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Professionals in Humanitarian Assistance and Protection (PHAP)

Monitoring, reporting, and fact-finding: Does the Human Rights Council report on human rights in North Korea provide a template for the Sri Lankan investigation?

Christopher Jenks

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2014 has already heralded two significant developments related to monitoring, reporting, and fact-finding (MRF) mechanisms for collecting information on alleged international law violations. First, the Human Rights Council (HRC) published their [“Report of the detailed findings of the commission of inquiry on human rights in the Democratic People’s Republic of Korea”](#) in February. This report may provide a roadmap for the second important development, the HRC’s [decision](#) in March to investigate alleged international law violations during the final phase of the armed conflict in Sri Lanka. More broadly, both these efforts offer lessons for any group or body participating in MRF activities.

At the outset, the inherent challenges in developing and executing effective MRF mechanisms bear emphasizing. At the macro level, MRF often begins on a path where success is an unlikely destination. There tends to be disconnects in the overall mandate establishing the MRF mechanisms: between the mandate and the guidance issued to those implementing the mechanisms, or between the scope of the mandate and available resources. At the micro level, by definition MRF mechanisms occur in places where horrific events have traumatized and scarred individuals and the goals of impartiality, independence, and neutrality consequently often turn out to be mainly aspirational in practice.

The HRC report on the Democratic People's Republic of Korea (DPRK)

The Commission of Inquiry encountered a number of difficulties in conducting its investigation of “the systematic, widespread and grave violations of human rights in the DPRK with a view to ensuring full accountability, in particular, for violations that may amount to crimes against humanity.” To a certain extent, the Commission’s charge could be viewed as preordaining the results of the investigation: the commission stems from a [2013 Human Rights Council Resolution](#) which itself flowed from the [report of the Special Rapporteur](#) on the situation of human rights in North Korea following a two year comprehensive review. That this process has been ongoing in different forms and fashions for some time, and has concluded that human rights violations have occurred – and are still occurring – in North Korea, may by some be seen as reflecting a lack of impartiality and neutrality. But that view misunderstands the import of those two terms in the MRF context. Neutrality “requires MRF missions to refrain from taking sides on issues related to the relevant political conflicts,” while impartiality “entails maintaining an objective methodology in the implementation of an MRF mechanism,” as noted by Rob Grace and Claude Bruderlein.

North Korea announced it would “totally reject and disregard” the investigation and refused to answer requests for information and for entering North Korea. Before publishing its report, the Commission provided draft findings to North Korea and invited a response and corrections – requests that went unanswered.

The 372-page report begins by outlining the origin of the commission’s mandate, how the mandate was interpreted, and their methods of work. There is also a section on “non-cooperation by the Democratic People’s Republic of Korea.” This section is critically important for at least two reasons: (1) it allows the MRF entity, here the HRC, to document attempts to contact and include the perspective of the object of the investigation and thus how the MRF entity is striving for impartiality, independence, and neutrality and (2) it provides the base for understanding (and defending) why the MRF entity utilized sub-optimal ways of gathering information - access to specific locations investigators would want to visit and people investigators would want to interview was not possible.

Beyond the report itself, the UN created an impressive collection of online resources. There is a question and answers section, background information, satellite images of political prison camps, a map of North Korea, videos of (and transcripts from) the Commission’s public hearings held in Seoul, Tokyo, London, and Washington DC, and even graphic illustrations by a former North Korean political prisoner. There is also media outreach section, which includes contact information for anyone seeking further information. Of particular note, the biographies of the three commissioners – Michael Kirby from Australia, Marzuki Darusman from Indonesia, and Senja Biserko from Serbia – are also available online.

The next challenge is the “so what” question – meaning what outcomes does the report generate. The goal according to the International Bar Association’s [Guidelines on International Human Rights Fact-Finding Visits and Reports](#) is that

[i]f a report has been compiled in accordance with these guidelines it indicates that the allegations, observations and conclusions in it can be reasonably relied upon, thus enhancing the efficacy and credibility of the report. This will enhance fact finding as a step in a constructive process to improve the general climate of human rights compliance and to protect the victims of human rights violations.

