been lobbying states in the months after the publication of the COI report and offering unprecedented concessions in an attempt to dilute adverse consequences. For instance, they raised the possibility of the Special Rapporteur visiting North Korea.[230] Although the DPRK has ceased its lobbying efforts for the present, these responses are indicative of its recognition of the consequences of shaming. The COI's report lists a number of recommendations that present a way forward for the regime to move from recognition to rehabilitation and reintegration if it were to accept the proposals and undertake consequent steps.

Aside from the offender state, the COI's work has had powerful consequences for other states because they can no longer claim a lack of knowledge or take cover under the plea that there is no proof. This leaves them open to secondary shaming by other states and by domestic groups including local human rights organisations that are part of transnational advocacy networks. That such secondary shaming has some potency is evidenced by the recent conduct of Russia and China.

4. CONCLUSION

The international community cannot continue to remain a mute spectator to the horrific abuses of human rights in North Korea. The extraordinary testimonies of victims documented by the COI have ensured that it is no longer possible to disclaim knowledge of the severe breach of international law obligations by the DPRK. Equally, we acknowledge that the current international legal system offers limited potential for direct action in order to hold the regime accountable for its actions. However, this does not mean that the international community is powerless against such a recalcitrant

[229] The Ambassador said, "The DPRK ramped up its propaganda machine, publishing its own sham report on its human rights record, and claiming "the world's most advantageous human rights system." [it] tried to smear the reputations of hundreds of people . . . calling them "human scum bereft of even an iota of conscience." *Id*.

[230] *See North Korea Suspends Human Rights Charm Offensive*, REUTERS (Nov. 11, 2014), http://www.theguardian.com/world/2014/nov/11/north-korea-suspends-human-rights-talks ("North Korean diplomats also recently met the UN special rapporteur on human rights in North Korea, Marzuki Darusman, for the first time and signalled that they could allow him to visit Pyongyang if references to the criminal court were removed from the draft.").

state. Rather, the enormous attention devoted to the COI's report since its publication illustrates the interest in applying international law norms to such states, assessing responsibility for actions that contravene those norms, and the desire to punish breaches. As noted, both the assessment of responsibility and the imposition of punishment are problematic in the context of recalcitrant states. Previously underappreciated alternative sanctions such as shaming might offer enforcement potential for international law in these circumstances. The work of the COI is an excellent example of how the objections typically levelled against shaming can be overcome. As discussed previously, shaming by the COI overcomes the objections of lack of authority and legitimacy. The COI possesses authority because it was created pursuant to a formal legal process and is conferred with a specific legal mandate. Shaming by the COI is legitimate because (i) the international legal obligations voluntarily assumed by the state pass the test of legality; (ii) there is an institutional process to assess facts and apportion responsibility; (iii) there are adequate procedural safeguards to ensure that the offender is entitled to due process, that the adjudication is neutral, follows precedent, and conforms to accepted standards of proof; and (iv) there are adequate fundamental rights protections for both the making of the underlying legal rules and the punishment of the offender. As discussed, shaming has the effect of persuading the violator to undertake corrective action. Even if the regime in the DPRK is impervious to such corrective measures, shaming can be deployed against other states in the international community as a secondary sanction to force them to acknowledge the wrongs and take action either unilaterally or in a coordinated fashion. As previously noted, the familiar objections to secondary shaming—that there is no due process, that facts are not properly established, that the fact-finder is not neutral and independent, etc.—are not tenable when a COI has issued a report supported by evidence documenting grave violations of human rights. Under such circumstances, shame sanctions ought to be deployed against states such as Russia which hold influence over the DPRK. Faced with the threat of shaming and related adverse consequences for reputation and important economic interests, such states will react as typical targets of secondary shaming do—by putting pressure on the primary violator, the DPRK, to change its behavior and comply with its legal obligations. A proper appreciation of shaming illustrates the powerful role that the institution of the COI can play in international law.