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ARTICLES

ARE SUBORDINATE OFFICIALS PENALLY RESPONSIBLE FOR OBEYING SUPERIOR ORDERS WHICH DIRECT COMMISSION OF CRIME?

BY MICHAEL A. MUSMANNO*

To what extent, if at all, should soldiers or subordinate officials be responsible for criminal acts committed under orders of a higher authority? This question, together with that of penal liability for aggressive war, engaged the attention of the Nuremberg courts following World War II, as it has been a matter for intense debate ever since the military came under scrutiny and adjudication for acts which extended beyond the scope of pure military offense and defense.

It will be recalled that at the end of the American Civil War, Captain Henry Wirz, commandant of the Confederate Prison at Andersonville, Georgia, was tried for maltreatment of federal soldiers and his defense was that the acts of brutality attributed to him were the result of orders forced upon him by superior rank. In the few trials which occurred after World War I, where German soldiers and sailors were charged with shooting civilians and machine-gunning survivors of torpedoed ships, their invariable defense was superior orders. It was inevitable then that when Adolf Eichmann was brought before a tribunal in Israel, charged with having caused the deaths of millions of Jews, his defense would be that to whatever extent he participated in the genocidal program he was immune from prosecution because he was under orders of the head of the State. He conceded on the witness stand that the massacre of unarmed and unoffending populations was "one of the most hideous crimes in the history of mankind." He explained: "I regarded this violent solution of the Jewish problem as something hideous and heinous," but he lifted the shield of assumed immunity with the statement: "I was compelled to do what I did because of my oath of loyalty and allegiance."

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It was on account of this anticipated defense of superior orders by Eichmann that the Israeli government invited me to testify at the trial in Jerusalem. As a judge at Nuremberg I had presided over the Einsatzgruppen trial, which was called by the Associated Press "the biggest murder trial in history."¹ The defense of the twenty-three defendants in that case, who were under indictment for having murdered one million civilians, was also that of superior orders. Thus, I had been called upon to rule on the very question which was now confronting the Israeli court.

At the trial in Jerusalem I related how one of the defendants in the Einsatzgruppen case, an SS Colonel Willy Seibert, had declared in his defense that Kaiser Wilhelm I or II had proclaimed that if a military situation made it necessary, a soldier would have to shoot his own parents if ordered to do so. After Seibert had quoted this authority, I asked him from the bench what he would do if he were ordered to shoot his own father and mother. Much to the surprise of everyone in the courtroom he replied that he could not answer the question. The faces of his codefendants in the dock dropped. "Why, you idiot," they seemed to say, "*that* is our whole defense." Of course, it was quite evident that Seibert had demurred because he saw that he had placed himself on the horns of a double dilemma. If he said he would shoot his parents he feared he would make of himself, in the eyes of the tribunal, something less than human, and if he replied that he would refuse to obey the order, he would be abandoning his defense of mandatory superior orders.

I insisted that he answer the question because it was he who had introduced the subject. He equivocated and rambled, fighting in his mind a delaying action, as he sought to extricate himself from the trap he had sprung on himself. When I demanded a straightforward answer he finally said:

"In my opinion this declaration was made in order to create an impression."

"But not to be obeyed literally?"

"That depends on the circumstances."

"Well, let us suppose a case where your superior officers tell you that the situation is such that the only way you can get out of it is for you to shoot your parents. Now that's an order. All right, now, are you going to live up to William the First or William the Second, or not?"

"In this situation it would have to be obeyed, your Honor."

"You would shoot your parents if the situation required it."

"Insofar as I would have my psychological reaction, and I do not know whether based on this psychological reaction I carry out the order which has to be obeyed or whether I subject myself to punishment."

1. Associated Press Disptach, April 10, 1948.

"Now you must answer the question. If the military situation is such that the only way you can be saved, according to what your officer tells you, is to shoot your parents, will you shoot them or not?"

"I cannot answer such a question, your Honor, in such a short time. That is such a psychological struggle that I am not in a position to say yes or no."

I allowed him until the next day to reflect. The following morning he returned to the witness stand, his features drawn, his eyes ringed red, inevitable signs of a sleepless night. I repeated the question of the day before. He stared straight ahead, obviously afraid of what his codefendants might think, and, then with an attitude of one who wants to get something unpleasant over as quickly as possible, replied: "Mr. President, I would not do so."

