

RULE OF LAW: BUILDING BLOCKS, HUMAN RIGHTS AND GLOBAL SECURITY

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This article, first delivered at The University of Queensland as the Naida Haxton AM Oration 2019, explores some of the components of the rule of law. It starts with building blocks in the common law system, including law reporting for the derivation of precedents. It describes the notable career of Naida Haxton and her approach to law reporting. It then extends to municipal and international law, including that relevant to universal human rights. In that connection, it describes the author's work as chair of the United Nations Commission of Inquiry on North Korea. It explains its successes and disappointments. Finally, it concludes with the importance of building effective protections for peace and security and justice, including addressing existential challenges such as pandemics, global climate change, and the control of nuclear weapons. The author argues that these components of the rule of law are ultimately integrated and essential to the safety and protection of human beings and the biosphere everywhere.

I RULE OF LAW AND LAW REPORTING

The *Legal Profession Act* of Queensland was amended in 1905 to make it clear that women could be admitted as barristers, solicitors and conveyancers of the Supreme Court of Queensland. This step was the local response to the substantial resistance within the legal profession, in Australia and elsewhere, over the practice of law by women. Anyone in doubt should read the article by Justice Virginia Bell, 'By the Skin of our Teeth'.¹ It shows once again that the rule of law must involve more than the law of rules.² This requires that the rules themselves must have a moral quality, at least to some degree. Equality, justice and universal human rights are today part of the necessary moral quality. In her own special way, Naida Haxton, *alumna* of The University of Queensland, contributed significantly to the rule of law in Australia. By this I mean the maintenance of a society that lives according to generally rational, just and ascertainable rules. When they are seen as irrational, unjust or unavailable, we need to move to change

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¹ The Hon Virginia Bell, 'By the Skin of our Teeth — The Passing of the *Women's Legal Status Act 1918*' (2018) 92(12) *Australian Law Journal* 935.

² MD Kirby, 'The Rule of Law Beyond the Law of Rules' (2010) 33 *Australian Bar Review* 195.

that state of affairs. The rule of law extends from its local building blocks, including in common law jurisdictions, law reporting. It extends to the body of municipal law and embraces the universal law of human rights. It also includes the global law governing peace and security, justice and safety for all.

Although the public address giving rise to this article was the third oration to honour Naida Haxton AM and her special place in the legal profession of Queensland and New South Wales, it is as well to recall the steps that led to her career. She was born in 1941. She graduated from The University of Queensland in 1965 with Bachelors Degrees in Arts and Law. She undertook her articles of clerkship at Flower & Hart, solicitors in Brisbane. During her law course she participated in mooting and debating. In August 1966 she was admitted to the Queensland Bar at a sitting of the Full Court of the Supreme Court of Queensland. It was presided over by Justice Gibbs, later a Justice of the High Court, and later still Chief Justice of Australia. Commenting on Naida Haxton's presence, he declared that she would be the first of many women who would be so admitted, with a view to private practice at the Bar. She was permitted to give one interview to the press on that day; but no photographs were to be taken in breach of the stern rules of that time against professional advertising and self-promotion.

Naida Haxton's practice was busy and successful. In 1971 she married and soon after moved with her new husband to Sydney. Bereft of the contacts she had acquired in Brisbane, she undertook lecturing in real property and commercial law to keep the wolf from the door. However, in 1974 she made a move that was to mark her professional life thereafter as distinctive. She became the legal reporter for the *Papua New Guinea Law Reports*. In 1981 she became Assistant Editor of the *New South Wales Law Reports*, under the supervision of Dyson Heydon. He was later to be a Judge of Appeal of the Supreme Court of New South Wales and, after 2003, a Justice of the High Court of Australia.

Naida Haxton later took over the editorship of the *New South Wales Law Reports*. It was during this period that I came to know her when, in 1984, I was appointed President of the Court of Appeal of New South Wales. She remained editor of that series after my departure to the High Court in 1996. She gave invaluable advice on the development of other series in specialised areas, including workers' compensation and local government law. She also gave advice on law reporting in overseas jurisdictions, including Vanuatu and Singapore. She was by this stage, with James Merralls AM QC, editor of the *Commonwealth Law Reports*, the senior law reporter of the nation.³

On her retirement from active work in law reporting, a tribute was paid to her by Justice Dyson Heydon. He acknowledged her prudence and sense of economy. She only reported decisions of New South Wales courts and tribunals if she judged

³ Further details on her career appear in 'Naida Jean Haxton — Barrister and Law Reporter', *Bar News* (NSW) (Winter 2006) 67.

them to contain new or specially useful statements of legal principle or of legal practice. She kept the size of the series under strict control, an attitude congenial to her temperament. Justice Heydon recounted at her farewell event how, when judges wrote words to the effect, 'I now turn, for the guidance of the legal profession, to vital statements of principle demonstrated in this case', such immortal words were frequently deleted from reporting with words appearing in square brackets: '[His Honour then proceeded to passages in his reasons that do not call for report]'.⁴

She courteously, but firmly, advised judges on matters of grammar and punctuation. She had a healthy respect for her leadership role in law reporting. As Justice Heydon explained, that role is 'lonely, ascetic, professional and dedicated'.⁵ To explain its significance, Justice Heydon reached for an explanation that I had given of that importance. Somehow, it had survived her editorial square brackets:

