CASE No. 1

THE PELEUS TRIAL

TRIAL OF KAPITÄNLEUTNANT HEINZ ECK AND FOUR OTHERS FOR THE KILLING OF MEMBERS OF THE CREW OF THE GREEK STEAMSHIP PELEUS, SUNK ON THE HIGH SEAS

BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS HELD AT THE WAR CRIMES COURT, HAMBURG, 17TH-20TH OCTOBER 1945

Killing of survivors of a sunken ship. Absence of mens rea. The defence nulla poena sine lege. The pleas of operational necessity and superior orders. The legal relevance of the British Manual of Military Law. Persuasive authority of the case of the "Llandovery Castle" decided by the German Reichsgericht in 1921.

The Commander of a German submarine was charged with ordering the killing of survivors of a sunken allied merchant vessel. Four members of the crew were charged with having done the actual killing. The defence of absence of *mens rea* was unsuccessful. It was held that the maxim *nulla poena sine lege* did not apply. The plea of operational necessity and the plea of superior orders were invoked by the Commander and three of the members of the crew respectively, but were held not to free the accused from responsibility.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was a British Military Court 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 Brigadier C. I. V. Jones, C.B.E., Commander 106 AA Bde., as President, and, as members, Brigadier R. M. Jerram, D.S.O., M.C., Commodore D. Young-Jamieson, Royal Navy, Captain Sir Roy Gill, K.B.E., Royal Naval Reserve, Lieutenant-Colonel H. E. Piper, Royal Artillery, Captain E. Matpheos, Royal Hellenic Navy, and Commander N. I. Sarris, Royal Hellenic Navy.

The Judge Advocate was Major A. Melford Stevenson, K.C., Deputy Judge Advocate Staff, Judge Advocate General's Office.

(1) *See* Annex I, pp. 105-10.

The Prosecutor was Colonel R. C. Halse, Military Department, Judge Advocate General's Office.

The Defending Officers were as follows :

For the Accused Kapitänleutnant Eck : Fregatten-Kapitän Meckel and Dr. Todsen.

For the Accused Leutnant zur See Hoffmann : Dr. Pabst and Dr. P. Wulf (as to character only).

For the Accused Marine Stabsarzt Weisspfennig : Dr. Pabst.

For the Accused Kapitänleutnant (Ing) Lenz : Major N. Lermon, Barrister-at-Law, HQ 8 Corps District.

For the Accused Gefreiter Schwender : Dr. Pabst.

For all the Accused : Professor A. Wegner.

2. THE CHARGE

The prisoners were :

Kapitänleutnant Heinz Eck,
Leutnant zur See August Hoffmann,
Marine Stabsarzt Walter Weisspfennig,
Kapitänleutnant (Ing) Hans Richard Lenz,
Gefreiter Schwender.

They were charged jointly with :

" Committing a war crime in that you in the Atlantic Ocean on the night of 13/14th March, 1944, when Captain and members of the crew of Unterseeboat 852 which had sunk the steamship " Peleus " in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them."

It was submitted on behalf of the Defence that the charge may be read in two different ways, according to which the phrase " in violation of the laws and usages of war " could qualify *either* the word " sunk " *or* the word " concerned," and what followed it.(2).

It was made clear at the outset by the Prosecution that the phrase " in violation of the laws and usages of war " qualified the words that follow it, and not the words that precede it, or in other words, that the prisoners were *not* accused of having violated the laws and usages of war by *sinking* the merchantman, but only by *firing* and *throwing grenades* on the *survivors* of the sunken ship.

3. THE OPENING OF THE CASE BY THE PROSECUTOR

The " Peleus " was a Greek ship chartered by the British Ministry of War Transport. The crew consisted of a variety of nationalities ; on board there were 18 Greeks, 8 British seamen, one seaman from Aden, two Egyptians, three Chinese, a Russian, a Chilean and a Pole.

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(2) The first interpretation would mean that the steamship " Peleus " was sunk in violation of the laws and usages of war. The second construction would mean that the killing of members of the crew was in violation of the laws and usages of war.

On the 13th March, 1944, the ship was sunk in the middle of the Atlantic Ocean by the German submarine No. 852, commanded by the first accused, Heinz Eck. Apparently the majority of the members of the crew of the " Peleus " got into the water and reached two rafts and wreckage that was floating about. The submarine surfaced, and called over one of the members of the crew who was interrogated as to the name of the ship, where she was bound and other information.

The submarine then proceeded to open fire with a machine-gun or machine-guns on the survivors in the water and on the rafts, and also threw hand grenades on the survivors, with the result that all of the crew in the water were killed or died of their wounds, except for three, namely the Greek first officer, a Greek seaman and a British seaman. These men remained in the water for over 25 days, and were then picked up by a Portuguese steamship and taken into port.

Later in the year, a U-boat was attacked from the air on the East Coast of Africa and was compelled to beach. Her log was found, and in it there was a note that on the 13th March, 1944, she had torpedoed a boat in the approximate position in which the S.S. " Peleus " was torpedoed. The U-boat was the U-boat No. 852 commanded by the accused Eck and among its crew were the other four accused, three of them being officers, including the medical officer, and one an N.C.O.

Five members of the crew of the U-boat made statements to the effect that they saw the four accused members of the crew firing the machine-gun and throwing grenades in the direction of the rafts which were floating about in the water.

4. EVIDENCE FOR THE PROSECUTION

The Prosecution put forward affidavits by the three survivors of the crew of the " Peleus," and called five members of the crew of the U-boat as witnesses.

On the application of the Prosecution, arrangements were made for the names of these German witnesses not to be published by the Press.

