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## Prize or Piracy – The Capture of Vessels During Geo-Political Conflicts

By John & Yoav Harris

An Iranian oil tanker was arrested on 4 July 2019 off the coast of Gibraltar on suspicion of transporting oil to Syria in violation of European Union sanctions and was later released. A British oil tanker was arrested on 19 July 2019 for violating maritime law in the Strait of Hormuz and was later released.

In addition, an Iranian oil tanker experienced two explosions in its cargo tanks 60 miles from the Saudi Arabian port city of Jeddah in October 2019, while another Iranian tanker experienced an ingress of water into its engine. Meanwhile, a Marshall Island tanker and a Panamanian tanker also experienced explosions in June 2019.

So far this year we have had 1:1 in tankers which were arrested and released and 2:2 in tankers which were damaged. These are the interim results of the "maritime war" between Iran and the rest of the world.

The maritime industry is almost as old as warfare itself, which means there is plenty of precedent and a specific protocol to follow at times of maritime war. In this article, we address some of



the most pertinent questions such as what legal grounds, if any, governmental officials have for taking over vessels, as well as the unique new way in which countries are exercising strength and force.

### Traditional Law Relating to Warfare at Sea

The concept of neutrality during war was acknowledged for the first time in the year 1164, where during a war between Pisa and Genoa, Pisa captured a Saracen ship that was allegedly carrying goods belonging to a citizen of Genoa. The Sultan of Egypt complained of the capture arguing that the goods belonged to one of his subjects. Pisa, after determining the Saracen ownership, released the ship.<sup>1</sup>

However, it seems that the beginning of traditional law of naval warfare can be ascribed to the date of Paris Declaration of 1856 and the "London Declaration" of 1909. Almost a century later, the San Remo Manual was introduced in 1994 to provide a contemporary restatement of international law applicable to armed conflicts at sea.

A decision as to whether enemy's property – vessel or goods – is liable to capture is determined by a prize court.

According to the traditional law relating to the warfare at sea, all merchant ships – whether enemy or neutral – may be stopped, visited and searched. An enemy cargo merchant ship can always be captured and seized as prize. Neutral cargo on board an enemy merchant vessel can be seized if it is contraband, or if the vessel is a blockade runner or actively resists visit and search.

A decision as to whether enemy's property – vessel or goods – is liable to capture is determined by a prize court. Although the act of capture itself takes place at sea it should be upheld by a judgement of a prize court where the owners and the cargo interests can bring their allegations before a specialised hearing. The prize court does not only rule on the validity of the capture itself but also gives orders in relation to the management of the Vessel, its crew and cargo, according to the principle that the property of private persons must not be converted without due process of law.<sup>2</sup>

### The Law of Prize After World War II

After World War II there was a rare use of the traditional law of prize. One of the countries that seized another country's vessel was Egypt, which following King Farouk's decree of 6 February 1950, ordering the cargos and manifests of vessels could be inspected in order to make sure that no arms, ammunition or other goods constituting contraband for Israel are on board and referring prize court's decisions made during World War II, begun, since 1951 to intercept ships destined to Israel either at the gulf of Aqaba or when seeking to pass through the Suez Canal. Although the Security Council in September 1951 characterised the Egyptian practice as an "abuse of the right of visit, search and seizure", Egypt maintained this practice until the peace treaty with Israel concluded in 1979.<sup>3</sup>

In 1982, the UNCLOS ("United Nations Convention on the Law of the Sea") was concluded in 1982. The convention followed the international conventions of 1956 and 1960, known as "UNCLOS 1" and "UNCLOS 2".

UNCLOS sets out, inter alia, the freedom of navigation in the high seas (Article 87 (1) (a)) and the right of innocent passage through a coastal state's territorial sea (Article 17). The UNCLOS also provides the rights of boarding ("visit") and of a hot pursuit of a foreign ship when competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of the state (Articles 110,111).

### The Blockade Running of the M/V Estelle

Since 2001, thousands of rockets and mortars have been fired into Israel in ever growing numbers from the Gaza strip while relations have been increasingly fraught since the takeover of Hamas in 2007. This led to a naval blockade being imposed by Israel on the Gaza Shore since January 2009 under the purpose of preventing weapons, terrorists and financial resources from entering or exiting the Gaza strip by sea. Following examination by a tribunal nominated on behalf of the Security Council, the Blockade was found to be legal.<sup>4</sup> Against the abovementioned background, the M/V Estelle set sail on a voyage from Finland towards Gaza in May 2012 in an attempt to break the naval blockade.