[Law reporting] requires very considerable skill. The [editing] of judicial reasons is extremely important in the common law legal system in a way non-lawyers may not always understand. The system is built on judicial precedents contained in published reasons. The preparation of reports, with accurate and brief headnotes, is an indispensable source of legal principle, used in daily practice and legal education. That is why law reporters deserve special acknowledgment. They are the unsung, and often unknown, heroes of the law. Without them the Australian legal system could not really continue to operate as it does.⁶

An added reason for the importance of the law reporter is that he or she is trained to know the precise way in which the legal principle for which the law, expressed by judges, is to be derived. Because this was something taught in every law course in Australia in our student days, it was known to those of our generation. It is not commonly known to younger lawyers, possibly because most of the law today is expressed in legislation. It was for this reason that in *Garcia v National Australia Bank Ltd*⁷ I took pains to explain how the *ratio decidendi* of judicial reasons was to be found. The rules that I stated were known and applied by Naida Haxton in her precise and accurate work of law reporting.

For her contributions, especially to law reporting in Australia and thereby to the rule of law as we practise it, I express thanks to Naida Haxton. Her dedication to this aspect of the rule of law was worthwhile and enduring. In reporting the many decisions of the Court of Appeal of New South Wales during my time as President (1984–96), including a few of my own, I express thanks to her. This foundation of acknowledging a special and almost unique lifelong dedication to

⁴ JD Heydon, 'Address Delivered on Retirement of Naida Haxton as Editor of the New South Wales Law Reports' (unpublished, 29 June 2006).

⁵ *Ibid* 6.

⁶ MD Kirby, cited in Heydon (n 4) 6.

⁷ (1998) 194 CLR 395, 417–18 [56]–[57].

the rule of law in Australia is an appropriate foundation for what follows, dedicated to Naida Haxton. For now, I must turn to a study of a particular jurisdiction, the Democratic People's Republic of Korea ('DPRK'), or North Korea, and to the international law on nuclear weapons to show how important it is to build the rule of law in a national jurisdiction and in the international community. And how perilous and dangerous it is when the rule of law is missing from the legal equation at any level.

II RULE OF LAW AND HUMAN RIGHTS: CAMBODIA AND NORTH KOREA

Before 2013, I had no more knowledge of the 'hermit kingdom' of North Korea than a person informed about international peace and security who read *The Economist* to keep updated on the recalcitrant states that neglect lawfulness and repeatedly depart from observance of universal human rights as envisaged by the *Charter of the United Nations* of 1945.⁸

Earlier, between 1993 and 1996 I served as the Special Representative of the Secretary-General of the United Nations (at the time Boutros Boutros Ghali) for Human Rights in Cambodia. This was at a time when that country had only recently been freed from the oppressive, anarchistic and generally lawless rule of the Khmer Rouge regime. In consequence of the *Paris Peace Agreement* of 1991 on Cambodia ('*Paris Agreement*'), steps were taken to conduct a national election in that country that was judged generally free and fair. One clause of the *Paris Agreement* required the establishment of a guardian or monitor to report to the then Human Rights Commission of the United Nations on the compliance of the state with universal human rights law. I was appointed as the first mandate-holder to fill that office. This gave me an acquaintance with what happens to a nation when it descends into lawlessness and gross abuse of human rights. In the case of Cambodia, that condition gave rise to grave instances of abuse of human rights and other international crimes.

Throughout my service as Special Representative in Cambodia, I received support from King Norodom Sihanouk. During the Khmer Rouge period, as was well known, the King spent significant amounts of time in the DPRK. In part this was to receive medical treatment. However, in part, it was also to escape the murderous regime in power in Phenom Penh. That was not the only coincidence between my call to duty by the United Nations Human Rights regime, first in Cambodia and then in the DPRK. There were, and are, many similarities between

⁸ *Charter of the United Nations*, signed 26 June 1945 (entered into force 24 October 1945) Preamble. The first item of the objectives is 'to save succeeding generations from the scourge of war'. The second is 'to reaffirm faith in fundamental human rights'. The third is 'to establish conditions under which justice [and] international law can be maintained'. The fourth objective is 'to promote social progress and better standards of life in larger freedom'.

the tyranny in Cambodia under the Khmer Rouge and the grave human rights abuses in the DPRK revealed in the report on my work there.

Prior to 2013, many reports had been received by the United Nations Human Rights officials in Geneva concerning shocking abuses of human rights that required investigation. By that stage, the United Nations Human Rights Commission had been replaced by the Human Rights Council. So egregious were the abuses of human rights in North Korea coming to the attention of the Council that in March 2013 it was resolved by the then United Nations High Commissioner for Human Rights (Navi Pillay of South Africa) to strengthen the response of the Human Rights Council in a significant way.

Prior to 2013, the Human Rights Council had established the mandate of a special rapporteur to investigate and report the conditions in the DPRK. The first mandate-holder was Professor Vitit Muntarbhorn (Thailand). His every endeavour to enter into and engage with the DPRK, and to investigate the conditions of human rights there, was frustrated. He was denied entry or cooperation. When eventually he resigned his responsibilities, he was replaced by Mr Marzuki Darusman, former Attorney-General of Indonesia. However, Mr Darusman also was denied admission or any cooperation by the DPRK. These were the circumstances in which High Commissioner Pillay commended to the United Nations Human Rights Council the establishment of a commission of inquiry ('COI') to investigate human rights violations in the DPRK. This was a significant upgrade in the seriousness with which the Council was treating the situation in the DPRK.

