spend their natural life in prison," no denial of release should ever be final, and not even recalled prisoners should be deprived of hope of release.[23]

In *Vinter*, the Court decided that the continued detention of a life prisoner without legitimate penological grounds violates Article 3 only when the sentence is irreducible. The Court might do well to abandon "irreducibility" as a condition for finding a violation of Article 3 since its concept of irreducibility is far from clear (paras. 69, 94).[24] The distinction between irreducible and reducible life sentences is often blurred, and the minimum institutional or procedural prerequisites that must be fulfilled to qualify a life sentence as reducible are not apparent. In particular, it remains unclear whether a life sentence without the possibility of conditional release can be deemed reducible simply because a sovereign or head of state is authorized to grant a pardon. One may reasonably ask whether it should not suffice, to consider a life sentence as an inhuman punishment within the meaning of Article 3, that the continued detention of life prisoners (who may have spent many years or even decades in prison) is no longer justified on any penological grounds, even if their sentences are formally reducible. In the present author's view, the answer should definitely be affirmative. For now, however, the Court assumes that execution of a reducible life sentence cannot infringe Article 3.

In sum, by outlawing, in light of Article 3 of the Convention, irreducible life sentences whose execution no longer serves any legitimate penological purpose, the Court has made it necessary to conduct a judicial review of the lawfulness of the continuing incarceration of life prisoners. While persons serving life sentences without parole still have no enforceable right to conditional release, it can be argued after *Vinter* that at least they are entitled to have their (irreducible) life sentence reconsidered, if only to determine whether there are valid grounds for continuing their incarceration. In this sense, it can be said that a free life after life imprisonment has become a more realistic option.

MAREK SZYDŁO*
University of Wrocław, Poland

Piracy—South Korea—prosecution in national courts—passive personality principle—universal jurisdiction

"REPUBLIC OF KOREA v. ARAYE." No. 2011 Do 12927.
Supreme Court of Republic of Korea, December 22, 2011.

A recent decision of the Supreme Court of the Republic of Korea (Daebeobwon) upheld the exercise of universal criminal jurisdiction over Somali pirates convicted of hijacking a Korean vessel in the Indian Ocean.[1] This was the first Korean piracy prosecution and it revealed various procedural issues related to the prosecution of such crimes that remain to be resolved.

[23] Jørgen Worsaae Rasmussen, *Actual/Real Life Sentences*, Doc. CPT (2007) 55, at 10 (June 27, 2007), *at* http://www.cpt.coe.int/en/workingdocs.htm.

[24] Kafkaris v. Cyprus, App. No. 21906/04, paras. 100–08 (Eur. Ct. H.R. Feb. 12, 2008).

* Research for this case report was supported by a grant from the Polish budgetary resources destined for science for the years 2012–14.

[1] Supreme Court [S. Ct.], No. 2011 Do 12927, Dec. 22, 2011 ("Republic of Korea v. Araye") [hereinafter Judgment]. The Judgment is summarized in English online at http://eng.scourt.go.kr/eng/decisions/guide.jsp. The Korean courts' spelling of the first defendant's surname is used here, but it is often rendered as "Arai" in English-language sources. Translations from the Korean below are by the authors unless otherwise noted.

On January 15, 2011, Somali pirates hijacked the MV *Samho Jewelry*, a chemical carrier flying the Korean flag, on the high seas in the northern Indian Ocean near Oman.[2] The pirates, after gaining control of the *Samho Jewelry* and its crew, appropriated and transferred to their mother ship approximately U.S.$12,000 worth of goods, including laptops, watches, cell phones, and shoes, and demanded ransom.[3] However, a South Korean naval task force, the Cheonghae Unit, headed by the destroyer *Choi Young*, had been tracking the *Samho Jewelry* and—as the pirates gave signs of preparing another hijacking—mounted a rescue operation on January 21. That effort ended in the deaths of eight pirates (including their leader) and the capture of five others. The crew was unharmed except for the captain, who had been seriously wounded by the pirates.

