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North Korean Detention of U.S. Citizens: International Law Violations and Means for Recourse

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North Korean detention of U.S. citizens has prompted considerable attention in the U.S. media over the years, especially with the most recent case of Otto Warmbier's death. Releases have usually been negotiated through diplomatic channels on a humanitarian basis. While detainee treatment is influenced primarily by political considerations, this Article asks what international legal implications arise from these detentions in terms of international law violations and recourse. Specifically, this Article analyzes (1) violations of consular law and international human rights law as applied to the detainees, such as standards for arrest, investigation, trial, and detention, and (2) whether viable legal recourse exists. While North Korea has acted contrary to international law in its treatment of U.S. detainees in a number of respects, including through violations of the *Vienna Convention on Consular Relations,* the *International Covenant on Civil and Political Rights,* and other treaties and principles of customary law, legal recourse is practically limited in both international and U.S. domestic law due to jurisdictional barriers and weak international enforcement mechanisms.

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Introduction

On January 2, 2016, North Korean authorities detained University of Virginia student Otto Warmbier as he was about to leave the Pyongyang airport.[1] According to North Korean authorities, Warmbier had stolen a propaganda banner from the wall of his hotel.[2] This was deemed to be a "hostile act."[3] After detaining him for several weeks, North Korean authorities released a video of Warmbier confessing to his crime, and tearfully begging for mercy.[4] Despite his pleas, on March 16, 2016, the North Korean Supreme Court convicted Warmbier after a one-hour trial and sentenced him to fifteen years of hard labor.[5] After a year and a half, Warmbier was medically evacuated back to the United States in a coma, passing away several days later. The exact cause of death remains a mystery given U.S. physicians' refutation of the North Korean claim that botulism and a sleeping pill had induced the coma, the severe neurological degeneration in his brain, and his burial without an autopsy.

North Korea still detains three other American citizens.[6] Kim Dongchul was arrested in October 2015 and sentenced on April 29, 2016 to ten years of hard labor for espionage, having allegedly attempted to transfer North Korean military data with a USB flash drive.[7] An accounting profes-

1. Nash Jenkins, *How Otto Warmbier Made It Out of North Korea*, N.Y. TIMES (June 14, 2017), http://time.com/4817541/otto-warmbier-north-korea-us/ [https://perma.cc/8GC3-YHYK].

2. *Id.*

3. Choe Sang-Hun & Rick Gladstone, *North Korea Sentences Otto Warmbier, U.S. Student, to 15 Years' Labor*, N.Y. TIMES (Mar. 16, 2016), http://www.nytimes.com/2016/03/17/world/asia/north-korea-otto-warmbier-sentenced.html [https://perma.cc/X4SE-ZPT9].

4. He somewhat improbably claimed that a church member had offered to trade him a used car for the stolen propaganda poster. *Id.*

5. *Id.*

6. Russell Goldman, *3 Americans Remain Imprisoned in North Kore*a, N.Y. TIMES (June 13, 2017), https://www.nytimes.com/2017/06/13/world/asia/north-korea-american-prisoner.html [https://perma.cc/TCV4-U5HV].

7. Steph Solis, *Report: North Korea Sentences U.S. Citizen to 10 years in prison for espionage*, USA TODAY (Apr. 29, 2016), http://www.usatoday.com/story/news/world/2016/04/29/north-korea-sentences-korean-us-citizen-10-years-jail-espionage/83689282/ [https://perma.cc/J3FA-MUAR]; *see also* 北, 한국계 미국인 김동철씨 노동교화형 10년 "제도전복 책동", ISPLUS (Apr. 29, 2016), http://news.donga.com/Main/3/all/20160429/77855825/1 [https://perma.cc/X75Y-RCK6]. While Kim confessed on video to espionage, his confession was speculated to have been made under duress. *See* James Rothwell, *What Happens to Foreigners Arrested in North Korea?*, THE TELEGRAPH (Apr. 25, 2016), http://www.telegraph.co.uk/news/2016/04/25/what-happens-to-foreigners-arrested-in-north-korea/ [https://perma.cc/D2ZL-L37Q].

sor at Pyongyang University of Science and Technology (PUST), Tony Kim (Kim Sang-duk) was arrested on April 22, 2017, on charges of hostile acts.[8] He was suspected of missionary activities outside his teaching.[9] Kim Hak-song, a pastor and also a PUST teacher working on agricultural projects, was arrested shortly after on similar charges.[10]

Except for Warmbier's tragic death, these cases are not altogether unique. Since 1996, North Korean authorities have detained at least fourteen other U.S. nationals for purported crimes in the country: Evan Hunziker (1996); Kwang-Duk Lee (1998); James Chin-Kyung Kim (1998); Karen Jung-Sook Han (1999); So Sun Dok (1999); Euna Lee and Laura Ling (2009); Robert Park (2009-10); Aijalon Gomes (2010); Eddie Jun (2010-11); Kenneth Bae (2012-14); Merrill Newman (2013); Matthew Miller (2014), and Jeffrey Fowle (2014).[11] Most were charged with illegal entry, anti-state crimes, or espionage, often in connection with missionary activity.[12] Several of these cases were heavily publicized in the United States and created significant diplomatic tensions.[13] In all cases, North Korea eventually released the detainees and sent them back to the U.S., usually as a result of a visit by a high-level U.S. envoy such as former Congressman Bill Richardson (for Evan Hunziker), former Senator Robert Torricelli (for Karen Jung-Sook Han), former president Bill Clinton (for Laura Ling and Euna Lee), former president Jimmy Carter (for Aijalon Gomes), Special Envoy for North Korean Human Rights Robert King (for Eddie Jun), and Director of National Intelligence James Clapper (for Kenneth Bae and Matthew Miller).[14] A handful of non-U.S. citizens (including Canadian, Australian, and South Koreans) have also been detained in a similar man-

8. Julia Carrie Wong, *The Three US Citizens Still Detained in North Korea*, THE GUARDIAN (June 20, 2017), https://www.theguardian.com/world/2017/jun/19/north-korea-detainees-us-citizens-otto-warmbier [https://perma.cc/28DX-PWE9].

9. *Id.*

10. *Id.*

11. US Detainees in the DPRK, NAT'L COMM. ON N. KOR., www.ncnk.org/resources/publications/US_detainee_issue_brief.pdf (last updated Oct. 21, 2014) [hereinafter U.S. Detainees] [https://perma.cc/5X7P-KYV6]. Perhaps coincidentally, the gap in detentions from 1999 to 2009 roughly tracks a period of decreased tensions on the peninsula corresponding to the presidencies of Kim Dae Jung (1998–2003) and Roh Moo Hyun (2003-2008); *see* Daniel Wertz, *Inter-Korean Relations*, NAT'L COMM. ON N. KOR., https://www.ncnk.org/resources/briefing-papers/all-briefing-papers/inter-korean-relations (last updated Jan. 2017) [https://perma.cc/K69Y-QVSH].

12. *See* U.S. Detainees.

13. For a summary, see Siobhan O'Grady, *North Korea Loves Accusing Americans of 'Hostile Acts'. That's Because 'Hostile Acts' can be Just About Anything*', FOREIGN POLICY (Jan. 22, 2016), http://foreignpolicy.com/2016/01/22/north-korea-loves-accusing-americans-of-hostile-acts-thats-because-hostile-acts-can-be-just-about-anything/ [https://perma.cc/Y427-PAYY].

14. Rothwell, *supra* note 7; Barbara Demick, *Why did North Korea Release Kenneth Bae and Matthew Todd Miller?*, NEW YORKER (Nov. 12, 2014), http://www.newyorker.com/news/news-desk/north-korea-release-kenneth-bae-matthew-todd-miller [https://perma.cc/L3CQ-5SCY]; Justin Rohrlich, *Exclusive: American Defector Home Safely from North Korea*, NK NEWS (Apr. 11, 2016), https://www.nknews.org/2016/04/exclusive-american-defector-home-safely-from-north-korea/ ("it nearly always takes a high-level U.S. envoy to free Americans who find themselves in North Korea under less-than-ideal circumstances") [https://perma.cc/H4W4-5CEM].

ner during this period, leading to similar tensions between their home countries and the North Korean government.[15]

While these detentions have prompted considerable attention in the U.S. media, especially upon Warmbier's death, they have been the subject of little academic study. Existing commentary has generally approached such detentions from the perspectives of politics and international relations.[16] Commentators have suggested that the detentions are politically motivated, with various political considerations influencing detainee treatment, and changes in the political climate or diplomatic concessions leading to the eventual solution of particular cases.[17] This perspective is certainly valid; political considerations infuse all of the North Korean regime's actions, including those of its court system. However, North Korean detention of U.S. nationals is also a legal act with significant implications as a matter of North Korean law, international law, and even (in some cases) U.S. law. This Article asks whether and how any substantive or procedural aspects of North Korean detention of U.S. citizens violate international legal norms and what would be the possible avenues of recourse where North Korea's actions violate such relevant norms.

Part I briefly explains the international legal framework applied for this Article, and Part II examines the international legal implications of consular law regarding these detentions. Part III analyzes how North Korea's criminal law applies to U.S. detainees, while Part IV reviews international human rights law as applied to the detainees, such as standards for arrest, investigation, trial, and detention. Part V discusses U.S. legislative responses and potential remedies through international mechanisms or within the United States for any such violations. This Article concludes that North Korea has acted contrary to international law in its treatment of U.S. detainees in a number of respects, including through violations of the *Vienna Convention on Consular Relations* (VCCR),[18] the *International Covenant on Civil and Political Rights* (ICCPR),[19] and other treaties and principles of customary law, but that, failing diplomatic solutions, legal recourse is practically limited due to jurisdictional barriers and generally weak (or non-existent) international enforcement mechanisms, thus making it difficult to hold the North Korean government or its state officials accountable.

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15. Associated Press, *U.S. Citizens and Foreigners Detained in North Korea: A List,* USA Today (May 8, 2017), https://www.usatoday.com/story/news/world/2017/05/08/north-korea-us-citizens-and-other-foreigners-detained/101423080/ [https://perma.cc/X65V-C93G].

16. *See* Nash Jenkins, *The U.S. has Called on North Korea to Release a Detained American Student*, Time (Mar. 17, 2016), http://time.com/4262320/otto-warmbier-north-korea-student/ [https://perma.cc/3HA8-L9HB]; Demick, *supra* note 14.

17. Choe & Gladstone, *supra* note 3.

18. Vienna Convention on Consular Relations, Apr. 24, 1963, T.I.A.S No 7502, 596 U.N.T.S. 261 [hereinafter VCCR].

19. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

I. International Law

As a starting point, Article 2(7) of the U.N. Charter prohibits states from "intervene[ing] in matters which are essentially within the domestic jurisdiction of any state."[20] As such, it is worth stressing that North Korea has the sovereign right to exercise criminal jurisdiction over acts taking place within its territory, and to judge and punish violations of its criminal law.[21] However, as detailed below, treaties and customary international law do impose various limitations to this sovereign right to legislate, arrest, and punish.[22]

The analysis undertaken in this Article is based on two fundamental assumptions. First, it assumes that detainees have been arrested while in North Korea. Although North Korea has in the recent past abducted its own and foreign citizens from neighboring countries,[23] it does not seem to have done so with the U.S. nationals discussed in this paper (although there is some debate as to whether Laura Ling and Euna Lee were actually captured on Chinese or North Korean territory).[24] Needless to say, additional grounds potentially exist for finding violations of international law if abductions from outside the country were involved. According to basic sovereignty norms, abductions of individuals from a foreign nation for

20. U.N. Charter, art. 2, ¶ 7, Oct. 24, 1045, 1 U.N.T.S 16.

21. MARTIN DIXON, TEXTBOOK ON INTERNATIONAL LAW 149–50 (7th ed. 2013) (" . . . it is a fundamental rule of international law that the jurisdiction of a state within its own territory is complete and absolute. . . . This is a basic attribute of sovereignty and flows from the very existence of the state as an international legal person.").

22. *Id.* at 150.

23. Since the end of the war, 3835 South Korean citizens have been abducted by North Korea, according to the Institute for National Unification, most of whom were fishermen taken at sea. Fred Ross III & Jae Chun Won, *North Korean Kidnappers: A Response to Illegal Abductions by the Democratic People's Republic of Korea Before the Working Group on Enforced and Involuntary Disappearances*, 9 REGENT J. INT'L L. 277, 282 (2013); *see* U.N. Human Rights Council, Comm. of Inquiry on Human Rights in the DPRK, Rep. of the Detailed Findings of the Comm. of Inquiry on Human Rights in the DPRK, ¶¶ 924–82, A/HRC/25/CRP.1 (Feb. 7, 2014) [hereinafter, 'COI Report'] (finding that since 1950, the DPRK government has systematically kidnapped nationals from South Korea, Japan, China, Thailand, Europe and the Middle East).

