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

raider. The log says: " After seven salvoes I give the order to cease fire. The crew are taking to their boats. No wireless telegraph has been heard ". The defence also contended that there was some movement amidship towards the gun, which caused the accused to re-open fire. The log says (on this point): " Shortly before the boats are put out I see a few men running aft to the gun. I immediately open direct fire on the gun with the 3.7 and 2 cm. The men run back to their boats and lower them to the water ".

The Judge Advocate, summing up, directed the minds of the Court to three questions: (1) " Was the signal ' use your radio not ' hoisted by the raider "; (2) " If so, was it acknowledged by the *Davisian* "; (3) " Was the accused justified in his belief that he saw men running to the gun, or were the crew of the *Davisian* merely sheltering from his fire ? " When considering the last question, the Court had to bear in mind that the raider steamed across to the opposite side of the *Davisian* and the movement on deck of the *Davisian* might have been the natural result of the accused's tactics to spray the deck with anti-aircraft fire in order to hurry the crew in taking to their lifeboats.

(*b*) *The case of the Empire Dawn* (*fifth charge*)

The *Empire Dawn*, a British merchant ship, was attacked in the North Atlantic without warning by a raider commanded by the accused during the night of the 12th September, 1942. The first salvo set the bridge on fire and destroyed the wireless, but though the *Empire Dawn* was rendered powerless by the hit she nevertheless continued to progress, and she was still moving forward when she eventually started to sink. Her captain did not open fire. He signalled by means of a torch that he was abandoning ship.

The Prosecution alleged that in spite of this the fire continued whilst the lifeboats were being lowered, breaking the ropes of one of the lifeboats with the result that it crashed into the sea and several members of the crew were killed. The survivors were eventually picked up and taken aboard the raider.

The Defence argued that it was not proved that the torch worked, that even if it did work a signal made with an ordinary torch against the background of the blazing bridge could not be observed on board the raider as the crew were blinded by the flash of their own guns. The accused gave evidence to the effect that he received no signal from the *Empire Dawn*. He kept up the firing to hurry the crew to their lifeboats as it had been repeatedly observed by the German commanders that whilst some of the crew of a sinking ship had taken to their boats, others would continue to resist.

The questions the Court had to consider were similar to those regarding the first charge : (1) " Was the signal of surrender given"; (2) " If so, was it received"; (3) " If it was not received, did the accused by his conduct prevent himself from receiving any signal ? "

The Judge Advocate advised the Court that even if they found as a fact that no signal was received by the raider, they could still convict the accused if they came to the conclusion " that the accused deliberately or recklessly avoided any question of surrender by making it impossible for the ship to make a signal ".

(ii) *The charges of failing to make provisions for the safety of the survivors after a battle at sea*

(*a*) *The case of the Beaulieu* (*second charge*)

The *Beaulieu* was a Norwegian tanker and was attacked without warning by a raider commanded by the accused on the night of the 14th August, 1940.

The Prosecution's case rested entirely on the log kept by the accused. In this log the accused, after pointing out that the *Beaulieu* was sailing without lights and that that was sufficient proof for him that she was an enemy vessel, recorded that he attacked her at 2050 hours and put her out of action by scoring nine direct hits. The *Beaulieu* had stopped and had put on her navigation lights, her masthead lights and her deck lights. She used no radio and did not fire or attempt to man the gun. The log continued: " There is a boat aft at her stern, with a crew of about 18 or 20 men in it. The cutter on the starboard side was not yet in the water. I again bring the deck under fire at close range so as to be secure against a burst of fire from the enemy from rifles or pistols. The enemy boat disappeared in the darkness. I did not see it again and also did not notice how the second one put off. One cannot and may not worry about boats and wounded at night for one cannot be certain in advance when approaching them whether they are going to start rifle fire. If a boat were to come alongside of its own accord to get help I would never send it away, but apparently the tales about us are so brutal that they would rather set out on the long sea trip than approach a warship. There was much in the procedure that my crew had not understood. I had to make clear to them why the attacks had to take place at night now and why we were taking no more prisoners. I had the feeling that for the first time a sense of the seriousness of war had been brought home to my men and that was good."

