CASE No. 5

THE SCUTTLED U-BOATS CASE

TRIAL OF OBERLEUTNANT GERHARD GRUMPELT

BRITISH MILITARY COURT HELD AT HAMBURG, GERMANY, ON 12TH AND 13TH FEBRUARY, 1946

Scuttling of U-boats in violation of the Instrument of Surrender of 4th May, 1945. Plea of Absence of Mens Rea, and of Superior Orders. The Language of the Court.

Grumpelt was accused of having scuttled two U-boats which had been surrendered by the German Command to the Allies. He claimed that he was not aware of the terms of the relevant Instrument of Surrender, since these had not been notified to him in any way, and further that he had received intimation that a general order for the scuttling of all U-boats should be put into effect, while at the same time not hearing of any countermanding of that order. He was nevertheless sentenced to imprisonment for seven years. His sentence was reduced to five years by higher military authority.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was a British Military Court for the Trial of War Criminals, convened under the Royal Warrant of 14th June, 1945, Army Order 81/1945, by which Regulations for the Trial of War Criminals were issued.(1)

The Court consisted of Lieut.-Col. Sir Geoffrey Palmer, Bart. (Coldstream Guards), as President, and Lieut.-Cdr. E. H. Cartwright (Royal Navy) and Lieut. I. S. B. Crosse (Royal Navy) as members, with C. L. Stirling, Esq., C.B.E., Barrister-at-Law, D.J.A.G., as Judge Advocate.

The Prosecutor was Colonel R. C. Halse, of the Office of the Judge Advocate General; the Defending Officer was Kapt. Lt. Ing. O. Daniel, of the German Navy.

2. THE CHARGE

The defendant was First Lieutenant (Engineer) Gerhard Grumpelt, an officer of the German Navy. Pursuant to Regulation 4 of the Regulations for the Trial of War Criminals he was charged with committing a war crime, in that he "at Cuxhaven, North-West Germany, on the night of 6-7th May, 1945, after the German Command had surrendered all Naval ships in that place, in violation of the laws and usages of war, scuttled U-boats 1406 and 1407."

The accused pleaded not guilty.

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(1) See Annex I, p. 105.

3. THE OPENING OF THE CASE BY THE PROSECUTOR

The Prosecutor stated that, before the surrender of the German armed forces to the Allies, the accused was an instructor to U-boat officers. In May, 1945, he was at Cuxhaven. On the 3rd May, U-boats 1406 and 1407, which were of the very latest type of U-boat, arrived at Cuxhaven under the command of their respective captains. The war was then nearly at its end. On the next day, five German officers of the High Command visited Field Marshal Montgomery, commanding 21st Army Group, and at 1830 hours on that day they signed an instrument of surrender, whereby the German High Command agreed to surrender all German armed forces in Holland, in North West Germany, including the Frisian Islands, Heligoland and all other islands, in Schleswig-Holstein, and in Denmark, to the Commander-in-Chief of 21st Army Group. This surrender included within its scope all naval ships in those areas. Hostilities were to cease on land and sea, and in the air, at 0800 hours British Double Summer Time on Saturday, 5th May, 1945. At the material time, it was agreed by the German High Command that all German vessels would be handed over to the British Command and that fighting would cease at 0800 hours on the next day.

At 0400 hours on the 5th May, continued the Prosecutor, four hours at the most before the firing was to cease as a result of the terms imposed by Field Marshal Montgomery, an order was issued by the German Naval Command giving the code word "Regenbogen"—"Rainbow"—which meant that all U-boats were to be scuttled. That was some short time after the German High Command had signed the terms of surrender. Later that morning someone came to the conclusion that that was not quite right and that order was cancelled. However, Grumpelt must have disagreed, because he made arrangements, at about 11 o'clock in the morning, that he and the captains of the U-boats 1406 and 1407 would proceed to sea and scuttle these ships.

That arrangement came to the knowledge of a higher German officer, and he gave orders that they were not to go to sea. Grumpelt got to hear of this, changed his plan, and made an arrangement by which they would go to sea at 2200 hours on the night of May 6th. That plan was defeated by the German commander of the "Helgoland," who called a conference of U-boat commanders at 2000 hours on the 5th May, at which the agreement was reached that the latter would not scuttle the ships under their command.

Despite this, after a day of discussion as to whether the U-boats were to be scuttled on the next night, Grumpelt went aboard these two U-boats with a rating, and scuttled them. He did it, according to his statement, of his own volition, quite openly and in a sane mind, because he wished to deprive the Allies of the use of those two submarines, which were of the very latest type and capable of giving a great deal of information to the Allies.