24. Peter Foster, *US Reporters 'Dragged Across North Korean Border' in Arrest*, TELEGRAPH (Sept. 2, 2009), http://www.telegraph.co.uk/news/worldnews/asia/northkorea/6125752/US-reporters-dragged-across-North-Korean-border-in-arrest.html (reporting claims that "We were firmly back inside China when the soldiers apprehended us") [https://perma.cc/2ZRT-PLFJ]. It is also worth noting that Kim Dong Shik was abducted by North Korea from well within China; he was a U.S. permanent resident but not a citizen. Andrew Wolman, *Han Kim and North Korean Accountability for Torture and Unlawful Killing*, 10 J.E. ASIAN & INT'L. L. 273, 275 (2017) ("On January 16, 2000, Pastor Kim was abducted by North Korean agents while leaving a restaurant in Yanji, China"). There is well-publicized suspicion of North Korean abduction of a U.S. citizen while in China in 2004, but reports that the individual is living inside North Korea remain unconfirmed. See, e.g., K.J. Kwon & Ben Westcott, *Did North Korea Abduct Missing U.S. Student David Sneddon*, CNN (Sept. 2, 2016), http://edition.cnn.com/2016/09/02/asia/david-sneddon-north-korea/ [https://perma.cc/4RHJ-N9NF]. This case has recently been the subject of renewed investigation by the Trump administration. Wan-Jun Yun, *U.S. Finds Facts on N. Korea's Alleged Kidnapping of College Student*, DONG-A ILBO (Feb. 7, 2017), http://english.donga.com/List/3/03/26/842426/1.

whatever purpose constitute violations of international law.[25]

Second, it assumes that North Korea and the United States are not currently in a state of armed conflict, and, therefore, the Geneva Conventions (and international humanitarian law in general) are not applicable. While this assumption may appear obvious on its face given the absence of fighting between the two parties, it is complicated by the fact that the Korean War ended in an armistice rather than an actual peace agreement.[26] It is often said that the U.S. and North Korea are still at war.[27] One scholar has characterized the situation as a *status mixtus* where peacetime laws apply except when there are actual armed hostilities.[28] In August 2016, North Korean authorities declared that Warmbier and Kim Dong-chul would be deemed prisoners of war due to the imposition of U.S. sanctions, which they consider tantamount to a declaration of war.[29] Former U.S. Ambassador to the UN Bill Richardson later accepted this characterization and claimed that North Korea was responsible for Warmbier's death under the Geneva Conventions.[30] These statements should be seen as more rhetorical than legal, however. While the Geneva Conventions by their terms are applicable in times of "armed conflict" or "declared war,"[31]

25. *See* Matteo M. Winkler, *When "Extraordinary" Means Illegal: International Law and European Reaction to the United States Rendition Program*, 30 LOY. L.A. INT'L & COMP. L. REV. 33, 48 (2008); *see also O'calan v. Turkey*, 2005-IV Eur. Ct. H.R. 131 § 93 (May 15, 2005); S.C. Res. 138 (June 23, 1960); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 432(2) cmt. b (AM. LAW INST. 1987). For an opposing opinion, *see Alvarez-Machain v. United States*, 331 F.3d 604, 619 (June 18, 2002) (finding no clear, binding obligation in customary international law to refrain from transborder kidnapping).

26. Agreement Between the Commander-In-Chief, United Nations Command, on the One Hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the Other Hand, Concerning a Military Armistice in Korea, July 27, 1953, 4 U.S.T. 234.

27. See, e.g., *Trump: 'Sad Day' for North Korea if Military Attacks*, AL JAZEERA (Sept. 8, 2017), http://www.aljazeera.com/news/2017/09/trump-sad-day-north-korea-military-strikes-170907225959147.html [https://perma.cc/NH77-LPR5]; Tom Phillips, *U.S. Must Stop North Korea Threats, says China, as Kim Jon-Un Aims for Military 'Eqilibrium'*, GUARDIAN (Sept. 16, 2017), https://www.theguardian.com/world/2017/sep/16/us-must-stop-north-korea-threats-says-china-kim-jong-un-military-equilibrium [https://perma.cc/MU83-H2U5]; Jesse Johnson, *North Korea says U.S. has 'Declared War', warns it may Shoot Down Warplanes as Risk of Escalation Grows*, JAPAN TIMES (Sept. 26, 2017), https://www.japantimes.co.jp/news/2017/09/26/asia-pacific/north-korea-says-u-s-declared-war-warns-shoot-american-bombers/ [https://perma.cc/56AU-BTLK].

28. Seunghyun Sally Nam, *War on the Korean Peninsula? Application of Jus in Bello in the Cheonan and Yeonpyeong Island Attacks*, 8 U. PA. E. ASIA L. REV. 43, 80 (2013).

29. Michael Edison Hayden and Bob Woodruff, *North Korea Tells ABC News: 'No Exception' to US Detainees Being Subject to Wartime Laws*, ABC NEWS (Aug. 3, 2016 3:47 PM), http://abcnews.go.com/International/north-korea-warns-us-prisoners-dealt-wartime-laws/story?id=41092793 [https://perma.cc/22E3-SH96].

30. Bill Richardson, *America's Hostage Negotiation Strategy is Broken*, WASH. POST (June 22, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/06/22/bill-richardson-americas-hostage-negotiation-strategy-is-broken/ [http://perma.cc/VXQ4-AG4K].

31. Geneva Convention Relative to the Treatment of Prisoners of War art. 2, 75 U.N.T.S. 135, Aug. 12, 1949.

this latter condition is now seen as outdated by commentators.[32] Thus, the question remains of whether an armed conflict exists. According to a definition proposed by the International Law Association based on its reading of various other authorities, an "armed conflict" requires, at a minimum, organized armed groups "[e]ngaged in fighting of some intensity."[33] By this definition, there is currently no armed conflict between the U.S. and North Korea.

II. Consular Access

Whenever a foreign national is arrested, Article 36 of the VCCR requires that consular officials be given access to the detained individual, in order to "correspond with him and to arrange for his legal representation."[34] Both North Korea and the United States are parties to the VCCR, and its provisions on consular access represent longstanding customary international law.[35] Consular access is sometimes also treated as a human right,[36] and is explicitly protected in the *International Convention for the Protection of All Persons from Enforced Disappearance* (which neither the United States nor North Korea has ratified).[37] The *UN Standard Minimum Rules for the Treatment of Prisoners* and the *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* also contain the principle of consular access for foreign prisoners.[38] As the

32. Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L.Q. 283, 304 (1987) "[i]t is the factual concept of armed conflict rather than the technical concept of war which makes [the rules of war] applicable."; JEAN S. PICTET, THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 32 (1952) ("The Convention becomes applicable as from the actual opening of hostilities.").

33. INT'L LAW ASSOC., FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010)

34. Vienna Convention on Consular Relations art. 36(c), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

35. Alyssa L. Enzor, *Ignoring the Obligation to Provide Consular Notification: How This Nation's Approach to Treaties Deprives Criminal Defendants of Procedural Safeguards*, 3 ALA. C.R. & C.L.L. REV. 123, 129 (2013) (VCCR "is widely considered to be a codification of customary international law"): Mark Warren, *Rendered Meaningless? Security Detentions and the Erosion of Consular Access Rights*, 38 S. ILL. U. L.J. 27, 29 (2013) ("International law has long recognized the customary right of consulates to assist and protect nationals detained abroad").

36. See, e.g., The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, Inter-Am. Ct. H.R. (ser. A.) No. 16 (Oct. 1, 1999), p. 35; Christina M. Cerna, *The Right to Consular Notification As A Human Right*, 31 SUFFOLK TRANSNAT'L L. REV. 419, 422–23 (2008).

37. International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 14 IHRR 582, art. 17(2)(d) ("any person deprived of liberty shall be authorized . . . if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law.").

38. Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, E.S.C. Res. 663C, Annex 1, at 11, U.N. ESCOR, 24th Sess., Supp. No. 1, U.N. Doc. A/CONF/611 (July 31, 1957), amended by E.S.C. Res. 2076, at 35, U.N. ESCOR, 32nd Sess., Supp. No. 1, U.N. Doc. E/5988 (May 13, 1977), art. 38(2); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, U.N. Doc. A/RES/43/173 (Dec. 9, 1988), Princ. 16(2).

United States does not have an embassy in North Korea or diplomatic ties with the country, Sweden acts as a protecting power for the United States, including with respect to consular assistance.[39] With respect to U.S. nationals detained to date, North Korea has, in general, eventually allowed Swedish officials to visit the detainee, and to attend any trial.[40] There have, however, sometimes been questions as to whether North Korea has permitted the initial consular visit promptly enough, and has allowed subsequent visits with sufficient frequency.

The promptness of the first consular visit has been a particular bone of contention in several cases. For example, it took over a month for Merrill Newman to receive access to Swedish officials, despite regular requests.[41] Matthew Miller had to wait at least seven weeks for consular access.[42] Laura Ling and Euna Lee also had to wait over a month for consular access.[43] These relatively long delays arguably violate international law. According to the VCCR, consular officials must be notified of the arrest of a foreign national "without delay," and consular officials, in turn, have the right to communicate with the detainee "without delay."[44] The International Court of Justice has interpreted the phrase "without delay" as not necessarily meaning "immediately upon arrest," but rather signifying that authorities must inform arrested individuals of their consular rights "as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national."[45] The Inter-American Court of Human Rights has interpreted "without delay" to require that advice about consular access be given at the time of arrest, or at least prior to interrogation.[46] In practice, states have insisted on access

39. Sweden is a protecting power for Australia, Canada, and the U.S. Magnus Andersson and Jinsun Bae, *Sweden's Engagement with the Democratic People's Republic of Korea*, 11 N. KOR. REV. 42, 52.

40. KOR. INST. NAT'L UNIFICATION, WHITE PAPER ON HUMAN RIGHTS IN NORTH KOREA 2015, 157 (2016) [hereinafter KINU WHITE PAPER 2015] (citing the cases of Robert Park, Kenneth Bae, Jeon Yong-Soo, Laura Ling, Euna Lee and Aijalon Gomes).

41. Dana Feldman, *No Word from American Detained in North Korea, Son Says*, NBC NEWS (Nov. 22, 2013), http://www.nbcnews.com/news/other/no-word-american-detained-north-korea-son-says-f2D11641595 [https://perma.cc/9M68-AWZZ]; AFP, *US Calls for 'Immediate Release' of 85-Year Old Tourist Held in North Korea*, TELEGRAPH (Dec. 1, 2013), http://www.telegraph.co.uk/news/worldnews/asia/northkorea/10486576/US-calls-for-immediate-release-of-85-year-old-tourist-held-in-North-Korea.html [https://perma.cc/FW7F-MBZ2].

42. Steven Borowiec, *North Korea Says it Will Put 2 Americans on Trial for 'Hostile Acts'*, L.A. TIMES (June 30, 2014), http://www.latimes.com/world/asia/la-fg-north-korea-indict-20140629-story.html [https://perma.cc/Y4PZ-T9WE].

43. Chris Green, *43 Days and Counting*, DAILY NK (May 12, 2009). http://www.dailynk.com/english/m/read.php?cataId=NK00100&num=4899 [https://perma.cc/Y3GR-XXYF].

44. VCCR, *supra* note 18, art. 36(1)(b).

45. Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. Rep. 12, ¶ 88 (Mar. 31).

46. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No. 16, 64 (Oct. 1, 1999).

in a matter of days,[47] and have tended to specify consular notification limits of between two and four days into their bilateral consular conventions.[48] Judging by these guidelines, North Korea has, in some cases, violated the VCCR by denying prompt consular access.[49]

The frequency of consular visits has been another recurring issue. During Warmbier's eighteen-month detention, he was reportedly in contact only once with the Swedish Embassy, in the first week of March before he went to trial.[50] In addition, despite requests from the embassy, North Korea did not allow a follow-up consular visit to Kenneth Bae for almost four months.[51] Laura Ling and Euna Lee were denied visits for at least forty-three days, which, at the time, the U.S. claimed was contrary to the VCCR.[52] While the VCCR does not specify how frequently visits must be allowed, it does specify that "consular officers shall be free to communicate with nationals of the sending State and to have access to them."[53] Thus, the question is whether such infrequent visits qualify as free access. Although there is little jurisprudential guidance on this issue, a number of bilateral consular conventions specify that intervals between visits should be no longer than one or two months.[54] Although Principle 15 of the *U.N. Body of Principles for the Protection of All Persons Under Any Form of Deten-*

47. *See Britain Slams Yugoslavia in Hostage Crisis*, RADIO FREE EUROPE RADIO LIBERTY (Aug. 25, 2008), https://www.rferl.org/a/1142225.html (arguing that 10-day delay in consular access was inaccessible) [https://perma.cc/9SPP-TEGV]; *see Ottawa Demands Access to Held Canadians*, UPI (Aug. 4, 2000), https://www.upi.com/Archives/2000/08/04/Ottawa-demands-access-to-held-Canadians/3844965361600/?spt=SU (stressing the need for immediate consular access after three days) [https://perma.cc/6ZBW-6MTB]. For US decisions, *see*, *e.g.*, United States v. Miranda 65 F. Supp. 2d 1002, 1005 (D. Minn. 1999) (two-day notification delay violates VCCR); United States v. Santos, 235 F.3d 1105, 1107 (8th Cir. 2000) (four-day delay violated VCCR).

