CASE No. 54

TRIAL OF KARL-HEINZ MOEHLE

BRITISH MILITARY COURT, HAMBURG

15TH TO 16TH OCTOBER, 1946

A. OUTLINE OF THE PROCEEDINGS

1. CHARGE AND THE EVIDENCE

The accused was charged with " Committing a war crime in that he, at Kiel, between September, 1942, and May, 1945, when senior officer of the 5th U-boat Flotilla, in violation of the laws and usages of war, gave orders to commanding officers of U-boats who were due to leave on war patrols that they were to destroy ships and their crews ".

The Prosecution evidence was entirely documentary, consisting of statements made by the accused. The Defence called no witnesses other than the accused himself.

2. COMMON GROUND BETWEEN THE PROSECUTION AND THE DEFENCE

The accused was a Korvetten Kapitan in the German Navy and from September, 1942, to May, 1945, was the officer commanding the 5th U-boat Flotilla at Kiel. In this capacity it fell upon him to brief U-boat commanders prior to their going out on operational patrols. Part of this briefing—though by no means the essential part which was of a technical nature—was to acquaint the U-boat commanders with an order originating from the German U-boat Command. This order, called the " Laconia Order ", was issued on the 17th September, 1942. It was in the nature of a standing order which was read regularly to the U-boat commanders. They were never given to them in writing. According to the accused the order stated:

> " (1) No attempt of any kind must be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews.
>
> " (2) Orders for bringing in captains and chief engineers still apply.
>
> " (3) Rescue the shipwrecked only if their statements would be of importance for your boat.
>
> " (4) Be harsh, having in mind that the enemy has no regard for women and children in his bombing attacks on German cities."

The accused agreed that these orders went much further than the previous standing orders which had been issued by the U-boat Command in 1939.

If the U-boat commanders asked no questions, after that briefing, nothing further would be said; if they raised any queries, the accused would give them two examples to elucidate the policy of the Naval High Command. The first example was that of a U-boat reporting in its war log that it had encountered a raft with five British airmen on it in the Bay of Biscay. Being unable to take them on board the U-boat proceeded on its journey. The commander was severely reprimanded by the Commander-in-Chief, U-boats, and it was pointed out that the correct action would have been to destroy the raft since it was highly probable that the airmen would be rescued by the enemy and would once more go into action.

The second example was that of American ships sunk by U-boats off the Caribbean coast. The criticism levelled against the U-boat commanders who had sunk the ships was that the crews were not destroyed but reached the coast and took over new ships. This, according to the U-boat commander, was to be prevented. Ships and crews were to be destroyed.

After giving these two examples, not as his opinion but as the policy of Naval Command, the accused went on to say to the U-boat commanders:

" Officially you cannot get such an order from the U-boat Command. You act in this matter according to the dictates of your conscience. The safety of your own boat must always remain your primary consideration ". The accused estimated that he had read out these orders and made the above comments to 300 or more U-boat commanders during the time he commanded the 5th Flotilla at Kiel. Many commanders after the reading of the order said: " That is quite clear and unequivocal, however hard it may be ".

3. THE ISSUE

Since the Prosecutor and the Defence agreed on the wording of the orders from U-boat Command and the accused admitted having passed them on to all U-boat commanders whom he briefed, the Court had two questions to decide:

(i) What was the true interpretation of these orders ?

(ii) Having put the true interpretation on them, were they contrary to the laws and usages of war ?

(i) *The interpretation of the orders*

The Prosecution's case on this first question was that the orders clearly meant that the U-boat commanders should destroy ships and their crews. Quoting from a statement made by the accused, the Prosecutor said: " So far as concerns the order itself it undoubtedly states, and in particular to those who know the manner in which the Commander-in-Chief U-boats was known to have given his orders, that the High Command regarded it as desirable that not only ships but also their crews should be regarded as objects of attack. German propaganda was continuously stressing the shortage of crews for enemy merchant ships and the consequent difficulties. I, too, put this construction on their order ".

The Defence case was that the orders were ambiguous and that by passing on these ambiguous orders with the final comment that each commander should follow the dictates of his conscience, Moehle had done the utmost he could do as a serving officer. The orders were ambiguous as they contained a prohibition against saving the crews but not an order to kill them.

