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## NORTH KOREA AND THE MADONNA OF CZESTOCHOWA

THE HON. MICHAEL KIRBY AC CMG\*



The intervention of the Madonna of Czestochowa, one of the many patron saints of the Roman Catholic Church in Poland, in my recent work for the United Nations on North Korea, would seem, on the face of things, to be a little far-fetched.

In the first place, I had never heard of the Madonna and certainly did not direct any specific entreaties to her.

More to the point, I doubt that the Madonna had heard anything about me or my work. We had never been in communication, by prayer, thought or in any other way.

Moreover, my upbringing was in the stern Protestant tradition of Christianity. The Anglican Church, into which I was confirmed, is (at least in its Sydney Diocese) an adherent to the Protestant side of Anglicanism. Notions of intercession to the Madonna would generally be regarded in that Church as heretical. The Marian tradition of Christianity is more common in the Roman and Orthodox Churches. For Protestants, the creation of a special significance for Mary, the Madonna, is generally regarded as erroneous and unbiblical. In its more extreme forms, it appears to elevate Mary to be a kind of goddess. At least, that is how many Protestants would view prayers to the Madonna.

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\* Chair of the United Nations Commission of Inquiry on Human Rights Violations in the Democratic People's Republic of Korea (2013-14).

Some Protestant Christians are even so unkind as to suggest that the elevation of Mary to a seemingly quasi-divine status was an outgrowth from the equally unsound doctrine that priests had to be unmarried (a view that Martin Luther rejected in theory and practice five hundred years ago) or that only men could be priests (a source of conflict right up to the present time).

Nevertheless, when I heard of the Madonna of Czestochowa, I was prepared to feel very grateful to her for her suggested intervention in my cause. Certainly, I needed all the help I could secure.

In March 2013, at its 22<sup>nd</sup> Session, the United Nations Human Rights Council established a Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea (DPRK).<sup>1</sup> The mandate for this body was provided by the Human Rights Council's resolution 22/13. It required the COI to investigate 'the systematic, widespread and grave violation of human rights in the DPRK with a view to ensuring full accountability, in particular for violations that may amount to crimes against humanity'.

The adoption of the resolution, and even the prospect that such a resolution would be adopted, was unknown to me when it occurred. However, as I now know, it was strongly supported at the time by a number of international human rights organisations based in Geneva. Those organisations included Human Rights Watch (HRW), a global international human rights body with its headquarters in New York. HRW was one of the main civil society actors pressing for the adoption of the resolution. An important voice of HRW was Juliette de Rivero,<sup>2</sup> a senior human rights officer. Although I did not know this at the time, the adoption of the resolution creating the COI and its mandate occurred in an unusual way.

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1 The report of the Commission of Inquiry of the Human Rights Council on Human Rights Violations in the Democratic People's Republic of Korea (DPRK) made public on 7 February 2014 (UN document A/HRC/25/CRP.1. It was formally delivered to the Human Rights Council in Geneva on 7 March 2014. After an Arria briefing given to interested members, the report was the cause for the addition of the situation in DPRK to the agenda of the Security Council. The story of the strong and affirmative response of the United Nations organisation at every level is told in M.D. Kirby, "The United Nations Report on North Korea and the Security Council: Interface of Security and Human Rights" (2015) 89 *Australian Law Journal* 714, 721-9.

2 Then Geneva Advocacy Director at Human Rights Watch.

The establishment of any COI is a significant scaling-up of the seriousness that is attached to human rights violations on a theme, or by a country, that is the focus of the COI mandate. Normally, the suggestion that such a body should be created, and mandate given, is hotly contested in the deliberations of the Human Rights Council. Unusually – indeed uniquely – this did not happen in the case of the proposal for a COI on DPRK when it was made.

