



Précis Paper

The United Nations, North Korea, Intellectual Property Rights, and Access to Essential Medicines

A discussion of issues of human rights in relation to North Korea, and universal access to health care

Discussion Includes

- North Korea and human rights
- Ongoing conflict between the interests of Big Pharma in protecting their intellectual property, and the universal right of access to health care

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The United Nations, North Korea, Intellectual Property Rights, and Access to Essential Medicines

1. In this edition of BenchTV, The Hon Michael Kirby AC CMG (Former Justice of the High Court of Australia) and David Buchanan SC (Barrister, Forbes Chambers, Sydney) discuss North Korea, and access to health care – two areas in which the Hon Michael Kirby AC CMG has held a mandate for the United Nations in human rights.

North Korea and human rights

2. The very nature of the North Korean regime that is such a problem for the international community, derives from the nature of the regime at home, and the way it treats its citizens. It is a very autocratic and (as the Commission of Inquiry found) totalitarian society, which creates the elements of instability and violence that are the source of the problem of getting a turnaround in the dangers that North Korea is presenting to the world.
3. It is important to remember that the people of the Korean Peninsula did not decide to divide their peninsula. It had been ruled as a unity for 2000 years. It had been ruled as a unity by Japan from 1911-1945. It was the allies in Cairo in 1944 who decided that the Korean Peninsula should be divided. That division has inflicted upon the North of the Peninsula a regime that is essentially a type of time capsule preserving features of the Stalinist communist regime that existed as one model for humanity in 1945. It is still in place, and must be understood as a remnant of that time.
4. It must also change, and the changes were mapped out in the Commission of Inquiry Report (in particular, those relating to the widespread violence of the regime). A violent regime is of its nature unstable, unpredictable, and dangerous, and that is why the peace and security issues that we presently face are intimately connected with the human rights issues reported by the Commission of Inquiry.
5. The Commission of Inquiry recommended a number of steps that should be taken, including that the matter should go from the Human Rights Council to the General Assembly, and from the General Assembly to the Security Council, and that the Security Council, in default of North Korea's membership of the *Rome Statute*, should step in and send the case of North Korea to the International Criminal Court. So far, this has not happened. It would be the best step that could be taken because it would render accountable the leadership and the personnel in North Korea for the crimes against humanity, which were found to have been proved.

6. Some things, however, were done pursuant to the Commission's recommendations. For example, a Field Office has been set up in Seoul, which is continuing the taking of testimony from a huge number of witnesses available to talk. There are 30,000 refugees from North Korea living in South Korea. Most of them have a story – one of oppression, violence, and crimes against humanity. All of this is being collected in the form of a prosecutor's brief, and it will be available for a time when a proceeding before either the ICC, or before another court or tribunal, is available.
7. But in the meantime, other steps can be taken, for example, steps that are taken in the meetings of the Human Rights Council in Geneva. At first, North Korea would have no cooperation with the Human Rights Council. It refused to accept that there were any human rights infractions.
8. There is now a system called Universal Periodic Review. Every country has to undergo Universal Periodic Review every three years. North Korea is now responding to Universal Periodic Review, because of the fact that the Report of the Commission of Inquiry was so shocking to the international community, and revealed in the language of witnesses the terrible events that were happening in North Korea.
9. The demands that North Korea turn up led to North Korea turning up, and even admitting that there were some areas in which human rights could be improved. However, North Korea will still not allow the Special Rapporteur on North Korea, or invite the High Commissioner For Human Rights, to come into North Korea.
10. The pressure that is placed on countries such as North Korea, by confronting them with the demands and assertions made by other countries, is the way the modern world compels states to bring themselves into conformity with universal human rights.

Ongoing conflict between the interests of Big Pharma in protecting their intellectual property, and the universal right of access to health care

11. This is an ongoing conflict on the international stage. The High-Level Panel of the Secretary-General was the body that was set up to investigate this issue. In July of 2017, the Hon Michael Kirby AC CMG was asked to go and report on what was happening on the High-Level Panel.
12. Essentially what happened was that the change of leadership of the World Health Organisation (WHO) led to the election of a new Director-General, who is more sympathetic to and supportive of the High-Level Panel's recommendations than his predecessor was.

