ISRAEL DEFENCE FORCES

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Proliminary Inquiry File 1/67

Preliminary Inquiry
Before: Sgan-Aluf I. Yerushalmi

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DECISION

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1. On Thursday 8th June, 1967, at approximately 1400 hours, aircraft of the Israel Air Force attacked a vessel situated about 20 miles north-west of El-Arish, and some 14 miles off the shore of Bardawil. About half an hour later torpedo boats of the Israel Mavy attacked the same vessel and hit it with a torpedo. Soon, during the attack by the torpedo boats, it become clear that the vessel thought to be an enemy ship, was a vessel named "Liberty", of the United States Havy. The attack was immediately broken-off, but most regrettably, only after, as transpired, loss of life and material damage had been caused.

- 2. In order to understand the chain of circumstances which lead to this infortunate incident, a number of the events which preceded it, must be reviewed.
- 3. The incident occured on the foruth day of the war. On that day the towns of Gaza and El-Arish, as well as the area extending to the Suez Canal were already in the hands of our forces. Although our command of the sir was absolute, our forces were still conducting battles in Sinai and Naval operations were being carried out on the day of the incident. In the hours before noon, naval engagements were taking place along the coast of Israel and an enemy submarine was believed to be sunk by the Naval Forces (note: there is no confirmation for this from intelligence sources).
- 4. Before noon, between 1100 and 1200 hours, Navy N.Q. received reports from two separate sources, according to which El-Arish was being shelled from the sea. The Naval representative at Air Force H.Q. was ordered

to check the credibility of the report. This officer got in touch with Air Force Operations Branch, and was told that the source of the report was the Air-Ground-Support Officer. Immediately thereafter by was informed by the Naval representative at G.N.Q. that the information about the shelling received by them originated from Southern Command.

It is to be noted that the reports from Southern Command about the shelling were also accompanied by information, that two vessels had been observed approaching the coast.

- st Ashdod to proceed in the direction of El-Arish. Reports about the shelling continued to reach G.H.Q./Operations, and pressured was exerted on the Naval representative, on the lines, at "the coast has been shelled for hours, and you the Navy are not reacting." The Naval representative contacted Navy H.Q. and proposed an immediate action. He was informed that torpedo boats has been sent to the spot to locate the target, and it had also been agreed with the Naval representative at Air Force H.Q., that as soon as the torpedo boats locate the target, aircraft would be dispatched. In the meantime, the commander of the torpedo boat division, who had already been proceeding in the direction ordered, was informed about the shelling of the El-Arish coast and he was ordered to establish radio contact with the aircraft as soon as they appeared over the target.
- 6. According to the division log-book, a target was located at 13.41 hours situated at a distance of about 20 miles north of El-Arish. The division was ordered "to close in and identify the target", and reported that the unidentified target was moving at a speed of 30 knots westwards that is, in the direction of Port Said.

A few minutes later, the Division Commander reported that the target, now 17 miles from him, was moving at a speed of 28 knots, and since he could not evertake it, he requested the dispatch of aircraft towards it. The Division Commander also reported that the target had changed its navigational direction.

7. As a result of the request of the Navy H.Q. through its representative with the Air Force, aircraft was dispatched to the target. The aircraft carried out a run over the ship in an attempt to identify it. According to their statements, they were looking for a flag, but found none; likewise no other identification mark was observed. As against this, it was established that the painting of the ship was grey (the color of a warship), and two gums were situated in the bow. This was reported to H.Q.

On the assumption that they were facing an enemy target an order was given to the hircraft to attack. During the first stage of the attack the aircraft strafed the ship with cannon and machine guns, and during the second stage dropped bombs on it, which caused fires, and smoke was seen to rise from the ship.

The sireraft was ordered to leave the target, to allow the torpedo boats, which had meanwhile drawn near, to engage in attack, but during the last run a lowflying aircraft observed the marking "CPR - 5" on the hull of the ship.

8. Upon receipt of the information about the marking, so observed by the pilot, an order was transmitted to the torpedo boar division not to attack the ship, since its identification might not be correct.

