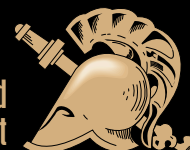




# **ORDINARY SOLDIERS:** **A STUDY IN ETHICS, LAW, AND LEADERSHIP**

UNITED STATES  
**HOLOCAUST**  
MEMORIAL  
**MUSEUM**

Center for Holocaust and  
Genocide Studies at West Point

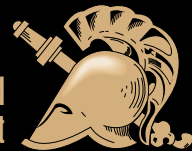




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This module emerged out of a May 2011 workshop conducted by the Center for Holocaust and Genocide Studies at West Point and the United States Holocaust Memorial Museum, during which West Point faculty examined ways to incorporate lessons from the Holocaust in the education of US military cadets. At that workshop, Professor Beorn shared his research on the impact of the 1941 Mogilev conference on antipartisan actions in occupied Belarus and the West German prosecution of former Captain Nöll and First Sergeant Zimmer, a context that provides a unique case study through which to explore issues of leadership, ethics, and the law of armed conflict for both military professionals and civilian leaders. The Nöll and Zimmer case now appears in Dr. Beorn's monograph, *Marching into Darkness: The Wehrmacht and the Holocaust in Belarus* (2014).<sup>1</sup>

The authors express gratitude to the following individuals, each of whom provided essential input to the module or invaluable opportunities to pilot the case study with future officers:

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Cover: German officers consult with their commanding officer on their orders of the day, Soviet Union, 1941. *US Holocaust Memorial Museum, courtesy of Philipp Merillat*

## A Note to Instructors from the Authors

**IT IS OFTEN CHALLENGING TO FIND A CASE STUDY FOR A LESSON** in military leadership and ethics involving the law of armed conflict (LOAC) for which the facts and documentation are sufficient to appeal to ethicists, historians, and lawyers. It is likewise challenging to find such a case study in which company-grade officers are unequivocally presented with an illegal order by a field-grade commander and demonstrate dramatically different responses to the same order in the same situational context. Finally, it is difficult to find these circumstances in the context of regular units, composed of ordinary soldiers, going about their military duties. The experiences of the 1st Battalion, 691st Infantry Regiment, of the German Wehrmacht (armed forces), performing rear-area security duties in the first week of October 1941 in occupied Belarus, meet these stringent requirements.

The Wehrmacht as an organization was deeply complicit in the Nazi genocidal project. It supported the mass murder of Jews and other perceived racial enemies in the east partly by providing for the logistics and movement of the Einsatzgruppen, or mobile killing squads. In some instances, it also provided the manpower for actual killing operations. Recent scholarship continues to unearth the myriad ways in which the Wehrmacht supported the Nazi genocidal project; however, the extent to which Wehrmacht units participated in the “Final Solution” remains somewhat unclear. Some units, because of their location and function, were not involved in the same way, and some simply chose to not participate. Some units, however, engaged in actual executions of Jewish civilians, rather than just providing security or logistical support. The 1st Battalion, 691st Infantry Regiment, was such a unit.

On or about October 7, 1941, the battalion commander ordered his three company

commanders to kill all the Jewish civilians in their respective areas of operation. One company commander complied immediately; the second reportedly refused; and the third tried to ignore the order, but when it was issued in writing, he directed the company first sergeant to conduct the shootings and retreated to his office. Because a German court investigated and then tried the third company commander and first sergeant for murder relatively soon after World War II, the events of early October 1941 are detailed and recorded to a degree not ordinarily seen at the small-unit level. Judicial documents provide a rich source of eyewitness testimony from battalion officers and soldiers concerning not only the facts of the shootings but also the emotional and psychological reactions of the Wehrmacht service members.

Because the unit was performing rear-area security duties before the Soviet partisan campaign had begun, the case study is not complicated by perceptions and decisions made in the heat of combat, such as those occurring at the front; it is, however, influenced by a Wehrmacht institutional attitude toward treatment of civilians in war. As the case study explores leadership at various levels, military professionals today will likely see the actions of the 1st Battalion officers and soldiers as relevant to their perspectives and concerns about leadership—regardless of their rank.

The lesson may be adapted as necessary by instructors to fit both the time allowed and the subjects to be addressed. Instructors may choose from options provided, which address ethical and legal points raised by the case study. Option A uses the Army Regulation 15–6 format for conducting investigations. This format allows participants to put themselves in the position of investigating officers (IOs) tasked not just with

explaining what happened but why it happened and how it might be prevented in the future. The study questions in Option B consider rules of engagement and the law of armed conflict and lend themselves to small-group work, depending on the size of the group and the time available. These questions are designed to allow participants to approach ethical and legal aspects of the case study from specific perspectives, thereby providing a platform for discussions on leadership. Option C's Peer-to-Peer format provides the opportunity for participants to engage in high levels of simultaneous communication simulating the challenges of leadership and conflict in a cyber environment. Each option provides military professionals and civilian students with a context within which they may begin to understand the importance of the tasks given to the military under Presidential Study Directive 10 (August 4, 2011) to prevent and respond to mass atrocities today.

Resources are provided for instructors who wish to go further in depth in their instruction. The short documentary *The Path to Nazi Genocide*, created by the United States Holocaust Memorial Museum, explores the Nazis' ideology, propaganda, and persecution of Jews and other

victims. It also outlines the path by which the Nazis and their collaborators led a state to war and to the murder of millions of people. The short film *The Role of the German Army during the Holocaust* features historian Geoffrey Megargee, who provides context on the changing nature and role of the Wehrmacht. Translated copies of the state court decision in the case involving the third company commander and the first sergeant and Nazi high-command directives supply additional material useful for deeper discussion of the study questions.

We hope you find this lesson as useful and as interesting to teach as we have. It lends itself to collaborative teaching and has proven to be a useful complement to instruction on the Uniform Code of Military Justice. We are available to discuss the lesson and our experiences teaching it, and we invite other instructors who conduct the lesson to let us know what they found useful and what they suggest to improve it.

**COL JODY PRESCOTT (RET.)**  
**DR. WAITMAN WADE BEORN**  
**JENNIFER CIARDELLI**  
**DR. DAVID FREY**  
**GRETCHEN SKIDMORE**

Opposite: Suspected partisans sit on the ground with German officers and soldiers in the background, Soviet Union-North, 1941. *Bundesarchiv Bild 101I-212-0221-04*





## **CASE STUDY**

## I. Introduction

Commanders often confront complex situations in which the imperatives of leadership intertwine with considerations of personal and professional ethics and the law. Using the case study of one Wehrmacht<sup>2</sup> battalion—1st Battalion, 691st Infantry Regiment—on the eastern front in World War II, this lesson examines the chain of events that led to the mass killings of Jewish civilians in the battalion’s area of operations (AO) in October 1941. These events, when considered within the context of the **Law of Armed Conflict (LOAC)**, provide a platform for today’s military professionals to think critically about their obligations as members of the military. The aim of this study is to provide military personnel an opportunity to weave understandings of ethics and law into their own developing leadership styles and to understand how, in the context of a particular war and particular military culture, protected civilians were transformed into military targets.<sup>3</sup>

In this case study, three commanders had three different responses to the same illegal order to kill civilians in the same AO. To explore these responses from a leadership perspective and to determine how these historical events at the small-unit level are relevant for US military personnel today, this lesson focuses on the actions of the commander and first sergeant of 3rd Company, 1st Battalion. Against this backdrop, participants identify and explain the basic principles of LOAC, and they analyze the company commanders’ actions specifically in the context of command responsibility and obedience to orders. Using the principles of LOAC that were reaffirmed in the post-World War II trials of Nazi war criminals before US Army tribunals and codified in the Third and Fourth Geneva Conventions of 1949, participants will discuss the legal and ethical standards US military professionals are expected to meet, the challenges military leaders face in making consistently legal and ethical decisions in a combat theater, and the consequences of failure to meet these standards.

## II. Occupied Belarus, October 1941

From the beginning of Operation Barbarossa, the German invasion of the Soviet Union in 1941, Wehrmacht units engaged in the forced ghettoization of Jewish civilians, used Jews for forced labor, and conducted reprisal killings against Jews in the newly occupied Soviet territories.<sup>4</sup> Two orders likely facilitated these actions. First, the May 13, 1941, Barbarossa Jurisdiction Order suspended most courts-martial for German soldiers committing punishable offenses against civilians in the east.<sup>5</sup> Second, the May 19, 1941, *Oberkommando der Wehrmacht* (OKW) “Directives for the Behavior of the Troops in Russia” reminded soldiers that “this struggle requires ruthless and energetic action against Bolshevik agitators, guerillas, saboteurs, and Jews and the total elimination of all active or passive resistance.”<sup>6</sup> With this order, the Wehrmacht drew on a military legacy of ruthless treatment of enemy civilian populations and on antisemitic stereotypes that falsely associated Judaism with Communism.<sup>7</sup> As German forces advanced rapidly through the Soviet Union, they found themselves occupying vast rural and undeveloped areas. This created vulnerable communications zones through which supply trains and reinforcements had to pass to reach the rapidly advancing German front lines. Even as it sought to secure logistical routes, the military supported other agencies of the Nazi state, especially the SS, in beginning the wholesale murder of Jews in the service of larger racist agendas.<sup>8</sup> In cooperation with units of the SS, the *Waffen SS* (military SS),<sup>9</sup> and the police apparatus (including the Security Police, *Sicherheitspolizei* or *Sipo*, and the Security Service, *Sicherheitsdienst* or *SD*),<sup>10</sup> and with the assistance of local collaborators, the Wehrmacht conducted shooting operations to kill unarmed Jewish and non-Jewish civilians.

Army Group Center (Rear), known by its German abbreviation rHGM, occupied most of modern-day Belarus (see fig. 1) and was commanded



Major Alfred Commichau, Commander, 1st Battalion, from personnel file. *Bundesarchiv-Militärarchiv Pers6-11125*

by General Max von Schenckendorff, whose headquarters were in Mogilev.<sup>11</sup> The German front lines were approximately 150 kilometers east of von Schenckendorff's AO. His forces included the 339th Infantry Division, which had been formed in Thüringen in central Germany in 1940 (see fig. 2).<sup>12</sup> The 339th had performed occupation duties in France's Loire Valley between May and August 1941. In early September the 339th moved to the eastern front and officially assumed rear-area security duties in rHGM on September 19, 1941. One of the division's components, the 691st Infantry Regiment, directed its 1st Battalion to establish its headquarters near the small Belarusian town of Krugloye. The 691st had been originally created out of a fortress infantry regiment.<sup>13</sup> First Battalion's three maneuver companies were dispersed among other small towns in the Krugloye area; 3rd Company, for example, was based in the village of Krucha.

On or about October 7, 1941, the 1st Battalion's commander, Major Alfred Commichau, issued an order to his company commanders directing

them to kill all Jews in their respective AOs.<sup>14</sup> The commander of 1st Company, 47-year-old World War I veteran and Nazi Party member First Lieutenant Josef Sibille, reportedly refused the order outright. The commander of 2nd Company, 33-year-old First Lieutenant Hermann Kuhls, was both a Nazi Party and an SS member and considered by his troops to be "radical," "anti-religious," and an outspoken antisemite; he complied and began shootings immediately.<sup>15</sup> The commander of 3rd Company, Captain Friedrich Nöll, was viewed by some of his troops as strict but by others as weak, indecisive, and more inclined to lead from his desk than from the front.<sup>16</sup> Nöll, who like Sibille was a World War I veteran, hesitated at first to carry out the order; eventually, however, he directed his company's first sergeant, Emil Zimmer, to instruct his soldiers to carry out the executions.

### III. The Mogilev Conference

Before Operation Barbarossa commenced, the Wehrmacht concluded a memorandum of agreement with the SS that allowed Einsatzgruppen, or mobile killing units,<sup>17</sup> to operate in the Army group rear areas.<sup>18</sup> During the first six months of the invasion, SS and police units, including the Einsatzgruppen, shot and killed approximately 778,000 people, the vast majority of whom were Jewish civilians.<sup>19</sup> Wehrmacht commanders on the eastern front cooperated extensively with the Einsatzgruppen, especially in matters of perceived partisan activity against their forces.<sup>20</sup> Casualty figures for the units composing rHGM suggest that fairly little organized partisan activity occurred on the part of bypassed Red Army formations or Soviet citizens in the rHGM AO well into late fall 1941;<sup>21</sup> despite the lack of any evidence, German commanders began focusing on a partisan threat. This obsession—or even paranoia—allowed the Wehrmacht commanders, with SS assistance, to conflate "antipartisan" actions with "anti-Jewish" actions.<sup>22</sup> SS and other Nazi leaders also seemed intent on leveraging the manpower and resources







of the Wehrmacht to support their goal of murdering Jews, political commissars, and other perceived enemies of the state. In so doing, army units became complicit in the mass murder of unarmed civilians, both Jewish and non-Jewish.

On September 24, 1941, General von Schenckendorff convened a conference of his subordinate commanders and other unit representatives at rHGM headquarters in Mogilev, Belarus, to discuss antipartisan operations.<sup>23</sup> Von Schenckendorff set the tone of the conference by stating at the outset that “townspeople will be used [by the partisans] as guides, scouts, and informants. Particularly the elderly, women, and adolescents because they are least suspicious, will be utilized for reconnaissance.”<sup>24</sup> Following his introduction, commanders at a variety of echelons, including General Bach-Zelewski, the Higher SS and Police Leader for rHGM (or as abbreviated in German, HSSPF),<sup>25</sup> and Colonel Hermann Fegelein,<sup>26</sup> the commander of an SS cavalry brigade, gave a series of 15-minute lessons-learned presentations. General Arthur Nebe, who commanded one of the four SS Einsatzgruppen, gave a presentation that focused on three main areas. First, he addressed the need for greater cooperation between Wehrmacht units and the SD; second, he discussed the selection and employment of local collaborators; and third—and most ominously—he took up the “Jewish Question,” with particular focus on the partisan movement.<sup>27</sup> The briefings were followed by a demonstration by military police on how to occupy a village.

The next morning, September 25, the exchange of experiences continued with an SS cavalry regiment commander leading off, followed by short classes and sand-table exercises conducted by various company-grade officers on tactical

Figure 1. Eastern Europe, 1941. Advance on Moscow: Operation Barbarossa. October 1941. *West Point Department of History Cartography Center*. Inset: Mogilev oblast location map, *Dimitrius, Share Alike 3.0 Unported*. Location titles by *US Holocaust Memorial Museum*.

level antipartisan subjects.<sup>28</sup> In the afternoon, the conference participants traveled to a village near Mogilev to watch a military police company conduct a village search. The company was supported by a 16-man SD detachment. Unable to find any identifiable partisans, the German forces instead shot 13 Jewish men and 19 Jewish women. The conference concluded the next day with the observation of another operation to ferret out Soviet partisans and political commissars.

The conference report was later distributed down to the company level throughout rHGM. In the report, General von Schenckendorff stated, “[t]he enemy must be completely annihilated.... The constant decision between life and death for partisans and suspicious persons is difficult even for the hardest soldier. It must be done. He acts correctly who fights ruthlessly and mercilessly with complete disregard for any personal surge of emotion.”<sup>29</sup> Interestingly, Jews were not mentioned in the report at all. Most of those who read the report (including the postwar court) understood, however, that the purpose of the Mogilev conference was to serve as a catalyst for bringing rHGM and Wehrmacht formations in line with the Nazi push to kill all Jews in the occupied territories. Holocaust historian Raul Hilberg explained some of this complicity, writing that “the generals had eased themselves into this pose of cooperation through the pretense that the Jewish population was a group of Bolshevik diehards, who instigated, encouraged, and abetted the partisan war behind the German lines.”<sup>30</sup> Not everyone was convinced, however. An inspector in the Army Economic and Armament Office in the Ukraine, for example, reported to his boss in December 1941 that “there is no proof that Jewry as a whole or even to a greater part was implicated in acts of sabotage.”<sup>31</sup> Indeed, a minority of Wehrmacht officers (and soldiers) recognized that the numbers of Jews active in the partisan movements began to grow *after* the murders of Jews had commenced. For officers and soldiers who may have been reluctant to kill women and children, on the other hand, connecting all Jews with an imagined anti-

partisan threat would have both partially allayed these concerns as well as lessened inhibitions by placing anti-Jewish actions in the context of “legitimate” combat operations.