Prior to the M/V Estelle's attempt to break the naval blockade, during 2009-2010 a number of attempts were made by various other vessels. On two occasions, after having been warned by the Israeli Navy, the vessels withdrew and turned back (the vessels "Iran Shhed" and "Spirit of Humanity"). On two other occasions where vessels did not pay attention to the Israeli Navy's warnings the vessels were taken over by force, brought to Ashdod Port and released to their owners.<sup>5</sup>

In May 2010, the attempt of a flotilla of six vessels – one of which was the "Mavi Marmara" – also resulted in Israeli officials taking over by force before releasing the vessels to their owners at Haifa and Ashdod ports, respectively. During the arrest, Israeli officials were confronted with a significant, organised and violent resistance which led to nine passengers losing their lives and many more passengers and soldiers sustaining injuries.

In October 2012, after anchoring in Spain and Italy, the M/V Estelle reached the naval blockades area where she resisted the Israeli Navy's warnings (which included messages to the Owners that humanitarian cargo can be discharged at Ashdod port and transferred through the land passage to Gaza). On 22 October 2012, the vessel was taken over by the blockading force with no resistance. The vessel was taken to Ashdod port where its passengers and crew were questioned and deported from Israel. The cargo was checked and then transferred to Gaza (part of the cargo, cement, was given to the Palestinian Authority and the other part was given to UNRWA).

#### The Awakening of the Prize Court

Contrary to the previous incidents, the vessel was not returned to its Owners. It was held by the Israeli Navy and after 10 months of detention the State of Israel applied to the Haifa Maritime Court and requested it to exercise its alleged authority as a prize court and order confiscation of the vessel (*Folio No. 26861-08-13 the State of Israel v. the M/V Estelle*). It was the first time after the World War II that the question of a Maritime Court acting as a prize court was ever dealt with – at least in the western world – and the first time this question was raised following the conclusion of the UNCLOS in 1982.

#### The Establishment of the Haifa Maritime Court

The Israeli Maritime Court is a legacy from the British Mandate over Palestine (Israel) which began after the end of the First World War (formally in 1922) and ended on 15 May 1948. By a King's Order-in-Council dated 2 February 1937, The Supreme Court of Jerusalem was constituted as a Maritime Court under the Colonial Courts of Admiralty Act, 1890 (the "Colonial Act"), which established Maritime Courts in Her Majesty's dominions and elsewhere out of the United Kingdom. However, under clause 2 (2) of the Colonial Act, a Colonial Court of Admiralty shall have the authorities to act as a prize court (under the Naval Prize Act 1864) only if it has been duly authorised. In other words, the Colonial Courts of Admiralty Jurisdiction and the authority to act as a prize court should be "triggered" by a specific authorisation on behalf of Her Majesty.

After the establishment of the State of Israel, the Admiralty Court Act 1952 transferred the authorities of the Supreme Court to act as a maritime court to the Haifa District Court (immediately acting as the Israeli Maritime Court). Later, in 1960, the Israeli Shipping Act was enacted, which elaborated on the Maritime Liens and their classifications (following the 1926 Brussels Convention)

but did not refer to any prize act of prize authority.

#### Does the Haifa Maritime Court Has the Authority to Act as A Prize Court?

Accordingly, the first question the Haifa Maritime Court dealt with in the matter of the M/V Estelle, was, if the colonial maritime court established in the Supreme Court in Jerusalem was "triggered" by a specific authorisation after its establishment to act as a prize court. It sought to determine whether such an authority was transferred to the Haifa Maritime Court when receiving the Authorities, or not.

The State of Israel argued that such an authority was given to the Supreme Court of Jerusalem under an Order given by the High Lord Admiral of the United Kingdom to the Senior Judge of the Supreme Court of Jerusalem published in 10 October 1939. The High Lord Admiral ordered that "when an announcement is made in Palestine stating a war has commenced between her Majesty's and any foreign country, to pay attention to all kinds of captures and prizes of all kinds of ships, vessels, aircrafts and cargos which will be taken and will be brought to the Supreme Court of Palestine (Israel) to rule over them, to judge and to confiscate them..."

The response to this argument was that the specific announcement mentioned in the Order was not presented as it seems that authorities to act as a prize court were given only for the purpose and the period of World War II which had ended and thus so had the British Mandate. Therefore, the Supreme Court in Jerusalem did not have the authority – as a colonial admiralty court – to act as a prize court when the Admiralty Court Act 1952 transferred the powers to the established Haifa Maritime Court.