48. *See, e.g.*, Consular Convention Between the People's Republic of China and the the United States of America, China-U.S., art. 35, Sept. 17, 1980, 33 U.S.T. 2973 (four days).

49. It must be noted, however, that the U.S. does not have an entirely pristine record of respecting the art. 36 prompt access obligations, either; this could diminish the likelihood of foreign countries respecting those obligations vis-à-vis U.S. nationals. *See* Sarah H. Lee, *Strangers in A Strange Land: The Threat to Consular Rights of Americans Abroad After Medellin v. Texas*, 70 OHIO ST. L.J. 1519, 1542 (2009); *see* Cindy Galway Buys, *Reflections on the 50th Anniversary of the Vienna Convention on Consular Relations*, 38 S. ILL. U. L.J. 57, 64 (2013) ("Unfortunately, law enforcement authorities in the United States have not always provided consular notification and access as required").

50. Rick Gladstone, *Few Consular Visits for American Held in North*, N.Y. TIMES (Aug. 30, 2016), https://www.nytimes.com/2016/08/31/world/asia/north-korea-otto-warmbier.html [https://perma.cc/LA2W-VG3J].

51. *North Korea Allows Consular Access to Bae,* KOREA TIMES (Aug. 13, 2014), http://www.koreatimes.co.kr/www/news/nation/2016/02/116_162871.html [https://perma.cc/WG6Q-5238].

52. Green, *supra* note 43.

53. VCCR, *supra* note 18, art. 36(1)(a).

54. *See*, *e.g.*, Agreement on Consular Relations between the Government of New Zealand and the People's Republic of China, China-NZ, art. 11, Oct. 26, 2003 (one month); Consular Agreement between the Republic of Korea and the Russian Federation, Russ.-S. Kor., art. 39(3), Mar. 18, 1992 (two months); Consular Convention between the United States of American and the Hungarian People's Republic, Hung.-U.S., art. 41(4), July 7, 1972, 24 U.S.T. 1141 (one month).

tion or Imprisonment does not specifically deal with consular access, it states that barring exceptional circumstances, "communication of the detained or imprisoned person with the outside world . . . shall not be denied for more than a matter of days."[55] If these intervals are taken as reasonable limits, then one can plausibly argue that North Korea's reluctance to allow more frequent access to Bae and others constitutes a denial of "free access" in contravention of its VCCR obligations.

Interestingly, North Korea justified denying Canadian consular access to a formerly detained Canadian (Hyeon-Soo Lim) during the investigative phase of the trial, by claiming that doing so was justified under North Korea's domestic law.[56] North Korea argued via its state-owned KCNA news service that VCCR art. 36(2) makes consular access obligations subject to controlling domestic law.[57] This is an ungrounded but not an unprecedented interpretation; the same argument was also made in a similar context by Argentine military officials to justify the incommunicado detention of U.S. nationals in 1976.[58] U.S. officials rejected the argument at the time, however, as another part of art. 36(2) states that "the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended."[59] In fact, it would defeat the purpose of the VCCR (as well as run counter to its plain language) to subjugate access to a country's domestic laws.[60]

III. North Korean Criminal Law as Applied to U.S. Detainees

While most of the earlier U.S. detainees were charged with illegal entry into North Korea, packaged with some variation of crimes against the state, the four most recently detained U.S. citizens were charged with hostile acts against the state or espionage during their stay in North Korea.[61] For example journalists Eunha Lee and Laura Ling were sentenced for "aggression against the Korean nation" and illegal border crossing, the former being a far more serious charge.[62] Warmbier was charged with con-

55. G.A. Res. 43/173, *supra* note 38, at principle 15. Extended incommunicado detention can also violate article 10 of the ICCPR. *See* Arutyunyan v. Uzbekistan, Comm. 917/2000, U.N. Doc. A/59/40, Vol. II, at 96 (HRC 2004); Arzuaga Gilboa v. Uruguay, Communication No. 147/1983, U.N. Doc. CCPR/C/OP/2 at 176 (1990) (15 day incommunicado detention violates article 10(1)).

56. J.H. Ahn, *North Korea Warns Canada not to Interfere with Pastor's Sentence*, NK NEWS (Dec. 23, 2015), https://www.nknews.org/2015/12/n-korea-warns-canada-not-to-interfere-with-pastors-sentence/ [https://perma.cc/9PJJ-9FN2].

57. See VCCR, *supra* note 18, art. 36(2) ("rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State").

58. Warren, *supra* note 35, at 34–35.

59. VCCR, *supra* note 18, art. 36(2).

60. *See* Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.").

61. Rothwell, *supra* note 7.

62. The Criminal Law of the Democratic People's Republic of Korea, 2009, arts. 69, 233 [hereinafter *DPRK Criminal Law (2009)*].

spiracy to subvert the state, while Kim Dong-chul was charged for espionage as well as conspiracy to subvert the state.[63] Their sentences ranged between ten and fifteen years.[64]

North Korean criminal law justifies these charges and harsh sentences. Consisting of 290 articles, North Korea's Criminal Law was extensively revised and publicly disclosed in 2004, with several subsequent amendments to the law since.[65] The Criminal Law states that it applies not only to its citizens who commit offenses in and outside of North Korean territory, but also to foreigners who commit offenses within its territory.[66] Offenses are defined as punishable, dangerous acts violating state sovereignty, the socialist system, and law and order, either intentionally or negligently.[67]

The offenses usually relevant to foreign detainees mainly fall within the categories of "crimes against the state" or "crimes against the people." "Crimes against the state" include: conspiracy to subvert the state, terrorism, anti-state propaganda and agitation, treason against the homeland, espionage, sabotage, inducement of armed intervention and severance of diplomatic relationship, and aggression against foreigners.[68] "Crimes against the people" include: treason against the nation, suppression of the national liberation struggle, and aggression against the nation.[69] As related to foreigners, "crimes against the people" would apply to any foreign national who "suppresses the national liberation struggle . . . or . . . reunification," or with hostile intentions "violates the personal liberty or property of a Korean national . . . abroad" or "causes national dissension."[70]

Most of the provisions under "crimes against the state" apply generally to anyone without regard to their citizenship or nationality. However, espionage applies specifically to any non-citizen "who detects, collects or transmits secrets with the intention of espionage against the Republic,"[71] while "treason against the homeland" is reserved for North Korean citizens specifically.[72] "Inducement of armed intervention and severance of diplomatic relationship" applies to foreign nationals only.[73] A number of terms

63. Rothwell, *supra* note 7.

64. Tiffany Ap & Brian Todd, *North Korea Sentences U.S. Student to 15 Years Hard Labor*, CNN (Mar. 16, 2016), https://www.cnn.com/2016/03/16/asia/north-korea-warmbier-sentenced/index.html [https://perma.cc/H8XV-RXSB]; Choe Sang-Hun, *North Korea Sentences American to 10 Years for Spying, Reports Say*, N.Y. TIMES, Apr. 29, 2016, https://www.nytimes.com/2016/04/30/world/asia/north-korea-kim-dong-chul-sentence.html [https://perma.cc/Z2SM-JSND].

65. *DPRK Criminal Law (2009)*, *supra* note 62

66. *Id.* art. 8.

67. *Id.* art. 10.

68. *Id.* arts. 60–67. Some of the translated terms are borrowed from the English translation of the DPRK Criminal Law.

69. *Id.* arts. 68, 69, 70.

70. *Id.* arts. 69, 70.

71. *Id.* art. 64.

72. *Id.* arts. 62, 67.

73. *Id.* art. 66.

are both undefined and overly broad, such as "anti-state purposes," "conspiracy to subvert," "propaganda and agitation," and "sabotage." These terms allow for broad interpretation by the North Korean authorities and thus increase the risk of foreigners unwittingly committing a criminal offense.

Historically, North Korean authorities have found additional subversive intent beyond the face of what appears to be a general crime, thus adding an additional layer of anti-state criminality, resulting in a cumulative effect of a plurality of offenses for a single act. As Hahm Pyong-choon explains the history of criminal law under North Korean socialist legality:

> A simple theft of state property easily merges into counter-revolutionary crimes . . . Every North Korean writer on the subject of law . . . emphasize[s] the interrelatedness of the ordinary and anti-state crimes [and] point out that anti-state crimes are often committed under the guise of ordinary crimes . . . . The prosecution and court personnel are constantly exhorted to look beyond and beneath the visible facts of the case to uncover the more sinister and reprehensible machinations of counterrevolutionary elements.[74]

Thus, the North Korean government can transform what may be perceived as a minor transgression in the first instance (e.g., theft of a government banner, crossing a border, leaving a bible) into various serious crimes of political rebellion.

As for punishment, the crime of "conspiracy to subvert the state" carries a sentence of at least five years of reform through labor, while punishment for a "grave offense" of this crime can be life-term labor, or the death penalty and confiscation of property.[75] For espionage, the sentence is reform through labor for more than five years and less than ten years, with more than ten years for a grave offense.[76] Warmbier was sentenced fifteen years for conspiracy to subvert the state,[77] while Kim Dong-chul was sentenced ten years for espionage and conspiracy to subvert the state.[78] Ling and Lee were sentenced twelve years total each (between five and ten years for "aggression against the Korean nation," or more than ten for a grave offense) and illegal border crossing (punishment of less than five years).[79]

When the accused is charged with more than one crime, the Criminal Law provides a formula that takes the heaviest penalty available and adds half of the remaining penalties; the total combined period for reform by

74. Hahm Pyong Choon, *Ideology and Criminal Law in North Korea*, 17 AM. J. COMP. L. 77, 82 (1969).

75. DPRK Criminal Law (2009), *supra* note 62, art. 59.

76. *Id.* art. 63.

77. 北, 억류 美 대학생에게 노동교화형 15년 선고 http://nk.chosun.com/bbs/list.html?table=bbs_16&idxno=7558&page=3&total=2451&sc_area=&sc_word= (Mar. 16, 2016) [https://perma.cc/RS8V-24A9].

78. Time Staff, *These Three Americans Are Still Imprisoned In North Korea*, TIME (June 14, 2017), http://news.donga.com/Main/3/all/20160429/77855825/1 (April 29, 2016) [https://perma.cc/2ESA-G8T8].

79. DPRK Criminal Law (2009), *supra* note 62, arts. 45, 233.

labor may not exceed fifteen years.[80] However, in the event of multiple "extraordinarily grave" crimes or for those "not willing to be reformed," an unlimited term of reform through labor or capital punishment applies.[81] (In the case of Kim Dong-chul, the North Korean court stated that it considered his advanced age in reducing his sentence to ten years despite the severity of his crime.)[82]

The threshold for what constitutes a grave offense is not stated within the law, and it is unclear whether the courts have an internal standard to follow in this respect, or whether this is a subjective determination on a case-by-case basis. This ambiguity is also reflected in the Criminal Law Addendum adopted in 2007, which relates to general crimes as opposed to special crimes (of the anti-state and anti-people varieties).[83] A brief law of twenty-three articles, it provides for additional penalties for "extremely grave" commissions of general crimes already addressed in the Criminal Law. The Addendum essentially negates the principle of legality provided by the 2004 amendment of the Criminal Law because it stands as a separate law stipulating harsher punishments such as the death penalty for crimes deemed "extraordinarily grave."[84] Disconcertingly, there is not a clear threshold for what is deemed a grave or extraordinarily grave offense.[85] While the Addendum itself does not affect the current detentions, its existence signifies the prosecutorial and courts' wide discretion in deciding what rises to the level of a grave or extraordinarily grave crime without the corresponding transparency for the public and the accused.

In terms of who stands trial for what offenses, there are inconsistent applications depending on the type of crime committed and the nationality of the accused. Foreign nationals usually have a trial. North Koreans accused of crimes may or may not get a trial depending on the investigative source and nature of the crime. If the investigative source is the Ministry of State Security or the inspection group checking on anti-socialist behav-

80. *Id.* arts. 45, 30.

81. *Id.* art. 30.

82. Tiffany Ap & Chandrika Narayan, *North Korea Sentences American to 10 Years Hard Labor*, CNN, https://www.cnn.com/2016/04/29/asia/north-korea-american-hard-labor/index.html (May 2, 2016) [https://perma.cc/9S7B-8BHH].

83. DRPK Criminal Law (2009), *supra* note 62; *see* Han Myung Sub, *Main contents and problems of North Korean human rights laws* in REPORT ON HUMAN RIGHTS IN NORTH KOREA 55–56 (Korean Bar Association and International Bar Association, 2014) (discussing general crimes include vandalism of military property; plundering, stealing, or vandalizing state property; currency counterfeiting; smuggling or trafficking of drugs, precious metals, or national resources; possession of drugs or their raw materials; selling strategic reserve supplies; evading foreign currency; violating construction law; illegally cooperating with a person living abroad; escape from prison; delinquent acts, kidnapping, rape, stealing personal property; condoning crimes or interfering with solving a case; illegally operating a business).