The facts as appearing on this evidence were that the accused captain of the U-boat, Eck, had ordered the shooting and the throwing of hand grenades at the rafts and the floating wreckage, and that the accused Lt. Hoffmann, Oberstabsarzt Weisspfennig and Gefreiter Schwender had done the actual shooting and throwing of grenades ordered by Eck. The fifth accused, Kapitän-Leutnant Engineer Lenz, appears to have behaved in the following way : (*a*) When he heard that the captain had decided to eliminate all traces of the sinking, he approached the captain and informed him that he was not in agreement with this order. Eck replied that he was nevertheless determined to eliminate all traces of the sinking. Lenz then went below to note the survivors' statements in writing and did not take part in the shooting and throwing of grenades. (*b*) Later on, Lenz went on the bridge and noticed the accused Schwender with a machine gun in his hand. He saw that Schwender was about to fire his machine gun at the target and thereupon he, Lenz, took the machine gun from Schwender's hand and fired it himself in the general direction of the target indicated. He did this because he considered that Schwender, long known to him as one of the most

unsatisfactory ratings in the boat, was unworthy to be entrusted with the execution of such an order.

5. OUTLINE OF THE DEFENCE

The defence of Heinz Eck was based on the submission that he, as the commander of the U-boat, did not act out of cruelty or revenge but that he decided to eliminate all traces of the sinking. The Defence claimed that the elimination of the traces of the " Peleus " was operationally necessary in order to save the U-boat.

The other accused relied mainly on the pleas of superior orders. In addition to Counsel for the individual accused, the German Professor of Criminal and International Law, Wegner, acted as Counsel for all the defendants.

In elaborating the defence of operational necessity, Professor Wegner pointed out that submarine commanders had long been in an unfortunate position. When the submarine was a comparatively new weapon, the Washington Convention wanted to treat the commanders of submarines in certain cases as pirates. This, however, was never ratified by the countries concerned.

With regard to the plea of superior orders, Professor Wegner said that he stuck " to the good old English principles " laid down by the " Caroline case," according to which, he submitted, it was a well-established rule of International Law that the individual forming part of a public force and acting under authority of his own Government is not to be held answerable as a private trespasser or malefactor, that what such an individual does is a public act, performed by such a person in His Majesty's service acting in obedience to superior orders, and that the responsibility, if any, rests with His Majesty's Government. Superior command, as excluding personal responsibility, had, Professor Wegner said, also been recognised in the treatment of prisoners of war in the Convention of 1929. He further invoked an alleged statement made by Mr. Justice Jackson.

Whatever may be the merits of the modern conception of war crimes, it must not be permitted to obscure old and sound principles of criminal law and procedure. Professor Wegner further referred to the important principle embodied in the Latin phrase, *nullum crimen sine lege, nulla poena sine lege.*

6. EVIDENCE BY THE ACCUSED HEINZ ECK, COMMANDER OF THE SUBMARINE

The accused, Heinz Eck, during examination and cross examination, did not plead that, when ordering the shooting at the rafts and the wreckage, he had acted on a superior order.

His orders were, he said, that when operating in the South Atlantic he was to be concealed as far as possible because great numbers of U-boats had been sunk in that particular region. He manœuvred the boat to the place of the sinking, and ordered small arms on deck to prevent danger to the boat arising out of the presence of survivors, as he had heard of cases where the loss of the U-boat had actually been caused by the presence of survivors. He decided to destroy all pieces of wreckage and rafts and gave the order to open fire on the floating rafts. He thought that the rafts were a danger to

him, first because they would show aeroplanes the exact spot of the sinking, and secondly because rafts at that time of the war, as was well-known, could be provided with modern signalling communication. When he opened fire there were no human beings to be seen on the rafts. He also ordered the throwing of hand grenades after he had realised that mere machine gun fire would not sink the rafts. He thought that the survivors had jumped out of the rafts. He further admitted that the Leading Engineer, Lenz, objected to the order. Lenz had said that he did not agree with it, but he, Eck, had told him that, despite everything, he thought it right and proper to destroy all traces.

It was clear to him, he went on, that all possibility of saving the survivors' lives had gone. He could not take the survivors on board the U-boat because it was against his orders. He was under the impression that the mood on board was rather depressed. He himself was in the same mood ; consequently he said to the crew that with a heavy heart he had finally made the decision to destroy the remainder of the sunken ship.

Eck referred to an alleged incident involving the German ship " Hartenstein," of which he had been told by two officers. After this boat had saved the lives of many survivors, it was located by an aeroplane. The boat showed the Red Cross sign and one of the survivors, a flying officer, had, with a signal lamp, given some signals to the aeroplane not to attack the boat because of the survivors being on board, including women. The plane left, and after a time it returned and attacked the boat, which was forced to unload the survivors again, in order to dive, and it survived only after sustaining some damage. This case, about which he had been told before the beginning of his voyage, showed him that on the enemy side military reasons came before human reasons, that is to say before the saving of the lives of survivors. For that reason, he thought his measures justified.

The firing went on for about five hours.

In his address to the crew, he said : " If we are influenced by too much sympathy, we must also think of our wives and children who at home die also as victims of air attack."

To the Prosecutor's question : " Sympathy about the wreckage ? ", Eck said it was quite clear to him that the survivors would also die. Eck realised that they would die as a result of his shooting. He gave the order to shoot to Hoffmann, Weisspfennig and Schwender, but not to Lenz.

Eck's description of the " Hartenstein " incident was, in the main, confirmed by an English witness, a solicitor serving as a temporary civil servant at the Admiralty. He confirmed that, as a result of the incident, the German U-boat Command issued instructions as follows :—

" No attempt of any kind should 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. Orders for bringing Captains and Chief Engineers still apply. Rescue the shipwrecked only if their statements will be of importance for your boat. Be harsh, having in mind that the enemy takes no regard of women and children in his bombing attacks of German cities."