The Division Commander was ordered to approach the ship in order to establish visual contact and to identify it. The order was carried out, and

the Commander reported that the ship appeared to be a merchant or supply vessel. The Division Commander also signalled the ship and requested its identification, but the latter replied with a signal meaning "identify yourself first". Meanwhile the Division Commander was consulting and parusing a book/on the identification or anab Navies and making comparisons with the target seen by him, he came to the sonclusion that he was confronting an Egytian Supply ship by the name of "El-Kasir". At the same time the commander of another torpedo boat of the division informed him, that he also had identified the ship as the Egyptian "El-Kasir", and than at 14.36 hours the Division Commander authorized the division to attack with torpedoes.

And in fact a torpedo was fired at the ship and hit it. Only at a later stage, when one of the torpedo boats approached the ship from the other side were the markings "CTR - 5" noticed on the hull, and then the final order was given to break off the attack.

It is to be noted that throughout the contact no American or any other flag appeared on the ship, and it was only a helicopter, sent after the attack in order to render assistance — if necessary — which noticed a small American Flag flying over the target. At that stage the vessel was finally identified as an audio-surveillance ship of the U.S. Navy.

- 9. Although at no stage of the inquiry was any evidence brought on the results of the attack, it is reasonable to assume, in view of the testimony as to the nature of the hits, that loss of life, as well as material damage to the ship, was caused. Revertheless, according to the evidence presented to me, the ship succeeded in leaving the area of the incident under its own power, without requiring the assistance offered.
- 10. I have briefly described the incident; in consequence of which a plaint has been submitted to me by the Chief Hilitary Prosecutor, in

hold a preliminary inquiry, since in his view offences had by a committed which a military court is competent to try. But before I deal with the seven counts of the plaint, I must briefly describe a number of facts which halp to explain the background of the plaint, and without which it cannot be understood.

observer on board, set out on an air reconnaissance mission, and reported, at approximately 06.00 hours, the location of a ship 70 miles westward of Tel Aviv. The ship was later identified as a supply vessel of the American Kevy. At about 09.00 hours an Israel aircraft flying over the sea, reported that some 20 miles north of El-Arish it had observed a warship which had opened fire on him when he tried to identify it. During the debricking of the pilot at .09.40 hours, it appeared that the report about the firing was unfounded, and that the ship was "coloured grey, very bulky and the bridge amidships".

At 10.55 hours the Haval Liaison Officer at Air Force H.Q. reported to Navy H.Q. that the ship about which he had reported earlier in the morning was an electromagnetic audio-surveillance ship of the U.S. Havy, named Liberty, whose marking was G.T.R. - 5. At the same time the Acting Chief of Naval Operations was present at Navy H.Q.

12. Upon receiving the information from the reconnaissance aircraft about the location of the ship, as mentioned above, it was marked on the <u>Corbat Information Centre Table at Navy H.Q.</u> At first the object was marked in red, meaning an unidentified target; afterwards, when the ship was identified as a supply vessel of the American Mavy, it was marked in green, i.e. a neutral ship. At about 11.00 hours, after the Acting Chief of Naval Operations had received the report, as above stated, from the Liaison Officer at Air Force H.Q., and had understood, as he testified, that it referred to the target,

the location of which was correct at 05.00 hours in the morning, he ordered its erasure from the table, since he had no information as to its location at the time of the report.

Accordingly, it is clear that from the moment when reports about the shelling of the const of El-Arish were received, and of the commencement of activity at Navy H.Q. in order to confront a presumed enemy, and until the said incident with the ship "Liberty", the latter was not to be found on the Combat Information Centre Table at Navy H.Q.

13. Upon receipt of the reports about the shelling of the El-Arish coast the Acting Chief of Maval Operations called the Head of the Maval Department to the Command Bridge, and the latter took over, he command on the bridge, ordered the dispatch of the toupedo boats and aircraft and their attack on the target.

At 14.20 hours 0.C. Navy arrived at the Command Bridge and it was he who authorized the commander of the torpedo boat division to attack. At the First stage of activity, with the appearance of the Head of the Maval Department, there was present on the bridge the Acting Chief of Maval Operations (a duty which he took over at approximately 10.30 hours). At a later stage the Chief of Naval Operations returned to the Command Bridge.