The submission of the Prosecution to the Court was that it was a war crime for a member of the armed forces, or any member of the vanquished nation, or in fact of the victorious nation, to break the terms of a surrender or armistice, especially in the existing circumstances, when a country which was victorious against one country was still at war with another, an ally of the second.

Acting in accordance with Regulation 8 (1) of the Royal Warrant, the

Prosecutor put forward a photostatic copy of the terms of surrender signed on 4th May, 1945, the relevant paragraphs of which read as follows :

" Instrument of Surrender of all German armed forces in Holland, in North West Germany, including all islands, and in Denmark.

" 1. The German Command agrees to the surrender of all German armed forces in Holland, in North West Germany including the Frisian Islands and Heligoland and all other islands, in Schleswig-Holstein, and in Denmark, to the C.-in-C. 21 Army Group. This to include all naval ships in these areas. These forces to lay down their arms and to surrender unconditionally.

" 2. All hostilities on land, on sea, or in the air by German forces in the above areas to cease at 0800 hrs. British Double Summer Time on Saturday, 5th May, 1945.

" 3. The German Command to carry out at once, and without argument or comment, all further orders that will be issued by the Allied Powers on any subject.

" 4. Disobedience of orders, or failure to comply with them, will be regarded as a breach of these surrender terms and will be dealt with by the Allied Powers in accordance with the accepted laws and usages of war."

4. EVIDENCE FOR THE PROSECUTION

The facts as appearing in the evidence for the Prosecution were provided by four witnesses, officers and other members of the German Navy as follows :

(i) *Werner Klug, Oberleutnant zur See, commanding U-boat* 1406

Klug stated that his ship, which was of the latest type, received on the 5th May, 1945, in a message, the code word " Rainbow," which meant " scuttle." The order came between 0300 and 0500 hours, and as a result, he went immediately to No. 5 Security Division for the purpose of scuttling the ship. There an order countermanding the first was given, at about 5 o'clock in the morning, almost immediately after the original order had been received. Shortly after that, on the same morning, he met the accused Grumpelt and both of them made up their minds to scuttle the U-boats, as they considered the countermanding of the order of No. 5 Security Division not binding on them, because they were not under the orders of that Division. The meeting for the purpose of scuttling the ships was fixed for the afternoon on the same day.

After that arrangement had been made, Klug received further orders from the Chief of No. 5 Security Division, Captain Thoma, who forbade him and the other commanders to scuttle their ships, and threatened that they would be shot in the event of disobedience.

The witness was unable to state whether he told the accused of the order of Captain Thoma when he saw him again later, or whether Grumpelt knew about this order. They both made a new arrangement for 2200 hours to scuttle the ships nevertheless, because they still considered the order of No. 5 Security Division as not binding on them.

The latter arrangement was again postponed, because at 2000 hours all the U-boats commanders were ordered to attend a conference with Admiral Klaikampf on the " Helgoland," where they had to give their word of honour not to scuttle their ships. Grumpelt had not attended the conference, but as a result thereof the meeting between him and Klug at 2200 hours did not materialise and they never saw or talked to one another after the conference.

Towards the end of 5th May, the witness's ship ceased to be on active duty, and the crew was paid off, and on the next day the U-boat was towed to a new position into a corner of the port where all the U-boats were left in the custody of a guard ship No..1267.

Cross-examined by the Defence, the witness stated that there was no superior officer at Cuxhaven whose orders were binding upon him, and that for operational duties he could not accept orders from the higher officers in charge of Cuxhaven. The No. 5 Security Division was an authority of the minesweeping department and Admiral Klaikampf was the Commander of the Coastal Defence. For operational duties and orders all U-boats Commanders were in touch with higher Commanders of the operational department only by wireless and on a different wave-length from that used for surface craft. His own listening-in device was not in a state of service at the material time.

The exact contents of the capitulation order or the so-called armistice order, or the wording of it, were not notified to the U-boats commanders.

Neither the Prosecution nor the Defence wished to call the commanding officer of U-boat 1407 because his evidence, it was thought, would be practically the same.

(ii) *Wilhelm Mohr, Obersteuermann, officer commanding VP1267 at Cuxhaven*

This witness said that, on the night of the 6/7th May, 1945, he was still commanding the ship VP 1267, and that at about 2330 hours, the sentry reported that one of the two U-boats which his ship was guarding was in the process of being sunk and that men were going on to the other U-boat. He did not know their numbers then, but found later on that they were the 1406 and the 1407. He then went on to the boat which was sinking last and there found O/Lt. Grumpelt and O/Machinist Lorenz. The witness told the accused to get off the U-boat at once, whereupon all three left the boat and went on to the witness's boat, VP 1267, where the latter told the accused that his, the witness's boat and another boat, No. 1225, commanded by Schroeder, had been detailed as guard ships and that the next morning he was going to report on the incident.