The audience broke into excited whispering and agitated elbow-prodding. The defendants' dock heaved a collective, heavy grunt of disgust. After gaveling for order I put another question: "Suppose the order came down for you to shoot the parents of *someone else*, let us say, a Jew and his wife. The children are standing by and they implore you not to shoot their parents. Will you do so?"

Seibert clutched at the edge of the witness stand and gasped: "Your Honor, I would not shoot these parents."²

Thus, what had begun as a demonstration of the absolute subserviency of a subordinate to superior orders ended with a declaration that a German soldier could and would refuse to respond to an order his conscience condemned.

Eichmann's attorney, Dr. Robert Servatius, argued at the trial in Israel that if his client had resisted the Jewish extermination order he would have incurred the death penalty. When I was on the witness stand, the Israeli Attorney General Gideon Hausner asked me whether the Nuremberg trials revealed that any soldier or officer had been shot for refusing to kill Jews. In my reply, I referred to the case of Mathias Graf who was one of the defendants in the Einsatzgruppen case. The evidence established that although this man had been ordered to kill Jews, he managed to circumvent the order. Upon this evidence I acquitted him and he walked out of the courtroom a free man.³ I also told of the case of Lieutenant Colonel Gustav Nosske who, after his Einsatzgruppen tour of duty, was routed to Dusseldorf, Germany, where he was ordered to shoot all Jews and half-Jews in that

2. Record, pp. 2460-2686, United States v. Ohlendorf (Einsatzgruppen Case), Tribunal II, Case No. 9 (Nuremberg 1948).

3. 4 TRIALS OF WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 587 (1950).

area. Nosske protested the order because, he explained, he could not bring himself to kill anyone who had at least one German parent. Although Nosske suffered some inconveniences because of his unwillingness to shoot half-Jews, he was not shot or even degraded.⁴

I introduced documentary evidence on other Einsatzgruppen defendants who, although they had, for a period, killed Jews under orders, eventually inwardly rebelled at the inhuman slaughter and requested transfer to other work and duties, and they were in fact so reassigned. One of the defendants, Erwin Schulz, asked to be relieved from his command in the Einsatzgruppen, and he was relieved.⁵ I made it clear in my testimony, however, that these individuals, who were released from complying with the extermination order, were excused not because their superior officers felt sorry for them, but because the protesting subordinates impeded the work of others who were perfectly willing, ready and able to shoot down in cold blood unarmed men, women and children. It was a matter of stark efficiency, not compassion, which caused the reassignment.

At the termination of the Einsatzgruppen trial in Nuremberg I sentenced fourteen of the defendants to death and nine others to varying terms of imprisonment because the evidence established beyond any doubt whatever (not merely beyond a reasonable doubt) that, in conducting their horrible massacres they agreed with the so-called superior orders and zestfully cooperated with their superiors in accomplishing the extermination of what they regarded an inferior race.

When the decision in the Einsatzgruppen case was publicly announced, Representative George A. Dondero of Michigan attacked in Congress that part of my Opinion in which I declared that subordinates in rank were required to obey only *lawful* orders. "Follow the implications of this statement through to a logical conclusion," Dondero taunted. "In effect, it encourages mass disobedience of superior officers within our armed forces. Implied therein is the threat that if the forces of international communism are victorious, ruthless vengeance will be meted out to those who dare to defend their own country and its interests."⁶

Mr. Dondero's observations and criticism rose from inadequate and faulty knowledge of the facts. I cast aside at once his irrelevant comment as to what the "forces of international communism" would do, because, having observed what international communism has done in all parts of the world, we know that those "forces," in the event of conflict, would not be guided by law in any event. But what Congressman Dondero failed to appre-

4. *Id.* at 558-59.

5. *Id.* at 519.

6. 94 CONG. REC. A-2369 (1948).

ciate is that while a soldier's first duty is to obey, it is also rudimentary common sense that his obedience is not that of an automaton. A soldier is a reasoning agent. He does not respond, and is not supposed to respond to an order which directs him to commit murder. General J. Lawton Collins, Chief of Staff of the United States Army, excellently put the matter when he said :

Discipline in our army cannot be founded upon a mechanical and uninquiring subservience, but instead must have as its keynote a respect for the rights and responsibilities of the individual.⁷

In behalf of his continuing thesis, Congressman Dondero printed in the Congressional Record a letter in which the writer, after quoting from my Opinion, said with heavy sarcasm :

Who is to say whether or not the given order is lawful? Is the subordinate required to go back to his bunk, look up the law on the subject, and if he believes the order is not lawful, so report back to his superior and decline to obey. . . . Imagine if during a crisis, instead of instantly obeying to the best of his ability, the buck private or gob would go leisurely to his cot and there read Blackstone on the particular subject.