7. EXAMINATION OF THE DEFENCE WITNESS, CAPTAIN SCHNEE

This officer, a member of the German U-boat command, who had sunk about 30 allied ships and received the Oak Leaf of the Iron Cross, described the instructions he had given to Eck before Eck left. He pointed out to him that the situation in this particular zone was very difficult for the Germans. In the months prior to the happening all boats of this type had been lost. The German U-boat command explained the destruction of these boats in that particular zone in two ways. First, this particular type of U-boat was the biggest of the German U-boat fleet and consequently the heaviest and slowest, and therefore the most vulnerable. Secondly, there was strong aircraft cover between the area of Freetown and Ascension. These air bases were in touch with aircraft carriers and so they were able to chase submarines until they could destroy them. Once the presence of the boat was detected in these waters, the aircraft defence could follow it up with all its power and destroy it. Traces of the sunken ship would be recognisable for the next few days and could be recognised by a plane. To the question whether it would not have been more advisable for Eck, instead of wasting time in destroying the wreckage, to take advantage of the night and to leave the place of the sinking, Schnee thought that in the best possible conditions the boat could only cover a distance of about 150 sea-miles during the night, a distance which was of no importance for air reconnaissance. During the course of the cross-examination of Schnee, the following exchanges took place between the Prosecuting Officer, the Judge Advocate and the witness :

Col. Halse (the Prosecuting Officer).—As an experienced U-boat commander what would you have done if you were in Eck's position on the night of the 13th March ?

A.—I do not know this case well enough to give an answer.

The Judge Advocate.—Come ; you can do a little better than that. You know the circumstances of this case, do you not ? You have been giving evidence about them ?

Q.—You have dealt in great detail with the propriety of leaving the site of the sinking, have you not ?

Q.—You were asked what would you have done if you had been the Commander of U-852 and had just sunk the " Peleus " ?

A.—It is very difficult for me to give an answer to that.

Q.—Would you try ?

A.—Now that the war is over I cannot possibly put myself in such a difficult position as Captain Eck was at that time.

Q.—The fact that the war is over has not deprived you of your imagination, has it ? Just answer yes or no.

A.—No.

Q.—What would you have done if you had been in Eck's position ?

A.—I would under all circumstances have tried my best to save lives, as that is a measure which was taken by all U-boat commanders ; but when I hear of this case, then I can only explain it as this, that Captain Eck, through the terrific experience he had been through, lost his nerve.

Q.—Does that mean that you would not have done what Captain Eck did if you had kept your nerve ?

A.—I would not have done it.

Q.—Did B.D.U. (the German U-boat command) approve of the killing of survivors ?

A.—No, it did not approve, not at the time when I was a member of the staff of B.D.U.

Q.—You were on the staff of B.D.U. in March 1944 ?

A.—Yes.

Q.—Were orders issued that survivors were not to be killed ?

A.—It was not necessary because this order had already been issued at the outbreak of war.

8. EXAMINATION OF THE FOUR OTHER ACCUSED

The accused Hoffmann, during his examination, relied for defence mainly on the order given by the Commandant.

The accused Weisspfennig also referred to the order but admitted that in the German navy there were regulations about the conduct of medical officers which forbade them to use weapons for offensive purposes. Weisspfennig disregarded this regulation because he had received an order from the Commandant. He did not know whether his regulations provided that he could refuse to obey an order which was against the Geneva Convention. He knew what the Geneva Convention was and realised that one of the reasons why he was given protection as a doctor was because he was a non-combatant. He realised that there were survivors. He did not regard the use of the machine gun in this particular case as an offensive action.

The accused Lenz, during his examination, repeated his explanation that he took over the firing from Schwender because he did not want a human being to be hit by bullets fired by a soldier whom he considered bad.

The accused Schwender said that, under orders, he fired at the wreckage, but not at human beings.

9. CLOSING ADDRESS BY PROFESSOR WEGNER

Professor Wegner recalled the decision of the German Supreme Court in the case of the " Llandovery Castle " (3) and submitted that the principle on which the German Supreme Court had acted in that case could not be followed today. Too much had happened since then ; the psychology of a whole nation, not to say of the world, had changed meanwhile. The legal difference between the situation of the Leipzig trials after the last war and the present situation was that now the accused were not before a German court and the defence did not know exactly what laws were going to be applied to their acts.

Counsel quoted Renault who, in an essay published in 1915, emphasised that one had to distinguish between a man being politically responsible and a criminal being guilty of a crime. If one confused criminal and political responsibility one became oneself guilty of a very dangerous confusion and injustice. One could not call any man a war criminal without his doing

(3) *Annual Digest of Public International Law Cases*, 1923-1924, Case No. 235 ; British Command Paper (1921) Cmd.1422, p. 45 ; Schwarzenberger, *International Law and Totalitarian Lawlessness*, p. 128.

wrong and being guilty according to a law enacted before his deed. And as to the wrong, one had to consider that in war acts which otherwise would be crimes are, in most cases, justified by International Law. Many rules of International Law were rather vague and uncertain. Could one decide to find an individual guilty of having violated a rule of International Law if the States themselves had always quarrelled about that rule, its meaning and bearing, if they had never really approached recognising it in common practice and hardly knew anything precise concerning it? If the States did not know, how could the individual know?

Professor Wegner further referred to statements made by the American Professor, Charles G. Fenwick, who, when dealing with the charges against the German army for devastation in 1917, resulting from the partial retreat of the German troops, had said: "Owing, however, to the conditional character of the prohibitions of the law, it is difficult in these cases as in others to determine whether the act of destruction was in violation of technical law, even in cases where it appeared to the sufferers to be wholly arbitrary and malicious."