## IV. 3rd Company Executions in Krucha

On or about October 7, 1941, the 3rd Company messenger brought a verbal order from battalion headquarters for 3rd Company to kill all Jews in its AO.<sup>32</sup> Company leadership discussed the order, and Nöll, who allegedly was troubled by the order, decided to ignore it.<sup>33</sup> A written order subsequently arrived, confirming the first order and signed by the battalion commander.<sup>34</sup> Nöll asked for volunteers to carry out the killings, but no one stepped forward.<sup>35</sup> He then ordered Zimmer to carry out the order. Zimmer assembled a platoon that had just returned from an overnight operation. When he read the order to them, the soldiers apparently responded with indignation. Zimmer reacted to this by saying, “We can’t change anything. Orders are orders.”<sup>36</sup> He then divided the men into three details: shooting, guarding, and evacuation and cordon. Local police collaborators also assisted.<sup>37</sup>

The evacuation detail began rounding up the village’s Jews and led them to a small square, where the guarding detail took control.<sup>38</sup> Groups of four or five Jews were then taken to a predetermined execution site in the forest, which was only about 200 meters from the village.<sup>39</sup> Importantly, Zimmer positioned himself at the shooting site and oversaw the pairing of two German soldiers per Jewish civilian to constitute the execution detail.<sup>40</sup> Because the executions took place so close to the village, the Jews in the square heard the shots and screams. The Jews begged the soldiers not to shoot them, but their entreaties had no effect.<sup>41</sup> After 114 Jews had been executed, with Zimmer apparently administering fatal shots to the ones who were merely wounded, the soldiers returned to their quarters.<sup>42</sup> In addition to local police, other non-



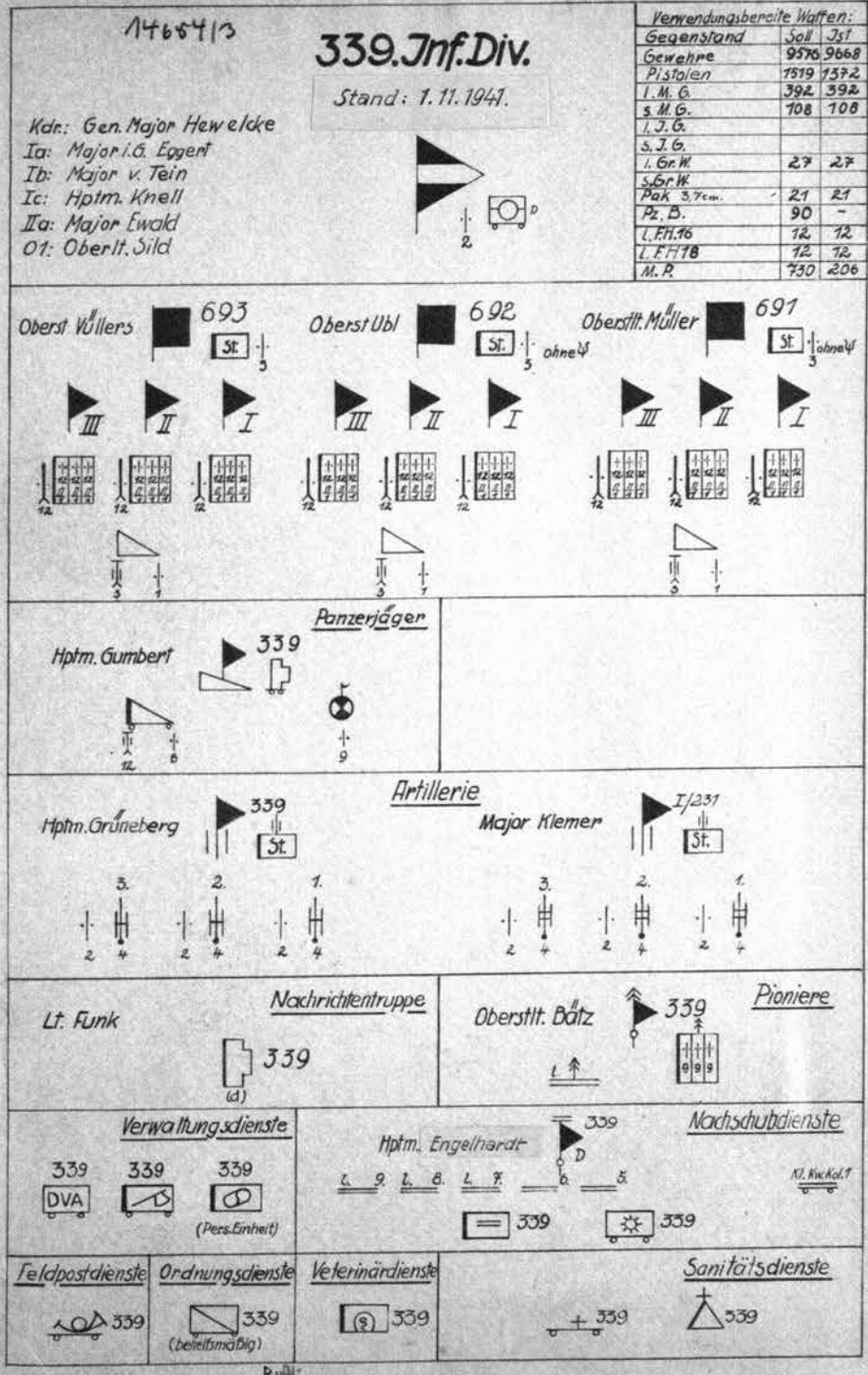


Figure 2:  
 339th Infantry  
 Division Table  
 of Organization  
 and Equipment.  
*Bundesarchiv-  
 Militärarchiv RH*  
 22-225 p. 157



Men with an unidentified unit execute a group of Soviet civilians kneeling by the side of a mass grave. Eastern front, circa June 1941–September 1941. *US Holocaust Memorial Museum, courtesy of National Archives and Records Administration*

Jewish civilians apparently also participated, killing wounded Jews and haphazardly burying them. Afterward, they helped themselves to the possessions of the murdered Jews.<sup>43</sup>

At least a handful of soldiers apparently chose not to participate in the shootings, despite orders to do so. One soldier, Wilhelm Magel, found himself walking next to a sergeant who was also a doctor of theology. As they walked, they discussed how they might avoid being part of the shooting detail.<sup>44</sup> Upon their arrival at the shooting site, Magel and the sergeant were paired up. As a local policeman yelled at the civilians to face away from the German soldiers, the sergeant asked Zimmer whether they could be relieved from the detail. Zimmer agreed that as soon as the next two soldiers arrived to relieve them, they could return to the guard detail in the square.<sup>45</sup> Zimmer then gave the order to fire, and Magel allegedly closed his eyes and did not aim as he fired. Apparently the theologian did the same, for their target

remained standing, unwounded. Zimmer then ordered a local policeman to shoot the Jewish civilian, and Magel and his partner returned to the square.<sup>46</sup> Sergeant Leopold W.<sup>47</sup> found out about the operation in advance and requested that Zimmer relieve him from the shooting detail, stating that “this wasn’t my thing and there were enough people who would do this voluntarily.”<sup>48</sup> Zimmer released him from the detail.

Upon returning to their quarters, the soldiers in the platoon were, in general, subdued. One soldier remembered that he “could read on the faces of my comrades that they detested this method of dealing with the Jews.”<sup>49</sup> The company clerk presented a more differentiated analysis of the soldiers’ reactions. “Overall,” he testified later, “I had the impression that the larger part of the company carried out the order with reluctance and felt its rationale to be poor. However, there were also people who found the order, while brutal, necessary with regard to the experience



with the partisans.”<sup>50</sup> Taking a different position, one soldier recalled that “the shooting was derided amongst the men because it had been people who had not fought and were only being shot because of their race.”<sup>51</sup> The experience was both collective and deeply personal. One soldier explained, “We were all so shocked that as we sat down together that evening, hardly anything was said about the incident. In particular, no one related what he had personally done.”<sup>52</sup>

The soldiers of the 3rd Company demonstrated a wide variety of emotional reactions to this killing. The first and most common reaction was some form of shock. By all accounts, this type of operation was not something to which these men had been exposed, certainly not in the Loire Valley, where they were previously stationed. The men were upset, uneasy, and disgusted; however, the reasons for these reactions are varied and often unclear. For many of the soldiers, what had been done apparently just felt wrong. Some soldiers thought that this was not a job for the army or that the Jewish civilians were not legitimate targets. For others who participated more intimately in the killing, the violent scenes and physical revulsion were traumatic. Some of the men seem to have felt a sense of shame and denial because they did not wish to speak about or acknowledge what they had done.



Former First Lieutenant Josef Sibille, after the war.  
*Courtesy of Richard and Christiane Sibille*

These emotional reactions do not by themselves signal disagreement with the policy in principle or an increased tendency to resist or evade participation; soldiers often have misgivings about killing. The reactions of these soldiers at the very least, however, indicate that the men were neither zealous killers nor numb to the gravity of the tasks they had completed. “If I was asked today,” one former soldier stated, “what my comrades said about the execution, I can only say that everyone back then said that they would never do something like that again.”<sup>53</sup>

In contrast, 1st Company refused to participate in the ordered killings. In a letter written to the senior civilian prosecutor trying Nöll’s and Zimmer’s cases in German court several years after the war, Sibille stated that he had received a telephone call on or about October 7, 1941, from the battalion commander, directing him to kill all Jews in his AO.<sup>54</sup> Sibille stated that Commichau had told him, “As long as the Jews are not eliminated, we will not have any peace from the partisans. The Jewish action in your area must therefore be completed in the end.”<sup>55</sup> Sibille related that this order caused him “anxious hours and a sleepless night” until he made his decision. After repeated urgent calls from the battalion commander, Sibille informed Commichau that “my Company would not shoot any Jews, unless we catch the Jew with the opposing partisans.” He explained that he could not “expect decent German soldiers to dirty their hands with such things.”<sup>56</sup> Commichau then asked Sibille when he would “be hard for once,” to which Sibille replied, “In this case, never.” Commichau then said, “Enough. You have three days to carry out this order.” Sibille again refused, saying he would never carry it out and that he would besmirch neither his honor nor that of his company.<sup>57</sup>

Although we know little about Sibille’s specific motivations beyond his statements to Commichau, suggestions from Sibille’s family indicated that his refusal to follow the order was not based only upon professionalism but also reflected a deeper moral objection based in part on religious grounds.<sup>58</sup> Further, not only



Nöll and Zimber, State Court Darmstadt, March 9, 1956. *ullstein bild/The Granger Collection, New York*

was Sibille at age 47 a mature first lieutenant, he was also a World War I veteran who had fought on the western front.<sup>59</sup> Other than an apparent assessment by his fellow officers in the battalion that he was too soft, Sibille apparently suffered no further repercussions from his refusal to obey the execution order.<sup>60</sup>

That Sibille was not penalized for his decision was surprisingly typical for those German officers and soldiers who chose not to comply with orders to shoot Jewish civilians. In one analysis of 85 documented cases in which Wehrmacht, SS, or police service members refused to shoot Jews or Soviet prisoners of war (POWs), 49 experienced no consequences.<sup>61</sup> Of the others, some suffered multiple but minor repercussions; for example, 15 were reprimanded, 14 were transferred, five were investigated, and three were sent to combat units at the front, but only one was imprisoned.<sup>62</sup> First Lieutenant Nikolaus Hornig, a Wehrmacht officer serving in a police battalion in Poland in November 1941, refused his battalion commander's order to participate in the execution of 780 Soviet POWs.<sup>63</sup> Hornig not only said no, he also explained to his troops that the order was illegal. In his defense, he consistently cited Article 47 of the Military Penal Code.<sup>64</sup> He was later tried before SS and police courts on charges of disobeying orders and, more importantly, undermining the fighting spirit of

his troops—the offense of *Wehrkraftzersetzung*.<sup>65</sup> He was convicted only of the latter charge and consequently held in Buchenwald concentration camp under a form of investigative arrest until the end of the war because the SS head, Reichsführer Heinrich Himmler, did not sign off on the sentence of seven years' imprisonment. Despite his detention, Hornig kept his rank and continued to draw his pay.<sup>66</sup>

## V. Postwar Trial

Long after these events, Nöll and Zimber were brought to trial in front of a German civilian criminal court for their roles in the murder of the Jewish civilians. A first trial resulted in sentences of four years' imprisonment for Nöll and three years for Zimber. After a retrial, both Nöll and Zimber were convicted of being accessories to at least 15 deliberate killings.<sup>67</sup> The Darmstadt State Court concluded:

A soldier in the performance of his duty is only then criminally responsible, as a participant, in the execution of an illegal command under Article 47, Subsection 1, Number 2 of the Military Criminal Code if he knows that the command of the superior concerned an action whose object is a general or military crime or offense. Under this provision, the Military Criminal Code, which, despite its repeal by the [Allied] Control Council..., is to be applied [here] since it was valid law at the time of the crime (Article 2, Subsection 2 of the Criminal Code), responsibility for an official order, which if followed would result in a violation of criminal law, belongs exclusively to the commanding superior. The subordinate may obey [without penalty] as long as he was not aware of the non-binding nature of the command because of its criminal purpose. *But should the subordinate realize that the superior intended the commission of a crime as a result of his order, he must refuse to carry out this illegal order. Otherwise, he faces punishment as a participant [in the crime].*<sup>68</sup>

The Darmstadt court therefore confirmed the trial court's findings but reduced the sentences that the trial court had given after a second trial—namely, a reduction in Nöll's sentence from four to three years and Zimmer's from three to two years.<sup>69</sup>

## VI. Killing in Context: The Basic Principles of LOAC

The United States recognizes four key principles of LOAC: military necessity, or military objective; distinction, or discrimination; proportionality; and humanity, or avoiding unnecessary suffering. **MILITARY NECESSITY** justifies those measures not forbidden by international law that are indispensable for securing the complete submission of the enemy as quickly as possible.<sup>70</sup> Military necessity was defined originally in the Civil War-era Lieber Code as follows: “those measures which are indispensable for securing the ends of war, and which are lawful according to the modern laws and usages of war.”<sup>71</sup> As just stated, the definition has two elements: there must be a military requirement to undertake the action, and the action itself must not be unlawful under LOAC. As settled at the war crimes trials in Nuremberg, Germany, after World War II, military necessity cannot ever be so great that it overcomes the need to conform to LOAC.<sup>72</sup> A subtle distinction exists, however, between violations that affect people as compared to property. Violations against people are never excused, but when military necessity imperatively demands the destruction of civilian property, as determined by commanders at the time they decide to destroy the property, it may be allowable under very specific circumstances.<sup>73</sup>

**MILITARY OBJECTIVE** is a component of military necessity. Once a commander determines that taking a certain action or striking a certain target is a military necessity, then the target must be confirmed as a valid military objective. The current definition of military objectives is “those objects which by their nature, location, purpose,

or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>74</sup> The Commentary on Additional Protocol I (AP I), which provides interpretive guidance for understanding AP I, states that it is not legitimate to launch an attack that offers only potential or indeterminate advantages.<sup>75</sup> This statement raises important questions regarding attacking enemy morale, deception operations, and strategic views of advantage versus the tactical advantages of individual attacks.

**DISTINCTION, or DISCRIMINATION**, means differentiating between combatants and noncombatants. “Parties to the conflict shall at all times distinguish between the civilian population and combatants and between



During the Civil War, Professor Francis Lieber headed a team that drafted General Orders 100 (1863), also known as the Lieber Code, which governed the actions of Union forces in their conduct of the war and their treatment of civilians and prisoners of war. Lieber was born and educated in Germany, fought in the Napoleonic wars, and had sons who fought on both sides of the Civil War. *Library of Congress, Prints and Photographs Division*

civilian objectives and military objectives, and accordingly shall direct their operations only against military objectives.”<sup>76</sup> Determining whether people can be valid military objectives requires either a status-based or a conduct-based determination. Enemy soldiers may usually be engaged at any time during armed conflict, regardless of whether they are actually involved in combat. Civilians remain protected as long as they do not take a direct part in hostilities. On the other hand, civilians are deemed to be targetable combatants when they choose to forgo their protected status and directly participate in hostilities.<sup>77</sup> Combatants are not lawful targets if they are “out of combat,” meaning if they are prisoners of war,<sup>78</sup> sick, wounded, or shipwrecked, or if they are medical personnel exclusively engaged in medical duties.<sup>79</sup> Consistent with the Geneva Convention Relative to the Treatment of Prisoners of War (GC III), before the United States considers enemy combatants prisoners of war, it requires that they be under responsible command, wear a distinctive sign or uniform recognizable at a distance, carry their arms openly, and generally abide by LOAC.<sup>80</sup> Civilians and civilian property may not be the sole object of a military attack and may not be subjected to indiscriminate attack. Neither prisoners of war<sup>81</sup> nor civilians may be subjected to reprisals,<sup>82</sup> which are violations of LOAC intended to induce the enemy to stop committing LOAC violations.

**PROPORTIONALITY** means that when commanders decide to execute an attack that may be expected to cause incidental injury or death to civilians or damage to civilian property, they must determine that the concrete and direct military advantage to be gained will not be outweighed by excessive collateral damage or injury to civilians and civilian property.<sup>83</sup> If the target is purely military, with no civilian personnel or property in jeopardy, no proportionality analysis is required. A commander’s determination must be evaluated on the basis of the information available at the time.<sup>84</sup> If civilians who were not known or could not reasonably have been known to be at the attack site are in fact injured, this circumstance

does not change the validity of the commander’s decision to launch the attack.<sup>85</sup> Further, this principle is in keeping with the reality that injuries to civilians often will be unavoidable regardless of how carefully commanders analyze their targeting decisions; these losses violate LOAC only when they are excessive compared to the military advantage to be gained.

The **PRINCIPLE OF HUMANITY** or **AVOIDING UNNECESSARY SUFFERING** means that military forces cannot use weapons against each other that are either designed or used to cause suffering unnecessary to accomplishing the military objective.<sup>86</sup> Certain weapons, for example, are considered per se unlawful, such as glass-filled bullets.<sup>87</sup> Other weapons are specifically prohibited by treaty because of their inhumane nature, such as chemical weapons.<sup>88</sup> Otherwise lawful weapons could be used in an unlawful manner, such as using a flamethrower against enemy troops in a bunker that has been doused in gasoline with the intention of inflicting severe pain and injury on the enemy troops.<sup>89</sup> All US weapons are required to undergo a legal review to determine whether they conform to this principle.