The North Korea report concluded with a number of recommendations, including that:

The Security Council should refer the situation in the Democratic People's Republic of Korea to the International Criminal Court for action in accordance with that court's jurisdiction. The Security Council should also adopt targeted sanctions against those who appear to be most responsible for crimes against humanity. 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.

In the [view of at least one of the report's commissioners](#), Judge Kirby, "[m]ore monitoring and engagement alone cannot suffice in the face of crimes that shock the conscience of humanity. [...] Perpetrators must be held accountable, it is necessary to deter further crimes."

The HRC resolution on Sri Lanka

On 27 March 2014, the HRC adopted a [resolution](#), which

requested the Office of the High Commissioner to undertake a comprehensive investigation into alleged serious violations and abuses of human rights and related crimes by both parties in Sri Lanka during the period covered by the Lessons Learnt and Reconciliation Commission, and to establish the facts and circumstances of such alleged violations and of the crimes perpetrated with a view to avoiding impunity and ensuring accountability, with assistance from relevant experts and special procedures mandate holders.

According to the High Commissioner for Human Rights, Navi Pillay, Sri Lanka has "[consistently failed to establish the truth and achieve justice](#)" by not adequately "[investigating possible war crimes during the military operations that crushed the Tamil Tigers' brutal rebellion to establish a homeland five years ago.](#)"

Sri Lanka is now, in a sense, where North Korea was in 2013. But the language in the mandate for the Sri Lankan inquiry is more open than that for North Korea. And Sri Lanka has participated to a degree in the process thus far. Referring to an earlier report, similar to the response of North Korea, "[t]he Government of Sri Lanka reiterates its categorical rejection of the Conclusions and Recommendations contained in the High Commissioner's Report, reflecting bias and is tantamount to an unwarranted interference in the internal affairs of a sovereign State." But unlike North Korea, Sri Lanka's rejection is not the sum total of its comments. Rather, Sri Lanka reiterated its rejection in the last paragraph of 18 pages of comments. And Sri

Lanka has allowed the High Commissioner “to go anywhere and see anything” she “wished to see” in Sri Lanka.

On the other hand, following the HRC's resolution calling for an inquiry,

the [Sri Lanka government moved to break the links between Tamils in the country and the diaspora](#) by introducing regulations that named 16 organizations and 424 individuals in the diaspora as financiers of terrorism. [...] While the regulations state the listed organizations are being penalized for terrorism financing, their broader effect is to prevent Tamils in Sri Lanka from using the diaspora as a conduit to alert the world about human rights violations. These measures aim to isolate Tamils living within the country from those abroad.

And it is the Tamil diaspora that “is expected to play a prominent role in presenting evidence at the [UN] inquiry.”

The question of to what extent Sri Lanka cooperates with and participates in the inquiry may depend in part on how events unfold regarding North Korea. North Korea did not cooperate with the HRC inquiry. That inquiry concluded that “[s]ystematic, 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.”

If North Korea suffers adverse affects from the HRC report, that may signal to Sri Lanka, and others, that participation and cooperation are advisable, or at least a better course of action than the alternative. But if there are no ramifications, the international community will be unintentionally sending a very different message – that States need not cooperate with UN inquiries. This latter outcome would be a large setback for MRF mechanisms, the relevance of the HRC, and international law writ large.

We shall see.

About the author

[Chris Jenks](#) is an assistant professor of law and directs the criminal justice clinic at the [SMU Dedman School of Law](#) in Dallas, Texas. He has published articles on drones, child soldiers, extraordinary rendition, law of war based detention, targeting and government contractors. He has also spoken on those same topics at universities and institutes in Australia, Brazil, Italy, South Africa and the United States, and with the militaries of the Republic of Yemen and several different European and African countries. Chris has served for over 20 years in the U.S. military, including as the primary international and operational law advisor near the demilitarized zone between North and South Korea.