When the *Samho Jewelry* entered a Yemeni port, the Korean government sought to negotiate the transfer of the captured pirates to Yemeni judicial authorities for purposes of prosecution in Yemen or Kenya. As cooperation with those countries became difficult, the captives were returned to the custody of the Korean government and subsequently transferred to Korea on January 30. Upon arrival, the pirates were handed over to the South Regional Headquarters of the Korean Coast Guard, which had jurisdiction over Busan, where the Samho Shipping Company was located.

On February 7, after an investigation, the pirates were sent to the Busan District Prosecutor's Office, which indicted them on February 25 on eight counts of criminal acts related to piracy: forcibly taking the ship; forcibly taking property on the ship; forcibly operating the ship; demanding ransom to release the hostages; firing at soldiers; inflicting physical assault, threats, and bodily harm on the crew; using the crew as "human shields"; and firing on the captain.[4] The pirates were additionally charged with maritime robbery and attempted murder, robbery and attempted murder, obstruction of justice (special operations) and infliction of injury, and violation of the Punishment for Damaging Ships and Sea Structures Act.[5]

In March, following a conference with their court-appointed lawyers, all of the pirates with the exception of Abdullah Hussein Mahamud requested a jury trial. On April 11, 2011, having considered the requests, Busan District Criminal Court No. 5 decided to commence the jury trial on May 23. Mahamud's separate bench trial began on June 1.[6]

At trial, the pirates claimed that their rights to due process had been violated, citing Article 12 of the South Korean Constitution, since following their arrest, they had been transferred to Korea without a proper procedural basis. They also argued that they had not been arrested pursuant to a warrant and that a warrant was not issued during the transfer period; that they had not received any legal assistance; that due process had not been guaranteed when they were

[2] The hijacking occurred about 350 nautical miles southeast of the port of Muscat, Oman, at latitude 22° north, longitude 64° east.

[3] Busan District Court [Dist. Ct.], 2011 Go-Hap 93, May 27, 2011 (Eng. trans. by court) [hereinafter Dist. Ct. decision] (on file with author, leeseokwoo@inha.ac.kr).

[4] *Id.*

[5] *Id.* For the act, designated here by the shortened translation used in *Statutes of the Republic of Korea*, see *infra* note 23.

[6] Park Si-soo, *Somali Pirates Go on Trial Today*, KOREA TIMES, May 22, 2011, *available in* LEXIS, News Library, Most Recent Two Years File. Under Article 7(1) of the Act on Citizen Participation in Criminal Trials, accused are entitled to seek a jury trial.

detained by the Korean Navy; and that despite physical assaults by the *Samho Jewelry*'s sailors during their arrest, the Korean military had made no effort to protect them. Because their presence in Busan was forced on them without due process, they challenged the court's territorial jurisdiction over the case.[7]

All the defendants were convicted. The court ruled that, by virtue of the domestic Criminal Procedure Act, it had territorial jurisdiction over the case based on the current location of the defendants. Another key issue was the shooting of the captain, in particular determining who was responsible for that crime. On the basis of the testimonies of both pirates and crew members, the court found that only Mahomed Araye had fired at the captain. But whether the pirates as a group had colluded to shoot the captain was another question; all the pirates vigorously denied any such involvement. The court held that it was difficult to conclude that, in the midst of the rescue operation by the Cheonghae Unit, the pirates had conspired to kill the captain in retaliation for causing their imminent capture.