## VII. Rules of Engagement

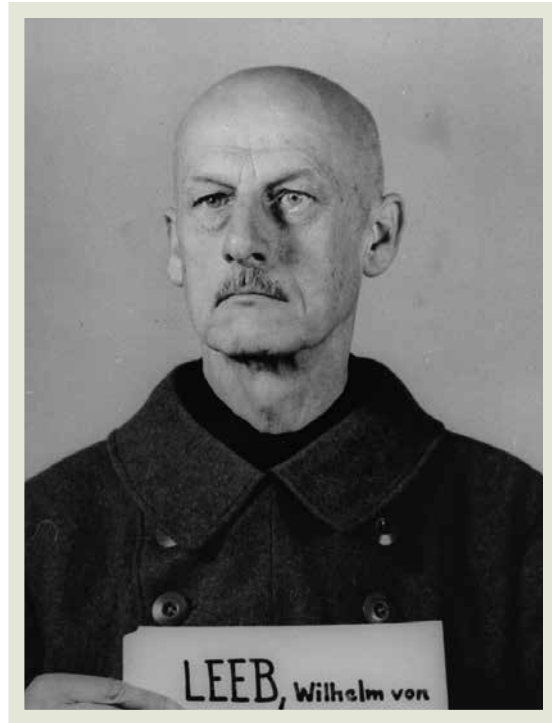
**RULES OF ENGAGEMENT (ROE)** are defined as “directives issued by competent military authority that delineate the circumstances and limitations under which US [naval, ground, and air] forces will initiate and/or continue combat engagement with other forces encountered.”<sup>90</sup> “As a practical matter, ROE perform three functions: (1) provide guidance from the president and secretary of defense (SECDEF), as well as subordinate commanders, to *deployed units* on the use of force; (2) act as a control mechanism for the transition from peacetime to combat operations (war); and (3) provide a mechanism to facilitate planning. ROE provide a framework that encompasses national strategic policy goals, mission requirements, and the rule of law.”<sup>91</sup>

As to political purposes, “ROE ensure that national policies and objectives are reflected in the actions of commanders in the field, particularly under circumstances in which communication with higher authority is not possible. For example, in reflecting national political and diplomatic purposes, ROE may restrict the engagement of certain targets, or the use of particular weapons systems, out of a desire to tilt world opinion in a particular direction, place a positive limit on the escalation of hostilities, or not antagonize the enemy.”<sup>92</sup>

From a military perspective, ROE provide parameters within which commanders must operate to accomplish their assigned missions. These parameters include limits on commanders’ authority to use certain weapons or to respond in certain ways to provocative actions by potential adversaries.<sup>93</sup> From a legal perspective, ROE ensure conformity with the legal authorities under which military operations are conducted. Although commanders may issue certain ROE to reinforce principles of the LOAC, commanders may also issue ROE that restrain the use of force significantly below that which would be lawful. This practice has been demonstrated by the tactical directives issued by succeeding International Security Assistance Force (ISAF) commanders in Afghanistan that require US forces to exercise tactical patience and take affirmative steps to minimize collateral injury and damage to civilians and their property.<sup>94</sup>

## VIII. Command Responsibility

Although the United States has not ratified the Rome Statute of the International Criminal Court, the definition of command responsibility for military commanders that the statute sets out is consistent with the definition used by the US judges in the *High Command Case*, tried at the Subsequent Nuremberg Military Tribunal after World War II.<sup>95</sup> The Rome Statute holds a



Field Marshal Wilhelm von Leeb was tried in the High Command Case with other senior Wehrmacht commanders. He pled not guilty to crimes against humanity, consisting of mass atrocities against civilians by his soldiers. The Subsequent Nuremberg Military Tribunal found him guilty, holding that he either knew or should have known, by virtue of his command position and the information he received, that his soldiers were committing these barbarities. Nuremberg, Germany, 1947. *US Holocaust Memorial Museum, courtesy of Vivien Putty Spitz*

commander criminally responsible for LOAC violations

committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces where:

- (i) That military commander...either knew, or owing to the circumstances at the time, should have known that forces were committing or about to commit such crimes; and



- (ii) That military commander...failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.<sup>96</sup>

Interestingly, the Rome Statute also provides for command responsibility for civilian leaders of armed forces, but the standard of knowledge required of the actions of the soldiers committing the violations is significantly higher.<sup>97</sup>

The US definition sets out the boundaries of the concept of command responsibility a bit more crisply. Importantly, commanders are not strictly liable for all that their subordinates do that is unlawful; they must be guilty of an element of personal dereliction. A commander is liable if any of the following statements are true:

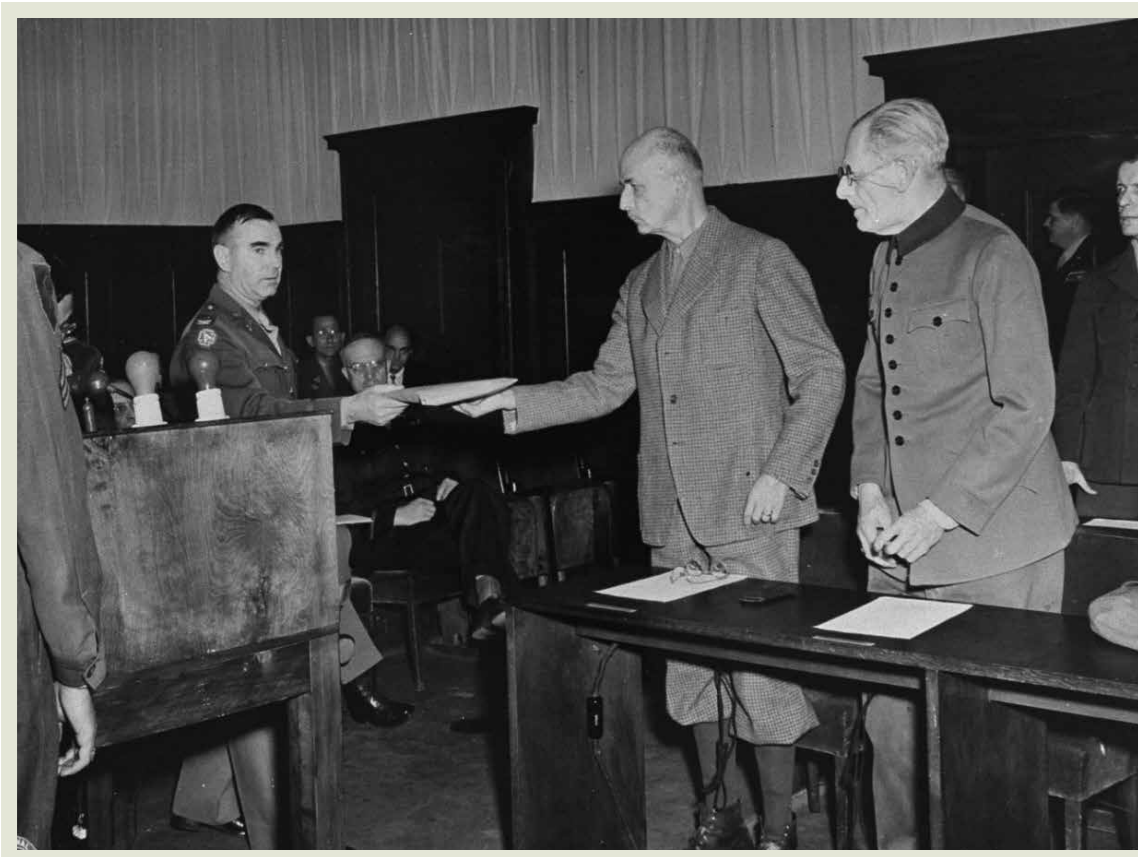
- a. the commander ordered the commission of the act;
- b. the commander knew of the act, either before or during its commission, and did nothing to prevent or stop it; or
- c. the commander should have known, “through reports received by him or through other means, that troops or other persons subject to his control [were] about to commit or [had] committed a war crime and he fail[ed] to take the necessary and reasonable steps to insure compliance with [LOAC] or to punish violators thereof.”<sup>98</sup>

## IX. Obedience to Orders

Under US law, military orders given by proper commanders are presumed to be lawful; therefore, the burden is on the recipients of orders to object if they believe the orders to be unlawful.<sup>99</sup> To be lawful, an order must have a valid military purpose, and it must have a clear, narrowly drawn mandate.<sup>100</sup> Although orders may seem puzzling or counter to what the recipient believes should

be done, these qualities do not make the orders unlawful. Blindly following superior orders is not ordinarily a defense in a case of violation of LOAC, however; it “is only a possible defense if the defendant was required to obey the order, the defendant did not know it was unlawful, and the order was not manifestly unlawful.”<sup>101</sup> Accordingly, reasonableness depends on many factors, including the rank, position, education, and experience of the recipient.<sup>102</sup> Since the end of Allied occupation and Germany’s recovery of sovereignty, international law has been received into German constitutional law directly, thus becoming German law.<sup>103</sup> Interestingly, during the Second Gulf War, a German federal administrative court confirmed a German officer’s refusal to obey an order to participate in a software project that could have been used by the United States in that conflict. The German court found the officer’s disobedience to be justified because it found the war to be illegal under its reading of international law.<sup>104</sup>

If a US soldier receives a potentially illegal order, that soldier should not immediately obey but should instead seek clarification from superiors as to whether he or she has understood the order properly and, if so, whether it is lawful. If the order is clarified and confirmed but the soldier still believes it is illegal, the order should be reported to a higher command authority or a servicing judge advocate. Even if an order is illegal, this cannot be a basis by itself for a subordinate to attempt to relieve a superior from command. For soldiers to show that they were under duress to obey an illegal order, such that it would be a complete defense to the crimes they were alleged to have committed, they must make a very strong case. They must show that they were “under an immediate threat of severe and irreparable harm to life or limb, that there was no adequate means to avert the act, that the act... was not disproportionate to the evil threatened,... and the situation must not have been brought on voluntarily by” the soldiers themselves.<sup>105</sup> However, “orders to commit genocide or crimes against humanity are manifestly unlawful.”<sup>106</sup>



Field Marshal Wilhelm List, the chief defendant in the Hostage Case, receives his indictment at the Subsequent Nuremberg Military Tribunal charging him with mass reprisal killings of civilians. He pled not guilty, arguing he was under superior orders from Hitler. The Tribunal found he knew or should have known the orders violated international law and that he was in a position to prevent these atrocities. Nuremberg, Germany, May 12, 1947. *US Holocaust Memorial Museum, courtesy of National Archives and Records Administration*

Depending on the situation, even if a subordinate is not relieved of responsibility for following an illegal order, a court might take the fact that a superior had ordered the act into consideration in assessing an appropriate punishment.<sup>107</sup>

## X. Conclusion

The three different responses to the same illegal order by the three company commanders of 1st Battalion, 691st Infantry Regiment, provide an important empirical example of how officers making command decisions during armed conflict will define their duty in different

ways depending upon the command climate, their individual experiences, their leadership style, their moral and ethical compasses, and their social and cultural values. The US Armed Forces take an oath to support and defend the US Constitution, which itself incorporates the Geneva Conventions and other LOAC treaties into US law. The reactions of the three company commanders provide a useful platform for discussion of the ethical and legal components of a US officer's leadership philosophy, how that philosophy is put into action, and the dynamic relationship between command climate, obedience to orders, discipline, and the protection of civilians in armed conflict.

Opposite: A German firing squad executes suspected  
partisans, Soviet Union-North, September 1941.  
*Bundesarchiv Bild 101I-212-0221-06*





## APPENDICES

## Appendix A: Wehrmacht Orders

Excerpt from Decree on Exercising Military Jurisdiction in the Area of Barbarossa and Special Measures by Troops (Barbarossa Jurisdiction Order), May 13, 1941<sup>108</sup>

### I. *Treatment of crimes committed by enemy civilians*

1. Until further order the military courts and the courts-martial will not be competent for crimes committed by enemy civilians.
2. *Francs-tireurs* will be liquidated ruthlessly by the troops in combat or while fleeing.
3. Also all other attacks by enemy civilians against the armed forces, its members, and auxiliaries will be suppressed on the spot by the troops with the most rigorous methods until the assailants are finished.
4. Where such measures were not taken or at least were not possible, *persons suspected of the act will be brought before an officer at once. This officer will decide whether they are to be shot....*

### II. *Treatment of crimes committed against inhabitants by members of the Wehrmacht and its auxiliaries*

1. *With regard to offenses committed against enemy civilians by members of the Wehrmacht or its auxiliaries, prosecution is not obligatory, even where the deed is at the same time a military crime or misdemeanour.*

Excerpt from Directives for the Behavior of the Troops in Russia, issued by the Armed Forces High Command (Oberkommando der Wehrmacht [OKW]), May 19, 1941<sup>109</sup>

1. *Bolshevism is the deadly enemy of the National Socialist German people. Germany's struggle is directed against this subversive ideology and its functionaries.*
2. This struggle requires ruthless and energetic action against Bolshevik agitators, guerillas, saboteurs, and Jews, and the total elimination of all active or passive resistance.
3. The members of the Red Army—including prisoners—must be treated with extreme reserve and the greatest caution since one must reckon with devious methods of combat. The asiatic soldiers of the Red Army in particular are devious, cunning, and without feeling.
4. When taking units prisoner, *the leader must be separated from the other ranks at once.*
5. In the Soviet Union the German soldier is not confronted with a unified population. The USSR is a state which unites a multiplicity of Slav, Caucasian, and asiatic peoples which are held together by the Bolshevik rulers by force. Jewry is strongly represented in the USSR....

## Appendix B: Excerpt from “Army Regulation 15-6: Investigation Guide for Informal Investigations”<sup>110</sup>

### V. Concluding the Investigation

1. Preparing Findings and Recommendations. After all the evidence is collected, the Investigating Officer (IO) must review it and make findings. The IO should consider the evidence thoroughly and impartially and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.
  - a. Facts: To the extent possible, the IO should fix dates, places, persons, and events, definitely and accurately. The IO should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.
  - b. Findings: A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, IOs are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, IOs should refer to the exhibit or exhibits relied upon in making each finding (e.g., “PFC Smith was intoxicated at the time of the collision, with a Blood Alcohol Content of .17 (See Exhibit E.)”). See AR 15-6, para. 3–9. You may find it appropriate to make negative findings (including findings of no fault, no loss, or no wrongdoing). Negative findings must also be supported by the documented evidence that will become part of the report.

If a finding is based on your observations, the observations should be explained in a Memorandum for Record (MFR) or reflected in a photograph or video. Normally the IO will obtain sworn statements from all witnesses involved, but only after providing a rights advisement form to any witness suspected of wrongdoing, and not simply produce an MFR that summarizes witness testimony. Exhibits should be numbered in the order they are discussed in the findings. Note that often the IO will be faced with conflicting or contradictory statements. The mere fact that only two individuals were present in a room and each testifies to contrary facts does not mean that the witnesses cancel each other out. You must decide who you believe and explain in your findings why you find one witness to be more credible than another. This should be based on corroboration, credibility, and common sense. For example, it may be based on a mere believable description of the events because one witness’ demeanor and method of answering questions appears forthright rather than evasive.

- c. Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

## Appendix C: State Court Decision

### BACKGROUND

#### Introduction

This appendix includes a translation of the state court decision in the case against Nöll and Zimmer;<sup>111</sup> it is worthwhile to read in its entirety as an original source. To summarize, they were not found guilty of murder as defined in Section 211 of the 1871 German Penal Code,<sup>112</sup> which was the law applicable at the time of the offenses. Instead, the court confirmed the trial court's verdict that they were guilty of violating Section 212, being accessories to intentional killing, or manslaughter. To reach this result, the court first examined the conduct of Commichau and decided that his order to kill all of the Jews did not constitute an order to commit murder. Because he had issued his order as a matter of reprisal against a group whom he suspected of supporting the partisans, the court decided that he did not have a base motive, such as antisemitism or bloodlust, in giving the order. Reprisal against even innocent civilians to deter others from violating LOAC by acting as or supporting partisans was not illegal prior to the Geneva Conventions of 1949.<sup>113</sup> Such specific intent was required to prove murder under Section 211. Under the Uniform Code of Military Justice (UCMJ), murder also requires a specific intent, but it is framed more broadly:

Premeditated murder is murder committed after the formation of a specific intent to kill someone and consideration of the act intended. It is not necessary that the intention to kill have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution. The existence of premeditation may be inferred from the circumstances.<sup>114</sup>

What made the order illegal in the view of the state court, however, was its scope. Reprisal resulting in the annihilation of an entire group of people, especially when it included the killing of children, violated the principle of humanity. A seasoned and mature staff officer, Commichau must have known this; Nöll and Zimmer should have known it as well. Nöll and Zimmer were required by the Military Penal Code to not obey an illegal order. The state court found that Nöll should have requested clarification from Commichau and advised the battalion commander that he had only elderly men, women, and children in his AO, and that there was no reasonable fear on his part that would justify obeying the illegal order. Nöll and Zimmer were therefore found guilty of being accessories to killing under Section 212, which would be equivalent to involuntary manslaughter under the UCMJ.<sup>115</sup> Because of extenuating circumstances, Nöll was sentenced to only three years' imprisonment and Zimmer to two.<sup>116</sup>

Certain historians and legal scholars have described a general reluctance on the part of the postwar German legal system to prosecute and punish German war criminals.<sup>117</sup> This was in part due to the complexity of trying these cases in evidentiary and procedural terms, as well as the poor fit between the applicable German homicide jurisprudence and the nature of the acts committed by the alleged perpetrators.<sup>118</sup> Other, less neutral factors complicated the trials as well. The German legal profession had quickly brought itself in line with Nazi ideology after the party came to power, and judges were expected to implement the Nazi perspective in their decisions.<sup>119</sup> Many of these individuals continued to play important roles in the postwar German judiciary, despite denazification; for example, as late as 1949, 81 percent of judges serving in Bavaria were former Nazis.<sup>120</sup> Further, many police investigators and other personnel had served in the Nazi police and sometimes even in the SD or Einsatzgruppen, and they sometimes helped their comrades. For example, when German police officials served a search

warrant on the former commander of the SD in Warsaw, Ludwig Hahn, they were astonished to find that he already had “not just ten binders of photocopied witness statements [in the case against him] but also photocopies of the most recent notes of the States Attorney’s office [in the case against him] from which he could learn the names and addresses of witnesses who had not yet been interviewed.”<sup>121</sup>

To more fully understand the legal reasoning of the court in reaching its decision, it is important to have an appreciation of its military and legal historical context. This lesson is about ethics and leadership at the small-unit level, but it is important to remember that company-level military culture is but one part of a larger whole of organizational climate and culture, and that those higher level manifestations of ethics and leadership are themselves both a reflection and a refraction of national and international societal and legal norms.