In the chair at the time that the proposal was presented on 21 March 2013 was the then President of the Human Rights Council, Ambassador Remigiusz Henczel of Poland. When he called forward the draft resolution, including its proposal for the creation of the COI on DPRK, and placed it before the Council for a vote, it is clear from the sound recording of the proceedings that he was surprised at the silence that ensued. He repeated his call, in case any delegate amongst the member states might wish to call for a vote on the subject, as had previously invariably been the case. In the event, despite this repeated call, no voice was raised to demand a vote. The decision was therefore declared ‘adopted’ on the voices, with no country then recording its opposition or abstention.

The reason why this was unusual, even in the case of DPRK which had many critics in the Council and in the world, was that many member states of the Council oppose *in principle* the creation of mandates nominating particular countries that might become the subject of investigation by a COI on human rights. In the case of some countries it is important for their own self-interest to oppose the creation of any “country specific COI”. They complain this involves “finger-pointing” at particular countries. They assert that this endangers that new approach established by the Human Rights Council, to replace the deep divisions and suggested failures of the previous Human Rights Commission. These views were later to emerge in response to the report of the COI on DPRK. Countries that could not point to any error of substance or procedure in the COI’s report or approach nonetheless resisted action on the report and its recommendations because it was the product of a “country-specific” investigation.

Yet despite frequent objections of this kind, no country raised its voice in opposition to the establishment of the COI on DPRK. Ambassador Henczel declared the motion adopted. He then moved on to the next item in the agenda.

Soon after this happened, in mid-April 2013, I was attending a conference of statisticians at Herstmonceux Castle in the South of England. North Korea and its human rights record were furthest from my mind. However, during the conference I received a telephone call from the office of the then Australian Minister for Foreign Affairs (Senator the Honourable Bob Carr). The caller enquired as to whether I would be prepared to permit my name to go forward for selection as chair of a new COI of the Human Rights Council, which had just been established to address alleged human rights violations in North Korea. After consulting my partner to secure agreement, I passed a message to the Australian Government in the affirmative. I then returned to the statisticians and put the possibility of an engagement with the people of Korea entirely out of my mind.

Between 1993-6 I had served on a human rights mandate that reported to the then Human Rights Commission of the United Nations in Geneva and to the Third Committee of the General Assembly in New York. I knew from that experience that appointments and election to such offices were often contested, always sensitive and sometimes disputable. I played no part in advocating my merits or lobbying those who would have the final decision (whoever those persons might be).

In the case of my mandate in 1993, this involved appointment by the then Secretary-General of the United Nations (Boutros Boutros-Ghali) to the office of his Special Representative on Human Rights in Cambodia. That office had been contemplated by the Paris Peace Accords. Those treaties, which were signed in Paris in 1991, brought an end to the military conflict over Kampuchea/Cambodia. The Khmer Rouge regime continued to enjoy accreditation to the United Nations seat in the name of Kampuchea until ousted by a military intervention led by forces from Vietnam in December 1978.

I knew, on that occasion, that I was not the first choice for appointment to the office of Special Representative. This had been His Excellency, Judge Kéba Mbaye, a distinguished Senegalese lawyer and a Judge at the International Court of Justice in The Hague, later that Court's Vice-President. In the 1980s I had worked with him in UNESCO and admired him greatly.

I knew nothing about the mysterious events that led to my being offered appointment on Cambodia in the place of Judge Mbaye. As rumour had it, he requested provision of first class air travel to proceed from Senegal or The Hague to the duties in faraway Cambodia. In fairness, Judge Mbaye was a man of substantial stature, in more ways than one. Objectively, his request for comfortable air travel, in order to assume an additional (and prospectively unpleasant) function might not have been unreasonable in his case. Moreover, he had then recently been serving as a member of the International Olympics Committee (IOC). That body provided its members with first class international air travel. However, the United Nations was not blessed with resources in the same way as the IOC. Under its protocols, only the Secretary-General travelled first class. Other officers had to make do, according to rank and duration of the journey, with business class or economy class.

