

The "Awakening" of the English Naval Prize Act 1864- By the Haifa Maritime Court

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I Introduction

In an extensive judgment dated 31 August 2014, the Haifa Maritime Court ("**HMC**"), the Honorable Judge Mr. Ron Sokol, held that he is authorized to act as a Prize-Court judge. Under his Judgment the HMC is authorized to give orders and directions relating to Vessels captured by the Israeli Navy whilst trying to break the naval blockade imposed by Israel on the Gaza Shore or carrying arms intended for Israel's enemies.

Nevertheless, in the specific case brought before him, the HMC ordered that the Vessel M/V Estelle captured on 20 October 2012 while attempting to break the naval blockade, will be released immediately and that the State of Israel will pay costs to the Owners, due to the state's 10 month's delay in applying to the Court and having regard to the fact that on other occasions vessels which were captured while attempting to break the blockade, had been released.

II The Naval Blockade on Gaza Shore

On January 2009 –more than a year after the take-over of Hamas of Gaza (in June 2007), and because from 2001, thousands of rockets and mortars have been fired into Israel in ever growing numbers from the Gaza Strip, the Government of Israel imposed a naval blockade on the coast of the Gaza Strip in order to prevent weapons, terrorist 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.¹

During 2009-2010 a number of attempts were made by various vessels to break the blockade. On two occasions after having been warned by the Israeli Navy, the vessels withdraw and turned back (the vessels "Iran Shahed" and "Spirit of Humanity"). On another two occasions where vessels did not pay attention to the Israeli's Navy warnings they were taken over by force, and brought to Ashdod Port and later released to their owners. On May 2010 there was another attempts to break the blockade by a flotilla of six vessels, one of which was the "Mavi Marmara". All of these vessels were also taken over by force and brought to Haifa and Ashdod ports, and later also released to their owners –including the Mavi Marmara where the Israeli Defense Force personnel faced significant, organized and violent resistance which led to nine passengers losing their lives and to injuries to many other passengers and soldiers.

III The Voyage of M/V Estelle

Against the above mentioned background the M/V Estelle on 28 May 2012 set sail on a voyage from Finland towards Gaza. After anchoring in Spain and Italy on October 2012 she reached the naval blockades area and when she did not follow previous warnings (including Israel's message to the Owners that humanitarian cargo can be transferred through the land passage) was taken over by the blockading force on 20 October 2012. The Vessel was taken to Ashdod Port where its passengers and crew were questioned and deported from Israel. The cargo was checked and was transferred through a land passage to Gaza (part of the cargo-cement –was given to the Palestinian Authority and other part was given to UNRWA). However, contrary to previous incidents the Vessel was not returned to its owners. It was held by the Israeli Navy and 10 months after the detention of the vessel the State of Israel filled an Application with the Haifa Maritime Court requesting the Court exercise its alleged authority as a Prize Court and order confiscation of the vessel. (Folio No 26861-08-2013, the State of Israel V. M/V Estelle).

IV 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 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**"). This Act established Maritime Courts in Her Majesty's Dominions and elsewhere out of the United Kingdom. Under clause 2(2) of the Colonial Act "**The jurisdiction of a Colonial Court of Admiralty shall subject to the provisions of this Act, be over the...matters, and things as the Admiralty jurisdiction of the High Court of England...**". Under clause 2(3)(a) of the Colonial Act "**A Colonial Court of Admiralty shall have under the Naval Prize Act, 1864 and under the Slave Trade Act, 1873, and any enactment relating to prize or slave trade the jurisdiction thereby conferred as a Vice-Admiralty Court and the Jurisdiction**

¹"The Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident", page 44, paragraph 81.

thereby conferred exclusively on the High Court of Admiralty or the High Court of Justice; but unless for the time being duly authorized, shall not by virtue of this Act exercise any jurisdiction under the Naval Prize Act of otherwise in relation to Prize"².

According to the above Acts the Authorization given to the Admiralty Court established in Jerusalem was limited in that in relation to acting as a Prize-Court, a special additional authorization by her Majesty was required. On the date when the Colonial Act was enacted the relevant Acts of Admiralty which were in-force were the Admiralty Court Acts of 1840 and 1861. These, continue to govern the Israeli Haifa Maritime Court to-date. Under The Naval Prize Courts Act 1894 Prize-Courts were established and the Prize Act of 1939 widened the prize authority to cover also air-craft.

After the British Mandate of Palestine ended and the State of Israel was established on 15 May 1948, In 1952 the Israeli Admiralty Court Act was enacted. Under this act all the authorities which were given to the Supreme Court of Jerusalem to act as a Maritime Court were transferred to the Haifa District Court acting as the Maritime Court. This Act, however, does not deal with and does not elaborate on the jurisdiction conferred by the above Acts themselves, and is, in fact purely administrative. Later, in 1960 the Israeli Shipping Act was enacted, which elaborated on the Maritime Liens and their classification (following the 1926 Convention³) but did not refer to any prize act or prize authority.

