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Legal Issues Concerning the Expulsion of North Koreans on Murder Charges and Tasks Ahead

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North Koreans, who hold dual status, would effectively earn ROK nationality by defecting to South Korea. However, in this instance the two North Koreans did not have the will to defect to the South. The ROK government has handled this case by recognizing North Koreans as being equal to foreigners under the Immigration Control Law. It is possible that those two repatriated North Koreans could be subject to torture and execution in North Korea. However, expulsion in accordance with the national law does not violate the UN Convention against Torture. Domestic legal grounds for the expulsion of the two North Koreans could be found in the application of the provision of Prohibition of Entry in the Immigration Control Law. To respond to similar incidents that may occur in the future, it is necessary to set the principle and standard for the grounds of expulsion and maintain the consistency in its application and execution. Above all, it is required to directly state the legal grounds in the relevant laws. In the mid- to long-term, it is needed to jointly respond to criminal issues between the two Koreas through mutual assistance in criminal matters.

Around 3:10 p.m., on November 7, the government of the Republic of Korea (ROK) repatriated two North Koreans through the Panmunjeom who were onboard a

squid fishing boat captured in the East Sea on November 2, 2019. The government cited two reasons for their deportation. First, since the two North Koreans fled the North after having committed serious crimes of a non-political nature, they are not subject to the protection of South Korea under the North Korean Refugees Protection and Settlement Support Act (hereinafter referred to as “North Korean Refugees Act”). Second, for that reason, they are not recognized as refugees under international laws. The ROK government has thus far considered North Koreans who defected the North into the South as nationals of the Republic of Korea and embraced them as North Korean defectors. It is noticeable that the ROK government, for the first time, expelled the two North Koreans to the North, a case running contrary to existing practices. This case raises various points regarding the interpretation and application of the Constitution, Convention relating the Status of Refugee, the Refugee Act, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as “the UN Convention against Torture”), North Korean Refugees Act, and Immigration Control Law. Below is an analysis of relevant legal issues and future tasks.

I . North Koreans on Dual Status and Their Intention for Defection into South Korea

The first part that should be looked at is the dual status of North Korea and North Korean residents. On one hand, inter-Korean relations are considered to be internal, special relations, not state-to-state relations. Article 3 of the Constitution suggests that the territory of North Korea could be recognized as belonging to the territory of the Republic of Korea. On the other hand, however, inter-Korean relations have characteristics tantamount to state-to-state relations since both Koreas have elements deemed eligible to be called a state under international laws. According to Article 3 of the Constitution and the international laws, North Korea could be interpreted as a de facto state, if not a de jure state. North Korean residents, in the same sense, have dual status. First, North Koreans hold the status of the ROK nationals as interpreted by Article 3 of the Constitution. Under the Article 3 of the Constitution, the ROK government has recognized North Koreans as nationals of the ROK without them having to go through the naturalization process usually required to grant foreigners a national status, thereby supporting their settlement in South Korea in

accordance with the North Korean Refugees Act. A repatriation of North Koreans this time could be viewed as unlawful if they are considered to be ROK nationals in strict compliance of the Article 3 of the Constitution. A citizen of the ROK is not subject to forced removal since it is only subject to foreigners under the Immigration Control Law. Second, at the same time North Koreans hold their native North Korean nationality, which is a de facto state. In addition, executive jurisdiction of the ROK does not extend to North Korean territory. With all those facts considered, it should be interpreted as that North Koreans ‘hold North Korean nationality, which is a de facto state, and possibly ROK nationality’ and that upon entry into exclusive jurisdiction of South Korea, he/she will effectively earn ROK nationality, doing away with a dual status. Such an interpretation complies with Article 3 of the Constitution, special relations between South and North Korea, and international law. The legal judiciary of the ROK once ruled that even though it is hard to recognize North Korea as a foreign country and North Koreans as foreigners, North Korea could be viewed as belonging to an area equal to a foreign country and likewise, North Koreans could have status tantamount to foreigners when it comes to applying an individual law.¹⁾

Then a question arises as to what rids North Koreans of the dual status and allows their effective acquisition of ROK nationality? The answer is the expression of the will of a person to be protected by the ROK, the intention to defect to South Korea. Not every North Korean would be accepted as North Korean defectors by South Korea. Only those who express the will to receive the protection from the ROK can be accepted as such (Article 3, North Korean Refugees Act). In other words, the North Korean Refugees Act will not be applied to North Koreans who do not have the will to defect to the South. Those North Koreans should be regarded as having a status equal to foreigners. Yeon-chul Kim, the Minister of Unification announced at a meeting of the Special Committee on Budget and Accounts of the National Assembly on November 8 that, during interrogations, two North Korean fishermen made a clear statement to return to North Korea even if it implies dying and that a final conclusion was drawn that those two did not have an intention to defect to South Korea. On

1) Supreme Court Decision of the Republic of Korea, 2004Do4044, decided on November 12, 2004; Constitutional Court Decision, June 30, 2005, 2005Heonbal14.

November 8, one government official cited the grounds for the expulsion of North Koreans as the provision of forced removal in Immigration Control Law. The government's ground for its judgment to view North Koreans as being equal to foreigners and North Korea being equal to a foreign territory does not deviate from the rulings of the judiciary.