### **Historical Treatment of Partisans by German Forces**

German forces had historically implemented a very definite approach to the treatment of captured partisans. During the Franco-Prussian War, French civilians (so-called *franc-tireurs*) took up arms against the Prussian invaders and conducted guerilla warfare.<sup>122</sup> When captured by Prussian forces, these civilians ordinarily were executed if found guilty by courts-martial, and many were apparently executed without benefit of trial.<sup>123</sup> During the abortive 1870 negotiations between the French Foreign Minister Jules Favre and Prussian Prime Minister Otto von Bismarck, Favre complained about this harsh treatment, noting the civilians were merely defending their homeland, as was their right. Bismarck rejected this position, stating, “They are not soldiers, and we are treating them as murderers” and “we only recognize as soldiers those under regular discipline; the others are outlaws.”<sup>124</sup> When Favre objected that the franc-tireurs were only doing what Prussian civilians had done in 1813 fighting Napoleon’s forces, Bismarck retorted, “True

enough, but our trees still bear the traces of the civilians whom your generals hanged on them.”<sup>125</sup>

### **Partisans and LOAC Prior to World War II**

By 1907, international law regarding civilians taking up arms against invading regular forces of another state had been modified to a degree. Under the 1907 Hague Regulations, “[t]he inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops ... shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war,” so-called *levées en masse*.<sup>126</sup> The authoritative *Kriegsbrauch im Landkriege* (“Usage of Land Warfare,” or “War Book”), published by the Prussian General Staff for the guidance of commanders and in use until the end of World War I, however, took the position that as a matter of practice, such civilians should not be treated as privileged combatants unless they also had “a responsible leader, military organization, and clear recognizability” as opposing fighters through the wearing of distinctive insignia.<sup>127</sup> The 1907 Hague Regulations did not address, and therefore did not change, the legal status of civilians who took up arms after the commencement of occupation.

German law provided that inhabitants of German-occupied territory were subject to courts-martial for certain offenses, including “war rebellion,” which was defined as “the taking up of arms by the inhabitants against the occupation.”<sup>128</sup> The *Kriegsbrauch im Landkriege* took the position that such civilians who took up arms could be treated as lawful combatants if they were in organized units commanded by a responsible official, carried their arms in the open, wore a recognizable and distinctive insignia, and followed LOAC.<sup>129</sup> This standard was consistent with the 1907 Hague Regulations stating the criteria that must be met for a detained member of an opposing armed force to be considered a prisoner of war,<sup>130</sup> and the standard mirrors the German requirements for a valid *levée en masse*. Further, to receive this treatment as an individual fighter, in the

German view, one would still need to produce “a certificate of membership in an armed band.”<sup>131</sup>

The 1929 Geneva Convention dealt with the treatment of prisoners of war. It was applicable between the signatories; and although France, Germany, the United Kingdom, and the United States signed and ratified the treaty, the Soviet Union did not.<sup>132</sup> The 1929 Geneva Convention incorporated the Hague Regulations’ standards for who was considered a prisoner of war;<sup>133</sup> the legal status of civilians who took up arms after the commencement of an occupation did not change.

### Training and Education in LOAC

In the 1890s, in terms of the training and education of German army officers in LOAC, mid-career officers at the War Academy in Berlin received during their second year of studies one hour per week of “military law”; during their third year, they had two hours per week of instruction in “municipal and international law, [and] state administration.”<sup>134</sup> On the eve of World War II, however, the amount of instruction in legal matters may have decreased, for it is not even mentioned in the report of a US Army officer who attended the War Academy as a separate course of instruction.<sup>135</sup> As to the training and education received by noncommissioned officers and soldiers prior to and during World War II, two types of documents are worth noting: *Der Dienstunterricht im Heere* (Army Service Training), a series of army handbooks written by a German military lawyer for noncommissioned officers of different branches of the Wehrmacht; and the *Soldbuch* (pay book), the identification books that each Wehrmacht soldier used to record his promotions and personal information, such as blood type and gas mask size. Both documents included guidance regarding the treatment of civilians who took up arms against the German military.

The first edition of Army Service Training was published in 1929, and it continued to be published in subsequent editions throughout most of the war.<sup>136</sup> Army Service Training tracked

with the 1907 Hague Regulations in that civilians participating in a *levée en masse* were recognized as privileged combatants as long as they bore their weapons in the open and followed LOAC.<sup>137</sup> The publication noted that once the territory was occupied, however, civilians bearing arms were subject to *Standrecht*, or summary martial law.<sup>138</sup> Specifically, the handbook noted, “[f]ranc-tireurs are private individuals who commit hostile acts without fulfilling the requirements for the *levée en masse*. In so far as they are not met in battle, they fall under summary martial law.”<sup>139</sup> The extent to which these books might have been required reading or incorporated into education and training is unknown.

Much less detailed was the guidance given to the enlisted soldier through the pay books. On their inside front covers, the pay books often contained the “Ten Commandments” for the conduct of war by German soldiers. The first commandment states, “The German soldier fights chivalrously for the victory of his people. Atrocities and useless destruction are unworthy of him.”<sup>140</sup> The third commandment reads, “No enemy may be killed who surrenders, including the partisan and the spy. They will receive their rightful punishments through the courts.”<sup>141</sup> The seventh commandment reads, “The civilian population is inviolable. The soldier may not plunder or wantonly destroy.”<sup>142</sup> Not all pay book editions contained this information, and photographs or other documentation often covered it when it was present.<sup>143</sup>

### German Military Justice and Discipline

In all armed forces, service member behavior is shaped by positive guidance, such as that detailed above, and disincentives, such as the fear of punishment for transgression of disciplinary codes. Article 47 of the German Military Penal Law, which was in effect between 1872 and 1945, provided that subordinates who followed orders were not criminally liable as long as they had acted within the scope of the authority given to them by the orders, or as long as they did not know the order commanded a violation



of German domestic or military law. In the post–World War I trials of alleged German war criminals at Leipzig by the German Supreme Court, for example, Lieutenant-Captain Karl Neumann, a submarine commander who had torpedoed and sunk a British hospital ship, was found to not be criminally responsible. The court held that because he had been following orders from the German Admiralty to engage such ships within certain areas, and because the orders were in the nature of a lawful reprisal against alleged British misuse of hospital ships during the conflict, he had remained within the directions provided to him, and he had had no reason to believe the orders were illegal.<sup>144</sup> On the other hand, submariners who shot survivors in the water per their captain’s order after the captain knowingly torpedoed a hospital ship outside such an engagement zone to hide the unauthorized attack were found guilty of being accessories to murder.<sup>145</sup>

The Barbarossa Jurisdiction Order issued by the German High Command prior to the invasion of the Soviet Union significantly diluted the legal measures that the German military ordinarily used to enforce discipline in the armed forces.<sup>146</sup> In particular, partisans and Jews were to be dealt with ruthlessly, and suspected partisans were to be brought immediately before an officer, who would decide whether they should be shot.<sup>147</sup> Second, court-martial-convening authorities lost jurisdiction to try offenses committed by Wehrmacht troops against enemy civilians unless the courts-martial were expected to have a positive impact on order and discipline.<sup>148</sup> Some German generals expressed concern that this order was illegal and dishonorable<sup>149</sup> and, perhaps to a greater degree, that it would negatively affect good order and discipline in the Wehrmacht ranks.<sup>150</sup> In response to these concerns, the commander-in-chief of the German Army, Field Marshal von Brauchitsch, issued a clarification supplementing the order, which stated:

[U]nder all circumstances it will remain the duty of all superiors to prevent arbitrary excesses of *individual* members of

the Army and to prevent *in time the troops* becoming unmanageable. It must not come to it that the individual soldier commits or omits any act he thinks proper toward the indigenous population; he must rather feel that in every case he is *bound by the orders of his officers*. I consider it very important that this be clearly understood down to the lowest unit. *Timely action* by every officer, especially every company commander, etc., must *help* to maintain discipline, the basis of our successes.<sup>151</sup>

Von Brauchitsch’s clarification was grounded in discipline, not humanity, but several senior Wehrmacht commanders chose to disregard the Barbarossa Jurisdiction Order in their respective AOs because they realized it would negatively affect discipline because of its inhumanity.<sup>152</sup> Objectively, however, if serious abuse of civilians became, in effect, the norm when ordered, then demonstrating at a court-martial that it had a prejudicial effect on good order and discipline when committed by a soldier on his own volition likely became difficult. Further, because the approval of sentences handed down by courts-martial still required approval by higher officials, a court-martial conviction was no longer a guarantee that a soldier would actually be punished. In one case, for example, a battalion commander killed several Soviet POWs. He was court-martialed, convicted, and sentenced to loss of rank and two years in prison. Because he had killed the Soviet POWs in revenge for the death of his brother at the hands of partisans, however, Hitler quashed the sentence when it came to him for review.<sup>153</sup>

After the war, trials of alleged war criminals generally resulted in few convictions and lenient sentences.<sup>154</sup> The case that perhaps puts the Nöll and Zimmer decision in the most objective light was tried a few years later, about 25 kilometers north of Darmstadt: the trial of SS personnel who ran the Auschwitz-Birkenau killing center. After a five-year investigation by the Hesse attorney-general’s office, which generated a 700-page indictment that included a 200-page

history of Auschwitz and the testimony of 252 witnesses, 24 defendants stood trial for the murders committed there.<sup>155</sup> Paradoxically, to try to prove murder under the 1871 Penal Code, the prosecution first had to establish the governing nature of the SS regulations that had been in place during the center's administration.<sup>156</sup> Predictably, with regard to the treatment afforded prisoners, these regulations were themselves extremely harsh.<sup>157</sup> Once the nature of the regulations was established, however, the prosecution presented testimony showing that certain defendants had exceeded these regulations in terms of cruelty to prisoners and, therefore, had been acting upon base motives in the killings they committed, making them murderers.<sup>158</sup> Those defendants against whom the prosecution could not bring such specific evidence, such as Nöll and Zimmer, were generally convicted of being accessories and likewise received relatively lenient sentences.<sup>159</sup>

### TRANSLATION OF DECISION

#### **In the Criminal Proceedings against the Teacher N[öll] and the Criminal Justice Secretary Z[imber].<sup>160</sup>**

Judgment of the State Court in Darmstadt of March 10, 1956 (No. 429)

In the Name of the People

In the criminal proceedings against

1. N[öll], a teacher, born on November 7, 1897, in Darmstadt, resident of the same, married, no prior convictions
2. Z[imber], police official [*Kriminalsekretär*], born on September 2, 1915, in Madretsch, Canton Bern (Switzerland), resident of Constance, married, no prior convictions

For accessory to manslaughter.

The trial court [*Schwurgericht*] at the State Court in Darmstadt on the basis of proceedings held on March 1, 2, 5, 6, 7, 9, and 10, 1956, and on March 10, 1956, recognized as just:

The defendants N[öll] and Z[imber] are guilty of accessory to involuntary manslaughter

- Crimes under Sections 212, 213, 49 of the Penal Code and Section 47 of the Military Penal Code.

Sentence was pronounced for:

Defendant N[öll] to three years in jail

Defendant Z[imber] to two years in jail

The defendants must pay court costs with the proviso that the fee for appeals will be reduced by a third for both defendants.<sup>161</sup>

#### **Legal Analysis<sup>162</sup>**

The defendants N[öll] and Z[imber], each through one and the same action, are guilty as an accessory to at least 15 acts of involuntary manslaughter (Crimes pursuant to Sections 212, 213, 49 of the Penal Code and Section 47 of the Military Penal Code), because they knowingly assisted through their actions the criminal intent of the battalion commander to kill the Jews in Krutscha.

A soldier in the performance of his duty is only then criminally responsible, as a participant, in the execution of an illegal command under Section 47, Subsection 1, Number 2, of the Military Penal Code if he knows that the command of the superior concerned an action whose object is a general or military crime or offense. Under this provision, the Military Penal Code, which, despite its repeal by [Allied] Control Council Law Number 34, is to be applied [here] since it was valid law at the time of the crime (Section 2, Subsection 2 of the Penal Code), responsibility for an official order, which if followed would result in a violation of criminal law, belongs exclusively to the commanding superior. The subordinate may obey [without penalty] as long as he was not aware of the non-binding nature of the command because of its criminal purpose. But should the subordinate



realize that the superior intended the commission of a crime as a result of his order, he must refuse to carry out this illegal order. Otherwise, he faces punishment as a participant [in the crime].

1. By his order “to shoot the Jews in Krutscha,” the battalion commander caused the killing of at least 15 Jewish inhabitants of the village. However, he cannot be classified as a murderer because the trial court once again at the rehearing could not come to the conclusion that the battalion commander acted because of base motives.

A base motive could have been attributed to the order to shoot if it could be determined that the battalion commander had issued the order to his subordinates on racial grounds that aimed at the elimination of the Jewish population in the area of his command. The suspicion that this could have been the case is based on the scope of the measures ordered, the undetermined number of persons to be removed, defined racially so that only a part of the population would be targeted without regard to age or sex. This is further supported by the evidence that has been established about the telephone calls between the battalion commander and the witness S[ibille]. Moreover, the witness Wilhelm Mü., who served as regimental adjutant and therefore possessed a clear insight into the events of that time, expressed his suspicions that the executions of Jews in the operational area of the first battalion could have been instigated by the training conference in Mogilev. The training in Mogilev was described outwardly as an anti-partisan training, but in reality it served to promote the annihilation of the Jews for racial reasons. Moreover, the entire regiment believed that Major Commichau had been influenced in this regard by First Lieutenant Kuhls. This belief was reinforced because of Kuhls’s political views, which, according to the witness, were clearly sympathetic to the “Third Reich.” Although under these circumstances racial motives appear very likely, it cannot be determined with certainty that it was these particular motives that brought the battalion commander to issue

the order to shoot. The battalion commander Commichau was killed in action. But, it has been established that Commichau expressed in front of his former regiment commander that partisans were repeatedly aided by the inhabitants of the village and that he was forced to this reprisal measure as deterrence. Therefore, there is not sufficient evidence for establishing base motives for the battalion commander.

The content of the order, and other circumstances as well as one of the elements of the crime as required under Section 211 of the Penal Code [Murder] do not apply to the person of Major Commichau. It cannot be assumed therefore that he intended the murder of the Jewish population. The order’s purpose was the intentional killing of human beings in terms of Section 212 of the Penal Code [Manslaughter].

The order to shoot was unlawful because there was no legal justification for battalion commander Commichau’s actions.

Neither are the prerequisites present for self-defense in the sense of acting in defense against imminent, unlawful attack. Around the time of the shooting, Defendant N[öll]’s company had scarcely come into contact with partisans. Neither was there an ongoing partisan attack nor was such an attack imminent. There was a partisan raid on battalion headquarters at the end of September 1941 during which two soldiers were killed. But that raid had taken place while the unit marched into position and while they were outside of the operational area assigned to the troops during the first days of October. Further, the raid had occurred days before and in no way justified as self-defense the shooting of the Jewish inhabitants of Krutscha. A connection between the Jewish or even the non-Jewish population of Krutscha and the partisans could not be established nor would such a connection have required the annihilation of an entire segment of the population.

The order to shoot was also not justified by the internationally agreed upon laws of war.

As outlined in the opinion of the appellate court, no one could possibly have doubted the illegality of the battalion commander's orders to shoot the Jewish population in the area of operations just because he suspected that this segment of the population supported the partisans and therefore needed to be eliminated in the name of security for the troops or in order to fulfill their mission in the final suppression of all partisan activity in the area assigned to them. The laws of war do not include the right of a leader whose forces are endangered by guerilla warfare to claim military necessity as justification for the annihilation of the entire enemy civilian population. Despite suspicions in support of this claim, it could not be definitively established that such considerations led the battalion commander to issue the order to shoot, because the battalion commander died in the war, and the testimony of Erich Mü. indicated the commander had ordered the shooting as a deterrent.