Normally, because the creation of a COI is viewed as a potential intrusion into the 'sovereignty' of member states of the United Nations, it is opposed by countries, many of them with serious human rights derogations of their own. However, when the proposal to create the COI on the DPRK was introduced by the Polish President of the Human Rights Council in February 2013, it was uniquely adopted without the call for a vote. No COI of the Human Rights Council, before or since, has been established without any expressed opposition and a vote to resolve the disagreements.

It was at this stage that I was invited to become the Chair of the COI on the DPRK. I accepted. I was joined by Ms Sonja Biserko (a human rights expert from Serbia) and Mr Darusman (who remained the Special Rapporteur on the DPRK from Indonesia and had been denied admission to North Korea).

The members of the COI first met in July 2013. We resolved to conduct the COI in a unique way. Whereas generally such investigations had been conducted according to the legal tradition of civil law nations, the very secretiveness of the DPRK made it important, in the view of the members of the COI, to proceed in a more open, transparent and publicised manner. Only in this way did we feel that it would be possible to gather testimony that could be shown to be trustworthy and truthful.

In the result the COI proceeded by way of public hearings convened in Seoul, Tokyo, London and Washington DC, and by closed investigation in Bangkok, Thailand. The testimony received was publicly recorded where it was considered safe to do so. The recording was uploaded online. To this day it is still available for the entire world to see and hear the shocking accounts of human rights abuses that emerged during the investigation of the COI.

The methodology embraced by the COI was widely appreciated in United Nations human rights circles.⁹ When the COI was criticised by the DPRK, for relying on testimony substantially of persons who had fled the regime in North Korea, the COI and United Nations machinery could point to the refusal of cooperation and to the apparent veracity and consistency of the witnesses whose testimony was recorded on, and retrievable from, the internet. As well, that testimony, in so far as it related to the existence of a large network of detention camps in nominated places in the DPRK, appeared to be corroborated by satellite imagery available to (and recorded in) the COI Report.

The DPRK has laws and institutions that pretend to comply with domestic law. However, the measure of lawlessness that exists in the DPRK under the revolutionary and despotic regime led since 1946 by the Kim family, represents the antithesis of a rule-of-law society. Enemies or suspected enemies of the ruling elite are imprisoned, together with their families. The murder of the uncle by marriage to the present Supreme Leader (Jang Song-thaek) took place soon after the establishment of the COI.¹⁰ Obviously, he was regarded by some as an alternative potential leader of the State and therefore dangerous to the third member of the Kim dynasty and present Supreme Leader, Kim Jong-Un. The murder of Jang was recorded in the COI Report. After that Report was presented to the Human Rights Council, the half-brother of the current Supreme Leader (Kim Jong-Nam) was notoriously murdered at Kula Lumpur International Airport. Pages of the COI Report are full of instances of lawlessness, cruelty and despotism. They address the nine heads of reference given to the COI by the United Nations Human Rights Council. The COI Report was delivered to the Council on 7

⁹ See Christian Henderson (ed), *Commissions of Inquiry — Problems and Prospects* (Bloomsbury, Oxford and Portland, 2017); see the author's Foreword at v–xii. See also MD Kirby, 'UN Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea: Ten Lessons' (2014) 15(2) *Melbourne Journal of International Law* 291; Choi Sun-Young et al, 'The UN Universal Periodic Review and the DPRK, Monitoring of North Korea's Implementation of Its Recommendations' (Database Center for North Korean Human Rights, Seoul, Republic of Korea, 2017); cf MD Kirby and Rebecca La Forgia, 'Fact-finding and Report Writing by UN Human Rights Mandate Holders' (2017) 38(1) *Adelaide Law Review* 463.

¹⁰ United Nations, Human Rights Council, *Report of the Detailed Findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea* (A/HRC/25/CRP.1, 7 February 2014) 43 [157] ('COI Report').

February 2014.¹¹ It was formally presented by me to a meeting of the Council in March 2014. The essence of the findings of the COI were summarised in the summary of the Report, set out at the opening of the text:

Systematic, widespread and gross human rights violations have been, and are being, committed by the Democratic People's Republic of Korea, 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 be 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.¹²

This Report, having been released internationally and laid before the United Nations Human Rights Council, effectively discharged the functions of the COI, while leaving the functions of the Special Rapporteur to be continued. The COI had recommended that the Report be transmitted to the General Assembly of the United Nations. This step was strongly resisted by the DPRK and its allies in the United Nations, including China, Cuba, Laos, Pakistan, the Russian Federation, Venezuela and Vietnam.

Notwithstanding the resistance by the DPRK, the United Nations General Assembly, by an overwhelming vote, received the COI Report. Moreover, it took a step that had only once before been taken in relation to a human rights issue (in the case of Myanmar/Burma) of referring the COI Report on the DPRK to the Security Council of the United Nations. This is the highest political organ of the United Nations.¹³ Moreover, under the *Rome Treaty* of 1957, which establishes the International Criminal Court ('ICC'), the Security Council has the residual jurisdiction to refer alleged international crimes to the International Criminal Court, a step that has previously been taken in the cases of Darfur and Libya. The COI on the DPRK urged that, on the basis of its findings and conclusions, the case

¹¹ MD Kirby, 'The United Nations Makes Human Rights Inquiry on North Korea: Background, Reaction and Prospects' (2015) 45(2) *Hong Kong Law Journal* 425, 427–8.