#### The Haifa Maritime Court's Decision

In its judgement, the Haifa Maritime Court judge, Honorable Judge Ron Sokol, held that considering there were some publications evidencing that during the Second World War, the Supreme Court in Jerusalem acted as a prize court and choosing between the two possibilities it prefers that of which there is a specialised prize court which is in compliance with traditional law's requirements rather than an absence thereof. Especially where there is a need that matters of prize would be dealt with promptly as the capturing authority is required to provide the vessel's documents to the court immediately after the capture and where immediate orders as to the management of the captured vessel, its crew and cargo and third-parties rights and interest should also be given by a specialised maritime court.<sup>6</sup>

Therefore, the Haifa Maritime Court held that it is authorised to act as a prize court. However, in relation to the M/V Estelle itself, and under the current circumstances where the State of Israel delayed the filing of proceedings for a 10 month period – which is contradictory to the principles of the traditional law requiring the capturing authority to deliver the vessel to the marshal of the Court "forthwith and without bulk broken" and also against the principles of administrative law – the vessels should be released. The release of the vessel was also justified in the current circumstances where the cargo carried by the vessel was humanitarian and the vessel did not resist the visit of the Israeli navy or its capture and arrest.

The judgment of the Haifa Maritime Court was also examined by the Supreme Court following an appeal filed by the State of Israel which after observing the traditional law authorities did not intervene (Supreme Court civil appeal 7307/04).

#### Further Confiscation of the Marine Blockade Runners

After the matter of the M/V Estelle was decided, two more vessels owned by the same owners tried to breach the naval blockade. These were captured by the Israeli navy and proceedings were filed before the Haifa Maritime Court promptly. In these matters, the Haifa Maritime Court ordered the confiscation and judicial auction of the vessels and ordered that the amount received from the sale will be transferred to the state of Israel (the matters of *M/V Marianne* (2016) and the *M/V Zaytouna - Oliva* (2019)).

#### The "Marine Cold War"

Unlike the State of Israel which bases the acts of its capture of blockade running vessels on the traditional law and the Haifa Maritime Court authorities, what seems to be an American-British cooperation took a different approach when capturing the Iranian tanker named Grace 1 in July 2019.

The justification for the capture of this tanker by British commando of the shore of Gibraltar was its intended violation of Council Regulation (EU) No. 36/2012 imposing sanctions against Syria due to the continuous violation of civil rights by the Syrian Government. The extended sanctions entered into force in 2014, forbidding, inter alia, the trade with a list of Syrian companies considered to be providing financial support to the Syrian government.

The Grace 1 was carrying oil intended for the "Baniyas Refinery Company" which was listed in the 2014 extended sanctions as being a part of the Syrian Ministry of Petroleum, and its capture

was upheld by the Court of Gibraltar.

However, not being aware to the fact that British and associated tankers have no choice but to navigate next to the Iranian "lion's mouth" at the Hormuz strait. Soon after the Grace 1 incident, authorities were confronted with an Iranian capture of the British tanker *Stena Impero* while navigating its way to Saudi Arabia on 19 July 2019 – just a few hours after the Gibraltar Supreme Court had extended the arrest of the Grace 1.

The capture itself was explained by the Iranian authorities as being due to the tankers' "crossing a route other than the shipping lane in the strait of Hormuz, switching off its transponders and not paying attention to Iran's warning when it was not seized by the Revolutionary Guards, forces".

As a result, soon after, the Gibraltar Court was satisfied with an Iranian commitment that the Grace 1 will not deliver its fuel to the Syrian refinery and released the tanker (soon after its release the tanker changed its name to Adrian Darya, and after it switched off its tracking devices near Iskenderun, it probably delivered its USD 140 million worth of cargo to the Syrian refinery). A few weeks later, the Stena Impero was released from its Iranian detention.

The "Marine Cold War" between Iran and other countries also took place in some unexplained expositions to tankers which resulted in damage to their cargo holds but did not result in either their explosions nor in any unrecoverable damage. They have also been found to violate the freedom of navigation at high seas and the right for innocent passage at a coastal state's territorial sea, which are well recognised principles stated in the UNCLOS and part of the international customary law.<sup>7</sup>

#### After Thoughts

It seems that as long as geo-political tension remains, marine traffic will be affected. The question will be if action will be taken under due process of (traditional) law or if piracy acts will take over.

1. Wolff Heintschel Von Heinegg, "Visit, Search, Diversion, and Capture in Naval Warfare: Part I: The traditional Law", (29 Can.Y.B. Int'l L. 283 (1991), page 284, foot note 4.

2. Foot note 1, pages 298, 304.

3. Foot note 1, "Visit, Search, Diversion, and Capture in Naval Warfare: Part II, Developments since 1945", (30 Can.Y.B. Int'l L. 89 1992), pages 91-93.

4. The Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident", page 44, paragraph 81.

5. Folio no. 26861-08-13 in the matter of M/V Estelle, Haifa Maritime Court, 31.8.2014, paragraphs 4-8.

6. Folio no. 26861-08-13 in the matter of M/V Estelle, paragraphs 55-58.

7. "The Iranian wave in the marine war", By Yoav Harris, Adv., 23.10.19, the "Cargo", <https://www.shipper.co.il/oneitem.asp?id=813368438>