14. The subject matter of the first two counts of the plaint is the failure the report the fact that the American ship "Liberty" was seen in the norming hours of the day of the incident, sailing in the vicinity of the Israel coast, under the first count - to the Bead of the Naval Department, and under the second count - to Air Force H.Q.

According to the third count of the plaint "the extent of the veracity and credibility of the reports on the shelling of El-Arish from the sea, which reached the Air Force, the Senior Mayal representative at the Air Force and the Navel mission at G.H.Q., was not properly investigated."

Ine fourth and fifth counts are alternative, and allega negligence, in that an order to attack a target thought to be an enemy target, was given without checking its national identity and without taking into account that the ship "Liberty" was observed in the morning hours of that day sailing in the vicinity of the Israel coast.

In the sixth count, the Chief Military Prosecutor charges that the crder of the Navel Department not to attack the ship, suspected by the division of being an enemy ship, "for fear of error and out of uncertainty with regard to the true identity of that ship", was not delivered to the division.

Finally, in the seventh count, the Chief Military Prosecutor charges that "aircraft of the Air Force and torpedo boats attacked the American ship "Liberty" on an unfounded assumption — resulting from failure to take reasonable steps properly to establish her identity — that she was an Egyptian warship".

To establish the plaint, the Chief Military Prosecutor called 34 witnesses and also produced to me 14 various exhibits. In his firm! submission the Chief Military Prosecutor argued that on the evidence, the commission of each of the offences, that appear in the plaint, can be attributed to various military personnel, whom he indicated by name, although the plaint itself does not mention the accused (see section 294(a) (2) of the Military Justice Law, 1955).

15. In an interim decision dated 5th July, 1967, I hald that "ft appears to me, prima facia, that offences of negligence may have been committed by the Acting Chief of Naval Operations, because he did not report to the Head of the Naval Department, that on the day of the incident the American ship "Liberty" was observed proceeding in the vicinity of and along the Israel coast"; and "that he may have been negligent in that after being informed that the target, which was reported to be allegedly shelling the El-Arish coast was marked CTR - 5, he did not inform the Head of the Naval Department and/or the O.C. Navy, that a vessel with identical or similar marking had earlier been identified."

As a result of this decision of mine, the Acting Chief of Naval Operations appeared as accused and was represented by the Chief Hilitary Defence Counsel. He called 3 witnesses, made a statement under oath and produced 5 exhibits.

16. Before dealing with each count of the plaint, I must observe that it is clear to me that it is not my function to determine, in any manner whatsoever, whether the ship "Liberty" acted properly at any stage prior to the incident or during the incident itself. By task is to decide whether any offence has been committed by any military personnel involved in this incident, i.e. as is stated in section 297 of the Military Justice Law, 1955, "to decide whether or not there is sufficient amount of prima facie evidence to justify the committal of the accused for trial". At the same time, since the subject matter of the plaint before me are offences of negligence, I will be unable to determine the reasonableness of the conduct of all those concerned in the matter without examining the conduct of the ship, against the background of the general situation, as was described to me.

connection between the American supply ship, reported on that morning in another location, and the target discovered by the torpedo bosts.

The Acting Chief of Naval Operations testified, that upon assuming his duties, he was not informed of the reports received at 09.40 hours at Mavy H.Q. about the presence of a ship at a distance of 20 miles north of El-Arish, while the report of 10.55 hours related to the presence of the "Liberty" 70 miles west of Tel-Aviv in the early hours of the morning. I shall go further and say, that after hearing all the witnesses, it appears to me that even on the assumption, that the presence of the "Liberty" as such, 20 miles north of El-Arish, was known to the concerned, that would not have alcored the conclusion as to the nature of the target discovered by the torpedo boats, that it was an enemy warship, according to 1 the said data.

Since I am of the opinion that the assumption as to an enemy ship was reasonable, I have come to the conclusion, that the order given to the aircraft to attack was in the said circumstances, justified.