¹² COI Report (n 10) 6 [24]. The findings of the COI concern: violations of the freedoms of thought, expression and religion; discrimination on the basis of state-assigned social class, gender and disability; violations of the freedom of movements and residence; violations to the right of food and related aspects to the right to life; arbitrary detention, torture, executions and enforced disappearance and political prison camp; and enforced disappearance of persons from other countries, including through abduction. The COI Report addresses alleged crimes against humanity at 270ff and deals with the allegation of political genocide at 350ff.

¹³ *Charter of the United Nations* (n 8). The provisions relating to the Security Council appear in ch V (arts 23–32).

of North Korea should likewise be referred by the Security Council to a prosecutor for examination and evaluation of whether the DPRK should be indicted before the ICC.¹⁴

The steps that led to the presentation of the COI Report to the Security Council and the consideration of the human rights situation in the DPRK under that Council's scrutiny were themselves exceptional.¹⁵ They arose out of particular provisions of the *Charter of the United Nations*.¹⁶ These provisions effectively exclude the operation of the 'veto' provision (applicable to substantive resolutions of the Security Council) in the case of procedural resolutions. This was a legacy from the former Council of the League of Nations.¹⁷ In fact, the acceptance of the issue of the DPRK on the agenda of the Security Council, in consequence of the COI Report, was critical to the events that followed. Those events included the steps that were taken by the DPRK, prior to and contemporaneous with, the COI investigation, to create a sizable armoury of nuclear weapons and, even more worrying, the concurrent creation of missile technology for the delivery of such weapons. The invention and development of intercontinental ballistic missiles could threaten nations close at hand: China, the Russian Federation, Japan and the Republic of Korea (South Korea). But also distant nations, including the United States of America and Australia. A realisation that the DPRK was asserting a nuclear weapons status necessarily attracted the attention and concern of the Security Council. It presented a grave potential threat to global peace and security.

At the time the DPRK became a member of the United Nations in 1991, it was a party to the United Nations *Treaty for the Non-Proliferation of Nuclear Weapons* ('NPT').¹⁸ However, the DPRK later withdrew from that treaty, as it began to build its own nuclear stockpile. Concern about these moves extended not only to the western countries that shared anxiety about the conditions of human rights revealed in the COI Report. It also extended to China and the Russian Federation, each of which has a border contiguous with the DPRK. In consequence of that concern, steps were taken by the Security Council to increase, and later substantially to increase, the sanctions imposed on the DPRK by the Security Council. Such sanctions were imposed, including with the affirmative votes of China and the Russian Federation, necessary to their validity. Those votes were cast despite the general stance of those two countries to oppose responses

¹⁴ The recommendation for reference to the situation in the DPRK to the International Criminal Court appears in COI Report (n 10) 370 [1225(a)].

¹⁵ The history of the procedural provisions of the United Nations *Charter* are explained in MD Kirby, 'The United Nations Report on North Korea and the Security Council: Interface of Security and Human Rights' (2015) 89 *Australian Law Journal* 714.

¹⁶ *Charter of the United Nations* (n 8) art 27.2. See the discussion in Kirby (n 15) 716.

¹⁷ *Covenant of the League of Nations*, art V, discussed in F Pollock, *The League of Nations* (Stevens, London, 1920).

¹⁸ *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970).

addressed to human rights violations as recommended by the COI. Early reports have indicated the general compliance of China and the Russian Federation with the sanctions regime imposed by the Security Council. That regime has, according to satellite and other reports, but also intense complaints by the DPRK itself, imposed serious hardships on the government and people of North Korea. The purpose of the sanctions was to endeavour to persuade and pressure the DPRK to desist from its nuclear weapons strategy, to return to compliance with the NPT, and to resume negotiations with a view to a peaceful resolution of the issues that remain outstanding, including the state of human rights in the DPRK, as disclosed in the COI Report.

Negotiations towards the ultimate conclusion of a formal peace treaty to replace the armistice that terminated the Korean War (1950–53) took place in Six Party Talks.¹⁹ However, these were suspended by the United States of America and its allies once the DPRK began developing its nuclear arsenal and later missile systems. United States Presidents Clinton, GW Bush and Obama established a tripartite requirement for the resumption of the Six Party Talks. These were that the DPRK would agree to denuclearisation of the Korean Peninsula that would involve *complete* removal of nuclear weapons, *verifiable* means of assuring ongoing denuclearisation, and establishment that denuclearisation was *irreversible*, confirmed by reports of trustworthy United Nations inspections. Because the Kim leadership saw the existence of nuclear weapons as their insurance against hostile activity towards the regime in power in the DPRK, they rejected the tripartite requirement of the United States and its allies.

Upon the election of President Donald Trump as United States President in 2016, the policy of the United States began to change. President Trump, after initial aggressive gestures, conceived the possibility of opportunities for economic advancement in the DPRK that could tempt that country to turn away from the present dangerous weapons accumulation and stand-off. Accordingly, in June 2018 and again in March 2019, President Trump agreed to bilateral meetings with Supreme Leader of the DPRK, despite the failure of the DPRK to accept the tripartite preconditions to such dialogue.²⁰ At the June 2018 bilateral meeting held in Singapore, the DPRK agreed to ‘*move towards* denuclearisation’. This was a very soft undertaking, falling far short of the tripartite preconditions of previous United States policy. When that soft undertaking was not substantially

¹⁹ Involving China, the DPRK, Japan, the Republic of Korea, the Russian Federation and the United States of America.