The Professor went on to say that the decision of the German Supreme Court in the case of the "Llandovery Castle" was regarded in Germany as treason, and people having taken part in it, or having defended it, were treated as traitors. He alleged that a similar tendency against which he had always fought in his books and essays was always very strong in some quarters of English and American jurisprudence and especially in that part of it which was represented by Austin and his school. Most modern writers of that school of thought openly taught, in Professor Wegner's view, outspoken National jurisprudence, discarding Divine as well as Public International Law. It is by such tendencies that, since the second half of the last century, the way had been paved for the National Socialist contention that there existed no universal truth and law, but that, instead, the will and command of the nation had the supreme, absolute and totalitarian value, claiming an individual's whole and undivided loyalty. If a heresy like this prevailed among so many famous lawyers of almost every country, the individual must be excused to some extent for a confusion in his conception as to right and wrong.

Professor Wegner stated that Gardner's contention that English law did not admit a plea of superior command had been refuted by many writers. He quoted the pre-1944 text of the British Manual of Military Law and also referred to the "Caroline" case and stated that ever since this "case" it had been a well-established rule in International Law that the individual forming part of a public force and acting under the authority of his Government is not to be held responsible as a private trespasser or malefactor. Superior command, as excluding personal responsibility, had, according to Professor Wegner, also been recognised in the treatment of prisoners of war.

Referring to American papers published during the second world war suggesting that there was a most important difference between the Imperial German Government of 1914-1918 and the National Socialist rulers of 1939, the Professor pointed out that the average German people were to a very large extent to be excused for their unfortunate mistaking of revolutionary

violence and political ruse and swindle for something like national leadership. The National Socialist administration had been recognised by foreign Powers. The fear emanating from the Hitler government was almost irresistible and dominated Germany absolutely. The foreign Powers, including Great Britain and the U.S.A., had no such excuse for recognising the Hitler administration.

War criminals could only be convicted of such crimes as were crimes according to the penal code of their country, in the present case the German Criminal Code of 1871, and only such punishment might be inflicted as was provided by that law.

10. THE CLOSING ADDRESSES OF THE OTHER DEFENDING COUNSEL

The advocates defending the accused Hoffmann, Weisspfennig and Schwender distinguished the crime of Schwender from that of the others because Schwender had neither purposely nor carelessly nor by chance killed anybody. If Schwender were to be punished, thousands of soldiers would have to be punished, who, on orders, have shot at non-living targets.

As to Hoffmann and Weisspfennig, Counsel pleaded superior orders and further that the offences had not been proved. It was for the court to decide whether there had been *dolus directus* or *dolus eventualis* or a careless offence. He pointed out that in case they were found guilty it must be decided whether they were to be punished for murder, for manslaughter or for involuntary killing. They were not guilty, as a superior order lifted the criminal responsibility from them. Paragraph 47 of the *Militärstrafgesetzbuch*, to which the accused were subject at the time of the act and which applied to them then, and as long as they were prisoners of war, said: "If a penal law is violated by the execution of an order in the course of duty, the commanding superior is alone responsible for it. The obeying subordinate meets punishment for participating, however, if it was known to him that the order referred to an action which involved a criminal purpose."

Regarding the culpability of a soldier, one had to distinguish between the cases in which the subordinate knew the illegality of the order and those in which he did not know it. Only in the former case could one speak of the responsibility of an obeying subordinate; but also in such case the British Military Law would not hold the imprisoned enemy responsible, as was shown in para. 443 of Chapter XIV of the British *Manual of Military Law* (pre-1944 text) (4). The advocate referred to the decision of the German Reichsgericht in the case of the "Dover Castle," which was distinguishable from the case of the "Llandovery Castle." In the "Dover Castle" case, the Reichsgericht acted on the principle that the commanding superior alone was responsible and that the subordinate can only be punished if he was aware of the illegality of the order. Counsel submitted that the British Government had acquiesced in this decision and thus not objected to the principle. In the "Llandovery Castle" case, the Reichsgericht established the fact that the accused knew that the execution of the order was criminal.

(4) Amendment No. 12 to the *Manual of Military Law* 1929, Chapter XIV, notified in Army Orders for January, 1936.

In the " Dover Castle " case ([5]) the accused were not aware of that and were therefore acquitted.

Another Defending Officer referred also to the United States *Rules of Land Warfare*, 1914, according to which, he submitted, obedience to superior orders was a good defence.

The amendment of paragraph 443 of the British *Manual*([6]) (Amendment No. 34, notified in Army Orders for April, 1944), was, in Counsel's view, not valid for several reasons. He referred to the " Zamora " case([7]) where it was stated that the prize court administers International Law and not Municipal Law and although it may be bound by the Acts of the Imperial legislature, it is not bound by Executive Orders of the King in Council. If that is so, then *a fortiori* the present court was not bound by an amendment published by the War Office, and further this amendment was merely a statement of one writer on the subject of International Law. Counsel referred to Wheaton, 1944 Edition, where it is stated on page 586 : " Common sense indicates that it must be very difficult for officers or men to know when they are committing war crimes and that in any case they act under immediate dread of punishment if they decline to obey orders, so that justice, on the whole, tends to the view that war crimes must not be charged on individuals."

With regard to the 1944 amendment of the British *Manual*, Counsel was asked by the Judge Advocate whether he challenged the accuracy of the following : " The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot, therefore, escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity." Counsel stated that he was not prepared to challenge that.

11. THE CLOSING ADDRESS BY THE PROSECUTOR

The Prosecutor based his case on the decision of the German Supreme Court in the case of the " Llandovery Castle," where it had been said : " The firing on boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not allowed. Compare the Regulations as to war on land, paragraph 23. Similarly in war at sea the killing of ship-wrecked persons who have taken refuge in lifeboats is forbidden."