He ended his letter with a recommendation that the judges in Nuremberg read Tennyson's "Charge of the Light Brigade."

The writer's hypotheses on buck privates and gobs find no confirmation in the Einsatzgruppen case where the convicted defendants were all commissioned officers holding high rank and thoroughly familiar with, as well as entirely in accord with, the criminal scope of the tasks they set out to perform.

The reference to Tennyson's "Charge of the Light Brigade" introduced a picture which could in no manner of comparison fit into the Einsatzgruppen frame. In war, the concept of unquestioning obedience, as lyricized in poetry, romance and fiction, has always revolved around some mortal risk assumed by the obedient soldier. It is traditional in those heroic episodes that the soldier goes forth unflinchingly to perform his duty knowing that his chances of returning alive are wrapped in bomb explosion and gunpowder smoke. Such was the setting of Tennyson's glorious verse. But the Einsatzgruppen defendants, many of whom, by a twist of ironic fate, were operating in that same Crimea where, a hundred years before, Cardigan's Cavalry charged the Russian batteries, never faced the dilemma which confronted the British Light Brigade at Balaklava. The Einsatz battalions were not "stormed at with shot and shell," they were not ordered into the "jaws of death," they did not flash "sabres bare" as they galloped into the mouths of cannon.

7. This Week, Feb. 12, 1950, p. 1.

The Einsatzgruppen soldiers were not commanded to oppose cannon or bayonets. They were summoned to shoot down unarmed, helpless men; they were directed to fire at fright-crazed harmless women; they were called upon to aim rifles at sobbing, weeping children. No soldier would be disgraced in asking to be excused from so one-sided a battle. No soldier could be accused of cowardice in seeking relief from a duty which, in verity, was not a soldier's duty at all. No soldier or officer attempting to evade such a task would be pleading avoidance of a military obligation. He would simply be requesting not to be made a criminal assassin. And if the leaders of the Einsatzgruppen had all expressed their unwillingness to play the odious parts assigned to them, that black page of million-mouth massacre in German history would not have been written.

One of the reasons why SS volunteers willingly accepted the Einsatzgruppen assignment, instead of fighting the enemy at the front, was that when they fired at helpless men, women and children, no one fired back.

Some of the defendants at Nuremberg said that they did not agree with the extermination order, but they were powerless to evade its execution. In those instances it became important to ascertain whether the asserted opposition was factual or was only conjured up as a defense at the trial. SS Colonel Walter Blume was one defendant who testified that he did not like to kill Jews. Yet he testified that before every execution he made a speech to his men in which he declared:

As such it is no job for German men and soldiers to shoot defenseless people, but the Fuehrer has ordered these shootings because he is convinced that these men otherwise would shoot at us as partisans or would shoot at our comrades, and our women and children were also to be protected if we undertake this execution.⁸

There was no proof or even the slightest intimation that the victims, who lived a thousand miles from Germany, might at some time in the indefinite future shoot at German women and children. Blume said that he made his speeches to the men to ease their feelings, but actually he was convincing them how proper and justifiable it was to kill innocent and defenseless human beings. If he had really believed the order to be unjust, conscience would at least have restrained him from falsely defending it on the basis of justice and reasonableness. His exhortations may well have persuaded his men into the enthusiastic accomplishment of other executions which might otherwise have been avoided entirely or less completely fulfilled.

It was suggested to Blume that he might have avoided the ordered mas-

8. Record, pp. 1788-89, United States v. Ohlendorf (Einsatzgruppen Case), Tribunal II, Case No. 9 (Nuremberg 1948).

sacrés simply by sending in false reports, but he said that such falsification would have been unworthy of him. Then as an afterthought he added :

Apart from this my personal attitude about giving a false report, it would have been discovered very soon and it would have brought the same results as an open refusal to obey, namely, my sentence to death.

I asked which of the two reasons motivated him to kill rather than to falsify. He said that he didn't know which thought dominated at the time. I insisted on an answer :

These two reasons can't be reconciled. It is like a person who must decide whether to steal a hundred dollars or not and a conflict arises in his mind: "If I steal this money I am being dishonest and I would not be true to myself; it is not correct, and it is not moral—that is one reason. And then, for the second reason, I may get caught and they might send me to jail."