²⁰ Cf COI Report (n 10) 363 [1204]–[1210]. See, eg, MR Gordon et al, ‘Even Before Trump and Kim Met, Nuclear Talks Had Run Aground’, *Wall Street Journal*, reproduced in *The Nation* (Thailand, 4 March 2019); K Needham, ‘The Art of No Deal: Who Is to Blame’, *Sydney Morning Herald* (Sydney, 2–3 March 2019).

delivered by the second meeting held in Hanoi, Vietnam, President Trump abruptly terminated the meeting. That is where things rest at this present time.²¹ This move was followed by a brief meeting between the two leaders in the Demilitarized Zone on the border between the two Korean states, but no significant developments occurred involving dismantlement of the nuclear or missile facilities by the DPRK.

Although direct dialogue between the United States and the DPRK was, in my view, to be welcomed, because the threat of nuclear warfare is itself a grave human rights peril of enormous potential danger, a particular feature of the negotiation by the Trump Administration has been its failure to advert to the human rights crisis in North Korea reported by the COI. South Korea and even Japan have also lapsed into a high degree of silence about the precondition of attainment of human rights in the DPRK, in marked contrast with earlier postures adopted by those countries.

In the COI Report, a number of human rights abuses were identified that went far beyond the kinds of human rights violations for which many or most countries (including Australia) can be criticised. Several of the abuses rose to the level of crimes against humanity. Such crimes, accepted in international law in 1948, demand the action of the United Nations and of the organised international community. The definition of ‘crimes against humanity’ is defined as a crime of violence of such a kind that it ‘shocks the conscience of mankind’;²² it demands that action on behalf of humanity should be taken through the United Nations system. After the egregious wrongs of the Nazi tyranny in Europe, the international community resolved to, and did, call those responsible for such crimes against humanity to account at the trials of the accused perpetrators in Nuremberg and Tokyo. Subsequently, the United Nations General Assembly in 2015 agreed that, if the state concerned did not address such crimes, it would be the entitlement and obligation of the international community to do so, in order that such crimes did not go unanswered and unpunished.²³

Although the danger to peace and security by the development of nuclear warheads and missile systems by the DPRK is great indeed, a sober reflection on the COI Report on the DPRK will convince any reasonable reader, I believe, that there is no prospect of lasting peace and security on the Korean Peninsula whilst a state such as is described in that Report remains unchanged. It is, and will continue to be, a place of mortal danger to its own people and to humanity. Because it provides no effective and accountable internal avenues of redress, it demands change in order to become safe and civilised. Such change should

²¹ G Korporaal, ‘Xi Bid to Revive Nuclear Talks’, *Weekend Australian* (Sydney, 2–3 March 2019) 11.

²² COI Report (n 10) 320 [1025]. See also 363 [1204].

²³ GJ Evans, *The Responsibility to Protect — Ending Mass Atrocity Crimes Once and For All* (Brookings Institution, 2008) 38ff.

preferably happen by peaceful negotiation. But if not, it must accompany negotiated changes to the security situation that threatens the region and the world.

International law on dealing with crimes against humanity is clear. So far, the follow-up to the COI Report on the DPRK has been insubstantial and ineffective. Building the rule of law includes the necessity of creating effective machinery to enforce the rule of law. This includes enforcement of international peace and security. However, as made plain in the *Charter of the United Nations* itself in 1945, it also includes protecting, respecting and upholding universal human rights that constitute the foundation and stable foothold of a world of safety and of political and legal accountability.

III RULE OF LAW AND NUCLEAR WEAPONS

The foregoing accounts reveal a broadening of my concerns beyond those of nation states (whether they be in a country like Australia or a country like North Korea) to wider issues affecting the global community. These raise issues of the rule of law in relation to nuclear weapons that constitute both an impediment to progress pursuant to the COI Report on the DPRK and the reason why such progress is so urgent.

Because a central purpose of the United Nations Organisation was to attain global peace and security, and because the highest organ entrusted with this objective was the *Security Council*, it is not unreasonable to infer that the United Nations, created in 1945, had special obligations to achieve, maintain and protect the security of all nations and peoples in the world.²⁴

The First and Second World Wars, which had given rise successively to the League of Nations and the United Nations Organisation, witnessed the invention and deployment of new weapons of mass destruction, previously unimaginable and increasingly prone to undermine the earlier efforts to develop an effective international law of War. In particular, aerial warfare and bombs of increasing power and destructiveness affected ever-increasing numbers of the civilian population. The consequences of warfare were no longer confined to naval and military combatants who were to varying degrees volunteers or treated as such. Increasingly, the available weapons had devastating effects on non-combatants, the civilian populations and minorities disrespected by the combatants. The plans for the creation of the United Nations Organisation preceded the detonation of the

²⁴ *Charter of the United Nations* (n 8) Preamble and art 1. In art 1.3 the purposes of the United Nations are defined as included 'to achieve international cooperation in solving international problems ... and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. See also *Universal Declaration of Human Rights*, adopted 10 December 1948 by General Assembly resolution 217A (III), UNDOC A/810 (1948).

first nuclear weapons, initially in tests conducted on the territory of the United States of America, but in August 1945 over two major cities of Japan: Hiroshima and Nagasaki. Although the precise results of those explosions were unknown when the *Charter of the United Nations* was being finalised, the United Nations was created to respond to the post-War world. When the nuclear age began in Japan, it immediately presented a new and major challenge to international law.