Araye, the pirate who had wounded Capt. Seok Hai-kyun, received a life sentence; the others were each sentenced to thirteen or fifteen years in prison. The court justified the imposition of these penalties (which were heavy by Korean standards) by citing several factors: the distress inflicted on the victims and their families; the intolerable insult to a sovereign state of collectively and systematically attacking its military, which had been dispatched to protect Korean ships and participate in the international effort to safeguard maritime security; the "excessively selfish and greedy motive" of the defendants in seeking instant riches at the cost of lives; their "daring and indiscriminate scheme" in hijacking ships on the high seas and attempting an additional hijacking; and "the need to warn the Somali pirates" from venturing into waters where Korean ships frequently navigate.[8]

Following the sentencing, both the defense and the prosecution immediately appealed, the former on grounds of excessive sentences and defendants' innocence of certain charges, and the latter on grounds of unreasonably lenient sentences (the prosecution had sought the imposition of capital punishment) and errors of law.

The Busan High Court, which considered the appeals, issued its decision in only three months, which was unprecedented in expeditiousness for a criminal case.[9] It corrected several technical misapplications of law by the district court (which in the separate trial of Mahamud had improperly added the sentence from a lesser offense to the sentence it imposed on him for attempted murder and had omitted punishment for certain crimes committed by the other defendants). The High Court reviewed and accepted the trial court's jurisdictional and factual findings.[10] Subsequently, the Supreme Court rejected the appeals of both the defense and the prosecution and upheld the revised sentences (pp. 2–3).

Among the issues the Korean courts considered, the most critical was whether the special forces of the Cheonghae Unit of the Korean Navy had the authority to arrest and confine the pirates. The jurisdiction exercised by the Cheonghae Unit in subduing the pirates may be grounded in international law in Article 105 of the United Nations Convention on the Law

[7] Dist. Ct. decision.
[8] *Id.*
[9] Busan High Court, 2011 No 349, Sept. 8, 2011.
[10] *Id.* at 12–15.

of the Sea (UNCLOS)[11] and various Security Council resolutions,[12] but the basis in domestic legislation was unclear.

Pursuant to its military orders to save the hostages aboard the *Samho Jewelry*, the Cheonghae Unit captured the pirates and confined them for nine days. Under Korea's Criminal Procedure Act, the legal authority to investigate and arrest lies with the public prosecutor. Judicial police officials such as investigators and police lieutenants conduct investigations under the instruction of the public prosecutor, and law enforcement officers such as police sergeants and patrolmen assist in the investigation under the direction of judicial police officials.[13] Because Korean criminal law does not grant judicial powers to military groups like the Cheonghae Unit, the defense claimed that the unit's exercise of judicial authority had been unauthorized.

The trial court did not accept these arguments. It held that although no specific provisions applied directly to the Cheonghae Unit's arrest and transfer of the pirates to the investigative bodies, it was proper to apply South Korean criminal procedure to the case.[14] Article 212 of the Criminal Procedure Act provides that "[a]ny person may arrest a flagrant offender without a warrant," and Article 213(1) states: "In cases where a person other than a public prosecutor or judicial police official arrests a flagrant offender, he shall immediately turn over the offender to a public prosecutor or judicial police official."

The court determined that the arrest made by the Cheonghae Unit at sea came under Articles 212 and 213.[15] Finding the navy, dispatched under the National Assembly's consent as representing the government, to be "any person" under the statute was perhaps the only possible decision because of the legislative deficiency regarding the activities of the Cheonghae Unit.[16]

* * * *

This case was Korea's first trial on piracy. But it was not the first time that these pirates had hijacked a Korean ship.[17] The previous incident took place in April 2010, and was only resolved 217 days later, when Samho Shipping paid a ransom of $9.5 million.[18] This history explains, at least in part, why the Korean government decided to transfer the pirates on *Samho Jewelry* to Korea to undergo trial when their handover to other countries became infeasible. That background also contributed to the realization that a clear basis was needed in Korean law for bringing the perpetrators to justice. An even more significant factor was the recent "arrest

[11] United Nations Convention on the Law of the Sea, Art. 105, *opened for signature* Dec. 10, 1982, 1833 UNTS 3.