During the course of the examination of the accused by the Judge Advocate the following exchange took place:

JUDGE ADVOCATE (after reading paragraph 1 of the orders): Do you agree or not that it comes to the same thing (i.e. the killing of the crew) if you send a lifeboat off in the middle of the Atlantic Ocean without a drop of water on board for the people to drink ?

A.: Yes, in its effect it will very often be the same, but the prohibition to save the crew has been issued because of the fact that U-boats whilst trying to save the crews of sunk ships have been attacked. . . . "

Q.: Do you agree that what I have read to you clearly applies to people after they have left the ship ?

A.: Yes, that no safety measure should be undertaken.

Q.: Do you think there was a single U-boat commander in the German Navy who could be in any doubt as to the meaning of that first paragraph ?

A.: No.

Q.: Do you think if you had tried to make it clearer, you could have made it clearer ?

A.: No, the prohibition to undertake rescue measures could not have been explained more explicitly.

Q.: Do you then agree with me that there is no ambiguity whatever in paragraph 1 of that Admiral Doenitz Order ?

A.: I agree with that.

(ii) *The Legality of the Order*

If the order was an order not to rescue survivors because it was dangerous for the U-boat to do so then it was a legal order. If the order was an order to kill survivors, then it was clearly illegal.

The Judge Advocate, summing up, said: " The Prosecution asked you to say that there is no formidable question of international law involved. They say that you should hold that international law is quite clear. After a ship has been sunk there is a duty upon the submarine commander (if he can, in all circumstances) to save the lives of the crew and they invite you to say (whether you accept that contention or not) that the order is directed to that aspect of the case and no further. They ask you to read it and they ask you to say: does it not all deal with the question of rescuing members of ships sunk after that has taken place. I do not think anybody is putting up the

proposition that if it were possible to save the lives of the crew from a ship that it torpedoed that there is not a duty to try and do so. Now I am sure that the naval officer in the Court will tell you what I think you already know and I think we all concede that the real important duty of the submarine commander is to ensure the safety of his own ship, and if it is a question of saving life or saving his ship, then clearly he must save his ship. But the Prosecution are saying here that that order which was distributed to the U-boat commanders is of the widest possible wording. Whether that is right or not is for you to decide ".

4. FINDING AND SENTENCE

The accused Moehle was found guilty and sentenced to five years imprisonment.

B. NOTES ON THE CASE[1]

1. SUBMARINE WARFARE IN GENERAL

Article 16 of Convention No. 10 agreed upon at the Hague in 1907 says: " After every encounter the two belligerents shall as far as military interests permit, take steps to search for the shipwrecked, wounded and sick and protect them (as well as the dead) against pillage and ill-treatment ". This is the general rule of maritime warfare. Its application to submarine warfare was laid down in Article 22 of the Naval Agreement concluded in London in 1930.([2]) " In their action with regard to merchant ships, submarines must conform to the rule of international law to which surface vessels are subject; in particular, except in cases of persistent refusal to stop on being duly summoned or active resistance to visit and search a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose, ships boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions by the proximity of land or the presence of another vessel which is in a position to take them on board."

This Naval Agreement was signed by the United States, Great Britain, France, Italy and Japan. When it expired in 1936, the above-mentioned Powers signed in London the " Naval Proctocol "([3]) 6th November, 1936, dealing with submarine warfare. This Naval Protocol incorporated the above-mentioned provisions of the London Agreement of 1930, with regard to submarines. Germany acceded to this Protocol in the same year, and this was the position at the outbreak of the second World War in September, 1939. Shortly after the outbreak of war, Germany embarked once more on

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([1]) Regarding the British law on war crimes questions, see Vol. I, pp. 105–110.
([2]) Treaty Series No. 1 (1931), Cmd. 3758.
([3]) Treaty Series No. 29 (1936), Cmd. 5302.

unrestricted submarine warfare against neutral and enemy vessels contrary to the 1936 Naval Protocol. On 27th November, 1939, Great Britain issued an Order in Council pronouncing retaliatory measures on the ground that Germany had violated her obligations under the Naval Protocol. (This Order in Council was modelled on an Order in Council dated 11th March, 1915, protesting against the violation of the Hague Convention by Germany in the first World War.) France and various neutral countries protested against the unrestricted submarine warfare carried out by the German Naval Command as being contrary to international law. Another retaliatory measure adopted by the Allies was the laying of mines in the Skagerrak in April, 1940.