In the aftermath of the Hiroshima and Nagasaki explosions, the new weapons not only led, virtually immediately, to the termination of hostilities with Japan following that country's unconditional surrender to the Allies. It also led to the release of the Korea Peninsula from Japanese colonial rule. It also revealed the devastating impact of the explosions on human life, human health (with shocking nuclear radiation burns and other human and ecological consequences), and physical devastation of infrastructure and property in Japan, previously unimaginable.

Unfortunately, the advent of the Cold War, which immediately followed the nuclear explosions over Japan, produced deep ideological divisions in the world that made it difficult to secure, by consensus, effective international rules and institutions to protect the world and its peoples from the use of such devastating weapons. Instead, the possession of nuclear weapons, which some had hoped would be placed under the immediate control of the United Nations, spread from the United States to other nations, initially all of the five permanent members of the Security Council (United States, Soviet Union (later Russian Federation), United Kingdom, France and [People's Republic of] China).

Notwithstanding such proliferation, the position reached by the 1950s at least had a certain symmetry with the structure of the *Charter of the United Nations*. It envisaged generally the limitation of nuclear weapons to the 'great powers', identified in the *Charter*.²⁵ Whilst leaders of other nations claiming 'great power status', including India, refused in principle to accept this 'apartheid' in the possession of nuclear capability, the ideological division of the planet between contesting powers and non-aligned nations effectively secured a degree of stability in the balance of power for several decades. However, two nations with significant enemies (Republic of South Africa and the State of Israel) were soon rumoured to have developed nuclear weapons. Later, two very populous nations in conditions of semi-permanent conflict (India and Pakistan) developed and tested nuclear weapons so as thereby to demonstrate their possession of them. Whilst South Africa surrendered its nuclear capability following the end of apartheid after 1994, and whilst all of the former Soviet Republics repatriated their nuclear weapons to the Russian Federation after the dissolution of the Soviet Union, the consequent international situation remained inherently unstable.

²⁵ *Charter of the United Nations* (n 8) art 23.1.

A number of steps were then taken by the United Nations in an attempt to reduce the huge stockpiles of nuclear weapons, considered unnecessary to any legitimate purpose of a lawful war. Steps were taken to render illegal under international law the testing of nuclear weapons in the global atmosphere in outer space and under water,²⁶ to institute monitoring of all underwater nuclear explosions,²⁷ and to regulate other aspects of the deployment of nuclear weapons by or with the consent of the nuclear weapons state.²⁸ However, even this semi-stable intermediate position soon broke down.

By the 1990s, concerns were expressed that a member of potentially dangerous states, Libya, Iraq and Iran, were developing nuclear weapons, which the United States regarded as intolerable to its own security and that of its allies. The agreements of Libya and Iraq to desist from nuclear weapons development led quickly to the overthrow respectively of the regimes of Muammar al-Gadhafi and Saddam Hussein. A Joint Comprehensive Plan of Action concerning the Iranian Nuclear Program, of contested utility, was then negotiated with Iran to put its nuclear program on hold in exchange for relief from severe United Nations sanctions.²⁹ This last treaty was bitterly opposed by Israel. Eventually the United States, after the election of President Donald Trump, withdrew from it; but without any immediate substitute for non-proliferation including by Iran.³⁰

The consequence of all these developments has been to focus sharp international attention upon the DPRK's development of a nuclear weapons arsenal of its own. That attention was increased by the demonstration of important advances, more quickly than had been expected, in the DPRK's missile capability. The DPRK has a total population of approximately 25 million people, roughly equivalent to that of Australia. It has an economy plagued by inefficiency and a population regularly afflicted by famine, civilian starvation and the many human rights violations as revealed in the COI Report. For such a state to develop deliverable nuclear weapons was naturally a matter of great concern to the international community. Moreover, if the DPRK could 'get away with'

²⁶ *Treaty Banning Nuclear Weapons Tests in the Atmosphere, In Outer Space and Under Water*, opened for signature 5 August 1963, 480 UNTS 43 (entered into force 10 October 1963) (*Partial Test Ban Treaty*) ('PTBT').

²⁷ *Ibid*; and see the *Seabed Arms Control Treaty (Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof)*, opened for signature 11 February 1971, 955 UNTS 115 (entered into force 18 May 1972).

²⁸ *Intermediate-Range Nuclear Forces Treaty* of 1988 (between the Soviet Union and the United States of America). The United States formally suspended the treaty on 1 February 2019. The Russian Federation did likewise on the following day.

²⁹ The Iran Nuclear Program Deal of 14 July 2015 between the Permanent Five Powers and Germany and Iran and European Union. This was later endorsed by the United Nations Security Council.

³⁰ On 3 May 2018, President Trump announced that the United States had withdrawn from the Iran Deal (*Joint Comprehensive Plan of Action*): reported *New York Times* (New York, 8 May 2018). In its place the United States imposed severe sanctions of its own.

withdrawal from the NPT and the development of deliverable nuclear weapons, what could other states do, to the great peril of humanity?

For decades following Hiroshima and Nagasaki questions were debated in the international community concerning the legality of the possession, use and threat of use of nuclear weapons under international law. Ultimately, proceedings were commenced to submit that question to an advisory opinion of the International Court of Justice ('ICJ'). The process was brought in the belief by many that the Court would advise in favour of illegality. After all, the carefully developed principles of the international law of War, during the century prior to 1945, had raised a number of issues concerning how weapons target, or necessarily affect, civilian populations of great numbers; how they impose death and destruction of a previously unimagined kind, scope and duration; and how they are disproportionate in their impact when compared with their military utility — all of which afforded a foundation for a strong argument in favour of the illegality of nuclear weapons.