[12] SC Res. 1816 (June 2, 2008); SC Res. 1846 (Dec. 2, 2008); SC Res. 1851 (Dec. 16, 2008); SC Res. 1897 (Nov. 30, 2009); SC Res. 1918 (Apr. 27, 2010); SC Res. 1976 (Apr. 11, 2011).

[13] Hyongsa sosong beob [Criminal Procedure Act], Act No. 341, Sept. 23, 1954, Arts. 195, 196.

[14] Dist. Ct. decision.

[15] *Id.*

[16] To cure this legal defect, a bill was proposed before the National Assembly, Somalia Haeyeok-eseo-ui Kukgunbudae Hwaldonge Kwanhan Teukryebeoban [Special Act for Military Activities in Somali Waters], Bill No. 1806600, Mar. 3, 2011. This proposed law grants judicial authority to ships' captains by providing that "regarding acts of piracy in Somali waters, the captain is assigned the role of judicial officer and those appointed by the captain the role of enforcement officer."

[17] Kim Rahn, *Samho Jewelry Pirates Indicted*, KOREA TIMES, Feb. 25, 2011, *available in* LEXIS, News Library, Most Recent Two Years File.

[18] *Crewmen Return Home After Seven Months of Captivity*, KOREA HERALD, Nov. 15, 2010, *available in id.*

and release" practice of states[19] and the passive attitude of the Kenyan government regarding the trials of pirates captured by foreign states.

The basis for the personal jurisdiction of Korean courts over the *Samho Jewelry* pirates can be found in both international and domestic law. The international legal basis is provided by Article 105 of UNCLOS, Article 6 of the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention),[20] and Article 5 of the International Convention Against the Taking of Hostages.[21] Korea has ratified all three. Article 6(1) of the Korean Constitution provides, "Treaties duly concluded and promulgated under the Constitution and generally recognized rules of international law shall have the same force and effect of law as domestic laws of the Republic of Korea." Thus, treaties, once ratified, do not require additional legislation for domestic application.[22]

The jurisdictional basis in Korean domestic law resides in Article 6 of the Criminal Code, which explicitly provides for criminal jurisdiction when the victim is a Korean national ("passive personality" jurisdiction), as well as in Article 3 of the Law on Punishment for Damaging Ships and Sea Structures.[23] The latter, in particular, was designed to implement the SUA Convention and therefore does not require the victim to be a Korean national. Article 3(3) of this law covers foreign nationals who have violated the SUA Convention and are within Korean territory. In the case at bar, the court applied the law pursuant to the above articles.[24]

Nonetheless, although Korean law clearly provided a sufficient basis for the prosecutions, the Ministry of Justice submitted to the National Assembly a proposed amendment to the Criminal Code on March 25, 2011, clearly establishing universal jurisdiction (which was previously unknown in the Korean Criminal Code)[25] and strengthening the country's ability to prosecute the most serious international crimes. The ministry explained that while both "international crimes violating the universal principle of human rights" and "international conventions seeking to regulate them" had increased, some "crimes committed by foreign nationals

[19] *See, e.g.*, Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AJIL 436, 450–51 (2010).

[20] Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 UNTS 222 [hereinafter SUA Convention] (entered into force for Korea Aug. 12, 2003). Korea has yet to adopt the 2005 Protocol amending the SUA Convention.

[21] International Convention Against the Taking of Hostages, Dec. 17, 1979, TIAS No. 11081, 1316 UNTS 205 (entered into force for Korea June 3, 1983).

[22] This has been confirmed in numerous cases. *See, e.g.*, S. Ct., 82 Da-Ka 1372, July 22, 1986 (recognizing that the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air, "as amended by the Hague Protocol, has the same effect as domestic laws; and in relation to civil law, it is *lex specialis*"); Constitutional Court [Const. Ct.], 99 Hun-Ma 139, 142, 156, 160 (consol.), Mar. 21, 2001 (stating that the Korea-Japan Fisheries Agreement, as "a treaty concluded and promulgated under the Constitution . . . has the same force and effect of law as domestic laws"); Const. Ct., 99 Hun-Ga 13, Apr. 26, 2001; Const. Ct., 2002 Hun-Ma 611, Apr. 24, 2001; Const. Ct., 2000 Hun-Ba 20, Sept. 27, 2001 (appeal to the unconstitutionality ruling on the Articles of Agreement of the International Monetary Fund, Art. 9(3)).