The two main arguments put forward by German writers to justify Germany's conduct are:

(i) That the provisions of the Protocol of 1936 do not apply to attacks on vessels in " operational zones "; by entering such operational zones barred to merchant ships the vessel behaves in a manner which is tantamount to " persistent refusal to stop " and thus puts itself outside the Naval Protocol.(1)

This argument was rejected by the International Military Tribunal at Nuremberg. The Judgment points out that the practice of proclaiming operational zones and sinking of merchant vessels entering those zones was employed by Germany in the 1914–1918 war and adopted in retaliation by Great Britain. The Washington Conference of 1922, the Land and Naval Agreement of 1930 and the Protocol of 1936 were entered into with full knowledge that such zones had been employed in the first World War yet the Protocol made no exception for operational zones. The order of Doenitz to sink neutral ships without warning when found within these zones was, therefore, in the opinion of the Tribunal, a violation of the Protocol.

(ii) That Great Britain, in accordance with the Handbook of Instructions of the Merchant Navy of 1938, armed her merchant vessels and in many cases convoyed them with an armed escort, and that these armed merchantmen had orders to send position reports on sighting U-boats, thus integrating the Merchant Navy into the network of naval intelligence. This argument was entertained by the International Military Tribunal at Nuremberg, and in its judgment the Tribunal said with regard to the accused Doenitz: " In the actual circumstances of this case the Tribunal is not prepared to hold Doenitz guilty of his conduct of submarine warfare against British armed merchant ships ", and " in view of all the facts proved, and in particular of an order of the British Admiralty announced on the 8th May, 1940, according to which all vessels should be sunk at sight in the Skagerrak and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that that nation entered the war, the sentence on Doenitz

(1) " Schmitz Zeitschrift Für Auslandisches Öffentliches Recht und Völkerrecht " 8 (1938), p. 671. Also Oppenheim-Lauterpacht, International Law, 6th edition, Vol. II, p. 385, footnote 2.

is not assessed on the ground of his breaches of the international law of submarine warfare ".(1)

2. THE TREATMENT OF SURVIVORS AFTER A SINKING OF A VESSEL BY SUBMARINE

If a submarine commander can, without danger to his boat, save or succour survivors, he is no doubt under a duty to do so. If, however, by so doing he would endanger his boat he cannot be held responsible if he does not save any such survivors since it is recognised that the safety of his own boat and its crew must be his primary consideration. It is clearly recognised, on the other hand, that the killing of defenceless survivors of a torpedoed ship is a war crime.(2)

The Defence argued that the " Laconia Order " of 1942 was an order to impress upon the U-boat commanders that they should not rescue survivors as doing so endangered their U-boats. The " Laconia Order " was thus a legal order stressing an operational necessity. The Prosecutor argued that the " Laconia Order " was an order to kill survivors and thus against the generally recognised rules of sea warfare. The Judge Advocate left this question—the interpretation of a document, the authenticity of which was agreed by Defence and Prosecution—to the Court, though he suggested in his summing up that the order was an order to kill.

The International Military Tribunal, in their judgment on Admiral Doenitz, found that by the " Laconia Order " Doenitz had not deliberately ordered the killing of survivors of shipwrecked vessels. The Judgment said: " The Tribunal is of the opinion that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of shipwrecked survivors. The orders were undoubtedly ambiguous and deserve the strongest censure ". The finding of the Court in the Moehle case can be reconciled with the Nuremberg judgment. The International Military Tribunal decided that the " Laconia Order " was ambiguous. By commenting on this ambiguous order when passing it on, and by giving examples which undoubtedly must have given the U-boat commanders the impression that the policy of the Naval High Command was to kill ship's crews the accused removed this ambiguity. The order he passed on could be interpreted by a reasonable subordinate only in one way, namely, as an order to kill survivors. Thus, whereas there was a reasonable doubt as to the meaning of Doenitz's order and therefore the benefit of that doubt was given to Doenitz by the International Military Tribunal, there was no such doubt in view of the evidence before this Court on the way in which Moehle had added to this order.

3. THE DEFENCE THAT THE ILLEGAL ORDERS WERE NOT CARRIED OUT

Counsel for the Defence argued that the accused could not be held responsible " because there were no manifest effects of this order and even the Prosecutor has pointed out that no evidence of criminal actions as a result

(1) The Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Cmd. 6964, p. 109.

(2) See summing up by the Judge Advocate in the Peleus Trial, Vol. I, p. 11.

of this order has been given and I may therefore put it to the Court that such crimes were not committed ".

