

International Law and the Problem of Repatriating North Koreans Who Have Stated Their Intention to Defect

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I . Defining the issue

A psychological battle has erupted between the two Koreas over the issue of repatriating the group of 31 North Koreans who crossed the Northern Limit Line (NLL) in the West Sea last month during the New Year's holiday. The South Korean authorities have said that they must "respect the free will decision of the North Koreans from a humanitarian standpoint," and thus they cannot return the four individuals who stated their desire to remain in the South. Meanwhile the North Korean side has asked that the families of those four be allowed to meet with them and confirm their intention to defect. Clearly the North intends to use the families to change the would-be defectors' minds about their decision.

Considered in light of the relevant statutes of international law, the ROK's position of supporting the free will decisions of the North Korean defectors is extremely reasonable. If those four were sent back, they would most likely be charged with treason under the DPRK Penal Code and then either publicly executed or sent to a political prison camp. At the very least, the North Koreans who expressed a desire to defect would be sent to a re-education center or a hard labor camp and subjected to inhumane treatment. Furthermore, if sent back these four would likely be made into examples to show to the North Korean people in order to stabilize the succession system

and tighten internal control. It is known that North Korea revised its Penal Code sometime after April 2009, but overall those changes reflected a trend toward regime preservation, including harsher punishment for political prisoners and stricter internal controls.

II . Knowingly returning those who face public execution violates the right to life

The act of sending the four intended defectors back to the North, while fully aware that they will likely be subjected to public execution, can be considered a violation of their right to life. The major international and regional human rights treaties and declarations including the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) guarantee that all human beings have a right to life. The right to life is a supreme right which is considered one of the major fundamental rights. Although this right is not explicitly stipulated in the ROK Constitution, the government has clearly guaranteed it through the provision on human dignity in Article 10 and the provision on personal liberty in Article 12 Paragraph 1. The Constitutional Court has also established the legal precedent that it views the right to life as a constitutional right. Since North Koreans are legally citizens of the ROK according to the territorial clause in Article 3, they are naturally subject to the right to life.

Neither the UDHR nor the ICCPR contains any clause explicitly prohibiting repatriation in cases where those repatriated may face execution. However the UN Human Rights Committee has established its clear support for this position in cases of individual communication. In the 1991 individual communication case of Chitat Ng, which was sent before the UN Human Rights Committee, the US had requested that Canada extradite Chitat Ng, who had committed a capital crime, but Chitat Ng argued that Canada would be breaching the ICCPR by doing so. After hearing both arguments, the UN Human Rights Committee ruled that all parties of the ICCPR must follow their obligations under the Covenant, and in cases where a country extradites a foreign national and that individual's rights are violated as a result, such extradition may constitute a violation of the ICCPR. Some international agreements specifically prohibit expelling or extraditing foreign nationals to countries where they face the threat of execution. Article 19 Paragraph 2 of the Charter of Fundamental Rights of the European Union, adopted December 7th, 2000, stipulates that it is unlawful to remove, expel or extradite anyone to a country where there is a serious risk that they may be subjected to death penalty.

III . Knowingly repatriating those who face harsh treatment violates the Convention against Torture

As is widely known, at North Korean detention and correctional facilities such as political prison camps, re-education centers, and hard labor camps, there is widespread use of harsh practices such as torture and beatings. Such harsh treatment can cause injury or disease, and those factors compounded with inadequate nutrition and sanitation often lead to death. Article 3 Paragraph 1 of the Convention against Torture(CAT) states 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. For the purpose of determining whether there are such grounds, Article 3 Paragraph 2 of the CAT states that the competent authorities shall take into account all relevant considerations. South Korea is a party to the CAT. Therefore it has an obligation to abide by the provisions specified in Article 3.

In the *Mutombo v Switzerland* individual communication case in 1994 the Committee against Torture dealt Article 3 of the CAT. Mutombo admitted to participating in demonstrations and unlawful gatherings in Zaire and entering Switzerland illegally, but claimed that he would face torture and a serious threat to his personal safety if repatriated. After considering all relevant circumstances in accordance with Article 3 Paragraph 2 of the CAT, the Committee ruled that it had substantial grounds to believe that Mutombo might face torture, and thus deporting or extraditing him would constitute a violation of Article 3 of the CAT. In the 1994 case of *Khan v Canada*, after considering all relevant circumstances in accordance with Article 3 Paragraph 2 of the CAT, the Committee ruled that it had substantial grounds to believe that Khan might be at risk of torture and that deporting or extraditing him would constitute a violation of Article 3 of the CAT.