

Interstatal cooperation and assistance in criminal matters

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In co-operation with

EULEC

The European Institute for
Freedom, Security and Justice

A recent exemple: arresting pirates abroad

- Location:
the Aden Gulf, high seas
- The Dutch Frigate “the
Seven Provinces”
patrols as a member of
a NATO flotilla in that
Gulf



May 5th 2009

- The frigate discovers an attempt to an act of piracy:
- There is the Antillean merchandiser "The Marathon" sailing in the Aden Gulf
- being attacked
by five Somalian pirates sailing in a little polyester vessel with an 40 HP outboard engine
- aboard of the vessel:
some drums containing hundreds of gallons gasoline, a extension ladder obviously fit to be grappled to another ship in order to board, machine guns and a grenade launcher.



- the frigate fires several times directly before the bow of the vessel ordering and signalling to stop the engines immediately to dead slow ahead crossing the course of the frigate
- the five pirates surrender at instance, being taken aboard of the frigate and detained



- the commander decides to bring the pirates to a riparian state in the neighbourhood, keen to return into the flotilla as soon as possible.
- Goal of the action: to have the Netherlands wielding its penal enforcement power over the pirates.



QUESTION:

- Operating in the high seas,
 - had the commander the competence to act as he did?
 - In other words – being the commander a representative of the Netherlands – had the Netherlands jurisdictional power over the case?
- This is a question of jurisdictional international law
 - Is there need of a special NEXUS between the Netherlands and this case?

Details ship

- registered in Willemstad, Curacao, Dutch Antillies
- But the ship owning company was not Dutch.
- The ship broker had the Dutch nationality, being established in the Northern part of Holland (Zaandam).
- Obviously “the Marathon” had been reflagged in convenience recently.
- 8 crew all Ukrainian
- Arrest on high seas



The nexus

- The nexus, the link, between “the Marathon” and the Netherlands was not a firm one, a genuine one.
- Does it matter to solve the jurisdictional issue?
 - The rule of universality does apply as far as the Netherlands is concerned;
 - does the intended riparian state have to respect that?
 - If so, does that prompt the obligation to cooperate with the commander?
 - The Somalians have been brought and detained aboard a Dutch man of war or warship: according to a long standing international tradition the pirates were to be considered to be on Dutch soil.

The frigate brings them on land in Bahrein: from Dutch soil to that of another nation.

Is this extradition?

Is a frigate commander competent to extradite? Does he have the external apparent authority to do so?

There is no treaty between Bahrein and the Netherlands. And for sure: Bahrein is not going to wield any penal enforcement power against the Somalians. It confines itself to act as mere custodian.

This is a question of international law on interstatal cooperation and assistance.

- The Bahrein authorities decide to detain the pirates in camel pens on the quay, urging the Dutch to bring the pirates immediately abroad, irrespective to which country
- The Prosecutorial Service sends a District Attorney empowered to bring them to the Netherlands
- Again: this is a legal act aiming to bring the culprits from the Bahrein jurisdiction to the Dutch jurisdiction with a penal enforcement goal:

Is this extradition? If so, what are the legal consequences for the Dutch jurisdictional power failing any extradition treaty between Bahrein and the Netherlands.

Could such a treaty be concluded with retroactivity?

The District Attorney charts an Dutch aircraft to pick up the pirates, without flagging on the forehand that the intended *passengers are pirates*.



- The Dutch captain of the aircraft refuses upon arrival to have the pirates aboard, neglecting the formal orders of the Attorney to have them boarded. He stipulates that the security risk is unacceptable and that it is only with him to decide upon that.
- Moreover, the Dutch aircraftowner asserts that a Dutch District Attorney cannot give such orders abroad: the overarching rule of territoriality simply dictates so.
- Again: this is a question of international jurisdictional law. In this case, that segment is tightly interlinked with extraterritorial matters.
- In the end, the Dutch Ministry of Defence sends a military plane. That plane has to be considered to be an extension of Dutch soil.

Gemeente Schouwen-Duiveland, oktober 2008

- The pirates love to board.
They love to go to the Netherlands, that Garden of Eden, so well reputed for its prosperity and stability.
- Aboard the plane, they apply for asylum.
- No compulsory power was needed to bring them aboard and to have them disembarking at the Dutch airport.
- Question: if the claimed persons obviously are willing to travel to the claimant party, could one assert that there was a case of extradition?
- Again a question of interstatal cooperation and assistance.

To conclude

- This is international criminal law.
- Three classical main segments:
 - interstatal jurisdictional law
 - interstatal law on cooperation and assistance
 - interstatal substantive criminal law

Those segments show a mutual contingency and interdependence

There is no watershed between them: each segment prompts the need of the other.

There is one other segment: interstatal institutional criminal law concerning the establishment, organisation and budgeting of international entities