84. 박정원. "북한의 체제수호를 위한 규범통제." *통일문제연구*22.1 (2010) [Bak Jeong-won, *A Study on the Normative Control for the Security of Kim Jong-il's Regime: with Emphasis on the Addenda of the North Korean Criminal Law in 2007,* 22 UNIFICATION ISSUES RES, 225–59 (2010); Han Myung Sub, *supra* note 83, at 54–56.

85. Black's Law Dictionary explains legality as "The principle that a person may not be prosecuted under a criminal law that has not been previously published." BLACK'S LAW DICTIONARY 1032 (10th ed. 2014).

ior (known as "*grouppa*") and finds the suspect to have committed a political crime, defectors claim that the prosecutorial office of the State Security Agency can send the person to prison without a trial.[86] The application of the criminal trial procedure for non-citizens accused of anti-state or anti-people crimes is a significant departure from this domestic standard. These procedural considerations will be addressed in a subsequent section on the criminal trial process with respect to international human rights law.

Meanwhile, North Korean officials and citizens are required by law to report any planning or commission of a crime, including those by foreigners, lest they themselves be charged with failing to report or not preventing a criminal act.[87] Before 2012, the Criminal Law stipulated that those failing to report a crime or its planning were also criminally liable, but the 2012 amendment added that failing to report a crime also constituted crimes against both the state and people, punishable by an imprisonment term of less than three years.[88] The amendment also added monetary penalties as punishment categories for crimes against the state or the people, though penalty amounts are not stipulated in the provisions themselves.[89] This illustrates a tightening of surveillance among officials, citizens, and peers; a system where *not* informing against others, including foreigners, becomes an anti-state crime in itself. This system thus pressures one to inform against others lest he or she gets charged with an anti-state or anti-people crime, without the guarantee of a trial.

IV. International Human Rights Law as Applied to U.S. Detainees

North Korea is obliged to abide by international human rights law in its treatment of arrested U.S. nationals. Specifically, North Korea is bound by customary international human rights law[90] as well as the six human rights treaties that it has acceded to, namely the ICCPR, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of all Forms of Discrimination Against Women*, the *Convention on the Rights of the Child*, the *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography,* and, most recently in 2016, the *Convention on the Rights of Persons with*

86. Kyu Chang Lee & Gwang Jin Chung, "The North Korean Criminal Trial System: Characteristics and Actual Practice, KINU Research Abstract 11-05, 2.

87. Hyeongbeob [Criminal Law], Dec. 19, 1974, amended by Decree No. 2387, May 14, 2012, arts. 25 (N. Kor.)

88. DPRK Criminal Law (2009), *supra* note 62, arts. 25, 72.

89. *Id.* arts. 27, 28.

90. According to many scholars, most if not all of the norms contained in the Universal Declaration of Human Rights have by now reached the status of customary international law. *See, e.g.*, THEODORE MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 79–135 (Oxford University Press 1989); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 17 (1982).

Disabilities.[91] North Korea had tried to withdraw from the ICCPR in 1997 but the U.N. Human Rights Committee, the ICCPR treaty body, denied this attempt; subsequently, North Korea resumed cooperation with the Committee by submitting its state party report in 2000.[92] This analysis focuses on the ICCPR as the most relevant set of international human rights law norms for evaluating North Korea's actions.

Publicly disclosed in 2004 and extensively revised during 2011–2012, the Criminal Procedure Code consists of 438 provisions.[93] The Criminal Procedure Code states that human rights are fully guaranteed in the handling of criminal cases,[94] but this is understood to be in the context of the socialist goals of the nation. Certain procedural safeguards appear to be in place textually, but their application is inconsistent, especially if the subject is suspected of anti-state crimes.[95] The analysis below examines additional aspects of the North Korean criminal procedural laws and practices in relation to the legal principles of the ICCPR, other international legal instruments, and customary practices. This section broadly analyzes potential human rights issues that are likely to arise in cases of foreign detainees. These issues include whether any aspects of the arrest, investigation, trial procedures, sentencing, and length and conditions of detention, respectively, violate human rights law, and whether North Korean authorities have committed torture.

A. Arrest

The first question that arises is whether North Korea's arrests of U.S. nationals violate human rights law. Where it is "clearly impossible to invoke any legal basis justifying the deprivation of liberty," an arrest is

91. U.N. Hum. Rts. Comm., Ratification of 18 International Human Rights Treaties: Status of Ratification Interactive Dashboard, http://indicators.ohchr.org/ (accessed June 14, 2016) [https://perma.cc/NEV6-QYKC]; Roberta Cohen, *Human Rights in North Korea: Addressing the Challenges*, 22 INT'L J. KOREAN UNIFICATION STUD. 29, 31 (2013); U.N. Division for Soc. Pol'y & Dev. Disability, *DPR of Korea Ratifies CRPD, Total Ratifications 172*, (Dec. 12, 2016); https://www.un.org/development/desa/disabilities/news/news/democratic-peoples-republic-of-korea-ratifies-crpd-total-ratifications-172.html [https://perma.cc/EAQ7-EGGS]. In 1997, North Korea sought to withdraw from the ICCPR and but was informed by the Human Rights Committee that it could not do so because the ICCPR does not contain a withdrawal provision. North Korea apparently accepted that outcome in 2000, when it submitted its second periodic report to the Human Rights Committee and participated in the ensuing examination. Laurence Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634, 639 (Duncan Hollis, ed., 2012).

92. U.N. Hum. Rts. Committee, Second Periodic Report of the Democratic People's Republic of Korea on its implementation of the International Covenant on Civil and Political Rights, U.S. Doc. CCPR/C/PRK/2000/2 (May 4, 2000).

93. Criminal Procedure Law of the Democratic People's Republic of Korea (2012, as amended by Directive 2387 of the Standing Committee of the Supreme People's Assembly) ("DPRK Criminal Procedure Law").

94. DPRK Criminal Procedure Law (2012), adopted by Directive No. 2387 by the Standing Committee of the Supreme People's Assembly, art. 6.

95. Tae-Ung Baik, *Nonjudicial Punishments of Political Offenses in North Korea - With a Focus on* Kwanriso, 64 AM. J. COMP. L. 891, 929 (2016).

considered to be "arbitrary," thus in violation of Article 9 of the ICCPR.[96] So far, this seems a difficult argument to make in most cases of U.S. detainees. Illegal entry and proselytization are prohibited under North Korean law. Even in the case of more political offenses—such as Merrill Newman's attempt to contact former Korean War guerillas or Otto Warmbier's alleged theft of a propaganda banner—the domestic legal basis for the arrests seems to exist, at least arguably. Nevertheless, in some cases it appears that a particularly harsh criminal charge has been arbitrarily applied to U.S. detainees, given their alleged actions. Euna Lee and Laura Ling, for example, were convicted of "hostility to the North Korean people" when their actions could not reasonably be said to harm "the person or property of North Koreans staying or visiting a foreign country," as specified in Article 69 of the then 2009 North Korean criminal code.[97] However, their actions may have been judged according to a broad interpretation of the title of the provision itself: "Aggression against the Korean nation." As explained earlier, North Korean authorities may read more sinister political intent into simple offenses.

Even if there is a domestic legal basis for the arrest, however, such an arrest would be considered arbitrary if the reasons for that arrest are inconsistent with international human rights law.[98] This would be most problematic in cases of U.S. nationals being arrested for proselytization and political crimes. Article 18 of the ICCPR states, "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to . . . manifest his religion or belief in worship, observance, practice and teaching."[99] This Article has generally been held to protect the right to peacefully proselytize.[100] Meanwhile, Article 19 protects the right to freedom of expression, including the freedom "to seek, receive and impart information and ideas of all kinds."[101] This would protect the right to make critical remarks of the North Korean government. It is important to note that states are obliged to respect the rights of all individuals within their territory, including foreign nationals.[102] Thus, if an individual is arrested for exercising his or her freedom of religion or speech, then that arrest and subsequent detention would violate Article 9

96. ICCPR, *supra* note 19, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").

97. KINU WHITE PAPER 2015, *supra* note 35, at 158–59.

98. U.N. Office of the High Commissioner of Hum. Rts., Working Group on Arbitrary Detention, http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx [https://perma.cc/X9ZL-U94M].

99. ICCPR, *supra* note 19, art. 18(1).

100. John Witte, Jr. & M. Christian Green, *Religious Freedom, Democracy, and International Human Rights*, 23 EMORY INT'L L. REV. 583, 596 (2009) ("The ICCPR thus protects the general right to proselytize for the sake of peaceably seeking the conversion of another.").

101. ICCPR *supra* note 19, art. 19(2).

102. *Id.*, art. 2(1).

of the ICCPR.[103]

B. Investigation and Preliminary Examination

Article 14 of the ICCPR sets out the international legal principles governing criminal procedure, such as the presumption of innocence until proven guilty, the ability to prepare a defense with the assistance of counsel, to be tried without delay, and not to be compelled to testify against oneself or confess guilt.[104] In North Korea, once deemed suspected of a crime, a suspect is detained for questioning during further investigation and the preliminary examination. The primary concern during this stage is that the Criminal Procedure Code allows interrogation without guaranteeing a suspect's right against self-incrimination.[105] The Criminal Procedure Code does not explicitly provide for the right to remain silent or the presumption of innocence. The Criminal Procedure Code provides that examiners cannot use forceful methods to extract a confession.[106] However, the interrogative culture pressures suspects to answer any and all questions; given the intensity and length of the interrogation, this often leading to coerced confessions and admissions of guilt. This type of coercion was disclosed in the memoirs and video clips of Laura Ling and Euna Lee, Kenneth Bae, Otto Warmbier, and Kim Dong-chul.[107] Intensive interrogation methods are likely to result in duress and pressure to admit to what the examiners want to hear in order to end the ordeal. This raises the question of whether harsh interrogation rises to the level of torture or cruel, inhuman, and degrading punishment. During the interrogation, the assistance of counsel or any type of personal advocate is also not provided.

During the preliminary examination, a suspect cannot be detained for more than a total of five months and twenty days, or for more than one and a half months for "crimes punishable with labor training."[108] Once the case is fully examined, and enough evidence is acquired, the investigator transfers the case to the prosecutor who must decide whether to prosecute

103. *Id.*, art. 9(1) ("No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").

104. *Id.*, arts. 14(2), 14(3).

105. Baik, *supra* note 95, at 896.

106. DPRK Criminal Procedure Law (2012), *supra* note 93, art. 166.

107. Laura Ling & Lisa Ling, Somewhere Inside: One Sister's Captivity in North Korea and the Other's Fight to Bring Her Home, 122–28 (William Morrow 2010); Euna Lee & Lisa Dickey, The World Is Bigger Now: An American Journalist's Release form Captivity in North Korea, 180-82 (Broadway Books 2010); Judy Kwon & Josh Levs, *Kenneth Bae Urges U.S. to Help Secure His Release in North Korea*, CNN (Jan. 21, 2014, 7:06 AM), https://www.cnn.com/2014/01/20/world/asia/north-korea-kenneth-bae/index.html; Full Press Conference with U.S. Student Otto Frederick Warmbier in North Korea, Youtube.com (Mar. 1, 2016), https://www.youtube.com/watch?v=DCZvgY1NGXU [https://perma.cc/95EA-XRBK]; Reuters, *Korean American Gets 10 Years of Hard Labor in North Korea*, Newsweek (Apr. 19, 2016, 10:58 AM), http://www.newsweek.com/korean-american-hard-labor-north-korea-454008 [https://perma.cc/4D25-B2QA].

108. DPRK Criminal Procedure Law (2012), *supra* note 93, arts. 150, 186, 187; *see also* Baik, *supra* note 97, at 904.

within ten days (or three days for crimes punishable by labor training).[109] However, detention can be prolonged for longer periods of time if the prosecutor or judge sends a case back on grounds of insufficient evidence, thus prolonging the examination and detention.[110] Based on defector testimonies, many of these procedural safeguards do not apply for those accused of political crimes, and are otherwise inconsistently applied for other general crimes.[111]

C. Trial

Considering international legal norms regarding what constitutes a fair trial, it seems very likely that, in the case of U.S. detainees, core norms such as the right to a "fair and public hearing by a competent, independent and impartial tribunal" have gone partially or totally unobserved by North Korea.[112] The structure of criminal procedure in North Korea is such that political cases are *de facto* already adjudicated based on a confession of guilt before they reach the court. For highly charged cases, the examination phase is shortened and heightened in intensity to prosecute and sentence swiftly, while other general crimes are allotted up to two months for examination.

The North Korean court system on the whole has been consistently found to lack independence and impartiality. According to Freedom House's 2015 Report, North Korea has the lowest possible score on the rule of law index, and "does not have an independent judiciary."[113] According to the recent U.N. Commission of Inquiry (COI) report on the situation of human rights in North Korea, "a lack of due process is apparent in the entire criminal justice system of the DPRK."[114] The lack of fairness and impartiality can also be judged by contemporary accounts of observers who have sometimes characterized them as "sham" or "mock trials."[115] With respect to the Kenneth Bae trial, Amnesty International stated, "The North Korean justice system makes a mockery of international fair trial standards . . . Kenneth Bae had no access to a lawyer. It is not even known

109. *Id.* arts. 262, 263; *see also* Baik, *supra* note 95, at 905.