II. Whether Convention Relating the Status of Refugee and the UN Convention against Torture Are Violated

What kinds of punishment would the two repatriated North Koreans face upon their entry into the North? It is estimated that what those two committed could at maximum be subject to a death sentence in accordance with Article 266 of North Korea's Penal Code (2015). Article 266 of North Korea's Penal Code stipulates that those who have purposefully murdered a person out of sly motivation, including greed and jealousy would be sentenced to over 10 years of correctional labor and be subject to unlimited-term correctional labor punishment or even executed if crimes committed are deemed especially grave. A joint investigation by relevant government agencies suggests that those two North Koreans killed one captain and 15 other crew members to cover up their killing of the captain. Given that the two fishermen murdered the captain out of anger for his abuse and violent treatment, Article 268 of North Korea's Penal Code could possibly be applied in this case (charges of murder precipitated by an excess of anger). This Article also stipulates that those who have committed a killing in the state of excess of enrage caused by the victim's assault or severe insult shall be sentenced to less than three years of correctional labor punishment. However, this case appears unlikely to fall into a category of excess of enrage since the two North Koreans connived with one other crew member to kill the captain. Even after putting Article 268 of North Korean Criminal Code aside, the two could be subject to a death sentence pursuant to Article 266. A question is raised here then whether the ROK government's action to deport them is in violation of the Convention relating the Status of Refugee, the Refugee Act of the ROK, and the UN Convention against Torture.

The Convention relating the Status of Refugee states "No Contracting State

shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened...” (Prohibition of expulsion or return (“refoulement”), Article 33.1). The Refugee Act of the ROK also has a similar provision (Article 3). A refugee is defined in great detail in Article 1 of the Convention relating the Status of Refugee (Article 1: Definition of the term “refugee”): “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee” (Article 1.F). The Refugee Act of the ROK also states the restriction on recognition of refugee status ‘where a refugee applicant has committed a grave non-political crime outside the ROK before entering the ROK’ (Article 19). The ROK government has not recognized the two North Koreans as refugees in viewing that the act of killing 16 people by two North Koreans is considered to be a grave non-political crime, which is evaluated as the reasonable interpretation and application of the law.

The UN Convention against Torture describes that “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture” (Article 3.1). In fact, it is highly likely that the two North Koreans could be subject to torture in the process of criminal trials once repatriated. However, the UN Convention against Torture also specifies that “The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion” (Article 16.2). It means that extradition or expulsion of a criminal in accordance with the national law does not violate the UN Convention against Torture. If so, what are the grounds of domestic law for the expulsion of two North Koreans?

III. Domestic Legal Grounds for Deportation

Some argue that Article 9.1 of North Korean Refugees Act could be presented as the legal ground for the expulsion of North Koreans that ‘offenders of nonpolitical and serious crimes, such as murder’ may not be designated as persons eligible for protection. However, this provision is not about whether the subjected person should

be expelled or not. In fact, this provision implies that North Koreans, once recognized as North Korean defectors, could be exempted from protection and support under the North Korean Refugees Act. The term “person eligible for protection” means a resident escaping from North Korea who is provided with protection and support pursuant to this Act (Article 2.2). In more detail, North Korean defectors can be divided into those who are provided with protection and support under this Act and those who are not. Those who fall into the category as determined by the criteria laid out in Article 9 of the North Korean Refugees Act are usually called ‘North Korean defectors non-eligible for protection.’

On November 8, one government official cited the grounds for the expulsion of North Koreans as the provision of forced removal under the Immigration Control Law. This Law stipulates that the head of an office, branch office or immigration detention center may deport those falling under any of the various sub-paragraphs laid out in Article 46. Given that the two North Koreans hold the status of being equal to foreigners, applying the Immigration Control Law could make sense. As stated above, the Judiciary ruled that North Korea could be recognized as an area equal to a foreign country and North Korean to a foreigner when applying an individual law. However, it appears that the provision of forced removal cannot be applied in this case for the following reasons: forced removal under the Immigration Control Law is an act of forced deportation against the will of a foreigner who has already entered the territory of the ROK, and the two North Koreans this time could not be viewed as being in the territory of the ROK since they did not have the intention to defect to South Korea. The application of forced removal is in conflict with the rationale of the ROK government, which has handled this case by recognizing North Korea as being equal to a foreign country and North Koreans as foreigners.

Domestic legal grounds for the expulsion of the two North Koreans could also be found in the application of the Prohibition of Entry (Article 11) in the Immigration Control Law. Article 11.1.3 stipulates that the Minister of Justice may prohibit a foreigner from entering Korea if a person about whom there are reasonable grounds for concern that he/she may commit acts detrimental to the interest of Korea or the public safety. The government cited one of the reasons for their expulsion as the possibility of them being a threat to the life and safety of the public if the two North

Koreans are integrated into our society.

IV. Future Tasks

An incident like this could happen at any time. In the short-term, it is necessary to set the principle and standard for the grounds of expulsion and maintain the consistency in its application and execution. When cases with the same type of crime are treated differently and demonstrate a lack of consistency, where some are being recognized as North Korean defectors while others are expelled, it could not be condoned by the South Korean public as well as the international community. A sense of objectivity should be secured by making an expulsion and repatriation procedure transparent. Once decided not to protect North Koreans, institutional back-up should follow. Even though legal grounds for the expulsion of North Koreans can be found in the application of judicial precedents and the prohibition of entry specified in the Immigration Control Law, it is desirable to directly state the legal grounds in the relevant laws. In addition, it is necessary to define the reasons for expulsion as detailed as possible when the relevant laws are supplemented to amend the abstract reasons for the prohibition of entry. In the mid- to long-term, it is recommended to jointly respond to criminal issues between the two Koreas by concluding an agreement between the ROK and the DPRK on mutual assistance in criminal matters, especially an agreement on extradition as many countries have struck a treaty on mutual assistance in criminal matters. To that end, analyzing the cases of North Korea's conclusion of a treaty on mutual assistance in criminal matters and a treaty on extradition with other countries is required to get a grasp of North Korea's standing on these issues. ©KINU 2019

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