Whether this was the true explanation of Judge Mbaye's passing up the appointment to the Cambodian function, I cannot say. His international appointment and distinction and his command of the French language were undoubtedly attributes that gave him the edge on me. Cambodia, in colonial times, had been a protectorate of the French Republic. It was a member of Francophonie, the global community of French-speaking nations. France took a special interest in Cambodia's affairs, as symbolised by the fact that it had convened the Paris Peace conference, resulting in an agreement that included the requirement to appoint a Special Representative of the Secretary-General to monitor and report on human rights following the conclusion of the work of the United Nations Transitional Authority for Cambodia (UNTAC).

Whatever the negotiations and background, I was appointed by Secretary-General Boutros Boutros-Ghali in 1993. I worked closely with his office, and in particular with the British-born under Secretary-General for Political Affairs, Mr (later Sir) Marrack Goulding. I also worked closely with excellent colleagues in what was then the United Nations Office of Human Rights. These colleagues included Mr John Pace (Officer in Charge), Mr Jose Gomez del Prado (Chief Officer), Mr Daniel Prémont (Head of the Office for Human Rights in Phnom Penh), and Mr Christoph Peschoux (Chief Investigative Officer). From these fine United Nations officers I learned much about how to discharge a United Nations human rights mandate. They helped me in the preparation of my reports. They made useful

suggestions concerning my oral reports to the Human Rights Commission in Geneva and the Third Committee of the General Assembly in New York.

I discharged my duties in the mandate, as I believe, to the satisfaction of the United Nations. Substantially I wrote my own reports. This was itself unusual for human rights special rapporteurs and special representatives. I only retired from the position after I was appointed a Justice of the High Court of Australia with effect from February 1996. During that service, until 2009, for Australian constitutional reasons, I was unavailable for further appointment to discharge a United Nations Human Rights mandate.

Nevertheless, between excellent training and preparation, skills and talent, and appointment to a United Nations mandate lie many obstacles and impediments. I knew of these (and I was later to learn of them again). That is why I put the approach to me in connection with North Korea out of my mind.

Then, in early May 2013, I was informed that the President of the Human Rights Council, who was still Ambassador Henczel of Poland, had appointed me to be a member of the COI on DPRK, and its chairman. The then current Special Rapporteur on Human Rights in DPRK (Mr Marzuki Darusman, Indonesia)<sup>3</sup> was *ex officio* a member of the COI according to the uncontested resolution of the Human Rights Council. President Henczel announced that the third member of the COI would be Ms Sonja Biserko, an experienced civil society expert from Serbia, with extensive experience in relation to the ‘crimes against humanity’ that had occurred in the former states of Yugoslavia. She was also an expert on the international crime of ‘genocide’ and had strong connections to international civil society as well as academic and professional experts on the crimes that were to become the focus of the COI on DPRK.

The expertise of the other two members of the COI on DPRK was therefore easily established. But what of my own qualifications? And why was I appointed and designated chairman? This is where the Madonna of Czestochowa came in.

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<sup>3</sup> Mr. Darusman was a member of the U.N. commission investigating human rights violations in North Korea that released its report in February 2014 strongly condemning the human rights situation in North Korea.

After the announcement of my appointment was made on 7 May 2013, I soon afterwards travelled to Europe for other purposes. I offered to divert from my journey to proceed to Geneva in order to have early consultations with officers of the Office of the High Commissioner for Human Rights (OHCHR). Those consultations took place, but they were not extended. A short interval was set aside for me to meet in the Avenue Motta office of the OHCHR. Over a cup of coffee, I discussed the background of the mandate and the hopes which the COI had engendered with Juliette de Rivero, whom I met for the first time.

I questioned her concerning her knowledge of the reasons why I was appointed. She was vague but mentioned the suggested good opinion that the then High Commissioner, Judge Navi Pillay,<sup>4</sup> from South Africa, had concerning my judicial work in Australia. In that work I had repeatedly upheld the interaction between common law principles, statutory interpretation and universal human rights law.<sup>5</sup> I was satisfied with the explanation and again put the matter out of my mind.