Of course, the second reason would completely nullify the first, because in the latter case he would not be debating the problem morally; his concern would only be that he might "be caught." Blume seemed offended with the illustration. He sat up erectly, squared his shoulders, and announced with emphasis that "the feeling that a false report was unworthy of me induced me not to take such a way out."

His reply is an interesting one for reflection. The man who must decide between honor with sacrifice and dishonor without sacrifice would prefer naturally not to be forced into choosing between such alternatives. But no one can be assured, in the complexities of life, that he will not be required to make momentous decisions. Blume had a choice between the physical fact of murder and the abstract concept of equivocation. He had to decide which was more honorable: to write up a report stating that a thousand men, women and children had been killed although they still lived, or to take these helpless creatures out into the woods, shoot them down pitilessly and fling them into graves with the possibility that some of them might still be alive.

Blume's further testimony revealed, however, that his involved explanations were merely a mask to cover his real feelings because before he left the witness stand he said that he "adored" and "worshipped" Hitler, and that whatever Hitler ordered was right. He asserted that Hitler "had a great mission for the German people." It did not matter to him what this mission might mean to the rest of mankind, and thus, he voluntarily took the Fuehrer oath :

I vow inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me.

By this voluntary and absolute submission of will to Hitler, Blume wiped out the defense of superior orders. When anyone willingly abdicates all independent thinking and tenders himself as putty into the hands of another, he cannot complain if he is punished for the crimes plotted and planned by the other with whom he stands inviolably in agreement. For it must be obvious that Hitler with all his cunning and unmitigated evil would have roamed the streets and alleys of Austria and Germany as innocuous as a rambling crank if he had not had a hundred thousand Blumes to do his bidding. Blume, in reality, was not a subordinate of Hitler, he was an alter ego of Hitler, he was a coconspirator, and here we come to the very heart of the subject of superior orders.

The lawyers defending Field Marshall Keitel and Colonel General Jodl before the International Military Tribunal argued that their clients were not responsible for the atrocities they directed since they were merely obeying the superior orders of Hitler. The Tribunal rejected this contention: "Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification."⁹ Also, "Participation in such crimes as these have never been required of any soldier and he cannot now shield himself behind a mythical requirement of soldierly obedience."¹⁰

In approving this decision the famous author Rebecca West observed with acidulous wit: "It is obvious that if an admiral were ordered by a demented First Sea Lord to serve broiled babies in the officers' mess he ought to disobey it."¹¹

What concept is embraced in the phrase "superior officer" when we deliberate on the duty the subordinate owes to obey him? Superiority is not confined to rank. Superiority inevitably must include also the capacity to compel and coerce. It could happen, for instance, in a criminal operation that the captain guides the major. In such case the captain could not expect exoneration on the theory that he was under the domination of the major. When the mental and moral capacities of the superior and subordinate are pooled in the planning and execution of a criminal act, the subordinate may not plead in his defense that he was forced into the performance of what he helped to plan.

No officer or soldier in the SS could honestly say that he was unaware of the Nazi program against Jewry. As early as February, 1920, the National

9. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 291 (1947).

10. *Id.* at 325.

11. WEST, A TRAIN OF POWDER 48 (1955).

Socialist Party announced in its twenty-five-point program, which never changed, its unrelenting hostility to Jews in every field of individual and social activity. *Mein Kampf* was dedicated to the doctrine of Aryan superiority. *Der Stuermer* and other publications spread the verbal poison of race hatred. Nazi leaders everywhere vilified the Jews, holding them up to public ridicule and contempt. In November, 1938, an SS-inspired and organized hoodlumism fell upon the Jews of Germany: synagogues were destroyed, prominent Jews were arrested and imprisoned, a collective fine of one billion marks was imposed. Eichmann and the Nuremberg defendants knew all these things. Could they then express surprise when, after this unbroken, mounting program of destructive violence, plans were formulated for the "final solution of the Jewish problem?"

Could Eichmann and the Einsatzgruppen defendants profess ignorance of the illegality of the extermination order? The sailor who voluntarily ships on a pirate craft may not be heard to answer that he did not expect he would be called upon to rob and sink other vessels. He who willingly embarks on an illegal enterprise is charged with the natural unfolding of that unlawful undertaking.

It was argued by Dr. Servatius and by the German lawyers in my court in Nuremberg that even if a subordinate realizes that the act he is called upon to perform is a crime, he should not be punished if he commits the crime in order to avoid serious consequences to himself. What would be the serious consequences? Certainly if the penalty for failure to execute a criminal order would be insignificant, in comparison to the fate to be visited upon the innocent victim, the doer cannot plead superior orders in his defense. For instance, if a soldier is threatened with a year's imprisonment if he does not shoot down an innocent child, he cannot shoot the child and expect to escape punishment because he was saving himself from an unmerited year's imprisonment. The child, in this hypothetical case, would be as much entitled to its life as the soldier was entitled to his year's freedom.