As to the maxim of *nullum crimen sine lege, nulla poena sine lege*, the Prosecutor submitted that it is only applicable to municipal and state law, and could never be applicable to International Law.

The plea of superior orders in any case, on the facts, did not apply to Eck and Lenz, but neither could Hoffmann, Weisspfennig and Schwender rely on the defence of superior orders, because the order which was given by Eck was an illegal order. The German Supreme Court had decided in the case of the " Llandovery Castle " that the two members of the crew of the U-boat who were acting under the orders of their commander committed a war crime

([5]) *Annual Digest*, 1923-1924, Case No. 231 ; (1921) Cmd. 1422, p. 42.
([6]) See later, p. 18.
([7]) [1916] 2. A.C.77.

in firing at the boat, because they were doing something which was illegal, and that court decided that if an order is given which is, in itself, illegal, there can be no defence of superior orders.

With regard to Eck, the Prosecutor stated that in his submission, he must be guilty of the charges preferred. Eck admitted in evidence that he knew there must be survivors on the rafts. The Prosecutor suggested that that was cold-blooded murder.

Hoffmann admitted that he threw hand grenades. It was established by one of the affidavits that one of the persons who died on board the rafts was hit by a hand grenade. Subject to the Court's decision on the question of superior orders, the Prosecutor submitted that the case against Hoffmann was fully proved.

In the case of Weisspfennig, the Prosecutor pointed out that his case was made the worse by reason of the fact that he was of the medical profession and had no right to bear arms at all, except against savages and persons who were not in the same position as white men who fought in the war.

With regard to Lenz, the Prosecutor said that he was a man who first objected to the order and then deliberately fired in the direction of a human form which was stated to have been on some wreckage. How he could plead that he acted under superior orders was beyond the Prosecutor's comprehension.

As to Schwender, the only rating involved, there was no doubt that he did fire in the direction of the wreckage and that he must have known that they were firing on human targets.

No legal ruling was required in this case as to whether the offence was murder or manslaughter. The accused were charged with killing of survivors of the ship in violation of the laws and usages of war, as accepted by decent nations all over the world.

12. SUMMING UP BY THE JUDGE ADVOCATE

The Judge Advocate stated at the very outset that the court should be in no way embarrassed by the alleged complications of International Law which, it had been suggested, surrounded such a case as this. It was a fundamental usage of war that the killing of unarmed enemies was forbidden as a result of the experience of civilised nations through many centuries. To fire so as to kill helpless survivors of a torpedoed ship was a grave breach of the law of nations. The right to punish persons who broke such rules of war had clearly been recognised for many many years. Whatever might be said by those who were interested for or against the so-called Leipzig Trials, no one as far as the Judge Advocate knew had ever challenged the accuracy of the principle which was expressed in the judgment of the Supreme Court of Germany in the " Llandovery Castle " case. The Judge Advocate's advice to the Court was that it was entitled to take the statement of principle contained in the Leipzig judgment as the starting point of its investigation of this case.

Regarding the defence of operational necessity, the Judge Advocate stated : " The question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life has been the subject of

much discussion. It may be that circumstances can arise—it is not necessary to imagine them—in which such a killing might be justified. But the court had to consider this case on the facts which had emerged from the evidence of Eck. He cruised about the site of this sinking for five hours, he refrained from using his speed to get away as quickly as he could, he preferred to go round shooting, as he says, at wreckage by means of machine guns." The Judge Advocate asked the court whether it thought or did not think that the shooting of a machine gun on substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. He asked whether it was not clearly obvious that in any event, a patch of oil would have been left which would have been an indication to any aircraft that a ship had recently been sunk. He went on to say : " Do you or do you not think that a submarine commander who was really and primarily concerned with saving his crew and his boat would have done as Captain Schnee, who was called for the defence, said he would have done, namely have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance ? "

Eck did not reply on the defence of superior orders. He stood before the court taking upon himself the sole responsibility of the command which he issued.

With regard to the defence of superior orders, the Judge Advocate said : " The duty to obey is limited to the observance of orders which are lawful. There can be no duty to obey that which is not a lawful order. The fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime, neither does it confer upon the perpetrator immunity from punishment by the injured belligerent."

The Judge Advocate added : " It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done ; but is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders ? "

The maxim *nulla poena sine lege* and the principle that is expressed therein had nothing whatever to do with this case. It referred only to the municipal or domestic law of a particular State and the court should not be embarrassed by it in its considerations.

13. THE VERDICT

The five accused were found guilty of the charge.

14. THE SENTENCE

After Counsel for the Defence had pleaded in mitigation on behalf of the accused and some of them had also called witnesses, the following findings and sentences of the court were pronounced on 20th October, 1945, subject to confirmation :

Eck, Hoffmann, Weisspfennig were sentenced to suffer death by shooting. Lenz was sentenced to imprisonment for life, Schwender was sentenced to suffer imprisonment for 15 years.

The sentences were confirmed by the Commander-in-Chief, British Army of the Rhine, on 12th November, 1945, and the sentences of death imposed on Kapitänleutnant Heinz Eck, Marine Oberstabsarzt Walter Weisspfennig, and Leutnant zur See August Hoffmann, were put into execution at Hamburg on 30th November, 1945.

B. NOTES ON THE CASE

1. QUESTIONS OF JURISDICTION AND PROCEDURE

As far as British municipal law goes the jurisdiction of the Court was based on the Royal Warrant dated 14th June, 1945, A.O. 81/1945, as amended([8]). As far as the basis of the jurisdiction in International Law is concerned, it may be pointed out that the crew of the " Peleus," i.e. the victims of the crime, consisted of 18 Greeks, 8 British seamen, 1 seaman from Aden, 2 Egyptians, 3 Chinese, a Russian, a Chilean and a Pole. There were, therefore, 9 British subjects among the victims (8 British seamen and one seaman from Aden), and in order to establish British jurisdiction in this case it is, therefore, not necessary to have recourse to the fact that nationals of other Allied states (Greece, China, the Soviet Union and Poland) were among the victims, and to the still more general question of the universality of jurisdiction over war crimes.

