

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Zayas, A. de, *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, pp. 258-259]

There is no doubt that official British policy was in keeping with the laws of war. But this did not preclude discussion of the limits of the laws of war in the British ministries – particularly, discussion of the possible military advantages of a harsher policy toward shipwrecked enemy crews.

Early in 1943 the German submarine commander Hans Diedrich von Tiesenhausen, who had been rescued by a British destroyer after his submarine was sunk, submitted a protest to the British government and asked that it be forwarded to the Protecting Power. He alleged that after his submarine had shown the white flag, British planes continued the attack and machine-gunned the shipwrecked crew. Von Tiesenhausen's report was considered at a British Foreign Office meeting on 3 June 1943. Legal advisor Patrick Dean, who chaired the meeting, advised against forwarding the report to the Protecting Power. He had already argued at the Air Ministry on 14 May 1943 that an airplane cannot capture a submarine it can only sink it. "The surrender of such vessels should not be accepted unless Allied surface craft in the immediate vicinity are in a position to ensure their capture. In all other circumstances the attack should be pressed home in spite of the flying of a white flag. It has been agreed that for operational reasons this policy should as far as possible be concealed from the German government... if it became known to them, they might institute reprisals against captured British seamen." Yet Dean did not succeed in having his point of view adopted; instead, the Air Ministry drafted very clear instructions for fighter pilots: "In no circumstances is the crew of a U-Boat in the water to be subjected to any form of attack". On 28 May 1943, Dean objected that "circumstances can be imagined (e.g. when a U-Boat crew are swimming from their sunk or damaged U-Boat to an enemy war vessel) where one would have thought that attack upon them from the air was justifiable."

Dean's point of view parallels the German hypothesis with respect to Narvik, that the crews of British destroyers considered it justifiable to shoot at the German shipwrecked because any German sailors who reached land would be incorporated into the German forces there. And it may be that the British destroyers in Narvik acted according to this unwritten policy – but other attacks on shipwrecked survivors were less easily rationalized. A case in point was the machine-gunning of the shipwrecked crew of the U-852 by four British fighter planes on 3 May 1944 near Bender-Beila, Somaliland, which was in British hands so that there was no danger whatsoever that the German crew would join other German forces on land. In fact, the survivors were all taken prisoner shortly after the landing.

This incident is not devoid of historical irony: it was this very U-boat that two months earlier, on 13 March 1944, had sunk the steamer *Peleus* in the Atlantic and machine gunned a number of Greek survivors. After the war, in criminal proceedings before a British military court in Hamburg, the commander of the U-852, Heinz Eck, defended his actions on grounds of operational necessity, arguing that Allied air surveillance was very intensive in the Atlantic and that late in 1943 four German U-boats had been discovered in the same area and sunk by fighter planes. He contended that he had never ordered the killing of survivors; rather, he gave an order to destroy all floating wreckage to prevent Allied planes from using it to find and destroy his ship – even though he knew that a number of shipwrecked would be hit by the shelling and that those not hit would have a much smaller chance of surviving without the larger floating objects to cling to.

[See British Military Court at Hamburg, The *Peleus* Trial]