



*Permanent Mission of the Republic of Korea
Geneva*

*Avenue de l'Ariana 1 P.O.Box 42, 1211 Geneva 20
Tel: +41(0)22 748 0000 / Fax: +41(0)22 748 0001
geneva.korea@mofa.go.kr*

Geneva, 28 February 2020

KGV/ 49 /2020

The Permanent Mission of the Republic of Korea to the United Nations and Other International Organizations in Geneva presents its compliments to the United Nations Office of the High Commissioner for Human Rights (OHCHR) and has the honour to request the latter to kindly forward the attached response of the Korean government to the joint letter (AL KOR 3/2019) dated 28 January 2020 to the relevant special procedures.

The Permanent Mission of the Republic of Korea to the United Nations and Other International Organizations in Geneva avails itself of this opportunity to renew to the United Nations Office of the High Commissioner for Human Rights (OHCHR) the assurances of its highest consideration.

Attachment: as stated



The ROK Government's Response Regarding the Joint Letter Sent by the Special Procedures of the UN Human Rights Council

1. Outline

- o **(Capture)** From October 31 (Thursday) to November 2 (Saturday), a North Korean fishing vessel crossed the Northern Limit Line (NLL) in the East Sea multiple times, disobeyed the ROK Navy's orders, and did not express intention of defection, and the ROK Navy chased the vessel and seized it and two crewmen around 20 nautical miles south of the maritime border.
- The government, through intelligence, learned in advance that a vessel was on the run after the killing of a number of people in North Korean waters in the East Sea.
- o **(Joint intelligence investigation and process of deportation decision)** Based on the findings of the joint intelligence investigation (November 2-6), the National Security Office had consultations with appropriate government departments in accordance with the *Manual on Response to North Korean Vessels Crossing the NLL* and the *Manual on Response to North Korean Defectors* and decided to expel the two fishermen to the North on the grounds that they were heinous criminals and that their intent to defect to the South was disingenuous.
- * The National Security Office oversees overall crisis management by multiple agencies in the capacity of a control tower. (Presidential Directive No. 388 - Basic Guidance on National Crisis Management)
- It was ascertained that 19 crew members including a captain were aboard the above-mentioned vessel departing the North's Kimchaek Port around the middle of August and that they fished in waters near Russia and North Korea.

- It was found that in late October, two crew members, along with an accomplice, had killed the captain for his harsh treatment and other two crew members and then murdered the remaining 13 fellow crew members, one by one, out of fear that their crime might be uncovered.
- o **(Deportation process)** After deciding to expel them, the ROK's Ministry of Unification carried out the deportation process including giving notice to North Korea according to protocol set forth in the response manuals and held a press briefing.
 - November 5 (Tuesday): The South notified the North of its intent to expel the two North Korean persons (November 7) and to hand over the fishing boat.
 - November 6 (Wednesday): The North's intention to take custody of the two fishermen and the vessel was confirmed.
 - November 7 (Thursday): The South deported the two North Koreans through the truce village of Panmunjeom around 15:10 p.m.
 - * The vessel was handed over to the North on the NLL in the East Sea from 14:08 to 14:51 p.m. on November 8 (Friday) considering the weather conditions in the East Sea.
 - November 7 (Thursday): A spokesperson for the Ministry of Unification made an announcement and the Ministry's director general for humanitarian cooperation held a press briefing around 15:40 p.m. after expelling the North Korean nationals.
 - * The press briefing was initially scheduled for 16:00 p.m., but it was held 20 minutes ahead of the schedule because it had been leaked to the press before the deportation.

2. ROK government' s basic position

- o The ROK government extensively reviewed and referenced similar statutes and regulations in order to deal with the first deportation of North Koreans because there was no precedent or clear provisions in domestic laws and regulations, particularly in light of the special nature (duality) of inter-Korean relations. The government finally decided to expel them because the lives and safety of the public are a top priority.
- o Although there are provisions concerning inter-Korean relations, immigration, and North Korean defectors in the Constitution and laws, no law on the books today applies to this case. The government sought to find the legal grounds for the handling of this case in the overall intent of the ROK legal system and international conventions and in consideration of the special nature of inter-Korean relations based on Article 3 (territory) and Article 4 (unification) of the Constitution.
 - The government reviewed the Articles of the Constitution on territory and unification, provisions in laws that define the special nature of inter-Korean relations, provisions and intents of laws concerning the protection of North Korean defectors and general immigration, the Convention Relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “the Convention against Torture”) for the protection of refugees and international human rights, and provisions in the Refugee Act – a domestic law consistent with the international convention. It also referenced judgments by the Supreme Court and the Constitutional Court on the specific meaning of the Constitution, laws, and international treaties.
- o The government comprehensively took into consideration the human rights of the North Korean fishermen and the special nature of inter-Korean relations while duly considering the state’s basic duties, public safety, and the public interest.