The accused eventually moved off at 2328 hours without having made an attempt to rescue the survivors. The distance from the place of the sinking to the nearest shore was approximately 1,200 miles. Four members of the crew were killed by the raider's fire, the remainder were picked up by an Allied vessel after five and a half days at sea in their two boats.

The defence case was that the accused sent a party on board the *Beaulieu* to investigate and any survivors who had stayed on board would have been rescued by this boarding party and that the raider stayed in the vicinity of the abandoned *Beaulieu* for two and a half hours, circling round and by increased look-out and special attention did everything possible to trace survivors. The defendant met the argument that he should have put out lifeboats to search for the survivors by saying that a lifeboat in the Atlantic swell could see less than a great number of people who are on a ship five metres above the water level. He also argued that the reason for not using any searchlights was that his searchlights had been dismantled before the action started as past experience had shown that in view of their blinding effect they did more harm than good. Two expert witnesses (a British captain and a former German admiral) agreed that with regard to lowering lifeboats and the use of searchlights, they would have acted in the same way as the accused did.

The Judge Advocate, summing up, pointed out that the *Beaulieu* had done everything that the accused himself in the course of cross-examination had indicated could be expected as a sign of surrender. The accused had furthermore seen with his own eyes 18 to 20 survivors trying to lower the lifeboat. In spite of this he again brought the whole deck under fire. In view of this conduct, the Judge Advocate said the Court may think " that this story that the survivors were voluntarily preferring to travel the Atlantic instead of surrendering," becomes almost fantastic. The accused could not be expected to look indefinitely for persons who were quite voluntarily taking that course of their own accord, but if you come to the conclusion that they were influenced in their decision by a real fear induced by the savage and (as they thought) unreasonable persistence of the attack, then in my opinion if the accused knew they were being so frightened his duty after the sinking became a very much greater one. If you took that view about the matter, you would, in my opinion, be justified in reaching the conclusion (if you are satisfied that these facts had been proved), that the accused was guilty of the charge ".

(*b*) *The case of the Anglo-Saxon* (*fourth charge*)

On the night of the 21st August, 1940, an armed raider commanded by the accused, attacked the *Anglo-Saxon*, a British merchant vessel, without warning. The first salvo hit the gun and blew up some ammunition, setting the stern ablaze. The raider's log said: " She had stopped and could go no farther ". The *Anglo-Saxon* began to send out distress signals but the raider's wireless succeeded in jamming these signals. The log kept by the accused said: " The flak is in action at ranges of less than 1,000 metres and is firing on direct targets. It can scarcely be checked and is making such a noise that the ' cease fire ' arrives much too late. For just a short time two lights were noticed in the vicinity of the steamer apparently from two boats which at one time kept a short morse traffic which, however, could not be read. Then no more lights or boats were seen. Since no distress messages of any kind were made I did not undertake any further search operations ". One of the survivors of the *Anglo-Saxon* said in an affidavit admitted as evidence by the Court that the raider gave no chance for the launching of lifeboats by keeping up a continuous stream of fire with tracer ammunition. The witness saw two life-rafts signalling to each other, but his own lifeboat tried to avoid the raider's attention in view of the savagery of the attack that had preceded. Only two survivors reached land after 70 days at sea in their lifeboat. All others perished.

The main arguments of the Defence were:

1. That the prolonged spraying of the deck was accidental.

2. That the survivors tried to escape unnoticed, thus making it almost impossible for the raider to rescue them.

3. That, according to the expert witnesses, the place of sinking was on a main shipping route and that persons left in a lifeboat there had a fifty-fifty chance of surviving.

Since the accused must have known that there were survivors who had taken to their boats, the questions to be considered by the Court were:

1. Did circling round a few times after the sinking of a merchant ship constitute necessary provisions for the safety of the survivors ?