110. Baik, *supra* note 95, at 905, 907.

111. *See* Chung Jae-hoon et al., Report on Human Rights in North Korea, 2014, KOREAN BAR ASS'N 68–69, 197 (2015), at http://www.ibanet.org/HumanrightsNorthKoreareport.aspx [https://perma.cc/THA4-SBRG].

112. ICCPR, *supra* note 19, art 14(1).

113. North Korea, FREEDOM House (2015), https://freedomhouse.org/report/freedom-world/2015/north-korea [https://perma.cc/E8WL-5JC3].

114. *COI report*, *supra* note 23, at 209, para. 696.

115. For example, Andrei Lankov characterizes trials of foreigners as "mock trials." Andrei Lankov, *Why, Despite Recent Arrests, there are Few Risks in Traveling to North Korea*, NK NEWS (July 21, 2014), https://www.nknews.org/2014/07/why-despite-recent-arrests-there-are-few-risks-in-traveling-to-north-korea/ [https://perma.cc/P3QW-8P5V]. According to Reporters Without Borders, Euna Lee and Laura Ling were convicted in "sham trials of an unspecified 'grave crime'". *American Reporters get 'Very Severe' 12-Year Sentences Designed to Scare all Foreign Journalists*, REPORTERS WITHOUT BORDERS (June 8, 2009), https://rsf.org/en/news/american-reporters-get-very-severe-12-year-sentences-designed-scare-all-foreign-journalists [https://perma.cc/S2HR-6FJR].

what he was charged with."[116] According to Human Rights Watch, the Aijalon Gomes trial looked like a "North Korean charade, with a vague criminal charge and a lack of due process leading to a long prison sentence."[117] However, these accounts may speak more to the lack of information about the North Korean process since Bae was offered the services of a lawyer.[118] Ling and Lee were also offered counsel assistance though only Ling agreed to it.[119] However, it should be noted that the utility of defense counsel is highly questionable in crimes against the state. While the Criminal Procedure Code provides the right to counsel for trial,[120] the defense counsel's presence is often found not to be helpful for rigorous advocacy on behalf of the defendant as found among surveyed North Koreans now residing in South Korea.[121]

It is also important to contextualize these trial procedures within the framework of national security. Due process considerations are often sacrificed in the name of national security when detainees or defendants are viewed as enemies of the state, much like North Korean spies have been detained without trial or public knowledge in South Korea, or terror suspects in Guantanamo who were not afforded due process at first (e.g. access to counsel, *habeas corpus*) and have been continuously denied access to the courts while under indefinite detention. Investigation and prosecution of anti-state crimes in North Korea often do not offer the full protection of law, especially if the Ministry of State Security is in charge of the investigation and preliminary examination, as would most likely have been the case for most, if not all, of the U.S. detainees.

D. Sentencing and Punishment

The severity of any punishment must not be disproportionate to the crime committed. Several of the U.S. detainees have been sentenced to long periods of "hard labor" as punishment.[122] For example, Otto

116. *North Korea Sentences U.S. Citizen to 15 Years Hard Labor*, AMNESTY INT'L (May 2, 2013), http://blog.amnestyusa.org/asia/north-korea-sentences-u-s-citizen-to-15-years-hard-labor/#more-34498 [https://perma.cc/4W8Y-Q57X].

117. *North Korea: Verdict on American Raises Fair Trial Concerns*, HUMAN RIGHTS WATCH (Apr. 8, 2010), https://www.hrw.org/news/2010/04/08/north-korea-verdict-american-raises-fair-trial-concerns [https://perma.cc/7EPX-SCYD].

118. *See North Korea Makes Its Case against Kenneth Bae*, THE GUARDIAN (May 10, 2013), https://www.theguardian.com/world/2013/may/10/north-korea-case-kenneth-bae [https://perma.cc/BF7V-S5C2].

119. Choe Sang-Hun, *North Korea Says Journalists Admitted Crimes*, N.Y. TIMES (June 16, 2009), www.nytimes.com/2009/06/17/world/asia/17confess.html [https://perma.cc/A4XP-QLE3].

120. DPRK Criminal Procedure Law (2012), art. 58, art. 275.

121. *See* Chung et. al., *supra* note 111, at 70–71, 73–74.

122. James Pearson, *Kenneth Bae Sentenced to 15 years Hard Labor*, NK NEWS (May 2, 2013), https://www.nknews.org/2013/05/kenneth-bae-sentenced-to-15-years-hard-labor-in-north-korea/ [https://perma.cc/UH7J-XFWY]. For Bae, this involved farming for eight hours per day. Chad O'Carroll, *North Korea Releases Kenneth Bae Prison Interview via CNN*, NK NEWS (July 3, 2013), https://www.nknews.org/2013/07/north-korea-releases-kenneth-bae-prison-interview-via-cnn/ [https://perma.cc/386X-TELA]; Nate Thayer, *Matthew Miller's Excellent Adventure in North Korea*, NK NEWS (Nov. 14, 2014),

Warmbier received a sentence of fifteen years for attempting to steal a propaganda banner, a punishment that Human Rights Watch condemned as an "outrageous and shocking" response to a college-style prank.[123] North Korean citizens must revere portraits, images, and representations of their leaders' visage and moniker in the manner of lèse-majesté laws. Thus, local authorities would consider any defacement or attempted theft of state property to be justification for harsh punishment. Nonetheless, while the use of hard labor is explicitly allowed by Article 8(3) of the ICCPR, one can nevertheless argue that the duration and nature of this punishment is so disproportionate to the crimes allegedly committed as to qualify as cruel and inhumane, in violation of Article 7 of the ICCPR.

Furthermore, U.S. detainees have generally been tried directly by the North Korean Supreme Court, meaning that they have no right to appeal, in violation of Article 14(5) of the ICCPR, which states, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."[124] This means that the sentencing of U.S. citizens would be final without further domestic judicial remedy, and thus forces a diplomatic solution in most cases.

E. Detention

According to the ICCPR, "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[125] It is quite clear that North Korea regularly violates this provision—to an extreme degree—with respect to its own prisoners. According to the UN COI report, ordinary North Korean prisoners are subjected to "solitary confinement in tiny cells, the deliberate imposition of extreme levels of starvation as a disciplinary measure, and the infliction of severe beatings and other atrocities."[126] Political prison camps are even worse, and according to Human Rights Watch are "characterized by systematic abuses and often deadly conditions."[127]

North Korea has tended to give U.S. nationals conditions of detention far superior to those that its own citizens suffer under.[128] Several detain-

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https://www.nknews.org/2014/11/matthew-millers-excellent-adventure-in-north-korea/ (describing his labor as involving moving stones and removing weeds) [https://perma.cc/TYA4-6WSC].

123. Choe & Gladstone, *supra* note 3 (quoting Phil Robertson, Deputy Asia director for Human Rights Watch).

124. KINU WHITE PAPER 2015, *supra* note 40, at 146.

125. ICCPR, *supra* note 19, art 10.

126. *COI report*, *supra* note 23, at 331, para. 1076. Political prisoners are subject to even worse conditions. *See COI Report*, at paras. 729–81.

127. *World Report 2015: North Korea*, HUMAN RIGHTS WATCH (2015), https://www.hrw.org/world-report/2015/country-chapters/north-korea ("[Deadly conditions at the camps include] meager rations that lead to near-starvation, virtually no medical care, lack of proper housing and clothes, regular mistreatment including sexual assault and torture by guards, and executions.") [https://perma.cc/X7HK-XFDL].

128. John Hudson, *What's It Like to Do 'Hard Labor' in North Korea*, FOREIGN POL'Y: PASSPORT (May 2, 2013), http://foreignpolicy.com/2013/05/02/whats-it-like-to-do-hard-labor-in-north-korea/ [https://perma.cc/P4WH-YU6W]. Matthew Miller stated that he

ees have stayed at a Pyongyang guest house rather than one of the notorious prison camps and report that they were treated reasonably and humanely.[129] Detainees have generally been given their own room, consistent with the *UN Standard Minimum Rules for the Treatment of Prisoners*.[130] However, most have been isolated in detention, usually kept alone without other prisoners. For example, Ling and Lee were separated and had guards staying in adjacent rooms.[131] Bae was kept isolated in a compound with only guards as his company.[132]

Whether North Korea's use of solitary confinement for U.S. detainees violates international human rights law would depend on the facts of each case.[133] According to the Human Rights Committee, solitary confinement is "justifiable only in case of urgent need,"[134] and its use may constitute inhumane punishment, in violation of Article 7 and Article 10 of the ICCPR.[135] Whether a particular use of solitary confinement in fact violates Article 7 of the ICCPR depends on the circumstances of the case. While the Human Rights Committee has found a one-year term of solitary confinement to be in violation of Article 7 of the ICCPR,[136] a ten-day soli-

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was "prepared for the 'torture' but instead of that I was killed with kindness". Nate Thayer, *Matthew Miller's Excellent Adventure in North Korea*, NK NEWS (Nov. 14, 2014), https://www.nknews.org/2014/11/matthew-millers-excellent-adventure-in-north-korea/ [https://perma.cc/2B8F-2RSZ]; Jeffery Fowle stated that the "North Koreans treated him reasonably well." Jon Kamp & Scott Calvert, *Former Detainees in North Korea Recount Pattern of Despair,* WALL ST. J. (Feb. 7, 2016), http://www.wsj.com/articles/former-detainees-in-north-korea-recount-pattern-of-despair-1454702338 [https://perma.cc/PN3H-97JW].

129. "Lee and Ling were held in isolation in a guest house in Pyongyang, as was Evan Hunziger." Andrew Salmon, *N. Korea: American Sentenced to 8 Years,* CNN (Apr. 7, 2010), http://edition.cnn.com/2010/WORLD/asiapcf/04/07/north.korea.american.sentenced [https://perma.cc/7UTE-ZW59]; Tim Dodson, *What does Detainment in North Korea Actually Mean?,* CAVALIER DAILY (Mar. 17, 2016), http://www.cavalierdaily.com/article/2016/03/what-does-detainment-in-north-korea-actually-mean (quoting Fowle as stating he was "treated reasonably well . . . [n]ever physically abused, [and given] three meals a day") [https://perma.cc/B2TT-CHNM].

130. Standard Minimum Rules for the Treatment of Prisoners, *supra* note 38 ("each prisoner shall occupy by night a cell or room by himself").

131. Hudson, *supra* note 128.

132. Tamara Khandaker, *American Detained in North Korea Had 30 Guards to Himself – And They All Wanted to Know about the US*, VICE NEWS (May 25, 2016), https://news.vice.com/article/man-detained-in-north-korea-had-30-guards-to-himself-and-they-all-wanted-to-know-about-america [https://perma.cc/2MPX-RPL4].

133. Hamish Macdonald, *Matthew Miller begins sentence, describes conditions* NK NEWS (Sept. 25, 2014), https://www.nknews.org/2014/09/matthew-miller-begins-sentence-describes-conditions/ (quoting Miller as stating "it's isolation, no contact with anyone") [https://perma.cc/QX3H-TD3Z].

134. Human Rights Committee, *Concluding Observations on Denmark*, UN Doc. CCPR/CO/70/DNK §12 (Nov. 15, 2000).

135. Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, Gen. Comment No. 20 §6 (Mar. 10, 1992); HRC regarding Denmark, "use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant." Human Rights Committee CCPR/CO/70/DNK, *supra* note 134.

136. Polay Campos v Peru, Human Rights Committee, Comm. No. 577/1994, UN Doc. CCPR/C?61/D/577/1994, §8.6 (Nov. 6, 1997).

tary confinement was not deemed to be a violation.[137] Besides duration, other factors that may play a role in assessing the legitimacy of solitary confinement include the stringency of the measure, the objective pursued, and the effects on the detainee.[138] Considering that the alternative to solitary confinement would mean spending time in a regular prison, the argument against solitary conditions may be a difficult one to make in the case of short detentions. However, solitary confinement for lengthier sentences would likely amount to human rights violations.

F. Torture

Another significant human rights question that arises is whether North Korea's actions violate the international law prohibition on torture, which is contained in Article 7 of the ICCPR,[139] as well as the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), which North Korea has not ratified.[140] Under CAT, inflicting "severe pain or suffering, whether physical or mental . . . intentionally" to extract a confession, punish, or intimidate is considered torture and thus a violation of international human rights law.[141] The prohibition against torture is also a widely accepted norm of customary international law that is also found in the *Geneva Conventions* and, most would agree, a *jus cogens* prohibition.[142] Thus, despite not having ratified CAT, any act of torture by North Korean officials would be a clear breach of one of the most important legal restrictions in international human rights law.