3. Reasons why their intention of defection was not recognized

- o The government's joint intelligence investigation found that the deported fishermen brutally murdered their 16 fellow crew members and planned to flee to Jagang Province, North Korea. They moved back to near Kimchaek Port to prepare for the escape (by selling the catch).
 - They stated that they plotted to "go back to the country and even if we die, let's die in our mother country (North Korea)."
- o In the process of fleeing to the South, they were found by the ROK Navy. The fishermen escaped to the North and then crossed the maritime border again. They attempted to continue to escape north and southwest and disobeyed the ROK Navy's orders without expressing intention to defect.
 - Because they continued to attempt escape even after the firing of warning shots, the ROK Navy sent commandos to subdue them. One of the fishermen stated that in the process, he was going to give up his life, saying "Let's meet our death with a smile."
 - This case is clearly unusual. In other cases, North Korean fishermen expressed intention of defection in any way possible when they crossed the NLL to defect to the South. It is difficult to deem this case to be a typical defection.
- o Although the two fishermen submitted a written request for protection by the South in the process of the joint intelligence investigation after being captured by the South, the ROK government could not recognize the authenticity of their intention to defect in consideration of the overall situation including their statements about crime, their activities in the North, and the process of their capture.

4. Substantive and legal grounds for the repatriation decision

Summary

- North Korean residents are ROK citizens according to Article 3 (territory) and Article 4 (peaceful unification) of the Constitution of the ROK and in light of the special nature of inter-Korean relations. However, if they are to exercise their rights as ROK citizens, they must meet the minimum requirement (clear expression of intention to defect) and undergo the minimum of procedures.
- Since it is considered that there was no authentic intention of defection by the North Korean fishermen in this case, the government expelled them to the North on the grounds of the provisions and intents of the Constitution, the North Korean Refugees Protection and Settlement Support Act defining the matters regarding this case, and the Immigration Act and the Refugee Act on similar situations.

① Special nature of inter-Korean relations and North Korea's duality

- According to Article 3 (territory) and Article 4 (peaceful unification) of the Constitution and in light of the "special nature of inter-Korean relations", North Korea not only has a character of an anti-state organization but a character of a partner in dialogue and cooperation for peaceful unification. Therefore, different laws apply depending on the character of North Korean activities in the specific case at issue.
- The Agreement on Reconciliation, Nonaggression, and Exchanges and Cooperation between the South and the North (also called the Inter-Korean Basic Agreement) and Development of Inter-Korean Relations Act stipulate that "Inter-Korean relations are not relations between nations, but special relations established temporarily in the course of pursuing unification."

② Status of North Korean residents and requirement for their expression of intention to defect to the South

- According to the special nature of inter-Korean relations and North

Korea's duality, in those cases where the North shows a character of a partner in dialogue and cooperation, North Korea is recognized as an entity with legislative, judicial, and administrative systems that effectively govern the North Korean region and North Korean residents are recognized as holding status as members of the North Korean public under the North's governing system, separately from holding status as ROK citizens based on Article 3 of the Constitution.

- The Supreme Court (2004Do4044) and the Constitutional Court (2003HeonBa114) handed down the judgment that individual laws, in their application, may define the North Korean region as a foreign country and North Korean residents as persons equivalent to foreign nationals in consideration of the special nature of inter-Korean relations, which shows the same position as above.
- Therefore, if North Korean residents are to acquire the rights and duties of ROK citizens and to be subject to ROK laws, they must meet the minimum requirement and undergo the minimum of procedures to be accepted into the Republic of Korea
- In this case, there was no authentic intention from the North Korean fishermen of obtaining protection from the South. Thus, the government did not employ the protection procedures as defined in the North Korean Refugees Protection and Settlement Support Act.

③ ROK's overall legal system regulating similar cases

- The ROK government referenced provisions concerning persons not eligible for protection and deportation measures in the North Korean Refugees Protection and Settlement Support Act, the Refugee Act, and the Immigration Act in its handling of this unusual situation. Instead of directly applying these relevant provisions to this case, the government merely referenced them.
- The ROK's overall legal system imposes certain limits on allowing other persons than ROK nationals residing in the territory of the ROK to be admitted into the country or accepted as nationals for the sake of national security, public safety, and public order, which is standard practice around the world.