2. If not, was the accused's conduct justified by the attitude of the survivors ?

With regard to the first point, the Judge Advocate said: " Do you think or don't you think that knowing that his own flak had gone on much longer than necessary (assuming as is obvious from the log that that was an accident) an armed raider might reasonably have made the most special and exhaustive search for those survivors instead of assuming that since no distress messages of any kind were made, he did not undertake any further search operations ? "

With regard to the second point, the Judge Advocate's advice proceeded on the same lines as in the case of the *Beaulieu*.

(iii) *The charge of attempting to kill survivors by firing on lifeboats (third charge)*

One of the two survivors of the *Anglo-Saxon* alleged in his affidavit that whilst in the lifeboats his party was fired upon by the raider. The accused denied this and his Counsel pointed out that the firing was directed above the heads of the survivors in the lifeboats and the ricochets from the ship could easily create the impression among the survivors that they were being fired upon. As the witness who had sworn the affidavit on which the Prosecution's case rested could not be brought before the Court to give his evidence in person, the Prosecutor indicated that he would not pursue this charge any further.

(iv) *Finding and sentence*

The accused was found not guilty of the third and the fifth charges. The accused was found guilty of the first, second and fourth charges. He was sentenced to 10 years' imprisonment. The confirming officer did not confirm the finding of guilty on the second charge. He reduced the sentence to seven years' imprisonment.

B. NOTES ON THE CASE

(i) *Choice of charges*

The facts underlying all charges are the same in so far as the accused, as commander of various armed raiders, attacked four Allied merchant vessels without warning, and sank them. It was contended by the Prosecution in all four cases that by his methods of attack and by unduly prolonging those attacks after the attacked vessel had surrendered, he had violated the rules of sea warfare. In two cases, however (the case of the *Davisian* and the *Empire Dawn*) he eventually took the survivors on board. In the other two cases (the case of the *Beaulieu* and the case of the *Anglo-Saxon*) he failed to do so. It was apparently felt that the failure to rescue any survivors was the graver offence and that in the two latter cases the lighter offence of unduly

prolonging the attack was merged in the graver offence. The accused was thus charged with the failure to rescue survivors after his attack on the *Beaulieu* and the *Anglo-Saxon*, and with continuing to attack after the surrender in the case of the *Davisian* and the *Empire Dawn*. In no case was he charged with attacking a merchant ship without warning.

2. THE LEGALITY OF THE ATTACK ON A MERCHANT SHIP WITHOUT WARNING

The difference between an attack on a warship on the one hand and on a merchant ship on the other, is thus stated by Lauterpacht in the sixth edition of Oppenheim's *International Law*, Vol. II, paragraph 181: " All enemy men-of-war and other public vessels which are met by a belligerent's men-of-war on the high seas . . . may at once be attacked. . . . Enemy merchantmen may be attacked only if they refuse to submit to visit after having been duly signalled to do so ". Counsel for the Defence contended that by arming a merchantman, the merchantman becomes a warship and can therefore be attacked without warning. Whilst he admitted that British writers do not share this view, Counsel relied on American writers, one of whom, Hyde, says in his work *International Law* (Vol. II, p. 469): " A merchantman armed in such a manner that she can sink or damage a man-of-war can under no circumstances claim the protections of a merchant vessel ". Counsel further argued that by arming her merchantmen and integrating them into the naval intelligence network, Britain forfeited the rights hitherto attached to these ships as merchant vessels. He maintained that the International Military Tribunal at Nuremberg had upheld this view.(1)

The Prosecutor pointed out that the question of the legality of the attack did not arise in this case. The accused was not charged with launching any illegal attack and the Court must therefore presume in his favour that his attacks were legal, but whereas the Nuremberg judgment may be interpreted as holding that the unwarned attack on armed merchantmen was legal, the judgment also stressed the fact that the German Naval Command was bound by the London Naval Protocol of 1936.(2) The Prosecutor argued that whereas the Nuremberg judgment may provide a defence for an accused who had violated the clause of the London Naval Agreement dealing with unwarned attacks on merchantmen, the judgment did in no way affect the other provisions of the London Agreement such as the duty to give quarter and the duty to rescue survivors.