In fact, there are many credible reports of North Korean officials torturing their own citizens, and it is a common feature of their political and non-political prison system despite the Criminal Procedure Code prohibiting the use of force to gain a confession.[143] With respect to U.S. nationals, there has been far less evidence of torture, except for the cases of the following detainees. For example, the possibility of torture had been brought up with respect to Robert Park, Aijalon Gomes, and Kim Dong Shik (who

137. Vuolanne v. Finland, Human Rights Committee, Comm. No. 265/1987, §9.2 (April 7, 1989).

138. Dhoest v. Belgium, App. No. 10448/83, Eur. H.R. Rep. §§ 117–118 (1987); McFeeley et al. v. United Kingdom, App. No. 8317/78, Eur. H.R. Rep. 44, 82 (1980).

139. International Covenant on Civil and Political Right art. 7, Mar. 23, 1976, 999 U.N.T.S. 171.

140. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1965 U.N.T.S. 112.

141. *Id.* art. 1.

142. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal),* Judgment of 20 July 2012, *ICJ Reports* 2012, para. 99 ("the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)") Questions Relation to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J. Rep. 144, ¶ 99 (July 20) ("the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)").

143. *See* COI Report, *supra* note 18, at para. 707 ("Torture is an established feature of the interrogation process"); *id.* at 1076 ("Torture, as defined under international criminal law, is an established feature of the ordinary prisons in the DPRK."); Human Rights Watch, *supra* note 127 ("People arrested in North Korea are routinely tortured by officials in the course of interrogations").

was a U.S. permanent resident rather than a citizen).[144] Robert Park alleged in a Yonhap News report that, while detained, he was beaten with his hands tied behind his back and later had his genitals beaten and laughed at by female North Korean officials, leading to serious physical and psychological trauma.[145] While Park brought details of this initial report into question,[146] he later reiterated the allegation of North Korean torture.[147] There were also press reports of Gomes being tortured, although when asked directly he declined to comment due to a stated respect for President Carter's desire to maintain friendly relations with North Korea.[148] Both Park and Gomes reportedly attempted suicide during or soon after their detention.[149] Finally, a number of North Korea experts reported that they had heard that Kim Dong Shik died as a result of his torture by North Korean authorities after his abduction from China, although they had no first-hand knowledge of his fate.[150]

Warmbier's comatose state also presents a dramatically different story from most of the U.S. detainees' experiences. Initial news media reported that upon return to the United States, physicians found him to be in "a state of unresponsive wakefulness" which was most likely due to cardiopulmonary arrest and that he had no signs of physical trauma to cause

144. Bryan Kay, *Robert Park Speaks Out*, THE DIPLOMAT (Feb. 16, 2012), https://thediplomat.com/2012/02/robert-park-speaks-out/ [https://perma.cc/KR8G-EE9H]; Choe Sang-Hun, *After 15 Years, Legal Victory for Family of Pastor Believed Abducted by North Korea*, N.Y. TIMES (Apr. 15, 2015), https://www.nytimes.com/2015/04/16/world/asia/after-15-years-victory-of-sorts-for-family-of-pastor-believed-abducted-by-north-korea.html [https://perma.cc/TS84-3HKL]; Choe Sang-Hun, Austin Ramzy & Motoko Rich, *Otto Warmbier Got an Extra Dose of Brutality From North Korea. The Mystery is Why*, N.Y. TIMES (June 14, 2017), https://www.nytimes.com/2017/06/14/world/asia/north-korea-otto-warmbier-.html [https://perma.cc/4PD2-UV9A]. Dating back to an earlier era, there is also considerable evidence of North Korea torture of U.S. sailors captured on the USS Pueblo in 1968. Zach Lowe, *Barnes & Thornburg Helps Tortured Sailors of USS Pueblo 40 Years Later*, AMLAW DAILY (Dec. 31, 2008, 2:36 PM), http://amlawdaily.typepad.com/amlawdaily/2008/12/barnes-thornburg-helps-tortured-sailors-of-uss-pueblo-40-years-later.html [https://perma.cc/ZQ8P-6STC].

145. Kim Kwang-tae, *Korean-American Missionary to Sue N. Korea for Sexual Torture*, YONHAP NEWS (Feb. 8, 2012), http://english.yonhapnews.co.kr/national/2012/02/08/58/0301000000AEN20120208006600315F.HTML [https://perma.cc/D9MV-Z2H4].

146. Kay, *supra* note 144.

147. Sang-Hun, Ramzy & Rich, supra note 144.

148. Associated Press, Former President Jimmy Carter Secures Release of American Aijalon Gomes from North Korea Jail, DAILY NEWS (Aug. 26, 2010, 10:50 PM), http://www.nydailynews.com/news/world/president-jimmy-carter-secures-release-american-aijalon-gomes-north-korea-jail-article-1.204589 [https://perma.cc/D67P-UXYC].

149. Ravi Somaiya, American Prisoner Attempts Suicide in North Korean Gulag, NEWSWEEK (July 8, 2010), http://www.newsweek.com/american-prisoner-attempts-suicide-north-korean-gulag-74557 [https://perma.cc/BSS8-6CJ7]; Mark McDonald, *Activist Tells of Torture in North Korea Prison*, N.Y. TIMES (Oct. 27, 2010, http://www.nytimes.com/2010/10/28/world/asia/28seoul.html [https://perma.cc/QE22-G5HB]; Lyndsay Winkley & Teri Figueroa, *Prisoner Free from North Korea with Help of President Carter Found Burned to Death*, SAN DIEGO UNION TRIB., (Nov. 21, 2017, 4:50 PM), http://www.sandiegouniontribune.com/news/public-safety/sd-me-fire-death-20171121-story.html [https://perma.cc/6L5M-ETGC].

150. Andrew Wolmam & Andrea Lazarow, *Han Kim and North Korean Accountability for Torture and Unlawful Killing*, 10 J.E. ASIAN & INT'L. L. 273, 275–76 (2017).

the coma.[151] His parents said that when they first met him on the plane, he was howling, "jerking violently," that he had unseeing eyes and could not hear them, that his bottom teeth looked like they had been rearranged, and that he had a large scar on his foot.[152] However, the coroner later announced that the evidence for torture was inconclusive: there was no trauma to his teeth; and his symptoms upon arrival in the United States were a result of the brain damage for which he had received "round the clock" care.[153] It was also noted that he was in "surprisingly good condition" for having been bedridden over a year.[154]

It may be difficult to believe Warmbier's condition could have reached this state without wrongdoing on the part of North Korean authorities in terms of outright cruel acts, extreme medical neglect or negligence, or a combination of the two. The U.S. physicians explained that his body was well nourished and he did not have scars other than what might have been needed for medical necessity.[155] While he may have received decent medical care after the cardiopulmonary arrest, the specific events triggering it are unknown. If North Korean officials had purposefully inflicted severe pain and suffering, physical or mental, on Warmbier during his time in detention, this would be a violation of the *jus cogens* prohibition against torture, as found in the ICCPR, CAT, and various other treaties and customary law sources. Most likely, any torture investigation would focus on the circumstances leading to Warmbier's cardiopulmonary arrest within the first month of detention after his trial. This also raises the issue of whether certain acts can rise to the level of torture, such as constant threats, use of force, solitary confinement, medical negligence or neglect in cases of illness, or combinations thereof. Without further facts, it is difficult to determine conclusively whether intentional infliction of pain and suffering occurred, but the North Korean government should nonetheless bear responsibility for Warmbier's final state.

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151. WCPO, *Doctors Update Public On Otto Warmbier's Death*, YOUTUBE (June 15, 2017), https://www.youtube.com/watch?v=NJKmyCKM7W0 [https://perma.cc/RP7S-BTVJ].

152. *Otto Warmbier's Parents Open Up About Son's Death*, FOX NEWS (Sept.26, 2017), http://video.foxnews.com/v/5588887953001/?#sp=show-clips [https://perma.cc/U3T2-GVG3].

153. Julia Jacobo, *Coroner: Evidence Inconclusive on Otto Warmbier being Tortured in North Korea,* ABC NEWS (Sept. 27, 2017), http://abcnews.go.com/US/evidence-inconclusive-otto-warmbier-tortured-north-korea-coroner/story?id=50135211 [https://perma.cc/J5EM-5GPE].

154. Dan Sewell, *Cause of Otto Warmbier's Death After North Korea Detention May Never Be Known*, NBC SAN DIEGO (Sept. 28, 2017, 7:15 AM), https://www.nbcsandiego.com/news/national-international/Coroners-report-sheds-little-light-on-Otto-Warmbiers-death-448261243.html?D [https://perma.cc/M4TD-45RW].

155. WCPO, *supra* note 151. They had received two scans on a CD of his brain from North Korea, dated April 2016 and July 2016, showing the evolution of neurological damage and that his symptoms developed consistent with those images. *Id.*

V. International and Domestic Legal Recourse

Given that North Korean actions toward U.S. detainees likely violate international human rights law, the next question is whether the individual detainee, his or her family, or the United States as a nation has any recourse for such violations. This section will discuss several potential options, although none of these options is likely to be particularly satisfactory to either the detainee or the U.S. government. Dispute settlement and enforcement mechanisms tend to be weak in international law, and even more so in the area of international human rights law. Nevertheless, possibilities for recourse do exist, including individual complaint mechanisms at the international level, individual actions under U.S. domestic law, and state action by the U.S. government. Each of these will be discussed in turn. North Korean domestic law provides another theoretical way for detainees to assert their rights, but this possibility will not be discussed here, as it is not a realistic option.[156]

A. Travel Restrictions

Until Warmbier's death, U.S. citizens had been free to travel to North Korea unrestricted, although the Department of State had issued its sternest travel advisory after the sentencing of Warmbier and Kim Dong-chul, exhorting:

> U.S. citizens to avoid all travel to North Korea due to the serious risk of arrest and long-term detention under North Korea's system of law enforcement, which imposes unduly harsh sentences, including for actions that in the United States would not be considered crimes and which threaten U.S. citizen detainees with being treated in accordance with wartime law of the DPRK.[157]

After Warmbier's death, the State Department placed restrictions so that U.S. passports would not be effective for travel to North Korea as of September 1, 2017 in order to prevent further detentions of U.S. citizens and to withdraw revenue sources for North Korea.[158] Exceptions for special, one-time visits may be made if an applicant demonstrates that the trip is in the national interest by qualifying as either a professional journalist or a Red Cross representative, or showing "compelling humanitarian considera-

156. The North Korean courts are heavily politicized and cannot be expected to rule that the government has violated international (or indeed domestic) law. Also, barriers of sovereign immunity and the detainees' presumed lack of desire or ability to return to North Korea after obtaining their freedom mean that North Korean domestic recourse would be essentially inconceivable.

157. U.S. Dep't ' Bureau of Consular Aff., International Travel, Country Information, North Korea, TRAVEL.STATE.GOV (Jan. 10, 2018), https://travel.state.gov/content/passports/en/alertswarnings/north-korea-travel-warning.html [https://perma.cc/2KEY-4V6P].

158. Yeganeh Torbati, *U.S. Bans Travel to North Korea from September 1, Says Americans Should Leave*, REUTERS (Aug. 2, 2017), https://www.reuters.com/article/us-northkorea-usa-travel/u-s-bans-travel-to-north-korea-from-september-1-says-americans-should-leave-idUSKBN1AI2H5 [https://perma.cc/FVD4-VF32].

tions" or "otherwise in the national interest."[159] Those U.S. citizens who violate the travel ban will have their passports revoked and may be subject to felony prosecution.[160]

Meanwhile, House representatives have introduced a bill to enact the *North Korea Travel Control Act* that would require the Secretary of the Treasury to issue regulations prohibiting travel-related transactions with North Korea unless granted a Treasury license, essentially curtailing U.S. citizen participation in tours to North Korea.[161] Although not explicitly connected to the detainee issue, the U.S. has also complicated travel to North Korea by placing Air Koryo (Korea's state-owned airline) on the Office of Foreign Assets Control sanctions list.[162]

Despite these restrictions, some U.S. citizens will no doubt continue to visit North Korea, so detentions may not be entirely remediated by the travel ban. The ban may also have certain negative consequences; some argue that allowing travel to North Korea is beneficial, as a way of exposing North Korean citizens to information from the outside world and humanizing Americans, who would otherwise be seen only through the lens of state propaganda.[163]

B. Individual Complaint Mechanisms at the International Level

One way that a detainee may choose to address human rights violations connected to his or her detention is by filing a complaint in an international forum. In many parts of the world, the most plausible starting point would be to file a complaint through a regional human rights mechanism; however, this is not an option for North Korean detainees because Northeast Asia is one of the few regions that lack either a regional or subregional human rights mechanism of any kind. A complaint to the Human Rights Committee would also be off the table; although North Korea has ratified the ICCPR, they have not accepted ICCPR Optional Protocol 1, which authorizes individual complaints.[164]

One possibility would be for a detainee to file a complaint to one of the UN Special Rapporteurs on Human Rights, such as the Special Rapporteur on the situation of Human Rights in the Democratic People's

159. 22 C.F.R. § 51.64 (2018).

160. 18 U.S.C. § 1544 (2018); 22 C.F.R. §51.64 (2018); U.S. Dep't of St. Bureau of Consular Aff., International Travel News, North Korea Travel Restriction, TRAVEL.STATE.GOV (Aug. 2, 2017), https://travel.state.gov/content/travel/en/News/international-travel-news/dprk-travel-restriction.html [https://perma.cc/P8ZM-SV6Y].