At the time, the witness thought he was going to get into trouble because Grumpelt had sunk the U-boats which he, the witness, was guarding. He even told the accused that he expected to have trouble because of this, to which the accused replied that he would hold himself responsible.

(iii) *Wilhelm Lorenz, Obermaschinist, subordinate to O/Lt. Grumpelt*

The witness said that he was living and messing with the accused on board the ship VP 1267, commanded by Mohr, when on the night of 6/7th May he was ordered by the accused to go with him on one of the U-boats. There he was told to search the boat for food-stuffs and after a while to take a piece

of lard on to his own ship. When he rejoined Grumpelt, he found that the U-boat was already sinking, from which he assumed that Grumpelt scuttled it. Both of them left the craft, and went to the other U-boat. Grumpelt went alone to the front and aft of the boat and the witness had the impression that valves were being opened. By that time a sentry was firing in the direction of the boat and after a while they were joined by Mohr. Water was already flowing through and the boat started sinking.

The witness did not know when the armistice was signed, but there was talk generally that the armistice had been signed, and they knew that military operations ended on the 5th May. They did not go on duty that day as it was obvious there was no further need to train U-boat crews.

(iv) *Edgar Pabst, Oberstaabsrichter at the 5th Security Division at Cuxhaven*

Pabst said that, in view of the information received from Captain Thoma on the 7th May, he saw the accused and asked him whether it was true that he had scuttled the U-boats. Grumpelt replied : " I have scuttled the boats, I take all responsibility and I had orders to do so. ' Rainbow ' was the code word."

The witness himself knew that the armistice with 21 Army Group was effective as from some time before the 6th May, as it was generally known that a " cease fire " had been ordered. He believed it was made known over the wireless, but was not sure. He could not say whether at that time he had had any knowledge of any terms of surrender between the armed forces.

(v) *Affidavit of Lt. Hunter*

At the end of the case for the Prosecution, the latter handed in to the Court under Regulation 8 (i) an affidavit containing a statement made by an officer attached to the staff of the British Naval Commander in Chief, Germany, who interrogated the accused several times, together with two exhibits referred to in that statement. One of these exhibits, a statement made by the accused before Lt. Hunter, a translation of which was read to the Court, runs as follows :—

> " Cuxhaven. 29.5.1945. Statement by Engineer Lt. Gerhard Grumpelt. (Technical U-boat Training Group.) During the nights of 5th, 6th, or 7th May, 1945, I went of my own volition on board the boats U 1406 and U 1407 in order to sink them. The fore and after air vents were opened. The Kingston valve was opened from the sea and the filter of the mud trap removed. Besides this, the air vent of the midship main ballast tank was opened in to the boat. I was hindered in my task by the guard firing. Nevertheless both boats were sunk. I gave Chief E. R. A. Wilhelm Lorenz the order to accompany me on these boats. The sinking of the two boats was carried out by me personally. Chief E. R. A. Lorenz switched off the current. We then went on board patrol vessel (K.f.K.) 1267. I confirm the correctness of this statement. (Signed) Gerhard Grumpelt, Oberleutnant (Ing)."

5. THE CASE FOR THE DEFENCE

The Defending Counsel admitted that the accused had sunk the two U-boats during the night of 6/7th May, 1945, and thus contravened the special

capitulation orders as laid down on the 4th May, but based his defence on the submission that the accused was not aware of the terms laid down in the Instrument of Surrender, because these were not notified to him in any way. Counsel pointed out that the accused had never heard about the countermanding of the order which the code word " Rainbow " implied, and could therefore not be found guilty.

6. THE EVIDENCE OF THE DEFENCE WITNESSES

(i) *The accused Gerhard Grumpelt*

The accused said that he knew of the preparations for the " Rainbow " order before the capitulation and also what should be done when that order was given. His whole education in the German Navy taught him that no ship should fall into the hands of the enemy but should be scuttled. Therefore, when on the morning of the 5th May he heard the word " Rainbow " it was at once quite clear to him that he had to obey the order implied in that code word. He had taken counsel with the other commandants of the U-boats, and they came to the conclusion that they should obey the order.

Up to the moment when he obeyed the order and committed the act which the code word " Rainbow " implied, he never heard anything about a countermanding of that order, although he was available at all times on board the Boat 1267 for any orders to reach him. He did not know there was a meeting on the " Helgoland " with all U-boat commanders, and had never seen the two commanders of U-boats 1406 and 1407 after the conference at which they had given their word of honour. In any case Admiral Klaikampf was not entitled to give operational orders to U-boats, and what he did at the conference was in fact, not the issuing of an order ; he merely received a pledge of honour from U-boats commanders not to scuttle their boats. Only on the 7th May did he hear that an armistice had been concluded and before the scuttling was effected he never heard anything about the conditions implied in the terms of the armistice.