Three propositions seem to emerge, either from the utterances of the Judge Advocate or from the findings of the Court: (1) no war crime is committed if an unwarned attack is made upon a merchantman who by reason of arms and wireless communication is part of the war effort of the opposing belligerent; (2) the impunity of attack without warning on a merchantman in these circumstances forms an exception to the general rules of sea warfare and imposes upon the attacking warship the duty to use only adequate force

(1) Cmd. 6964, p. 109.

(2) The Naval Protocol only applies to submarines, but its provisions are taken from the London Naval Agreement (1930) which applies both to submarine and surface vessels. See p. 78

and not to kill or wound a greater number of the crew than is reasonably necessary to secure the defeat of the attacked vessel; (3) as soon as the attacked merchantman is effectively stopped and silenced, all possible steps must be taken by the raider to rescue the crew.

3. THE DUTY TO RESCUE SURVIVORS

The duty to rescue survivors after an engagement is laid down for all naval encounters in Article 16 of the 10th Convention of the Hague, 1907, which says that, " The two belligerents will, as far as military interests permit, take steps to look after the shipwrecked, wounded, etc. ". This duty has been amplified with regard to the sinking of merchantmen by the London Naval Agreement of 1930([1]) which provides that a warship (whether surface vessel or submarine) may not sink a merchant vessel " without having first placed the crew and the ship's papers in a place of safety ", adding that lifeboats are not places of safety for this purpose " unless the safety of the crew is assured in the existing sea and weather conditions by the proximity of land or presence of another vessel which is in a position to take them on board.([2]) Thus, even if an armed merchantman was a warship and not a merchantman, and the London Naval Treaty were therefore not applicable, the chief duty laid down by Article 16 of the Hague Convention for all naval encounters still remains.

With regard to Article 16, the Defence argued that this article says that " both belligerents " must after an engagement search for the shipwrecked and protect them. This, according to Counsel for the Defence, places the duty upon the healthy survivors to look after their wounded comrades and to attract the attention of the enemy so that they may be rescued. If they prefer the hazards of a long sea journey to being taken prisoners and take their wounded with them in an attempt to get away, one cannot hold the raider responsible for not rescuing them.

The Judge Advocate advised the Court in his summing up, that the duty of the accused was higher than the duty generally owed to survivors. if the raider had, by his methods of attack, intimidated the crew of the attacked vessels. Knowing that they were thus intimidated and that they would possibly avoid him, his search should have been even more thorough than is normally required.

The two following propositions seem to emerge: (1) if the raider is aware of survivors who have taken to their lifeboats, he must make reasonable efforts to rescue them; (2) it is no defence that the survivors did not draw attention to their boats if they had reasonable grounds to believe that no quarter was being given.

([1]) Throughout the trial the defence and the prosecution referred with regard to this point to Articles 72–74 of the German Prize Ordinance, but this Ordinance repeats almost verbatim the relevant passages of the London Agreement (1930).