161. H.R. 2732, 115th Cong. § 3 (2017).

162. Chad O'Carroll, *Restrict U.S. Travel to N. Korea: Expert Recommendation to Congress,* NK NEWS (Feb. 8, 2017), https://www.nknews.org/2017/02/restrict-u-s-travel-to-n-korea-expert-recommendation-to-congress/ [https://perma.cc/JL59-F8KL].

163. Chad O'Carroll, *Tourism in North Korea: Right or Wrong? Defectors make their Case,* THE GUARDIAN (May 1, 2014), https://www.theguardian.com/world/2014/may/01/tourism-north-korea-right-wrong-ethical-defectors [https://perma.cc/C5J3-LHSN].

164. The U.S. has also refrained from ratifying ICCPR Optional Protocol 1. *See* Office of the U.N. High Comm'r of Human Rights, Optional Protocol to the International Covenant on Civil and Political Rights (Jan. 24, 2018), http://indicators.ohchr.org/ [https://perma.cc/KLW2-YXRC].

Republic of Korea (DPRK Special Rapporteur), currently Argentinian lawyer Tomàs Ojea Quintana, or the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Méndez (also an Argentinian lawyer).[165] Special Rapporteurs are able to receive communications from the public; however, they do not issue decisions on a particular complaint's validity. Rather, they can contact the government involved to help work towards resolving the complaint, or to remind the government of its obligations. In the North Korean case, however, such interventions are unlikely to be helpful, as the North Korean government has refused to engage with DPRK Special Rapporteur and has regularly attempted to delegitimize the Rapporteur's work.[166]

The Working Group on Arbitrary Detention (WGAD) is a third possible venue for a detention complaint. WGAD is a five-person committee of experts established in 1991 by the Human Rights Commission.[167] It receives and evaluates complaints from around the world that allege arbitrary detention. WGAD considers detention to be arbitrary in three different circumstances: (1) when it is "clearly impossible to invoke any legal basis justifying the deprivation of liberty;" (2) when the detention "results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 10 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights;" and (3) when the non-observance of fair trial rights "is of such gravity as to give the deprivation of liberty an arbitrary character."[168] The WGAD condemned the North Korean government on several occasions for its treatment of its own citizens.[169] The North Korean government, however, is not legally required to comply with Working Group rulings, and in fact has

165. *See*, *e.g.*, Office of the U.N. High Comm'r of Human Rights, Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx [https://perma.cc/R3ZM-YU6V].

166. *See, e.g.*, Louis Charbonneau, *North Korea Says U.N. Rights Talk Is Political Plot*, REUTERS (Oct. 22, 2010), http://www.reuters.com/article/uk-korea-north-un/north-korea-says-u-n-rights-talk-is-political-plot-idUKTRE69L5S620101022 [https://perma.cc/LR89-TWE5].

167. *See* Office of the U.N. High Comm'r of Human Rights, Working Group on Arbitrary Detention, http://www.ohchr.org/EN/Issues/Detention/Pages/WGADIndex.aspx [https://perma.cc/L4DM-TT8Z].

168. *See* Office of the U.N. High Comm'r Of Human Rights, Individual Complaints and Urgent Appeals, http://www.ohchr.org/EN/Issues/Detention/Pages/Complaints.aspx [https://perma.cc/6GTS-R36S].

169. *See* Working Group on Arbitrary Det., Ops. Adopted by the Working Group on Arbitrary Det. at Its Sixty-Eighth Session, U.N. Doc. A/HRC/WGAD/2013/36 (Democratic People's Republic of Korea), at 6–7 (Apr. 4, 2014); Working Group on Arbitrary Det., Ops. Adopted by the Working Group on Arbitrary Det. at Its Sixty-Eighth Session, U.N. Doc. A/HRC/WGAD/2013/34 (Democratic People's Republic of Korea), at 5–7 (Apr. 4, 2014); Working Group on Arbitrary Det., Ops. Adopted by the Working Group on Arbitrary Det. at Its Sixty-Seventh Session, U.N. Doc. A/HRC/WGAD/2013/35 (Democratic People's Republic of Korea), at 8 (Jan. 15, 2014). The Working Group also heard a case involving alleged North Korean abduction of South Korean citizens, but was not able to reach a conclusion regarding the credibility of the allegations. *See* Working

dismissed these cases as part of a political plot against North Korea by the South Korean regime.[170]

The Human Rights Council would be one final plausible venue for an individual complaint. Pursuant to Resolution 5/1 (2007), the Council can hear communications from individuals who "claim to be victims of human rights violations or that have direct, reliable knowledge of such violations."[171] As with the other UN human rights mechanisms, though, any conclusions made by the Council would not be binding, and (unlike the WGAD) would be conveyed confidentially to the state concerned. In the case of North Korean detainees, however, there would likely be admissibility difficulties for any complaint, because cases are not allowed if the underlying violations are "already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights."[172] In this case, the DPRK Special Rapporteur is already mandated to address North Korean human rights abuses.

While all of these possible venues would allow a detainee to at least highlight their treatment at the international level, it is important to stress that the chances of a former detainee receiving a satisfying resolution are very limited. These venues are not courts, so any judgments offered would not be considered binding under international law, and, in fact, North Korea would be very unlikely to comply with any recommendations. Meanwhile, these mechanisms may be used to bring attention to current detainees, for example, through petitions by the National Human Rights Commission of Korea to the DPRK Special Rapporteur, WGAD, and the Working Group on Enforced or Involuntary Disappearances to address the arrest and detention of three South Korean pastors charged with espionage as well as the capture of several North Korean defectors who had become South Korean nationals.[173]

C. U.S. Private Law Remedies

Another option worth examining is the filing of civil suits against North Korea in U.S. courts. Claims against foreign governments are generally not allowed because of the principle of sovereign immunity, as implemented in the U.S. by the Foreign Sovereign Immunity Act (FSIA).[174] However, FSIA exempts suits against foreign sponsors of terrorism for hostage-taking (as defined in the Hostages Convention), torture (as defined in

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Group on Arbitrary Det. Decision No. 29/1995 (Democratic People's Republic of Korea), ¶ ¶ 5, 8 (Sept. 13, 1995).

170. *See* Working Group on Arbitrary Det., U.N. Doc. A/HRC/WGAD/2013/36, *supra* note 169, at ¶ 20.

171. Office of the U.N. High Comm'r of Human Rights, Human Rights Council Complaint Procedure, http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx [https://perma.cc/VK2K-JPTB].

172. *Id.*

173. *S. Korea to Ask U.N. to Look into Fate of Detainees in N.K,* YONHAP NEWS (Sept. 12, 2017), http://english.yonhapnews.co.kr/news/2017/09/12/0200000000AEN20170912005300315.html [https://perma.cc/U8C8-CH7U].

174. Foreign Sovereign Immunities Act, 28 U.S.C. § 1604 (1976).

the Torture Victims Protection Act), and extrajudicial killings.[175] In the past, this has proven to be a feasible way to receive a judgment for damages (even if collecting on that judgment has been impossible) in two detainee cases: *Massie v. Government of Democratic People's Republic of Korea*[176] and *Han Kim v. Democratic People's Republic of Korea*.[177]

Massie involved a lawsuit from survivors and family members of the Pueblo incident, the 1968 capture by North Korea of the spy submarine USS Pueblo and the subsequent eleven-month imprisonment (and torture) of eighty-two of its crew-members.[178] North Korea was found guilty of both hostage-taking in violation of Article 1 of the Hostages Convention and torture in violation of Section 3 of the Torture Victims Protection Act.[179] The plaintiffs were awarded $10,000 per day for pain and suffering during their captivity, as well as a total of $46,400,000 for pain and suffering endured after their release.[180]

In the *Han Kim* case, the family of Kim Dong Shik sued the North Korean government, alleging that it had abducted him, confined him in a political prisoner camp, and eventually tortured and killed him.[181] The U.S. District Court for the District of Columbia denied the appellants' claim, because it found no first-hand evidence of torture.[182] However, the D.C. Circuit Court of Appeals reversed on appeal, holding that even absent direct evidence, the court should find a default judgment in favor of the plaintiff where there is compelling and admissible evidence that the "regime abducted the victim and that it routinely tortures and kills the people it abducts," as is the case in North Korea.[183] Interestingly, the adequacy of circumstantial evidence in cases involving disappearances was justified in part by Congress's purpose of holding state sponsors of terrorism responsible for their crimes, and also in part by reference to the disappearance-related jurisprudence of the Inter-American Court of Human Rights.[184] On remand, the D.C. District Court awarded each plaintiff $15

175. *See id.* §1605A(a). The TVPA defines torture as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual . . . intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind." *See* Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 (1992).

176. Massie v. Gov't of Democratic People's Republic of Korea, 592 F. Supp. 2d 57, 73–77 (D.D.C. 2008). The FSIA was also successfully employed.

177. Han Kim v. Democratic People's Republic of Korea, 950 F. Supp. 2d 29 (D.D.C. 2013), *rev'd*, 774 F.3d 1044, 1050–51 (D.C. Cir. 2014).

178. *See Massie*, 592 F. Supp. at 60–61.

179. *Id.* at 74.

180. *Id.* at 77.

181. *Han Kim*, *supra* note 177, at 1045.

182. *Id.*

183. *Id.* at 1049.

184. *Id.* at 361 (citing *Radilla-Pacheco v. Mexico,* Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 209, ¶ 222 (Nov. 23, 2009) and *Velásquez-Rodriguez v. Honduras,* Merits, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 4, ¶ 131 (July 29, 1988)).

million and assessed $300 million of punitive damages against North Korea.[185]

Unfortunately for more recent detainees, the FSIA temporarily ceased to be a viable option between 2008 and 2017, because North Korea was removed from the list of state sponsors of terrorism during this period, after being on the list for twenty years.[186] Starting in 2016, however, legislative pressure to reinstate North Korea as a terrorist state emerged.[187] In May 2016, Ted Poe (R) introduced a bill requesting the State Department to report to Congress within ninety days on whether a list of North Korean acts constitute support for international terrorism.[188] This was enacted nearly a year later as the *North Korea State Sponsor of Terrorism Designation Act of 2017*, asking for the State Department's appraisal.[189] In September 2017, the Warmbier family spoke out to urge North Korea's relisting.[190] Finally, on November 17, 2017, the State Department reinstated North Korea as a state sponsor of terror.[191] In his speech announcing this development, President Trump cited the country's threats of nuclear destruction and involvement in assassinations on foreign soil and remembered Otto Warmbier.[192]

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185. Kim v. Democratic People's Republic of Korea, 87 F. Supp. 3d 286, 291 (D.D.C. 2015). The plaintiffs in this case (as in *Massie*) have not actually received compensation from North Korea, although the plaintiffs' lawyers continue to search for accessible funds. Recently, they filed suit in Mexico, in an attempt to seize a North Korean ship located there in order to help satisfy the judgment, but this attempt proved unsuccessful. Andrew Wolman & Andrea Lazarow, *Han Kim and North Korean Accountability for Torture and Unlawful Killing*, 10 J.E. ASIAN & INT'L. L. 273, 278 (2017).

186. The removal was effected as part of (eventually unsuccessful) disarmament negotiations underway at the time. North Korea was listed by the U.S. as a state sponsor of terrorism in 1988. Public Notice 53 Fed. Reg. 3325 (Feb. 5, 1988); AP, *U.S. Lawmakers Push to have North Korea Reinstated on List of State Sponsors of Terrorism*, JAPANESE TIMES (June 17, 2016), http://www.japantimes.co.jp/news/2016/06/17/asia-pacific/u-s-lawmakers-push-north-korea-reinstated-list-state-sponsors-terrorism/ [https://perma.cc/CZR5-4S45].

187. AP, *U.S. Lawmakers Push to have North Korea Reinstated on List of State Sponsors of Terrorism*, JAPAN TIMES (June 17, 2016), http://www.japantimes.co.jp/news/2016/06/17/asia-pacific/u-s-lawmakers-push-north-korea-reinstated-list-state-sponsors-terrorism/ [https://perma.cc/4UHH-T6NL].

188. This list includes assassinations of dissidents and weapons sales to militant groups, H.R. 5208, 114th Cong. (2nd Sess. 2016).

189. North Korea State Sponsor of Terrorism Designation Act of 2017, H.R. 479, 115th Cong.(2017).

190. Marc Thiessen, *The Warmbiers are Right: North Korea should be back on the State Sponsors of Terror List*, FOX NEWS (Sept. 28, 2017), http://www.foxnews.com/opinion/2017/09/28/marc-thiessen-warmbiers-are-right-north-korea-should-be-back-on-state-sponsors-terror-list.html [https://perma.cc/SLH9-4XVS].

191. Department of State, Public Notice 10211: Democratic People's Republic of Korea (DPRK) Designation as a State Sponsor of Terrorism (SST), 82 Fed. Reg. 56,100 (Nov. 27, 2017).