Therefore, it is to be assumed that Major Commichau ordered the companies he commanded to shoot Jews to deter the entire population from collaboration with partisans and to force the enemy to stop partisan activities in general. In the opinion of the trial court, it was the training in Mogilev that led him to choose the Jewish population as the target of his reprisal. It is therefore to be examined whether the order to shoot all Jews in Krutscha is to be understood as a reprisal—that is, the internationally recognized right as a last resort to force the opponent, his military forces, and his population to abide by the laws of war as the laws of war were understood at the time of the shooting (compare: Schütze, *Die Repressalie*, p. 41). The trial court rejected that argument.

The German Federal Supreme Court ruled on this matter in the judgment of April 28, 1955, that the killing of innocent enemy nationals as a response to enemy conduct contrary to international law is legal both in terms of the actual practice of states and in the literature of international law. The only question contested

at that time was whether the admissibility of measures of reprisal should depend on additional prerequisites or just conduct by the opposing side that is contrary to the internationally agreed upon laws of war. Or whether a warning should precede any action, or whether there needs to be a geographical or chronological relationship between the conduct that violates international law and the measures of reprisal that such conduct provokes, or whether reprisals must be proportional to the violations of international law by the opponent. The International Court of Justice and the American Military Tribunals in Nuremberg tried to establish those kinds of prerequisites for permissible reprisal killings. However, for the acts committed before these judgments those prerequisites are not proven to be part of general state practice and therefore not valid international law. On the other hand, however, as the Federal Supreme Court has outlined further, international law recognizes that even by reprisals the laws of humanity must be respected. Even if the principle of humanity does not preclude the killing of innocent people as a reprisal per se, it does in any case forbid the killing of children, especially infants.

The trial court adopted this legal opinion [of the Federal Supreme Court] pursuant to Section 358, Subsection I, of the Code of Criminal Procedure. At the time the order to shoot was issued, there had already been enemy conduct contrary to internationally accepted laws of war, which is the fundamental requirement for a [legitimate] reprisal. As has been established, the infantry regiment 691, which included the first battalion under Major Commichau, was moved to the Orscha-Smolensk area, because the security division deployed in the rearward area of Army Group Center was no longer sufficient to protect supply lines to the front and suppress partisan activities. Moreover, it is likely and has not been refuted that there were also partisans in the forests of the area of operation that was allocated to the first battalion in early October 1941 and that these partisans were supported by segments of the population—that they conducted their activities in civil clothes without special insignia

and were therefore in violation of the principles of international law, as required especially by Article 2 of the Hague Convention regarding the Laws and Customs of War on Land. In order to force the enemy to comply with internationally agreed upon principles, the battalion commander was authorized to take effective and tough measures of reprisal even against innocent segments of the population. However, he was absolutely not allowed to exceed the limits imposed by the imperatives of humanity. But that is what he did when he issued the order to shoot “the Jews,” i.e., the shooting of an entire segment of the population, that is, numerically not specified, but only racially distinguished segment of the population including all children. This was a measure that even under the circumstances of the times, no law-abiding person could reasonably have regarded as a lawful act of war; unless anything would be considered admissible in war.

In Prof. Dr. Schw.’s expert opinion, expressed in his affidavit, it is doubtful that at the start of World War II, the requirement to comply with the limits imposed by humanity while imposing retaliation measures had already been common state practice. He rather thinks that only the aspect of military necessity need be considered when evaluating reprisals (similarly see: Siegert, *Requisition und Höherer Befehl*, p. 21 ff.). Notwithstanding the opinion of the trial court that the killing of innocent people as a reprisal is always inhumane if such killings are not required by military necessity; insofar as a factual difference does not exist, therefore the order of the battalion commander would have also been illegal according to this opinion, because military necessity did not require the shooting of the entire Jewish population that consisted mainly of older men and women and children of all ages. Witness S[ibille] has confirmed this. The order to kill was therefore as a consequence of its content under all circumstances illegal.

The criminal liability of the defendant further requires that the battalion commander aimed at committing a crime through his order and that this was known to them. As stated by the

appellate court, criminal intent does not need to be understood as requiring that the criminal aim of the ordered act be understood or even that its unlawfulness had been the motive or the aim of the order, because this requirement would mean that criminal responsibility for orders contrary to international law would be eliminated in practice. The fact that the act was ordered so as to reach a lawful military aim cannot lead to a rejection of the action’s criminal intent. It rather has to be sufficient that the person issuing the order is completely sure that the execution of the order is unlawful and criminal.

It was not possible to hear testimony on his intentions from battalion commander Commichau as he was killed during the war. However, this does not preclude the possibility of making a determination on this point. Not having such evidence, a court is often forced to get an idea of intent through inference from the facts that are visible from the outside and by referring to its body of experience [*Erfahrungssätze*] in cases where the accused either refuses to testify or denies having fulfilled the element of intent in committing a crime. Commichau certainly was a mature adult and a staff officer. As such, he must have known that even measures of reprisal have to have their limits and that it is not possible to reconcile the view of law-abiding people with the necessity of killing an entire segment of the population, one that was determined by race and included children, only because individuals of this race had supported the partisans or were continuing to support partisans; not even if it is intended to deter the rest of the population. Even though he might have followed the principle “right is what benefits the German people”—as espoused by his supreme commander [Hitler]—even though he might have considered the lives of others as less valuable as indicated by the testimony of S[ibille] that he used the term “liquidate” in referring to the shootings. Nevertheless, it could not have been unclear to him that his draconian measure was incompatible with the general sense of what constitutes justice. This justifies the finding that he knew that his order to kill did not comply

with valid law in force at that time. His order therefore concerned a crime pursuant to Section 212 of the Penal Code.

2. This could not possibly have been hidden to the accused N[öll] even though he contests it. The fact that the order to kill could, for example, be covered by the so-called limitation on court jurisdiction order [*Gerichtsbareitsbefehl*] is irrelevant for him because this order—as he knew—referred exclusively to combating partisans or other such persons, who attacked or supported attacks on the German armed forces, or its retinue. This prerequisite could not possibly have applied to the entire Jewish population of Krutscha and especially not to their children. Even if the defendant N[öll] had assumed that the battalion commander had ordered the shootings as a deterrent because something or other had happened or because he suspected the collaboration of the Jewish population with the partisans, it had been nevertheless clear to defendant N[öll] that this would not justify such a measure. He knew that the order was to shoot all Jews in the town, even all the children as well, without regard to age. He could not be in doubt that this action would never be permissible under international law.

The illegality of such reprisals is—as stated by the Federal Supreme Court—obvious, i.e., known to everyone.

It follows then that defendant N[öll] too realized the injustice of that measure and that he moreover knew that the battalion commander was also aware of the illegality of such a reprisal. In addition the behavior of the defendant as he received the verbal order and during the subsequent discussions in the office, either after the verbal order was issued or after receipt of the written order, makes certain that the illegality of the order—an order for annihilation and one that scorned every feeling of humanity—was clear to him. His acknowledgement that he thought there could have been a reporting error and therefore requested written confirmation of the order in the hope that such written confirmation would

not be forthcoming is further evidence of his knowledge; as was his behavior at the meetings held at the orderly office after the arrival of both the verbal and the written order. This justifies the finding that defendant N[öll] had certain knowledge of the criminal purpose of the ordered action as required by Section 47 of the Military Penal Code.

Finally, according to his own statements, it has also been known to defendant N[öll] since his service in World War I that a soldier can refuse the execution of an order that he recognizes as criminal. Thus, he knew the basic content of Article 47 of the Military Penal Code and therefore knew that an obviously unlawful order of the battalion commander was not binding for him. The fact that he nevertheless executed the order was undoubtedly out of fear. He convincingly testified to this during the main proceedings. Maybe he did it also because he shared the common fear in those days that helping ostracized people [Jews] could be detrimental—he could be regarded as a political enemy. He was, after all, a tenured official (teacher) in the civil service. Perhaps he also feared to be regarded as weak. Possibly he anticipated a report of his refusal. However, fearing trouble does not excuse his behavior. Also, the fear of a report of his refusal cannot exonerate him as he knew that he would not have to execute an obviously unlawful order. Therefore, he did not need to fear punishment.

The actions of the accused N[öll] are not excused by virtue of the necessity to obey orders [*Befehlsnotstand*] according to Section 54 of the Penal Code. He was not placed in a situation where his only option was to follow the order to shoot. There was no deadline set for his compliance to the order. He already had two or three days' time before the written confirmation of the order arrived in which to consider how to avoid or circumvent the order that he judged to be criminal. Moreover, after the arrival of the written order there was no reason for him to carry out the order the next day, particularly since the order lacked justification and a time

limit for its execution. Therefore, there was no reason to assume that the order was particularly urgent. In contrast to witness S[ibille], he had not had any direct contact with the battalion headquarters and could assess the situation in his area of command on his own authority and due to the expanse of his district, he was free to make his own decisions to such an extent that from the point of view of the expert witness von G., it had been possible for him to reject the order by referring to the military situation in the area covered by his company.

With regard to the consequences of this order, he had both the possibility and the duty to personally contact the battalion commander in order to clarify what had induced him to issue such a grave measure. In preparation for this he should have reconnoitered the area to determine the composition and number of Jewish residents covered by the order. The fact that the order only concerned elderly men, women, and children was an indication that he should have attempted to get the battalion commander to retract the order or at least restrict its application. In doing so, he could have referred to the consequences that carrying out the order to kill would have had on the decent-thinking portion of the Russian population. The defendant N[öll] had known the battalion commander since the formation of the regiment and had become more closely acquainted with him during his time in Jena. He knew therefore that a personal discussion would not have angered the battalion commander. Here too, the defendant was not hindered by the distance between the command posts of the battalion and the company. According to the statement of witness Wa., the supply squad, which traveled on foot, accompanied by a horse-drawn wagon, covered the distance to the battalion headquarters and back in one day. That would have been reasonable for the defendant to do, especially since he could travel using the dispatch group as cover, maybe even riding on horseback or in the convoy. If he, however, believed that it was not permissible for him to leave his company post, then at least he could have sent his company officer Lieutenant

Schlepper for this purpose to battalion headquarters. The defendant is an intelligent man and had been employed as an experienced company commander since the beginning of the Second World War. It is apparent that he knew of this possibility.

If the defendant had refused the order he would also have faced no immediate threat to life and limb. At the time the battalion commander issued the order, he was not reminded of his duty to obey, and was certainly not compelled by force of arms to its implementation and therefore was not under any psychological pressure to comply. Further, there was no evidence that the battalion commander would apply such pressure in the future. Defendant N[öll] had no reason to fear the implementation of court-martial proceedings for insubordination in the field because he was well aware that he had no need to obey an order to shoot since he understood that such an order was illegal.

There is no evidence that defendant N[öll] willingly acted on his own accord. He has, rather, by passing on the order of the battalion commander in full knowledge of its criminal purpose to the defendant Z[imber], made himself complicit in a criminal offense and additionally, through one and the same action, knowingly rendered assistance in the killing of at least 15 people.

3. Defendant Z[imber] had similarly recognized that the order of the battalion commander whose implementation had been transferred to N[öll] involved actions that were criminal in nature. As has been determined, he shared the belief of this order, which he personally issued verbally without any limitation to the entire company, that all the Jews in Krutscha without regard to sex or age were to be shot. He knew as a master sergeant also that the order concerning court jurisdiction and the subsequent orders issued to the troops regarding the energetic combating of partisan activities permitted at most the shooting of only those persons who were determined to be partisans or their helpers and that this

requirement in no way applied to the entire Jewish population of Krutscha. It was also clear to him that this measure was itself illegal if the battalion commander ordered it as retaliation for some action known to the defendant because it was apparent for him as for anyone that the order was illegal since it included the shooting of a segment of the enemy population that was determined by race and included children of all ages. This confirms his admission that he, like all platoon leaders and sergeants, was upset that the company would be expected to carry out such extensive shootings. He had heard while on the march into the operational area of the extermination actions against the Jewish population taken by the SS or SD and considered all this a terrible thing. This was even more so as his company leader refused to participate in the carrying out of the order himself and as one or other of the platoon leaders also declared that one could not do such a thing. The trial court was convinced that defendant Z[imber] also recognized that the battalion commander placed himself above and beyond the laws of humanity when he issued this order and therefore considers this action a crime of involuntary manslaughter.

Defendant Z[imber] could not have believed that he was allowed to carry out an order that he recognized as criminal, one that included the killing of innocent children, without coming into conflict with the law. Even if he was conditioned to obedience during, at the time, his more than five years of military service and perhaps was not made expressly aware of the provisions of Section 47 of the Military Penal Code, he nevertheless had to have known that even a superior in the German military cannot issue orders covering every act and situation to subordinates and that the obedience of subordinates ends where carrying out the order involves a commission of a crime. This is especially true for defendant Z[imber], who was not a simple soldier but had been promoted to sergeant major with the rank of master sergeant. He, moreover, has such military experience that he could not have been in doubt about [the limitations of orders], even more so since he was later promoted to

first lieutenant and was employed after the war as a police official [*Kriminalsekretär*]. Z[imber] therefore possessed sufficient intuition and intelligence that he had to be so sure of himself, that no superior could force him to be complicit in carrying out a criminal order. Since he nevertheless conducted the action without opposition, in the opinion of the trial court, he did it for the same or similar reasons that had guided the accused N[öll] to issue the order for the action to him. In addition defendant Z[imber] was perhaps less deeply moved by the incident than the accused N[öll] because in a letter of March 13, 1954, he called the killings “old chestnuts of the war” [*alte Kriegskamellen*].

Defendant Z[imber] cannot rely on his stated fear of punishment as an excuse for what he did at that time since for him as well there was no extremis due to orders [*Befehlsnotstand*] in the sense of Section 54 of the Penal Code. N[öll] had not issued the order in such a way that contradiction or counterarguments were excluded from the start, nor did he remind Z[imber] of his duty to obey nor, using his weapon, force him to comply. Thus there was no imminent threat to life or limb present. Z[imber] had no fear that N[öll] would force him to obey using his weapon if he should refuse to carry out the order. Considering N[öll]’s own behavior on that day, Z[imber] did not even need to fear a report of his refusal to obey. Even if he had feared such a report, as he now claims, he would not have had to fear a court-martial [*Kriegsgericht*] at the time since the order was illegal and he was therefore not obligated to carry it out.

Even the fear of punishment—and it could only have been here an unjust punishment—does not excuse him because the execution of the order was not his last resort in the situation at that time. Being a longtime soldier, he knew that it was not at all necessary that the order be carried out the very next day because of the absence of any limitations to the order and because of the large measure of autonomy the company had in implementing orders. Thus there was time to consider how to avert carrying out the order

or at least consider limitations to the order that could be, if necessary, defended at a later time. Defendant Z[imber] certainly does not make the impression of being a helpless and fearful person. If he had not possessed a certain degree of intelligence and wit, as well as military experience and ability to enforce his views, he would certainly not have been promoted to company sergeant at the beginning of 1941.

This justifies the assumption that he, too, knew of the possibility of presenting counter-arguments against the order in the appropriated military form. He would have had to point this out to his superior. Since there were good relations between him and N[öll] he knew he could have allowed himself that action. He also knew that he could bolster his counter-arguments by establishing just who and how many would be affected by the order.

Because of what has been said above, he could have pointed out to his commanding officer that he could not expect him to undertake actions that his commander, as an officer, would not undertake himself. As company sergeant major, he did not show the same civil courage that Private First Class M[agel] and noncommissioned officer W. have shown toward him. He cannot then claim that he was in an inescapable predicament or even that he believed he faced an inescapable predicament. An energetic refusal by defendant Z[imber] would certainly not have been without effect on N[öll], who did not exactly make a heroic impression during the main proceedings before the trial court, and might even have brought him either to refuse the assignment now that a second officer was on hand (Second Lieutenant Schleper had been due to return from deployment) or N[öll] could have then presented opposing arguments to Commichau. Of course it was likely that Commichau would have reacted to N[öll] the same way he did to S[ibille], because he was characterized by the regimental adjutant, the witness Mü., as an idiosyncratic and sometimes even arrogant officer. But it is just as possible that the protest of two of his company commanders

could have brought the battalion commander to his senses or that the regiment commander could have stopped the further shooting of Jews based on the report of October 9, 1941, (by Kuhls) about the shooting of Jews.

Someone who feels threatened but does not use all the means at his disposal to turn away that danger cannot then successfully claim that he could not possibly have avoided the criminal outcome that resulted from that danger.

Also, with regard to the accused Z[imber], there is no reason to assume that he wanted the killing of the Jews, as ordered by the battalion commander, as his own deed. He nevertheless intentionally committed, through one and the same inherent acts, the crime of accessory to involuntary manslaughter of at least 15 persons by taking all the measures required to carry out and even partially leading the shootings himself.