The commander of the 5th Security Division could not have given him any orders in connection with U-boat warfare which would have been binding on him. The only higher authority which could have been entitled to give him such orders at the time was Admiral Friedeburg, who was the highest of the commandants of the U-boats.

In answer to Dr. Pabst's question whether he had scuttled the two submarines, he had said : " Yes, I scuttled two U-boats, I did it alone and I received the order to scuttle by the code word ' Rainbow.' I take full responsibility for my actions." He said that, because he had been told on the morning of the 7th by Captain Thoma that the code word " Rainbow " did not exist any more.

The order " Rainbow " made him responsible for seeing to the scuttling of all the U-boats in his area. In the first instance, he said, " the U-boat commanders were responsible for it, but if they did not obey the orders the second roster came, and I as training officer belonged to this part of the officers who then had to step into the breach. . . This order came through the wireless and if the commanders did not obey and execute this order the next step was that we, the training officers, had to do the job." It was a

general order in the German Wehrmacht that if one leader did not do his duty then the next one stepped into the breach and did it for him. That had nothing to do with the " Rainbow " order ; " it was a very high order, the so-called Führer order, concerning doing duty if the senior officer does not do so."

He did not hear the order on the radio himself. A U-boat commander, whose name he could not remember, told him that the order was to the effect that U-boats should obey the order " Rainbow " within a specified area. On the morning of the 5th May, on the " Helgoland," the former said, according to the accused, " Grumpelt, the time has come ; we must scuttle the U-boats ; the code word ' Rainbow ' has arrived." He had also received the news from Klug, who had said to him : " Grumpelt, it is a necessary and it is quite a natural course for us to take, to scuttle the ships of the newest and latest type, and it is our duty to do so."

(ii) *Karl Schimpf, U-boat commander*

Schimpf said that, before and after the " cease fire," he was stationed in Wesermunde, which was in the same naval district as Cuxhaven, and that the orders for Wesermünde were the same as those for Cuxhaven. At the time of the " cease fire," a code word " Rainbow " was made known. It was binding and necessitated the immediate sinking of the U-boats. No further explanatory orders were necessary. The order was carried out in the district of Wesermunde and all the U-boats were scuttled during the " cease fire," but before the armistice. He did not remember the exact date because he did not execute the order himself, as he had already left the boat at that time.

He was aware of a so-called " Führer " or " Leader " order, which signified that if a leader failed in the execution of his duty, the next in line was responsible for carrying it out, and it was even possible that a training officer belonging to a U-boat unit in the area governed by the district command could carry out an order of that sort. Such an order was supposed to go down even to a seaman as it spoke only about higher authority without defining the exact grade of the rank.

(iii) *Fritz Schroeder, officer commanding boat No.* 1225

The witness stated that he received an order from the 5th Security Division to make his ship fast alongside U-boats 1406 and 1407 as a security boat in order that no unauthorized personnel should go on to those craft, as they had been left by their crews. He ordered the sentry to fire on the accused Grumpelt and his Chief Maschinist Lorenz because he was not aware or not sure that it was they who were there. If he had known for certain that it was Grumpelt and Lorenz he would not have given an order to fire, as he would have considered them as authorized personnel. It would not have been his duty to try and stop officers known to him in the process of scuttling the boats as his orders did not include ensuring that the boats were not damaged.

Examined by the Judge Advocate, Schroeder nevertheless admitted that he told the accused after the scuttling occurred that the accused was " putting him and his crew on the spot for negligence," and that he would report the matter to Captain Thoma.

(iv) *E. Bleihauer*

The witness claimed that he had been in charge of the U-boat flotilla at Wilhelmshaven which belonged to the same district as Cuxhaven. At the time he supervised all signals in the flotilla. He was on duty on the morning of 5th May when the code word " Rainbow " was sent out directly to all U-boats west of a certain area. It came from the commandant of the U-boat flotilla in Kiel, Admiral Friedeburg.

7. THE CLOSING ADDRESS OF THE DEFENDING COUNSEL

The defending Counsel admitted that the scuttling of the two U-boats was without doubt a violation of the laws and usages of war, but stated that this clear fact was not quite sufficient to make the accused guilty, because it had not been proved that the terms of surrender were known to the accused. In fact, at the time when the scuttling took place the accused did not know those stipulations and could not have known them. Counsel pointed out the fact that it was forbidden to the whole of the German people and, therefore, to the German Wehrmacht, to listen in to Allied or neutral radio stations. To these stations belonged also those German stations which fell into the hands of the enemy, for instance Hamburg, which was conquered during the war. That order, was, of course, obeyed, and it was not until after the general surrender and capitulation on the 8th May, 1945, that the order was cancelled.