- The purpose of the North Korean Refugees Protection and Settlement Support Act is to help North Korean defectors adjust to liberal democracy and law and order of the Republic of Korea, and the Act specifies that non-political criminals committing serious crimes including murder may not be accorded protection. The Refugee Act provides that those who committed serious non-political crimes outside of the ROK may not be recognized as refugees.
- The Immigration Act stipulates that one's entry into the country may be prohibited if there are substantial reasons to believe that the person may engage in actions undermining the national interest or public safety. It also prescribes that one may be deported if anyone else who previously entered the territory of the ROK falls under the above-mentioned case. A government manual says that a North Korean fishing boat drifting down into the South's waters should be sent back to the North after taking appropriate on-site measures in consideration of the reality of inter-Korean relations.
- o This means that although the North Korean fishermen are not directly subject to the North Korean Refugees Protection and Settlement Support Act, the Refugee Act, or the Immigration Act, they can be considered as similar offenders subject to provisions on "persons not eligible for protection," "prohibition of entry into the country," and deportation. In cases like these, the ROK legal system regulates their entry into the territory of the ROK, and even after entry into the country, they can be deported if necessary. The government referenced these provisions for this case.

5. Arrest, detention, investigation, and repatriation decision

(Was due process guaranteed including the provision of legal advice, the presumption of innocence, and the possibility of exercising trial under the jurisdiction of the ROK)

Summary

- If the ROK government is to exercise judicial jurisdiction over North Korean residents, the authenticity of their intent of defection should be confirmed and a certain procedure set forth in the North Korean Refugees Protection and Settlement Support Act should be performed.
 - The government did not arrest or investigate the North Korean fishermen as criminal suspects according to criminal justice procedures. In the administrative investigation procedures to determine the specifics of their escape from the North and confirm their intent to defect to the South, the government determined that their intention of defection was disingenuous and took corresponding measures.
 - It concluded that it is difficult to ensure proper investigation and trial due to lack of criminal judicial assistance between the two Koreas and impossibility of obtaining evidence and that the South's exercise of trial jurisdiction would rather bring a danger to public security and public safety in the South.
- Based only on Article 3 of the Constitution, North Korean residents can be considered ROK citizens and, therefore, under the ROK's jurisdiction. However, considering a harmonious interpretation of Articles 3 and 4 of the Constitution and the reality of inter-Korean relations, whether the South can exercise jurisdiction should be determined by the "special nature of inter-Korean relations."
- Since North Korea has a character of a partner in reconciliation and cooperation for peaceful unification, the North's laws and jurisdiction apply to the North Korean people within the scope in which the North is recognized as an entity of the governing system with the effective legislative, judicial, and executive system. Within this scope, the South's jurisdiction is considered to be limited.
 - Thus, if a North Korean resident gets out of North Korea and wants to acquire the status of an ROK national in the places effectively governed by the South, his/her intent to acquire the status of an ROK citizen should be clearly expressed and the true intent should be confirmed by the ROK.

- Although there is no clear provision in the Constitution or individual laws, Article 3 (Scope of Application) of the North Korean Refugees Protection and Settlement Support Act - “This Act shall apply to residents escaping from North Korea who have expressed intention to be protected by the Republic of Korea”- can be referenced as a provision for a similar situation under the ROK’s legal system. The past practices of returning North Korean fishermen who drifted into the South’s waters to the North according to their intent also shows that the ROK government has acknowledged the North’s jurisdiction over its residents.

- * The ROK government has repatriated 185 North Koreans who crossed the NLL and allowed 82 persons to defect to the South over the last 10 years. Since 2010, North Korea has handed over 16 ROK citizens in 10 cases who illegally entered the North to the South via Panmunjeom.

- o It did not apply the protection procedures under the North Korean Refugees Protection and Settlement Support Act to this case because there was no genuine intent by the fisherman of obtaining protection from the South.

- o If the North Korean fishermen were to be recognized as ROK citizens, it may be possible, in theory, to investigate and prosecute them according to ROK law. However, it is highly unlikely that the South could exercise proper criminal jurisdiction over a crime committed in the North by North Korean residents because it would be difficult to obtain evidence. Rather, it would undermine the public security and public safety of the ROK people K.

- o In this case, there was no genuine intention of defection from the North Korean fishermen, and the low possibility of mutual cooperation in criminal matters between the two Koreas would prevent proper investigation and trial, which would rather undermine public security and public safety. Thus, the government determined that repatriating the North Korean fishermen constituted appropriate application of criminal jurisdiction and met the intent of the North Korean Refugees Protection and Settlement Act.