The crime had been committed on the high seas, and this circumstance could be considered an additional ground for the jurisdiction of the court.

Finally, by the Declaration regarding the Defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945([9]), the four Allied Powers occupying Germany have assumed supreme authority with respect to Germany, including all the powers possessed by the German government and any state, municipal or local government, or authority. The jurisdiction of the British court, sitting in the British Zone, could, therefore, also be based on the fact that after the *debellatio* of Germany, the Allied Powers have been the local sovereigns in Germany.

The fact that a Greek ship and 18 Greek nationals were involved as the victims of the crime was obviously the reason why the Convening Officer appointed, as members of the Court, two officers of the Royal Hellenic Navy.

The trial was conducted under the rules of procedure as specified in the

([8]) See Annex I, p. 105.
([9]) (1945) Cmd. 6648.

Royal Warrant which contains a number of alterations of the general rules of procedure applicable to trials by Field General Courts Martial.

Applying the provision of the Royal Warrant, according to which the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to be of assistance in proving or disproving the charge, the Court admitted *inter alia* evidence consisting of affidavits made by the three survivors of the crew of the " Peleus." The affidavit of one of the survivors, a British seaman, contained a paragraph stating what the third officer, who later died, had told the deponent during the time he nursed him. One of the Defending Officers objected by saying that while the Regulations did permit affidavits which would not be admissible under the normal rules of evidence, there was nothing in the Regulations which says that an affidavit which also includes a statement from a third party may be introduced.

The Judge Advocate, in summing-up the discussion on this point, said that it was quite clear that in a Court which was bound by the ordinary English law this evidence could not be admitted ; but for convenience, and in view of the practical difficulties of obtaining evidence in cases such as this, the Court was granted a discretion to accept statements of this kind if it was so disposed. The only question was whether in the exercise of its discretion the Court thought it right to receive this statement.

The Court decided to admit the statement.

2. QUESTIONS OF SUBSTANTIVE LAW

The legal points raised by the Defence may be summarised under the following headings :—

(i) The absence of *mens rea* of the accused.
(ii) The maxim *nulla poena sine lege.*
(iii) The defence of operational necessity.
(iv) The defence of superior orders.

They will be dealt with in the following pages in this order and notes on the following questions involved in the trial will be added :—

(v) The problem of classification of War Crimes.
(vi) The awarding of punishment.

(i) *The absence of mens rea*

The Defence submitted that many rules of International Law are rather vague and uncertain and that an individual could not be found guilty of having violated a rule of International Law if the States themselves had always quarrelled about that rule, its meaning and bearing and if they had never really recognised it in anything that might be called a " common practice."

One of the defending Counsel alleged that tendencies, according to him very strong even among some English and American writers, had paved the way for the National Socialist contention that there existed no universal truth and law but that instead of it the will and command of the nation had the supreme and absolute and totalitarian value, and claimed an individual's whole and undivided loyalty. The National Socialist administration had been recognised by foreign Powers, and the fear emanating from the Hitler

régime was almost irresistible and dominated Germany absolutely. The foreign Powers, including Great Britain and the United States of America, had no such excuses for recognising the Hitler administration.

The Judge Advocate ruled on this plea that if this were a case which involved the careful consideration of the question whether or not the command to fire at helpless survivors struggling in the water was lawful in International Law, the Court might well think it would not be fair to hold any of the subordinates accused in this case responsible for what they were alleged to have done. In the present case, however, it must have been obvious to the most rudimentary intelligence that it was not a lawful command.

(ii) *The Defence of Nulla Poena Sine Lege*

The Defence submitted, though perhaps not in so many words, that the acts committed by the defendants were not crimes according to the law to which the accused were subject at the time when the crime was committed. The Prosecutor replied that the maxim *nullum crimen sine lege, nulla poena sine lege* was only applicable to municipal and State law and could never be applicable to International Law.

The Judge Advocate, in summing up, also ruled that the maxim *nulla poena sine lege* and the principle that it expressed had nothing whatever to do with this case. It referred only to municipal or domestic law of a particular State and the Court should not be embarrassed by it in its considerations([10]).

(iii) *The Defence of Operational Necessity*

The Commander of the U-boat did not plead that he had acted on superior orders. His defence was that he thought that the floating rafts were a danger to him, first because they would show an aeroplane the exact spot of the sinking, and secondly because rafts at that time of the war could be provided with modern signalling communications. The position of U-boats was very precarious, particularly in that part of the Atlantic where the incident occurred. Eck therefore thought his measure justified. It was clear to him that as a result of his shooting at the rafts, the survivors would die.

The Judge Advocate ruled that the question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life did not arise in the present case. It may be, he said, that circumstances could arise in which such a killing might be justified. On the facts which had emerged in the present case, however, the Judge Advocate asked the Court whether or not it thought that the shooting with a machine gun at substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. A submarine commander who was really and primarily concerned with saving his crew and his boat would have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance.

([10]) As will be shown, when the defences of operational necessity and superior orders are examined, the acts committed by the accused were punishable at the time they were committed both in International Law and in German municipal law, as laid down by the German Supreme Court in the case of the "Llandovery Castle." It was, therefore, not necessary for the decision to discard the maxim altogether from the province of International Law.

The case contains, therefore, no decision on the question whether or to what extent operational necessity legalises acts of cruelty such as shooting at helpless survivors of a sunken ship because on the facts of the case this behaviour was not operationally necessary, i.e. the operational aim, the saving of ship and crew, could have been achieved more effectively without such acts of cruelty.