The defendants in the Einsatzgruppen case, however, were not charged with killing one child but thousands of children. Aside from any written law, they had the natural duty, the obligation to society, the bounded responsibility to divine justice to make every effort to avoid massacring the innocents. Killings by the Einsatzgruppen defendants were not a matter of a day's business. It was a continuing business, day after day, week after week, and month after month. The objective was to kill off all the Jews until there were no more Jews. No kind of a superior order could justify so monstrous a program.

If killers engaged in such an operation could find an excuse for killing a thousand babies today, and a thousand tomorrow, and a third thousand the

day after tomorrow, the time would have to come when the excuse would not avail, no matter what might be the punishment. Again it must be repeated that the innocent thousands have as much right to live as the executioner, and only a world made up of imbeciles and idiots could allow a mass murderer to go on killing off the population simply because he feared that if he did not fill the rivers with blood he himself would suffer disconcerting consequences. A mass murderer, in such a situation, has a duty which cannot be excused under any circumstances, to fight against continued murdering. Justice Moshe Landau spoke wisely and justly when, in sentencing Adolf Eichmann, he said:

Even had we found that the Accused acted out of blind obedience, as he alleges, we would still have said that one who had participated in crimes of such dimensions, for years on end, must undergo the greatest punishment known to the Law, and no order given to him could be a ground even for mitigating his punishment.

The Court then added:

But in fact we have found that in acting as he did, the Accused identified himself in his heart with the orders received by him and was actuated by an ardent desire to attain the criminal objective.¹²

Thus, it is patently clear that the murderer may not plead innocence even if the murder he commits is ordered by a superior officer, when it is clear that he is in accord with the principle and the objective aimed at by the criminal act. When the will of the doer merges with the will of the superior in the execution of the illegal act, the doer has lost all right to plead coercion under superior orders.

Colonel Werner Braune at the Einsatzgruppen trial testified that he entertained "inner misgivings" about shooting unresisting civilians. However, he presented no objective testimony to prove that reluctance. If he was really acting under compulsion and deplored the killings (in one massacre he directed the killing of 10,000 Jews and gypsies) it is reasonable to suppose that he would have wanted, whenever the opportunity presented itself, to save some hapless intended victim if, for no other reason than to be enabled, later on, to give substance to his contention that he was morally opposed to the extermination order. I asked him if he had at any time released "some defenseless woman or whimpering child of the Jewish faith, who was scheduled for execution?"

He said he had not. I gave him time to search his memory and then later asked him: "Did you not, in complying with that order, attempt to

12. *The Attorney General v. Eichmann*, Criminal Case No. 40, Dist. Ct. Jerusalem, Dec. 15, 1961.

salve your conscience by releasing one single individual human creature of the Jewish race—man, woman, or child?"

He was as constant as a professor of geology. "Your Honor, there were no exceptions, and I did not see any possibility."

But was this credible? Braune was separated from the bastions on the Rhine by mountains, lakes, rivers, forests, vast plains, countless cities and millions of people. He would have encountered no difficulties if he had taken a boy or girl by the hand and led him or her away from the execution pits, if only he might be able to say in later years, in the event Hitler's boast for a thousand-year Reich should go awry, that he did have "inner misgivings" about the Fuehrer-Order and that on one occasion he did save a dirty-faced, whimpering child.

The real truth was that Braune, like Adolf Eichmann, had no interest in saving Jewish children. In Eichmann's memoirs dictated in Argentina, and presented at his trial in Israel, he told of attending an Einsatzgruppen massacre where a woman holding a child in her arms pleaded with him to save the child from the doom she and the hundreds of others were facing. Eichmann was stone, and both the infant and mother fell beneath the volley of mortal fire. Eichmann could not say that he lacked the authority to exempt that Jewish child. He found authority quickly enough to exempt a Jewish relative from annihilation, and so testified in Jerusalem.

But Eichmann and the other Nazi defendants strenuously argued, through their attorneys, that what they did was accomplished under the aegis of the National Socialist regime of Germany and that they, of course, were bound by the law of the realm. Strange as it may seem, however, the fact is that even under Nazi law murder was illegal. The Nazis, of course, ignored the law, but not one of the score of German lawyers before me in Nuremberg was able to point to a German statute which authorized human slaughter. In jurisprudential verity the German law actually invalidated the defense of superior orders when the controverted act was shown to be a crime.