### **Sentence**

Extenuating circumstances are to be attributed to the defendants N[öll] and Z[imber] under Section 213 of the Penal Code. Their fate reveals a certain tragedy. Since that time they have had no criminal record. They both are respectable men, who both as professionals and—apart from the occurrence that is the subject of these proceedings—as soldiers during the war, have always done their duty. Their act was neither a product of their own inclination nor did it derive from a criminal inclination. Neither of them would have committed a crime if they had not come into this difficult situation, a situation for which they were no match in terms of their humanity and character. Their guilt is profound, but make no mistake, guilt here originated above all with the battalion commander who did not survive the war and who was the originator of the inhuman order. To the credit of the defendants weighs also that the partisan war waged by the enemy was illegal under international law and also necessarily led on the German side to a radicalized atmosphere in which the troops were more susceptible to excesses of that kind. Further

consideration is required because the defendants together with their company were deployed without the proper equipment and without clear instructions. It should be considered as well that the orders from the highest leadership were contradictory. This is evident in the conflicting severe Führer orders and orders from the High Command of the Armed Forces on one hand and the attempt to weaken these same orders through additional orders from the Army High Command on the other. Moreover, the military leadership failed to the extent that they did not take a clear position on the activities of the SD and SS in occupied territory and in that they permitted their officers to be influenced in the sense of such trainings as, for example, the training seminar in Mogilev. Finally, to the benefit of the defendants is that they committed the criminal act with aversion and inner refusal and that they in the end only carried out the order because of the general fear prevailing at that time that they would otherwise arouse the suspicion of being members of the political opposition and the possible consequences to their person deriving from such exposure. This human weakness and deficiency does not excuse them, but it puts their actions in a milder context. N[öll] obviously has severely suffered from this burden. While recognizing extenuating circumstances, a jail term is appropriate for them, which according to the regulation of Section 358, Subsection 2 of the Code of Criminal Procedure may not surpass the sentence pronounced by the original trial court. The sentence imposed must reflect the serious punishment required for the large number, at least 15 victims, who lost their lives because of the actions of the defendants. Also to be considered in this regard is the grievous harm their actions had on the reputation and honor of the German people. With regard to the defendant N[öll] it must be considered to his detriment that he pushed responsibility for the execution of the order off onto a subordinate in a manner unworthy of an officer.

On the other hand, the trial court believed that it was required to hand down a criminal penalty below that set in the original verdict because

in the new trial many fewer victims than in the first trial were included in the case and especially since there was no proof offered that children were actually killed, notwithstanding that this reduction in the number of victims could not be attributed to the actions of the defendants. Further, the severity of the penalty must also reflect the extenuating circumstances previously cited as requiring a reduction in sentence. In addition, in defendant Z[imber]'s case, his status as a military subordinate reduces his responsibility, meriting a further reduction in sentence.

Weighing all circumstances and considering the reduction in sentencing permitted under Sections 49, Subsection 2, and 44 of the Penal Code, the court considers a three-year sentence of imprisonment for defendant N[öll] and two years for defendant Z[imber] as appropriate and just.

The decision on the payment of the court costs is based on Sections 465 and 473 of the Code of Criminal Procedure. Since the appeal of the defendants was partially successful, as it has led to a reduction in penalties, it seems appropriate to reduce the fee for appeals for each by a third.



## Appendix D: Acronyms

AO—Area of Operations

AP 1—Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

GC I—Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

GC III—Geneva Convention Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

GC IV—Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

HSSPF—Higher SS and Police Leader

ISAF—International Security Assistance Force

LOAC—Law of Armed Conflict

POW—prisoner of war

rHGM—Army Group Center (rear)


ROE—Rules of Engagement

SD—Sicherheitsdienst (security service)

SECDEF—Secretary of Defense

SS—Schutzstaffel (protection squadrons)

UCMJ—Uniform Code of Military Justice



Opposite: A German soldier speaks to civilians who are crowded on the side of a street, perhaps in Mogilev, Soviet Union, August, 1941. *Bundesarchiv Bild 101I-138-1084-24*



## **EDUCATIONAL MATERIALS**

The suggested activities are designed to be adapted as necessary by instructors to fit both the time allowed and the subjects to be addressed. The questions and approaches are designed to address ethical and legal points raised by the case study.

**POTENTIAL LEARNING OUTCOMES:**

- Apply and discuss rules of engagement (ROE) and the law of armed conflict (LOAC) through a historical case study
- Practice Army Regulation 15-6, Procedures for Investigating Officers and Boards of Officers
- Weave understandings of ethics and law into developing leadership styles

**RESOURCES:**

- Case Study
- *The Path to Nazi Genocide*: 38-minute film produced by the United States Holocaust Memorial Museum, available at [www.ushmm.org/learn/introduction-to-the-holocaust/path-to-nazi-genocide](http://www.ushmm.org/learn/introduction-to-the-holocaust/path-to-nazi-genocide)
- *The Role of the German Army during the Holocaust*: five-minute video produced by the United States Holocaust Memorial Museum,

available at [www.ushmm.org/professionals-and-student-leaders/military-professionals/military-history/german-military-and-the-holocaust](http://www.ushmm.org/professionals-and-student-leaders/military-professionals/military-history/german-military-and-the-holocaust)

- Educational Materials
- Appendices

Three approaches for working with the case study follow: Option A addresses Army Regulation 15-6; Option B provides a study-question approach that considers ROE, LOAC, and ethical decision-making. Option C offers a “peer-to-peer” approach intended to enhance communication and fact-finding between participants throughout the case study experience. Instructors may pick and choose elements from the options to suit their goals. The approaches invite active participation from group members in either small- or whole-group discussions. The options take into account different time availability and delivery formats.

The authors recommend that participants be assigned the Case Study to read in advance, regardless of how the instructor intends to structure the class. The United States Holocaust Memorial Museum videos are suitable to be viewed either in advance or as part of the class.

## Option A: Army Regulation 15-6

For this exercise, participants will practice the procedure for Army Regulation (AR) 15-6 by applying information from the historical case study to the four key sections of an AR 15-6 Investigation: Relevant Facts, Standards, Findings, and Recommendations. Appendix B provides a useful starting point for introducing participants to the AR 15-6 process, but service-specific investigation guidance can be easily substituted for it. Implicit in the investigation process is determining what and why something happened and, in this context, conducting analysis by applying legal standards to these facts to deduce findings and make recommendations to prevent misconduct or mishaps from occurring in the future. For participants who are cadets or junior officers, they must realize that as lieutenants, they will likely find themselves tasked with conducting investigations pursuant to regulations such as AR 15-6 and that the process is used for investigations of both minor and very serious matters. Although the conduct of AR 15-6 investigations may in fact be the first instance in which lieutenants have the quality of their work assessed by a field-grade commander, it is not a subject with which cadets or junior officers ordinarily have much time to familiarize themselves during the course of typical military instruction. Depending on the nature and the pace of the conflict, and the legal status of US forces in an AO, commanders will often require AR 15-6 investigations into civilian deaths caused by US forces. In Afghanistan in 2008–09 for example, General David McKiernan required not only that investigations be done into all US actions that caused civilian deaths, but that all other ISAF units do the same. The reports were to be forwarded to his headquarters to be assessed for potential lessons learned regarding civilian deaths and then distributed to the force to prevent similar events in the future. Working through Option A will introduce participants to this important task, using the case study as a vehicle for considering a wide range of factors

and standards that may be applicable in such an investigation.

### LEARNING OUTCOMES:

- Participants will discuss the implications of the case study while practicing the procedures involved with an AR 15-6 investigation.
- Participants will practice critical thinking skills on a concrete task typical of what they may be assigned to complete as investigating officers.

### BACKGROUND:

AR 15-6, Procedures for Investigating Officers and Boards of Officers (2 October 2006), establishes procedures for investigations, including “proceedings that involve a single investigating officer.”<sup>163</sup> “The primary function of any investigation... is to ascertain facts, and to report them to the appointing authority.... It is the duty of the investigating officer... to ascertain and consider the evidence on all sides of each issue, thoroughly and impartially, and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority.”<sup>164</sup>

### TASK FOR PARTICIPANTS:

Assume you have been appointed as an investigating officer to look into the killings of Jewish civilians by soldiers of 1st Battalion. You are to report back to the appointing authority the relevant facts, the standards by which you assessed the facts, your findings that result from that assessment, and any recommendations on how such killings could be prevented in the future.

### IF YOU HAVE ONE HOUR

Have the group complete the reading and watch the historical video prior to attending the session. Use session time for an instructor-led discussion of the following: Relevant Facts, Standards, Findings, and Recommendations.

### IF YOU HAVE TWO HOURS

Have participants complete reading prior to attending the session. Watch the historical

video(s) during the session. As a large group, discuss Relevant Facts and Standards. Break the group into small working groups and have each work through Findings and Recommendations. Discuss Findings as a large group.

### IF YOU HAVE THREE HOURS

Have participants complete reading prior to attending the session. Watch the historical video(s) during session. As a large group, discuss Relevant Facts and Standards. Break the group into small working groups and have each group work through Findings and Recommendations. Have each group brief the entire class on their Findings and Recommendations. End with a large-group discussion of the groups' approaches.

The following are possible responses for the key sections considered:

#### I. Relevant Facts

Instructors should guide participants through the process of determining relevant facts, including, although not limited to, the list below:

- a. Nazi dehumanization of Jews
- b. Lack of partisan activity
- c. Institutional army history of brutality against civilians
- d. Higher command guidance
- e. Presence of SS and a mobile killing unit in the AO
- f. Commichau's direct order, reaffirmed
- g. Company commander political membership; Nazi Party vs. SS
- h. Leadership style different among company commanders
- i. Company culture possibly different
- j. Mogilev Conference, which encouraged cooperation between SS and Army; and included demonstrations at the tactical level, which showed that for higher command, "partisan" equals "Jew"
- k. ROE and implied ROE (Mogilev)
- l. Company commanders with different prior military experience
- m. Sibille suffering no real repercussion

- n. Sibille's other moral points on his compass, including religion

#### 2. Standards

Instructors should be sure to guide participants through discussion of the key components of LOAC that form the standards against which facts are applied:

- a. Military Necessity: All force that does not violate LOAC is allowed to accomplish the mission. Mission accomplishment is not a valid reason to violate LOAC.
- b. Distinction: Distinguish between parties taking a direct part in hostilities and protected civilians. The United States still follows GC III, not AP I, regarding who can be a prisoner of war.
- c. Unnecessary Suffering: No means or methods are used that are calculated to cause unnecessary injury or pain.
- d. Proportionality: The commander may use force as long as the direct and concrete military advantage expected to be gained is not outweighed by excessive civilian casualties or unnecessary damage to civilian property.
- e. Command Responsibility: Commanders must prevent or prosecute violations they either knew or should have known were occurring.
- f. Obedience to Orders: Soldiers are not required to obey orders that they either knew or should have known, based on circumstances, to be unlawful.
- g. Reprisal: Although measured actions against protected civilians in response to the enemy's violation of LOAC may have once been lawful, it is no longer lawful.

#### 3. Findings

Instructors should assist participants in applying the standards to the facts to develop the findings:

- a. Military Necessity: No evidence existed of a partisan threat in general or that Jews in 1st Battalion AO were partisans or had

been helping partisans. Shootings of Jews, therefore, occurred without military necessity.

- b. Distinction: Jews were targeted as so-called “racial” enemies, were not taking a direct part in hostilities, and were not displaying hostile intent or hostile acts.
  - c. Unnecessary Suffering: Jews who were rounded up in the square heard the screams of those being executed, and the marksmanship at the killing site was poor, requiring additional shots from executioners.
  - d. Proportionality: Because no military necessity existed, no direct and concrete military advantage would be gained; therefore, killing even one civilian would have been excessive.
  - e. Command Responsibility: Commichau, Kuhls, Nöll, and Zimber knew or should have known that killing the Jewish civilians was unlawful.
  - f. Obedience to Orders: Each of these four leaders should have also known that the order was illegal. Sibille sought clarification, received reaffirmation of the order, and refused to comply. Nöll hoped to ignore the order, but once the written order was received, he directed Zimber to carry it out.
- 4. Recommendations**
- The instructor will likely need to guide participants in formulating their recommendations in a structured and logical fashion that would be clear to the Appointing Officer. Recommendations they identify that could play a role in shaping leadership might fall within the following areas:
- a. Mentorship
    - (1) Leadership vs. followership
    - (2) With whom do you form this bond?  
On what basis?
    - (3) What are the elements of mentorship?
    - (4) What are your core values? How do your actions reflect your core values?
  - (5) How can the unit best learn from noncommissioned officers (NCOs)?
  - b. Education
    - (1) Good vs. bad role models—whom do you study, and why?  
Does a mix work best?
    - (2) Holism—can you integrate ethics, morals, leadership, law, and history?
  - c. Discipline
    - (1) How is discipline enforced?  
What is tolerated?
    - (2) Legal discipline vs. moral discipline
  - d. Training
    - (1) Who conducts the training?
    - (2) Are you, as a commander, conducting the training, or are you defaulting to a judge advocate?<sup>65</sup>
  - e. Exercises
    - (1) How are they structured?
    - (2) Do you use role players? How good are they?
    - (3) Do situational training exercises push the edge in developing judgment in complex situations?
  - f. Command Climate
    - (1) How well do you understand the life experiences of your NCOs?
    - (2) How does your commander interact with you and your peers?
    - (3) How do your soldiers perceive what you really care about and what is not as great a priority (“expect what you inspect”)?

## Option B: Study Questions

The study questions that follow are samples that relate to the lesson and can be modified as instructors deem appropriate for their classes. Instructors can tailor the number of questions selected and the use of small groups to fit the allotted timeframe.

### LEARNING OUTCOMES:

- Participants, through the lens of the historical case study, examine and discuss the application of ROE, LOAC, and sources of ethical decision-making for leaders.
- Participants understand how history, ethics, law, and military tactics relate to each other in an operational setting.

### BACKGROUND:

The study questions delve into concepts relevant for today. Engaging in the questions in a group environment enables participants to hear different perspectives as they develop and refine their own approaches to leadership.

### TASK FOR PARTICIPANTS:

In this environment, participants are tasked with reflecting on and responding to the prompts so as to deepen their understandings of the concepts at hand.

Depending upon course requirements and time available, instructors may want to specify certain study questions for participants to consider as they complete the reading in preparation for discussion. Instructors may also wish to assign different questions to different small study groups for them to discuss and brief back to the larger group.

- i. Define and explain:
  - a. Proportionality
  - b. Distinction
  - c. Avoiding Unnecessary Suffering
  - d. Military Necessity

2. Apply each of the four principles to a specific example from the actions of rHGM troops in Belarus in the fall of 1941. Consider the context of a 1st Battalion company commander, and contrast and compare that perspective with what you would expect of yourself as a US military professional.
  - a. **Proportionality**

The concrete and direct military advantage to be gained, in the commander's view, seemed to be that killing Jewish civilians would hamper partisan activities in the battalion AO. Not only were civilians directly targeted for execution, but there was no indication that these individuals were actually acting as or assisting partisans; therefore, executing these civilians yielded no military advantage. Even had these been incidental deaths, which they were not, the loss of civilian life was excessive compared to the anticipated military advantage.
  - b. **Distinction**

No evidence existed to suggest that the Jewish civilians rounded up and shot by the 3rd Company soldiers had taken part in hostilities; they therefore were not combatants. Even if they had been identified as combatants, they should have been detained under these circumstances rather than summarily executed. The United States, as a matter of policy, ordinarily treats captured partisans as enemy prisoners of war (POWs).
  - c. **Avoiding Unnecessary Suffering**

This principle is not applicable in the strict sense, but participants may present the argument that holding the Jews near the execution site where they could hear the shots and screams was inhumane.
  - d. **Military Necessity**

Even if the evidence had demonstrated that some Jewish civilians were assisting



the partisans, as long as they were not taking a direct part in hostilities, they could not be targeted as combatants but could perhaps be detained as security threats. Shooting of civilians is unlawful and, therefore, not excused under the principle of military necessity.

3. Define and explain the legal standards for command responsibility and obedience to orders.
4. If there are any defenses for failing to meet the standards of command responsibility and obedience to orders, what are they?

Command responsibility is not a strict liability concept. If a commander could show that he did not know and should not have been expected under the circumstances to know, then he will not be responsible for his subordinates' violations of LOAC.

Similarly, if a subordinate can show that he did not know an order was illegal and that it was not manifestly illegal, he could have a valid defense to a law of war violation. Certain offenses, however, are so patently illegal that this defense will not be available in all circumstances, such as with genocide and crimes against humanity.

5. Identify successes and failures to meet the standard of command responsibility in the actions of rHGM troops in the fall of 1941. Discuss the repercussions that did or did not follow from the decisions of the 1st Battalion company commanders to follow Commichau's order.

At the battalion level and below, Commichau, Kuhls, and Nöll were responsible for the acts committed by their soldiers against the Jewish civilians. Although he was not an officer, Zimmer was also guilty, given his responsibilities. Sibille conducted himself properly. At the higher levels, the brigade and division commanders, as well as General

von Schenckendorf, could likely be found criminally responsible.

6. Identify successes and failures to meet the standard of obedience to orders in the actions of rHGM troops in the fall of 1941.

Only Sibille met the standard. Concerned about the propriety of the orders, he went directly to his commander for clarification. Despite receiving further direction to follow the original order, he refused. His basis for refusal was not primarily that the order was illegal; rather, refusal seems to have been a moral choice for him. Nöll initially did not intend to obey the order but did not question it once it was confirmed in writing. Kuhls apparently obeyed the order without question.