192. Jeff Mason & David Brunnstrom, *Trump Declares North Korea State Sponsor of Terrorism, Triggers Sanctions*, REUTERS (Nov. 20, 2017), https://www.reuters.com/article/us-northkorea-missiles-usa/trump-declares-north-korea-state-sponsor-of-terrorism-triggers-sanctions-idUSKBN1DK223 [https://perma.cc/KP6F-43F7]. The assassination allusion presumably refers to the murder of Kim Jong Nam by VX nerve agent at the Kuala Lumpur airport in February 2017. See, generally, Joshua Berlinger, *Kim Jong Nam: The Plot to Murder North Korea's Exiled Son*, CNN (Sept. 26, 2017), https://edition

Now that North Korea is once again on the list of state sponsors of terrorism, current and future detainees will have a more plausible path to justice. In particular, they may be able to claim that North Korea has sponsored their hostage-taking. This would be a factual question that is difficult to prove, but certainly many commentators have characterized U.S. detainees in North Korea as "bargaining chips" to be cashed in by the North Korean government in exchange for official or semi-official visits by U.S. officials, or perhaps other inducements.[193] This has also been the feeling of at least some of the detainees themselves. Kenneth Bae, for example, wrote that he concluded based on his interactions with guards that he was being used as a bargaining chip.[194] In fact, the use of detainees as "bargaining chips" has been explicitly condemned by the Israeli Supreme Court as hostage-taking under Article 1 of the Hostages Convention.[195] Although North Korea has at times openly connected detainee treatment with geopolitical issues,[196] on other occasions it has officially denied that the detainees are being held as bargaining chips, and may or may not have covertly made explicit demands of the U.S. in exchange for their release.[197] However, the existence of explicit demands is not determinative. According to U.S. case law, it is not necessary for the hostage-takers demands to

.cnn.com/2017/07/26/asia/kim-jong-nam-killing/index.html [https://perma.cc/G3UZ-E9A9].

193. Choe Sang-Hun, *North Korea Expected to Indict American it is Holding*, N.Y. TIMES (Apr. 27, 2013), http://www.nytimes.com/2013/04/28/world/asia/north-korea-expected-to-charge-american.html ("North Korea, a police state, has often used the plight of detained Americans as a bargaining chip in its dealings with Washington") [https://perma.cc/6XWP-TERG]; Kang Tae-ho, *U.S. Asking N. Korea to Release American Citizen,* HANKYOREH (May 1, 2013), http://english.hani.co.kr/arti/english_edition/e_northkorea/585413.html (noting that US detainees such as had been used as Euna Lee, Laura Ling, and Anjali Gomes had been used by the North Koreans to induce U.S. officials to visit for talks) [https://perma.cc/GZC6-P4NK]; SANGSOO LEE, INST. SEC. & DEV. POL'Y, TOWARDS A RESENT IN U.S.-NORTH KOREA RELATIONS? (2014), http://isdp.eu/content/uploads/publications/2014-lee-towards-a-reset-in-us-north-korea-relations.pdf at 1 (arguing that US detainees were being used "as a bargaining chip so as to obtain a high-ranking visit from Washington") [https://perma.cc/WUK8-V3BW]; *North Korea to Issue Verdict on US Citizen*, BBC NEWS (Apr. 27, 2013), http://www.bbc.com/news/world-asia-22320287 (quoting Dongguk University Professor Koh Yu-hwan as stating that "For North Korea, Bae is a bargaining chip in dealing with the US.") [https://perma.cc/F2BR-RHH3].

194. Jonathan Cheng, *U.S. Ex-Detainee in North Korea Tells Cautionary Tale,* WALL ST. J. (Apr. 16, 2016), http://www.wsj.com/articles/u-s-ex-detainee-in-north-korea-tells-cautionary-tale-1460861223 [ ]https://perma.cc/T4TL-LGP2]; *Three Detained Americans in North Korea Presented to Media,* CBS NEWS (Sept. 1, 2014), http://www.cbsnews.com/news/three-detained-americans-in-north-korea-presented-to-media/ (citing Bae, Miller and Fowler's statement that they believed they would only be released if a U.S. representative comes to Korea to make a direct appeal) [https://perma.cc/937F-24TZ].

195. CA 7048/97 Anonymous (Lebanese citizens) v. Minister of Defense, (2000) (Isr.).

196. *North Korea Threatens US Prisoner Aijalon Gomes*, BBC NEWS (June 24, 2010), http://www.bbc.com/news/10401853 [https://perma.cc/VE59-XC9T].

197. Dana Ford, *State Media: U.S. Man Sentenced in North Korea not a 'Bargaining Chip'*, CNN (May 6, 2013), http://edition.cnn.com/2013/05/05/world/asia/north-korea-american-sentenced/ [https://perma.cc/6LYA-LHFX].

be communicated to a third party, as long as the intent to compel exists.[198]

It is less certain whether individuals detained between 2008 and November 2017 would be able to file suit. The FSIA requires that a foreign state be designated as a state sponsor of terrorism at the time that the litigated act occurred, or was so designated as a result of such act.[199] In addition, there is a ten-year statute of limitation for suits under § 1605A(b)(2), although courts have held that under principles of equity, the statute of limitations can be tolled for the period during which a foreign state enjoyed immunity.[200] Even after North Korea's reinstatement on the list of state sponsors of terrorism, other hurdles may remain for any detainees' TVPA claim. For one thing, the FSIA only lifts immunity in cases of death or personal injury, and it is not clear that recent detainees (Warmbier excepted) have suffered a personal injury, even where they can make a colorable claim that they were held hostage.[201]

While this Article only addresses recourse against North Korea, it is worth noting that detainees and their families may also have tort claims against tour companies or others involved in their travel to North Korea. For example, the liability of Young Pioneer Tours (the China-based company with which Warmbier traveled to North Korea) has been questioned, given their student targeting and claims that North Korea is a safe country to visit.[202] They have since ceased accepting U.S. citizens as tour members.[203]

D. State-to-State Action

Finally, it is worth briefly considering possible venues if detainees are able to enlist the U.S. government to assert a state-to-state claim against North Korea on their behalf. As a starting point, dispute settlement at the International Court of Justice (ICJ) would not likely be available for breaches of VCCR, because neither North Korea nor the U.S. have made declarations accepting the court's compulsory jurisdiction,[204] nor have

198. Wyatt v. Syrian Arab Republic, 362 F.Supp. 2d 103, 113 (DDC 2005).

199. 28 U.S.C. § 1605A.

200. Massie, *supra* note 176, at 73; Simon v. Republic of Iraq, 529 F.3d 1187, 1195-96 (D.C.Cir. 2008) (citing 28 U.S.C. § 1605(f)); Simpson v. Socialist People's Libyan Arab Jamahiriya, 470 F.3d 356, 418 (2006).

201. 28 U.S.C. § 1605A(a)(1).

202. *See* Anna Fifield, *After Otto Warmbier's Death, Tourism to North Korea comes under Scrutiny*, WASH. POST (June 20, 2017), https://www.washingtonpost.com/world/asia_pacific/after-otto-warmbiers-death-tourism-to-north-korea-comes-under-scrutiny/2017/06/20/e0e7fa20-55ab-11e7-9e18-968f6ad1e1d3_story.html [https://perma.cc/9BQ6-HQ46].

203. *Id.*

204. *Declarations recognizing the jurisdiction of the Court as compulsory*, Int'l Ct. Just., http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3 (the U.S. withdrew its prior acceptance of the optional clause after losing the Nicaragua case) [https://perma.cc/2UZ3-YN4N]; *See also* Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES (Mar. 10, 2005), http://www.nytimes.com/2005/03/10/politics/us-says-it-has-withdrawn-from-world-judicial-body.html (the U.S. withdrew its prior acceptance of the optional clause after losing the Nicaragua case) [https://perma.cc/7PUH-DHV2].

either state accepted compulsory ICJ dispute settlement in the VCCR.[205] Another possibility would be the ICCPR, which includes a state-to-state complaint mechanism involving the Human Rights Committee and, if necessary, an ad hoc Conciliation Commission.[206] Here too, however, North Korea has not accepted the optional state-to-state dispute settlement clauses (although the U.S. has done so).[207] It should also be noted that the ICCPR state-to-state dispute settlement system so far exists more in the realm of ideal than reality; no country has yet filed a dispute against another state, under the ICCPR or any other UN human rights treaty.[208]

While venues for a state-to-state complaint may be hard to come by, there are of course other ways that the U.S. can choose to highlight North Korean actions at the international level. The detention of U.S. citizens can be included among the other human rights abuses that are condemned on an annual basis by the UN Human Rights Council and UN General Assembly.[209] Such detentions can also be brought up in the UN Security Council, which has begun to discuss North Korean human rights issues more actively in the wake of the Commission of Inquiry report.[210] The U.S. may also choose to take action outside of international institutions to punish North Korea for violating international law in its detentions of U.S. nationals. For example, the U.S. could condemn such detentions in its human rights reports about North Korea.[211] It could also strengthen existing unilateral sanctions against North Korea as a response.[212] However, a particularly strong response might endanger the lives or delay the release of detainees.

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205. *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, United Nations Treaty Collection, updated Jan. 31, 2018, (the U.S. withdrew from the Optional Protocol to the VCCR concerning the Compulsory Settlement of Disputes in 2005).

206. ICCPR, *supra* note 19, arts. 41–42.

207. *International Convention on Civil and Political Rights, UN Treaty Collection, updated Jan. 31, 2018,* https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en [https://perma.cc/V3HS-3PP9].

208. *Human Rights Bodies - Complaints Procedures*, UN Office of the High Comm. Of Hum. Rts., http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#interstate [https://perma.cc/EH43-YPAR].

209. Park Si-soo, *UN Committee Passes N. Korea Human Rights Resolution*, KOR. TIMES, Nov. 16, 2016, http://www.koreatimes.co.kr/www/news/nation/2016/11/485_218305.html [https://perma.cc/F9V5-6QEA]; Jee Abbey Lee, *UN Condemns North Korea's Human Rights Violations*, VOA NEWS (Mar. 27, 2015), http://www.voanews.com/a/un-condemns-north-korea-human-rights-violations/2697311.html [https://perma.cc/6S9W-4C2Z].

210. Michelle Nichols, *U.N. Council Meets on North Korea Human Rights Despite China Opposition*, REUTERS (Dec. 9, 2016), http://www.reuters.com/article/us-northkorea-rights-un-idUSKBN13Y2BH [https://perma.cc/ZU2L-WKR7].

211. *See*, *Report on Human Rights Abuses or Censorship in North Korea*, U.S. STATE DEP'T (July 6, 2016), https://www.state.gov/j/drl/rls/259366.htm [https://perma.cc/T64U-HWNA].

212. *See id.*

Conclusion

The detention of U.S. citizens is a cautionary tale for all travelers to North Korea who risk behavior antagonistic to the North Korean government. The criminal codes are both exhaustive yet vague in their application to both citizens and non-citizens alike. The danger of the North Korean criminal system lies in the discretion of the authorities to determine the severity of a crime prior to judicial determination. The domestic legal culture of interrogating until confession evokes a pattern of torture found worldwide where authorities harass individuals until they extract information to serve as the sole basis of evidence for prosecution. The superior authority of the Ministry of State Security for "anti-state" crimes over the judiciary illustrates the hierarchical relations between the prosecutorial and judicial mechanisms, the latter of which then serves more of a sentencing function than as an independent decision-maker.

U.S. detainees have experienced this legal process, undergoing intense investigations without the right to remain silent, without rigorous legal advocacy, and without the right to appeal. In the cases at hand, there has always been some triggering conduct on the part of the individual to form the basis for an arrest, investigation, and charge. The issue is whether these detentions in substance and procedure violate international legal norms. On the whole, the North Korean government has treated U.S. detainees better than their own citizens accused of crimes against the state, particularly in terms of treatment and conditions during detention and imprisonment, as well as the feasibility of being released contingent on beneficial negotiations with the U.S. government.

Despite criminal law violations from the perspective of the North Korean government, the detention of U.S. citizens nonetheless violates international law in several respects, especially the VCCR and the ICCPR. Unfortunately, there may be little chance for detainees to obtain recourse for these violations. The most plausible international forum for a complaint would be the Working Group on Arbitrary Detention, but its recommendations are not considered binding under international law and would likely be ignored by the North Korean government. Private suits under U.S. law may now be possible, however, due to North Korea's reenlistment as a state sponsor of terrorism.

In the last century, international law has developed a robust set of norms for the protection of individuals from mistreatment at the hands of the state. The enforcement of those norms is another matter. With the partial exception of certain regional human rights regimes, there is usually little hope for individual victims to receive recourse. This is especially true for individuals suffering at the hands of a state like North Korea that is not a full participant in the international system. Diplomatic measures continue to be the usual alternative path for resolution, but the current environment of sanctions has made it more difficult to negotiate the release of the current detainees through official government channels. U.S. detainees fall victim not only to the North Korean legal system but also to the limita-

tions of international law and the contentious relationship between North Korea and the United States.