25. At the second stage of the activity of our forces, upon the receipt of the report of the pilot with regard to the marking discovered on the hull of the attacked ship, the order was given to cease the attack, and at a later stage the Division was ordered to draw near to the target and make a visual identification. During this stage the suspicion of the Acting Chief of Maval Operations was indeed aroused, that possibly the target attacked was not an enemy target, but at that moment it was the Head of the Maval Department who was directing the activity, at whose side was the Chief of Maval Operations, who had meanwhile returned to the Command Bridge. In the course of deliberations and attempts at identification at Mavy M.Q., the O.C. Mavy arrived at the Command Bridge, and he took over the command from the Head of the Maval Department.

that in the course of the fight with the submaripe the Head of the Naval Department was present on the Command Dridge. At the same time an American supply ship was marked in red on the Combat Information Centre Table, and during a nomentary hull in the fight, the O.C. Navy, who was directing the fight, inquired into the import of the marking, and ordered it to be changed to green.

The Acting Chief of Naval Operations testified that he was an eye-witness of the said event, and concluded therefrom that the head of the Maval Department knew about the presence of an American supply ship in the area, as had already been reported in the hours of the morning. This assumption sooms to me to be reasonable under circumstances, and therefore I take the view that no negligence on his part has been proved, even prima facis. As repards the second stage — that is, the failure to draw the attention of the Head Of the Naval Department to the fact that the marking, which the pilot had reported as being on the hull of the ship, was similar to the markings of the "Liberty" — it is my considered opinion, there was no reason for him to repeat this information to the Head of the Naval Department.

Witnesses related that the Naval Lieison Officer at the Air Force passed on to the Naval Cormand Bridge the report on the marking and its similarity to that of the "Liberty", and the officer with whom he spoke, repeated his words in a loud voice, so as they were heard by all present on the bridge, including the Head of the Naval Department and the Chief of Naval Operations. What reason, therefore, was there to draw the attention to the Ecad of the Naval Department to a fact which had been audioly announced by the said officer? Moreover, as I have already pointed out, the Acting Chief of Naval Operations had reasonably assumed that the facts of the presence of the "Liberty" in the area, was known to all concerned.

No one present, indeed, had connected this report with the target attacked, but I shall consider this question, when I deal with the reasonableness of the attack on the target, under the given circumstances.

18. As to the second count the Chief Military Prosecutor argued that it was the duty of the Naval Liaison Officer at the Air Force to report to the Air Borce, where he represented his Service, the information about the presence of the "Liberty" in the area, and not having done so, was negligent in the discharge of his duty.

This argument is unfounded. The responsibility for the Referee of Israel against enemy Naval actions rests solely with the Navy. It was made clear to me in this instance that the Air Force fulfilled merely an auxiliary function, while the responsibility for identification and attack lay upon the Navy. Even though Air Force U.Q. issued the order to the pilot to attack, it was really an order issued by the Navy, passed on through Air Force H.Q., and the responsibility for its issue falls upon whoever issued it at Naval E.Q.

The Naval Lisison Officer at the Air Force well knew, that the report on the "Liberty" was transmitted by him to Navy E.Q.; and he was entitled to assume, that whoever decided upon the attack, had dear so after taking the above fact into consideration. What reason was there in feeding the Air Force with information and considerations which did not concern it?

19. It appears to me that it would be proper at this stage to deal with the sixth count, in which the Chief Military Prosecutor alleges that the Torpedo Boat Division Commander was not provided with the order of the Maval Department not to attack a ship, suspected by the former to be an enemy wessel, for fear of orror and uncertainty as to its true identity.

In the operations log-book of the fleg boat, carrying the Division Commander on board, it was recorded that at approximately 14.20 hours an order in the following terms was received from Naval Operations Branch: "Do not attack. It is possible that the aircraft have not identified correctly". A similar entry, made at the same time, is to be found in the war-diary of Naval Operations Branch, as an instruction transmitted to the Division.

When the entry was produced to the Division Commander, he claimed that no such message ever reached him, the deputy commander of the boat, through whom contact between the Division Commander and Baval Operations Branch was maintained, testified, that he received the message and passed it on to the Division Commander.

Although considerations of the credibility of vitnesses should not be part of my functions, it appears to me that in the normal course of events as described, the message was passed on in the normal course of reporting to the bridge of the Division Commander. It is possible that the message escaped the awareness of the Division Commander in the heat of battle.

In any event, be the matter as it may, there is insufficient evidence before me, justifying the committal for trial of any accused person on these grounds, and accordingly I so decide.