In the result, the ICJ accepted the process. It agreed to provide an advisory opinion. It delivered its opinion in 1996.³¹ A majority of the judges held back from finding that, in its present state, international law afforded a sufficient foundation for a declaration of illegality involving such weapons. Nevertheless, the Court expressly stated that the states presently possessed of nuclear weapons were obliged by international law to 'pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control'.³²

Despite this opinion of the ICJ, the nuclear weapons states have completely failed to enter into such negotiations, in good faith or otherwise. To the contrary, they have severally continued to assemble and hold in readiness, nuclear weapons with a capacity greatly exceeding that of the weapons used in 1945. Some have even set in train steps to dismantle particular treaties or agreements useful for limitation purposes.³³ And they have resisted efforts on the part of non-nuclear states to initiate new international treaty negotiations aimed at bringing nuclear weapons under the operation of effective treaty law, even if nuclear weapons states possessing such weapons refused to do so. Whilst any such treaty development would not necessarily achieve, on its own, the abandonment of stockpiled nuclear weapons currently held by the nuclear weapons states, the objective of such a development is to assert a principle of international law and to uphold the right of non-weapons states and others to protect their own populations and the health and safety of the global biosphere. Such a treaty could

³¹ International Court of Justice, Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ 2.

³² *Ibid* [105], s 2f.

³³ This is a reference to the renunciation by the United States of the Iran Nuclear Deal and the *Intermediate-Range Nuclear Forces Treaty* in 2018–19.

also shame or persuade nuclear weapons states to refrain from using nuclear weapons and from continuing to stockpile them. Still more it would stand as a principle and warning from international law not to enhance a nuclear armoury once it has become contrary to international treaty law. In this sense the proposed Nuclear Ban Treaty would be a step in the efforts of mankind to bring the catastrophic potential of nuclear weapons under the control of international law.

This is the context in which participants in civil society established in Melbourne, Australia, initiated the idea of a Nuclear Weapons Ban Treaty and propounded the potential content of such a treaty. The organisation involved, International Campaign to Abolish Nuclear Weapons (ICAN), thereby began a global process that ultimately produced a draft treaty, the *Treaty on the Prohibition of Nuclear Weapons* ('*Nuclear Weapons Ban Treaty*').³⁴ When this draft instrument was tabled before the General Assembly of the United Nations, it attracted the participation of a majority of member states of the United Nations and an affirmative vote in favour of proceeding with this treaty of 122-1. All of the nuclear weapons states, including worryingly the DPRK, absented themselves. Thus, the initiative was effectively boycotted by the states possessed of nuclear weapons. Moreover, other responsible states, that take international law seriously, including Australia, did not attend the United Nations discussions. Despite the initiation of this development within Australia, the government of our country has constantly opposed the draft treaty and the efforts of ICAN. Those efforts have also been strongly opposed by the United States of America with the lobbying of its representatives. It has also been opposed by all other nuclear weapons states. Those who hold these weapons of mass destruction, stockpiled in huge numbers, constituting an existential danger to the survival of humanity, often speak of the importance of the international rule of law. However, where it matters most, they seek to continue their speciality and exceptionalism.

Notwithstanding the foregoing indications of strenuous opposition, on 7 July 2017 the United Nations General Assembly voted to commence the formal process towards the adoption of the *Nuclear Weapons Ban Treaty*.³⁵ For that treaty to come into effect in international law, it requires ratification by 50 member states of the United Nations. Already 40 states have ratified. Those ratifying have included many small and Pacific states in Australia's region. But the supporters have also included significant international players, notably Austria, the Republic of South Africa and New Zealand.

³⁴ *Treaty on the Prohibition of Nuclear Weapons*, open for signature 20 September 2017 (not yet in force).

³⁵ *Ibid.*

In May 2018, New Zealand signed and ratified the *Nuclear Weapons Ban Treaty*. In December 2018, by vote at the biennial conference of the Australian Labor Party ('ALP'), it was agreed that ratification should be adopted as an objective of an incoming Federal Labor Government in Australia. The ALP conference resolution was subject to the maintenance of Australia's defence relationship with the United States, forged in the Second World War and expressed in the Australia, New Zealand, United States Security Treaty³⁶ ('ANZUS Treaty') and later agreements. Whilst some opponents have suggested that Australia's ratification of the *Nuclear Weapons Ban Treaty* would be contrary to the *ANZUS Treaty* between Australia, New Zealand and the United States, no mention is made in the latter document concerning the so called 'nuclear umbrella' afforded by the United States. Nor does the United States guarantee and promise in that treaty to defend Australia with or against the use of nuclear weapons specifically so declared. Opinions have been expressed that there would be no legal impediment to Australia's ratifying the *Nuclear Weapons Ban Treaty* while renouncing any use, possession or threat of use of nuclear weapons for itself or in its own defence by the United States.³⁷ Many would conclude that the introduction of the use of such weapons, including the introduction of new, smaller so-called strategic nuclear weapons suitable for use in a field of battle, would necessarily introduce catastrophic real risks that outweigh any potential advantages, and that such risks need to be clearly subtracted from any equation involved in the defence of Australia and its people.