7. What are ROE?

ROE are constraints on the latitude exercised by commanders and soldiers regarding the use of force and employment of forces in accomplishing their missions.

8. What are the differences between ROE and LOAC?

ROE can be more restrictive on the use of force than LOAC would allow and also address political, diplomatic, and military coordination, and materiel stewardship, in addition to ensuring conformance with legal requirements.

9. What are the sources and content of your leadership values?

- a. Officer's Oath, training
- b. Institutional organizational culture. Discuss organizational conduct that has occurred in the US armed forces, such as detainee abuse at Abu Ghraib, instructor misconduct at Aberdeen, the "kill squad" murders in Afghanistan, or the Iron Triangle killings and Haditha in Iraq.

- c. Sports teams
  - d. Social clubs
  - e. Religious education
  - f. Philosophy/ideals
  - g. Peers/parents
  - h. Experience
10. Contrast the origin and content of the values of Kuhls with those of Sibille. What are the differences, what are the similarities, and how do they compare with yours?

Although both men held Nazi Party membership before the war, Kuhls was the more radical antisemite. Sibille was also a religious man, whereas Kuhls was anti-religious. Further, Sibille's perspectives were informed by his prior service on the western front in World War I; so, too, were Nöll's. Interestingly, both were teachers. What are the specific sources of your values, and what do you believe or value that would have mattered had you been ordered to execute civilians?

11. What possible factors led to the slaughter of Jewish civilians by rHGM troops in the fall of 1941?
1. Eight years of accelerating dehumanization of Jews in German society
  2. The influence of the Nazi Party political program over all aspects of German life
  3. Newly formed unit, weak leadership
  4. Prior "soft" duty of the western front vs. the brutality of the eastern front
  5. Promotion of a "war of annihilation" context by both the Nazi Party and Germany
  6. Wrapping genocide in the blanket of antipartisan action
  7. From a US perspective, a values system inconsistent with the principles of LOAC and constitutional protection of expression, religion, and ethnicity
  8. A desire to please one's commander
  9. A laziness or lack of moral compass, demonstrated by taking the easy wrong over the difficult right
  10. Being a rule follower no matter how ridiculous the rule; obedience to orders

## Option C: Peer-to-Peer (P2P) Format

Today's young military professionals exchange information with each other and learn about their environments through social media. The flattened hierarchy of this style of interaction is complemented by almost boundless and immediate access to information and perspectives, with few if any hierarchical filters. The instructor's role in such an environment is very different than that in traditional ethical and legal education and training—given a task, conditions, and standards, the participants teach each other both within their immediate discussion groups and in the greater discussion group as a whole. Although this model has been demonstrated to be useful for developing a better understanding of leadership ethics and values for military professionals in general, it particularly provides an environment beneficial for considering the challenges of leadership and conflict in a cyber environment.<sup>166</sup>

This option creates an environment in which military professionals engage in interactive discussions that emphasize high levels of simultaneous communication between participants during the lesson. Additionally, the format provides the ability to learn and act as a group to solve complex problems, permits an arena for those often quiet in instructor-led environments to speak out, and models an environment in which immediate access to multidisciplinary information drives decision-making.

This option works well if you can combine sections or convene multiple groups that are studying this case. In field testing, this format has been used successfully with groups as large as 85 students at one time, in one location.

### LEARNING OUTCOMES:

- When P2P is used in conjunction with Option A or Option B, corresponding Learning Outcomes apply.

- Participants simulate a “real-world” environment in which they must base their decision on information gathered from the field.

### BACKGROUND:

This example uses Option A as a foundation. Tasking for participants can be tweaked (using Option B, for example) while still applying the P2P approach.

### TASK FOR PARTICIPANTS:

They are appointed to conduct an investigation into the circumstances of the execution order given by the 1st Battalion commander. They are to report back to the entire group their assessments of the causes for the different reactions by the company commanders to the illegal order, potential moral and legal culpability, and recommendations for preventing such atrocities in the future.

This approach requires a total of three hours. The first hour, ideally given earlier in the day or week so that the students can reflect upon the content, provides the historical background of the case study. The capstone exercise portion takes two hours.

### HOUR ONE

Provide a historical foundation via lecture, film, and/or readings (see previous options for guidance). This segment is done in a traditional format.

### HOURS TWO AND THREE: P2P

**First Hour:** Participants convene in groups of four to eight to answer the questions required to complete the AR 15-6 investigation. As groups, they must identify the relevant facts; the applicable ethical, legal, moral, and military standards to apply to the facts; the findings they derive from the application of the standards to the facts such as ethical, moral, and legal culpability; and their recommendations for action at the small-unit level to prevent atrocities like this in the future. Each group appoints a

scribe and a spokesperson to record the results of their discussions.

**Second Hour:** “Briefing by exception” during which groups present the outcomes of their group’s discussion to the entire group. In the briefing-by-exception format, groups focus on raising new points rather than repeating already-shared details. The moderator performs the important task of ensuring that the briefing moves along at a swift pace while clarifying and emphasizing points raised by the successive spokespersons for the groups. If technology is available, representatives from each group should type up results that can then be projected on a large screen when reporting out.

**Wrap-Up:** The capstone can be concluded successfully in various ways. For example, the instructor can identify two students in advance to be thinking about the “so what?” of this exercise. The session can end with them articulating these observations for final comments and reflections. Or, the moderator could identify the most important themes brought forth in the discussions and briefings and emphasize them to the students.

Additionally, as a means to mirror contemporary communication environments, smart devices and social media technology can be incorporated to augment the lesson in the following ways:

**Hour One: Historical Presentation**

- If there will be a significant amount of time between the historical presentation and the P2P session, the moderator can send tweets to the students to ask them to consider certain issues raised by the case study.

**P2P first hour**

- Video teleconferencing can be used to bring in remotely located experts or military leaders.
- Websites containing video interviews and written resources on leadership, ethics, history, and legal matters can be accessed by

students after the historical presentation to deepen understandings.

- Participants can use their smartphones during the small group sessions to send and receive tweets between groups about important points raised at their tables (accelerating the normalizing of the whole group’s information).
- Appointed scribes can blog about their table’s progress and results in real time.

**P2P second hour**

- Audience survey techniques can be used to quickly assess whether participants understood key facts and important points of the lesson.

## Endnotes

- 1 Waitman Wade Beorn, *Marching into Darkness: The Wehrmacht and the Holocaust in Belarus* (Cambridge, MA: Harvard University Press, 2014).
- 2 The Wehrmacht was the combined German air, land, and sea armed forces. It included an armed forces high command, *Oberkommando der Wehrmacht* (OKW), a subordinate army high command, *Oberkommando des Heeres* (OKH), a subordinate naval command, *Oberkommando der Kriegsmarine* (OKM), and a subordinate air force command, *Oberkommando der Luftwaffe* (OKL). The Army was the largest and most important of the Wehrmacht branches. After December 1941, Hitler was both supreme commander of the Wehrmacht and the Army commander-in-chief. See The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*. Vol. 12, *The German High Command Trial* (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, 1949), 9. This publication is an abridged version of the U.S. Military Tribunal judgment in United States v. Von Leeb, Case No. 72, 9 (December 30, 1947–October 28, 1948) (hereafter cited as High Command Case). For clarity, this lesson plan will refer to the regular German forces involved as Wehrmacht units.
- 3 In the case of the Wehrmacht, the High Command tribunal stated that “antipartisan warfare was used by the German Reich as a pretext for the extermination of many thousands of innocent persons.” *Ibid.*, 85.
- 4 In addition to the recent work by Waitman Beorn, on whose work this case study is based, see Omer Bartov, *The Eastern Front, 1941–1945: German Troops and the Barbarisation of Warfare* (New York: St. Martin's Press, 1986); Geoffrey P. Megargee, *War of Annihilation: Combat and Genocide on the Eastern Front, 1941* (Lanham: Rowman and Littlefield Publishers, 2006); Wolfram Wette, *The Wehrmacht: History, Myth, Reality*, trans. Deborah Lucas Schneider (Cambridge, MA: Harvard University Press, 2006); Hannes Heer and Klaus Naumann, eds., *War of Extermination: The German Military in World War II 1941–1944* (New York: Berghahn Books, 2000).
- 5 Megargee, *War of Annihilation*, 37. See Appendix A for the text of this order.
- 6 J. Noakes and G. Pridham, eds., *Nazism, 1919–1945: A History in Documents and Eyewitness Accounts*, vol. 2, *Foreign Policy, War, and Racial Extermination* (New York: Schocken Books, 1988), 1089–90. See Appendix A for the text of this order.
- 7 Jürgen Zimmerer, “Annihilation in Africa: The ‘Race War’ in German Southwest Africa (1904–1908) and its Significance for a Global History of Genocide,” *Bulletin of the German Historical Institute* 37 (Fall 2005), 51–57; Isabel V. Hull, *Absolute Destruction: Military Culture and the Practices of War in Imperial Germany* (Ithaca, NY: Cornell University Press, 2006); and Dominick J. Schaller, “The Genocide of the Nama and the Herero in German South-West Africa, 1904–1907,” in *Centuries of Genocide: Essays and Eyewitness Accounts*, 4th ed., ed. Samuel Totten and William S. Parsons (London: Routledge, 2013), 89–114.
- 8 “From modest beginnings the SS (*Schutzstaffel*; Protection Squadrons) became a virtual state within a state in Nazi Germany, staffed by men who perceived themselves as the ‘racial elite’ of Nazi future. In the Nazi state, the SS assumed leading responsibility for security, identification of ethnicity, settlement and population policy, and intelligence collection and analysis. The SS controlled the German police forces and the concentration camp system. The SS conceived and implemented plans designed to restructure the ethnic composition of eastern Europe and the occupied Soviet Union. From 1939, the SS assumed responsibility for ‘solving’ the so-called Jewish Question; after 1941, its leadership planned, coordinated and directed the so-called Final Solution of the Jewish Question.” United States Holocaust Memorial Museum, “SS,” in *Holocaust Encyclopedia*, www.ushmm.org/wlc/en/article.php?ModuleId=10007400.
- 9 The Waffen SS was a frontline military force established by Heinrich Himmler. It “eventually fielded more than 20 divisions, putting half a million men under arms and establishing a command and operations structure to rival” the Wehrmacht. United States Holocaust Memorial Museum, “Waffen SS,” in *Holocaust Encyclopedia*, www.ushmm.org/wlc/en/article.php?ModuleId=10007405.
- 10 Helmut Krausnick, *Hitlers Einsatzgruppen: Die Truppen des Weltanschauungskrieges, 1938–1942* (Frankfurt am Main, Germany: Fischer Taschenbuch Verlag, 1985), 217–18.
- 11 Beorn, *Marching Into Darkness*, 92 n.3.
- 12 For information on the 339th Infantry Division and the 691st Infantry Regiment, see *Ibid.*, 120.
- 13 Soldiers assigned to fortress units were trained to hold static positions. These units were unlikely to be as well trained in modern maneuver warfare as were front-line infantry or armored units.
- 14 Beorn, *Marching into Darkness*, 121.
- 15 *Ibid.*, 126–27.
- 16 *Ibid.*, 129. Later, as a battalion commander, Nöll was apparently accused of cowardice before the enemy and only escaped execution when Soviet forces overran the German positions.
- 17 As defined in the United States Holocaust Memorial Museum’s online encyclopedia, the “*Einsatzgruppen* (in this context, mobile killing units) were squads composed primarily of German SS and police personnel. Under the command of the German Security Police (*Sicherheitspolizei*; *Sipo*) and Security Service (*Sicherheitsdienst*; *SD*) officers, the *Einsatzgruppen* had among their tasks the murder of those perceived to be racial or political enemies found behind German combat lines in the occupied Soviet Union.” United States Holocaust Memorial Museum, “*Einsatzgruppen* (Mobile Killing Units),” in *Holocaust Encyclopedia*, www.ushmm.org/wlc/en/article.php?ModuleId=10005130.
- 18 See Chapter 7, “Mobile Killing Operations,” in Raul Hilberg, *The Destruction of the European Jews*, 3 vols. (New York: Holmes & Meier, 1985), 1:271–390.
- 19 Alexander Kruglov, “Jewish Losses in Ukraine, 1941–1944,” in *The Shoah in Ukraine: History, Testimony, Memorialization*, ed. Ray Brandon and Wendy Lower (Bloomington: Indiana University Press, 2008), 278–79; Christian Gerlach, *Kalkulierte Morde: Die Deutsche Wirtschafts und Vernichtungspolitik in Weissrussland 1941 bis 1944* (2. Aufl. Hamburg: Hamburger Edition, 2000), 628; “Nuremberg Document 2273-PS Report of Einsatz Group A,” in *Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945–1 October, 1946*, 42 vols. (Nuremberg, Germany: [s.n.], 1947–1949), 30: 71–77.
- 20 For examinations of the relationship between the Wehrmacht and the SS during the war, see Jürgen Förster, “Complicity or Entanglement? Wehrmacht, War, and Holocaust,” in *The Holocaust and History: The Known, the Unknown, the Disputed, and the Reexamined*, ed. Michael Berenbaum and Abraham J. Peck (Bloomington: Indiana University Press, 1998), 266–84. Primary source documents, such as “The Regulation of the Deployment of the Security Police and SD within the Context of Army Operations,” signed by Army Commander-in-Chief von Brauchitsch on April 28, 1941 [extant text] (in Noakes and Pridham, *Nazism* 2:1088–89), provide support that the two institutions worked in conjunction to coordinate efforts.
- 21 Beorn, *Marching into Darkness*, 94–95.
- 22 *Ibid.*, 93.
- 23 The following section on the Mogilev conference is excerpted from *Ibid.*, 92–103.
- 24 Quoted in *ibid.*, 99–100.

- 25 "In the occupied territories, the HSSPFs continued to be personally responsible to Himmler and had constant instructions from him, but they were, for operational purposes, responsible to the senior military commander" in their respective AOs. High Command Case, 12.
- 26 Hermann Fegelein's SS Cavalry Brigade murdered over 20,000 Jewish civilians during August 1941. Beorn, *Marching into Darkness*, 99.
- 27 By the end of 1941, 190,000 Jews would be murdered in Belarus, most of them by units under Nebe's command. *Ibid.*, 98.
- 28 Sand tables are generally simplified dioramas used to represent particular tactical situations.
- 29 Quoted in Beorn, *Marching into Darkness*, 102–03.
- 30 Hilberg, *The Destruction of the European Jews*, 1:301.
- 31 Quoted in Beorn, *Marching into Darkness*, 110.
- 32 The following account is found in *Ibid.*, 119–34. Trial records cited in Beorn are also included to show the range of witness perspectives.
- 33 "Hans W. Statement, 26 August 1953," Hessisches Staatsarchiv Darmstadt (hereafter cited as HSA-D), H-13 Darmstadt, Nr. 979 I, Bd. II, 335; "F. Nöll Statement, 25 April 1951," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. I, 32; "F. Nöll, Statement, 11 February 1952," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. I, 11.
- 34 "F. Nöll Statement, 25 April 1951," 32; "F. Nöll Statement, 11 February 1952," 11.
- 35 "Josef H. Statement, 7 May 1952," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. I, 44.
- 36 "W. Magel, Statement, 16 June 1951," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. I, 163.
- 37 *Ibid.*
- 38 Martin Dean and Geoffrey P. Megargee, eds., *Encyclopedia of Camps and Ghettos. Vol. 2, Ghettos in German-Occupied Eastern Europe* (Bloomington: Indiana University Press, 2014), part B, 1690.
- 39 "Karl S. Statement, 16 December 1953," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. II, 390.
- 40 "Adolf Z. Statement, 24 September 1953," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. II, 360.
- 41 "Willi S. Statement, 9 August 1951," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. I, 178.
- 42 "Adolf Z. Statement, 24 September 1953," 360.
- 43 "Josef B. Statement, 29 June 1953," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. II, 310.
- 44 "W. Magel, Statement, 8 August 1951," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. II, 172.
- 45 *Ibid.*
- 46 *Ibid.*
- 47 For individuals who appear only in German judicial archives, we have used their first name and last initial to comply with the archival privacy regulations. For individuals whose names or personal information appears in other sources, we have used their full names.
- 48 "Leopold W. Statement, 29 July 1953," HSA-D, H-13 Darmstadt, Nr. 979 I, Bd. II, 326.
- 49 "Karl S. Statement, 16 December 1953," 390.
- 50 "Hans W. Statement, 26 August 1953," 336.
- 51 "Karl S. Statement, 5 December 1953," 383.
- 52 "Willi S. Statement, 9 August 1951," 178–79.
- 53 "Wilhelm L. Statement, 5 February 1953," HSA-D, H-13 Darmstadt, Nr. 929 I, Bd. I, 215. Recent historical research into transcripts of secretly recorded conversations between thousands of German POWs at Fort Hunt, Virginia, during the war suggests that peer pressure and loyalty to the small unit may have been important factors in German soldiers' decisions about whether to commit atrocities. Soldiers who had not participated in the atrocities were more likely to criticize them, whereas those who had participated were more likely to justify them as being necessary. Felix Römer, *Kameraden: Die Wehrmacht von innen* (Munich: Piper Verlag, 2012).
- 54 "Bataillonskommandeur gab Erschießungsbefehl," *Darmstädter Tagblatt*, 3 May 1954. Josef Sibille kept a series of newspaper clippings from the trial. His family was kind enough to share them with Dr. Beorn.
- 55 *Ibid.*
- 56 "Sibille Letter, 2.2.1953," HSA-D, H-13 Darmstadt, Nr. 929 I, Bd. III, 208.
- 57 C. F. Rüter et al., eds., *Justiz und NS-Verbrechen. Sammlung deutscher Strafurteile wegen nationalsozialistischer Tötungs-Verbrechen 1945–1966*, 1st ed., 22 vols. (Amsterdam: University Press of Amsterdam, 1968–81), 12:371 (case no. 398) (hereafter cited as *NZ-Verbrechen*).
- 58 "Letter from Christiane Sibille to Waitman Beorn," 3 October 2010 (on file with Dr. Beorn).
- 59 *Ibid.*
- 60 "Sibille Letter, 2.2.1953," 208.
- 61 David H. Kitterman, "Those Who Said 'No!': Germans Who Refused to Execute Civilians during World War II," *German Studies Review* 11, no. 2 (May 1988): 241, 250.
- 62 *Ibid.*, 250–51.
- 63 *Ibid.*, 246.
- 64 *Ibid.*
- 65 Wehrkraftzersetzung became a military offense in 1938 under *Verordnung über Sonderstrafrecht im Kriege und beibesonderem Einsatz (Kriegssonderstrafrechtsverordnung)*, § 5 (Aug. 17, 1938), at the same time that changes in the Military Penal Code made the code more restrictive. During the war, at least 5,000 soldiers were sentenced to death for convictions of Wehrkraftzersetzung. David H. Kitterman, "Review Article: The Justice of the Wehrmacht Legal System: Servant or Opponent of National Socialism?" *Central European History* 24, no. 4 (1991), 455, 457–58.
- 66 Kitterman, "Those Who Said 'No!'" 247.
- 67 German legal practice commonly elected to conservatively limit the number of victims to those that could "reasonably" be proved. Witness statements indicate that far more than 15 Jews had been murdered.
- 68 *NS-Verbrechen* 13:629 (case no. 429); italics added for emphasis. The appeals court approved the reduced sentence handed down after the retrial because fewer victims were proven to have been killed. See Appendix C for more on the Darmstadt State Court decision.
- 69 *Ibid.*, 637.
- 70 Field Manual 27-10, *The Law of Land Warfare* (Washington, DC: Department of the Army, July 15, 1976), ¶3 (hereafter cited as Field Manual 27-10).
- 71 General Orders 100, Instructions for the Government of Armies of the United States in the Field, art. 14 (April 24, 1863).
- 72 See High Command Case, 123–27.
- 73 *Ibid.*