[23] Sunbak mit haesanggujomule daehan wihaehaingwi chubul deonge gwanhan beobyul [Act on Punishment, etc. for Activities to Damage Ships and Maritime Structures], Act. No. 6880, May 27, 2003, *amended by* Act No. 9109, Sept. 14, 2008, and Act No. 11302, Feb. 10, 2012, Kwanbo [Official Gazette], Feb. 10, 2012.

[24] Dist. Ct. decision.

[25] Some domestic statutes implement treaty requirements for "extradite or prosecute" jurisdiction (*e.g.*, Gukje-hyungsajaepanso gwanhal beomjoiui chubul deonge gwanhan beobyul [Act on the Punishment of Crimes Within the Jurisdiction of the International Criminal Court], Act No. 8719, Dec. 21, 2007, *amended by* Act No. 10577, Apr. 12, 2011; and the Act on Punishment for Damaging Ships and Sea Structures, *supra* note 23).

abroad . . . do not fall under . . . our criminal law even with mechanisms such as personal or territorial jurisdiction and protective jurisdiction."[26] It cited this need and strengthening international cooperation as justifying the measure. The bill was forwarded to the Legislation and Judiciary Committee of the National Assembly on October 27, 2011, and currently remains pending.[27]

While the amendment does not specifically define "universal jurisdiction," it provides in Article 7 that "[t]his law applies to foreign nationals having committed one of the following offenses outside the territory of the Republic of Korea." The article then enumerates an expansive list of the specific crimes to which universal jurisdiction would apply.[28] It would also allow Korea as a state party to exercise universal jurisdiction under the SUA Convention by calling the crimes governed by it "punishable pursuant to treaties binding upon the Republic of Korea."

Commendably, the defendants received a quick and fair trial—four months from investigation to the trial court's verdict, and three months from the appeal to the High Court's decision—and each defendant was represented by two legal counsels (except Mahamud, who had one for his bench trial) even though the case involved accomplices. In addition, Somali interpreters were provided from abroad and defendants' human rights were guaranteed through criminal procedure and a jury trial.

But the case raised questions about the legitimacy of the arrests under international law, in particular whether the use of force by Korean naval forces and the subsequent confinement of the pirates conformed with Korea's international legal obligations. The traditional definition of piracy as provided under UNCLOS Article 101 refers to actions taken for private ends by the crew of a private ship; the laws of war (international humanitarian law), which apply to states or organized armed groups, do not necessarily apply to the suppression of such acts of piracy. The pirates' arrest by Korean naval forces can therefore be seen as equivalent to the arrest of flagrant offenders under domestic law; and the armed forces assume the role of police on the high seas where the governmental powers of any single state do not reach.

Yet the Somali pirates are difficult to categorize, as their systematic organization, taking up of arms, and ties to armed terrorist groups have complicated their character. Thus, it can be asked whether international humanitarian law can be applied to these pirates, just as it can be asked about terrorist groups like Al Qaeda.

Despite this lack of clarity, the use of armed force for the suppression of piracy is justified by UNCLOS Article 105. But such force is permitted for the purposes of arrest and capture only and does not justify the use of deadly force unless the conditions for self-defense arise, which would be evaluated under the standards of necessity, proportionality, and immediacy.

[26] Ministry of Justice, Explanatory Statement for Partial Amendment of the General Provisions of Criminal Law 22 (Apr. 2011) (in Korean).