20. The third count concerns, as has been said, the insufficient investigation of the varacity of the report on the shelling of El-Arish by the Eaval Lizison Officer at the Air Force, who was ordered to do so by the Head of the Kaval Department.

It is not disputed that the Liaison Officer clarified with Air Force H.Q. the source of the report concerning the shelling, and was told that the source of the information was the Air-Ground-Support Officer. Immediately thereafter he was informed by C.H.Q., that reports of the shelling were being

remained from Amirbura Command. The Chief Hillienry Prosecutor argued must be soon as the Husel of the Haral Department had made doubts upon the normal mass of the report. It was the cuty of the Baval Lisison Officer at his force Hele to establish its correctness by contacting the original source of the report.

This argument does not recommend itself to me at all. We are concerned with Emperts in time of var accing through the usual report—chancel, and it appears to me that a conscrater may excure that every such report received by him is correct, and treat it with utwest seriousness as long on the infermation is vishen the limits of remonstlaness. Since expervise, if the original poerce, our consurt and upon to injuric into the correctness at the criginal sparce, our consurt and upon reports at all, and it would be injured to describe and it is entire absence whatsomers in the example of the head of the head for the head of the head for the head formation.

An hound he the limit result of the Atr Torce, and but treathrely quilined its content from another assures, i.e., Sentions Command through the particular of the Information and, in my opinion assertated wolfishedly, and it a reasonable manner.

21. Three course remain to be dealt with -- the fourty, the fifth and the seasons, of the glaint -- which, or it seems to was form the wholes

The Color Military Procedure arrest the stabilishing, buyond doubt, its national identity and without taking into account the processes of the doubt of the court of the avening in the vicinity of the court of the stability of the stability of the court of the stability of the stabi

In surring-up the seventh count of the plaint, the Chief Military
Prosecutor saw negligence in the giving of the order to the sircrest
and torpedo boats to attack the ship upon an unfounded presumption that it
was an Egyptism warship, and this as d'consequence of not having taken
reasonable dteps to ascertain properly its identity. As parties to the
negligence, the Chief Military Prosecutor joined the Head of the Maval
Department, the Chief of Naval Operations and the Acting Chief of Maval
Cparations (who fulfilled his functions during a dertain period on that
day), the Torpedo Boat Divison Commander, and finally, although indirectly,
the Naval Liaison Officer at Air Force N.Q.

- 22. It appears to me that the activity of our forces in the said incident, may be divided into three stages:
 - (a) the first stage, in which the order was given to Air Porce planes to attack the target, and their attack;
 - (b) an intermediate stage, after the report of the aircraft about the marking of the attacked ship with the symbole "CTR 5";
 - (c) the identification of the target as the ship "El-Kasir" and the attack of it with torpedoes.
- 23. In my opinion, on the evidence I have heard, there are five factors, as a result of which the assumption arose, that the target was an enemy ship and should be attacked:
 - (a) the report on the shelling of the El-Arish coast for hours on end;
 - (b) the speed of the target, assessed by the torpedo boats as 28 to 30 knots;
 - (c) the course of the target towards Port Said;
 - (d) the report from the aircraft that the target was a

warship and carried no naval or other identification , marks;

(e) the location of the ship -- close to shore in a battle zone.

There is no doubt that the dominant factors were the speed and the course of the target. Most remarkably, it were two torpedo boats of the Division, which determined the speed, although it was proved to me beyond a shadow of doubt, that no ship of the class of the "Liberty" is capable of developing a speed above 15 knots, this being the theoretical maximum speed limit.

24. The Chief Military prosecutor is summing up his argument with respect to this stage of the incident, reiterated with emphasis that the root of the negligence of all parties lay in their disregard of the presence of the ship "Liberty" in the vicinity, and not connecting the target discovered by the torpedo boats with this ship.

It seems to me that thoses concerned were entitled to assume, that they had before them a correct report as to the speed of the target, within the usual limits of reasonable error of 10% to 15%, relying upon the existing means of determining the speed of the target.

The initial speed of the target, determined by the torpedo boats at 30 knots, and received with doubts, was verified within minutes and finally confirmed as a speed of 23 knots, as is customary at sea.