The Judge Advocate's reference to this point in his summing up was this: " Now the Prosecutor has quite clearly told you that he has no evidence to prove and establish that ships were sunk and sailors were drowned by the operations of the U-boat commanders as a result of this order, but generally, you do know that these orders were being repeated over and over again over a period of years, and during that time a great many sailors were killed and it is for you to decide, as service personnel, but do you think it is common sense and quite logical to assume that it is an irresistible inference that such orders and such explanations by the accused must have had some effect upon the ultimate course of conduct of U-boat commanders ? Do you think that a U-boat commander, if he is a good German naval officer wishes to flout the views and directions of his higher command ? That is a matter for you ".

The charge, as laid, charges the accused with giving orders to U-boat commanders " that they were to destroy ships and their crews ". Strictly speaking, therefore, what happened at a later date as a result of these orders is not relevant in deciding the question whether the accused did or did not issue the orders to kill the crews. It may, however, be argued that the question before the Court was how a reasonable U-boat commander would interpret the orders given by the accused and that therefore the way in which U-boat commanders did actually interpret these orders is material.

By finding the accused guilty the Court held that a military superior who issues orders which are against the laws and usages of war commits a war crime even if these orders were not carried out by his subordinates. Having found the accused guilty of issuing the illegal orders, the results of this order may be a relevant consideration in assessing the punishment.

4. THE RELATION OF THIS TRIAL TO OTHER WAR CRIMES TRIALS

The " Laconia Order " was issued by the German U-boat Command in 1942. It was passed on by Moehle as a commanding officer, 5th Flotilla, continuously from 1942 to 1945. In one case the sinking of the *Peleus* (a Greek ship chartered by the British Ministry of War Transport) by a U-boat, the " Laconia Order " was carried out by a U-boat commander, Heinz Eck.

The indictment against the German Major War Criminals charged the Commander-in-Chief U-boats, Grand Admiral Doenitz, *inter alia*, with the issuing of the " Laconia Order ". In its judgment the International Military Tribunal recorded its opinion that the orders were " undoubtedly ambiguous " but were not deliberate orders for the killing of shipwrecked survivors.[1]

Heinz Eck was tried and convicted by a British Military Court at Hamburg in October, 1945.[2] for firing on and killing shipwrecked members of the crew of the S.S. *Peleus* which he had sunk in the Atlantic Ocean. Eck, though not pleading superior orders in his defence, quoted the " Laconia Order " verbatim when giving his evidence.

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(1) Cmd. 6964, p. 109.

(2) See Vol. I of this series, case No. 1.

These three trials, seen together, deal with three stages of the same order, with the Admiral who originated the order, with the staff officer who passed it on and with the officer at the end of the chain of command who carried it out. Though there was no evidence that Eck had been one of the 300 U-boat commanders briefed by Moehle, he had received the "Laconia Order".

CASE No. 55

TRIAL OF HELMUTH VON RUCHTESCHELL

BRITISH MILITARY COURT, HAMBURG
5TH TO 21ST MAY, 1947

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

All five charges brought against the accused referred to his conduct when he commanded German armed raiders in the North Atlantic between 1940 and 1942. The charges were of three kinds:

(i) that in two engagements he continued to fire after the enemy had indicated his surrender (first and fifth charges);

(ii) that in two other engagements he sunk enemy merchant vessels without making any provision for the safety of the survivors (second and fourth charges);

(iii) that after the engagement forming the subject of the fourth charge he ordered the firing at survivors on life-rafts (third charge).

The accused pleaded not guilty to all five charges.

2. THE EVIDENCE AND ARGUMENTS

(i) *Charges of prolongation of hostilities after surrender*

(*a*) *The Case of the Davisian (first charge)*

The Prosecution alleged that the *Davisian*, a British merchant vessel, was attacked in daylight, without warning, by a German armed raider commanded by the accused on 10th July, 1940. The attacker destroyed her wireless aerial with his first salvo. He maintained heavy fire for about five minutes and then signalled "use your radio not". The captain of the *Davisian* stopped his engines, hoisted an answering pennant and acknowledged the signal. In spite of this, the raider's firing continued for 15 minutes, wounding 8 or 10 of the crew of the *Davisian*, whilst they were trying to abandon ship. The crew were later picked up by the raider.

The Defence relied on two members of the crew of the accused's ship, and on the log kept by the accused, to prove that no signal was received by the