Counsel also submitted that in all German official documents and communications of that period only the word or idea of " cease fire " was used and mentioned. As to this, Counsel said that only on the 7th May, 1945, after the scuttling, did the accused hear anything about the so-called " cease fire," and that the conditions relating to the German units stationed in North West Germany, in Holland and in Denmark between the 5th and 8th May, 1945, were always called by the German authorities " cease fire " and not " armistice," " surrender " or " capitulation." Only after the 8th May, 1945, the day when the whole German Wehrmacht capitulated, was the word " armistice " mentioned. As distinct from the expression " armistice," the words " cease fire," in the Counsel's submission, meant only that all acts of war with the enemy were interrupted temporarily, and that after " cease fire " these hostilities might be continued or on the other hand an armistice might be concluded.

The third point of the defending Counsel's submission was that apart from the above facts the accused had, by virtue of the receiving of the code word " Rainbow," a clear order and duty to scuttle the boats under all conditions. In all the German armed forces, he said, it had always been a holy tradition and duty never to allow any arms, not even in the worst circumstances or conditions, to fall into the hands of the enemy. This duty could only be cancelled through the conclusion of an armistice. During the whole duration of the war this spirit had been taught to all soldiers through their officers again and again and it had become part of their code of honour. Any soldiers who acted otherwise would have been condemned to death. In order to make sure that in extreme cases or conditions this was so understood an order, the code word " Rainbow," had been prepared. This code word dealt with scuttling and destruction of ships of war provided the

respective commandants found it necessary. In order to make absolutely sure that these orders should be carried out in time of crisis an order which was considered extremely important by the High Command, a so-called Leader order or Führer order, had been given at the beginning of 1945, saying that if a superior officer was not in a position to carry out an order the next senior in rank had to carry it out. The rank in this case did not matter and this duty was passed on from rank to rank until an officer was found who could carry out the order.

8. THE CLOSING ADDRESS BY THE PROSECUTOR

The Prosecutor based his case on the submission that though the order " Operation Rainbow " was issued, the accused was acting after this order had been cancelled, knowing well that it had been cancelled, and therefore he was not in fact acting under that order. He knew this quite well, because of various events which transpired, first that the two boats had been moved from their original positions and were moored next to a couple of guard-ships, secondly that the captains did not agree to go at 1600 hours and again did not attend at 2200 hours, and thirdly, that those captains made no attempts to scuttle their ships. The accused acted, therefore, entirely of his own volition in order to deprive His Majesty of the use of two of the latest submarines.

The Prosecutor based his argument on the following statement of law contained in Oppenheim-Lauterpacht, *International Law*, 6th Edition, Volume II, pp. 432-3 : " That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent Government, and a war crime if committed without such order. Such violation may be met by reprisals or punishment of the offenders as war criminals." He submitted that, in view of the fact that on the 4th May the German High Command surrendered the German armed forces in North West Germany, any act done to any part of the German forces after that time was an act of violation of the laws and usages of war. Therefore, it was a war crime for Grumpelt to scuttle the two U-boats and he actually did it knowing that it was a war crime.

Assuming for a moment that the accused did not know that the order " Rainbow " had been cancelled, the Prosecution's submission was that even then it was no defence to the charge that Grumpelt committed an act in violation of the laws and usages of war as he could not plead as a defence that he acted under an order which was obviously an illegal order. That order was illegal, as the German High Command had no power to order the U-boat commanders to sink vessels which no longer belonged to the German High Command but had been handed over to the British authorities under the terms of the surrender.

9. SUMMING UP BY THE JUDGE ADVOCATE

The summing up by the Judge Advocate was to a large extent confined to the facts of the case, and centred predominantly around the all-important question of the *mens rea* of the accused, upon which the accused's case entirely depended.

" The interesting part," he said, " of this little congregation of German craft on that night was . . . that the crews of those U-boats had left them, that they had been moved specially to this place in the port and that they were under the guard of VP.1225 . . . and that any ordinary sensible person must have appreciated that the position then was that the VP was in that position to prevent those two U-boats being damaged or scuttled, and that was because the German High Command realised full well that if U-boats were scuttled after a certain period elapsed from the signing of these terms of the surrender on the 4th May it would involve a great deal of trouble for the Germans." This was because in view of the terms of the surrender signed on the 4th May, 1945 " the operative *de facto* German Command at that time were undertaking that at least by the morning of 5th May, 1945, the ownership, the property, in U-boats would pass to the Allies and that they would not treat them from that moment as their own and cause them to be scuttled or damaged in any way," and the Defence were agreed " that if after the signing of those terms of surrender a German officer with knowledge of those terms deliberately sabotaged a German U-boat which had become the property of the Allies that would be a breach of the laws and usages of war." It was a matter for the Court to decide " whether or not the scuttling of German U-boats on the late evening of the 6th May after these terms of surrender had been entered into was a war crime or not, done with the knowledge that these terms had been entered into." In the Judge Advocate's opinion there was ample evidence that the fact of scuttling U-boats in such circumstances could be a war crime.