([2]) See p. 78

4. SURRENDER AT SEA: REFUSAL OF QUARTER

Article 23 of the IVth Hague Convention, 1907, says that it is forbidden " to kill or wound an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion ". According to modern ideas of warfare, quarter can be refused only when those who ask for it attempt to destroy those who have been showing them mercy (Lawrence, *Principles of International Law*, p. 376). Thus far the law is clear. The question, however, on which there is remarkably little authority is what constitutes unconditional surrender at sea. Oppenheim-Lauterpacht, part 2, paragraph 183, says: " As soon as an attacked or counter-attacked vessel hauls down her flag and therefore signals that she is ready to surrender, she must be given quarter and seized without further firing. To continue to attack, though she is ready to surrender and to sink the vessel and her crew would constitute a violation of customary international law and would only as an exception be admissible in case of imperative necessity or of reprisals ". This passage was relied on as an authority by the Prosecutor and by Defence Counsel. The latter did not plead necessity or reprisals to bring the case within the exception stated by Oppenheim-Lauterpacht. The central question therefore was: are there generally recognised ways of indicating surrender at sea other than hauling down a ship's flag ? Two expert witnesses (a captain in the Royal Navy and a former vice-admiral in the German Navy) gave evidence, *inter alia*, on the customs in this regard of their respective services. The common denominator of their evidence could be thus stated: (1) the attacked ship must stop her engines; (2) if the attacker signals, the signal must be answered—if the wireless is out of action, it must be answered by a signalling pennant by day or by a torch or flashlight by night; (3) the guns must not be manned, the crew should be amidships and taking to the lifeboats; (4) the white flag may be hoisted by day and by night, all the ship's lights should be put on.(1)

The Defence argued that Oppenheim-Lauterpacht does not give any alternative to the hauling down of the flag. If the attacked vessel does not strike the flag and, because the wireless is out of action, cannot tell her attacker *expressis verbis* that she is " ready to surrender ", the decision when to discontinue the attack must be left to the commander of the attacking vessel. Since the safety of his ship must be his primary consideration, he need not stop the attack until he is satisfied that the safety of his own ship is no longer endangered by his opponent. He can thus press home the attack as long as he considers it operationally necessary.

The Judge Advocate in his summing up said that stopping the ship and switching on navigation lights, masthead lights and deck lights after a night attack is an unequivocal indication of surrender. He also advised the Court that if the accused deliberately or recklessly prevented the attacked ship from surrendering by making it impossible for her to convey her readiness to

(1) It was held by the Privy Council in the case of the " Pellworm " (1922 A.C. 292) that hauling down the flag alone is not sufficient indication of surrender if it is accompanied by a change of course. The Privy Council held that " in principle capture consists of compelling the captured vessel to conform to the captor's will. When that is done " Deditio " is complete. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary."

surrender, he would be guilty of a violation of the customary rules of sea warfare.

The Court's findings of guilty in the *Davisian* case and of not guilty in the *Empire Dawn* case are in line with the rules of surrender stated by the naval experts. The *Davisian*, after a day attack, stopped, hoisted a reply pennant and the crew took to the lifeboats. (The Court appeared to have disbelieved the accused's evidence that some of the crew of the *Davisian* were running towards the guns.) The *Empire Dawn*, after a night attack, did not stop, did not switch on her lights and the evidence about the signals given by means of a torch was open to doubt. The Court thus seemed to have held that there were generally recognised rules as to what constituted surrender at sea and that a war crime was committed if the attacking vessel continued her attack after her opponent has communicated her surrender in accordance with these rules. The Defence of operational necessity did not avail the accused in this case.

5. UNCORROBORATED EVIDENCE OF AN ABSENT WITNESS

The Prosecution's case with regard to the third charge rested on the affidavit of one of the survivors admitted as evidence by the Court.

On the ninth day of the hearing, the President stated that it had now become clear that the attendance of that witness could not be procured. The Court decided that subject to anything the Prosecutor may have to say, they did not wish to hear any further evidence on that charge. The Prosecutor said that in view of the fact that the third charge rested on uncorroborated evidence of one absent witness, and in view of the gravity of the charge, he did not feel it proper to press that charge any further.

CASE No. 56

TRIAL OF OTTO SKORZENY AND OTHERS

GENERAL MILITARY GOVERNMENT COURT OF THE U.S. ZONE OF GERMANY

18TH AUGUST TO 9TH SEPTEMBER, 1947

A. OUTLINE OF THE PROCEEDINGS

The ten accused involved in this trial were all officers in the 150th Panzer Brigade commanded by the accused Skorzeny. They were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States. They were also charged with participation in wrongfully obtaining from a prisoner-of-war camp United States uniforms and Red Cross parcels consigned to American prisoners of war.