6. Assessment on the risk of being repatriated to the North regarding the principle of non-refoulement under international human rights law

- Considerations regarding human rights including the Convention against Torture and the International Covenant on Civil and Political Rights

Summary

- The government reviewed not only the domestic Constitution and laws but international conventions on human rights including the Convention Relating to the Status of Refugees and the Convention against Torture and other Cruel, Inhuman and Degrading Punishment or Treatment in order to duly protect the human rights of the North Korean fishermen.
- According to the Convention Relating to the Status of Refugees, it is difficult to recognize the North Korean fishermen as refugees. It does not recognize refugee status in cases where the persons in question “committed serious non-political crimes.” The government carefully considered whether this case falls under any part of Article 3 (limits including expulsion) of the Convention against Torture, and it determined that their extradition to the North was not prohibited in that they are criminal suspects in the heinous killing of multiple persons.
- The ROK government has joined and strongly supports international conventions to prevent infringement upon individual rights and fully concurs with the intents and implementation of the International Covenant on Civil and Political Rights (ICCPR), the Convention Relating to the Status of Refugees, and the Convention against Torture. For the case of the North Korean fishermen, the government fully reviewed international conventions on human rights as well as domestic laws.
- Article 1A(2) of the Convention Relating to the Status of Refugees prescribes well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion as one of the requirements for refugee status. The government determined that the North Korean fishermen do not fall under the above

provision on refugees since they are criminal suspects who killed 16 people. It also decided that the North Korean fishermen fall under those who committed "a serious non-political crime," one of the reasons for limiting refugee recognition, prescribed in Article 1F(b) of the Convention. Although Article 32 of the Convention specifies the prohibition of the expulsion of a refugee, it allows expulsion on grounds of national security or public order. Thus, in light of the overall provisions of the Convention, the government determined that the North Korean fishermen were not *bona fide* refugees, who cannot be expelled.

- o Article 7 of the International Covenant on Civil and Political Rights stipulates that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." The Convention against Torture provides for these in greater detail. Although Article 3(1) of the Convention against Torture specifies 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 16(2) therein prescribes that "the provisions of the Convention are without prejudice to the provisions of any other international instrument or national law which relates to extradition or expulsion." Accordingly, the ROK government carefully reviewed their relations with the provisions of the ROK's Constitution and its laws on immigration, on North Korean defectors, and on refugees.
- o The government considered the fact that multiple international human rights resolutions on North Korea have been adopted. Yet, in this case, it could not but seriously consider that the North Korean fishermen are atrocious criminal suspects who murdered as many as 16 people.
 - In light of the reality of inter-Korean relations, the government was compelled to seriously consider the danger to be caused by them to the public security and safety of the ROK people.
- o Taking into consideration the purposes of international conventions and the situation in question, the government determined that extraditing the heinous criminals who killed 16 fellow crew members to the North is not against the above-mentioned international conventions.

7. Other information

[1] Detailed information including the identities of the two persons repatriated to the North

- o The two expelled North Koreans are male in their 20s, and it is inappropriate to reveal specific personal information on them.
 - Yet, the murder suspects, being in their early 20s, are in pretty good physical shape. There was no sign that they had received any special training, but one of them practiced *Jeong Gwon* (martial art meaning “straight fist (punch)”) for physical fitness and the other was confirmed to have been imprisoned for theft.
 - Most of the murdered crew members were not full-time crewmen but “mobilized workers” who had no shipboard experience. Meanwhile, three accomplices each had work experience as a chief engineer or a boatswain.
 - Most of the victims were found to have complied with instructions of shift work due to the strict rules of life onboard.
 - The two expelled fishermen were directly involved in the murder. The chief engineer, who was arrested in the North as an accomplice, just had a role of calling out the fellow crew members.

[2] Information about the North Korean authority that took custody of the North Korean fishermen and whether the ROK government checked if they are alive after the repatriation

- o The ROK government notified the North of the plan to hand over the North Korean fishermen through the inter-Korean joint liaison office in Gaeseong on November 5, 2019 and sent them back to the North via Panmunjeom on November 7.

- It has yet to identify which authority took the fishermen into custody. Whether the deportees are alive or their whereabouts after the extradition has also not been identified yet.