On the defence of superior orders, the Judge Advocate said that the fact that the " Rainbow " order was sent out to U-boat commanders had to be accepted but he left it to the Court to decide " how far it was binding upon the accused, Grumpelt, whether it was binding upon him by reason of receiving an order from an unknown U-boat commander or from the U-boat commander Klug, or whether it devolved upon him in the way he suggested, arising out of what he calls a Führer order. And even although that might have been binding upon him on the 5th May, had not things happened to which any sensible man would have reacted by the night of the 6th May, that any reasonable person must have understood then that there was no possibility of scuttling those boats and then being able to say that it was done under a lawful command? . . . Is it not reasonable to assume that Grumpelt knew perfectly well on the 6th May that those U-boats could not be scuttled, and further, that the command who had power to put them under guard had deliberately put them under guard so that they might not be scuttled? "

The Judge Advocate thought that there was nothing in the relationship between Grumpelt and Schroeder to suggest that the accused was at that time setting up a defence that he was carrying out the lawful orders of his superiors. Another point in favour of the Prosecution was " the statement which the accused himself made. . . . It is typed in German and it is signed by the accused. . . . The translation with which we were supplied starts off quite categorically in this way : ' During the night of the 5th or 6th (or 6th to 7th) of May, 1945, on my own resolve, I boarded U-boats 1406 and 1407 in order to sink same.' The material German phrase appears to be ' eigner Entschlossenheit ' . . . It might be described as ' Of my own disposition '."

The Prosecution, stated the Judge Advocate, asked the Court to "say that on the evidence you should find as an irresistible inference that the accused on that night did not bother to make inquiries apparently of any superior officer and he had quite a time on the day in question to do so if he wanted to, and the only interpretation you can put upon that is that he was deliberately wishing to appear as a German patriot and sink these craft in circumstances in which he knew perfectly well he was not entitled to and knowing perfectly well he had no proper orders from a proper lawful superior authority to carry out."

10. THE VERDICT AND SENTENCE

The accused was found guilty of the charge.

After the Prosecutor had stated that he himself was satisfied that the accused had an entirely good character, the defending Counsel pleaded on his behalf in mitigation of punishment. To that end Counsel made a statement which included the following :

"The Prosecution tried to establish a case that the accused acted entirely on his own and out of his own decision. As I see it, the expression 'own decision' has not been understood in the right way. The accused did not want you to infer that he scuttled the U-boats on his own because he sought fame or something similar. I want to point out the reason is, because of the absence of the U-boat commanders, Grumpelt thought that the above-mentioned Leader order came into effect."

On 13th February, 1945, subject to confirmation by higher authority, the Court sentenced the accused to be imprisoned for seven years. The findings and sentence were confirmed by the General Officer Commanding 8 Corps District on 8th March, 1946, with a remission of two years.

B. NOTES ON THE CASE

1. QUESTIONS OF JURISDICTION AND PROCEDURE

(i) *Composition and Jurisdiction of the Court*

As to these, see Annex I, pp. 105-6.

(ii) *The Language of the Court*

The trial was conducted under the rules of procedure specified in the Royal Warrant.

At the very outset, defending Counsel applied for the whole of the proceedings to be translated to the accused. Counsel stated that he would himself address the Court and speak during the whole trial in German.

The Judge Advocate thereupon explained the position as follows :

"The language of the Court is English, and it is quite unusual for the Court to be addressed in German. What we normally do is to translate all the evidence so that the accused understands it, but it is quite unusual to translate everything the defending Counsel says."

After ascertaining that Counsel had some knowledge of English, the Judge Advocate requested that Counsel should do his best to address the Court in

English, and so far as the evidence was concerned, that would be translated to the accused. The defending Counsel's reply was as follows :

" I must insist upon it that all the most important parts which will be decisive for the judges to judge Gerhard Grumpelt must be in the German language, and I must insist that the German language should be acknowledged here as having the same rights as the English language. I am quite satisfied that things which are not important need not be translated so that the proceedings should not be unduly interrupted, but my opening and closing speech, which are decisive, I shall give in German."

After the Court had conferred, the Judge Advocate provisionally ruled that all the evidence would be translated, but that the Prosecutor's opening address should not be translated in the ordinary way. Counsel stated that this was agreeable to him and added that he understood enough English to follow the Prosecutor, but not enough to deal with the witnesses when in the witness box or in his addresses to the Court. In fact, the defending Counsel's short opening address was made in German and translated at once, and the German text of his final address, written by himself, was attached to the proceedings.