In 2017, ICAN was named winner of the Nobel Prize for Peace. It was acknowledged that the group of citizens in Melbourne had initiated the steps that have led to a response by increasing numbers of states, despairing that the nuclear weapons nations will ever take 'bona fide' or any other steps to reduce the perils of nuclear war and stockpiles of such weapons unless somehow obliged to do so. Although Australians were present in Oslo to receive the Nobel Prize for Peace, and although this is, for Australia, a unique and praiseworthy achievement, it attracted no commendation whatever from the Australian Government. Yet the ratifications are being assembled. The test for Australia's own participation in resolving this issue of international law lies ahead.

There are, it is true, arguable weaknesses in the *Nuclear Weapons Ban Treaty*. Most importantly, it does not introduce a strong, effective and independent inspection system, as such, to ensure that states parties and non-parties are

³⁶ *Australia, New Zealand, United States Security Treaty, signed 1 September 1951, [1952] ATS 2 (entered into force 29 April 1952).*

³⁷ International Human Rights Clinic, 'Australia and the Treaty on the Prohibition on Nuclear Weapons' (Harvard Law School, December 2018); International Committee of the Red Cross, 'The Prohibition to Assist, Encourage or Induce Prohibited Activities under the Treaty on the Prohibition of Nuclear Weapons' (ICRC Briefing Note, Geneva, 2019).

doing what they respectively claim they will. This is a weakness.³⁸ On the other hand, doing nothing appears to be an even greater weakness.³⁹ Failing to address the challenges of nuclear weapons for humanity, the safety of the planet and the biosphere is an indictment of the failure of the global community to respond appropriately and effectively to the existential peril of nuclear weapons. This is why many thoughtful observers consider that the time is right for an initiative that cannot await the conscience of the nuclear weapons states. They have all been dragging the nuclear chain for too long.

The world has survived since August 1945 without suffering a nuclear weapons holocaust. Nevertheless, there have been serious changes in that interval. These are not limited to the dangers of deliberate use of nuclear weapons, although such dangers exist and are serious enough. They include the risks of accidents, mistakes and individual rage or desperation. That the world has survived 75 years since Hiroshima and Nagasaki is no guarantee that it will continue to do so in an environment of proliferating nuclear weapons of such existential potential. At the very least, the *Nuclear Weapons Ban Treaty* draws to the high attention of the United Nations, and all member states, the urgency of the global situation we now face. We live not in a nuclear-free world, but in a world free of law and effective international legal controls to defend our planet, its human populations and all living creatures in it, as well as civilisation and the values of human rationality, beauty, culture and consciousness.

IV CHAMPIONS FOR THE RULE OF LAW AT ALL LEVELS

The rule of law requires champions. At the local and national level, it requires serious and faithful lawmakers and those who record and apply the law, like Naida Haxton and the judges and lawyers whose work she presented, digested and served. At the national level it requires legislators and governments of wisdom and insight, concerned beyond the pedestrian issues that typically engage local politics. At the international level it requires the development of international law, including effective means to implement the law that guards international peace and security, universal human rights, justice and equity for all.

The role of lawyers in local and national law is clear enough. But lawyers also have a role in the development, expression and enforcement of international

³⁸ But see International Committee of the Red Cross, 'Safeguards and the Treaty on the Prohibition of Nuclear Weapons' (ICRC Briefing Note, Geneva, 2018).

³⁹ JA Camilleri, Michael Hamel-Green SC and Fumihiko Yoshida (eds), *The 2017 Nuclear Ban Treaty* (Routledge, 2019) 254. See also R Thakur, 'The Nuclear Ban Treaty: Recasting a Normative Framework for Disarmament' (2018) (Winter) *The Washington Quarterly* 71, 90–1.

law.⁴⁰ If we focus our skills as lawyers only on small, manageable and local concerns, but ignore challenges to, and dangers faced by, our species and planet, we will have lost our sense of priorities.⁴¹ This is why the issues that arise in our national legal systems, and those that exist globally and regionally, are also of legitimate concern to all lawyers. The rule of law is important for our states and nations. But it is also important for the international community and for human beings everywhere who depend on an international rule of law for our survival.

Nowhere is this more so than in the challenge presented to that global community by the human rights record of the DPRK and other countries like it, and the perils for peace and security presented by the nuclear weapons arsenals and the risks that they present for human survival. There are, of course, other global perils that we must confront and resolve: dangerous pandemics like COVID-19; global climate change and warming of the biosphere; endemic poverty and overpopulation; and lack of access to adequate water and food. But no such peril is as great as that presented by nuclear weapons. Even in this area the rule of law, to which Naida Haxton dedicated her life as a lawyer, has its role to play. It is the duty of citizens and lawyers to bring this necessity to the attention of each other and of lawmakers and leaders everywhere.

⁴⁰ See the *Bangalore Principles on the Domestic Application of International Human Rights Norms* (1998), explained and elaborated in MD Kirby, 'The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms' (1988) 62 *Australian Law Journal* 514, 531–2; Gregory Davies, 'The rise of judicial diplomacy in the UK: aims and challenges (2020) 40 *Legal Studies* 77.

⁴¹ Differences of approach to the issue of the relevance of international law, especially the international law on universal human rights, has given rise to differences in the High Court of Australia. See *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [62]ff (McHugh J), 617ff [152]ff (Kirby J); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224 [181] (Heydon J). Cf MD Kirby, 'Municipal Courts and the International Interpretive Principle: *AL-Kateb v Godwin*' (2020) 43(3) *University of New South Wales Law Journal* (forthcoming).