

OPINION

Take Kim to Court

By Jared Genser

It was a quiet night aboard the South Korean naval warship Cheonan on March 26 as it patrolled the Yellow Sea south of the Northern limit line, the de facto boundary dividing North and South Korea. Suddenly a strong underwater explosion, later determined to have been the detonation of a North Korean homing torpedo, split the ship in two. Within five minutes, the ship had sunk, killing 46 of its crew and sparking a new threat of war on the Korean peninsula. Since then, the international community has been scrambling to defuse tensions, coordinate a

response, and understand why North Korean leader Kim Jong Il would launch this unprovoked attack. What has been missing in the assessment of options so far, however, is the prospect that Kim may have exposed himself for the first time to international justice. There is I believe, a *prima facie* case for referring the sinking of the Cheonan to the International Criminal Court for investigation and prosecution of those who carried out and ordered the attack.

The crux of the crime itself is straightforward. One of the war crimes that can be prosecuted in the ICC is the crime of "killing . . . treacherously individuals belonging to the hostile nation or army." Merely conducting a sneak attack itself is not considered treachery under the laws of war, as surprise is often used in wartime. What was actually "treacherous" is that North Korea signed the 1953 armistice and committed unequivocally to "order and enforce a complete cessation of hostilities."

In this case, North Korea invited the confidence of South Korea that the armistice was in force—despite the occasional minor skirmish here and there over the years—which led the South Korean navy to not be patrolling on high alert. That confidence was intentionally betrayed to

sink the vessel and kill its crew. The laws of war make very clear that while an armistice merely suspends active fighting and can indeed be broken, notice must be provided to the other side first.

With regard to jurisdiction, the incident took place in South Korean territorial waters and against a South Korean ship. Either of these facts alone—given

Sinking the Cheonan was a war crime. There would be several advantages to prosecuting it as such.

that North Korea would dispute the first point—gives the court jurisdiction to hear a complaint because South Korea is a party to the Rome Statute establishing the Court.

All that is required at this point to trigger an investigation would be for a party to the Rome Statute to refer the situation to the prosecutor for investigation. Beyond South Korea, that could include any of more than 100 countries around the world. Alternatively, the Court's creative and relentless prosecutor, Argentine lawyer Luis Moreno Ocampo, could decide to take up the situation on his own.

That said, this would not necessarily be an easy course to follow. Even if the situation is taken up by the prosecutor to indict anyone responsible for the sinking of the Cheonan would require substantial evidence. While the report on the sinking says the evidence for North Korean culpability is conclusive, the court only prosecutes individuals and not countries. Thus, further intelligence to determine who is actually responsible and following those orders up the chain of command would be required.

Then there's the time factor. All the court's investigations up to now have taken years to complete. And even if one could ultimately procure the evidence to issue an arrest warrant for Kim, it would be highly unlikely that he could be easily apprehended, given his limited travel outside North Korea.

Yet despite all the obstacles, this remains a desirable course to pursue for several reasons. Beginning such an investigation could mark a critical rhetorical turning point in labeling Kim as an international criminal, rather than merely as a dictator. Such a label is past due. While global focus on North Korea in recent years has been primarily on its nuclear weapons program, the daily reality for the people of the country is appalling. Starvation is wide-

spread and the Kim regime maintains a vast gulag system holding some 200,000 political prisoners.

Beyond the sinking of the Cheonan, there is little doubt that Kim is also guilty of committing crimes against humanity against his own people. Any measure that focuses attention on this aspect of his character would be a needed reality check on the tendency to treat him merely as a strong-willed, if unpredictable and cunning, dictator to be negotiated with by the international community.

Kim is ailing and may well die of natural causes in the next few years before facing any sort of justice. But given the profound suffering of the North Korean people and his recent actions against South Korea, triggering an investigation before the International Criminal Court could drive a wedge between Kim and any elements of his government that care about the damage his conduct has caused the country and its people. If this hastens his demise even a little, that can only benefit the North Korean people and the world.

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