The interests of the accused in this case were fully safeguarded by the fact that two, and later on, during the evidence for the defence, a further three, officers and soldiers were detailed to act as interpreters.

It is to be noted that the rules of procedure as specified in the Royal Warrant do not contain any express provision either as to the language of the Military Courts trying war crimes cases, or as to the rights of the accused and duties of the defending Counsel as to the language in which they should address the court.

The rules of procedure followed in war crimes trials by British Military Courts are with certain exceptions(*) those followed in English civil courts. It seems beyond doubt that an English Court would have a right to insist on *Counsel* addressing it in English. The English law on the rights of a non-English speaking *accused* is at present contained in an *obiter dictum* of Lord Reading, C.J., in *R.* v. *Lee Kun* (1916) 1 K.B. 337, to the following effect : When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by Counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by prisoner. If he is defended by Counsel, the evidence must be translated to him unless he or his Counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.

The action of the Court in the Grumpelt trial could in any case be fully explained by reference to two relevant provisions. Regulation 13 of the Royal Warrant states that " In any case not provided for in these Regulations such course will be adopted as appears best calculated to do justice." The same is provided by Rule 132 of the Rules of Procedure made under the authority of the Army Act.

(*) See Annex I, pp. 107-8.

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Criminality of Violating the Terms of Surrender*

(*a*) *Capitulation and Armistices in International Law.* Defending Counsel, endeavouring to establish the absence of *mens rea* in the accused, made a distinction as to the character of certain different legal conceptions, namely " cease fire," " armistice," " surrender " and " capitulation," and submitted that at the time when the scuttling took place the convention of 4th May, 1945, agreed upon between the two belligerent parties, was known to the German people and the accused as signifying " cease fire " and nothing else. Therefore, he contended, the accused's actions should be judged from the point of view of what the " cease fire " conception implied.

International Law recognises and distinguishes between capitulations and simple surrender on the one hand, and different kinds of armistice on the other.

As to the first category, capitulation or *stipulated* surrender in contradistinction to *simple* surrender is a convention between the armed forces of belligerents stipulating the terms of surrender of defended places, or of men-of-war, or of troops. With regard to the character and contents of capitulations, Oppenheim-Lauterpacht, *International Law*, Volume II, Sixth Edition (Revised), p. 431, contains the following passage : " Unless otherwise expressly provided, a capitulation is concluded under the obvious condition that the surrendering forces become prisoners of war, and that all war material and other public property in their possession, or within the surrendering place or ship, are surrendered in the condition in which they were at the time when the capitulation was signed. Nothing prevents forces fearing surrender from destroying their provisions, munitions, arms, and other instruments of war which, when falling into the hands of the enemy, would be useful to him. Again, nothing prevents a commander, even after negotiations regarding surrender have begun, from destroying such articles. But when once a capitulation has been signed, such destruction is no longer lawful and if carried out, constitutes perfidy, which may be punished by the other party as a war crime."(3)

As to the second category, armistices or truces are all agreements between belligerent forces for a temporary cessation of hostilities. Under this category come all kinds of cessation of hostilities, including suspensions of arms (referred to by the Defence as " cease fire "), general armistices, and partial armistices.(4).

The common feature of all kinds of armistices is that hostilities between the belligerent parties must cease. The legal consequences of an armistice are in some respects the subject of much dispute in legal literature, as the

(3) And see also the passage quoted by the Prosecutor, on p. 63. As an illustration of the State practice of the United States reference could be made to the following extract from *The Laws and Usages of War at Sea*, published by the Navy Department, on June 27th, 1900 ; " *After agreeing upon or signing* a capitulation, the capitulator must neither injure nor destroy the vessels, property, or stores in his possession that he is to deliver up, unless the right to do so is expressly reserved to him in the agreement of capitulation." (Italics not in the original.)

(4) See p. 434 of the work already quoted in the text.

Hague Regulations do not mention the matter. This controversy has been summarised as follows :

" Everybody agrees that belligerents during an armistice may, *outside the line where the forces face each other*, do everything and anything they like regarding defence and preparation of offence ; for instance, they may manufacture and import munitions and guns, drill recruits, build fortresses, concentrate or withdraw troops. But no unanimity exists regarding such acts as must be left undone, or may be done, *within the very line where the belligerent forces face each other*."(5)

It seems therefore that the legal issue is in doubt, but in any case it must be argued that the above-mentioned controversy and the differentiation put forward by the Defence Counsel, as well as the meaning which according to him should have been laid upon the " cease fire " conception, was not relevant to the case, because it must have been obvious to the accused, as it must have been to the most rudimentary intelligence, that the German Naval Authorities could not have issued a general order for scuttling all naval craft if only a simple " cease fire " was agreed upon temporarily, after which, as the Defence contended, hostilities might have been resumed.