V The Precedent of the Case of M/V Estelle

In fact the above mentioned case Folio No 26861-08-13 was the first time in the 65 year's of history of the State of Israel where a prize matter has arisen and only one of a few in the western world after the end of World War II. This matter caught the attention of other practitioners and scholars besides the parties themselves. The undersigned published an article in this regard which was answered by Dr. Ziv Borer from Bar-Ilan University and was counter answered in a replying article⁴.

VI The Main question regarding HMC's Authority

The main question the HMC and the above mentioned external scholars dealt with was whether, during the period February 1937- May1948 (the date of the King's Order-in-Council and the end of the British Mandate and establishment of the State of Israel, relatively) was the Admiralty Court in the Palestine (Israel) authorized by her Majesty to act as a Prize-Court and if so, did this authorization continue until 1952 so that when the Haifa Maritime Court received the Admiralty Court's jurisdiction it received also the jurisdiction to act as a Prize Court.

² The Order-in-Council ordered that Clause 2 (2)-(4) clauses 5,6, and clause 16(3) of the Colonial Courts of Admiralty Act, 1890 will apply on the Supreme Court of Palestine (Israel) as if this Court is mentioned in those clauses instead of Colonial Court of Admiralty.

³ The International Convention for the Unification of Certain Rules of Law Relating to Maritime Liens and Mortgages, 1926.

⁴ Y. Harris, "About micelles, cement, and Prize", Dr Ziv Borer "The Israeli law is a wide ocean", Y. Harris "More about the Prize" all published (in Hebrew) in The Emile Zola Chair for Human right's electronic magazine, in editions 21 and 24 on March 2014.

VII The Principles of the Traditional Law relating to Prize

Until the twelfth century war at sea was conducted without legal restrictions. The concept of neutrality was acknowledged for the first time in 1164 and later in the fourteenth century in the "consolato del mare": During the war between Pisa and Genova, Pisa captured a Saracen ship that allegedly was carrying goods belonging to a citizen of Genova. The Sultan of Egypt complained of the capture by maintaining that the goods belonged to one of his subjects. Pisa, after determining the Saracen ownership, released the ship. However it seems that the beginning of the traditional law of naval warfare can be ascribed to the date of the Paris Declaration of 1856. On 1909 a Declaration concerning the Laws of Naval Warfare was signed in London.(The "London Declaration").⁵

According to the traditional law, all merchant ships, whether enemy or neutral, may be stopped, visited and searched.⁶ An enemy cargo on board an enemy merchant ships can always be seized and captured as a 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 search⁷.Enemy's property, whether vessels or goods is liable to capture and, subject to a decision of a prize court, to condemnation.⁸ Although the act of capture itself takes place at sea it should be upheld by a Judgment of a Prize Court where the owners and the cargo interests can bring their allegations before a specialized Court. 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 law⁹. Hence, under clause 16 of the Naval Prize Act 1864 –"**Every ship taken as a prize and brought into port within the jurisdiction of a Prize Court, shall forthwith and without bulk broken, be delivered to the marshal of the Court.**"

VIII The Developments after 1945

After the end of World War II, there was rare use of the traditional law of prize. In fact Israel has suffered from Egypt's use of King's Farouk's decree dated February 6 1950 whereby manifests and cargoes of vessels could be inspected to make sure that no arms, ammunition, or other goods constituting contraband, directly or indirectly for Israel were on board. According to article 10 goods such as fuel of any kind, chemicals, ships, motor vehicles money and gold were to be seized as prize. Since 1951 Egypt began to intercept ships destined to Israel either at the Gulf of Aqaba or when seeking to pass through the Suez Canal, and the Egyptian Prize Court often referred to the decisions of prize courts made during the two World Wars. All goods labelled "produce of Israel" were considered to be of military character. Even though the Security Council in September 1951 characterized the Egyptian practice as an "abuse of the exercise of the right of visit, search and seizure", Egypt more or

⁵ Wolff Heintschel Von Heinegg, "Visit, Search, Diversion, and Capture in Naval Warfare: Part I: The traditional Law", (29 Can.Y.B. Intl's L. 283 (1991), page 284, foot note 4.

⁶ Foot note 6, page 298.

⁷ Foot note 6, page 304.

⁸ Foot note 6, page 304.