The Prussian Military Code, as far back as 1845, declared that a subordinate would be punished if he executed an order knowing that it "related to an act which obviously aimed at a crime." This provision was copied into the Military Penal Code of the Kingdom of Saxony in 1867 and of Baden in 1870. Continuing and even extending the doctrine of conditional obedience, the Bavarian Military Penal Code of 1869 went so far as to establish the responsibility of the subordinate as the rule, and his irresponsibility as the exception. The Military Penal Code of the Austro-Hungarian Monarchy of 1855 provided:

Article 158. A subordinate who does not carry out an order is not guilty of a violation of his duty of subordination if (a) the order is obviously contrary to loyalty due to the Prince of the Land; (b) if the order pertains to an act or omission in which evidently a crime or an offense is to be recognized.¹³

In 1872 Bismark attempted by legislation to limit subordinate responsibility, but the Reichstag rejected his proposal and instead adopted the following as Article 47 of the German Military Penal Code:

If through the execution of an order pertaining to the service, a penal law is violated, then the superior giving the order is alone responsible. However, the obeying subordinate shall be punished as accomplice (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at civil or military crime or offense.¹⁴

This law was never changed, except to broaden its scope by changing the word "civil" to "general," and as late as 1940, one of the leading commentators of the Nazi period, Professor Schwinge, wrote: "Hence, *in military life*, just as in other fields, *the principle of absolute, i.e., blind obedience* does not exist."¹⁵

It had been established by precedent in Germany even before the Nuremberg trials, and of course prior to the Eichmann trial, that superior orders is no defense in the wake of an unmistakably patent crime. In 1921 two officers of the German U-boat 68 were charged with violation of the laws of war in that they fired at and killed unarmed enemy citizens seeking to escape from the sinking hospital ship H.M.S. Llandovery Castle. The defendants pleaded lack of guilt in that they had merely carried into effect the order given them by their commander, First Lieutenant Patzig. The German Supreme Court did find as a fact that Patzig ordered his subordinates Dithmar and Boldt to fire at the lifeboats, but it adjudicated them guilty nonetheless, stating:

It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But, no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But, this case was precisely one of them. For in the present instance, it was perfectly clear to the accused that killing defenseless people in the lifeboats could be nothing else but a breach of law. As naval officers by profession they were well aware, as the

13. *Op. cit. supra* note 3, at 471.

14. *Id.* at 471-72.

15. *Id.* at 472.

naval expert, Saalwaechter, has strikingly stated, that one is not legally authorized to kill defenseless people. They quickly found out the facts by questioning the occupants in the boats when these were stopped. They could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carry out a breach of law. They should, therefore, have refused to obey. As they did not do so they must be punished.¹⁶

The dedication of German officials to the maintenance of written records is proverbial. No order, action, episode or incident in government can be regarded too insignificant for recording and for depositing in the archives of the nation. Following the surrender of Hitler's armies in Europe, the Allies found, collected and categorized hundreds of tons of documents. It is strange to the point of bizarreness that in all that documentation there should not be found one copy of perhaps the most momentous order in the whole history of Nazidom, the edict which directed the wiping out the lives of millions of human beings.

The defendants in the Einsatzgruppen case testified in my court that they never were served with a copy of the extermination order. The directions and instructions on how to kill the Jews were conveyed to them orally. Where it became necessary, in any given situation, to direct the massacre of Jews, the euphemism "special treatment" was used. Even the overall plan for the wiping out of all Jews was referred to as "the solution of the Jewish problem."

Why was this veiled nomenclature adopted? The reason is obvious. The officials knew they were ordering and committing murder. Nothing perhaps more conclusively establishes the awareness on the part of the designers, the planners and the executants of the murder program of its criminality than this reluctance to acknowledge in writing what was obviously a violation of the criminal code of the nation, of international law and the law of humanity.

The Nuremberg and the Eichmann trials have now established authoritatively that superior orders is no defense when one is charged with committing a crime whose purpose he approved and in the illicit results of which he eagerly participated. The world is improving. Attorney General Gideon Hausner spoke well and conclusively when he said: "Individual responsibility is the moral backbone of the law."¹⁷

16. 16 AM. J. INT'L L. 721-22 (1922).

17. Saturday Evening Post, Nov. 17, 1962, p. 86.