The first formal meeting of the members of the COI took place in Geneva on 1-5 July 2013. It was an intensely busy one because we had not only to plan the conduct of our inquiry but to determine a number of controversial preliminary questions governing the methodology of the COI. Shortly, we resolved to undertake our inquiry in a distinctive way utilising public hearings, engagement with the media, use of the internet and emphasis on transparency, the provision of due process and engagement with civil society.

Late in the first week of our meetings together, the commissioners met Juliette de Rivero in a social setting and sought to learn about the civil society organisations which had been engaged with DPRK issues for a long time; including HRW and Citizens' Alliance on North Korean Human Rights.

Juliette de Rivero told me that, in order to secure my appointment to the position of Chairman of the COI on DPRK, she had felt obliged to appeal to 'higher powers'. She was not religious at all herself. But she admitted that she had sought the intervention of the Black Madonna of

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<sup>4</sup> Navi Pillay is a South African jurist who served as the United Nations High Commissioner for Human Rights from 2008 to 2014. A South African of Indian Tamil origin, she was the first non-white woman judge of the High Court of South Africa.

<sup>5</sup> See e.g. *Al-Kateb v Godwin* (2004) 219 CLR 562 at 617 ff [512] ff; cf 586-595 [41]-[73]: [2004] HCA 37.



Czestochowa. With this, she produced a small laminated image showing a Madonna with child. Both the Madonna and the child shown in the image reflected a dark skin colour which contrasted with the vivid golden halo that was painted to surround their heads. She pressed the laminated image into my hand, urging me to keep it with me throughout the enquiry. While she was not particularly religious herself, ‘in the circumstances’ she thought that this might be a good idea. She told me that her friend and colleague, Joanna Hosaniak of Citizens’ Alliance, could explain to me the appeal to ‘higher powers’. I was intrigued with her story. When I first met Joanna Hosaniak, I invited her to tell me who the Black Madonna of Czestochowa was and how she came to be involved in the COI on DPRK.

Soon after that, I met Joanna at a public meeting held by the COI in the CBD of Seoul. This was attended by many civil society organisations, their supporters and officials. I became aware that Joanna was of Polish extraction. This meant that she would bring to the table her own knowledge about the Communist regime in Poland before the fall of the Berlin Wall. I told her of my conversation with Juliette de Rivero and produced the image of the Black Madonna.

“Who is the Black Madonna?”, I asked.

“And why was it necessary to resort to ‘higher powers’, in getting the COI constituted?”

Joanna Hosaniak protested that she also was not particularly religious. However, like her friend Juliette de Rivero, she had been engaged in energetic lobbying both to ensure the COI would be established and that I would be appointed to it.

Upon reflection, perhaps energetic lobbying understates the significance of the role Joanna undertook with others, especially Juliette De Rivero and Phil Robertson<sup>6</sup> in the establishment of the COI and it is important that I acknowledge this at this time and also thank Joanna who has provided considerable background to the establishment of the COI before I further discuss the significance of the role of the Black Madonna upon my appointment.

For many years the North Korea issue has certainly been of concern to a number of human rights organisations including Human Rights Watch (HRW), the Citizens’ Alliance and North Korean Human Rights and Conectas Human Rights from Brazil. It was well known that the

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<sup>6</sup> Deputy Director HRW Asian Division.

idea of a COI into human rights in the DPRK needed to be approached strategically as it was believed the creation of the Commission would not develop without determined and resolute advocacy. As Joanna has noted this was difficult as Citizens Alliance did not have any support for advocacy work because many donors did not appreciate the importance of the establishment of the COI at the time.

Since 2002, Citizens' Alliance (CA) had been going to Geneva yearly to advocate and build greater support amongst the countries for the North Korea Resolution. However, it was not until 2010 that HRW in Geneva joined as a main partner in organising these meetings. Support for the establishment of a COI was lacking with some parties actively opposed to the formation of a COI. Subsequently in November of 2011, Citizens Alliance held conferences in cooperation with HRW and Concetas Human Rights in Geneva (CHR), to acquaint diplomats and UN officials with the need for the creation of the COI.