It was therefore the speed of the target, which led to the final and definite conclusion, that this was a miditary vessel, and thus there was no reason for surmising, in view of this datum that the target could possibly be the ship "Liberty". If we add to this the others factors mentioned above, their cumulative effect was to negate any presumption whatsoever as to a

when the request for identification follows an aircraft attack. Such an event should have, in my opinion, made the captain realise, that he had been attacked because he was regarded as an enemy target.

I addition I saist add that the Division Commander gave evident from the experience of the Navy in the Sinai War, that when the destroyer "Ibrahim El-Awal" was requested to identify itself by our vessels, she gave the same reply "identify yourself first". Likewise, the Division Commander and one of the torpado host commanders testified, that the target was reported to have opened fire upon one of the torpado hoats. Under those circumstances it saems, that the identification, in the third stage of the activity of our forces, as the "El-Xasir", was well within reason.

To sum up these last counts, my conclusion is that in all the circumstances of the case, the cunduct of anyone of the wal officers concerned in this incident cannot be considered unreasonable, to an extent which justifies his committel for trial.

For all my regret that our forces were involved in an incident with a vessel of a friendly state, and its sad outcome, I ought to put the behavior of each of the officers, who had any connection with the incident, to the test of the conduct of reasonable efficers during war operations, when the match arm of the Israel Defence Forces was confronted with maritime forces superior in numbers, and when all involved were conscious of the task before than — to protect the safety of Israel, to identify every enemy threatening from the sea, to attack it speedily and destroy it. The criterion for reasonable conduct under these conditions may possible differ from that in times of relative quiet. Indeed, wheever peruses the ample evidence presented to me, may conceivably draw some lesson regarding the relations between the two arms of the Israel Pefence Forces, which were involved in the incident, and the operational procedures in times of war, particularly between the different branches of the Envy — but all this is certainly not within the

The visual identification by the Division Commander on the spot was awaited at Navy H.Q., following, apparently, misgivings and the awareness of a possible camouflage of markings by an Egyptian ship. This identification was not delayed, and the Division Commander reported the ceftain identification of the vessel as an Egyptian transport ship named "NI-Nasir". It is noteworthy that the identification of the target as the "NI-Nasir" was made both by the Division Commander and the Commander of another torpedo boat, and on examining photographs of the two ships I am satisfied that a likeness exists between them, and that an error of identification is possible especially having regard to the fact, that identification was made while the ship was clouded in smoke.

The Chief Military Prosecutor attacked this identification as unreasonable in view of the fact that it was clear to all those involved in the incident, that it was inconceivable for this auxiliary ship to shall the El-Arish coast, or for her ever to move at a speed of 30 or 28 knots. He also argued that its presence at the scene of the incident was without logic. The answer to this submission, as explained to me, was that those concerned were entitled, on the assumption that the coast was indeed shelled, to surmise that she formed, parhaps, part of the vessels engaged in the shelling of the shores which succeeded to get away from the area, which she lagged behind them. Or, as one of the witnesses contended, she had come to assist in the evacuation of Egyptian soldiers, straggling in the areas occupied by our forces.

26. There is no doubt to the fact, that the refusal of the "Liberty" to identify herself to the torpedo boats, largely contributed to the error of identification. The Division Commander testified that he signalled the "Liberty" after the aircraft stack and requested its identification, and was answered "identify yourself first". If the conduct of the captain of the "Liberty" can still be explained by the sustom existing, as I have heard in maritime tradition, that a vessel belonging to a power does not identify itself first to a smaller vessel, then such conduct cannot be comprehended

when the request for identification follows an aircraft attack. Such an event should have, in my opinion, made the captain realise, that he had been attacked because he was regarded as an enemy target.

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scope of my inquiry. Yet I have not discovered any deviation from the standard of reasonable conduct which would justify the committed of anyone for trial.

In view of what has been said above, I hold, that there is no sufficient amount of Frima facie facie evidence, justifying committing anyone for trial.

Given the 13th day of Tamuz, 5727 (21.7.67) and read in the presence of the Chief Military Presecutor — Rav-Seren Kedmi, the Chief Military Defence Counsel — Sgam-Aluf Tein, and the Acting Chief of Naval Operations.

Y. YERUSHALMI, SORD-Aluf

Examining Judge