⁹ Foot note 6, pages 307-308.

less regularly maintained this practice until the conclusion of the peace treaty in 1979 with Israel.¹⁰

After World War II the UNCLOS¹¹ was developed following international conventions which took place in 1956 (known as "UNCLOS 1") and in 1960 (known as "UNCLOS 2") and finally in 1982. UNCLOS sets out 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 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 that state. (Article 110, 111)

Also during 1988- 1994 the San Remo Manual came into force.¹² This Manual states, in clause 3, that: **"The exercise of the right of individual or collective self-defence recognized in Article 51 of the Charter of the United Nations is subject to the conditions and limitations laid down in the Charter, and arising from general international law, including in particular the principles of necessity and proportionality"**. Under clause 67: **"Merchant vessels flying the flag of natural States may not be attacked unless they: (a) are believed on reasonable grounds to be carrying contraband or breaching a blockade..."**, and according to clause 146: **"Neutral merchant vessels are subject to capture outside natural waters if they are engaged in any of the activities referred to in paragraph 67 or if it is determined as a result of visit and search or by other means, that they:... (f) are breaching or attempting to breach a blockade"**.

IX The Parties' and Legal Commentators Arguments

Considering all the above the HMC referred to the current dispute before it. The State of Israel argued that the HMC's authority to act as a prize court was established by an Order given by the High Lord Admiral of the United Kingdom to the senior judge of the Supreme Court of Palestine (Israel) published in 10 October 1939 ordering him that **"when an announcement is made in Palestine (Israel) 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 before the Supreme Court of Palestine (Israel) to rule over them, to judge and to confiscate them according to the Law of Admiralty and Regulations as will be in-force at that time. For this purpose this order is your writ of authority until cancelled or dismissed"**.

The undersigned argued that the announcement mentioned in the above mentioned orders was not presented, and in any event it seems that it was in force only for the purpose of and for the period of the Second World War which had ended as so had the British Mandate – four years before 1952. This argument was put forward also by Owners. The undersigned also mentioned that it does not seem that the Israeli Legislature was even aware in 1952 of a Maritime's Court authority to act as a Prize-Court and it is not reasonable that in that time (1952) it was intended to give a District Court the authority to undermine the actions of the

¹⁰ Foot note 6, "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.

¹¹ The United Nations Convention on The Law of the Sea (1982).

¹² San Remo Manual on International Law Applicable to armed conflicts at Sea, 12 June 1994.

Israeli Army/Navy, specially, when taking into consideration that at that time and for many years thereafter the jurisdiction to challenge the acts of the State of Israel was exclusively and only that of the Supreme Court acting as the High Court of Justice. In fact, previously, the HMC had dealt only with commercial matters and limited its authority only to matters of maritime liens and their priorities under the Israeli Shipping Act of 1961 and the Admiralty Court Acts of 1840 and 1861. The undersigned further argued that this "test-case" filed by the State of Israel with the HMC is quite unfair towards the HMC, because as the current situation and Israel's security needs requires acts of prize-the Haifa Maritime Court should be provided with a clear and an up to date law which will set out the HMC authority and the manner in which this authority can be exercised.

X The Haifa Maritime Court's Judgment

The HMC took a different path. It ordered that choosing between the two possibilities it prefers that under which there is a specialized Prize-Court which is in compliance with the Traditional Law's requirements rather than an absence thereof. This is reinforced by the need for matters of Prize to be dealt promptly as the capturing authority is required to provide the vessels documents to the Court immediately after the capture, and where the HMC has the required experience and knowledge and authority to give immediate orders regarding the management of the captured vessel, its crew its cargo and to relate to third-parties and cargo interest's, claims.

Therefore the HMC ordered it is authorized to act as a prize court.

However the Judgment held that under the current circumstances where the Israeli Navy has delayed the filing of proceedings for a 10 month's period which is contradictory to the principles of the traditional law as mentioned above, is also inequitable and is considered as being against the principals of administrative law, the Vessel Estelle should be released immediately. The release of the vessel is 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 honorable Judge Mr. Ron Sokol added that the current situation under which the HMC draws its jurisdiction and authority from laws which were enacted 150 and 170 years ago, when vessels were powered by steam and which do not appear directly and formally in the Israeli enacted Statues is not appropriate and the time has come for the Israeli Legislature to provide the public with modern and clear Israeli Admiralty legislation.

The State of Israel filed an Appeal before the Supreme Court which has not been decided yet.

XI Afterthoughts

Since it seems that the warfare in our region is far from at an end, and as arms can be smuggled as innocent cargo even without the knowledge of the vessel's master, the owners and cargo interests should bear in mind that either on the high seas (based on intelligence provided) or when attempting to breach the military blockade off the shores of Gaza, any vessel can be taken over by the Israeli Navy or other forces, searched for arms ammunition and other contraband and brought before the Haifa Maritime Court. The Court will be in a position to order either the release of the vessel or its confiscation and the confiscation of its

cargo. The tests of how and when the HMC will exercise such powers remain vague until the necessary legislation is enacted.