13. The UN General Assembly has endorsed the so-called Sustainable Development Goals. There are 17 of them, and they were adopted by the General Assembly in 2015.
14. Sustainable Development Goal No. 3 deals with health care. In Goal no. 3 is a promise by the UN that by 2030 everyone everywhere will have access to essential health care, technologies, and pharmaceuticals. Of course what is essential is a matter for debate, but the idea is that place of birth should not determine whether a person receives the health care that makes the difference between life and death.
15. We cannot promise these achievements by 2030 and then do nothing about them. So the latest meeting in July 2017 reviewed the progress being made. These meetings will continue to occur, mainly to make sure that the World Trade Organisation (WTO) will comply with the principles that protect the human rights that exist in the TRIPS Agreement, and the DOHA Declaration, which guarantee that countries facing a serious health crisis will be able to secure compulsory licences of essential health care.
16. This is resisted by some countries (generally the ones in possession of patent intellectual property protection for health care). But in pursuance of the Sustainable Development Goals, we have to do things to protect that right, which is one of the recommendations of the High-Level Panel, and is currently before the UN, and the Secretary-General.

The effect of a compulsory licence of essential health care

17. If a big pharmaceutical corporation has an intellectual property protection of an essential drug, an order can be made under domestic law requiring the holder of that protection to provide a licence in order to meet a health crisis in a country.
18. This was very important in the early days of HIV, when the antiretrovirals were developed. The way in which these essential medicines were able to be made available to millions of people around the world was by reverse-engineering the original drugs in order to develop cheaper, generic versions. But there continues to be a need for new drugs because some of the older drugs do not continue to be efficacious, which presents new problems of new patent protections for new drugs.
19. Particularly in poorer or middle-income countries, people should have the right to declare a health crisis under their own law to require a compulsory licence for the availability of these new drugs, and to negotiate the payment of a much lower licence fee.

What impacts President Trump's declaration that the US will not participate in the Trans-Pacific Partnership (TPP) will have in this area

20. The *Trans-Pacific Partnership Agreement* had many impacts. It was negotiated in total secrecy – citizens had no idea how officials and bureaucrats, with a big participation of lobbyists from Big Pharma, were negotiating. The aspect of the Agreement that President Trump does not like is, as he sees it, the fact that it would have the effect of shifting jobs from the US to countries around the Pacific.
21. There were other provisions of the Agreement, which like most so-called free trade agreements, did not deal equitably with people who are dependent on drugs and on the intellectual property in drugs, and on their right to get compulsory licences or exemptions, because they live in poor countries.
22. The problem with free trade agreements is that they are not gotten unless the right that is guaranteed under the TRIPS Agreement and the DOHA Declaration to secure compulsory licences is given away. This is a very common provision, and it was in the TPP. So the issue that concerned civil society organisations about TPP was not the same as the one that concerned President Trump.
23. The fact of the matter was that to get the trade benefits of TPP, very poor and sick people would be paying the price. If, as is rumoured, there are moves to re-open the TPP in the countries that were prepared to sign it other than the US, the hope is that it will be done in a way that is conformable to the human rights protecting provisions recommended by the High-Level Panel, and is different from the TPP Agreement.
24. The TPP Agreement was a very typical free trade agreement, negotiated in secret, and with a lot of pressure from the pharmaceutical industry, and powerful lobbyists. Lobbyists in the US are extremely powerful in respect of both the US health care system, and the operation of that system and of its patent laws on the world. This becomes a matter of concern for the international community, particularly for the human rights protection community, because the promise made in Sustainable Development Goal No. 3 will not be met by 2030 if those human rights provisions are not protected.

BIOGRAPHY

The Hon Michael Kirby AC CMG

Former Justice of the High Court of Australia

Michael Kirby is an international jurist, educator and former Justice of the High Court of Australia. In addition, he has served as Deputy President of the Australian Conciliation and Arbitration Commission, Chairman of the Australian Law Reform Commission, President of the NSW Court of Appeal, Judge of the Federal Court of Australia and President of the Court of Appeal of the Solomon Islands. He has also undertaken many international activities, serving as Commissioner of the UNDP Global Commission on HIV and the Law and leading the UN Commission of Inquiry into human rights abuses in North Korea. He was also a Member of the UN Secretary General's High Level Panel on Access to Medicines and the UNAIDS/OHCHR's panel on Overreach of Criminal Law.

David Buchanan SC

Barrister, Forbes Chambers, Sydney

David Buchanan SC was admitted to practice in 1975, called to the Bar in 1977 and appointed Senior Counsel in 1997. His areas of expertise include criminal law, administrative law, public law and dealing with OH&S, environmental and other regulatory offences. He has been involved for many years in the community response to HIV/AIDS both in Australia and overseas. He has a particular interest in the role of the criminal law and of public health interventions in the HIV/AIDS epidemic.

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