Take Kim to Court

By Jared Genser

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

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

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

vited the confidence of South Koon high alert. That confidence Korean navy to not be patrolling was intentionally betrayed to the years—which led the South nor skirmish here and there over force—despite the occasional mirea that the armistice was in In this case, North Korea in-

response, and understand why

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

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

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

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

against a South Korean ship. Eithe incident took place in South Korean territorial waters and ther of these facts alone-given

court only prosecutes individuals culpability is conclusive, the the evidence for North Korean sinking of the Cheonan would reessarily be an easy course to folcommand would be required. ing those orders up the chain of actually responsible and followintelligence to determine who is and not countries. Thus, further the report on the sinking says quire substantial evidence. While indict anyone responsible for the taken up by the prosecutor, to low. Even if the situation is That said, this would not nec-

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

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

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

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

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 years before facing any sort of justice. But given the profound of natural causes in the next few people and the world. only benefit the North Korean demise even a little, that can and its people. If this hastens his conduct has caused the country Kim is ailing and may well die

versity of Pennsylvania law University of Michigan and Unihas previously taught at the lawyer in Washington, D.C. who Mr. Genser is an international