(*b*) *Violation of the Terms of Surrender viewed as a War Crime*. That capitulations, surrender conventions and armistices must be scrupulously observed is an old customary rule strengthened by the provisions of Article 35 of the Hague Regulations which expressly provides that " capitulations agreed upon between the contracting parties must . . . be scrupulously observed by both parties."

It would therefore appear as beyond doubt that any violation of a capitulation or armistice is prohibited and if committed constitutes a violation of the customary and conventional rules of the laws and usages of war. There is no doubt that any act contrary to a capitulation and any violation of an armistice would also constitute a war crime if committed by individuals on their own account. This point of view finds confirmation, in addition to the above-mentioned provision, also in Article 41 of the Hague Regulations, which says that " a violation of the terms of the armistice by individuals acting on their own initiative . . . entitles the injured party to demand the punishment of the offenders . . ."

It is also to be recalled that the Royal Warrant of 14th June, 1945, by which Regulations for the trial of war criminals were issued, expressly provides that " ' War Crime ' means a violation of the laws and usages of war . . ."

The same definition has been provided by the Charter of the International Military Tribunal in Article 6 (*b*), which reads as follows : " The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility : *war crimes :* namely, *violation of the laws or customs of war.* Such violations shall include, *but not be limited to,* murder, illtreatment or deportation to slave labour, or for any other purpose, of civilian population of or in occupied territory, murder or illtreatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

(5) Ibid, p. 438.

From the latter part of this Article it follows that not only crimes of the " murder type " (atrocities) but also violations of any other laws or customs of war should be considered as war crimes, even though such violations might constitute purely technical offences only.

(*c*) *The Instrument and Terms of Surrender.* The charge against Grumpelt was based on the Instrument of Surrender signed on 4th May, 1945, which, in paragraph 1, provided that " the German Command agrees to the surrender of all German armed forces. . . . This to include all naval ships . . ."

This Instrument, however, did not provide any conditions with regard to scuttling or damaging the instruments of war, conditions which are usually embodied in the conventions between armed forces of belligerents stipulating terms of surrender. Such conditions were, for instance, provided in two further Conventions signed with the German Command after 4th May, 1945. Paragraph 2 of the Unconditional Surrender of the German Forces signed at Rheims on 8th May, 1945, contains the words : " No ship, vessel or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment." Paragraph 2 of the Unconditional Surrender of German Forces at Berlin on 9th May, 1945, contains the words " No ship, vessel or aircraft is to be scuttled, or any damage done to their hulls, machinery, or equipment, nor to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general."(6)

Irrespective of whether the omission of such a specification in the Instrument of 4th May was accidental or not, the Court would seem to have acted on the assumption that this does not affect either the legal or the practical question of what is to be involved in the surrendering of enemy armed forces. Any surrender convention is concluded under the implied condition that all war material in the possession of the surrendering forces is surrendered in the condition in which it was at the time when the instrument was signed. Therefore, such an explanatory provision need not necessarily be embodied in the surrender agreement. It was also of no avail for the Defence to argue that at the material time the accused did not know the exact terms of the Instrument of Surrender, as the necessary conditions of any surrender must be obvious at least to any military person of the rank of officer.

(ii) *The Mens Rea of the Accused*

In spite of some legal points raised, or rather, touched upon, by the Defence, the case turned substantially on a question of fact and on what view the Court was to take of the question whether the accused at the material time knew of the surrendering of the German armed forces in the North West region of Germany.

With regard to this question, the Judge Advocate in concluding his summing-up advised the Court in the following way :

" Do you think it is at all reasonably possible that the accused had heard nothing at all which would put him upon his guard as regards the handing over of the submarines, remembering that he was with this security flotilla, and was in a naval port at a time when rumours were presumably going round

(6) For the full texts, see *American Journal of International Law*, Vol. 39, No. 3, July, 1945, pp. 169-71.

like wild fire? Are you satisfied that the man's state of mind at the time in question was this: "I honestly believed I had an order: I did not know anything about any surrender; it was not for me to inquire why the higher command should be scuttling submarines; I honestly conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command and I cannot be held responsible"? Gentlemen, that is a matter for you to consider.

"The Defence suggests if you look at the evidence as a whole that that is a reasonable possibility. I am going to tell you that in my view, if the accused did not have any knowledge of these terms and that he did believe honestly that he had an order of this kind and that he carried it out, well, then, gentlemen, you will be entitled to acquit him."