In 2012, in Jakarta, Julie De Rivero and Phil Robertson considered that the time to strongly argue for the creation of the COI was auspicious due to the fact that both China and Russia would not be sitting on the Human Rights Council in Geneva in 2013. Joanna further noted that during this time CA, HRW and CHR met with the U.N. special rapporteur on North Korea, Marzuki Darusman, and promised him that full responsibility would be taken in assisting him and the Commission if the call for establishments of the COI succeeded. Julie De Rivero assisted in ensuring that Marzuki's report would be significant in calling for the establishment of the COI. In December 2012 Julie De Rivero, with the assistance of Joanna (also Deputy Director General Citizen's Alliance for North Korea on Human Rights), facilitated a meeting between Citizens' Alliance and Navi Pillay and organised for the High Commissioner's press office to issue a public statement after the meeting. I am informed that Citizens' Alliance brought two survivors of political prison camps in North Korea to the meeting. Citizens' Alliance considered that the statement from Navi Pillay would be influential in convincing states of the need for a COI.

Navi Pillay's public statement was made in January 2013, giving Citizens' Alliance 1.5 months to start drafting the Resolution and convince the states. Following this, lobbying activities were commenced by HRW in countries where they had field offices; Julie De Rivero from the HRW Geneva office, the HRW New York and Brussels offices and Joanna

Hosaniak in Seoul. The problem was that although some EU missions in Geneva gave the green light for a COI, the same EU missions in South Korea were blocking it because many of them had also been in charge of North Korean affairs. Additionally, the South Korean government was proving to be an obstacle. This was difficult. At the time the Presidential Office was undergoing transition with the election of President Park Geun-hye, and Citizens' Alliance was experiencing trouble with the South Korean Blue House<sup>7</sup> and the Ministry of Foreign Affairs. Without tacit approval from South Korea, other states made it clear that it would be difficult to support the call for a COI.

A breakthrough occurred when Julie De Rivero was able to secure Japanese support for a COI, whilst they were drafting the March resolution at the Human Rights Council, during a visit organised by the Japanese Division of HRW. Kanae Doi,<sup>8</sup> from the Japanese division, was critical in convincing relatives of abduction victims in Japan that a COI would not be an obstacle to their hope of resolving the issue bilaterally between Japan and North Korea. Afterwards Citizens' Alliance was able to convince EU States, especially missions in Seoul (particularly UK, the Netherlands, and France) and the EU Commission to support the call for a COI.

The next issue was to get the right people on the COI and a Chair who was "strong and charismatic". Citizens' Alliance recommended Sonka Biserko as Chair. I am informed that HRW strongly supported my appointment.

Following this, Joanna Hosaniak was in Geneva to continue to support the COI during final drafting, organise parallel meetings in Geneva with the states in February and March of 2014 and to contact missions drafting the resolution after the COI's report was published. This was all done in partnership between Human Rights Watch and Citizens Alliance for North Korean Human Rights.

Even after the COI published its report the work was not over. CA, CHR and HRW had to make sure that the findings in the report would be reflected in the Resolution. Joanna organised the special meeting with the EU states in Seoul and invited Julie de Rivero because

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<sup>7</sup> The Blue House is the executive office and official residence of the South Korean head of state.

<sup>8</sup> Kanae Doi, HRW Japan Director, works to encourage the Japanese Government to prioritize human rights in its foreign and domestic policies and practices.

she feared many states would be reluctant to the call for ICC referral, especially those that had a strong humanitarian presence in North Korea. They also made an early call upon Vice Minister of Foreign Affairs of Republic of Korea (ROK) to request that the ROK government invited the UN field office to Seoul (the Minister opposed that idea during the meeting). After the Resolution was passed in March 2013 and the ROK government officially rejected it, Citizens Alliance organised public and media campaigns, mobilising civil society in Seoul to criticise the government. Finally the government reversed its position. A campaign was also planned for New York to prepare for the General Assembly and the ground for possible official briefings at the Security Council. Param Preet-Singh,<sup>9</sup> HRW in New York, contacted states to get them on board to co-sponsor the meeting at the ECOSOC Council<sup>10</sup> (Australia, Panama, and Botswana). Joanna and Param continued the advocacy by bringing in North Korean victims and focusing on abstaining states and states that were non-permanent members of the Security Council so that the briefing could be held in December of 2013.