(iv) *The Plea of Superior Orders*

(1) *The reference to the " Caroline " case*

The defence relied on what they called the " Caroline " case, alleging that ever since this " case " it had been a well-established rule of International Law that the individual forming part of a public force and acting under the authority of his Government is not to be held responsible as a private trespasser or malefactor. No pronouncement on this particular alleged authority was made by the Judge Advocate in his summing up. Nevertheless it may be useful to examine the proposition submitted by the Defence in more detail.

(*a*) At the outset it should be pointed out that the " Caroline " case is no " case " in the meaning of a decision of a court, at all, but a mere diplomatic incident. In so far as court proceedings were involved in the " Caroline " incident, they would rather establish a principle contrary to that claimed by the defence, as will be shown below.

(*b*) In 1837, during the Canadian Rebellion, several hundreds of insurgents seized Navy Island on the Canadian side of the river Niagara and chartered a vessel, the " Caroline," to carry supplies from the American side of the river to Navy Island and from there to the insurgents on the mainland of Canada. The Canadian Government, informed of the impending danger, sent across the Niagara a British force which obtained possession of the " Caroline," seized her arms, set her on fire and then sent her adrift down the falls of Niagara. During the attack on the " Caroline," two Americans were killed and several others were wounded. The United States complained of this British violation of her territorial supremacy, but Great Britain asserted that her act was necessary in self-preservation since there was not sufficient time to prevent the impending invasion of her territory through application to the United States Government. The latter admitted that the act of Great Britain would have been justified if there had really been a necessity for self-defence, but denied that, in fact, such necessity existed at the time. Nevertheless, since Great Britain had apologised for the violation of American territorial supremacy, the United States Government did not insist upon further reparation.

From this it follows that this " Caroline " incident has nothing to do with the individual responsibility of members of armed forces for war crimes, but is an illustration of the doctrine of self-preservation in International Law.

(*c*) The " Caroline " incident had a sequel known as the " Case of McLeod " which occurred in 1840. McLeod was a member of the British force sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the " Caroline." In 1840 he went on business to the State of New York and was there arrested and

indicted for the killing of an American citizen on the occasion of the capture of the " Caroline." At his arrest the British Minister at Washington demanded his release, claiming that the destruction of the " Caroline " was a public act done by persons in Her Majesty's Service, acting in obedience to superior orders and that the responsibility, if any, rested with Her Majesty's Government and could not, according to the usage of nations, be made a ground of legal proceedings against the individuals concerned, who were bound to obey the authorities appointed by their own Government. The United States Secretary of State replied that as the matter had passed into the hands of the Courts it was out of the United States Government's power to release McLeod summarily. A writ of Habeas Corpus was applied for on McLeod's behalf, but the courts of the State of New York refused to release him. McLeod had to stand his trial, but he was acquitted on proof of an alibi.

In a note from the American Secretary of State, however, occurs the following passage : " The Government of the United States entertains no doubt that after the avowal as a public transaction authorised and undertaken by the British authorities, individuals concerned in it ought not . . . to be holden personally responsible in the ordinary tribunals for their participation in it."

(*d*) In so far as there were actual decisions and proceedings of Courts in the Caroline-McLeod incidents, these decisions of the New York Courts upheld the personal responsibility of McLeod and he was acquitted on the merits of the case, not for reasons of immunity from American jurisdiction, or for taking part in an act of State, or for obeying superior orders.

(*e*) The diplomatic correspondence in the matter does not concern war crimes. The incidents occurred in the relations between two States that were and remained at all material times at peace, one of them (Great Britain) claiming to have exercised the legally recognised right of self-preservation and the other, the United States, acquiescing in it.

(*f*) The incident is, if anything, an illustration of the problem of the jurisdictional immunity of armed forces on *friendly* foreign territory, a problem which has played an important part in the legal development during the second World War.(11)

Nothing can be deduced from the " Caroline-McLeod " incident on the relationship between belligerents, particularly between a belligerent who is in occupation of enemy territory and the captured armed forces of the conquered belligerent. There does not exist any recognised doctrine in International Law under which the immunities of members of the forces of one belligerent from the jurisdiction of the other could be claimed.

(*g*) The members of the force that destroyed the " Caroline " were engaged in an enterprise claimed to be legitimate in International Law. The shooting of survivors of a sunken ship, on the other hand, is, as has been established in the " Llandovery Castle " case, obviously illegal.

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(11) *cf.* The Allied Forces Act, 1940, the United States of America (Visiting Forces) Act, 1942, and similar enactments and agreements of the United States, the Soviet Union and British Dominions and Dependencies.

(2) *The British Manual of Military Law and the plea of superior orders*

Until April, 1944, Chapter XIV of the British *Manual of Military Law* contained the much discussed statement (para. 443) that " members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to other means of obtaining redress . . . "

This statement was based on the 5th edition of Oppenheim's *International Law*, Volume II, page 454. Considerable doubts were cast on the correctness of this statement by most writers upon the subject and it was replaced in the 6th edition of Oppenheim by its learned editor, Professor Lauterpacht, by a statement to the effect that the fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime.

The fallacy of the opinion expressed in the pre-1944 text (para. 443 of Chapter XIV) of the British *Manual* and the corresponding rule of the United States *Rules of Land Warfare* (para. 347 of the 1940 text), was demonstrated in an article by Professor Alexander N. Sack in the *Law Quarterly Review* (Vol. 60, January, 1944, p. 63). The relevance of the plea of superior orders became also the subject of research and critical examination by official and semi-official international bodies which dealt with problems of war crimes during the second world war (United Nations War Crimes Commission ; London International Assembly, etc.).