[27] Hyong beob gaejeongan [Draft Amendment to the Criminal Act], Bill No. 1811304, Mar. 25, 2011 [hereinafter Amendment]; *see* National Assembly of the Republic of Korea, Agenda Information System, *at* http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=ARC_Z1J1G0J3C2J5B1K7G3T3I3S1J9P3E9 (in Korean).

[28] Amendment, *supra* note 27, Art. 7(1)–(4) lists use of explosives (Art. 119), counterfeiting of currency (Art. 207), acquisition of counterfeit currency (Art. 208), attempt to acquire counterfeit currency (Art. 212), counterfeiting marketable securities (Art. 214), counterfeiting revenue and postal stamps (Art. 218), acquisition of counterfeit marketable securities and revenue and postal stamps (Art. 223), abduction and kidnapping of minors (Art. 287), abduction, kidnapping, and sale for profit (Art. 288), abduction, kidnapping, and sale for international transfer (Art. 289), abduction and kidnapping for marriage (Art. 291), purchase or harboring of abducted, kidnapped, or sold persons (Art. 292), attempts to violate Arts. 287–291, excluding habitual offenders (Art. 294).

After their arrest in the Indian Ocean, the pirates were confined for nine days without the intervention of a court or legal counsel before being handed over to the Coast Guard, which had proper judicial authority to arrest them. Although domestic law provides for prompt requests for arrest warrants and other guarantees of due process, these restrictions did not apply because the court determined that the arrest had been made by "private individuals." As seen above, Article 213(1) of the Criminal Procedure Act requires that suspects arrested by someone other than the public prosecutor or an enforcement officer be "immediately" handed over to the authorities.

The Supreme Court, however, interpreted the word "immediate" generously. As used in Article 213(1), the Court ruled, it does not mean "to be adjacent in time to the point of arrest, but rather means 'not delaying handover or continuing confinement without justifiable reason'" (pp. 2–3).[29] In considering the overall situation at the time, the Court held that the spatial and material limitations involved made the nine days spent in transferring the suspects after their arrest by the Cheonghae Unit inevitable, and that as a result their delayed handover and continued confinement cannot be seen as lacking justification. Unfortunately, the Court's decision can be interpreted as allowing indefinite confinement past nine days without a warrant as long as it is "inevitable due to spatial and material limitations" (p. 4).[30]

This decision is problematic in that it appears to violate Article 9 of the International Covenant on Civil and Political Rights,[31] to which Korea is a party and which is considered to be part of domestic law pursuant to Article 6(1) of the Constitution.[32] Article 9 permits deprivation of liberty only in accordance with the law (Art. 9(1)); and it entitles detainees charged with criminal offenses to be brought before proper judicial authorities and tried within a reasonable time or released (Art. 9(3)), and all detainees to bring proceedings before a court so that a decision may be made without delay on the lawfulness of their detention (Art. 9(4)).

Beyond resulting in the incarceration of the individuals responsible for the act of piracy against the *Samho Jewelry*,[33] this incident led to the proposal of significant amendments to Korean law, incorporating and giving effect to the principle of universal jurisdiction for the most serious international crimes. At the same time, it has left unresolved some important procedural issues that are likely to be encountered in any future exercise of such jurisdiction over serious extraterritorial crimes involving Korean interests.

SEOKWOO LEE
Inha University, Incheon, Korea

YOUNG KIL PARK
Korea Maritime Institute

[29] Quoting Dist. Ct. decision.

[30] Quoting *id.*

[31] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 (entered into force for Korea July 10, 1990).

[32] For Article 6(1) of the Constitution, see text at note 22 *supra*.

[33] Deportation may be considered, but pardoning those who committed grave offenses prior to deportation raises a policy issue. Releasing them from prison after the completion of their sentences may also cause problems. Reportedly, some of the pirates may desire to settle in Korea, but that may stir popular emotions. Deportation, however, may be a violation of Article 33 of the Convention and Protocol Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150, and Jan. 31, 1967, 19 UST 6223, 606 UNTS 267, respectively, to which Korea is a party.