

In the latest stage of the stoush over Japanese whaling activities in the Southern Ocean, the (Japanese) Institute of Cetacean Research together with Kyodo Senpaku Kaisha have successfully sued for a preliminary injunction against the Sea Shepherd Conservation Society in a United States Court. In a judgment released on the 25 February 2013, the US Court of Appeals for the Ninth Circuit overturned an earlier decision of the Western District of Washington, which denied the Institute of Cetacean Research the injunction it requested under the Alien Tort Statute (that provides for a cause of action for a “tort... committed in violation of the law of nations of a treaty of the United States”) and dismissed its claims that Sea Shepherd’s acts amount to piracy.

In a robust judgment, very different in style and tone to that typically used in New Zealand or Australia, Chief Judge Kozinski began by stating: “You don’t need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, you are, without a doubt, a pirate, no matter how high-minded you believe your purpose to be.” The definition of piracy, as provided for in Article 101 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) (to which the US is not yet a party) requires illegal acts of violence or detention, committed for private ends by the crew or the passengers of a private ship on the high seas. Traditionally, the term “private ends” has been interpreted as referring to acts relating to personal enrichment rather than those with a political or other motive. This was the approach taken by the District Court in this case but overturned and described as “erroneous” by the Ninth Circuit Court of Appeals. Relying on a much broader definition of “private”, as set out in Webster’s Dictionary, the Court of Appeal decided that the term more generally refers to “matters of a personal nature that are not necessarily connected to finance”. The extent to which “private ends” includes activities of a political nature has benefited from recent academic discussion, and the Court of Appeal cited works by Douglas Guilfoyle and Michael Bahare as well as a decision issued by a Belgium court to support its conclusion that “private ends” “include those pursued on personal, moral or philosophical grounds, such as Sea Shepherd’s professed environmental goals.”

Characterising the activities of Sea Shepherd as piracy has potentially far-reaching implications. Piracy is a crime of universal jurisdiction under the UNCLOS (Article 105) and customary international law. Pirates can therefore be prosecuted by any state even where there is no connection between the prosecuting state and the pirates, pirate vessel or the victims. Moreover, any state can board and seize a pirate vessel on the high seas (UNCLOS, Article 105 and 110(1)(a)). These rights do not generally apply to other offences committed at sea. Furthermore, the 1988 International Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA), which was cited by the Court of Appeal, explicitly does not provide for universal jurisdiction in respect of offences involving acts of violence at sea (Article 6). The fact that this Convention specifically created a number of offences involving violence at sea, broad enough to include those committed with a political or non-profit motive, supports the argument that piracy, a crime under customary international law, does not cover violence committed for political or non-profit motive. One potential consequence of this decision, particularly if it were followed in other jurisdictions, would be to permit Sea Shepherd vessels to be boarded by any state on the high seas and for its crew to be prosecuted in any

jurisdiction. This arguably goes too far and cannot be supported under international law as it stands today.

The Court of Appeal went on to discuss the relevance of the fact that the whaling activities are taking place in Australian Antarctic Territory (AAT). Unsurprisingly the Court dismissed this as a consideration and confirmed the long-held position that the US does not recognise Australian sovereignty in, and consequently, jurisdiction over, the Antarctic. The Court also dismissed the argument that the appellants' hands were "unclean" (and therefore undeserving of an equitable remedy) because they had ignored an injunction previously issued by an Australian court in respect of their whaling activities (*Humane Society International v. Kyodo Senpaku Kaisha Ltd* [2004] F.C.A. 15110; [2005] F.C.A. 664; [2006] F.C.A.F.C. 116; [2008] F.C.A. 3) on the basis that neither the US nor Japan recognises Australian jurisdiction over any portion of the Southern Ocean. Rather surprisingly, the Court made no reference to the legal proceedings initiated by Australia against Japan in the International Court of Justice in 2010 challenging Japan's scientific whaling programme under the 1946 International Convention on the Regulation of Whaling as well as other conventions, although as these proceedings concern the conduct of Japan rather than the Institute of Cetacean Research, they arguably would have no relevance to the grant of an equitable remedy at the request of the Institute and other private parties.

This appeal concerned a preliminary injunction only, which can only be enforced should Sea Shepherd vessels or crew members enter US jurisdiction (unless the US chooses to take action on the basis of its rights to respond to piracy under customary international law). It will remain in effect until the further order of the Court. With respect to future proceedings, Chief Judge Kozinski took the unusual step of commenting that "[t]he District judge's numerous, serious and obvious errors identified in our opinion raise doubts as to whether he will be perceived as impartial in presiding over this high-profile case. The appearance of justice would be served if the case were transferred to another district judge, drawn at random." It would appear that not only is the stoush in the Southern Ocean on-going but an equally undignified one is developing in the US courts over this matter.

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