In April, 1944, the British *Manual* was altered, the sentences just quoted being replaced by the following statement of the law :

> " The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime ; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

A similar though not identical alteration of the American Field Manual has been brought about by " Change No. 1 to the *Rules of Land Warfare* " dated 15th November, 1944.

In the course of the trial, an objection was raised to the application of the law as stated in the amendment to the British *Manual of Military Law* and the decision of the British Privy Council in the Zamora case was invoked

where it had been stated that a British Prize Court administers International Law and not Municipal Law and although it may be bound by acts of the legislature, it is not bound by executive orders of the King in Council. If that be so, then, it was said, *a fortiori*, the Court is not bound by an amendment published by the War Office.

This objection was not referred to by the Judge Advocate in his summing up, but it was implied in his direction to the Court that this plea was not well founded.

The British *Manual of Military Law* is not a legislative instrument ; it is not a source of law like a statutory or prerogative order or a decision of a court, but is only a publication setting out the law. It has, therefore, itself no formal binding power, but has to be either accepted or rejected on its merits, i.e. according to whether or not in the opinion of the Court it states the law correctly. A problem similar to that which arose in the Zamora case, namely whether a Prerogative Order in Council is binding upon a British Court administering International Law, did not, therefore, arise.

If a statement contained in the *Manual* was, as is stated in the footnote to the British Amendment No. 34, " inconsistent with the view of most writers upon the subject and also with the decision of the German Supreme Court in the case of the Llandovery Castle," there was no obstacle, constitutional, legal or otherwise, to correcting the mistake in the statement of law on the one hand, and to proceeding on the basis of the law, as it had thus been elucidated, on the other.

The Judge Advocate accepted the law as stated in the 1944 amendment to the British *Manual* and advised the Court accordingly.

Counsel for the Defence, asked by the Judge Advocate whether he challenged the accuracy of the statement that the question was governed by the major principle that members of armed forces are bound to obey lawful orders only, stated that he was not prepared to challenge that.

(3) *The case of the " Llandovery Castle "*

Much reliance was placed in the " Peleus " case, both by the Prosecutor and by the Judge Advocate, on the decision of the German Supreme Court in the case of the hospital ship " Llandovery Castle," delivered in 1921. The case of the " Llandovery Castle " was treated not only as an authority for the rejection of the plea of superior order in the case of an order manifestly illegal, but it was treated as an authority also, as it were, on a special rule applicable to the particular facts of the case, namely on the question whether or not firing on lifeboats is an offence against the Law of Nations.

The facts in both cases were indeed very similar. The commander of the U-boat was not on trial before the German Reichsgericht ; the trial was conducted only against two officers of the crew, whereas the " Peleus " trial was against both the commander and the guilty members of the crew. The motive for the illegal command given by the U-boat commander was slightly different in the case of the " Llandovery Castle," where a hospital ship had been sunk and the U-boat commander, Patzig, attempted to eliminate all traces of the sinking in order to conceal his criminal act altogether, while the commander of the U-boat in the " Peleus " case claimed to have ordered the firing on the rafts out of operational necessity.

The Prosecutor in the " Peleus " trial quoted the German decision in the " Llandovery Castle " case *in extenso* and the Judge Advocate reminded the Court that it was entitled to take the statement of principle of International Law which was made in the case of the " Llandovery Castle " as the starting point of its investigation of the " Peleus " case.

The Defence attempted to distinguish the " Peleus " case from the " Llandovery Castle " case from two different angles.

On the one hand, it was submitted that during and since the last war there had been a practice on both sides that in certain conditions it might be permissible to attack lifeboats and survivors in case of emergency. By this alleged practice, the usage of war, according to which lifeboats should not be attacked under any conditions, had been changed. The Defence announced that they would call evidence in order to prove this change of the usages of war and a discussion took place whether evidence about this alleged practice should be admitted. The Judge Advocate advised the Court to allow such evidence as part of the defence, but the plea was not eventually substantiated in the course of the trial and the statement of the alleged change of the usages of war was not borne out by the evidence.

The other attempt to distinguish the " Llandovery Castle " case was made by arguing that the " Llandovery Castle " case had been decided by a municipal court applying German Municipal Law, whereas the " Peleus " case was being decided under International Law. This plea was unsuccessful.

(v) *The Problem of Classification of War Crimes*

One of the defending Counsel submitted that it is necessary to examine whether the accused were to be punished for murder, for manslaughter or for involuntary killing.

The Prosecutor replied that there was no legal ruling required in this case as to whether the offence was murder or manslaughter. The accused were charged with, " being concerned in the killing of survivors of the ship in violation of the laws and usages of war."

The Judge Advocate did not expressly deal with this point, but he stressed the fact that the Court was concerned here to decide whether or not there had been a violation of the laws and usages of war. The acts committed by the accused were therefore considered to be crimes, namely war crimes, irrespective of whether in municipal jurisprudence they should correctly be classified either as murder or as manslaughter or as any other offence against life and limb.

(vi) *The awarding of Punishment*

The Royal Warrant provides in Regulation 9 that a person found guilty by a Military Court of a war crime may be sentenced to any one or more of the following punishments, namely : (1) death (either by hanging or by shooting), (2) imprisonment for life or for any less term, (3) confiscation, (4) a fine.

In the " Peleus " case three of the accused, namely, the commander of the U-boat, one of the officers and the medical officer, were sentenced to death by shooting, the two latter in spite of their plea of superior orders. The ship's engineer was sentenced to imprisonment for life. In his case the

Court probably took into consideration, on the one hand, that he did, to a certain extent, oppose the order given by the commander to the other accused (not to him), and that, on the other hand, he had, without being personally ordered, eventually taken part in the shooting. The fifth accused, the only rating in the dock, was sentenced to 15 years' imprisonment, the Court probably considering the superior order given to him as an extenuating circumstance.