- 74 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 52(2), 1125 U.N.T.S. 3 (hereafter cited as Additional Protocol I). Although most US allies have ratified Additional Protocol I, the United States has not, but it does view many of the provisions of Additional Protocol I as accurate statements of customary international law.
- 75 *Commentary on the Additional Protocols I and II of 8 June 1977*, ed. Yves Sandoz et al. (Geneva: Martinus Nihoff, 1987), 636 ¶2024.
- 76 Additional Protocol I, art. 48.
- 77 Additional Protocol I, art. 51.3.
- 78 Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereafter cited as Geneva Convention III).
- 79 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (hereafter cited as Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.
- 80 Additional Protocol I does not require that combatants wear a fixed sign or uniform and requires only that weapons be carried in the open during an attack. Additional Protocol I, art. 43.3. The United States does not agree that these provisions represent customary international law.
- 81 “Measures of reprisal against prisoners of war are prohibited.” Geneva Convention III, art. 13.
- 82 “Reprisals against protected persons and their property are prohibited.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 33, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereafter cited as Geneva Convention IV).
- 83 Additional Protocol I, art. 57.2(b).
- 84 *Law of War Deskbook* (Charlottesville, VA: The Judge Advocate General’s Legal Center and School, 2010), 140–41 (hereafter cited as *Law of War Deskbook*).
- 85 *Ibid.*, 141.
- 86 *Ibid.*, 141–42.
- 87 *Ibid.*, 142.
- 88 *Ibid.*, 149–50.
- 89 *Ibid.*, 142.
- 90 Joint Pub. 1-02, *Dictionary of Military and Associated Terms* (Washington, DC: Department of Defense, January 31, 2011), 317.
- 91 *Operational Law Handbook* (Charlottesville, VA: The Judge Advocate General’s Legal Center and School, 2010), 73.
- 92 *Ibid.*, 73–74.
- 93 *Ibid.*, 74.
- 94 “General Petraeus Issues Updated Tactical Directive, Emphasizes ‘Disciplined Use of Force,’” News Release 2010-08-CA-004, International Security Assistance Force News (August 4, 2010), [www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html](http://www.isaf.nato.int/article/isaf-releases/general-petraeus-issues-updated-tactical-directive-emphasizes-disciplined-use-of-force.html).
- 95 High Command Case, 112 n. 3.
- 96 Rome Statute of the International Criminal Court (July 17, 1998), art.28(a) (hereafter cited as Rome Statute).
- 97 Civilian commanders will be held responsible when they “either knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes.” *Ibid.*, art. 28(b)(1).
- 98 Field Manual 27-10, 178–79, ¶501; see also Additional Protocol I, art. 86.
- 99 Article 90, *Manual for Courts-Martial* (Washington, DC: Department of Defense, 2012), IV–19, ¶14c(2)(a)(i).
- 100 Court of Appeals for the Armed Forces “United States v. Moore,” *Military Justice Reporter* 58 (West Publishing Co.: St. Paul, MN, 2003), 466.
- 101 *Law of War Deskbook*, 174.
- 102 As the Military Tribunal noted in the High Command Case, “The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defense. To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.” High Command Case, 72.
- 103 Unlike the United States, which requires international law in treaty form to be ratified by the legislature and implemented into US domestic law, the post–World War II German constitution makes international law applicable without further action by the German legislature. *Grundgesetz für die Bundesrepublik Deutschland*, art. 25, 23 May 1949, BGBI 1(Ger.).
- 104 See Peter Blechschmidt, “Reaktionen auf Urteil: Bunter Vogel in der olivgrünen Truppe,” *Süddeutsche.de* (June 26, 2005), [www.sueddeutsche.de/politik/reaktionen-auf-urteil-bunter-vogel-in-der-olivgruenen-truppe-1.887732](http://www.sueddeutsche.de/politik/reaktionen-auf-urteil-bunter-vogel-in-der-olivgruenen-truppe-1.887732)
- 105 *Law of War Deskbook*, 176.
- 106 Rome Statute, art. 33.
- 107 *Ibid.*
- 108 High Command Case, 29–30.
- 109 Noakes and Pridham, *Nazism*, 2:1089–90.
- 110 Army Regulation 15-6: Investigation Guide for Informal Investigations, Office of the Staff Judge Advocate, 4th Infantry Division and Fort Carson Administrative Law Division (March 1, 2010).
- 111 *NS-Verbrechen* 13:615–44
- 112 *Strafgesetzbuch* [StGB] (Penal Code), *Reichsgesetzblatt* [RGBl] § 211 (Berlin, 1871).
- 113 Geneva Convention IV, art. 33.
- 114 *Manual for Courts-Martial*, art. 118(c)(2), IV-63 (2012).
- 115 *Ibid.*, art.119, IV-65.
- 116 It is not difficult to detect the court’s sympathy for the defendants in its opinion, although it did chastise Nöll for pushing “responsibility for the execution of the order onto a subordinate in a manner unworthy of an officer.” *NZ-Verbrechen* 13:637.
- 117 Joachim Perels, “Perceptions and Suppression of Nazi Crimes by the Postwar German Judiciary,” in *Nazi Crimes and the Law*, eds. Henry Friedlander and Nathan Stoltzfus (New York: Cambridge University Press, 2008), 87–99; Rebecca Elizabeth Wittmann, *Beyond Justice: The Auschwitz Trial* (Cambridge, MA: Harvard University Press, 2005), 36–49.
- 118 Rebecca Elizabeth Wittmann, “The Wheels of Justice Turn Slowly: The Pretrial Investigations of the Frankfurt Auschwitz Trial, 1963–1965,” *Central European History* 35, no. 3 (2002), 347–54.
- 119 Jody M. Prescott, “Litigating Genocide: A Consideration of the International Criminal Court in Light of the German Jews’ Legal Response to Nazi Persecution, 1933–1941,” *Maine Law Review* 51 no. 297 (1999), 305–12.
- 120 Rebecca Wittmann, “Tainted Law: The West German Judiciary and the Prosecution of Nazi War Criminals,” in *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, ed. Patricia Heberer and Jürgen Matthäus (Lincoln: University of Nebraska Press, 2008), 212.



- 121 "NS-Verfahren: Bombe los," in *Der Spiegel* (April 5, 1971), www.spiegel.de/spiegel/print/d-43732448.html, 102.
- 122 Michael Howard, *The Franco-Prussian War* (New York: Dorset Press, 1990), 249–56, 374–75, 377–78.
- 123 Edmund Ollier, ed., *Cassell's History of the War between France and Germany, 1870–1871*, 2 vols. (London & New York: Cassell, Petter, and Galpin, 1871), 1:220.
- 124 M. Jules Favre, *Gouvernement de la Défense, Volume I* (Paris: Henri Plon, 1872), 163, <https://archive.org/details/gouvernementdelaoifavre> (translation by Jody Prescott). The imperial German Army issued a proclamation during the Franco-Prussian War that "[e]very prisoner who wishes to be treated as a prisoner of war must produce a certificate as to his character as a French soldier, issued by the legal authorities, and addressed to him personally, to the effect that he has been called to the Colors and is borne on the Roll of a corps organized on a military footing by the French government." *The War Book of the German General Staff*, trans. J. H. Morgan (New York: McBride, Nast & Company, 1915), 79 (hereafter cited as *War Book*).
- 125 Favre, *Gouvernement de la Défense*, 163.
- 126 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, October 18, 1907 (hereafter cited as Hague Convention IV). Annex to the Convention: Regulations respecting the Laws and Customs of War on Land, Section 1, Chapter 1: The Qualifications of Belligerents, Regulations: art. 2.
- 127 *War Book*, 83.
- 128 *Ibid.*, 87 (citing the Prussian Law of June 4, 1861).
- 129 *Ibid.*, 81.
- 130 Hague Convention IV, Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, Section 1, Chapter 1, The Qualifications of Belligerents, art. 1, art. 3.
- 131 *War Book*, 12.
- 132 List of Signatories and Ratification Dates, Convention relative to the Treatment of Prisoners of War, Geneva, July 27, 1929. In World War II, Soviet soldiers were deemed by the Germans to have forfeited any claim to Geneva Convention treatment because of their treacherous political orientation and conduct, and they were to be treated harshly. Memorandum from Director of the Party Chancellery, Circular No. 21/41, Subject: Treatment of Soviet Prisoners of War, ¶1 (September 30, 1941). An estimated 3.3 million Soviet prisoners out of a total of almost 5.7 million died in German captivity. United States Holocaust Memorial Museum, "Nazi Persecution of Soviet Prisoners of War," in *Holocaust Encyclopedia*, www.ushmm.org/wlc/en/article.php?ModuleId=10007178.
- 133 Convention relative to the Treatment of Prisoners of War, Geneva, July 27, 1929, art.1(1).
- 134 Theodore Schwan, *Report on the Organization of the German Army* (Washington, DC: Government Printing Office, 1894), 79. These were no ordinary officers; students were specially chosen to attend the War Academy.
- 135 See Albert C. Wedemeyer, G-2 Report, Germany (Combat), Subject: German General Staff School, 7–11 (August 3, 1938). No specific law instruction noted, but special lectures given once a week for two hours consisted of "Political Organization; Military Geography; Historical Subjects: New Discoveries in the Field of Science; Study of Neighboring Countries Political, Economic, and Military; Current Events."
- 136 "Dienst-Unterricht: Reibert Redivius," *Der Spiegel*, Jan. 27, 1960, www.spiegel.de/spiegel/print/d-43063123.html. This article discusses the Army Service Training manual and what it outlined.
- 137 Wilhelm Reibert, *Der Dienstunterricht im Heere, Ausgabe für den Panzerjäger*, ed. Guido Allmendinger, 12th ed. (E. S. Mittler & Sohn: Berlin, 1941), 48.
- 138 *Ibid.*
- 139 *Ibid.*, 49.
- 140 *Soldbuch* No. 68, Heinrich Heuberger, Service Number I 98/97W/35 (1944), Andre Becker, Report No. III, Research at the Deutsche Dienststelle (WASt), Berlin, March 29–April 4, 2012, 7 (April 8, 2012).
- 141 *Ibid.*
- 142 *Ibid.*
- 143 Becker, 6–7.
- 144 Claud Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality* (London: Witherby, 1921), 101–7.
- 145 *Ibid.*, 107–34.
- 146 *Über die Ausübung der Kriegsgerichtsbarkeit im Gebiet "Barbarossa" und über besondere Massnahmen der Truppe*, May 13, 1941, ¶1.1, reprinted in High Command Case, 29–31.
- 147 High Command Case, 25. The US military tribunal in the High Command Case found summary execution on grounds of suspicion by a junior officer to be criminal per se. *Ibid.*, 83, 86.
- 148 *Ibid.*, 31. For example, situations of "serious deeds due to lack of self-control in sexual matters, which originate from a criminal disposition." This portion of the order could be interpreted such "that unwarranted acts against civilians constituted a breach of discipline," leaving the definition of "unwarranted" to the field commanders. *Ibid.*, 83.
- 149 Matthew Lippman, "Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War," *Dickinson Journal of International Law* 15, no. 1, (1996), 31–34.
- 150 See Klaus Gerbet, ed., David Johnston, trans., *Generalfeldmarschall Fedor von Bock: The War Diary, 1939–1945* (Atglen, PA: Schiffer, 1996), 219. Discipline would play a deciding role in whether soldiers were tried after von Brauchitsch's clarification; see text accompanying note 148.
- 151 *Ibid.*, 26.
- 152 See, e.g., Heinz Guderian, *Panzer Leader*, trans. Constantine Fitzgibbon (New York: Dutton, 1952), 152; Walter Görnitz, *Paulus and Stalingrad: A Life of Field Marsbal Friedrich Paulus*, trans. R. H. Stevens (New York: Citadel Press, 1964), 32–34. In these cases, the Barbarossa Jurisdiction Order and related orders were not followed. It is unknown whether the Barbarossa Jurisdiction Order was in effect in rHGM during the autumn of 1941; regardless, the killings of the Jewish civilians were ordered, so the only possible infractions of discipline would be the manner of execution rather than the executions themselves.
- 153 David H. Kitterman, "The Justice of the Wehrmacht Legal System," 461. This case was cited by the Army chief of personnel as a proper example of what military courts did.
- 154 See, e.g., "Einstellungsverfügung Zst Dortmund 45 Js 9/64 Gg. Waldow U. A., September 9, 1969," (BA-ZS: B162/3911); case dismissed due to battalion commander's infirmity. See also case of Werner Schönemann, who led Einsatzkommando 8 while it killed tens of thousands of Jews. He was found guilty of 12 counts of aiding and abetting murder of 2,170 people and sentenced to only six years in prison. [Extant text.] *NS-Verbrechen* 20:163–84 (case no. 573).
- 155 Rebecca Elizabeth Wittmann, "Indicting Auschwitz? The Paradox of the Frankfurt Auschwitz Trial," *German History* 21, no. 4 (2003), 505–6.
- 156 *Ibid.*, 515–17
- 157 *Ibid.*, 516, 520–23.
- 158 *Ibid.*, 521–25.
- 159 *Ibid.*, 510.

- 160 *NS-Verbrechen*, 13:615–44. The English translation was completed at the US Holocaust Memorial Museum courtesy of Andre Becker and Museum historians. In the *Justiz und NS-Verbrechen* series, names of defendants are abbreviated in accordance with German privacy regulations.
- 161 *Ibid.*, 13:617.
- 162 *Ibid.*, 13:629–37. “Krucha,” the town spelling used in the case study, is the American transliteration from the Cyrillic alphabet original. The trial testimony uses “Krutscha,” the German transliteration of the Cyrillic.
- 163 “Army Regulation 15-6: Procedures for Investigation Officers and Boards of Officers” (Washington DC: Department of the Army, 2 October 2006) 1, ¶1–5, [http://dmna.ny.gov/suicideprevention/Serious\\_Incident\\_Report\\_Protocol/AR%2015-6%20procedures%20for%20investigating%20officers%20and%20boards%20of%20officers.pdf](http://dmna.ny.gov/suicideprevention/Serious_Incident_Report_Protocol/AR%2015-6%20procedures%20for%20investigating%20officers%20and%20boards%20of%20officers.pdf).
- 164 *Ibid.*, 1–2, ¶1–6.
- 165 Judge advocates or JAGs, can assist commanders as subject-matter experts, but delegating completely to JAGs might cause soldiers to think that the commander does not consider the issue very important.
- 166 For more information on ethical training for a cyber environment see Jody Prescott’s “Building the Ethical Cyber Commander” featured in *Rutgers Computer and Technology Law Journal* 40 (2014).

**The United States Holocaust Memorial Museum** is America's national institution for the documentation, study, and interpretation of Holocaust history, and serves as its memorial to the millions of people killed during the Holocaust.

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