③ As any thorough investigation been conducted into the alleged killing of 16 people on board – investigation findings and information about the remains of the murder victims

① Joint intelligence investigation and consultations with appropriate agencies

- o The ROK government formed a joint intelligence investigation team consisting of professional personnel from the military, police, and the National Intelligence Service and carried out a thorough investigation from November 2 to 6, 2019.
- o Based on the investigation findings, the National Security Council of the Blue House determined, in consultation with appropriate Ministries, that the fishermen should be extradited.

② Motive and process of the crime

- o The three accomplices including the two extradited fishermen plotted to kill the captain for his harsh treatment (abusive language and beating).
- o The three criminals murdered 16 people including the captain and crew members, one by one, in isolated spaces aboard the vessel.
- They killed two crew members on night shift at the bow and stern of the vessel with blunt objects, then brutally murdered the captain, who had been asleep at the wheelhouse, and dumped their bodies overboard.
- Out of the fear that they might be harmed by fellow crew members if their crime were discovered, they called out the remaining 13 crew members, who were asleep in their sleeping quarters, for night shifts by twos to the bow and stern, slaughtering them all one-by-one with a hatchet and a hammer.

- o After committing the crime, the three accomplices entered Kimchaek Port in late October in order to sell the catch to raise funds for their escape, and one of them was arrested by the North Korean authorities.
- They initially decided, "If we have to die, let's die in North Korea" and plotted to flee to Jagang Province, North Korea. However, the two of them saw the third taken under arrest and instead escaped by the waters.

③ Factual grounds for determining the criminal act

- o There was no doubt about their criminal act since the findings of the intelligence, the statements of the two arrested fishermen under separate interrogations, and North Korea's response were all consistent.
 - The government, through intelligence, learned in advance that the two expelled fishermen were on the run after killing multiple people.
 - It separately interrogated the two criminals, and their statements were consistent.
 - Even though the South did not notify the North of any specific situations in the process of consulting the deportation, the North was found to have already recognized the murder of 16 people.
- * It is assumed that the North Korean authorities learned of the killing of the 16 people from the arrested accomplice's statements.
- o It was ascertained that, after the crime, the criminals cleaned the inside of the vessel, dumped the bodies and murder weapons overboard, and tried to destroy evidence by changing the boat's official number by repainting.

Reference Statutes and Regulations at Home and Abroad

1 Domestic Regulations

☐ “Persons not eligible for protection”

- o Article 9 (Criteria for Protection Decision) of the North Korean Refugees Protection and Settlement Support Act provides that “In making a decision on whether to provide protection, any of the following persons may not be designated as persons eligible for protection” (Article 9(1)), including “Offenders of nonpolitical and serious crimes, such as murder” (Article 9(1)2).
- o Article 19 (Restriction on Recognition of Refugee Status) of the Refugee Act stipulates that “Where the Minister of Justice has sufficient grounds to recognize that a refugee applicant falls under any of the following cases even in recognition that the refugee applicant constitutes a refugee, he/she may make a decision of non-recognition of refugee status,” including “Where a refugee applicant has committed a grave non-political crime outside the Republic of Korea before entering the Republic of Korea” (Article 19 3).

☐ “Expulsion”

- o Article 11 (Prohibition, etc. of Entry) of the Immigration Act provides that “The Minister of Justice may prohibit an alien from entering the Republic of Korea if the alien falls under any of the following subparagraphs (Article 11 (1)),” including “A person deemed highly likely to engage in any conduct harming the interests or public security of the Republic of Korea” (Article 11(1)3).
- o Article 46 (Persons subject to Deportation) of the Immigration Act specifies that “The head of a Regional Immigration Service may deport any of the following aliens from the Republic of Korea according to the procedures prescribed in this Chapter” (Article 46(1)), including “A person who has become or is subsequently found to be subject to grounds for prohibition of entry provided for in the subparagraphs of Article 11(1)” (Article 46(1)3).

- o The *Manual on Response to North Korean Fishermen Crossing the NLL* stipulates that if a North Korean fisherman has no intent to defect to the South and merely drifted over the NLL, he/she shall be expelled to the North.

2 International Conventions

- o The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides 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), and 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).
- o The Convention Relating to the Status of Refugees, in Article 1 (definition of the term “refugee”), specifies that “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that” (Article 1F) “he has committed a serious non-political crime outside the country prior to his admission to that country as a refugee” (Article 1F(b)); and Article 32 (expulsion) stipulates that “The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order” (Article 32 1).
- o Article 1A(2) of the Convention Relating to the Status of Refugees prescribes “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion” as one of the requirements for refugee status. It is difficult to determine that the North Korean fishermen fall under the above provision.