In her correspondence to me Joanna Hosaniak comments:

I could write a book of what happened in between, while preparing for the COI, during the COI's operation and after.

The above comments relating to the creation of the COI do not do justice to the monumental task in establishing the COI and the commitment and passion of others. It is clear that the COI would not have come about except for a number of dedicated individuals and organisations who cared about human rights generally and the plight of victims in North Korea in particular.

In returning to the role of the Black Madonna with respect to my appointment, in the days before the names of the appointees were announced, things did not appear to be going in the right direction, according to the rumours circulating in the Palais des Nations in Geneva. It was at that point that Juliette de Rivero decided to go to the top, literally. She knew that Joanna's mother was religious because she had spoken about her from time to time. To fend

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<sup>9</sup> Param-Preet Singh is Associate Director in the International Justice Program of HRW in New York. Her work focuses on pressing for credible national and international justice for those suspected of committing war crimes, crimes against humanity, and genocide. She is also chair of Human Rights Watch's Fellowship Program.

<sup>10</sup> The Economic and Social Council (ECOSOC) is one of the six main organs of the United Nation (Art. 7, Charter of the UN). The main task of the ECOSOC is to promote economic and social development. The promotion of human rights is of significant importance for it.

off a bad outcome in respect of the COI or its appointees, Juliette resolved that it was essential to invoke Joanna's mother's assistance. So Juliette asked Joanna if she could contact her mother to seek divine intervention, to ensure that the appointment process would proceed in the right direction.

Joanna went on:

I honestly laughed at the time and told Juliette that all would be fine. But I was not so sure that this was necessarily so. So, to be sure of a clear conscience and that I had done everything that I could, I telephoned my mother that night in Poland. I told my mother about Juliette's request. My mother was touched by the request, so much so that the next day, accompanied by my father, she set out by train to travel to Czestochowa. This was a distance of 200 kms. But it was necessary because, in my mother's view, the best intervention we could hope for was by the Black Madonna of Our Lady of Czestochowa. My father accompanied my mother on the journey. After arriving at the church in Czestochowa, where the image of the Madonna was on display, these two old people spent the night in the chapel praying for the success of the COI to bring justice to the people of North Korea. And for your selection to head the inquiry.

I had never met Joanna still less her mother and father. Joanna, fulfilled her part. And so, it appears at the time of these prayers, did her parents. When, on the following day, the creation of the COI and my appointment to chair it were announced, Juliette de Rivero exclaimed, 'Perhaps it was the intervention of your mother's prayers.'

Certainly the course of events bore the hallmark of a little help from 'higher powers'.

As I listened to this story I was, of course, polite, although my Protestant background made me hugely sceptical about this story. Joanna seemed certain that it was her mother's prayers that had delivered the appointment to me. And that this was what was meant to be.

Often as we laboured over the difficult and upsetting investigations that resulted in the report of the COI on DPRK on 7 February 2014, I thought of the Black Madonna. I am not as convinced as others might be that I owe my appointment to her intervention. Just the same, I placed the laminated image of the Black Madonna on the front of my desk in Sydney, Australia. As I looked at the image, she sometimes seemed to smile at me.

So far, because of international power play and the inevitable politics of such matters, we have not been able to produce outcomes that implement all, or even most, of the COI's recommendations on human rights violations, described in the COI report. Yet God, we are told, moves in mysterious ways. The achievement of relief from the dire situation described in the report on North Korea is an important moral obligation of the United Nations and the international community. We all know this. The DPRK knows it. And doubtless the Black Madonna of Czestochowa knows it best of all.